IN THE SUPREME COURT OF THE STATE OF NEVADA

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ZANE MICHAEL FLOYD,

Appellant,

vs.

E.K. McDANIEL, Warden of the NEVADA STATE PRISON at ELY, NEVADA; and CATHERINE CORTEZ MASTO, Attorney General for Nevada,

Respondents.

Case No. 51409

APPELLANT'S OPENING BRIEF

Appeal from Order Dismissing Petition for Writ of Habeas Corpus (Post-Conviction)

Eighth Judicial District Court, Clark County

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09-05662

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I. STATEMENT OF THE CASE

Appellant, Zane Floyd, was convicted of first-degree murder and sentenced to death by a jury in Clark County in 2000. 7 App 1374-1384; 11 App 2051-2057; 11 App 2096-2099. This appeal is from the dismissal of his Amended Petition for Writ of Habeas Corpus by the Eighth Judicial District Court. 37 App 7411-18; 37 App 7420-7425.

This Court affirmed Mr. Floyd's conviction and death sentence on direct appeal in Floyd v. State, 118 Nev. 156, 42 P.3d 249 (2002). Judicial Notice Appendix 73-99; see also 11 App 2058-2092. Mr. Floyd filed his first state Petition for Writ of Habeas Corpus on June 19, 2003, which was supplemented on October 6, 2004. 11 App 2115-2153. On January 18, 2005, first state post-conviction counsel waived the evidentiary hearing on the first state petition, 11 App 2155-2158, and then inexplicably claimed on appeal that the state post-conviction court erred by failing to provide Mr. Floyd with an evidentiary hearing. JN125-126. The state post-conviction court entered an order denying the first state petition on February 4, 2005, (11 App 2159-2169) and this Court affirmed the denial of writ of habeas corpus on February 16, 2006. Nevada v. Floyd, Order of Affirmance (Feb. 16, 2006); JN167-JN183.

Mr. Floyd filed a Petition for Writ of Habeas Corpus in the federal court on April 14, 2006. On June 8, 2007, Mr. Floyd filed an Amended Petition for Writ of Habeas Corpus in the state post-conviction court. 11 App 2178-12 App 2392; see also 26 App 5054; 37 App 7341.

II. STATEMENT OF THE FACTS

Mr. Floyd's death sentence survives even though the jury was never informed that he suffers from a personality change due to organic brain damage caused by fetal alcohol spectrum disorder which substantially contributed to his committing the crimes while in a dissociative fugue.

Mr. Floyd's dissociative fugue places his first degree murder conviction on shaky ground since Mr. Floyd was unable to form the requisite statutory intent to commit first degree murder.

The state post-conviction court refused to consider most of Mr. Floyd's nineteen claims pled in his Amended Petition, even though Mr. Floyd was prevented from raising these claims

in the first state petition by the ineffective assistance of first state post-conviction counsel. Each of these issues, when considered separately or cumulatively, rendered Mr. Floyd's first degree murder conviction and death sentence unconscionable.

The state post-conviction court arbitrarily limited Mr. Floyd's evidentiary hearing to ninety minutes and only allowed first state post-conviction counsel to testify. The state post-conviction court adopted the state's proposed order verbatim despite that Mr. Floyd filed an opposition notifying the court of numerous indisputably erroneous facts that did not reflect the decision issued at the conclusion of the evidentiary hearing.

III. ISSUES PRESENTED

A. Whether the state post-conviction court erred in finding that Mr. Floyd's "organic brain damage was known and testified to at the time of trial" as the basis for finding that first state post-conviction counsel was effective.

B. Whether the state post-conviction court failed to provide Mr. Floyd with a fair evidentiary hearing by refusing to allow him to demonstrate that he was prejudiced by first state post-conviction counsel's failure to raise meritorious claims.

C. Whether the state post-conviction court erred in adopting verbatim over Mr. Floyd's objection the state's clearly erroneous proposed findings of fact and conclusions of law which failed to reflect the decision announced by the state post-conviction court at the conclusion of the evidentiary hearing.

IV. ARGUMENT

A. This Court should overrule the state post-conviction court's clearly erroneous finding that post-conviction counsel was effective because Mr. Floyd's "possible organic brain damage was known and testified to at the time of trial."

The state post-conviction court's factual finding that Mr. Floyd's "possible organic brain damage" was "testified to at the time of trial" was clearly erroneous. 37 App 7413. There was absolutely no testimony at trial that Mr. Floyd suffered from a Personality Change Due to

Neuropsychological Brain Damage[1] (hereinafter referred to as "organic brain damage"). Since the state post-conviction court's ruling that first state post-conviction counsel was effective was based in part on this erroneous factual finding, 37 App 7413, the state post-conviction court's denial of relief must be overturned.

1. The state post-conviction court erroneously found that the jury heard testimony that Mr. Floyd suffered from organic brain damage.

Mr. Floyd suffers from organic brain damage caused by Fetal Alcohol Spectrum Disorder (FASD). 19 App 3723-3745. The trial and sentencing transcripts reflect that the jury who convicted and sentenced Mr. Floyd to death was never presented with this information. See 4 App 729-2033; 4 App 729-0792; 5 App 793-1001; 6 App 1002-1201; 7 App 1202-1400; 8 App 1401-1600; 9 App 1601-1800; 10 App 1801-2000; 11 App 2001-2033. The psychological testimony presented at trial focused upon Attention Deficit Disorder (ADD), a diagnosis that is completely separate and distinct from organic brain damage. See generally, 19 App 3797 (Report by Dr. Mack); DSM-IV™ 85, 171-74. While the former can be caused by a temporary immaturely developed frontal lobe, the latter is due, in Mr. Floyd's case, to a permanently damaged right cerebral hemisphere. The former is a thinking clarity cognitive disorder that can be outgrown, while the latter results in the permanent loss of volitional control leading to violence and problematic sexual behavior. The child with ADD fails to pay attention to the teacher, while the child with organic brain damage might stab the teacher with a pencil if severely agitated.

The two experts called to testify at trial for Mr. Floyd, Drs. Roitman and Dougherty, were general psychologists who did not testify about Mr. Floyd's organic brain damage. Unlike neuropsychologists who specialize in testing for and diagnosing organic brain damage, general psychologists are not trained to test for, diagnose or testify about the existence or effects of organic brain damage. Dr. Roitman testified that Mr. Floyd experienced anxiety and depression,

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[1]Diagnostic and Statistical Manual of Mental Disorders 85, 171-74 (Task Force on DSM-IV et al., eds., 4th ed. 1994); 19 App 3797 (Dr. Mack's report).

and explained that ADD is a "thinking clarity, cognitive" disorder that is easily controlled by "stimulat[ing] the cortex a little bit" with Ritalin. 8 App 1571-1572. Dr. Dougherty testified that Mr. Floyd suffered from a mixed personality disorder and stated that despite that Mr. Floyd had a history of "minimal brain damage, the instruments that [he] used were not sensitive enough to pick anything up, or it's very minimal." 9 App 1710. The experts' testimony centered on ADD and personality disorders, which are minor issues when compared to the debilitating nature of organic brain damage. Neither Dr. Roitman's nor Dr. Dougherty's testimony supports the state post-conviction court's erroneous finding that Mr. Floyd's Personality Change Due to Organic Brain Damage was known and testified to at trial.

2. Trial counsel rendered ineffective assistance by failing to provide Mr. Floyd with access to competent expert assistance to aid in his defense in violation of the state and federal constitutions.

Trial counsel failed to address the most important question at trial – why Mr. Floyd had lessened moral culpability for the crimes. A neuropsychologist, timely hired and competently prepared to identify and testify about Mr. Floyd's organic brain damage, could have explained to the jury about the violence, sexual dysfunction, and alcohol and drug abuse associated with this disorder which culminated in the dissociative fugue experienced by Mr. Floyd on the day of the crimes. An FASD expert could have explained to the jury that the organic brain damage was not Mr. Floyd's fault. Juror Quiroz, the "holdout juror," noted that had trial counsel presented testimony that Mr. Floyd suffered from a serious mental illness, the information would have weighed heavily in her decision of whether to vote for death. 20 App 3990-3994 (emphasis added). She noted that she waited for anything to be presented by the defense to explain Mr. Floyd's actions, and only chose death after not receiving that important information. Id. Mr. Floyd's social history created a duty for trial counsel to hire competent experts to assess and present testimony regarding FASD and organic brain damage. Trial counsel violated Mr. Floyd's state and federal constitutional right to effective assistance of counsel and his state and federal right to competent expert assistance.

Natalie Novick Brown, Ph.D., a specialist in the evaluation and treatment of individuals

with FASD, reported that Mr. Floyd suffers from judgement and emotion control impairments caused by FASD which, when combined with Mr. Floyd's alcohol and drug abuse, resulted in both the loss of volitional control and in an exaggerated behavioral response triggering the dissociative disorder that rendered him incapable of controlling his actions on the day of the crimes. 19 App 3736.

Despite notes in trial counsel's file identifying the potential presence of FASD, 21 App 4016, trial counsel failed to investigate, develop or present this defense at Mr. Floyd's trial. Dr. Brown notes that readily obtainable infant photographs of Mr. Floyd confirm the "typical facial anomalies associated with FASD." 19 App 3729. The interview of Mr. Floyd's mother where she stated that she abused alcohol and drugs during Mr. Floyd's gestational period, 21 App 4064, should have prompted trial counsel to hire an expert to investigate the presence of FASD. Obtainable birth records, indicating that Mr. Floyd suffered from a growth deficiency when he was born, also should have prompted trial counsel to investigate FASD. See 20 App 3822. Had trial counsel hired an expert such as Dr. Brown, they would have learned that Mr. Floyd displays every manner of neurodevelopmental disorder associated with FASD. 19 App 3727-3730, 3735.

Neuropsychologist Jonathan H. Mack, Psy.D., hired by current counsel, conducted a full battery of neurological tests which examined the patterns of neurological dysfunction identified by Dr. Cardle when Mr. Floyd was thirteen. Dr. Mack found that in addition to ADD, Mr. Floyd suffers from "significant weakness in the neurological functioning of the right cerebral hemisphere compared to the left." 19 App 3783. Dr. Mack opined that Mr. Floyd was clearly influenced and controlled by his underlying diseases of the mind and brain which acted to cause him to not be "fully in control of his impulses and actions at the time of the crimes in question." 19 App 3800. Dr. Mack reported that:

> 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.

19 App 3799. This dissociated soldier hero state explains the manner in which Mr. Floyd dressed

in his uniform and behaved as if he were at target practice at the time of the offenses.[2]

Trial counsel failed to present testimony about how Mr. Floyd's damaged right cerebral hemisphere, when combined with his extreme level of mental and emotional disturbance and drug and alcohol abuse, caused him to "not be fully in control of his impulses and actions at the time of the crimes in question." 19 App 3799. Mr. Floyd's jury was never informed that Mr. Floyd experienced a dissociative episode on the day of the crimes causing him to not be in control of his actions, which was in part due to his FASD and a personality change due to organic brain damage. Had the jury known that Mr. Floyd, through no fault of his own, suffers from these organic disorders, it is more likely than not that they would not have sentenced Mr. Floyd to death.

Trial counsel's actions were worse than merely failing to present competent expert testimony. Their presentation of expert testimony about Mr. Floyd's minor personality disorders and ADD created the false impression with the jury that Mr. Floyd did not suffer from any severe mental health disorders. By focusing on relative trivialities, trial counsel denied Mr. Floyd his state and federal constitutional right to access competent expert assistance regarding his serious organic brain damage.

The state argues that the mere act of hiring a neuropsychologist inoculates trial counsel from a claim of ineffectiveness despite that trial counsel failed to provide the neuropsychologist with the necessary background information or time to conduct competent testing. In fact, the United States Supreme Court noted the importance of a competent psychiatric evaluation as necessary to ensure the fundamental fairness of a trial. Ake v. Oklahoma, 470 U.S. 68, 83 (1985). The failure of a psychiatrist to adequately inquire into a petitioner's background can constitute ineffective assistance. Wallace v. Stewart, 184 F.3d 1112, 1118, n.7 (9th Cir. 1999). Thus, the mere act of hiring a neuropsychologist does not innoculate trial counsel from a claim

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[2]After sexually assaulting a stripper in his home, Mr. Floyd put on his Marine uniform under his bathrobe, and marched to a supermarket and shot five people, killing four. See 21 App 4042.

of ineffective assistance of counsel. In order for trial counsel to have provided state and federal constitutionally competent access to a neuropsychologist, that expert should have been given enough time to conduct the necessary full battery of tests and be provided with the client's obtainable medical, psychological and educational records. See Daniels v. Woodford, 428 F.3d 1181, 1209-1210 (9th Cir 2005).

Maria J.P. Cardle, Ph.D., who was hired by Mr. Floyd's parents in 1989 because Mr. Floyd's Ritalin treatment for ADD had been ineffective, reported that he suffered from more neurological issues than just ADD, 20 App 3801-2813, thereby cementing the need to conduct a full battery of neurological tests. Although trial counsel knew at least a year prior to trial that Dr. Cardle had diagnosed Mr. Floyd when he was thirteen as suffering from a neurological disorder, they failed to timely hire a neuropsychologist or provide the untimely hired neuropsychologist with Dr. Cardle's report. As a direct result of trial counsel's ineffectiveness, the untimely hired neuropsychologist, Dr. Schmidt, only conducted a limited battery of tests, which predictably failed to detect Mr. Floyd's organic brain damage. Trial counsel's ineffectiveness cannot be excused simply because they hired Dr. Schmidt as they were constitutionally ineffective in failing to provide him with the necessary records and time to conduct competent testing.

In light of Dr. Cardle's report, trial counsel suspected that there was a significant problem with Dr. Schmidt's testing, 37 App 7334, which prompted them to hire a neuropsychologist, Dr. Thomas Kinsora, a few days prior to Mr. Floyd's trial. Dr. Kinsora informed trial counsel that Dr. Schmidt's testing was defective. 17 App 3239-3242. Dr. Kinsora, however, was unavailable during Mr. Floyd's trial. 37 App 7334. Constitutionally effective trial counsel would have requested a continuance so that Dr. Kinsora could conduct the necessary competent testing as indicated by Dr. Cardle's report and be available to testify at Mr. Floyd's trial. Instead, trial counsel failed to request a continuance, 37 App 7334, and ineffectively used general experts who distracted the jury from Mr. Floyd's very serious neurological issues.

Separate and apart from trial counsel's ineffectiveness, the failure of the untimely hired

neuropsychologist to provide professionally competent services to the defense violated Mr. Floyd's state and federal constitutional right to present an adequate defense to the charges or an adequate case in mitigation in the penalty phase resulting in a violation of due process and a reliable sentence. Ake v. Oklahoma, 470 U.S. 68, 83 (1985); U.S. Const. amends. VI, VIII & XIV.

3. Trial counsel rendered ineffective assistance by failing to conduct an adequate investigation under state and federal constitutional guidelines.

Trial counsel are obligated to fully investigate a capital case. Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). In the instant case, there was extensive evidence, not only of Mr. Floyd's neurological and psychiatric impairments, but also of a family history of abuse, which would have rebutted the state's psychological expert, and significantly undermined a death verdict. There was also significant evidence that drugs, alcohol and a dissociative disorder negated Mr. Floyd's ability to form the requisite specific intent necessary to commit first degree murder. Trial counsel's failure to investigate, develop and present this evidence fell below an objective standard of reasonableness undermining confidence in the outcome of Mr. Floyd's trial. Strickland v. Washington, 466 U.S. 668, 694 (1984); 37 App 7336-7339.

Reasonable performance of counsel includes an adequate investigation of the facts of the case, consideration of viable theories, and the development of evidence to support those theories. Counsel has a duty to investigate all material witnesses. Lawrence v. Armontrout, 900 F.2d 127, 130 (8th Cir. 1990). It is the duty of the lawyer to conduct a prompt investigation into the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. Eldrige v. Atkins, 665 F.2d 228, 232 (8th Cir. 1981) (quoting American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function § 4.1 (Approved Draft 1971)); see also Chambers v. Armontrout, 907 F.2d 825, 828 (8th Cir. 1990) ("The decision to interview a potential witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial."); State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 324 (1993) ("Under Strickland,

defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.") (citation and internal quotations omitted).

The Sixth Amendment right to the effective assistance of counsel extends to the sentencing phase of a capital case. Silva v. Woodford, 279 F.3d 825, 836 (9th Cir. 2002). In a capital sentencing proceeding, a "reliable adversarial testing process" requires that counsel present to the sentencing jury evidence of "the character and record of the individual offender and the circumstances of the particular offense," to allow the jury to reach the "reasoned moral response" to punishment as required by the state and federal constitution. Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982). Only when all of the available information about the offender and the offense is subjected to the adversarial process "can [we] be sure that the jury has . . . made a reliable determination that death is the appropriate sentence." Penry v. Johnson, 532 U.S. 782, 797 (2001).

The United States Supreme Court's Eighth Amendment jurisprudence requires that capital sentencing procedures implement "the principle that punishment should be directly related to the personal culpability of the criminal defendant." Penry v. Lynaugh, 492 U.S. 302, 319-20 (1989) (explaining Eddings, 455 U.S. at 111 and Lockett v. Ohio, 438 U.S. 586, 604 (1978)). A capital jury must be afforded the opportunity to assess "the character and record of the individual offender," as well as "the circumstances of the particular offense." Eddings, 455 U.S. at 112. As the United States Supreme Court has explained:

> if the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.

Penry v. Lynaugh, 492 U.S. at 319 (quotations omitted) (abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002); see also Penry v. Johnson, 532 U.S. at 797; Johnson v. Texas, 509 U.S. 350, 375 (1993) (O'Connor, J., dissenting). The sentencer's constitutionally-prescribed task is thus to render "a reasoned moral response" to the unique individual circumstances of the

capital defendant. Penry v. Lynaugh, 492 U.S. at 327; Eddings, 455 U.S. at 111 (consideration of offender's life history is a "constitutionally indispensable part of the process of inflicting the penalty of death").

When it comes to the penalty phase of a capital trial, "it is imperative that all relevant mitigating information be unearthed for consideration." Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir. 1999). "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." Rompilla v. Beard, 545 U.S. 374, 387 (2005) (quoting ABA Standards for Criminal Justice 4-4.1); see also American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 11.4.1.

In a capital case, a lawyer's failure to prepare and present a case in mitigation can threaten the reliability of the sentencer's "reasoned moral response" fully as much as any state-imposed impediment to the full presentation of mitigating evidence. See e.g., Williams v. Taylor, 529 U.S. 362, 396-98 (2000); see also Penry v. Johnson, 532 U.S. at 797 (jury must "be able to consider and give effect to [a defendant's mitigating] evidence in imposing sentence"). Trial counsel's failure to conduct an adequate investigation "puts at risk both the defendant's right to an ample opportunity to meet the case of the prosecution, and the reliability of the adversarial testing process." Kimmelman v. Morrison, 477 U.S. 365, 385 (1986).

As in nearly all other capital cases, here the prosecution's case for death focused upon the facts of the crime, harm to the victims' families, and the negative aspects of the defendant's character and life history. Trial counsel had to give the jury reasons to spare Mr. Floyd's life. Typically, that means adducing evidence of a defendant's background and character that might "reduce [a defendant's] moral responsibility . . . to a level at which capital punishment would

strike [a] juror as excessive." Emerson v. Gramley, 91 F.3d 898, 907 (7th Cir. 1996) (Posner, J.). While the jury was presented with some mitigation evidence, the most significant mitigation, that which impaired Mr. Floyd's ability to form the intent to murder, was left out.

Additionally, trial counsel failed to interview, develop and present witness testimony about the extent of Mr. Floyd's intoxication on the day of the crimes, the child abuse suffered by Mr. Floyd, and the remorse that Mr. Floyd expressed. Paulina Atamoh, who observed Mr. Floyd's extensive alcohol use leading up to the commission of the crimes, was not interviewed. 37 App 7331. Barbara Stockings, Herbert Smith, Jay Hall and Carolyn Smith could have testified about Mr. Floyd's routine alcohol abuse, his methamphetamine and marijuana use, his school problems, his mother's inappropriate sexual behavior and his father's physical abuse. 24 App 4793-4794; 24 App 4782-4786; 21 App 4017; 21 App 4049. Corrections Officer Dan Webb could have testified that Mr. Floyd displayed remorse for the crimes by breaking down and crying, contrary to the behavior of a sociopath or psychopath.[3] See 24 App 4769-4770; 24 App 4771-4772. It is only when the sentencing jury has the opportunity to consider all available mitigation evidence, and the prosecution's case for death has thus been subject to full adversarial testing, that "we can be sure that the jury has . . . made a reliable determination that death is the appropriate sentence." Penry v. Johnson, 532 U.S. at 797.

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[3]Trial counsel's failure to call Dan Webb because the information that would have demonstrated Mr. Floyd's remorse was told to trial counsel while at church created a conflict of interest that trial counsel should have disclosed to Mr. Floyd and to the trial court. Mr. Floyd was never given the opportunity to waive this conflict. Officer Webb's testimony could have convinced at least one juror to refuse to give death. Newspaper articles reported that Mr. Floyd lacked emotion during court proceedings. See 15 App 2887-2889, 2893-2896, 2941-2943; 16 App 3119-3121, 3140-3143. Officer Webb's testimony could have combated this false impression. Because Attorney Hedger failed in his obligation to disclose his conflict, the outcome of Mr. Floyd's sentencing is undermined. See Model Rules of Prof'l. Conduct 1.7, 3.7; see also Mannhalt v. Reed, 847 F.2d 576, 580-81 (9th Cir. 1988) (violation of Strickland standard where attorney's personal interests conflict with representation of client where the court is not notified and the conflict is never explained to the client).

In Williams, 529 U.S. 362, and Wiggins, 539 U.S. 510, the United States Supreme Court reaffirmed in the clearest possible terms that a capital defense attorney's duty under Strickland must be measured by reference to the unique requirements of capital sentencing, and that counsel's duty therefore must generally encompass a thorough investigation of the defendant's life history. See Strickland, 466 U.S. at 691 (explaining counsel's "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). Trial counsel in Williams failed to conduct an investigation that would have uncovered evidence of Williams's "nightmarish" childhood. The United States Supreme Court held that trial counsel had failed to fulfill their "obligation to conduct a thorough investigation of the defendant's background." Williams, 529 U.S. at 396. Similarly in Wiggins, the Court held that failure to expand the mitigation investigation beyond the PSI and DSS records "fell far short of the professional standards" that prevailed in Maryland in 1989. Wiggins, 539 U.S. at 524; see also Rompilla v. Beard, 545 U.S. 374, 381-90 (2005) (trial counsel ineffective for failing to obtain information that the state had and intended to use against the defendant, and because the information would have "opened up" other mitigation leads). In Mr. Floyd's case, the life history put forth at trial omitted that Mr. Floyd suffered from neurological brain damage as a result of FASD, the severe abuse that he experienced as a child, and that his history of drug and alcohol abuse and mishandled Ritalin for his ADHD propelled him into a dissociative state on the day of the offenses, thereby negating his intent to commit first degree murder, and substantially mitigating his moral culpability for the offense.

Federal courts have ruled that investigation for the penalty phase of a capital case "should include inquiries into social background and evidence of family abuse, potential mental health impairment, physical health history, and history of drug and alcohol abuse." Correll v. Ryan, 465 F.3d 1006, 1011 (9th Cir. 2006) (citing Summerlin v. Schriro, 427 F.3d 623, 630 (9th Cir. 2005) (en banc) (overruled on other grounds by). Investigations should also "include examination of mental and physical health records, school records, and criminal records. See Lambright v. Schriro, 485 F.3d 512 (9th Cir. 2007) (trial counsel's failure to investigate was ineffective

assistance); Anderson v. Simons, 476 F.3d 1131, 1142 (10th Cir. 2007) (trial counsel should consider "medical history, educational history, social and family history, religious and cultural influences, and employment"); Outten v. Kearney, 464 F.3d 401, 418 (3d Cir. 2006) (noting it was standard practice in 1993 for penalty phase investigations by counsel to include "medical history, educational history, family and social history, employment history, and adult and juvenile correctional records."); Dickerson v. Bagley, 453 F.3d 690, 694-96 (6th Cir. 2006) (noting that because counsel's duty to investigate is "now well established," and a partial mitigation investigation is inadequate, counsel must explore medical history, family and social history, and employment and training history) (citing ABA Guidelines 10.7, 80-83; Campbell v. Polk, 447 F.3d 270, 282 (4th Cir. 2006) ("Trial counsel have a duty to reasonably investigate and present mitigation evidence at sentencing."); Lewis v. Dretke, 355 F.3d 364, 367 (5th Cir. 2003) (in capital cases, defense counsel has the obligation to conduct a reasonably substantial, independent investigation into potential mitigation circumstances.)

This Court has also clearly held that defense counsel in a capital case is obligated to diligently investigate mitigation evidence. In Kirksey v. State, 112 Nev. 980, 996, 923 P.2d 1102, 1112 (1996), this Court held "that failure to adequately investigate the availability of mitigating evidence or to advise the defendant regarding its significance might undermine the defendant's decision not to present mitigating evidence and thereby support a claim of ineffective assistance." Likewise, in Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 281 (1996), this Court concluded that trial counsel was ineffective because he failed to investigate the potential testimony of several witnesses for the penalty phase of the capital trial. This Court explained that in order to satisfy the objective standard of reasonableness under Strickland, trial counsel must make a sufficient inquiry into the information that is pertinent to his client's case. Id. The same result was reached in Dumas v. State, 111 Nev. 1270, 903 P.2d 816 (1995), in which this Court concluded that the failure to investigate and present evidence of the defendant's mental status rendered counsel ineffective and required the reversal of the sentence of death; see also Deutscher v. Whitley, 946 F.2d 1443, 1446 (9th Cir. 1991), vacated, 113 S. Ct. 367 (1992),

aff'd sub nom., Deutscher v. Angelone, 16 F.3d 981, 984 (9th Cir. 1994) (reversing sentence of death in Nevada case because defense counsel failed to investigate and offer evidence concerning the defendant's history of schizophrenia, pathological intoxication and organic brain damage).

Clearly established United States Supreme Court law confirms that defense counsel in a capital case must conduct a reasonable investigation into potential mitigation evidence in order to ensure that the sentencer has the opportunity to render a "reasoned moral response" to the defendant's background and character, and thereby ensure the "reliable adversarial testing process" required by Strickland.

4. First state post-conviction counsel was ineffective in failing to raise a claim that trial counsel was ineffective for depriving Mr. Floyd of his state and federal constitutional right to access competent expert assistance and for failing to adequately investigate, develop and present Mr. Floyd's mitigation evidence.

First state post-conviction counsel was ineffective for failing to investigate, develop and present evidence at an evidentiary hearing that trial counsel was ineffective for failing to inform jurors of Mr. Floyd's organic brain damage caused by FASD and of his social history of abuse. 11 App 2178-2220; 12 App 2201-2392. There was no legitimate strategic reason that would justify first state post-conviction counsel's failure to investigate, develop and present these claims, as this essential mitigation evidence would have weighed heavily against the imposition of the death penalty and negated specific intent for first degree murder. Its omission was extremely prejudicial.

Trial counsel's files contain a plethora of information that was available to first state post-conviction counsel which supports the diagnosis that Mr. Floyd suffers from organic brain damage caused by FASD. Despite the existence of Drs. Cardle and Kinsora's reports regarding Mr. Floyd's neurological impairment and trial counsel's handwritten notes referencing the need to hire a "fetal alcohol" expert, first state post-conviction counsel completely failed to investigate, develop and plead this meritorious claim. 21 App 4010, 4025; 34 App 6697-6742; 11 App 2115-02153; 37 App 7351-07364. Had first state post-conviction counsel interviewed

trial counsel and Dr. Schmidt about these issues, he would have learned that trial counsel: (1) failed to hire a neuropsychologist to test for organic brain damage until shortly prior to trial; (2) did not provide that neuropsychologist with Dr. Cardle's report diagnosing Mr. Floyd with brain damage at age thirteen; and (3) did not request that the neuropsychologist perform the full battery of tests which would have revealed the existence of organic brain damage. 37 App 7333. Id. First state post-conviction counsel also would have learned from trial counsel that after talking with Dr. Schmidt regarding the results of his neurological testing, trial counsel "became skeptical about the quality of his testing, and decided to hire Dr. Kinsora days prior to trial to resolve the difference between" Dr. Schmidt's findings and Dr. Cardle's findings. Id. First state post-conviction counsel also would have learned that although Dr. Kinsora confirmed the accuracy of Dr. Cardle's finding of organic brain damage and reported that Dr. Schmidt's testing was incomplete, trial counsel inexplicably and ineffectively failed to request a continuance to develop and present this evidence, despite Dr. Kinsora's unavailability to testify. Id.

Had first state post-conviction counsel interviewed Mr. Floyd's family members, he would have learned of the physical and emotional child abuse suffered by Mr. Floyd. See 24 App 4764-4768, 4787-4794. According to Mr. Floyd's best friend, Jay Hall, Mr. Floyd's parents often walked around in the nude, skinny dipped in front of the then-teenaged boys, told the teenaged boys sexual jokes and on one occasion, Mr. Floyd's mother was so drunk that she pulled down her pants and urinated on the coffee table. See, e.g., 24 App 4783-85; 19 App 3746-3800. Jay Hall recalled incidents when Mr. Floyd's mother would get drunk and tell Mr. Floyd that she wished that her first son had lived and Mr. Floyd had not been born and she did not know why Mr. Floyd was so stupid. Id. Jay Hall witnessed Mr. Floyd's father punch Mr. Floyd in the mouth, pick Mr. Floyd up by his hair and slam him down. Id. Carolyn Smith could have testified that whenever Mr. Floyd's father became drunk, he was prone towards violence against Mr. Floyd and his mother. 21 App 4049. Paulina Atomah could have testified that a few hours prior to the crimes, Mr. Floyd had nine double shots of Jim Beam. 18 App 3416-3436. Instead of hearing about the abuse suffered by Mr. Floyd, the jury was given a picture that Mr. Floyd

had a relatively normal family life, which picture was emphasized by the state. 10 App 1881.

The main purpose of post-conviction litigation is to establish facts outside of the record that would have a reasonable possibility or probability of changing the result. Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995); see generally Strickland, 466 U.S. at 693-694. There can be little doubt that Mr. Floyd's first state petition did not accomplish either of these objectives. Not only did first state post-conviction counsel fail to investigate or allege Mr. Floyd's FASD and organic brain damage in the first state post-conviction petition, he failed to add any extra-record evidence or claims.[4]

Post-conviction counsel ineffectively treated the habeas proceeding as merely another review of the record created at trial, an approach that is antithetical to competent habeas counsel's duty to go beyond the record to identify and present constitutional violations. Investigating, developing and presenting extra-record evidence is required to demonstrate the prejudicial ineffectiveness of trial counsel. Strickland, 466 U.S. at 699-700; Bennett, 111 Nev. at 1108, 901 P.2d at 682; Wilson v. State, 105 Nev. 110, 114-115, 771 P.2d 583 (1989); In re Marquez, 1 Cal.4th 584, 822 P.2d 435, 446 (1992) ("To determine whether prejudice has been established, we compare the actual trial with the hypothetical trial that would have taken place had counsel competently investigated and presented the . . . defense. [Citation]"); see also Ford v. Warden, 111 Nev. 877, 881, 901 P.2d 123 (1995) (claim that client's mental state prevented counsel from adequately litigating habeas proceeding rejected because counsel did not raise any claims "not ascertainable from records . . . reviewed").

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[4]First state post-conviction counsel alleged that Mr. Floyd had been deprived of effective assistance of counsel because, among other things, trial counsel failed to request a penalty phase jury instruction correctly defining the use of "character" evidence and failed to strike overlapping aggravating circumstances. 11 App 2115-2153. There were no aggravating circumstances, however, that could even remotely be said to be overlapping, and there was no "character" evidence presented in the petition or opening brief. 11 App 2159, 2161. First state post-conviction counsel presented three other record-based claims, and waived the state evidentiary hearing.11 App 2115-2153.

Prior post-conviction counsel also failed to meet state and federal constitutional due process standards when he did not conduct tasks necessary to adequately represent Mr. Floyd during his habeas proceeding. Even under the due process "farce or sham" test, this Court held that counsel's representation could violate the due process federal constitutional right to effective assistance of counsel:

> [W]hile Nevada law will recognize the ineffectiveness of counsel only when the proceedings have been reduced to a farce or pretense, Warden v. Lischko, 90 Nev. 221, 223, 523 P.2d 6, 7 (1974), it is still recognized that a primary requirement is that counsel '. . . conduct careful factual and legal investigations and inquiries with a view to developing matters of defense in order that he may make informed decisions on his client's behalf both at the pleading stage . . . and at trial . . . .' In re Saunders, 2 Cal.3d 1033, 99 Cal.Rptr. 633, 638, 472 P.2d 921, 926 (1970). If counsel's failure to undertake these careful investigations and inquiries results in omitting a crucial defense from the case, the defendant has not had that assistance to which he is entitled. In re Saunders, supra; People v. Stanworth, 11 Cal.3d 588, 114 Cal.Rptr. 250, 522 P.2d 1058 (1974).

Jackson v. Warden, 91 Nev. 430, 432-433, 537 P.2d 473 (1975) (remanding for hearing where petition alleged counsel advised guilty plea without conducting any investigation); accord Mazzan v. State, 100 Nev. 74, 79-80, 675 P.2d 409 (1984) (counsel's representation fell below "farce or sham" standard, where counsel did not obtain or present any mitigating evidence but berated jury for guilty verdict); Bean v. State, 86 Nev. 80, 92-93, 465 P.2d 133 (1970) (pre-Strickland "farce or sham" test of counsel's effectiveness based on due process). Even under the more lenient standard, counsel's failure to inquire into extra-record issues violated Mr. Floyd's basic right to due process of law under the state and federal constitutions, as well as his right to the effective assistance of first state post-conviction counsel pursuant to Crump v.Warden, 113 Nev. 293, 934 P.2d 247 (1997). Investigating extra-record claims is a pre-requisite to making a strategic decision about which claims should be raised.

Had first state post-conviction counsel simply asked trial counsel about their failure to present evidence of the organic brain damage and FASD noted in their file, he would have learned that trial counsel did not omit this evidence due to a strategic decision, but instead were ineffective under the state and federal constitutions for failing to pursue this investigation. 37 App 7331-7336. First state post-conviction counsel swore that he: (1) did not recall having seen

Dr. Kinsora's report; and (2) did not recall seeing the documents indicating that Mr. Floyd suffered from FASD, despite their existence in trial counsel's file. 37 App 7339. Had first state post-conviction counsel conducted a state and federal constitutionally adequate investigation into Mr. Floyd's family history, he also would have learned about the physical and emotional child abuse suffered by Mr. Floyd.

Even during the erroneously limited evidentiary hearing, first state post-conviction counsel testified that he did not have a strategic reason for failing to investigate and present a claim that trial counsel was ineffective in failing to inform the jury that Mr Floyd suffered from organic brain damage and fetal alcohol spectrum disorder. 37 App 7353, 7361, 7363. First state post-conviction counsel also testified that he did not have a strategic reason for failing to hire an expert to follow-up on Dr. Cardle's 1989 diagnosis that Mr. Floyd suffered from organic brain damage or Dr. Kinsora's 2000 report that Dr. Cardle's testing revealed neurological wiring anomalies. 37 App 7357, 7360. First state post-conviction counsel also admitted that he did not recall discussing the topic of Mr. Floyd's organic brain damage with trial counsel. 37 App 7358.

During cross-examination, first state post-conviction counsel testified that after reviewing the information testified about at the evidentiary hearing, including Dr. Cardle's report, Dr. Kinsora's report, and trial counsel's investigative memorandum indicating that an investigation needed to be conducted regarding FASD, it was his opinion that he should have raised a claim that trial counsel should have presented an additional expert at trial. 37 App 7369. First state post-conviction counsel testified that:

> there were footprints in this case file indicating fetal alcohol syndrome that I don't believe was adequately followed-up by the experts that the defense had for trial and that I should have followed-up and raised as ineffectiveness on their part at not having done so.

37 App 7370. First state post-conviction counsel also testified that FASD would have impacted the trial because "it explains behaviors of the Defendant that the jury might not otherwise understand or have reason to exercise some mercy towards the Defendant. It's a factor that came into the Defendant's life before he was even born, based on the conduct of his mother, and

oftentimes the jury will take a sympathetic view to that type of testimony." Id.

First state post-conviction counsel admitted that in order to assess whether the trial testimony was appropriately presented, he needed assistance from experts in neuropsychology, pharmacology and FASD. 37 App 7374. He admitted that he failed to consult with any experts, and that this failure was not a strategic decision. Id. He noted that he could not demonstrate trial counsel ineffectiveness without consulting experts. 37 App 7376. The state post-conviction court clearly erred by finding that first state post-conviction counsel was not ineffective in failing to plead a claim that Mr. Floyd suffered from organic brain damage and FASD. The state post-conviction court also erred by failing to allow Mr. Floyd to present evidence that first state post-conviction counsel was ineffective in failing to investigate Mr. Floyd's history of child abuse and substance abuse.

B. The state post-conviction court erred in failing to provide Mr. Floyd with a fair evidentiary hearing by setting an arbitrary time limit and refusing to allow him to demonstrate that he was prejudiced by first state post-conviction counsel's failure to raise meritorious claims.

The state post-conviction court erred by arbitrarily limiting the length of the evidentiary hearing on his Amended Petition to ninety minutes, limiting the topic of the evidentiary hearing to the issue of whether first state post-conviction counsel was ineffective in failing to raise the claim that Mr. Floyd suffered from organic brain damage and limiting Mr. Floyd's presentation of witnesses. These errors violated Mr. Floyd's state and federal constitutional rights to a full and fair hearing, due process, equal protection and a reliable sentence. U. S. Const. amend. V, VI & XIV; Nev. Const. art. 1.

1. The state post-conviction court erred by failing to provide Mr. Floyd with a fair evidentiary hearing.

Current counsel provided a Hearing Memorandum informing the state post-conviction court of the need for a three day evidentiary hearing during which first state post-conviction counsel David Schieck, trial counsel Curtis Brown, and experts Dr. Jonathan Mack, Dr. Maria Cardle, Dr. Nathalie Novick-Brown, Dr. Jonathan Lipman, Dr. Thomas Kinsora and Dr. Joseph Spano would be called as witnesses to address the issue of whether first state post-conviction

counsel was ineffective for failing to raise a claim that Mr. Floyd suffered from organic brain damage. JN184-190. In response, the state post-conviction court informed current counsel by telephone prior to the hearing that the hearing would be limited to ninety minutes. During the hearing, the trial court indicated that first state post-conviction counsel would be the only witness allowed to testify. 37 App 7350, 7377. Throughout the evidentiary hearing, the state post-conviction court reaffirmed these limitations over the objection of current counsel:

> THE COURT: Okay. Thank you. We're here because on December 13th, 2007, on the Petition for Writ of Habeas Corpus, I said the following: That we'd have a hearing on the limited/narrow issue regarding whether Mr. Schieck failed to raise the organic brain issue, and then the petition is denied on all the other issues.
>
> So the only thing, as far as this Court's concerned today, is that we're going–we should be hearing from would be Mr. Schieck.
>
> We ready to go?
>
> MR. OWENS [recte - MR. ABBINGTON]: Just for the record, Your Honor, we would object to the limitation on the Court's order, just so we're clear on that.
>
> THE COURT: I'm happy to have you make the objection. The objection's now on the record and let's hear from Mr. Schieck.
>
> . . . . . .
>
> MS. HURST: Given the Court's time limitations, Your Honor, and our need to call additional witnesses, I would pass this witness at this time. Thank you.
>
> THE COURT: You're gonna–you're planning on calling additional witnesses?
>
> MS. HURST: I guess I may have confused your prior ruling. Was that a mandate that we cannot, or that you–
>
> THE COURT: I didn't think that it was going to be necessary to hear from anybody else other than Mr. Schieck because the issue is whether–what Mr. Schieck did or didn't do. So, we'll pass the witness and then we'll see how it goes.
>
> . . . . . .
>
> THE COURT: Okay. Ms. Hurst, I guess what you want me to do is listen to other witnesses?
>
> MS. HURST: Yes, Your Honor.
>
> THE COURT: Okay. I don't–at this point–as I said in my determination of having this hearing in the first place, it's what Mr. Schieck did. I know you want to put on other witnesses. I don't want to hear from other witnesses. Your position is noted for the record and your, I'm sure, vehement objection to the fact that I'm not

listening to other witnesses–big letters in the minutes–and now you can conclude with your argument.

. . . . . .

MS. HURST: ...Attorney Schieck admits that the issue of organic brain damage, and fetal alcohol syndrome, and its related components should have been raised. He failed to raise it. Not only did he fail to raise it, he failed to investigate it, and there was no strategic reason for failing to investigate it. And the case law is very clear that you cannot fail to investigate.

But the second prong of that Strickland analysis requires a showing of prejudice that, in fact, had the claim been raised, it would have been meritorious. And, unfortunately–I am assuming that at this point we're only addressing the procedural aspect of things, because we haven't been able to put on the witnesses that would in fact demonstrate that substantively Mr. Floyd was prejudiced because the jury would have found a different result had the investigation been done. And, thus, we brought all of our doctors here in anticipation that that might be addressed today. However, without being able to put those doctors on, we cannot address the substantive aspect of the Strickland claim; however, I would suggest that we have put forth...

The evidence that we have put forth is enough to take us out of the procedural–the issue of procedural default and to survive the dismissal of the claim. More–an additional hearing is necessary to determine the substantive merits of the claim. The Court cannot decide the effectiveness of counsel without looking at and weighing the evidence that was presented versus what evidence could and should have been presented.

. . . . . .

MS. HURST: ...In terms of the merits of the substantive aspect of our claim regarding organic brain damage and fetal alcohol syndrome, we haven't even reached testimony regarding that. So, the State's argument that it would not have been meritorious, therefore, we should find that Mr. Schieck was not ineffective, is not argued based upon the evidence at this hearing. In order to determine that the issue would have been meritorious, you need to hear from the numerous experts that we have here who will tell you where the ball was dropped by trial counsel and how Mr. Schieck could have presented an effective claim with their assistance.

The reports that we've submitted, with our petition, by our neurological–our neuropsychologist, our pharmacologist, our fetal alcohol syndrome disorder address the fact that the information that was presented to the prior experts was incomplete. Counsel had notes to obtain certain documents and certain information but didn't do it. So, the question of prejudice can only be answered if Your Honor has a full picture of what should have occurred had the investigation been effective and Your Honor won't have that full picture until there's testimony presented–substantive testimony presented on the issue of organic brain damage.

37 App 7348-7350, 7364, 7377-7379, 7383. The state post-conviction court's limitations

violated Mr. Floyd's state and federal constitutional right to due process through a full and fair hearing, as well as his right to equal protection[5] and a reliable sentence. U. S. Const. amend. V, VI & XIV; Nev. Const. art. 1.

This Court specifically addressed a due process claim partially based on a district court's limitation of the time in which to put on an evidentiary hearing in Kirksey, 112 Nev. 980, 923 P.2d 1102. In Kirksey the petitioner had subpoenaed ten witnesses to testify at his state post-conviction hearing. The hearing began at 10:40 a.m. and concluded at 5:15 p.m. with a lunch break from 11:25 a.m. to 1:35 p.m. Kirksey at 1003-1004, 923 P.2d at1117. As a result, only six of the petitioner's witnesses testified and his counsel made an offer of proof as to the testimony of the remaining four.

While holding that "...it would have been preferable in this capital case for the state post-conviction court to have heard testimony from all of Kirksey's witnesses, we conclude that any

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[5]When a state court arbitrarily applies different rules to similarly-situated litigants without adequate notice of what standards will be applied, even on issues of purely state law, it violates the state and federal constitutional rights to due process and equal protection. Lankford v. Idaho, 500 U.S. 110, 126 n.2 (1991) (due process requires "giving the parties sufficient notice to enable them to identify the issues on which a decision may turn [citations]"); Castillo-Manzanarez v. I.N.S., 65 F.3d 793, 795 (9th Cir. 1995). "The Equal Protection Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly situated should be treated alike." City of Clelburne v. Clelburne Living Center. Inc., 473 U.S. 432, 439 (1985), citing Plyer v. Doe, 457 U.S. 202, 216 (1982); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Whether or not a particular state rule or practices is itself required by the federal constitution, the federal equal protection clause requires that "once the state has established a rule it must be applied evenhandedly." Myers v. Ylst, 897 F.2d 417, 421, 426 n. 9 (9th Cir. 1990), quoting LaRue v. McCarthy, 833 F.2d 140, 142 (9th Cir. 1987); see also Bush v. Gore, 531 U.S. 98, 104-109 (2000) (per curiam) (inconsistent treatment with respect to state law right to vote violates federal equal protection guarantee); Village of Willowbrook v. Olech, 528 U.S. 562, 564-565 (2000) (per curiam) (single individual may be class of one for stating equal protection violation arising from arbitrary difference in treatment); Louis v. Supreme Court of Nevada, 490 F.Supp 1174, 1183 (D. Nev. 1980) ("Where waivers of a rule are not granted with consistency and no explanation is given for the disparity in treatment, a finding of denial of equal protection may be appropriate. [Citations]"). Thus this Court's failure to apply the laws in favor of Mr. Floyd on this issue would implicate his constitutional rights.

error was harmless." Id. at 1004, 923 P.2d at1117. This Court concluded that the error was harmless because: 1) Kirksey's counsel was allowed to make an offer of proof as to the testimony of the remaining witnesses; and 2) there was no indication that any witness who did not testify would have made any difference in the outcome of the hearing. Id. Even so, this Court expressed concern about the limitation of the petitioner's presentation of evidence and indicated that, in its view, the state post-conviction court had committed error by failing to allow all of Kirksey's witnesses to testify.

Despite the above-cited criticisms of the state post-conviction court in Kirksey, the judge in that case allowed for significantly more time than the 1 ½ hours allotted for Mr. Floyd's hearing. In the instant case, current counsel informed the state post-conviction court that establishing the effect of Mr. Floyd's organic brain damage at the time of the incident depended upon expert testimony from several different experts with specialized areas of expertise. JN184-190. It is only through their reliance upon, and adoption of, one another's findings that a complete picture of Mr. Floyd's mental state at the time of the shootings emerges. Id. Mr. Floyd's Hearing Memorandum detailed the need for the testimony of each witness. Id. Moreover, Mr. Floyd's counsel at the hearing repeatedly informed the state post-conviction court of the necessity of calling the subpoenaed experts and trial counsel in order to establish what the trial testimony would have been had trial counsel been effective. 37 App 7348-50, 7364, 7377-7379, 7383. The inability to call these witnesses prejudiced Mr. Floyd because the state post-conviction court was not presented with the full extent of the possible mitigation evidence during the evidentiary hearing that the jury would have heard had it not been for trial counsel's failure to investigate, develop and present testimony.

The federal courts have recognized that the right to a full and fair hearing is a fundamental right guaranteed by the federal constitution's due process clause. Although denying relief to the petitioner, the Ninth Circuit set out the standards that must be met for a hearing to be "full and fair" in Mack v. Cupp, 564 F.2d 898 (9th Cir. 1977). The court held that a federal court must grant an evidentiary hearing on habeas corpus review when a state court's

proceedings do not satisfy certain due process guarantees. The court held that a state court evidentiary hearing is not full and fair if:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Mack at 900 (quoting Townsend v. Sain, 372 U.S. 293 (1963)) (although Townsend was subsequently superseded by statute in 1997, there is no indication that this is not still the standard for reviewing state court hearings for due process violations).

Recently the United States Supreme Court confirmed that a habeas determination which does not afford a petitioner a full and fair hearing violates due process. Panetti v. Quarterman, 127 S. Ct. 2842, 2856 (2007) (a governor's determination that a habeas petitioner is competent to be executed without a full and fair hearing violates due process). In so holding, the Court emphasized that a full and fair hearing involves the opportunity to be heard, which includes an opportunity to submit evidence and argument. Id.

The state post-conviction court's action, in so severely limiting Mr. Floyd's evidentiary hearing, violated his fundamental state and federal constitutional right to due process. The hearing that Mr. Floyd received was not "full and fair" for purposes of state and federal constitutional analysis. Mr. Floyd was entitled to a hearing that was not arbitrarily limited in time or scope where he could present evidence demonstrating that he was prejudiced by first state post-conviction counsel's state and federal constitutional ineffectiveness.

2. The state post-conviction court erred by failing to allow Mr. Floyd to demonstrate that he was prejudiced by first state post-conviction counsel's failure to raise several meritorious claims.

In addition to the claim that first state post-conviction counsel was ineffective under state and federal constitutional standards in regard to Mr. Floyd's organic brain damage and social history, first state post-conviction counsel was also ineffective for failing to investigate, develop and plead several other meritorious claims. The state post-conviction court erred by failing to

allow Mr. Floyd to present evidence at his evidentiary hearing demonstrating that he was prejudiced by first state post-conviction counsel's failure to raise the meritorious state and federal, see 1 App 110-113, 1 App 130-132, constitutional claims outlined below.

a. Mr. Floyd was denied his state and federal constitutional right to a fair trial by fair, impartial, and indifferent jurors due to substantial error during the voir dire proceedings and the trial court's failure to grant a change of venue.

During the voir dire proceedings the trial court erred, trial counsel provided ineffective assistance, and the prosecution committed misconduct in violation of Mr. Floyd's state and federal constitutional rights to due process, equal protection, see n. 5 supra, effective assistance of counsel, an impartial jury and a reliable sentence. U. S. Const. amend. V, VI & XIV; Nev. Const. art. 1. The trial court improperly rushed the voir dire proceedings, erroneously limited the number of for-cause challenges, failed to grant Mr. Floyd's meritorious motion for individually sequestered voir dire, disparately questioned persons on the venire, incorrectly removed a death scrupled juror, failed to remove a biased juror, and failed to grant a change of venue. The state reinforced the trial court's error by criticizing trial counsel's attempts to adequately question members of the voir dire in front of the panel. The trial court's erroneous and unreasonable time limitations prevented trial counsel from effectively questioning jurors regarding their exposure to pre-trial publicity, their ability to consider a sentence of less than death, and their ability to consider mitigating circumstances. Trial counsel ineffectively acceded to the improper demands of the trial court by agreeing to a prejudicial voir dire format where the state was allowed to question jurors first, followed with minor questioning by trial counsel under improper pressure to go quickly. Trial counsel failed to attempt rehabilitation of death scrupled jurors, question each juror regarding their ability to be fair and impartial, remove jurors for cause who were biased against Mr. Floyd, and intelligently exercise their peremptory challenges. Direct appeal and first state post-conviction counsel ineffectively failed to investigate, develop and present these errors on appeal.

The Sixth Amendment guarantees "the criminally accused a fair trial by a panel of

impartial, indifferent jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961) (internal quotations omitted); see also Pruett v. Norris, 153 F.3d 579, 584 (8th Cir. 1998). The voir dire process was established to assure that the jurors selected will be fair and impartial. See Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981). "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges . . ." Id. (Internal quotations omitted). The denial of Mr. Floyd's right to a fair and impartial jury was structural error and no showing of prejudice need be made. See United States v. Annigoni, 96 F.3d 1132, 1144 (9th Cir. 1996); Gray v. Mississippi, 481 U.S. 648, 668 (1987) (holding that the impermissible exclusion of a juror is not subject to harmless-error analysis); Chapman v. California, 386 U.S. 18, 23 (1967). In addition, Mr. Floyd has demonstrated that he was actually prejudiced by the erroneous qualification of two biased jurors, one partial towards imposing the death penalty and one who could not consider life with parole.

i. The trial court erred by setting arbitrary time limitations during the voir dire proceedings.

The trial court abused its discretion by arbitrarily forcing counsel to select a capital jury in less than one day. The trial court mandated that the parties complete the entire voir dire in Mr. Floyd's capital case by 2:30 in the afternoon of the first day, including a lunch break. 3 App 591. At the beginning of the voir dire proceedings, the trial court announced to the venire "[w]hat we're going to do this morning, and as quickly as possible, is pick a jury . . . [This] process . . is the boring part of the case that you rarely, if ever, see on television in those trial shows." 3 App 433-434. To speed up the process, the trial court arbitrarily limited the number of for cause challenges to two. 3 App 591. The trial court also denied Mr. Floyd's motion for individual voir dire. 2 App 350. These artificial time limitations substantially impaired trial counsel's ability to question venirepersons. 3 App 494-95. The trial court interrupted trial counsel after only one question was asked due to its desire to make the process "a little quicker." 3 App 512. The trial

court badgered trial counsel when they asked legitimate questions in an attempt to rehabilitate persons on the venire. 3 App 531. The state seized upon the trial court's improper time limitations by disparaging trial counsel for not clearly asking a qualification question. 4 App 637-638. In frustration, trial counsel exclaimed, "I got yelled at the last time I was longer than that." Id. In a later exchange, the state told trial counsel to stop their questioning because the trial court was about to "ask [him] to sit down." 4 App 677.

In Salazar v. State, 107 Nev. 982, 985, 823 P.2d 273, 274 (1991), this Court ruled that a completely arbitrary limitation on voir dire, which had no relation to the circumstances of the case and deprives counsel of the opportunity to fully examine prospective jurors, is an abuse of discretion and is per se prejudicial. The United States Supreme Court determined that in order to ensure the fairness and impartiality of the jury, a capital defendant must be afforded the opportunity to conduct adequate voir dire to determine whether the potential jurors are capable of imposing a life sentence upon conviction in accordance with the facts and law. Morgan v. Illinois, 504 U.S. 719 (1992). General questions of fairness and impartiality and the ability to "follow the law" are not sufficient to afford a defendant adequate voir dire. Id. at 739. Mr. Floyd was entitled to ask whether the jurors could fairly consider mitigating evidence and to determine whether the proposed jurors could consider a life sentence under the facts of Mr. Floyd's case.

Limiting voir dire solely based upon time-related reasons is completely arbitrary. NRS 175.031 entitles the defendant to supplement the court's examination of jurors, and indicates that such supplemental examination "must not be unreasonably restricted." The trial court's actions conveyed to the jury that the voir dire process was perfunctory and unimportant, substantially impaired counsel's ability to impanel a fair and impartial jury, and denied Mr. Floyd a fair and impartial jury.

ii. The trial court improperly conveyed a partiality towards the state during voir dire and deprived trial counsel of their ability to life qualify the jury.

The trial court's behavior towards trial counsel during voir dire conveyed a partiality towards the state. A necessary component of a fair trial is an impartial judge. See In re

Murchison, 349 U.S. 133, 136 (1955); Tumey v. Ohio, 273 U.S. 510, 532 (1927). Due Process, however, demands more than that the court actually be impartial; rather, "'justice must satisfy the appearance of justice.'" In re Murchison, 349 U.S. at 136 (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)). "The appearance of even-handed justice . . . is at the core of due process." Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., concurring). "Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well." Peters v. Kiff, 407 U.S. 493, 502-03 (1972). The denial of the right to an unbiased tribunal is not subject to a harmless error analysis. Gray, 481 U.S. at 668 (1987). The trial court's arbitrary time limits prevented trial counsel from life qualifying the jury, and when combined with its disparate treatment of death prone and death scrupled jurors, mandates reversal of Mr. Floyd's judgment of conviction and sentence of death.

(a) The trial court improperly failed to remove biased jurors.

The trial court improperly failed to remove biased venirepersons Gertrude Curl-Leatherwood, Mary Ellen Nelson and Tammy Hanlon for cause. See 3 App 425. Because trial counsel used all of their peremptory challenges, they were unable to strike Ms. Curl-Leatherwood and Ms. Nelson, who were seated as jurors. "Detached language [of a potential juror] considered alone is not sufficient to establish that a juror can be fair when the juror's declaration as a whole indicates that she could not state unequivocally that a preconception would not influence her verdict." Weber v. State, 121 Nev. 554, 581, 119 P.3d 107, 125 (2005).

Ms. Hanlon indicated that her brother had recently been murdered. 3 App 572. The state had prosecuted the case, and the case was heard before Judge Sobel, the judge hearing the instant case. 3 App 575. In fact, Ms. Hanlon had observed Mr. Floyd in prison garb and shackles the day before voir dire, when she was in court for a hearing related to her brother's case. 3 App 593-94. Ms. Hanlon's family intended to introduce victim impact testimony substantially similar to the evidence adduced in the instant case. 3 App 572. Initially, Ms. Hanlon unequivocally

stated that she could not consider a sentence of life without parole because this sentence was not severe enough for a murder. 3 App 579.

During questioning, Ms. Hanlon stated that she had a hard time considering parole, and she did not state that she could follow the law in accordance with the instructions and the evidence. 3 App 579-580. Ms. Hanlon had heard about Mr. Floyd's case and had already formed an opinion about his guilt and punishment. 3 App 580-581. Ms. Hanlon further stated that she did not believe that "being on [Mr. Floyd's] jury would be good." 3 App 594. In fact, she questioned whether "the other side [could] come back and say, well, the jury was partial because they had two people that experienced the death penalty?" 4 App 0624. Mr. Floyd moved to strike Ms. Hanlon for cause. Id. The trial court denied the motion. 3 App 594-597. The trial court also denied Mr. Floyd's motion for an additional peremptory strike. The trial court's denial of Mr. Floyd's motion forced Mr. Floyd to peremptorily strike Ms. Hanlon whose personal life and views about the death penalty disqualified her from being an impartial juror, and prevented him from striking Ms. Nelson, a biased juror who was eventually seated. The voir dire of Ms. Nelson reveals that she was prejudiced against Mr. Floyd but was able to parrot back language of impartiality due to the fact that she had witnessed the entire voir dire proceeding in the morning and was well aware of the qualifying questions and the answers that were necessary to appear impartial. 4 App 718-719.

The trial court additionally failed to excuse venirewoman Gertrude Curl-Leatherwood even though she told the court that she did not fully fill out the questionnaire because its questions were "stupid," and she agreed that a person who kills should necessarily be himself killed. 4 App 628, 631. Defense questioning further revealed that Ms. Curl-Leatherwood would exclude a sentence of life without parole for first-degree murder. 4 App 633. At this point, the trial court intervened and asked Ms. Curl-Leatherwood leading questions about her ability to consider all three penalties. 4 App 633-0634. Further questioning confirmed that she could not consider a sentence of life with parole for a deliberate murder. 4 App 635. When trial counsel indicated that they wished to lay more foundation before challenging Ms. Curl-Leatherwood for

(b) The trial court improperly removed death scrupled jurors.

In contrast with its failure to remove biased jurors, who favored the death penalty, the trial court did not permit Mr. Floyd to properly rehabilitate death scrupled jurors, including venirewoman Gail Waldon. After the state moved to challenge Ms. Waldon for cause, trial counsel informed Ms. Waldon that the law required consideration of all penalties to first-degree murder and that her instructions required her to follow the law. 4 App 688-689. Ms. Waldon replied that she "would... follow the law." Id. The state renewed its motion to dismiss her for cause. Id. The trial court then led Ms. Waldon, asking whether she would "invariably in all cases give a sentence less than death as a juror." Id. When Ms. Waldon replied affirmatively, the trial court dismissed her for cause.

The trial court also improperly dismissed Mr. Yong K. Pak, another death scrupled juror, for cause. When initially questioned, Mr. Pak stated that he used to believe in the death penalty but church had made his beliefs less certain. 3 App 468 In response to subsequent questions, Mr. Pak stated that he could act in accordance with his instructions and with the evidence presented to him. Witt, 469 U.S. at 424. Mr. Pak stated his belief that the death penalty should be imposed only in "extreme cases." 3 App 471. At this point, the trial court interjected questions regarding Mr. Pak's English-speaking abilities. At the time of voir dire, Mr. Pak was an accountant with a bachelors degree from the University of Nevada in Las Vegas. 3 App 472. All of his classes were conducted in English. 3 App 473-474. He had lived in the United States for over ten years. 3 App 493; see also 19 App 3684-3693. Although Mr. Pak agreed that there were "times when [he] had problems with English," the trial court noted that in "90 percent of the questions, we're understanding you and you are understanding us, but there does seem occasionally a problem." 3 App 473-74. The state did not object to Mr. Pak's fitness to serve as a juror, and expressed its belief that he was fit to serve on a non-capital case. 3 App 472. The trial court, however, pretextually dismissed Mr. Pak for cause because it did not want to "take a chance where the stakes are so high to both sides." 3 App 474. When Mr. Floyd objected to Mr. Pak's dismissal,

the trial court justified its decision as falling within its discretion. 3 App 498. On the contrary, it was improper for the trial court to remove a juror who could follow the law using a justification that would not require Mr. Pak's removal in a non-capital case.

The Supreme Court summarized Witherspoon in Adams as follows:

> [A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Adams v. Texas, 448 U.S. 38 at 45 (1980). In Witt, 469 U.S. 412, the United States Supreme Court clarified the law relating to juror exclusions. It held that the proper standard is the one stated in Adams – "whether the juror's views would 'prevent or substantially impair the performance of his duties in accordance with his instructions and his oath." Witt, 469 U.S. at 424. The record in this case does not support a finding that either Ms. Waldon or Mr. Pak's views would have interfered with their ability to perform their duties. See Lockhart v. McCree, 476 U.S. 162, 176 (1986); see also Szuchon v. Lehman, 273 F.3d 299, 329-30 (3d Cir. 2001) (finding dismissal of prospective juror improper where the prosecutor failed "to meet his burden under Witt of asking even a limited number of follow-up questions to show that [the juror's] views would render him biased"). The state's motion to remove these jurors was, therefore, improper, see 1 App 133-136, 2 App 312-314, and the trial court erred by granting the motion.

iii. Trial counsel, the state and the trial court erroneously agreed not to call into court death scrupled jurors for rehabilitation.

Trial counsel ineffectively agreed not to call into court death scrupled jurors from the venire to attempt rehabilitation, instead agreeing to excuse them based solely upon their jury questionnaire answers. "A sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objection to the death penalty or expressed conscientious or religious scruples against

its infliction." Witherspoon, 391 U.S. at 522 (emphasis added). The United States Supreme Court indicated that it was particularly concerned by the exclusion of prospective jurors who "said they did not 'believe in the death penalty'" and were immediately excused, "without any attempt to determine whether they could nonetheless return a verdict of death." Id. at 514. The United States Supreme Court found that it was "entirely possible" that a juror who is resolutely opposed to the death penalty "could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State." Id. at 514 n.7. By agreeing not to call death scrupled jurors into court simply because of the answers put in their questionnaire, trial counsel ineffectively waived Mr. Floyd's right to a fair and impartial jury as established under Witherspoon and its progeny. Trial counsel had a duty to call these death scrupled jurors in for questioning about "whether the juror's views would 'prevent or substantially impair the performance of his duties in accordance with his instructions and his oath." Witt, 469 U.S. at 424. The dismissal of prospective jurors is improper where there was not even a limited number of follow-up questions to show that the venirepersons' views would render them biased. Szuchon, 273 F.3d at 329-30 (3d Cir. 2001). Witherspoon violations are not subject of harmless error analysis. Gray, 481 U.S. 648, 668 (1987); Davis v. Georgia, 429 U.S. 122, 123 (1976).

iv. There were several instances of trial counsel ineffectiveness during voir dire.

In addition to above-cited errors, trial counsel failed to question jurors in several other areas important to determining their ability to be fair and impartial. Many of the jurors who served on Mr. Floyd's jury were only asked cursory and perfunctory questions by trial counsel that did not concern their ability to consider a sentence of less than death in Mr. Floyd's case. Trial counsel's failure to make an adequate inquiry of each of the persons on the venire was prejudicial because it prevented them from making appropriate challenges for cause and from intelligently exercising their peremptory challenges. Trial counsel also failed to remove biased jurors, and to effectively exercise their peremptory challenges. See 12 App 2201-2205

Trial counsel ineffectively failed to question the jurors that served on Mr. Floyd's jury about their exposure to pre-trial publicity after the trial court erred in failing to change the venue of the trial. There were close to 100 newspaper articles written prior to the trial and over 79 television news spots aired, 14 App 2773-2781; 14 App 2788-2800; 15 App 2801-3001, 16 App 3008-3151,which exposed jurors to information not presented at trial, the conjecture of pseudoscientific experts who opined about Mr. Floyd's mental state, and victim impact information that was inadmissible at trial.

Trial counsel also failed to voir dire jurors about their ability to consider mitigating evidence, including one juror who was eventually seated. See 3 App 475 (no defense questioning of Connie Caven). Trial counsel questioned other seated jurors on matters that did not relate to their ability to consider a sentence of life or the mitigation evidence that would be presented. See, e.g., 3 App 541 (Joan McGee), 3 App 546-547 (Carol Pierson), 3 App 547-548 (Timothy LeMaster), 3 App 556-562 (Patrick Sherry), 3 App 537-540 (Quenneta Green), 3 App 639-649(Dolores Quiroz), 3 App 663-665 (Luigi Mastropietro), 3 App 680-681 (Sharil Stern) 3 App 696-699 (Mary Jayne Lueberstorf), 3 App 718-719 (Mary Ellen Nelson). This was particularly prejudicial because Juror Nelson was actually seated.

Trial counsel also failed to follow-up on relevant answers contained in the jury questionnaires that would have impacted the jurors' ability to be fair and impartial. For example, trial counsel failed to ask Ms. Pierson about the nature of her prior jury service. 3 App 546-0547. Upon information and belief, Ms. Pierson had previously served as a juror in a capital case where the death penalty was imposed. Trial counsel's failure to question Ms. Pierson about her prior jury service deprived Mr. Floyd of the ability to move to excuse her for cause or to intelligently exercise his peremptory challenges.

Trial counsel was ineffective in agreeing to a voir dire format where the state was allowed to voir dire every juror before trial counsel was allowed to ask any questions. See generally 3 App 429-600. The state was also allowed to voir dire several persons on the venire during the afternoon voir dire proceeding without interruption by the defense. As a consequence, trial

counsel either completely failed to individually voir dire some of the veniremen in order to determine if, in addition to their feelings about the death penalty, they could consider a sentence less than death, as required by state and federal constitutional law. Moreover, trial counsel failed to follow-up on important statements made by potential jurors, including individuals who were ultimately seated as jurors in Mr. Floyd's case. See 3 App 476-477 (no defense questioning).

v. Given the bias demonstrated by the venire, the trial court erred in denying the defense motion for a change of venue and to sequester the jury.

Given the bias demonstrated above, the trial court erroneously failed to change the venue and sequester the jury in spite of the voluminous publicity surrounding Mr. Floyd's case. See 1 App 70-79; 1 App 114-17; 1 App 118-129; 2 App 280-311; 2 App 322-324; 2 App 347-63. Mr. Floyd's jury was exposed to extensive media sources reporting his trial in a biased manner. This exposure resulted in a biased jury predisposed to convict Mr. Floyd and sentence him to death. The constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding culminating with a trial in a courtroom presided over by a judge. Carey v. Musladin, 127 S. Ct. 649, 653 (2006); see also Carey, 127 S. Ct. at 656 (Kennedy, J., concurring); Casey v. Moore, 386 F.3d 896, 908 (9th Cir. 2004). Coercive or intimidating media attention allows a defendant to be tried by the public without constitutional safeguards. Carey, 126 S. Ct. at 653; Rideau v. Louisiana, 373 U.S. 723, 725-26 (1963). This attention taints a jury pool and denies a defendant his rights to due process of law and to a trial by an impartial jury. Id. See also Dobbert v. Florida, 432 U.S. 282, 302 (1977);Groppi v. Wisconsin, 400 U.S. 505, 510-11 (1971); Sheppard v. Maxwell, 384 U.S. 333, 351 (1966); Estes v. Texas, 381 U.S. 532, 542-44 (1965).

Mr. Floyd demonstrated that the media attention surrounding his trial tainted his jury pool because it was so widespread and intrusive that bias must be presumed. Dobbert, 432 U.S. at 302; Rideau, 373 U.S. at 725-26. Alternatively, Mr. Floyd demonstrated that this attention unconstitutionally tainted his venire because he has demonstrated that biased jurors were actually seated. Id.

Duplicative broadcasts and articles conveyed to the venire false information, information not presented at trial, prejudicial victim impact evidence, and unreliable psychological and forensic evidence. 14 App 2788-16 App 3151. Virtually all venirepersons were exposed to dozens of news articles about Mr. Floyd's case. 34 App 6697-37 App 7329.

False, misleading news articles contaminated the venire. Both the Las Vegas Review-Journal and the Las Vegas Sun, the two major newspapers in the area, ran articles with patently false information. See 14 App 2288-16 App 3151. News articles also contaminated the venire by providing prejudicial information that was inadmissible at trial. 15 App 2864, 2874, 2888, 2894, 2909, 2921, 2923, 2928, 2932, 2937, 2942; 16 App 3078, 3089, 3120, 3141. Further, News articles contaminated the venire with prejudicial accounts of victim impact evidence inadmissible at trial. 15 App 2808, 2815, 2827, 2844, 2853, 2864, 2877; 16 App 3027, 3048, 3081, 3123. News articles also contained numerous opinions about Mr. Floyd's psychological state. 15 App 2805, 2840, 2912, 2942, 2947, 2977.

Many news articles detailed the community's reactions of fear and hysteria that occurred after the incident. 15 App 2815, 2827, 2813. Prosecutor Bell echoed these sentiments in other articles. 15 App 2864, 2942, 2844; 16 App 3089, 3145. One article in a local paper attributed an increase in gun sales to the Albertson's shootings. 15 App 2923. Taken together, this media requires this Court to presume that the venire was tainted and contaminated before voir dire. See Dobbert, 432 U.S. at 302; Carey, 126 S. Ct. at 653; Rideau 373 U.S. at 725-26.

Mr. Floyd has demonstrated that biased venirepersons heard his case. Dobbert, 432 U.S. at 302. One-fourth of the potential jurors were dismissed for bias because their questionnaires indicated that the media had contaminated their views about Mr. Floyd's case. Mr. Bell conceded this fact to a local paper. In an article, he told a local paper that many jurors "had already formed an opinion of the guilt or innocence of [Mr.] Floyd and what sentence he should get if convicted." 16 App 3097. Of the 120 potential jurors responding to juror questionnaires, only thirteen claimed to never have heard about Mr. Floyd's case. 34 App 6743-37 App 7329. Sixty-two, nearly half of the responders, admitted to having formed an opinion about Mr.

Floyd's guilt. 34 App 6751, 6760, 6769; 35 App 6859, 6868, 6877, 6886, 6895, 6931, 6940, 6958, 6967, 6985, 6994; 36 App 7012, 7021, 7030, 7048, 7056, 7074, 7119, 7128, 7146, 7155, 7164; 37 App 7208, 7235, 7244, 7253, 7271, 7280, 7289, 7298, 7319. Of forty-eight responders called into court for voir dire, only nine claimed to never have heard of Mr. Floyd's case. 34 App 6787, 6850; 35 App 6904, 6913, 7003; 36 App 7083, 7137, 7181, 7199. Of the jurors who had concluded that Mr. Floyd was guilty, three ended up on his jury. 34 App 6751, 6760, 6769.

Juror responses during voir dire illustrate this contamination. Juror number 1, Ms. McGee, heard about Mr. Floyd's case prior to trial. 34 App 6751. She subscribed to a local paper that published many stories about the case. Id. Ms. McGee had formed an opinion about Mr. Floyd's guilt prior to voir dire. Id. Similarly, Ms. Caven had discussed the case with her husband. 34 App 6769. She admitted that she had formed an opinion about Mr. Floyd's guilt. Id. Ms. Luebstorf also subscribed to a major local paper that had published many stories about Mr. Floyd's case. 34 App 6760. Like Ms. Caven and Ms. Luebstorf, she had formed an opinion about Mr. Floyd's guilt before voir dire. Id. These jurors were actually seated and heard Mr. Floyd's case. Accordingly, Mr. Floyd has shown that actually biased jurors were seated. See Dobbert, 432 U.S. at 302.

b. Mr. Floyd was denied his right to due process and a fair trial by trial counsel's failure to object to prosecutorial misconduct, the trial court's failure to sustain properly made objections, and the prosecutors' blatant and continuous misconduct.

Trial counsel were ineffective when they failed to make timely objections, the trial court erred by failing to sustain properly made objections, and the prosecutors committed blatant and continuous misconduct, all in violation of Mr. Floyd's state and federal constitutional rights to due process, equal protection, see n. 5 supra, effective assistance of counsel, an impartial jury and a reliable sentence. U. S. Const. amend. V, VI & XIV; Nev. Const. art. 1; see also 1 App 137-235; 2 App 315-317. Trial counsel should have objected to the state's penalty phase misconduct during opening and closing argument and to the introduction of inappropriate victim impact testimony. Trial counsel also should have objected to the prosecution's failure to preserve

the blood sample taken from Mr. Floyd on the day that he was arrested to investigate, develop and present evidence regarding his blood alcohol level and drug use at the time of the offense. There was no strategic or tactical reason, reasonably designed to effectuate Mr. Floyd's best interests, for trial counsel's failure to object to the prosecutor's misconduct. See 37 App 7330-7337. Trial counsel's failure to object, the trial court's failure to sustain properly made objections and the prosecution's blatant and continuous misconduct significantly undermines confidence in the death verdict.

i. Trial counsel ineffectively failed to object to the prosecutors' improper argument.

The prosecution made improper closing arguments by expressing their personal opinions, misstating the law, referring to facts not in evidence, mis-characterizing the defense, bolstering the credibility of the government neuropsychologist, improperly inflaming the passions of the jury, and referring to prison conditions. Trial counsel's failure to object to these improper remarks was ineffective. The trial court's failure to sustain the objections that were made by trial counsel was error. In the few instances where the trial court sustained trial counsel's objections, the prosecutors' pattern of misconduct still served to undermine confidence in the jury's verdict, and warrants reversal of Mr. Floyd's judgment of conviction and sentence of death without need for a showing of prejudice. Brecht v. Abrahamson, 507 U.S. 619, 638 n.9 (1993); Hardnett v. Marshall, 25 F.3d 875, 879 (9th Cir. 1994).[6]

(a) The prosecutors improperly expressed personal opinion.

It is improper for a prosecutor to invoke the legitimacy of the state via his personal opinion in support of his argument for the death penalty. Such arguments were pervasive and violated the state and federal constitutions. Berger v. United States, 295 U.S. 78, 85 (1935); United States v. McKoy, 771 F.2d 1207, 1210-11 (9th Cir. 1985); United States v. Smith, 962

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[6]As this Court failed to distinguish in its direct appeal and first post-conviction appeal opinions what allegations were considered harmless misconduct from what allegations were not considered to be misconduct, all prior claims have been repeated herein for this Court to conduct a cumulative analysis along with newly raised claims of misconduct.

F.2d 923, 934 (9th Cir. 1992); Earl v. State, 111 Nev. 1304, 904 P.2d 1029 (1995); ABA Standards for Criminal Justice 3-5.8. It was also misconduct for the prosecutor to identify the state with the victims. Flanagan v. State, 104 Nev. 105, 107, 109, 754 P.2d 836, 837-38 (1988); Hawthorne v. United States, 476 A.2d 164, 171-72 (D.C. 1984). Additionally, the prosecutors' arguments improperly reflected the prosecutor's personal beliefs about the propriety of the death penalty. Darden v. Wainwright, 477 U.S. 168, 179 (1986); Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126 (1985); Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992).

Prosecutor Bell began his closing argument by giving his opinion that Mr. Floyd deserved the death penalty, and by challenging jurors to explain a decision not to give death to the victims' families by stating:

> [i]f not this case, ladies and gentlemen, what case? If not this case, what case? If the conduct in this case is not sufficiently offensive or the loss not sufficiently devastating to merit the maximum penalty allowed by law, then come back and tell me, and while you're at it, tell Leanne Leos, Mona Nall–

10 App 1920. At that point, trial counsel objected, and the trial court sustained the objection. Mr. Koot furthered this argument by telling the jury "I trust that you will agree with Mr. Bell and myself that for his crimes he deserves what is in this case a just penalty of death."

Mr. Bell continued to improperly give his opinion, 11 App 2020, without objection by trial counsel. Mr. Bell stated that "nothing scares people more than the potential of random victimization".10 App 1925. While opining about the weakness of the mitigating factors, Mr. Bell improperly characterized them as "red herrings." 10 App 1929. He also improperly minimized the importance of mitigating circumstances by repeatedly referring to them as "excuses." 7 App 2013, 7 App 2014. Mr. Bell characterized the defense's argument that Mr. Floyd could flourish in a structured setting as "hogwash." 10 App 1938. Mr. Bell opined that "the ruthlessness of the crime is beyond belief." 10 App 1933. He also opined that Mr. Floyd "has a hollow soul. He doesn't care who he hurts, when he hurts, or how he hurts as long as he can satisfy his own basic desires." 10 App 1940. Mr. Bell repeated his opinion that Mr. Floyd had a hollow soul twice.

Prosecutor Koot improperly expressed his personal opinion during closing argument on numerous occasions. Trial counsel failed to object when Mr. Koot stated "I don't think there's much question about the facts in this case." 7 App 1280. The trial court sustained defense objection when Mr. Koot stated that he "felt the case was sufficiently important" that it was necessary to arrest the victim, Tracie Carter, to insure her testimony. 7 App 1283. Trial counsel failed to object to an improper opinion that bordered on commenting upon Mr. Floyd's failure to testify when Mr. Koot stated that he found it difficult to understand "how a man could forget an hour and a half activity with Tracie Carter . . . Yet, for whatever reason, and I'm sure it has something to do with his idea of what, how others are to view a man, killing is one thing, but raping or sexually assaulting a woman, that is a cowardly act, and so you don't want to mention that." 7 App 1284. Trial counsel did not object to Mr. Koot's personal opinion that it would be "rash" to find Mr. Floyd not guilty of the attempted murder of Zachery Emenegger, and that if the jury found Mr. Floyd guilty of murdering the four people, then "obviously Mr. Emenegger also follows." 7 App 1292.

Mr. Bell, without objection, improperly gave his opinion that Mr. Floyd did not have the courage to pull the trigger to kill himself. 7 App 1322. Mr. Koot furthered this theme by calling Mr. Floyd a "coward." 11 App 2007. Trial counsel's objection was overruled. Id. Mr. Koot also opined that the mitigators were "embarrassing". 11 App 2009.

Considering that voluntarily intoxication was central to a defense against first degree murder, the prosecutors' personal opinions were especially prejudicial. In explaining that second degree murder "may" involve consideration of voluntary intoxication, Mr. Koot improperly opined that it "seems rather farfetched" that Mr. Floyd was voluntarily intoxicated. 7 App 1294. Mr. Bell improperly inserted his personal opinion, argued beyond the evidence presented, and mis-characterized Mr. Floyd's defense when he stated "Devil whiskey made me do it. It wasn't me, it was methamphetamine or cocaine or heroine or PCP. That is what defendants would say for years when they had no real excuse for the conduct that they committed." 7 App 1309. Trial counsel objected to this line of argument and was sustained, 7 App 1310, but the damage was

done. Mr. Bell also improperly stated without objection that "I think it is easy to look at what he did and what he said and make it absolutely clear that he knew exactly what he was doing and the consequences thereof when he shot everybody he could find in the Albertson's store." 7 App 1313.

(b) The prosecutors improperly instructed the jurors to send a message to the community.

Mr. Bell improperly implored the jurors without objection that they should "on behalf of the community," parrot his argument – "if not this case, what case" – during deliberations against any jurors who doubted whether to give death. Mr. Koot told the jury that one reason to impose the death penalty was to send a message to the community. 11 App 2016. Trial counsel's objection was overruled. Urging the jury to execute Mr. Floyd in order to protect community values, preserve order, deter future law breaking, or to stop domestic violence is misconduct. Darden, 477 U.S. at 179; United States v. Leon-Reyes, 177 F.3d 816, 822-23 (9th Cir. 1999); Collier, 101Nev. at 479, 705 P.2d at 1130; but see Williams v. State, 113 Nev. 1008, 1019, 945 P.2d 438, 445 (1997).

Finally, the state urged the jury to make sure that the next day's newspaper headline would read "death penalty" and that the accompanying article would read "[j]ustice was done in the Las Vegas courtroom Tuesday as a jury determined that Zane Floyd should be sentenced to death for the...killing of four innocent citizens of this community." 10 App 1942. This is a blatant misuse of the influence of the media in a capital murder case. These comments were so unduly prejudicial that they rendered the trial fundamentally unfair and were a denial of Mr. Floyd's due process rights.

(c) The prosecutors improperly misstated the law.

It is improper for the prosecutor to make a false and misleading argument on the law. See Evans v. State, 117 Nev. 609, 634, 28 P.3d 498, 515 (2001); Nev. R. Prof. Conduct 3.3(a)(1) (a lawyer cannot knowingly "make a false statement of . . . law to a tribunal."). In a particularly egregious rant, Mr. Koot improperly misstated the law, appealed to community conscience, and

attempted to shift the burden of proof without objection by telling the jury that:

> Once Mr. Bell and I present you with sufficient evidence to prove to you his guilt beyond a reasonable doubt, that presumption was removed and you as jurors in our system, the only way to let the judge and the community know that the presumption of innocence is no longer there is the return verdicts of guilty.

7 App 1299. Mr. Koot went on to incorrectly explain that this elimination of the presumption of innocence represents due process in America. Contrary to Mr. Koot's statement, the state bears the burden of proving all elements of guilt beyond a reasonable doubt throughout trial until jury deliberations determine otherwise. In re Winship, 397 U.S. 358, 361 (1970); see also Lankford v. Arave, 468 F.3d 578, 586 (9th Cir. 2006). The accused never bears the burden of proving that he or she did not engage in the criminal conduct charged. See DeCecco v. United States, 338 F.2d 797, 798 (1st Cir. 1964) (holding no burden on the defendant to dispute the evidence offered by the prosecution); see also LaFave & Scott, Criminal Law § 1.8 at 58 (2d ed. 1986); Wharton, Criminal Evidence § 2.2 (15th ed. 1997).

Mr. Koot, without objection, improperly misstated the law regarding proper deliberations, telling the jury that "you can approach deliberations any way you want." 7 App 1284. Mr. Koot also misstated the law with regard to the offense of burglary, first degree murder and second degree murder without objection. See 7 App 1286. Mr. Koot also mis-characterized the law with regard to sexual assault. 7 App1294-95. Trial counsel objected, but the trial court failed to sustain the objection by only responding that the instruction would speak for itself. Id. In addition to improperly referring to mitigating factors as "excuses" and "red herrings", Mr. Koot incorrectly stated, without objection, that the jury can throw away the entire list of mitigating factors. 11 App 2008.

(d) The prosecutors improperly inflamed the passions of the jury and referred to prison conditions.

It is improper to appeal to the emotions and prejudices of the jury. Darden, 477 U.S. at 180; Viereck v. United States, 318 U.S. 236, 247 (1943); But see Haberstroh v. State, 105 Nev. 739, 741, 782 P.2d 1342, 1344 (1989).

Mr. Bell improperly stated that:

> The bottom line, ladies and gentlemen, is that Zane Floyd purposely, intentionally, premeditatedly, deliberately perpetrated the worst massacre in the history of Las Vegas.

7 App 1320. This statement was patently false, purely opinion, and was clearly stated with no other purpose than to inflame the passions of the jurors. Trial counsel objected to this comment outside the presence of the jury, and the trial court agreed that it was improper. Trial counsel, however, ineffectively decided that recalling the jury to tell them to disregard the statement would draw more attention to the statement. 7 App 1324. In line with his comment that this was the worst massacre in Las Vegas history, Mr. Bell improperly informed the jury that they were "in the presence of the most dangerous man you will ever encounter in your lifetime." 10 App 1935. Trial counsel objected, but the trial court overruled the objection.

Mr. Koot improperly commented upon prison conditions by stating that "[t]hey mentioned a 10 by 15 cell block. Give me a break. He wants to be on the yard, he wants to play ball, he wants to watch television, have three meals a day–." 11 App 2017. Trial counsel's objection was sustained. Mr. Koot went on to state that people who do not commit murder receive life without parole. 11 App 2017. Trial counsel again objected, but was overruled. Id. Mr. Koot then told the jury that a quadruple murderer such as Mr. Floyd was more deserving of death than someone who killed fewer people. 11 App 2018. Trial counsel objected again, and this time the objection was sustained. Id.

Mr. Koot then tried to relieve the jury's sense of responsibility by stating that "[y]ou're not killing him," and that the jury was "part of a shared process." 11 App 2019. The defense objection was overruled. Id. Mr. Koot continued the argument by stating that "even after the verdict, there's a process that continues." Id. The defense objection was not ruled upon by the trial court.

(e) The prosecutors improperly referred to facts not in evidence, mis-characterized the defense, and bolstered the credibility of a government witness.

It is improper to rely in argument on facts which were not in evidence. Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974); Floyd, 118 Nev. at 173, 42 P.3d at 261; Guy, 108 Nev.

at 780, 839 P.2d at 586 (1992). Mr. Koot improperly, without objection, referred to facts not in evidence by stating that "a lady such as [Tracie Carter] had to use condoms, if they don't want to die an early death of AIDS or some other sexually transmitted disease." 7 App 1295. Tracie Carter testified that she did not typically engage in penetration with her clients. 5 App 817. Mr. Bell also extrapolated without objection that if Mr. Floyd had had his pistol, Tracie Carter would be dead. 7 App 1315. Mr. Koot referred to facts outside the evidence by stating without objection that burglars incarcerated in Nevada most likely have more mitigating circumstances than Mr. Floyd. 11 App 2009. Mr. Koot also improperly bolstered the credibility of the government psychologist by stating that "he knew what he was talking about and the right tests were applied." 11 App 2006.

(f) Mr. Floyd was clearly prejudiced by the prosecutors' misconduct.

While each of the above-listed errors may appear harmless when considered individually, their cumulative effect clearly denied Mr. Floyd a fair trial and a reliable sentence in violation of the state and federal constitutions. Where prejudicial prosecutorial misconduct infects the trial with unfairness, the sentence of death is a denial of due process. Greer v. Miller, 483 U.S. 756, 765 (1987); Donnelly, 416 U.S. at 643; see also United States v. Bagley, 473 U.S. 667, 676 (1985); United States v. Agurs, 427 U.S. 97, 108 (1976). The trial court's failure to sustain trial counsels' objections denied Mr. Floyd his constitutional rights to state and federal due process and equal protection. To the extent that trial counsel failed to object to prosecutorial misconduct, Mr. Floyd was denied the effective assistance of counsel. There can be no strategic reason for prior counsel failing to object to these errors and or failing to raise these errors on appeal. See 37 App 7330-37,7338-39.

ii. Trial counsel's failure to object to the state's failure to preserve Mr. Floyd's blood samples, and failure to independently test Mr. Floyd for intoxication prejudiced Mr. Floyd.

Voluntary intoxication can negate the specific intent necessary for a jury to convict under a theory of first degree murder. Nevius v. State, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985)

(citing Williams v. State, 99 Nev. 530, 655 P.2d 260 (1983)). The evidence presented at trial indicated that Mr. Floyd had been heavily drinking and ingesting methamphetamine up to and during the commission of the offenses. See 19 App 3722-3800. Toxicology expert, Dr. Jonathan Lipman, concluded that given Mr. Floyd's FASD, ADD, Dissociative Disorder, long-term drug use and use of alcohol and methamphetamines, Mr. Floyd was incapable of forming the premeditation or deliberation required to substantiate a first degree murder charge. The state's failure to preserve Mr. Floyd's blood sample prejudiced his ability to present a defense negating intent to commit first degree murder.

The police administered toxicology tests within hours after the offense which indicated that Mr. Floyd did not have methamphetamine in his system, and that Mr. Floyd's estimated blood alcohol content during the offense was low. 6 App 1140-41.The evidence adduced during investigation, however, was that Mr. Floyd had been drinking heavily and taking methamphetamine on the night before and morning of the offenses. 17 App 3274; 17 App 3265. Prior to trial, trial counsel was unable to obtain independent testing of the blood sample drawn as a result of its destruction. 37 App 7331-7332.

In order to establish a due process violation resulting from the state's loss or destruction of evidence, a defendant must demonstrate either: (1) that the state lost or destroyed the evidence in bad faith; or (2) that the loss unduly prejudiced the defendant's case and the evidence possessed an exculpatory value that was apparent before the evidence was destroyed. See State v. Hall, 105 Nev. 7, 9, 768 P.2d 349, 350 (1989). Bad faith can be demonstrated where the chemist who disposed of the sample failed to save it for a reasonable period of time or disposed of it contrary to routine practice and for a legitimate purpose. State v. Hall, 105 Nev. at 9, 768 P.2d at 350.

The prosecution committed misconduct by failing to preserve the blood sample taken from Mr. Floyd at the time of his arrest for independent testing, contrary to their normal procedures. The normal procedure for the taking and preservation of a suspect's blood sample is that two vials of blood are drawn once a suspect arrives at the jail; these vials are immediately

sent to a toxicologist who tests a portion of one vial; and the blood is then sent to the evidence vault where it is refrigerated and stored indefinitely, or until a request is made for independent testing. See 37 App 7341. The state's failure to comply with this protocol satisfies the legal requirement that bad faith be demonstrated. Unlike in Arizona v. Youngblood, 488 U.S. 51 (1988), Mr. Floyd indicated that he had ingested methamphetamine during the assault, therefore, the contrary toxicology report has been called into question. Furthermore, unlike in Hall, the toxicologist in Mr. Floyd's case failed to follow his own protocol, thereby establishing bad faith.

Dr. Jonathan Lipman, a toxicology expert, has reviewed expert reports and has opined that: (1) the testimony supporting the finding that there was no methamphetamine metabolite in Mr. Floyd's blood on the morning of the offense is incoherent; (2) Mr. Floyd was vulnerable to abusing methamphetamine because of his ADD developmental problems; (3) Mr. Floyd's chronic use of methamphetamine likely altered his brain, making him more prone to transient psychosis at the time of the offense; (4) chronic alcohol abuse likely altered Mr. Floyd's brain at the time of the offense; and (5) Mr. Floyd was in a dissociative or psychotic state at the time of the offense as a result of the long and short term effects of his alcohol and methamphetamine abuse. See 20 App 3801-3813. Dr. Lipman's opinion is substantiated by state witness, Tracie Carter, who testified that Mr. Floyd stared right through her and zoned in and out. 5 App 828. Dr. Lipman opines that Mr. Floyd was clearly in the throes of a dissociative state when his alleged "premeditated" statement was made that he was going to kill the next nineteen people he saw. See 20 App 3801-3813.

Although trial counsel wrote a note to file indicating that they planned to take a hair sample from Mr. Floyd for toxicology testing, they ineffectively failed to collect this sample, or hire a toxicology expert such as Dr. Lipman to rebut the state's testimony that Mr. Floyd was not significantly under the influence at the time of the crimes. See 21 App 4097-4098.

c. The death penalty as administered in Nevada does not satisfy state or federal constitutional standards.

The application of the death penalty in Nevada is arbitrary and capricious and its

administration is cruel and unusual in violation of Mr. Floyd's state and constitutional rights. U.S. Const. amend. VIII; Nev. Const. art. 1. Mr. Floyd's death sentence is therefore invalid under Furman v. Georgia, 408 U.S. 238 (1972). Prior counsel's ineffective failure to raise this claim violated Mr. Floyd's state and federal constitutional rights to due process, equal protection, see n. 5 supra, effective assistance of counsel and a reliable sentence. U. S. Const. amend. V, VI & XIV; Nev. Const. art. I. Additionally, Mr. Floyd is entitled to a constitutionally-adequate hearing before any attempt to execute him is made because he may become incompetent during his long stay on death row, and the execution of the incompetent violates the Eighth and Fourteenth Amendments.

The Eighth and Fourteenth Amendments prohibit the gratuitous infliction of suffering, e.g., Gregg v. Georgia, 428 U.S. 153, 173, 183 (1976) (plurality opn.); Estelle v. Gamble, 429 U.S. 97, 103 (1976), as does international law. International Covenant on Civil and Political Rights, Art. 7, reprinted in 999 U.N.T.S. 171 (entered into force March 27, 1976) (forbidding "cruel, inhuman, or degrading treatment"); U.S. Const. amend. VIII. Executing Mr. Floyd by lethal injection would constitute cruel and unusual punishment because Nevada's process of execution presents an unacceptable danger of inflicting unnecessary suffering which is objectively intolerable. U.S. Const. Amend. VIII; Nev. Const. Art. 1 § 6 (prohibiting "cruel or unusual punishment").

Although the Nevada execution protocol is "confidential," and not generally released, Mr. Floyd provided the state post-conviction court with a copy of a recent execution "manual" which he believes to contain the protocol. Nevada's execution manual does not specify what, if any, training in anesthesiology the persons administering the lethal injection must have.[7] If an untrained or unskilled executioner fails to deliver sufficient sodium thiopental to ensure adequate anesthetic depth, the inmate will feel the excruciating pain of the subsequent injections

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[7]Although the Nevada execution manual suggests that Nevada may use emergency medical technicians in its lethal injection process, the National Association of Emergency Medical Technicians discourages such practice. Baze v. Rees, 128 S. Ct. 1520, 1539 (2008).

of pancuronium bromide and potassium chloride.[8] 28 App 5501-5504. The failure to ensure that a person properly trained and practiced in the institution of intravenous lines, and the administration of anesthetic drugs through such lines, creates a subjective risk of serious harm that is objectively intolerable. Moreover, the failure to adopt and practice appropriate execution procedures to assess and ensure the appropriate anesthetic depth creates a substantial risk of serious harm that is objectively intolerable.

In Baze v. Rees, 128 S. Ct. 1520 (2008), the United States Supreme Court noted the dangers associated with the inadequate administration of sodium thiopental in a state sponsored execution:

> failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.

Id. at 1533. The plurality noted that this danger, under the Kentucky execution protocol, was not insubstantial:

> Kentucky has put in place several important safeguards to ensure that an adequate dose of sodium thiopental is delivered to the condemned prisoner. The most significant of these is the written protocol's requirement that members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman. ... Kentucky currently uses a phlebotomist and an EMT, personnel who have daily experience establishing IV catheters for inmates in Kentucky's prison population. ... Moreover, these IV team members, along with the rest of the execution team, participate in at least 10 practice sessions per year. ... These sessions, required by the written protocol, encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers.
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> . . .
>
> In addition, the presence of the warden and deputy warden in the execution chamber with the prisoner allows them to watch for signs of IV problems, including infiltration. Three of the Commonwealth's medical experts testified that identifying signs of infiltration would be "very obvious," even to the average person, because of the swelling that would result. ... Kentucky's protocol specifically requires the warden to redirect the flow of chemicals to the backup IV site if the prisoner does not lose consciousness within 60 seconds. ... In light of

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[8] A majority of the United States Supreme Court appears to agree that an injection of pancuronium bromide or potassium chloride after no, or insufficient, sodium thiopental is cruel and unusual punishment. See and compare Baze, 128 S. Ct. 1520 (Roberts, C.J–plurality); (Breyer, J, concurring); (Stevens, J., concurring); and (Ginsburg, J. dissenting).

> these safeguards, we cannot say that the risks identified by petitioners are so substantial or imminent as to amount to an Eighth Amendment violation.

Id. It was the safeguards instituted by Kentucky to ensure that sodium thiopental rendered the inmate unconscious which ultimately satisfied the constitutional requirements.

The safeguards in the Kentucky execution protocol, relied upon by the plurality in Baze, are absent from the Nevada execution protocol. Nevada's execution protocol only requires that "appropriate medical services personnel" perform a venipuncture.[9] After the venipuncture, the "medical services personnel will then leave the chamber." 23 App 4528. The protocol does not designate who will administer the lethal chemicals, who will determine whether the lethal chemicals were appropriately administered, or who is responsible to determine when a condemned inmate requires further sedation. The Nevada execution protocol does not designate the training for any of these execution team members. Finally, the Nevada execution protocol does not require a regular or routine "walk through of the execution procedures, including the siting of IV catheters into volunteers." See Id. Nevada's protocol offers little or no safeguards to eliminate the substantial or imminent risks that an inmate will suffer the excruciating pain of an injection of pancuronium bromide and potassium chloride.

The Nevada execution protocol provides that, after the lethal injections are administered, "the attending physician or designee and coroner shall then determine whether it was sufficient to cause death. If the injections are determined to be insufficient to cause death, the second set of lethal injections shall be administered." 23 App 4528. Under the Nevada execution protocol, therefore, an inmate who was never appropriately rendered unconscious, suffering the painful effects of the lethal chemicals, will be evaluated by a physician or coroner after an undesignated amount of time, and will possibly suffer further painful lethal injections. Such a protocol unquestionably poses a substantial risk of serious harm. See 12 App 2371-02378, (demonstrating

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[9]The "execution checklist" attached to the protocol suggests Nevada contracts with the Carson City Fire department to provide emergency services personnel to assist in an execution. The Nevada execution protocol, however, does not designate the training and experience of those personnel or what responsibilities they will have in an execution.

botched lethal injection executions and risk of such a result in Nevada).

If terror, pain, or disgrace are "superadded" to punishment, such punishment violates the Eighth Amendment. Baze, 128 S. Ct. at 1530 (citing Wilkerson v. Utah, 99 U.S. 130 (1879)). Under the Nevada execution protocol, an inmate must be administered a strong sedative four hours before his scheduled execution and again one hour prior to execution. The medication is not voluntary–it is mandatory for all inmates scheduled to be executed. Such a requirement is cruel and unusual. The mandatory sedation clouds the inmate's senses, muddles his thoughts and interferes with his ability to communicate with the warden or execution team. The forced sedation strips from the condemned inmate his last opportunity to acknowledge family or friends, or to express remorse to the victims, and denies the inmate any dignity in death. The forced sedation only serves to inflict further terror, pain and disgrace and is constitutionally intolerable. The Baze plurality suggested that alternative methods of execution will support an argument that an execution protocol is unconstitutional:

> Instead, the proffered alternatives must effectively address a "substantial risk of serious harm." ... To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment.

Id. at 1532. Even though Baze was not decided until after Mr. Floyd filed his habeas petition, Mr. Floyd identified three constitutional concerns with Nevada's execution protocol: (1) the protocol did not require experience, training or certification of the execution team members; (2) the use of pancuronium bromide assured a torturous death if the condemned inmate was not sufficiently anaesthetized; and (3) the protocol procedures independently provided a substantial risk of serious harm. 12 App 2366-2379. Mr. Floyd's habeas petition inherently proffered alternative procedures in requiring sufficient training, expertise or certification of execution team members, dispensing with the use of pancuronium bromide and requiring reliable safeguards.

These alternatives are feasible, readily implemented and would significantly reduce the

risk of severe pain. The adoption of training, expertise or certification requirements similar to that in the Kentucky protocol is feasible and readily implemented. Nevada should require those who practice venipuncture in Nevada executions to be qualified and experienced. Nevada should ensure that persons within the execution chamber be trained and experienced in the determination and maintenance of consciousness. If technical procedures or equipment are available to ensure an inmate is unconscious before the administration of pancuronium bromide or potassium chloride, Nevada should use or adopt these resources. Nevada execution team members should regularly walk through the execution procedures, including venipuncture. Finally, Nevada can discontinue the use of pancuronium bromide or potassium chloride in the execution protocol, causing death solely with the use of sodium thiopental. See 12 App 2369-2370 (arguing that pancuronium bromide is torturous and unnecessary to the process). The adoption of such safeguards will easily and significantly reduce the risk of severe pain. Nevada's current procedures are cruel and unusual in violation of the Eighth Amendment of the United States Constitution, and Article One of the Nevada Constitution.

The imposition of death sentences in Nevada is every bit as arbitrary and capricious - - cruel and unusual in the way that being struck by lightning is cruel and unusual, Furman, 408 U.S. at 309 (Stewart, J., concurring) - - as it was pre-Furman. The statutory aggravating circumstances for imposition of the death penalty are so numerous and vague that they arguably exist in every first degree murder case. See 2 App 236-268; 2 App 325-346; 2 App 347-363. Additionally, the unconstitutional definitions of reasonable doubt, premeditation and implied malice make it possible that the death penalty can be the result of virtually any unlawful killing. The Nevada scheme, which permits judges and juries an unlimited ability to impose a death sentence, regardless of the circumstances of the case, makes arbitrary application of the death penalty not merely possible but inevitable. See Walton v. Arizona, 497 U.S. 639, 662-665 (1990) (Scalia, J., concurring) overruled on other grounds by Ring v. Arizona, 536 U.S. 584 (2002). Mr. Floyd's death sentence is therefore invalid under the reliability guarantee of the Eighth Amendment. U.S. Const. Amend. VIII.

The death penalty is cruel and unusual punishment under any circumstances, and its imposition on Mr. Floyd would constitute cruel and unusual punishment because his mental impairments reduce his culpability and because the aim of protecting society can be achieved by incarceration. Since his execution is not necessary to achieve any legitimate state purpose, it violates the Eighth and Fourteenth Amendments and international law. Mr. Floyd has been held on Nevada's death row for more than five years, attempting to obtain relief for the constitutional violations that infect his conviction and sentence. Confinement on death row for over five years awaiting execution raises a presumption of inhumane or degrading treatment. Pratt v. Attorney General of Jamaica, [1994] 2 A.C. 1, 29, 4 All E.R. 769, 783 (Privy Council 1993); International Covenant on Civil and Political Rights, Art. 7; compare Knight v. Florida, 120 S. Ct. 459, 461 (1999) (Thomas, J., concurring in denial of certiorari) (citing cases), with id. at 462-465 (Breyer, J., dissenting from denial of certiorari) (citing cases).

Mr. Floyd is entitled to a constitutionally-adequate hearing before any attempt to execute him is made because he may become incompetent to be executed, and his execution under such circumstances would violate the Eighth and Fourteenth Amendments. Stewart v. Martinez-Villareal, 523 U.S. 637 (1998); Ford v. Wainwright, 477 U.S. 399, 411 (1986) (plurality opn.); id. at 427 (O'Connor, J., concurring). Mr. Floyd raises this issue in order to avoid any possibility that it would be found to be waived. See Stewart, 523 U.S. at 645 n.*. Given Mr. Floyd's neurological impairments and his extended confinement under sentence of death, it is reasonable to anticipate that he will be incompetent at the time of execution.

d. The trial court violated Mr. Floyd's state and federal constitutional rights to due process and a fair trial.

The trial court erred by allowing victim impact testimony, giving erroneous jury instructions, failing to grant a severance of counts, requiring the disclosure of Mr. Floyd's raw data of expert testing, ruling that the preliminary hearing could be televised, allowing the admission of gruesome photographs, and failing to sua sponte order the removal of Mr. Floyd's shackles and prison garb in violation of Mr. Floyd's state and federal constitutional rights to due

process, equal protection, see n. 5 supra, an impartial jury and a reliable sentence. U. S. Const. amend. V, VI & XIV; Nev. Const. art. 1. To the extent that trial counsel failed to object, and appellate counsel failed to raise this issue on appeal, they violated Mr. Floyd's state and constitutional rights to effective assistance of counsel. U. S. Const. amend. VI; Nev. Const. art.1

i. The trial court erred in allowing victim impact testimony.

Nevada's limitations on victim impact testimony failed to rationally channel the jury's sentencing discretion in Mr. Floyd's death penalty case. Nevada law allows the state to introduce evidence "concerning aggravating or mitigating circumstances relative to the offense, defendant or victim, and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible." NRS 175.552(3) (2000). This Court has interpreted this broad language to allow victim impact evidence where the evidence relates to the "victim's character and the emotional impact of the murder on the victim's family." Rippo v. State, 113 Nev. 1239, 1260, 946 P.2d 1017, 1031 (1997).

Under the state and federal constitutions, victim impact evidence may not be admitted if this evidence renders a person's capital proceedings fundamentally unfair. Payne v. Tennessee, 510 U.S. 808, 825 (1991) (citing Darden v. Wainwright, 477 U.S. at 179-83 (1986)). A state law governing victim impact evidence is therefore invalid if the law fails to rationally narrow a jury's judgment as to whether the circumstances of a particular defendant's case warrant the death penalty. Payne, 477 U.S. at 824 (citing McCleskey v. Kemp, 481 U.S. 279, 305-06 (1987)).

Throughout the penalty hearing, over trial counsel objection, the trial court allowed testimony on subjects completely unrelated to the harm caused to the murder victim's families.3 App 400-412. In addition to improperly allowing persons present during the offenses to testify about its impact upon them, Ms. Nall, victim Thomas Darnell's mother, testified to matters that exceeded the scope of allowable victim-impact testimony. Ms. Nall's testimony began with Mr. Darnell's disabilities, from his premature birth and childhood meningitis when his "head looked bigger than the rest of his body," to the resulting brain damage. 8 App 1466-1469. These disabilities made Mr. Darnell "slow... [but] not retarded." 8 App 1469. Ms. Nall also noted that

Mr. Darnell attended over sixteen schools as a result of his father's military service. Id. Ms. Nall told the jury her ex-husband's tragic fate: Mr. Darnell's father was killed "by a person on alcohol and drugs and a million different excuses." 8 App 1470. Ms. Nall then explained in graphic detail how Mr. Darnell had been robbed at gunpoint, which robbery involved the raping of his sister, kidnapping of the entire family, and the holding of Mr. Darnell for thirty days, during which an attempt was made to "cut off his ears".[10] 8 App 1472-1475. The jury was forced to confront the issue of how to vindicate a homicide against a disabled man who had previously been the victim of violent crime.

In essence, the jury heard broad assertions about life histories unrelated to the harm resulting from Mr. Floyd's offenses. Nevada's victim impact limitations deprived the jury of rational criteria to sentence Mr. Floyd because of the broad range of subjects addressed by the victim-impact witnesses. These broad assertions made meaningful cross-examination of victim-impact witnesses impossible resulting in the failure of the jury to have a reasonable basis upon which to evaluate the perception, memory, and sincerity of the state's victim-impact witnesses.

ii. The trial court gave erroneous jury instructions.

In violation of Mr. Floyd's state and federal constitutional rights to due process, equal protection, the effective assistance of counsel and a reliable sentence, the trial court gave erroneous jury instructions on death eligibility, reasonable doubt, premeditation, implied malice, the use of character evidence and anti-sympathy.

(a) The trial court erroneously failed to instruct the jury that it had to find beyond a reasonable doubt that the aggravating circumstances were not outweighed by the mitigating circumstances.

Under Nevada law a jury "'may impose a sentence of death only if it finds at least one

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[10]On direct appeal, this Court found the testimony about the robbery/rape/ kidnapping/assault to be so collateral and inflammatory that it exceeded the scope of proper impact testimony. Floyd v State, 118 Nev. 156, 174, 42 P.3d 249, 261 (2002) ("this testimony alone, however, was not so unduly prejudicial that it rendered the proceeding fundamentally unfair"). This testimony, however, must be considered as part of this Court's cumulative error analysis.

aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.'" Johnson v. State, 118 Nev. 787, 802, 59 P.3d 450, 460. (2002) (quoting NRS 175.554(3)) (emphasis in original). This Court has held that the determination of whether any mitigating circumstances outweigh the aggravating circumstances is in part a factual determination. Id. This Court further held that because this is a factual determination, pursuant to the United States Supreme Court's holding in Ring v. Arizona, 536 U.S. 584 (2002), the determination must be made by a jury in order to satisfy the requirements of the Sixth Amendment. Id. at 802-03, 59 P.3d at 460. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact–no matter how the State labels it–must be found by a jury beyond a reasonable doubt." Ring, at 602. (citing Apprendi v. New Jersey, 530 U.S. 466, 482-83 (2000)) (emphasis added).

Mr. Floyd's jury was properly instructed in the penalty phase that the existence of aggravating circumstances had to be found beyond a reasonable doubt. 11 App 2040. The jury was not instructed, however, that it had to find the second element of death-eligibility, that the aggravating circumstances were not outweighed by the mitigating, beyond a reasonable doubt. 11 App 2040. Failure to instruct the jury on the proper burden of proof violated Mr. Floyd's state and federal constitutional rights to a fair hearing and to due process of law. This error is structural and Mr. Floyd is therefore automatically entitled to relief. Mr. Floyd's appellate and first state post-conviction counsel were ineffective for failing to raise this claim as Johnson v. State, Ring and Apprendi were all decided before his direct appeal was final and therefore applied to his case.

(b) The reasonable doubt instruction erroneously misstated the state's burden of proof.

The reasonable doubt instruction given in Mr. Floyd's case was unconstitutional because it required a higher degree of doubt than permissible. In both the guilt and penalty phases of Mr. Floyd's trial the jury was instructed that a reasonable doubt is "such doubt as would govern or control a person in the more weighty affairs of life." 7 App 1338; 11 App 2044. This language

is an appropriate characterization of the degree of certainty required to find proof beyond a reasonable doubt, rather than the standard of reasonable doubt itself. This burden shifting violates the principles set forth in Victor v. Nebraska, 511 U.S. 1 (1994) and Cage v. Louisiana, 498 U.S. 39 (1990).

In Cage v. Louisiana, 498 U.S. 39 (1990), the United States Supreme Court held that the Louisiana reasonable doubt instruction was improper. Focusing on the characterizing of reasonable doubt as "such doubt as would give rise of a grave uncertainty" and as "actual and substantial doubt," it concluded that:

> It is plain to us that the words "substantial" and "grave" as they are commonly understood suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id. at 41. In Victor, 511 U.S. 1, the United States Supreme Court addressed a Nebraska instruction, concluding that, as a whole, it passed constitutional muster. The opinion noted that the term "substantial doubt" is "somewhat problematic," but concluded that "the context makes clear that 'substantial' is used in the sense of existence rather than magnitude. . . ." Id. at 1250. The instruction given in this case shares the constitutionally impermissible features of the Cage instruction without the curative elements of the Victor instruction. The instruction here refers to doubt which would "govern or control a person in the more weighty affairs of life," a standard of doubt greater than doubt that would cause a person to hesitate before taking action. Victor, 511 U.S. at 24-25 (conc. opn. of Ginsburg, J.); McAllister v. State, 112 Wis. 496, 88 N.W. 212, 214 (1901) (use of "govern or control" language to describe reasonable doubt prescribed impermissibly greater quantum of doubt than the "hesitate to act" standard); Commonwealth v. Miller, 139 Pa. 77, 21 A. 138, 140 (1891) (rejecting instruction defining reasonable doubt as "such doubt as would influence or control you in your actions in any of the important transactions of life," because it required doubt that amounted to preponderance); State v. Carter, 66 Ariz. 12, 182 P.2d 90, 94 (1947), quoting Minisch v. People, 8 Colo. 440, 9 P. 4, 13 (1885);

see also State v. Pedersen, 802 P.2d 1328, 1332 (Utah App. 1990) (dictum). A jury instruction that misstates the burden of proof is a constitutional violation which is not subject to harmless error analysis. Sullivan, 508 U.S. 275.

(c) The premeditation instruction failed to distinguish first degree from second degree murder.

The premeditation instruction given to the jury misstated the law, or would have been understood by a reasonable jury to allow a finding of guilt and the imposition of a death sentence in an unconstitutional manner. The "instantaneous premeditation" portion of the instruction created a reasonable likelihood that the jury would convict and sentence on a charge of first degree murder without any rational basis for distinguishing its verdict from one of second degree murder, and without proof beyond a reasonable doubt that the murders were premeditated, a statutory element of first degree murder. See Bullock, 122 F.2d at 214; Bryan, 709 P.2d at 263 ("Equal protection of the law guarantees like treatment of all those who are similarly situated. Accordingly, the criminal laws must be written so that there are significant differences between offenses and so that the exact same conduct is not subject to different penalties"); see also n. 9 supra,. The failure to distinguish between first and second degree murder also violates Mr. Floyd's right to be free from cruel and unusual punishment due to the failure to narrowly define first degree murder. Zant v. Stephens, 462 U.S. 862, 877 (1983); Lowenfield v. Phelps, 484 U.S. 231, 244-46 (1988). The definition given abolishes the statutory requirement of proof of actual reflection, and substitutes instead the mere passage of time, which does not require any premeditation. The definition of first degree murder given is so bereft of any meaning of premeditation that the jury is left without adequate standards by which to assess culpability. Byford v. State, 116 Nev. 215, 233-37, 994 P.2d 700, 712-15 (2000); Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007).

By relieving the state of its burden to prove an essential element of the charged offense of first degree murder, no showing of specific prejudice is required. Despite the fact that no showing of prejudice is required, Mr. Floyd, in fact, was substantially prejudiced by the giving

of this instruction. Apart from the fact that the prosecutor urged the jury to follow the defective portions of the instruction, 7 App 1288, Mr. Floyd was also prejudiced because substantial evidence existed to demonstrate that Mr. Floyd was intoxicated and under the influence of methamphetamine during the time of the offense and did not possess the ability to premeditate and deliberate. 18 App 3416-3436; 17 App 3274. This evidence would likely have caused a reasonable, properly instructed jury to conclude that Mr. Floyd did not commit first degree murder.

(d) The implied malice instruction improperly creates a mandatory presumption of malice when the killing allegedly involves the vague "abandoned and malignant heart" standard.

The statutory definition of implied malice is unconstitutional because it creates a mandatory presumption that "malice should be implied" both in the absence of provocation and when the circumstances of the killing show an "abandoned and malignant heart." NRS 200.020 (see Statutory Addendum); see Yates v. Evatt, 500 U.S. 391 (1991); Arnold v. Evatt, 113 F.3d 1352, 1356 (4th Cir. 1997). The predicate facts – "an abandoned and malignant heart" – are also so vague as to be devoid of content and simply pejorative, and they allow a finding of malice simply on the ground that the defendant is a bad man. See People v. Phillips, 64 Cal.2d 574, 414 P.2d 353 (1966) (disapproving language on non-constitutional grounds). The use of this mandatory presumption, see 7 App 1344, deprived Mr. Floyd of his state and federal constitutional rights because it prevented the trial court from conducting a constitutionally-adequate canvass to establish each element of the offense beyond a reasonable doubt in violation of the due process and equal protection clauses.

(e) The jury was not instructed that character evidence cannot be included in the death eligibility calculus.

The trial court instructed the jury that "[i]n the penalty hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, and any other evidence that bears on the Defendant's character. Hearsay is admissible in the penalty hearing." 34 App 6684. This Court ruled in Nevada v. Floyd, Order of Affirmance, (Feb. 16,

2006), JN 167-183, that this instruction failed to explain the limited use of character evidence and specifically failed to explain to the jury that character evidence could not be considered by a jury during its weighing of aggravating and mitigating circumstances to find Mr. Floyd eligible for death.[11] Throughout the closing arguments, the prosecutors emphasized the victim impact testimony, 10 App 1940; 11 App 2009-2011, and the sexual assault that preceded the homicides, 11 App 1934-35. These facts did not relate to the aggravating factors and they could not properly be considered under state law in making the eligibility determination. Additionally, there was evidence that Mr. Floyd possessed what could be considered to be deviant pornography. 4 App 743.

In Evans, 117 Nev. at 627, 28 P.3d at 511, this Court carefully considered the use of character evidence in a capital penalty hearing and reversed four sentences of death based upon a prosecutor's improper statement regarding the use of such evidence. The Court noted that:

> [t]o determine that a death sentence is warranted, a jury considers three types of evidence: "evidence relating to aggravating circumstances, mitigating circumstances, and 'any other matter which the court deems relevant to sentence.'" The evidence at issue here was the third type, "other matter" evidence. In deciding whether to return a death sentence, the jury can consider such evidence only after finding the defendant death-eligible, i.e., after it has found unanimously at least one enumerated aggravator and each juror has found that any mitigators do not outweigh the aggravators. Of course, if the jury decides that death is not appropriate, it can still consider "other matter" evidence in deciding on another sentence.

Id. at 515 & n. 56-58 (quoting Hollaway v. State, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000) (in turn quoting NRS 175.552(3)); Middleton v. State, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998); Butler v. State, 120 Nev. 879, 102 P.3d 71, 83 (2004); Arave v. Creech, 507 U.S. 463, 474 (1993); and Zant v. Stevens, 462 U.S. at 877.

In Evans, this Court concluded that reversal was mandated because of "the heightened need for reliability in capital cases and the 'tremendous risk that improperly admitted character evidence will influence a jury in setting a punishment for a convicted defendant. This risk is

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[11]This Court found that the two incidents of improper character evidence cited by first state post-conviction counsel in his reply brief to be harmless.

(f) The anti-sympathy instruction prohibited the jurors from considering mercy in violation of the state and federal constitutions.

The jury was instructed that "[a] verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law." 34 App 6677. It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death.'" Eddings, 455 U.S. at 110 (quoting Lockett, 438 U.S. at 604 (plurality opinion)); see also Skipper v. South Carolina, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'" is equally "well established." Id. (quoting Eddings, 455 U.S. at 114); see also Mills v. Maryland, 486 U.S. 367, 374-75 (1988); McKoy v. North Carolina, 494 U.S. 433 (1990).

The anti-sympathy instruction given in Mr. Floyd's case was improper and unconstitutional because it acted to limit or prohibit the jury's consideration of mercy in determining whether to sentence him to death. See Penry v. Lynaugh, 492 U.S. at 326 (violation of the Eighth and Fourteenth amendments to tell jurors that they could not act on their emotions but had instead to act on the law as presented by the judge); California v. Brown, 479 U.S. 538, 545 (1987) ("The sentence imposed at the penalty phase should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion") (O'Conner, J., concurring); Saffle v. Parks, 494 U.S. 484, 490 (1990).[13]

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previous decisions, and because this issue must be presented to preserve it for federal review. See Bejarano v. State, 122 Nev. 1066, 146 P.3d 265, 271 (2006).

[13] This issue is presented here because this Court may reconsider its previous decisions and because this issue must be presented to preserve it for federal review. See Bejarano v. State, 122 Nev. 1066, 146 P.3d 265, 271 (2006).

iii. The trial court erred by failing to grant a severance of unrelated counts which occurred in different locations and involved different victims.

In addition to being charged with the offenses that occurred at the supermarket, Mr. Floyd was charged with the unrelated sexual assault and kidnapping of a stripper who had come to his home earlier that morning. 1 App 35-40; 2 App 378-383. These were two distinct crimes, occurring in different locations, involving different victims, having nothing apparent in common. NRS 173.115 allows for the joinder of claims where the offenses are: (1) based upon the same act or transaction; or (2) based upon two or more acts or transactions connected together or constituting parts of a common scheme or plan. The trial court provided no reason for denying trial counsel's Motion to Sever. See 1 App 61-69, 1 App 82-92; 1 App 93-109; 2 App 347-363. Improper joinder of claims is a constitutional violation if a defendant is prejudiced by the misjoinder to the point that he is denied his Fifth Amendment right to a fair trial. United States v. Lane, 474 U.S. 438, 446 (1986). Such prejudice is shown if the impermissible joinder has a substantial and injurious effect or influence in determining the jury's verdict. Sandoval v. Calderon, 241 F.3d 765, 772 (9th Cir. 2000). "[J]oinder of counts tends to prejudice jurors' perception of the defendant and the strength of the evidence on both sides of the case." United States v. Lewis, 787 F.2d 1318, 1322 (9th Cir. 1986). The state's reason for joinder, namely that evidence of each incident would be cross-admissible to demonstrate Mr. Floyd's state of mind, is pretextual. Nevada's definition for mens rea provides that deciding to commit the crime a moment before actually doing it satisfies the state's burden to prove mens rea. The stripper's testimony was not necessary under Nevada's statutory scheme to the state's theory that the murders were premeditated.

Even if the trial court were within its discretion to join the counts under the theory that they were connected or part of a common plan, the prejudicial effects of joinder were severe enough to justify severance pursuant to NRS 174.165. "A [J]oinder may be so prejudicial 'that the trial judge [is] compelled to exercise his discretion to sever.'" Tabish v. State, 119 Nev. 293, 72 P.3d 584, 592 (2003) (internal citations omitted). Mr. Floyd was prejudiced by joinder in that

the cumulative nature of the evidence and multiple charges created a more death prone jury.[14]

iv. The trial court improperly required Mr. Floyd to provide the confidential reports and raw data of non-testifying defense experts to the state.

The trial court improperly required Mr. Floyd, an indigent defendant, to provide confidential reports and raw data of non-testifying mental health experts. An indigent defendant, unlike a wealthy defendant, lacks the financial capacity to retain mental health experts other than those that the court appoints. Smith v. McCormick, 914 F.2d 1153, 1159 (9th Cir. 1990). Where a mental health expert may produce an evaluation which is unuseable for a particular defense, effective counsel must take all necessary steps to prevent this evaluation from reaching the trier of fact. Id. If the court and government compromise trial counsel's adversarial role, the state has constructively denied a defendant the right to effective assistance of counsel. United States v. Cronic, 466 U.S. 648, 653-54 (1984). Such an error warrants reversal per se. Id.

The trial court's order compelling Mr. Floyd to turn over expert reports constituted judicial interference with trial counsel's ability to effectively assist Mr. Floyd. Mr. Floyd needed mental health experts to fairly prepare for and present his defense. As he was indigent, court appointed experts were required to fully present the jury with a basis upon which they could determine his culpability and punishment. In response to Mr. Floyd's request, the trial court appointed experts Dr. Camp, Dr. Paul and Dr. Schmidt. Mr. Floyd chose not to use these experts at trial. See 24 App 4773-4775. The trial court, however, ordered Mr. Floyd to turn over his confidential expert reports. 2 App 364-377; 2 App 384-395. Although trial counsel attempted to prevent the court-ordered disclosure, this attempt was futile. See 24 App 4779-4780. The state's expert then based his testimony on Mr. Schmidt's raw data. As explained in depth in Section A(2) pp. 4-7 supra, Mr. Floyd was prejudiced by the use of Dr. Schmidt's raw data which was gathered using incomplete information and testing.

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[14]This issue is presented here because this Court may reconsider its previous decisions and because this issue must be presented to preserve it for federal review. See Bejarano v. State, 122 Nev. 1066, 146 P.3d 265, 271 (2006).

v. The trial court improperly ruled that the preliminary hearing could be televised, thereby depriving Mr. Floyd of his state and federal constitutional right to a preliminary hearing.

The federal and state constitutions prevent the trial court from denying statutory rights creating a liberty interest without due process of the law. Mathews v. Edridge, 424 U.S. 319, 334-35 (1976). The trial court denied Mr. Floyd his statutory right to a preliminary hearing. Prior to the scheduled preliminary hearing, Mr. Floyd moved to disallow live media coverage of the hearing because the hearing would expose the public to testimony not admissible at trial and taint the jury pool. 1 App 50-60. The trial court denied both this motion and a motion for a stay to appeal its order. Id. Due to the trial court's rulings, Mr. Floyd was forced to waive his preliminary hearing. See 18 App 3445-3446.

Mr. Floyd had a liberty interest in his preliminary hearing. Mathews, 424 U.S. at 335. Neither the public nor the press enjoyed a similar right to participate in this hearing. Azbill v. Fisher, 84 Nev. 414, 417, 442 P.2d 916, 917 (1968). Nevada law requires that a preliminary hearing be provided to protect a defendant from being prosecuted for a crime that the state has insufficient evidence to bring. Id. at 418. A preliminary hearing also protects a defendant's right to have the state disclose its complete case against him. Id. As a preliminary hearing often uncovers evidence not admissible at trial, the parties and the court may exclude any person, including the press, if they have demonstrated good cause. See NRS 171.204.

The court denied Mr. Floyd this liberty interest without due process of law. Mathews, 424 U.S. at 335. Numerous statements would have been presented during the preliminary hearing even though they were inadmissible at trial. These statements would have made any venire hearing his case on television predisposed to return the death penalty. Mr. Floyd had no opportunity to truly challenge the state's evidence against him without repercussion. See 18 App 3541-3551. The trial court could have allowed the press to cover the hearing by numerous available lesser intrusive means.

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vi. The trial court erred in denying a pretrial motion to exclude gruesome photographs.

The trial court erred in allowing the admission of gruesome photographic evidence which so infected the trial with unfairness that Mr. Floyd was deprived of his right to due process and a fair trial. See Romano v. Oklahoma, 512 U.S. 1, 12 (1994); Bruton v. United States, 391 U.S. 123, 131 (1968); see also 2 App 274-279; 2 App 318-321; 2 App 347-363. Mr. Floyd neither contested the element of death nor the element of serious bodily injury underlying the charges. The only factual issue during the guilt phase of trial was the extent of Mr. Floyd's intoxication. The state, however, submitted photographs contrasting the previously happy lives of the victims with their bloody post-mortem states. For example, one victim was depicted with her brain spilled onto Albertson's tile floor. See 25 App 4827. Twenty-two other gruesome photographs of the victims were presented in this way. Id. These photographs had little probative value given the fact that Mr. Floyd contested neither the deaths nor the serious bodily injury of the victims. Rather, these pictures were admitted solely to inflame the jury to convict and impose a death sentence on the basis of their passion and prejudice.

Under the circumstances of Mr. Floyd's trial, admission of the gruesome photographs was unduly prejudicial and reversal of the judgment is mandated. See Donnelly, 416 U.S. at 642 (federal courts may review state trial error if it "so infected the trial with unfairness as to make the resulting conviction a denial of due process.") Gruesome photographs may not be admitted where their admission is inflammatory and serves to excite and prejudice a jury. Archanian v. State, 122 Nev. 1019, 145 P.3d 1008, 1017-18 (2006) (citing Flores v. State, 121 Nev. 706, 722, 120 P.3d 1170, 1180 (2005)). Where photographs admitted are merely cumulative to the severity of the wounds and the manner in which wounds were inflicted, their admission is unconstitutional. Castillo v. State, 114 Nev. 271, 278, 956 P.3d 103, 108 (1998); Browne v. State, 113 Nev. 305, 314, 933 P.3d 187, 192 (1997).

vii. The trial court made improper comments during trial.

A trial judge is charged with maintaining the order and decorum of trial proceedings.

Parodi v. Washoe Medical Center, 111 Nev. 365, 367-68, 892 P.2d 588, 589 (1995). Especially in capital murder trials, where a defendant's life hangs in the balance, improper jokes and levity understates the jury's need for acting in accordance with its instructions and the evidence adduced at trial. Id. Here, the trial court violated this mandate by joking with detective David Mesinar. When Mr. Mesinar testified that several people ran into the beer cooler when running from Mr. Floyd, the trial court interjected "the record should reflect that in all of those, Mr. Bell located the beer cooler quicker than any of the others." 6 App 1035.

Moreover, a trial judge may not comment on the credibility of witnesses. Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 416, 470 P.2d 135, 140 (1970). During the testimony of Torrey Johnson, a criminalist for the state, the trial court commented that he trusted Mr. Johnson because he had known him for years. 6 App 1189. In making these comments, the trial court denied Mr. Floyd's right to a fair and impartial tribunal. Both statements caused the jury to devalue their role in determining Mr. Floyd's guilt and sentence as the jury accepted these comments as true.

viii. The trial court erred by failing to require that the aggravating factors be submitted to the grand jury for a probable cause finding.

The statutory aggravating factors, and the outweighing of mitigation by the aggravating factors, which are elements of capital-eligible murder, were not submitted to the grand jury for a probable cause determination before trial in violation of clearly established federal law, under Ring, 536 U.S. 584, and Apprendi, 530 U.S. 466, which were decided before Mr. Floyd's conviction and sentence were final on direct appeal. See also 3 App 413-424.

The Fifth Amendment to the United States Constitution and Article 1, Section 8 of the Nevada Constitution require that no person shall be held to answer to criminal charges without a finding of probable cause by a grand jury. The United States Supreme Court has found that a preliminary hearing before a neutral magistrate to determine probable cause is a constitutionally permissible alternative to a Grand Jury Indictment. See Hurtado v. California, 110 U.S. 516 (1884). By either method, however, every element of the offense that has the effect of increasing

the possible sentence must be supported by probable cause and charged in the indictment or information. See Jones v. United States, 526 U.S. 227, 232-33 (1999). In Apprendi, 530 U.S. at 478 the United States Supreme Court rejected distinctions between "sentencing enhancements" and "elements" for purposes of what must be charged. 2 App 396-399. Ring, 536 U.S. at 602 made it clear that the logic of Jones and Apprendi applied to aggravating circumstances in a capital case.

The failure to submit the essential elements of death eligibility to a probable cause determination was prejudicial, because there was no factual or constitutionally valid basis for two of the three aggravating factors presented at trial as to each of the homicides. There was also no basis for finding probable cause to believe that the aggravating factors were not outweighed by the mitigation, and thus there was no basis for subjecting Mr. Floyd to a trial in which, contrary to the process required under state law, character evidence not related to the statutory aggravating factors was considered in the capital eligibility calculus by the jury.

This error was therefore substantially injurious to the fundamental fairness of Mr. Floyd's capital sentencing hearing and to the reliability of his death sentence. Had Mr. Floyd's trial, direct-appeal, and state post-conviction attorneys complied with their state and federal constitutional obligation to render effective assistance of counsel, Mr. Floyd would not have been convicted of first-degree murder and would not have received a sentence of death. Mr. Floyd was deprived his state and federal constitutional rights to effective assistance of counsel, a fair trial and reliable sentencing proceeding, due process of law and equal protection. Mr. Floyd is entitled to relief in the form of a new trial and a new sentencing proceeding.[15]

ix. The trial court erroneously failed to order removal of Mr. Floyd's shackles and prison clothes sua sponte.

Mr. Floyd was brought before his jury in shackles and prison garb. The trial court did not

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[15]This issue is presented here because this Court may reconsider its previous decisions and because this issue must be presented to preserve it for federal review. See Bejarano v. State, 122 Nev. 1066, 146 P.3d 265, 271 (2006).

independently evaluate the need for these restraints in light of security concerns. These restraints invoked fear in jurors and caused jurors to draw adverse inferences about Mr. Floyd's guilt and dangerousness.

The United States Constitution forbids the use of physical restraints at any phase in a criminal trial unless that use is warranted by an "essential state interest... specific to the defendant on trial." Deck v. Missouri, 544 U.S. 622, 624 (2005) (citing Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986); Illinois v. Allen, 397 U.S. 343, 344 (1970)). Only "compelling circumstances that some measure is necessary to maintain the security of the courtroom" justify such restraints. Gonzalez v. Pliler, 341 F.3d 897, 901 (9th Cir. 2003). The inherent prejudice that ensues from jurors viewing a restrained defendant requires a court to "pursue less restrictive means before imposing physical restraints." Id. (citing Morgan v. Bunnell, 24 F.3d 49, 51 (9th Cir. 1994)). A court, not law enforcement, must determine whether physical restraints are an appropriate security measure. Gonzalez, 341 F.3d at 902. This determination must be made upon evidence of prisoner misconduct "presented on the [judicial] record." Id. Law enforcement alone may not determine whether restraints are necessary to preserve courtroom security. Id.

Mr. Floyd's jury saw him in shackles and prison garb even though the trial court did not rule that he posed a threat to courtroom security. The record is devoid of a showing that Mr. Floyd threatened the peace of his proceedings. See Gonzalez, 341 F.3d at 901. The record is also devoid of a showing that physical restraints were necessary to achieve a compelling interest in courtroom security. Id. The record does not reflect that physical restraints were the least restrictive means of achieving courtroom security nor does the record reflect that the trial court pursued less restrictive means to achieve this security. Id.

The trial court did not independently evaluate the propriety of physically restraining Mr. Floyd at trial. The determination to shackle Mr. Floyd at trial was made by Clark County correctional officers. As with the restraints used in Gonzalez, the trial court's failure to evaluate the matter was insufficient to "satisfy the safeguards of the constitution." Id.

The inherent prejudice in seeing Mr. Floyd in shackles and prison garb was exacerbated

by the fact that the shackles employed here made actually seated jurors fearful of Mr. Floyd and presume his dangerousness. Juror Quenetta Green witnessed Mr. Floyd in shackles on the first day of voir dire. 24 App 4746. The frightening physical restraints alerted Ms. Green to the fact that the trial she was about to witness was a grave matter. Id. The restraints therefore colored Ms. Green's determination of Mr. Floyd's guilt or innocence. Similarly, Juror Dolores Quiroz witnessed Mr. Floyd in handcuffs and prison garb during the early stages of the proceedings. 20 App 3991-93. This formidable sight scared Ms. Quiroz and predisposed her to a guilty verdict. These sights also caused jurors to presume Mr. Floyd to be dangerous, and likely influenced their death penalty verdict.

Mr. Floyd was also prejudiced when he was forced to wear a stun belt. The initial decision requiring him to wear a stun belt was made by the Clark County correctional officers, not the trial court. This unilateral decision did not satisfy constitutional safeguards. Gonzalez, 341 F.2d at 901; see also Deck, 125 S. Ct. at 2012. The trial court improperly allowed Clark County Detention Center officials to make the initial determination that Mr. Floyd appear before the jury in a jail jumpsuit and handcuffs. The trial court also did not determine, on the record, that an actual security problem existed in court that warranted the use of any physical restraints. Finally, the trial court could not make a determination as to whether any less restrictive alternatives existed because of the two previous errors. Gonzalez, 341 F.2d at 901. Accordingly, Mr. Floyd was prejudiced when the jury viewed him in prison garb, shackles and a stun belt. This Court should therefore reverse Mr. Floyd's conviction and death sentence. See Gonzalez, 341 F.3d at 902.

e. Two of the three aggravating factors presented to the jury were constitutionally invalid.

Nevada's death penalty statutes do not genuinely narrow the class of people eligible for the death penalty so as to reasonably justify the imposition of a more severe sentence for Mr. Floyd in comparison to others found guilty of murder in violation of Mr. Floyd's state and federal constitutional rights to due process, equal protection, see n. 5 supra, effective assistance

of counsel, an impartial jury and a reliable sentence. U. S. Const. amend. V, VI & XIV; Nev. Const. art. 1. In Gregg, 428 U.S. 153, the Supreme Court upheld Georgia's revised death penalty statutory scheme, finding that it met the constitutional requirement for individualized sentencing determinations, which the Court had set forth four years earlier in Furman, 408 U.S. 238. The most important concept in Furman and Gregg is that the jury's discretion must be limited because a jury "will have had little, if any, previous experience in sentencing,"Greg at 192, and therefore any murder may seem horrendous to a group of people not experienced in evaluating killings.

Since 1976, Furman and Gregg have provided the chief test for determining whether state death penalty statutory schemes are constitutional. In Godfrey v. Georgia, 446 U.S. 420 (1980), the United States Supreme Court struck down a Georgia death sentence because the aggravating factor triggering eligibility was vague and failed to guide a jury in distinguishing which cases deserved the death penalty. The United States Supreme Court noted that under Georgia law, "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id. at 433. In Zant, 462 U.S. at 877, the United States Supreme Court reaffirmed that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Id.; see also Spaziano v. Florida, 468 U.S. 447, 460 (1984) (if a state has determined that death should be an available penalty for certain crimes, then it must administer the penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction from those for whom it is not).

Nevada's death penalty statutory scheme violates the command of Furman and Gregg by not adequately limiting the jury's discretion. Under Nevada's statutory scheme, virtually all people who kill are eligible for the death penalty. The final decision regarding who should die and who should live is therefore arbitrary and capricious. The state has argued in other cases that Nevada's system is "virtually identical" to the statutory schemes enacted by Georgia and Florida

that have been approved of by the United States Supreme Court. This argument, however, is without merit. Even if Nevada's factors are applied with the most restrictive interpretation possible, they fail to meet the constitutional demand of Furman and Gregg by not channeling the jury's discretion in such a way as to separate "compellingly bad" murder cases from those that are less offensive. Mr. Floyd, therefore, was sentenced to death under Nevada's statutory scheme which was unconstitutional.

Nevada caselaw also has not sufficiently channeled imposition of death sentences by a narrowing construction of its death penalty statutes. When the Supreme Court upheld Georgia's death penalty in Gregg, 428 U.S. at 202, it relied both on Georgia's statute, which limited a jury's discretion in imposing the death penalty, and the fact that Georgia caselaw interpreted its factors in a narrow fashion. Based on Gregg, any analysis of whether a state's statutory scheme is constitutional must take into account both the statute and how the statutory aggravating factors are interpreted in Nevada Supreme Court caselaw.

i. The random and without apparent motive factor is unconstitutionally vague and is not supported by substantial evidence.

This Court's construction of NRS 200.033(9) (random and motiveless factor) has been controversial because Nevada is the only state in the country that employs this factor and interprets it in its most expansive way. This Court has routinely applied this factor to numerous situations where it is obvious that the murder is neither random nor without apparent motive. Because of the expansive interpretation of this factor, it can be applied to every case in which the murder is not deemed necessary, or in other words, to almost every murder.

Until the recent decision in Leslie v. McDaniel, 118 Nev. 773, 59 P.3d 440 (2002), this Court had even held that this factor applied where the defendant was also convicted of robbery of the victim, thus establishing a motive for the murder. Moran v. State, 103 Nev. 138, 734 P.2d 712 (1987); Lane v. State, 114 Nev. 299, 956 P.2d 88 (1998); Calambro v. State, 114 Nev. 106, 952 P.2d 946 (1998); Leslie v. State, 114 Nev. 8, 952 P.2d 966 (1998); see also Nika v. State, 113 Nev. 1424, 951 P.2d 1047 (1997) (affirming factor where defendant was angry with and

incapacitated the victim with blows from a crowbar, and did not have to fire fatal shot in order to take the victim's car). In Leslie v. McDaniel, on the other hand, this Court acknowledged that the "at random and without apparent motive" factor was inappropriate when it was solely based upon the fact that the killing was unnecessary to complete the robbery. 59 P.3d at 445-47. By limiting its ruling only to robbery-related killings, however, this Court apparently permits this factor to apply to any non-robbery situation in which the killing is deemed unnecessary for the accomplishment of the defendant's purpose. This interpretation makes almost every murder a capital one, except those in which the killing of the victim was a necessary precondition to the accomplishment a robbery. See Nika, 951 P.2d at1058 n.1 (Springer, C.J., dissenting).

There are several additional constitutional violations inherent in this factor. First, the factor violates the state and federal due process guarantees, and the sixth amendment right to a jury trial, by imposing a burden on the defendant to establish a motive for the killing in order to avoid the application of this factor. The state has the constitutional burden of proving all the elements of capital-eligibility, including this aggravating factor, to a jury beyond a reasonable doubt. Ring, 536 U.S. at 609; Johnson, 118 Nev. at 802-803, 59 P.3d at 460. But as this Court has applied the random and motiveless factor, it imposes a burden on the defense to prove that such a motive exists. See Nika v. State, No. 46586, Adv. Op. at 43 (Dec. 31 2008) (en banc); (Green v. State, 113 Nev. 157, 931 P.3d 54, 64 (1997) (referring to lack of evidence of "any apparent motive" for killings). The statute requires the absence of any "apparent" motive. By upholding the factor under these circumstances, this Court is imposing a constitutionally impermissible burden on the defense to establish an actual motive for the homicide in order to avoid death-eligibility.

This Court's application of the factor in this case also impermissibly burdens the defendant's state and federal constitutional privilege against self-incrimination. If the defendant is given the burden of providing a motive for the killing, such a motive would normally have to be demonstrated through the defendant's own testimony. By remaining silent, the defendant risks having this factor found merely because the state does not present evidence of motive or, even

more offensively, because the state's evidence showing an "apparent" motive does not persuade the jury that it is the actual motive. See Nika, Adv. Opn. at 43. The state cannot burden the defendant's exercise of the right to remain silent in this way. See, e.g., Bennett v. United States, 390 U.S. 377, 394 (1968) (holding that government could not force defendants to waive fifth amendment right to remain silent in order to enjoy protection of another right).[16]

The factor also violates the state and federal due process guarantees and the eighth amendment right to a reliable sentence by basing death-eligibility upon the mere absence of evidence of a motive for the offense. Both the United States Supreme Court and this Court have repeatedly held that a defendant with an evil motive for a killing is more culpable than a defendant without one. See, e.g., Wisconsin v. Mitchell, 508 U.S. 476 (1993); Tison v. Arizona, 481 U.S. 137, 156 (1987). This Court has embraced this principle in reducing death sentences for homicides without apparent motives. See, e.g., Chambers v. State, 113 Nev. 974, 979, 944, P.2d 805, 812 (1997); Haynes v. State, 103 Nev. 309, 319, 739 P.2d 497 (1987); Biondi v. State, 101 Nev. 252, 250, 699 P.2d 1062 (1985). There cannot be any sort of rational basis for punishing a homicide more severely when there is no evidence of motive, if the lack of motive is also a basis of reducing a death sentence, and if the presence of a motive is also a basis for imposing a more severe sentence. See United States v. Garcia-Camacho, 53 F.3d 244, 247 (9th Cir. 1995) (in determining whether a traffic stop is justified, "[a] driver's failure to look at the border patrol car [cannot be used to justify the agent's suspicion] since the opposite reaction, a driver's repeated glancing at a Border Patrol car, can also be used to justify the agent's suspicion. To give weight to this kind of justification 'would put the officers in a classic "heads I win, tails you lose" position [and] the driver, of course, can only lose'," quoting Gonzalez-

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[16]Further, by explaining a motive for the crime, the defendant also risks supplying the prosecution with incriminating evidence that supports a finding of guilt for the underlying offense. See, e.g., Lay v. State, 110 Nev. 1189, 1195, 886 P.2d 448, 452 (1994) (noting that prosecutor introduced evidence of motive to prove elements of underlying crime); People v. Anderson, 70 Cal.2d 15, 447 P.3d 442 (Cal. 1968) (evidence of motive supports a finding of premeditation and deliberation.

Rivera v. INS, 22 F.3d 1441, 1446-1447 (9th Cir. 1994) (alterations in original).)

Finally, the factor violates the basic state and federal due process right to adequate notice of what the statute forbids and it is thus void for vagueness. In City of Chicago v. Morales, 527 U.S. 41 (1999), the Supreme Court struck down an ordinance that prohibited loitering "with no apparent purpose." The Court found that this provision gave no guidance to citizens, police, or prosecutors for determining what acts were forbidden or what standards should be applied for enforcing it; and it left to the complete discretion of the arresting officer whether an individual had an "apparent purpose" or not. Id. at 62-63 (plurality opn.); id. at 67-68 (O'Connor, J., concurring).[17] The same problem exists with this factor: there is no definition of what an "apparent motive" is substantively, or to whom – the defendant, the prosecutor, the jury, or the reviewing court – it must be "apparent"; and the gloss put on the statute in Leslie similarly does not identify to whom the "apparent" motive must be "obvious or easily understood." This leads to a completely unfettered discretion in the part of prosecutors to charge, and juries to find, this factor on the basis of any or no evidence; and this Court, by holding that a jury is free to reject evidence of an "apparent" motive, even when it is offered by the state itself, and to find the lack of an "apparent" motive when there is no evidence at all, expands that discretion beyond any rational or constitutional limitation.

ii. The "Great Risk of Death" aggravating factor is unconstitutionally vague, duplicative and factually unsupported.

This Court has expansively construed NRS 200.033(3) (see Statutory Addendum) (risk of harm to more than one person) by finding that it applies in absurd situations. See e.g. Moran, 103 Nev. 138, 734 P.2d 712 (firing a gun at the victim with another person nearby); Nevius, 101 Nev. 238, 669 P.2d 1053 (firing a shot at the victim with victim's wife in the same room). The

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[17]The Morales court also noted the irony that the ordinance criminalized much innocent loitering for being without an "apparent purpose," but had the "perverse consequence of excluding from its coverage" the bad conduct at which the ordinance was aimed, which did have an "apparent purpose." Id. at 63 (plurality opn.).

analysis and application by this Court is far too general and ignores the essential issue of who is in the actual zone of danger. See State v. Smith, 707 P.2d 289 (Ariz. 1985) (firing a gun in a public place does not necessarily equate to the risk of harm to more than one person; the mere fact that other persons could have been shot is not sufficient as the murderous act itself must actually put others in the zone of danger). Most courts considering this issue have focused on the nature of the murderous act, the actual proximity of other people to the victim, the actual zone of danger, the defendant's intent to harm one person or more than one person, the defendant's knowledge of other people nearby, whether other people were actually hurt, or whether other people were threatened. See Thomas M. Fleming, Annotation, Sufficiency of Evidence, for Purposes of Death Penalty, to Establish Statutory Aggravating Circumstance that in Committing Murder, Defendant Created Risk of Death or Injury to More than One Person, to Many Persons, and the Like-Post-Gregg Cases 64 A.L.R. 4th 837, 847 (1988). The fact that the entire Nevada statutory aggravator scheme fails to limit which cases are death eligible is per se prejudicial to Mr. Floyd.

f. Appellate counsel were ineffective under the state and federal constitutions by failing to raise cognizable and substantial state and federal constitutional issues.

Appellate counsel failed to raise substantial and cognizable state and federal constitutional issues, and all available grounds on direct appeal in violation of Mr. Floyd's state and federal constitutional right to effective assistance of counsel. U. S. Const. amend. VI; Nev. Const. art. 1. The fact that a claim of error establishes "a meritorious ground for appeal" is sufficient to show that appellate counsel was defective for failing to raise the issue. Turner v. Duncan, 158 F.3d 449, 459 (9th Cir. 1998). Furthermore, appellate counsel is ineffective for "failing to find arguable issues" to assert on appeal. Smith v. Robbins, 528 U.S. 259, 285 (2000). Appellate counsel failed to raise the voir dire, prosecutorial misconduct, improper victim impact testimony, improper jury instructions and unconstitutional capital punishment claims contained in Mr. Floyd's Amended Petition which is summarized herein. It is reasonably probable that a more favorable result would have been obtained on appeal if appellate counsel had performed

effectively and had invoked the higher standards for review. See Chapman, 386 U.S. 18 (requiring the state to show beyond a reasonable doubt that any error was harmless).

g. Erroneous appellate review by popularly elected judges violated Mr. Floyd state and federal constitutional rights.

NRS 177.055(2) requires this Court to review each death sentence to determine whether there was sufficient evidence to support the aggravating factors found by the sentencing body and whether Mr. Floyd's death sentence was imposed under the influence of passion and prejudice. Such a review is part of the Eighth Amendment requirement of reliability. See Gregg, 428 U.S. at 195; see also U. S. Const. amend. VIII; Nev. Const. art. 1. This Court has never enunciated the standards it applies in conducting review under this statute. See Jones, 107 Nev. at 817 P.2d 1179. The complete absence of standards renders the purported review unconstitutional under federal due process standards. Harris ex rel. Ramseyer v. Blodgett, 853 F. Supp 1239, 1291 (W.D. Wash. 1994), affirmed 64 F.3d 1434 (9th Cir. 1995) (absence of standards for proportionality review); cf. Campbell v. Blodgett, 997 F.2d 512, 523 n.13 (9th Cir. 1992) (detailed standards for mandatory review of issues other than proportionality).

The constitutional inadequacy of this Court's review is compounded by the fact that Nevada Supreme Court justices are popularly elected and thus face the possibility of removal if they make a controversial and unpopular decision, as was the trial judge who imposed Mr. Floyd's death sentence. This situation renders the Nevada judiciary insufficiently impartial under the federal due process clause to preside over a capital case. At the time of the adoption of the constitution, which is the benchmark for the protection afforded by the due process clause, see, e.g., Medina v. California, 505 U.S. 437, 445-447 (1992), English judges qualified to preside in capital cases had tenure during good behavior.[18] The absence of any such protection for

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[18] The tenure of judges during good behavior was firmly established by the time of the adoption: almost a hundred years before the adoption, a provision required that "Judges' Commissions be made quamdiu se bene gesserint . . . ." was considered sufficiently important to be included in the Act of Settlement, 12, 13 Will. III c. 2 (1700); W. Stubbs, Select Charters 531 (5th ed. 1884); and in 1760, a statute ensured their tenure despite the death of the sovereign, which had formerly

Nevada judges results in a denial of federal due process in capital cases, because the possibility of removal, and at minimum of a financially draining campaign, for making an unpopular decision, are threats that "offer a possible temptation to the average [person] as a judge ... not to hold the balance nice, clear and true between the state and the [capitally] accused." Tumey, 273 U.S. at 532; see Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing, Ass. Conc. Res. No. 3 (file No. 7, Statutes of Nevada 2001 Special Session), meeting of February 21, 2002, partial verbatim transcript (testimony of Rose, J., noting that lesson of election campaign, involving allegation that justice of Supreme Court "wanted to give relief to a murderer and rapist," was "not lost on the judges in the State of Nevada, and I have often heard it said by judges, 'a judge never lost his job by being tough on crime.'"); Beets v. State, 107 Nev. 957, 976, 821 P.2d 1044 (1991) (Young, J., dissenting) ("Nevada has a system of elected judges. If recent campaigns are an indication, any laxity toward a defendant in a homicide case would be a serious, if not fatal, campaign liability.")[19]

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voided their commissions. 1 Geo. III c.23; 1 W. Holdsworth, History of English Law 195 (7th ed., A. Goodhart and H. Hanbury rev. 1956). Blackstone quoted the view of George III, in urging the adoption of this statute, that the independent tenure of the judges was "essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown." 1 W. Blackstone, Commentaries on the Laws of England *258 (1765). The framers of the constitution, who included the protection of tenure during good behavior for federal judges under Article III of the Constitution, would not likely have taken a looser view of the importance of this requirement to due process than George III. In fact, the grievance that the king had made the colonial "judges dependent on his will alone, for the tenure of their offices" was one of the reasons assigned as justification for the revolution. Declaration of Independence § 11 (1776); see Smith, An Independent Judiciary: The Colonial Background, 124 U.Pa.L. Rev. 1104, 1112-1152 (1976). At the time of the adoption, there were no provisions for judicial elections in any of the states. Id. at 1153-1155.

[19] The recent removal of a Supreme Court justice for participating in an unpopular decision strongly reinforces this point; See Sherman Fredrick, Editorial, "Voters like R-J's Ideas - - Guess Who Hates That?" Las Vegas Review-Journal (November 12, 2006); Editorial "Brian Greenspun on Tuesday's Victories Amid a Judicial Warning," Las Vegas Sun (November 9, 2006); Carri Geer Thevenot, "Supreme Court's Becker Falls to Saitta - - Douglas Retains Seat - - Political Consultant Says Justice Hurt by Guinn v. Legislature Ruling in 2003," Las Vegas Review-

Considering all of these factors, it is clear that any death sentence imposed in appellant's case cannot be constitutionally reliable under the Eighth and Fourteenth Amendments, unless it is imposed by a fully informed and properly instructed jury. Accordingly, the death sentence must be vacated and a new trial ordered.

h. Mr. Floyd's claims cumulatively establish a violation of the state and federal constitutions.

Mr. Floyd's first-degree murder conviction and death sentence are invalid due to the numerous state and federal constitutional violations which, singly or cumulatively, see Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985); Mak v. Blodgett, 970 F.2d 614, 621 (9th Cir. 1992), infected the proceedings and require reversal of the conviction and sentence.[20] See U. S. Const. amend. V, VI, VIII & XIV; Nev. Const. art. 1. The merits of these constitutional claims establish undue prejudice from the refusal to entertain them. NRS 34.726(1)(b). The state and federal constitutional violations in Mr. Floyd's petition must be considered together with the state and federal constitutional violations that this Court acknowledged on direct appeal that were found to be harmless error.

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Journal (November 8, 2006); Editorial, "Nancy Becker Must be Removed - - Supreme Court Justice Backed Guinn v. Legislature Travesty," Las Vegas Review-Journal (November 5, 2006); Editorial, "Nancy Becker has the Right Stuff - - State Supreme Court Justice has Faithfully and Honestly Interpreted the Constitution," Las Vegas Sun (October 22, 2006); Jeff German, "Far Right Targets Justice Becker - - Supreme Court Vote on Tax Increase was Right Thing to do, She Says," Las Vegas Sun (October 15, 2006); Jon Ralston, "Campaign Ad Reality Check," Las Vegas Sun (October 3, 2006); Jon Ralston, "Jon Ralston is Impressed at the Clarity and Brevity Displayed by Lawyer-Politicians," Las Vegas Sun (September 22, 2006); Michael J. Mishak, "Libertarian Lawyer has More Issues Up His Sleeve - - Waters' Next Targets: Campaign Funds, Real Estate Tax," Las Vegas Sun (September 16, 2006); Sam Skolnik, "Who Owns Whom is Supreme Theme - - Becker, Saitta Race is Rife with Accusations," Las Vegas Sun (August 27, 2006).

[20]As explained above, the state has not yet controverted any of the factual allegations contained in Mr. Floyd's petition. For the purposes of this appeal, therefore, Mr. Floyd's allegations from the petition must be taken as true. See, e.g., Mann v. State, 118 Nev. 351, 354-55, 46 P.3d 1228, 1230 (2002).

C. The state post-conviction court erred by adopting verbatim, over Mr. Floyd's objection, the state's clearly erroneous proposed findings of fact and conclusions of law which failed to reflect the decision announced by the state post-conviction court at the conclusion of the evidentiary hearing.

The state post-conviction court erred by adopting the state's proposed finding of facts and conclusions of law, JN 191-200, verbatim despite Mr. Floyd's objection, 37 App 7411-7417, because the findings adopted did not reflect the decision issued by the court during the evidentiary hearing, 37 App 7406-7410, nor were they supported by the record, 37 App 7348-7386.

On February 28, 2008, the state post-conviction court held an evidentiary hearing on one of the claims in Mr. Floyd's Supplemental Petition. At the conclusion of the hearing, the state post-conviction court stated its decision to deny Mr. Floyd relief. 37 App 7384-7385. On or about March 28, 2008, the state submitted proposed findings of facts and conclusions of law to the state post-conviction court containing indisputably erroneous factual findings clearly contradicted by the record. JN 191 - 200. On March 28, 2008, Mr. Floyd submitted an opposition alerting the state post-conviction court to the numerous factual errors cited in the state's proposal. 37 App 7406-7410. Less than three business days later, on April 2, 2008, the state post-conviction court endorsed the state's proposed findings of facts and conclusions of law, 37 App 7411-7418, and officially entered them into the record verbatim on April 3, 2008, 37 App 7419.

The state post-conviction court clearly failed to review Mr. Floyd's opposition as Mr. Floyd pointed out several indisputable and easily correctable factual errors for which there was no rational basis to ignore. For example, Mr. Floyd notified the state post-conviction court that, contrary to the state's proposed findings of fact, the transcript reflects that Mr. Floyd was present during the evidentiary hearing, 37 App 7407; JN 192, 37 App 7350. There simply is no defensible reason for the state post-conviction court's failure to make this change to the state's proposed findings of facts unless the court simply failed to review Mr. Floyd's opposition. Mr. Floyd also notified the state post-conviction court that the June 8, 1999, Criminal Complaint

contained four charges of Attempted Murder with Use of a Deadly Weapon, 1 App 1-2, not three as listed in the state's proposed findings, JN 192. Additionally, Mr. Floyd noted that the June 25, 1999, Amended Criminal Complaint reduced the number of Attempted Murder Charges by one, and reduced the total counts charged from fifteen to twelve, 1 App 1-5; 1 App30-34, rather than adding an Attempted Murder charge as indicated in the state's proposed findings, JN 193.

While the above-listed indisputable and easily correctable errors are harmless, they support the contention that the state post-conviction court committed reversible error by adopting the state's proposed findings of fact and conclusions of law verbatim, without reviewing Mr. Floyd's objections, in violation of Byford v. State, 123 Nev. 67, 156 P.3d 691 (2007) and NRS 34.830(1). This Court ruled in Byford that the reason for the existence of the Nevada Code of Judicial Conduct Canon 3B(7), which requires state district courts to accord every person who has a legal interest in a proceeding the right to be heard, is that it is "important to ensure that the proposed order drafted by the prevailing party accurately reflects the district court's findings." Byford, 156 P.3d at 692. NRS 34.830(1) provides: "Any order that finally disposes of a petition, whether or not an evidentiary hearing was held, must contain specific findings of fact and conclusions of law supporting the decision of the court."[21] At the conclusion of Mr. Floyd's evidentiary hearing, the state post-conviction court issued the following decision:

> In this case, in looking at the testimony that has been provided here today, and looking at Strickland, where it says: Judicial scrutiny of counsel's performance must the highly differential. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting affects of hindsight and to reconstruct the circumstances of counsel's challenge conduct and to evaluate the conduct from counsel's perspective at the time.
>
> Well, sure you had Mr. Schieck on the stand who says: Well, if I – now, from today's perspective and I looked back, I sure - I would have done things differently but, at the time, after hearing about the experts that were obtained and everybody who was brought in and the testimony that was raised, I think that there's a different view point, other than what we now have, which is: Okay, it's 2008 and let's look back at the year 2000 and what should have been done or what you say should have been done.

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[21]The federal and state constitutions prevent the trial court from denying statutory rights creating a liberty interest without due process of the law. Mathews, 424 U.S. at 334-35.

> Strickland goes on to say: Because of the difficulties inherent in making the evaluation, the Court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the Defendant must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy. Now, we're not looking at sound trial strategy; we're looking at sound post-conviction strategy.
>
> At the time Mr. Schieck did this post-conviction, and having the information he had from the trial transcript, the reports, and everything that he had, I don't find that his conduct falls below the standard and I don't find that he was ineffective. So, at this point the petition is denied.

37 App 7383-7384.

The proposed findings of fact and conclusions of law drafted by the state and adopted verbatim by the state post-conviction court do not reflect the findings made by the state post-conviction court at the evidentiary hearing. A district court's "endorsement of [an] order drafted unilaterally by the State" can call into question whether a district court has considered the underlying issue. See, e.g., Byford, 156 P.3d at 692. Contrary to the state's proposed findings of facts, the state post-conviction court did not rule that it had found that first state post-conviction counsel was effective because "[d]efendant's possible organic brain damage was known and testified to at the time of trial." JN 194. Additionally, as noted in Section A supra, pp 3-4, Mr. Floyd's organic brain damage was not testified to during the trial.

Further, a significant portion of the state's proposed findings of facts indicated that Mr. Floyd's Amended Petition was procedurally barred pursuant to NRS 34.726[22] and NRS 34.810.[23]

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[22]Had the post-conviction court ruled that Mr. Floyd's petition was untimely pursuant to NRS 34.726, said ruling would have been erroneous as the tolling of NRS 34.726 renders Mr. Floyd's Petition timely. See n. 24 infra. This Court has ruled that NRS 34.726 "is not a statute of limitations." Glauner v. State, 107 Nev. 482, 485 n.3, 813 P.2d 1001, 1003 n.3 (1991), superseded by statute on other grounds as stated in Gonzalez v. State, 118 Nev. 590, 593 n.5, 53 P.3d 901, 901 n.5 (2002). Mr. Floyd must be "given an opportunity to show either that no default occurred or that there was good cause for the delay because it was not his fault." Id. The subjective test for "fault" in NRS 34.726(1)(a) is more lenient than a traditional statute of limitations in that it incorporates a tolling of the limitation period until such time as the petitioner should have discovered the necessary facts to present his claim:

> Under the discovery rule, the statutory period of limitations is tolled

> until the injured party discovers or reasonably should have discovered facts supporting the cause of action.
>
> The rationale behind the discovery rule is that the policies served by the statutes of limitation do not outweigh the equities reflected in the proposition that plaintiffs should not be foreclosed from judicial remedies before they know that they have been injured and can discover the cause of their injuries. . . .

Spraguea v. Brown, 114 Nev. 1384, 1392, 971 P.2d 801, 806-07 (1999) (ellipses in original, footnote omitted) The state in this case has not made any attempt to demonstrate that it was prejudiced in any way by any supposed delay in filing the Petition. See NRS 34.800(1) This Court has consistently and uniformly held that the tolling of a limitations period is appropriate until the "plaintiff discovers or should have discovered all of the necessary facts" giving rise to the claim. Id. at 1393, 971 P.2d at 807. As a matter of state and federal constitutional law, therefore, Mr. Floyd is entitled to the statutory tolling of NRS 34.726. Mr. Floyd is also entitled to equitable tolling. See Copeland v. Desert Inn Hotel, 99 Nev. 823, 826, 673 P.2d 490, 492 (1984) (The appropriateness of equitable tolling is dictated by "the diligence of the claimant; the claimant's knowledge of the relevant facts; . . . the prejudice to [the opposing party] that would actually result from delay during the time that the limitations period is tolled; and any other equitable considerations appropriate in the particular case").

[23]Had the post-conviction court ruled that Mr. Floyd's petition was untimely, that ruling would be in error as Mr. Floyd demonstrated "good cause" and "prejudice" under controlling state and federal constitutional law to overcome the procedural bars in NRS 34.726 and 34.810. See, e.g. Crump, 113 Nev. at 304-305, 934 P.2d at 253-54. The failure of prior state post-conviction counsel to present the new claims contained in Mr. Floyd's Petition was not Mr. Floyd's fault, and, therefore, Mr. Floyd has adequately alleged "good cause" under the explicit statutory definition of that term in NRS 34.726(1)(a). See, e.g. Bennett, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995); Slaked v. Farmers Ins. Exchange, 5 P.3d 280, 285 (Colo. 2000) (to be at fault, a party must have acted in a manner that goes beyond negligence because "fault contemplates more than mere negligence, and includes intentional acts"). As explained in Crump, if Mr. Floyd "can prove that [prior post-conviction counsel] committed error which rises to the level of ineffective assistance, then [he] will have established 'cause' and 'prejudice' to overcome the procedural bars." 113 Nev. at 304-05; 934 P.2d at 254 (emphasis added) (citing Coleman v. Thompson, 501 U.S. 722, 753-54) (1991)). The instant proceeding is the first opportunity that Mr. Floyd has had to challenge the ineffectiveness of prior state post-conviction counsel, and Mr. Floyd has made a prima facie showing that he can overcome procedural rules, which is why he was entitled to a full and fair evidentiary hearing on his claim that prior state post-conviction

JN 194-195. This contention is belied by the December 13, 2007, hearing on the state's motion to dismiss, see 37 App 7342-7347, where the state post-conviction court ordered that an evidentiary hearing would be held on the question of whether first state post-conviction counsel was ineffective for failing to present a claim in the initial state petition that Mr. Floyd suffered from organic brain damage. 37 App 7346. Had Mr. Floyd's Supplemental Petition been procedurally barred, then the court would not have had a basis to hold an evidentiary hearing about the ineffectiveness of first state post-conviction counsel.[24] This fact is furthered by the state post-conviction court's statement during the February 13, 2008, evidentiary hearing:

> Okay. I'm sitting here with Strickland in front of me, the case, and I've listened to counsel and the simple thing to do, and originally would have been to say: You're procedurally barred. Go to Federal Court. Bye Bye. See ya. But, I said: You raised an issue regarding [first state post-conviction counsel] and his performance. I was going to listen to that limited issue.

37 App 7383. The state post-conviction court then went on to analyze the claim of ineffectiveness on the merits by performing a Strickland analysis of whether first state post-conviction counsel was ineffective. 37 App 7383-7384. It is clear that the state post-conviction court chose not to find that Mr. Floyd's Supplemental Petition was procedurally barred. The state post-conviction court committed reversible error, therefore, when it failed to "either draft its own

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counsel was ineffective.

[24]This Court issued Mr. Floyd's Remittitur on March 15, 2006, after denying the first state petition. Mr. Floyd initiated federal proceedings on April 14, 2006. Mr. Floyd's new meritorious claims that first state post-conviction counsel ineffectively failed to raise were revealed in and about October, 2006, as a result of current counsel's investigation. Mr. Floyd filed a federal Amended Petition on October 23, 2006. Once Mr. Floyd's federal Amended Petition was filed, the state's delay in responding significantly contributed to the failure of the federal court to order a return to state court until April 25, 2007. See, e.g., King v. Bell, 378 F.3d 550 (2004) (refusing to hold defendant accountable for delay caused by government). Mr. Floyd's successive state court petition was filed on June 8, 2007, within fourteen days of the federal court's order. The instant Amended Petition, therefore, was filed less than fifteen months after the remittitur was issued, and within eight months of learning of Mr. Floyd's meritorious claims. The state's motion to dismiss, 33 App 6408-6506, was clearly unfounded as argued in Mr. Floyd's opposition, 33 App 6531 - 34 App 6625, and found by the state post-conviction court.

> You raised an issue regarding [first state post-conviction counsel] and his performance. I was going to listen to that limited issue.

37 App 7383. The state post-conviction court then went on to analyze the claim of ineffectiveness on the merits by performing a Strickland analysis of whether first state post-conviction counsel was ineffective. 37 App 7383-7384. It is clear that the state post-conviction court chose not to find that Mr. Floyd's Supplemental Petition was procedurally barred. The state post-conviction court committed reversible error, therefore, when it failed to "either draft its own findings of facts and conclusions of law or announce them to the parties with sufficient specificity to provide guidance to the prevailing party in drafting the proposed order." See Byford, 156 P.3d at 692. The state post-conviction court also committed reversible error by failing to issue an order containing specific findings of fact and conclusions of law that "support[ed] the decision of the court" issued at the conclusion of the evidentiary hearing, in violation of NRS 34.840(1).

V. CONCLUSION

For the foregoing reasons, Mr. Floyd respectfully requests that this Court reverse his conviction and death sentence. In the alternative, Mr. Floyd requests that this Court remand the case to the state post-conviction court for a hearing on his meritorious constitutional claims.

Dated this 3rd day of February, 2009.

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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 N.R.A.P 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 3rd day of February, 2009.

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CERTIFICATE OF SERVICE

I certify that on the 3rd day of March , 2009, I served a copy of APPELLANT'S OPENING BRIEF and APPELLANT'S APPENDIX TO APPELLANT'S OPENING BRIEF pursuant to N.R.A.P. 9(a) upon all counsel of record by mailing it by first class mail with sufficient postage prepaid to the following address(es):

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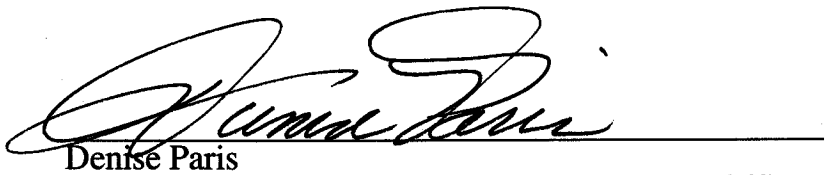

Denise Paris
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STATUTORY ADDENDUM

NRS 200.020 Malice: Express and implied defined.

1. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.

2. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

[1911 C&P § 120; A 1915, 67; 1919 RL § 6385; NCL § 10067]

NRS 200.033 Circumstances aggravating first degree murder.

The only circumstances by which murder of the first degree may be aggravated are:

1. The murder was committed by a person under sentence of imprisonment.

2. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of:

(a) Another murder and the provisions of subsection 12 do not otherwise apply to that other murder; or

(b) A felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony.

For the purposes of this subsection, a person shall be deemed to have been convicted at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

3. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

4. The murder was committed while the person was engaged, alone or with others, in the commission of, or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnapping in the first degree, and the person charged:

(a) Killed or attempted to kill the person murdered; or

(b) Knew or had reason to know that life would be taken or lethal force used.

5. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

6. The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value.

7. The murder was committed upon a peace officer or firefighter who was killed while engaged in the performance of his official duty or because of an act performed in his official capacity, and the defendant knew or reasonably should have known that the victim was a

peace officer or firefighter. For the purposes of this subsection, "peace officer" means:

(a) An employee of the Department of Corrections who does not exercise general control over offenders imprisoned within the institutions and facilities of the Department, but whose normal duties require him to come into contact with those offenders when carrying out the duties prescribed by the Director of the Department.

(b) Any person upon whom some or all of the powers of a peace officer are conferred pursuant to NRS 289.150 to 289.360, inclusive, when carrying out those powers.

8. The murder involved torture or the mutilation of the victim.

9. The murder was committed upon one or more persons at random and without apparent motive.

10. The murder was committed upon a person less than 14 years of age.

11. The murder was committed upon a person because of the actual or perceived race, color, religion, national origin, physical or mental disability or sexual orientation of that person.

12. The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. For the purposes of this subsection, a person shall be deemed to have been convicted of a murder at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

13. The person, alone or with others, subjected or attempted to subject the victim of the murder to nonconsensual sexual penetration immediately before, during or immediately after the commission of the murder. For the purposes of this subsection:

(a) "Nonconsensual" means against the victim's will or under conditions in which the person knows or reasonably should know that the victim is mentally or physically incapable of resisting, consenting or understanding the nature of his conduct, including, but not limited to, conditions in which the person knows or reasonably should know that the victim is dead.

(b) "Sexual penetration" means cunnilingus, fellatio or any intrusion, however slight, of any part of the victim's body or any object manipulated or inserted by a person, alone or with others, into the genital or anal openings of the body of the victim, whether or not the victim is alive. The term includes, but is not limited to, anal intercourse and sexual intercourse in what would be its ordinary meaning.

14. The murder was committed on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person. For the purposes of this subsection, "school bus" has the meaning ascribed to it in NRS 483.160.

15. The murder was committed with the intent to commit, cause, aid, further or conceal an act of terrorism. For the purposes of this subsection, "act of terrorism" has the meaning ascribed to it in NRS 202.4415.

(Added to NRS by 1977, 1542; A 1981, 521, 2011; 1983, 286; 1985, 1979; 1989, 1451; 1993, 76; 1995, 2, 138, 1490, 2705; 1997, 1293; 1999, 1336; 2001 Special Session, 229; 2003, 2945; 2005, 317)