IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 83436

ZANE FLOYD,

Petitioner,

v.

STATE OF NEVADA, et al.,

Respondent.

Appeal From Clark County District Court
Eighth Judicial District, Clark County
The Honorable Michael Villani, District Judge

PETITIONER'S APPENDIX

VOLUME 12 OF 14

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reasonable doubt that the deprivation of an opportunity to seek clemency is harmless.

CLAIM THREE: Current Law Operates to Prohibit Floyd's Execution by Lethal Injection at Ely State Prison

Zane Floyd's death sentence is invalid under state law and the state and federal constitutional guarantees of due process, equal protection, and freedom from cruel and/or unusual punishment as current law in the State of Nevada precludes the execution from occurring at the Ely State Prison. U.S. Const. amend. V, VIII, XIV; Nev. Const. Art. I, §§ 6, 8(2), Art. IV, § 21; NRS 176.355(3).

SUPPORTING FACTS

Floyd cannot be executed by lethal injection at Ely State Prison (ESP), as NRS 176.355(3) permits executions to only occur at Nevada State Prison (NSP).

The State has requested a hearing wherein it intends to obtain an execution warrant from this Court. Initially, the warrant proffered by the State was compliant with state law as it sought Floyd's execution at NSP, which it referenced correctly as the state prison. However, now the State just filed a pleading on May 10, 2021, where it argues that it made an error and that the location of the execution should have been ESP. While NRS 200.030 permits executions of death sentenced inmates, NRS 176.355 prescribes the manner in which those executions must be carried out. NRS 176.355(3) expressly provides that "[t]he execution must take place at *the* state prison." (Emphasis added). Although an execution chamber exists at ESP, the state prison actually referenced in the statute is the now decommissioned Nevada State Prison, in Carson City, Nevada. Accordingly, because the State intends to use the death chamber at ESP as the execution location Floyd's execution is precluded

by current law and this Court must decline to sign the State's order and warrant requesting his execution at that location.

NRS 176.355 is Nevada's execution statute. It prescribes the method and manner by which lethal injection executions may be carried out within the state, including execution locations. Under NRS 176.355(3), all executions "*must* take place at *the* state prison." *See* NRS 176.355(3) (emphasis added). This provision clearly requires that any execution in Nevada occur at Nevada State Prison, located in Carson City. In constructing NRS 176.355(3), the Legislature purposefully used the definite article "the," denoting its intent to limit executions to a singular location, NSP. *See Freytag v. Commissioner*, 501 U.S. 868, 902 (1991) (Scalia, J., concurring) (use of the definite article in the Constitution's conferral of appointment authority on "the Courts of Law" obviously narrows the class of eligible 'Courts of Law' to those courts of law envisioned by the Constitution"); *Pineda v. Bank of America, N.A.*, 241 P.3d 870, 875 (Cal. 2010) ("Use of the indefinite articles "a" or "an" signals a general reference, while use of the definite article 'the' (or 'these' in the instance of plural nouns) refers to a specific person, place, or thing.").

Moreover, Nevada State Prison was the only "state prison" in existence at the time of NRS 176.355's enactment. ESP and High Desert State Prison were constructed years later and as such could not have been intended to act as "the state prison" referenced in NRS 176.355(3). Although Nevada State Prison is currently decommissioned and other state prisons have been constructed, this fact cannot override the original intent of the Legislature. *See* Antonin Scalia & Bryan

A. Garner, Reading Law: The Interpretation of Legal Texts 135 (2012) (when a known edifice is cited in a statute, the subsequent construction of an edifice that also falls under the statute does not change the original meaning). Thus, this Court must apply NRS 176.355(3) as it is plainly written and cannot amend the statute to include additional state prisons, as this is a task left solely to the Legislature.

Allowing Floyd's execution to occur at ESP, despite NRS 176.355's explicit restriction constitutes a violation of current Nevada law as well as the state and federal constitutions. As a matter of due process, the statute creates a liberty interest in Floyd's favor that cannot be disregarded. Similarly, it violates equal protection principles for Floyd to be treated dissimilarly to similarly situated condemned inmates. Finally, an unlawful execution violates Floyd's right to be free from cruel and/or unusual punishments. As such, this Court must refuse to sign the warrant for his execution that has been sought by the State and set an evidentiary hearing to determine whether any valid execution could be conducted under current law at NSP.

Permitting Floyd's execution to occur in an unlawful manner is prejudicial per se, and no further showing of prejudice is required.

CLAIM FOUR: Floyd's Execution Would Result in Cruel and Unusual Punishment

Zane Floyd's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, a reliable sentence, and freedom from cruel and unusual punishments because the circumstances surrounding his upcoming execution pose a substantial and unjustified risk of causing cruel pain and suffering, which constitutes cruel and/or unusual punishment. U.S. Const. amends V, VI, VIII, XIV; Nev. Const. Art. I, § 1, 5, 6, 8; Art. 4, § 21.

SUPPORTING FACTS

The circumstances surrounding Floyd's upcoming execution constitute cruel and/or unusual punishment in violation of the state and federal constitutions. The last execution in the State of Nevada occurred in 2006, and it was conducted using a lethal injection protocol consisting of sodium thiopental as the first drug in the protocol. Sodium thiopental is a fast-acting barbiturate medication that was used to induce anesthesia so the condemned inmate was insensate and thus unaware when the lethal drugs were administered. Sodium thiopental was the standard drug used in lethal injection protocols across the nation since lethal injection became a method of execution in the 1970s. Sodium thiopental is currently unavailable for use in executions.

NDOC does not have, and does not intend to use, an anesthetic agent that reliably produces unawareness before the lethal drugs are administered. Instead, NDOC will likely use a drug that is experimental precisely because it has not previously been used in an execution and thus has not yet been placed on a list of banned drugs that cannot be purchased in normal commerce by a prison pharmacy.

The choice of a drug based upon what can be obtained through subterfuge rather than on what can reliably induce anesthesia carries a substantial risk of causing cruel pain and suffering.

Floyd's execution is also unconstitutional because NDOC is not prepared to conduct his execution in a manner that complies with constitutional requirements. On May 6, 2021, NDOC Director Charles Daniels testified in federal court regarding the department's lack of preparedness to conduct an execution in the time frame currently sought by the State. Daniels testified he was "still in the process of looking at the various drugs to be used" in NDOC's execution protocol. Ex. 4 at 40, *id.* at 55 (Transcript of Evidentiary Hearing held on May 6, 2021). He repeatedly stated the need to consult with the Chief Medical Officer (Ishan Azzam) and other individuals regarding the execution protocol. *Id.* at 40, 43-44, 48, 76.[5] He also needed to ensure the drugs chosen were available to NDOC. *Id.* at 42. Daniels testified NDOC's pharmacist would order the drugs and do research for him about them. *Id.* at 47-48.

Daniels acknowledged the need to "run through our protocols step-by-step ensuring that we stay within the confines of what we've actually drafted." *Id.* at 41. He referenced the need to "identify any particular issues" that arose during test runs. *Id.* Daniels did not know when the execution protocol would be finalized, but he testified approximately 90 to 120 days were needed. *Id.* at 43-44.

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[5] Daniels later testified he had already met with Dr. Azzam, *id.* at 52, but said he could not recall the date of the meeting. *Id.* at 53. Daniels stated that he expected to meet again with Azzam when new drugs became available. *Id.* at 55-56. That meeting has not currently been scheduled. *Id.*

Director Daniels also acknowledged he would comply with a state court warrant for Floyd's execution, even if it is scheduled to occur in approximately four weeks. Ex. 4 at 45-46, 49-51, 70, 72. Daniels testified his preference would be to "go with the longer date" if given a choice. *Id.* at 74.

The State's insistence in seeking an order for Floyd's execution before NDOC is prepared to conduct one carries a substantial risk of causing cruel pain and suffering. Daniels' testimony, taken at face value, shows NDOC is at the beginning of its deliberative process because he still has not selected the drugs to be used in the execution. If that is true, then important issues such as dosage amounts, drug interactions, arrangements for purchase, preparation of the drugs, test runs on the protocol, and identification of issues that need correction during test runs has not yet occurred. Given the Director's personal preference for more time and NDOC's agreement in federal court to a scheduling order setting forth a timeline of approximately 90 days (from disclosure of the execution protocol through the dispositive motions deadline), *Floyd v. Daniels*, Case No. 3:21-cv-00176-RB-CLB, Rule 26(f) Conference Report at 3-4 (filed May 2, 2021), ECF No. 33 at 3-4, it follows that the State cannot insist the execution warrant be effectuated before that time, including the State's new date of late July, 2021.

The State also cannot perform a constitutional execution at the Nevada State Prison, which is the location where state law designates the execution must occur. Floyd incorporates the allegations of Claim Three as if fully set forth herein. The warrant submitted by the State designates that Floyd's execution will be performed

at NSP, but the Director testified on May 6, 2021, that the execution would be performed at the ESP, as does the State's latest filing. Ex. 4 at 56; Addendum to State's Motion for the Court to Issue Second Supplemental Order of Execution and Second Supplemental Warrant of Execution at 3 (filed May 10, 2021). However, the State argues, "Defendant cites to no statute that requires NDOC to issue assurances of the manner and method or place of execution *before* this Court can issue the Order of Execution." Reply to Opposition to Motion for the Court to Issue Second Supplemental Order of Execution and Second Supplemental Warrant of Execution at 4 (filed May 5, 2021). What is clear is that NDOC is not capable of conducting an execution at the closed and abandoned prison at NSP. Floyd incorporates his allegations in Section II(C)(2, 3) of his Opposition to the State's motion to issue an order and warrant of execution as if fully set forth herein.

NDOC's inability to perform a constitutional execution during the time frame contemplated by the State's order and warrant of execution invalidates Floyd's death sentence. Under state law, executions must be performed using lethal injection and the execution must occur at the Nevada State Prison. The inability to conduct a constitutional execution using those means at the required location means the execution cannot go forward. Moreover, the signing of unenforceable execution orders and the setting of multiple execution dates constitutes a mock execution which violates the constitution by causing needless psychological injury to Floyd. These constitutional violations are prejudicial per se.

CLAIM FIVE: Errors in Penalty Verdict Form

Zane Floyd's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, a reliable sentence, and a fair and impartial jury, because the verdict forms given to the jury for penalty deliberations contained misleading language and an erroneous standard for consideration of the life sentencing options. U.S. Const. amends V, VI, VIII, XIV; Nev. Const. Art. I, § 1, 5, 6, 8; Art. 4, § 21.

SUPPORTING FACTS

The general verdict forms and instructions used in Floyd's case misled jurors by incorrectly requiring mitigating circumstances to outweigh aggravating circumstances in order to impose a life sentence. As explained below, life sentence options were improperly removed from the jury's consideration upon finding the existence of the aggravating circumstances. By stating that the jury's ability to consider a life sentence was dependent upon the weighing of aggravating and mitigating circumstances, the verdict forms and instructions also prevented the jury from considering the life sentencing options. These errors were prejudicial as a jury in Nevada is allowed to impose a life sentence under any circumstances, including those where mitigation is equal to, or outweighed by, statutory aggravating circumstances.

The court provided the jury with two forms for deliberation: a general verdict form, to determine penalty, and a special verdict form, which included a list of

aggravating factors.[6] The jury used both forms. The general verdict form included the following section:

> [H]aving found that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances impose a sentence of,
>
> _____ A definite term of 100 years imprisonment, with eligibility for parole beginning when a minimum of 40 years has served,
>
> _____ Life in Nevada State Prison with the possibility of parole, with eligibility for parole beginning when a minimum of 40 years has been served.
>
> _____ Life in Nevada State Prison without the possibility of parole.
>
> _____ Death.

Ex. 5.

A substantial problem exists with the general verdict form, thus rendering Floyd's death sentence invalid. The verdict form lists all life sentencing options with language stating that each of the sentences can only be imposed if "the aggravating circumstances outweigh any mitigating circumstance." *Id.* This is error, as only death sentences require a finding "that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances." NRS 175.554(3). When a verdict form lists life sentencing options and requires jurors apply a death sentencing standard in choosing one of those options, it is not only error, but plain error which warrants reversal. Ex. 7 (*Petrocelli v. State*, No. 79069, 2021 WL

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[6] Exs. 5, 6.

2073794 (May 21, 2021)) (Order of Reversal and Remand) (reversing death sentence after concluding that penalty verdict forms contained erroneous language requiring the jury to weigh aggravating and mitigating circumstances for life sentencing options).

Using this error-filled verdict form—which did not allow the jury to render a verdict for a life sentence without first finding mitigation outweighed aggravating circumstances, conflated death eligibility with death worthiness, and was written in a way that was prejudicial per se to Floyd, and the State cannot demonstrate beyond a reasonable doubt that the error is harmless. Floyd therefore is entitled to a new penalty hearing.

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RELIEF REQUESTED

For the foregoing reasons, Zane Floyd respectfully requests that this Court:

1. Grant his petition as to Claim One and permanently set aside his death sentence and set the case for a non-capital sentencing hearing. In the alternative, Mr. Floyd requests an evidentiary hearing to demonstrate his reduced culpability warrants a categorical exclusion from the death penalty, followed by the permanent setting aside of his death sentence and the scheduling of a non-capital sentencing hearing:

2. Grant his petition as to Claim Two and decline to sign an execution warrant proffered by the State until Mr. Floyd has had an opportunity to seek clemency before the Pardons Board. In the alternative, grant a stay of Mr. Floyd's execution warrant until he has had an opportunity to seek clemency before the Pardons Board. In the alternative, set aside Mr. Floyd's death sentence.

3. Grant his petition as to Claim Three and decline to sign an execution warrant proffered by the State for Mr. Floyd's execution at Ely State Prison. In the alternative, grant Mr. Floyd's motion to strike the motion for execution warrant sought for Mr. Floyd's execution at ESP.

4. Grant his petition as to Claim Four and decline to sign an execution warrant proffered by the State until Mr. Floyd's execution can be constitutionally carried out.

5. Grant his petition as to Claim Five and set aside his death sentence and set the case for a new penalty hearing.

DATED this 3rd day of June, 2021.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

/s/ Jocelyn S. Murphy
JOCELYN S. MURPHY
Assistant Federal Public Defender

VERIFICATION

Under penalty of perjury, the undersigned declares that he is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge except as to those matters stated on information and belief and as to such matters he believes them to be true. Petitioner personally authorized undersigned counsel to commence this action.

DATED this 3rd day of June, 2021.

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with EDCR 8.04(c), the undersigned hereby certifies that on this 3rd day of June 2021, a true and correct copy of the foregoing SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION), was filed electronically with the Eighth Judicial District Court. Service of the foregoing document shall be made via electronic service to:

Alexander Chen
Chief Deputy District Attorney
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/s/ Sara Jelinek
An Employee of the Federal Public Defenders Office, District of Nevada

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DISTRICT COURT
CLARK COUNTY, NEVADA

ZANE MICHAEL FLOYD, Petitioner, v. WILLIAM GITTERE, Warden, Ely State Prison; AARON FORD; Attorney General, State of Nevada Respondents.	Case No. A-21-832952-W Dept. No. 17 **SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** Date of Hearing: Time of Hearing: **(DEATH PENALTY CASE)** **EXECUTION SOUGHT BY THE STATE FOR THE WEEK OF JULY 26, 2021**

Petitioner, Zane Michael Floyd, hereby files this Second Amended Petition for Writ of Habeas Corpus pursuant to Nevada Revised Statutes sections 34.724 and 34.820. Floyd alleges that he is being held in custody in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution of the United States of America; Article 1, sections Three, Six, Eight, and Nine and Article Four, section Twenty-one of the Constitution of the State of Nevada; and the rights afforded him under international law enforced under the Supremacy Clause of the United States Constitution, U.S. Const. art VI, cl.2.

DATED this 3rd day of June, 2021.

Respectfully submitted
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Federal Public Defender

/s/ David Anthony
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/s/ Brad D. Levenson
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/s/ Jocelyn S. Murphy
JOCELYN S. MURPHY
Assistant Federal Public Defender

PROCEDURAL HISTORY

Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Ely State Prison, located in White Pine County.

Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court, 200 Lewis Avenue, Las Vegas, NV 89101.

Date of judgment of conviction: September 5, 2000

Case Number: C159897

(a) Length of Sentence:

Count I: 72 – 180 months

Counts II, III, IV, and V: death by lethal injection

Count VI: 96 – 240 months plus equal and consecutive enhancement

Count VII: Life with parole eligibility after 60 months

Counts VIII, IX, X, and XI: Life with parole eligibility after 120 months to run consecutively with an additional life sentence of 120 months

Counts VI and VII are served consecutive to Count VIII; Count IV served consecutive to Count VIII; Count X served consecutive to Count IX; and Count XI served consecutive to count X.

(b) If sentence is death, state any date upon which execution is scheduled:

The week of July 26, 2021.

Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes [ ] No [×]

If "yes", list crime, case number and sentence being served at this time:

Nature of offense involved in conviction being challenged: N/A

Nature of offense involved in conviction being challenged:

Zane Floyd was charged by information with, on or about June 3, 1999: (1) burglarizing Albertsons while in possession of a firearm; (2) four counts of murder with use of a deadly weapon for shooting Thomas Michael Darnell, Dennis Troy Sergeant, Carlos Chuck Leos, and Lucille Alice Tarantino, who died as a result of their injuries; (3) attempted murder with use of a deadly weapon for shooting Zachary Emenegger; (4) first degree kidnapping of Tracie Rose Carter with use of a deadly weapon; and (5) four counts of sexual assault upon Tracie Rose Carter with use of a deadly weapon.

What was your plea?

(a) Not guilty ___×___ (c) Guilty but mentally ill _____

(b) Guilty _____ (d) Nolo contendere _____

If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

If you were found guilty after a plea of not guilty, was the finding made by:

(a) Jury ___×___ (b) Judge without a jury _____

Did you testify at the trial? Yes _____ No ___×___

Did you appeal from the judgment of conviction? Yes ___×___ No ___

If you did appeal, answer the following:

(a) Name of Court: Nevada Supreme Court

(b) Case number or citation: *Floyd v. State,* 118 Nev. 156, 42 P.3d 249 (2002)

(c) Result: Conviction and sentence affirmed.

If you did not appeal, explain briefly why you did not: N/A

Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes × No _____

If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of Court: Eighth Judicial District Court

(2) Nature of proceeding: State post-conviction Petition for Writ of Habeas Corpus

(3) Ground raised:

I. The trial court committed constitutional error in denying Defendant's motion to sever counts for trial.

II. The trial court committed constitutional error in denying Defendant's motion for a change of venue.

III. The trial court committed constitutional error in denying Defendant's motion to dismiss statutory aggravators based on a failure to find probable cause for existence of aggravating circumstances.

IV. The trial court committed constitutional error by improperly requiring Defendant to disclose expert witness test results and allowing the State to make use of that data in presenting penalty phase rebuttal evidence.

V. The trial court committed constitutional error in denying Defendant's motion to suppress Defendant's statements.

VI. Prosecutorial misconduct during closing argument requires that a new trial be conducted.

VII. Prosecutorial misconduct during the presentation of victim-impact testimony at the penalty hearing requires that a new penalty hearing be conducted.

VIII. Floyd's conviction and death sentence are invalid under the State and Federal guarantee of effective assistance of counsel, due process of law, equal protection of the law, cross-examination and confrontation and a reliable sentence due to the failure of trial counsel to provide reasonably effective assistance of counsel.

IX. Trial counsel failed to make contemporaneous objections on valid issues during trial and appellate

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

X. Trial counsel failed to request an instruction during the penalty phase that correctly defined the use of character evidence for the jury.

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

XII. The malice instruction given to the jury contained an unconstitutional presumption that relieved the State of its burden of proof and violated Floyd's presumption of innocence.

XIII. Floyd's conviction and sentence are invalid under the State and Federal Constitutional guarantee of due process, equal protection of the laws, and reliable sentence due to the failure of the Nevada Supreme Court to conduct fair and adequate appellate review.

XIV. Floyd's conviction and sentence is invalid under the State and Federal Constitutional guarantees of due

process, equal protection, impartial jury from cross-section of the community and reliable determination due to the trial, conviction, and sentence being imposed by a jury from which African Americans and other minorities were systematically excluded and under-represented.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No ___×___

(5) Result: Denial of the Writ for Habeas Corpus

(6) Date of Result: February 4, 2005

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: District Court entered an order of denial on February 4, 2005; Nevada Supreme Court affirmed the denial on February 16, 2006. *Nevada v. Floyd*, Order of Affirmance (Feb. 16, 2006).

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: Eighth Judicial District Court

(2) Nature of proceeding: Successive Petition for Writ of Habeas Corpus

(3) Grounds raised:

I. Floyd's convictions and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, and a reliable sentence due to the ineffective assistance of counsel.

II. Floyd's conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, right to effective assistance of counsel, a fair trial and a reliable sentencing because Floyd was deprived of expert assistance to aid in his defense during the guilt and penalty phases of his trial.

III. Floyd's conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, trial before an impartial jury, and a reliable sentence in violation of U.S. Constitutional Amends. V, VI, VIII, & XIV and Nev. Const. Art. I, IV, because he is actually innocent of first-degree murder.

IV. Floyd's conviction and death sentence are invalid because Floyd's state and federal constitutional guarantees of due process, equal protection, trial

before an impartial jury, and a reliable sentence were violated because of prosecutorial misconduct.

V. Floyd's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, trial before an impartial jury, a reliable sentence, and protection from cruel and unusual punishment because Nevada law fails to properly channel death sentences by limiting the scope of victim-impact testimony.

VI. Floyd's conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, a reliable sentence, an impartial jury, and the effective assistance of counsel due to the improper actions of the trial court during the voir dire proceedings which deprived Floyd of his right to a fair and impartial jury.

VII. Floyd's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, trial before an impartial jury, and a reliable sentence because of the trial court's failure to grant a change of venue and sequester the jury.

VIII. Floyd's conviction and death sentence are invalid under the constitutional guarantees of a trial before an impartial jury, due process, and a reliable sentence because the trial court failed to properly instruct the jury.

IX. Floyd was deprived of his state and federal constitutional rights to communicate with counsel, to the effective assistance of counsel, due process, equal protection, and a reliable sentence due to the jurors viewing him in prison clothes, handcuffs, and shackles.

X. Floyd's conviction and death sentence are invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence because of the failure to preserve Floyd's blood sample.

XI. Floyd was deprived of his state and federal constitutional right to adequate notice of the charges against him, a pretrial review of probable cause to support aggravating factors as elements of capital eligibility, due process of law and a reliable sentence by the failure to submit all the elements of capital eligibility to the grand jury or to the court for a probable cause determination.

XII. Floyd's conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, trial before an impartial jury, and a reliable sentence because of the trial court's failure to grant a motion to sever counts relating to events at his apartment from those relating to events at the Albertson's store.

XIII. Floyd's death sentence is invalid under state and federal constitutional guarantees of due process of law, equal protection of the laws, and a reliable sentence due to the failure of the Nevada Supreme Court to conduct fair and adequate appellate review.

XIV. Floyd's death sentence is invalid under federal constitutional guarantees of due process, equal protection, and a reliable sentence because the Nevada capital punishment system operates in an arbitrary and capricious manner.

XV. Floyd's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence because execution by lethal injection violates the constitutional prohibition against cruel and unusual punishment.

XVI. Floyd's conviction and sentence violate the constitutional guarantees of due process of law, equal protection of the laws, a reliable sentence, and international law because Floyd's capital trial and sentencing and review on direct appeal were conducted before state judicial officers whose tenure in office was not dependent on good behavior but whose tenure was dependent on popular election.

XVII. Floyd's conviction and death sentence are invalid under the federal constitutional guarantees of due process, equal protection, right to counsel, and a reliable sentencing because the State improperly withheld exculpatory evidence in violation of U.S. Const. Amends. V, VI, VIII, and XIV, and Nev. Const. Art. I, IV.

XVIII. Floyd's conviction and death sentence are invalid under state federal and constitutional guarantees of due process, equal protection, the effective assistance of counsel, a fair tribunal, an impartial jury, and a reliable sentence due to the cumulative errors in the admission of evidence and instructions, gross misconduct by state officials and witnesses, and the

systematic deprivation of Floyd's right to the effective assistance of counsel.

XIX. Floyd's conviction and death sentence are invalid under the federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, a fair tribunal, an impartial jury, and a reliable sentence due to the use of peremptory strikes against women in a discriminatory manner.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes × No _____

(5) Result: Petition dismissed as procedurally barred.

(6) Date of result: April 2, 2008

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Case No. C159897, dismissed petition as procedurally barred on April 2, 2008. Nevada Supreme Court affirmed dismissal on January 19, 2011

(d) As to any third petition, application or motion, give the same information:

(1) Name of court: Federal District Court, District of Nevada

(2) Nature of proceeding: Second Amended Petition for Writ of Habeas Corpus

(3) Grounds raised:

I. Floyd's convictions and death sentence are invalid under federal constitutional guarantees of due process, equal protection, and a reliable sentence due to the ineffective assistance of counsel.

II. Floyd's conviction and death sentence are invalid under federal constitutional guarantees of due process, equal protection, the right to effective assistance of counsel, the right to a fair trial and the right to a reliable sentence because Floyd was deprived of expert assistance to aid in his defense during the guilt and penalty phases of his trial.

III. Floyd's conviction and death sentence are invalid under federal constitutional guarantees of due process, equal protection, a trial before an impartial jury, and a reliable sentence because he is actually innocent of first-degree murder.

IV. Floyd's conviction and death sentence are invalid under federal constitutional guarantees of due process, equal protection, a reliable sentence, an impartial jury, a fair tribunal, and the effective assistance of counsel due to the improper actions of the trial court during

the voir dire proceedings which deprived Floyd of his right to a fair and impartial jury.

V. Floyd's conviction and death sentence are invalid under the federal constitutional guarantees of due process, equal protection, a trial before an impartial jury, and a reliable sentence because of the trial court's failure to grant a change of venue and sequester the jury.

VI. Floyd's conviction and death sentence are invalid under the constitutional guarantees of a trial before an impartial jury, due process, equal protection and a reliable sentence because the trial court failed to properly instruct the jury.

VII. Floyd's conviction and death sentence are invalid under the federal constitutional guarantees of due process, equal protection, trial before an impartial jury, a reliable sentence, and protection from cruel and unusual punishment because Nevada law fails to properly channel death sentences by limiting the scope of victim-impact testimony.

VIII. Floyd was deprived of his federal constitutional rights to communicate with counsel, to the effective

assistance of counsel, due process, equal protection, and a reliable sentence due to the jurors viewing him in prison clothes, handcuffs, and shackles.

IX. Floyd's conviction and death sentence are invalid under federal constitutional guarantees of due process, equal protection, trial before an impartial jury, and a reliable sentence because of the trial court's failure to grant a motion to sever counts relating to events at his apartment from those relating to events at the Albertson's.

X. Floyd's conviction and death sentence are invalid because Floyd's federal constitutional guarantees of due process, equal protection, trial before an impartial jury and a reliable sentence were violated due to severe and pervasive prosecutorial misconduct.

XI. Floyd's death sentence is invalid under the federal constitutional guarantees to freedom from cruel and unusual punishment, due process, equal protection, a reliable sentence, and compliance with international law because execution by lethal injection is unconstitutional under all circumstances, and

specifically because it violates the constitutional prohibition against cruel and unusual punishments.

XII. Floyd's conviction and sentence violate the federal constitutional guarantees of due process, equal protection, a reliable sentence, and international law because Floyd's capital trial, sentencing and review on direct appeal were conducted before state judicial officers whose tenure in office was not dependent on good behavior but was rather dependent on popular election, and who failed to conduct fair and adequate appellate review.

XIII. Floyd was deprived of his federal constitutional right to adequate notice of the charges against him, a pretrial review of probable cause to support aggravating factors as elements of capital eligibility, due process of law and a reliable sentence by the failure to submit all the elements of capital eligibility to the grand jury or to the court for a probable cause determination..

XIV. Floyd's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence because the Nevada

capital punishment system operates in an arbitrary and capricious manner.

XV. Floyd's conviction and death sentence are invalid under the federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, a fair tribunal, an impartial jury, and a reliable sentence due to the use of peremptory strikes against women in a discriminatory manner.

XVI. Floyd's conviction and death sentence are invalid under federal constitutional guarantees of due process, equal protection, a fair tribunal, the effective assistance of counsel, an impartial jury, and a reliable sentence due to the cumulative errors in the admission of evidence and instructions, gross misconduct by state officials and witnesses, and the systematic deprivation of Floyd's right to the effective assistance of counsel.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No ___×___

(5) Result: dismissed as claims were either procedurally barred or invalid on the merits

(6) Date of result: August 20, 2012 (procedural dismissal); September 22, 2014 (merits-based dismissal)

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Case no. 2:06-CV-0471-PMP-CWH; August 20, 2012, September 22, 2014

Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? No If so, identify:

Which of the grounds is the same: N/A

The proceedings in which these grounds were raised: N/A

Briefly explain why you are again raising these grounds. N/A

If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.). *See* Grounds For Relief Claims One through Five below:

(a) Claim One has been raised for the first time in the instant petition. Claim One was not previously raised because the factual basis of the claim did not exist during any of the prior state proceedings. The factual basis for Claim One is based upon new scientific evidence demonstrating the equivalence in adaptive functioning deficits between individuals who suffer from Intellectual

Disability (ID) and those who suffer from fetal alcohol spectrum disorder (FASD) and delayed brain development due to a combination of age and FASD. Based on this new science, Zane Floyd is categorially ineligible for execution and this Court must decline to sign the execution warrant proffered by the State. In the alternative this Court should stay its decision on the execution warrant until Floyd has had the opportunity to receive factual development on its claim of categorial exclusion from the death penalty. Floyd is entitled to a stay until he has been able to fully litigate the instant petition. 176.415(6), NRS 176.486, 176.487(3)-(6) (stay of execution required when necessary to litigate pending habeas petition).

(b) Claim Two has been raised for the first time in the instant petition. The factual basis for the claim is that Floyd has been deprived of an adequate and meaningful opportunity to seek commutation of his death sentence with the Nevada Board of Pardons. The factual basis for Claim Two was not known until the State announced it intended to seek a warrant for Floyd's execution without giving Floyd the opportunity to pursue clemency. Claim Two is accordingly not procedurally defaulted from review by this Court. NRS 176.415(6), NRS 176.486, NRS 176.487(3)-(6) (stay of execution required when necessary to litigate pending habeas petition). Floyd is entitled to a stay until he has been able to fully litigate this Claim. *Id.*

(c) Claim Three has been raised for the first time in the instant petition. The factual basis for the Claim was not available during prior state court proceedings. The State has only just notified Floyd that it intends to effectuate his

execution at the Ely State Prison (ESP), not NSP as was stated in the prior pleadings seeking an execution warrant. Floyd's argument that NRS 176.355(3) requires his execution to occur at NSP was therefore not ripe for review before he received notice of the State's instant proposed execution warrant in its addendum. Claim Three is accordingly not procedurally defaulted from review by this Court. NRS 176.415(6), NRS 176.486, 176.487(3)-(6) (stay of execution required when necessary to litigate pending habeas petition). Floyd is entitled to a stay until he has been able to fully litigate this Claim. *Id.*

(d) Claim Four has been raised for the first time in the instant petition. Claim Four is based on the testimony of Nevada Department of Corrections (NDOC) Director Charles Daniels in federal court on May 6, 2021, which means the factual basis for the claim was not available during prior state proceedings. Daniels's testimony demonstrates that the NDOC is not capable of conducting an execution that complies with the state and federal constitutions during the time period stated in the State's warrant of execution. Thus, Claim Four is not procedurally defaulted from review by this Court. NRS 176.415(6), NRS 176.486, NRS 176.487(3)-(6) (stay of execution required when necessary to litigate pending habeas petition). Floyd is entitled to a stay until he has been able to fully litigate this Claim. *Id.*

(e) Claim Five has been raised for the first time in the instant petition. Claim Five was not previously raised because the legal basis of the claim did not exist during any of the prior state proceedings. Claim Five is based upon

new intervening authority from the Nevada Supreme Court in *Petrocelli v. State*, No. 79069 (Nev. May 21, 2021) (Order of Reversal and Remand). Claim Five is accordingly not procedurally defaulted from review by this Court. 176.415(6), NRS 176.486, 176.487(3)-(6) (stay of execution required when necessary to litigate pending habeas petition). Floyd is entitled to a stay until he has been able to fully litigate this Claim. *Id.*

Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) Yes; *see* question 21(a) and (b) above.

Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes _____ No ___×___

If yes, state what court and the case number:

Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

(f) Pre-trial, Trial, and Sentencing Proceedings:

Curtis Brown (Clark County Public Defender)

Douglas Hedger (Clark County Public Defender)

(b) First Direct Appeal:

Morgan Harris (Clark County Public Defender)

Marcus D. Cooper (Clark County Public Defender)

Robert Miller (Clark County Public Defender)

(c) State Post-Conviction:

David Schieck (Private)

Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack: Yes _ No x

State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

GROUNDS FOR RELIEF

Floyd alleges the following grounds for relief from the judgment of conviction and sentence. References in this Petition to the accompanying exhibits incorporate the contents of the exhibit as if fully set forth herein.

CLAIM ONE: Fetal Alcohol Spectrum Disorder Renders Floyd Ineligible for Execution

Zane Floyd's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, a reliable sentence, and freedom from cruel and/or unusual punishments because his Fetal Alcohol Spectrum Disorder categorically removes him from the class of offenders that may be punished by the death penalty. U.S. Const. amends V, VI, VIII, XIV; Nev. Const. Art. I, § 1, 5, 6, 8; Art. 4, § 21.

SUPPORTING FACTS

Floyd is categorically exempt from the death penalty, as he suffers from Fetal Alcohol Spectrum Disorder (FASD), stemming from prenatal exposure to alcohol. Further, Floyd is exempt from capital punishment because his brain was not fully developed at the time of the offense due to his prenatal exposure to alcohol which would have had an additive and cumulative effect on the brain damage he was born with.

The litany of deficits suffered by Floyd are akin to those identified by the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 318, 320–21 (2002) and *Roper v. Simmons*, 543 U.S. 551, 578 (2005), and require his exclusion from the class of persons eligible for the death penalty. *See also* Scott E. Sundby,

The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling, 23 Wm. & Mary Bill Rts. J. 487, 512–24 (2014). As such, Floyd is ineligible for the death penalty and this Court must set aside his death sentence and decline to sign the State's warrant requesting his execution.

A. FASD is Equivalent to Intellectual Disability

Floyd has been diagnosed with FASD. Ex. 1 at ¶15; Ex. 2 at ¶9, ¶18, ¶24, ¶25. As will be discussed below, Floyd's FASD is a "brain-based, congenial, lifelong, impactful disorder" with corresponding adaptive functioning deficits analogous to "Intellectual Disability (ID) Equivalence," making him ineligible for the death penalty. Ex. 2 at ¶9, ¶32.

1. Brief Summary of FASD

A fetus is susceptible to damage from alcohol exposure throughout the mother's pregnancy. Prenatal alcohol exposure typically causes widespread structural damage throughout the fetus' brain. Ex. 2 at ¶14. Alcohol exposure during pregnancy is a major known cause of birth defects, neurodevelopmental disorders, and learning disabilities. *Id.*

The toxic effects of prenatal alcohol exposure are widespread throughout the brain causing potent irregularities in brain structure that compromise the brain function and impact cognition and behavior. Ex. 2 at ¶14.

FASD in an umbrella term that encompasses all the medical conditions caused by prenatal alcohol exposure described in the diagnostic guidelines

published in 1996 by the Institute of Medicine. Ex. 2 at ¶14 (fetal alcohol syndrome (FAS), partial FAS, alcohol related neurodevelopmental disorder (ARND), and alcohol related birth defects (ARBD)). Under the Diagnostic and Statistical Manual of Mental Disorders 5 (DSM-5), the term FASD also includes the diagnosis for the Central Nervous System (CNS) dysfunction due to prenatal alcohol exposure: neurodevelopmental disorder associated with prenatal alcohol exposure (ND-PAE/FASD). *Id.* This diagnosis requires evidence of prenatal alcohol exposure, at least one impairment in neurocognitive functioning, at least one impairment in self-regulation, and at least two domains of adaptive impairment. *Id.*

Organic brain damage in FASD directly impairs the cognitive skills needed to think adequately and self-regulate one's behavior. Ex. 2 at ¶19. In turn, cognitive dysfunction in FASD impairs adaptive functioning. *Id.* Of the many possible cognitive impairments in FASD, executive dysfunction is the most serious because the executive system controls self-regulation, conscious decision-making, and everyday adaptive behavior. Ex. 2 at ¶14. Prenatal exposure creates hypersensitivity to stress via faulty neurological hard-wiring of the hypothalamic-pituitary-adrenal system which causes chronic overreaction to stressful events. *Id.* But because of the executive functioning deficits, individuals with FASD lack the top-down moderating influence of a fully functioning prefrontal cortex. *Id.* As a result, those with FASD are prone to act out their emotions, particularly in high stress everyday situations. *Id.*

It is not surprising then that a deficient adaptive profile is a universal finding in persons with FASD. The DSM-5 defines adaptive functioning as everyday behavior that meets developmental and sociocultural standards for personal independence and social responsibility. Ex. 2 at ¶14.

2. Floyd Suffers From ND-PAE/FASD

Floyd meets the current diagnosis under the DSM-5 for the CNS impairment in FASD. Ex. 2 at ¶24, ¶25, ¶28.

First, Floyd's mother has a well-documented history of drinking while pregnant with Floyd. Ex. 2 at ¶24.

Second, testing from 1989, 2000, and 2006 demonstrates that Floyd suffers from neurocognitive impairments in four areas (although only one area is needed for a diagnosis): sub-test discrepancies in intellectual testing; complex visuospatial memory deficits; academic learning disabilities; and deficits in visuospatial construction. Ex. 2 at ¶19, ¶24.

Third, Floyd suffers from impairments in three areas of self-regulation (although only one is needed): attention, impulse control, and problem solving. Ex. 2 at ¶24.

Fourth, Floyd suffers from adaptive impairments in four areas (although only two are needed): communication, daily living skills, socialization, and motor coordination. Ex. 2 at ¶18, ¶24.

Further, Floyd's FASD is long standing from childhood and his FASD causes clinically significant distress or impairment in social, occupational, or other

important areas of functioning. Ex. 2 at ¶24. And finally, Floyd's FASD is not better explained by the direct physiological effects of postnatal use of a substance, a general medical condition other than FASD, a genetic condition, or environmental neglect. *Id.*

Floyd also suffers from secondary disabilities from his FASD. According to studies, children with FASD are at a very high risk of negative developmental outcomes. Ex. 2 at ¶22. In Floyd's case, the secondary disabilities include disrupted education, mental health problems, substance abuse, employment problems, and dependent living. *Id.*

3. FASD is ID Equivalent from the Perspective of Floyd's Moral Culpability

FASD and ID are both classified by DSM-5 as neurodevelopmental disorders meaning both disorders typically: (1) manifest early in development, often before grade school; (2) are characterized by developmental deficits that produce impairments of personal, social, academic, or occupational functioning; and (3) involve a range of developmental deficits that vary from the very specific limitations of learning or control of executive functions to global impairments of social skills or intelligence. Ex. 2 at ¶26.

DSM-5 diagnoses can be classified by disability severity. One way to measure disability severity is by definitional complexity: the number of domains that must be impaired under the DSM-5 to meet diagnostic criteria. ID and FASD are similar in that both require five diagnostic elements: neurocognitive deficit (executive

function); adaptive function deficits; deficits that significantly interfere with functioning; and deficits that constitute a lifelong disorder. Ex. 2 at ¶30. Further, the adaptive functioning component is a more stringent requirement for FASD (impairments in two categories) while ID only requires one impaired adaptive domain. *Id.*

Disability severity also can be compared in terms of how extensively a disorder typically impairs functional capacity. FASD impairs nineteen domains of functional capacity while ID impairs twenty-one. Thus, both are similar in terms of widespread functional deficiency in both cognition and adaptive functioning. Ex. 2 at ¶30.

Another way of looking at disability severity is the risk of adverse developmental outcomes, including secondary disabilities. Individuals with FASD are at a much greater risk of a negative developmental trajectory than those with ID: FASD has negative developmental outcomes in nineteen areas while ID has negative developmental outcomes in only nine areas. Ex. 2 at ¶30. ID is a mild severity disability compared to FASD in terms of negative life course outcomes. *Id.* However, most people with FASD and ID cannot live independently in society as adults. *Id.*

Whether measured by definitional complexity, functional capacity, or outcome risk, FASD is equal to and in some cases a more severe disorder than ID. Thus, FASD is deserving of being viewed under the category of "ID Equivalence." Ex. 2 at ¶31.

Both ID and FASD stem from permanent structural brain damage. Ex. 2 at ¶31. Typically, ID is diagnosed by a single provider (mental health provider or pediatrician) and requires relatively minimal testing (IQ and adaptive assessment). *Id.* FASD on the other hand is diagnosed by a multidisciplinary team comprised of a neuropsychologist, adaptive functioning specialist, and a medical doctor to access physical indicia of FASD. Thus, FASD requires more resources to diagnose. *Id.*

While IQ distinguishes ID from FASD in the majority of FASD individuals, executive and everyday functioning in both conditions tends to be identical. Significant discrepancies in IQ domains are seen frequently in persons with FASD, as is the case here with Floyd, which makes full scale IQ an inaccurate way to classify functional deficiency in FASD. Ex. 2 at ¶19, ¶31. Full scale IQ also has become less important in ID, according to the DSM-5, as "intellectual deficiency now is defined as a broad array of mixed impairments that mostly involve executive dysfunction." *Id.* Further, executive functioning tends to be universally impaired in FASD as well as ID. *Id.*

Both ID and FASD have an adaptive impairment diagnostic criteria in the DSM-5 (one deficient domain for ID and two deficient domains for FASD), making individuals with FASD and ID indistinguishable in terms of everyday behavior. Ex. 2 at ¶31.

Of particular interest is that FASD is the leading cause of ID and is misdiagnosed or undiagnosed more than ID. Ex. 2 at ¶31. In children with FASD, average or low-average IQs in the context of learning disabilities, self-regulation

problems, social deficits, and interpersonal difficulties often lead teachers and providers to attribute the difficulties to parenting deficiency. *Id.* Thus FASD is very much a hidden disability. *Id.*

Symptom manifestation in both FASD and ID is lifelong and permanent. Ex. 2 at ¶31. With regard to ID, symptom course remains relatively stable over the developmental years into adulthood, but FASD symptoms become more complex and debilitating, leading to greater adaptive severity into adulthood. *Id.*

Life expectancy in males in the general population is seventy-six years. Ex. 2 at ¶31. For males with ID, life expectancy is seventy-four years and it is only thirty-four years with FASD. Thus, FASD has a greatly increased risk of mortality compared to ID. *Id.*

4. Summary

Floyd's FASD diagnosis under the DSM-5, ND-PAE, is a brain-based, life-long impactful disorder deserving of the classification "ID Equivalence." Regardless of how severity is measured—definitional complexity, diagnostic protocol, functional capacity, risk of negative outcomes, cognitive dysfunction, adaptive dysfunction, comorbidity, likelihood of misdiagnosis, lifetime course, or mortality—Floyd's FASD is similar to ID with broad ramifications that have affected all important functional domains in his life. Ex. 2 at ¶32. Thus, like the categorical exclusion of an individual with ID to capital punishment, *Atkins*, 536 U.S. at 320–21,[1] here, Floyd's FASD too should make him ineligible for the death penalty. Because of his FASD, Floyd's execution would constitute cruel or unusual punishment.

The execution of a person such as Floyd who suffers from FASD is prejudicial per se, and no additional showing of prejudice is required. Therefore, this Court must permanently set aside his death sentence and refuse to sign the warrant for his execution that has been sought by the State. Floyd's case should therefore be set for resentencing where the death penalty is not a sentencing option.

[1] The *Atkins* Court found that the consensus against executing individuals with intellectual disability "unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Atkins*, 536 U.S. at 317.

B. Floyd is Ineligible for Execution Because of His Age at the Time of the Incident

In *Roper v. Simmons*, 543 U.S. 551, 578 (2005), the Supreme Court established a categorical rule forbidding the execution of offenders under the age of eighteen when their crimes were committed. The Court relied in large part on three "general differences" between juveniles under eighteen and adults, "demonstrat[ing] that juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569. Pointing to scientific and sociological studies, the Court noted that juveniles exhibit a "'lack of maturity and an underdeveloped sense of responsibility,'" which "'often result in impetuous and ill-considered actions and decisions.'" *Id.*

The Court in *Roper* also recognized juveniles are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* Finally, the Court explained "the character of a juvenile is not as well formed as that of an adult." *Id.* at 570 (personality traits of juveniles more transitory, less fixed). Noting "the death penalty is reserved for a narrow category of crimes and offenders," the Court concluded that juveniles under the age of eighteen simply "cannot with reliability be classified among the worst offenders." *Id.* at 568-69.

In addition to the lesser culpability of juvenile offenders, the Court adopted a categorical exemption from the death penalty because the status as a juvenile prevents the finder of fact from giving full effect to mitigation evidence. *See Roper*, 543 U.S. at 573 ("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments

based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."). The Eighth Amendment requires a reliable and individualized decision in capital cases. *See* Lockett *v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (Burger, C.J., Stewart, Powell, Stevens, JJ.). This individualized decision precludes the introduction of factors that create "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* Only by ensuring that the sentencer considers and gives effect to a capital defendant's mitigation evidence can a court ensure the Eighth Amendment's right to a reliable sentencing determination. *Id.*

Extending *Roper* to Floyd, who committed the offense at age twenty-three, is required under the Eighth and Fourteenth Amendments. Indeed, *Roper* itself was an extension of *Thompson v. Oklahoma*, which precluded the execution of offenders under the age of sixteen. *See Roper*, 543 U.S. at 561-62 (discussing *Thompson v. Oklahoma*, 487 U.S. 815 (1988)). Although *Roper* drew a cut-off at age eighteen, the rationale of *Roper* extends to individuals age twenty-three because the human brain continues to develop beyond the age of eighteen. Even *Roper* recognized "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Id.* at 574. This reasoning is particularly applicable to individuals like Floyd whose cognitive functioning is actually below that of their chronological age. Ex. 2 at ¶41.

Born with widespread brain damage, people with FASD exhibit abnormal and delayed brain maturation across the developmental years. Ex. 2 at ¶38. Studies have found that significant maturation alterations and delays in the prefrontal cortex and its microstructure in children, adolescents, and adults with prenatal alcohol exposure compared to normally developing age peers. *Id.* Compared with normal changes in brain structure during adolescence that improve speed and efficiency of neurochemical communication, research finds that individuals with prenatal alcohol exposure show: (1) blunted volume changes in grey matter in adolescence, indicating compromised pruning and diminished plasticity in the cerebral cortex, as well as (2) delayed white matter myelination. *Id.* Together these two brain development abnormalities in individuals with prenatal alcohol exposure significantly impair global network efficiency, speed of information processing, and executive self-regulation. *Id.*

Other studies show the following with respect to individuals exposed to prenatal exposure: normal processes of brain maturation were significantly delayed or disrupted in children and adolescents; smaller volumes in structure throughout the brain, with significantly different trajectories of brain activation in visuospatial attention and working memory tasks; smaller total brain volume as well as smaller volume of both white and grey and white matter in specific cortical regions; alternations in the shape and volume of the corpus callosum, as well as small volume in the basal ganglia and hippocampi; reduced functional connectivity between cortical and deep grey matter structures; impaired white matter integrity

in communication tracts throughout the brain throughout development; and abnormalities in white matter pathways important in self-regulation. Ex. 2 at ¶¶39-40.[2]

Given the normally-developing adolescent brain does not have mature executive control capacity until at least the age of twenty-five and brain development in young adults with FASD lag many years behind rates seen in neurotypical age peers, it is likely that Floyd's brain was not fully developed at the time of the offense due to his ND-PAE/FASD, which would have had an additive and cumulative effect on the brain damage he was born with. Ex. 2 at ¶41. Because Floyd was twenty-three at the time of the offenses, he is categorically exempt from the death penalty under the rational of *Roper*.

Allowing a person like Floyd who is categorically exempt from the death penalty to remain on death row is prejudicial per se and would constitute cruel or unusual punishment. Floyds' death sentence must be vacated and permanently set aside.

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[2] *See also* Kevin J. Holt, *The Inbetweeners: Standardizing Juvenileness and Recognizing Emerging Adulthood for Sentencing Purposes After Miller*, 92 Wash. U.L. Rev. 1393, 1396 (2015) (neurological research and social science conclude that cognitive abilities are not fully developed until around age twenty-five; "arbitrary and inconsistent" to choose age eighteen as age offender subject to death penalty); Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 Hofstra L. Rev. 13, 38-39 (2009) (Court's decision to place cutoff at age eighteen in *Roper* was inconsistent and arbitrary in light of child development research).

C. Cruel or Unusual Punishment

The Nevada Supreme Court has long recognized its ability to find greater constitutional protections under the state constitution than under the federal constitution. *See, e.g.*, *State v. Kincade*, 129 Nev. 953, 956, 317 P.3d 206, 208 (2013) ("states are permitted to provide broader protections and rights than provided by the U.S. Constitution.").[3] Here, especially, there is cause to construe the Nevada Constitution's provision more broadly than its federal counterpart: the Nevada Constitution independently prohibits cruel punishments and unusual punishments. *Compare* Nev. Const. art. 1, § 6 (prohibiting "cruel or unusual" punishments) *with*

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[3] *See also Thomas v. Eighth Jud. Dist. Ct.*, 133 Nev. 468, 469, 402 P.3d 619, 622 (2017); *Wilson v. State*, 123 Nev. 587, 595, 170 P.3d 975, 980 (2007); *State v. Bayard*, 119 Nev. 241, 246, 71 P.3d 498, 502 (2003); *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 414, 23 P.3d 243, 250 (2001); *State v. Harnisch*, 114 Nev. 225, 228–29, 954 P.2d 1180, 1182–83 (1998); *Zale-Las Vegas, Inc. v. Bulova Watch Co.*, 80 Nev. 483, 501–02, 396 P.2d 683, 693 (1964) ("We are under no compulsion to follow decisions of the United States Supreme Court which considers such acts in connection with the federal constitution."); Amicus Br. of Am. Civil Liberties Union of Nev. & Am. Civil Liberties Union Found. [hereinafter ACLU Br.] at 2–11 (Oct. 24, 2019) ("history reflects a repeated recognition that the Nevada Constitution, written to address the concerns of Nevada citizens and tailored to Nevada's unique regional location, is a source of protection for individual rights that is independent of and supplemental to the protections provided by the Federal Constitution.").

Indeed, federal judges have emphasized that state constitutions may offer broader protections than the federal constitution. Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 16 (2018) ("State courts have authority to construe their own constitutional provisions however they wish. Nothing compels the state courts to imitate federal interpretations of the liberty and property guarantees found in the U.S. Constitution when it comes to the rights guarantees found in their own constitutions, even guarantees that match the federal ones letter for letter."); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.").

U.S. Const. am. VIII (prohibiting "cruel *and* unusual" punishments); *Anderson v. State*, 109 Nev. 1129, 1134, 865 P.2d 318, 321 (1993).[4]

Thus, even if Floyd does not prevail under the Federal Constitution, he does so under the State Constitution.

[4] *See also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* [hereinafter Scalia & Garner, *Reading Law*] 116, 119 (2012) (describing Conjunctive/Disjunctive Canon and "The Basic Prohibition": With the conjunctive list, the listed things are individually permitted but cumulatively prohibited. With the disjunctive list, none of the listed things is allowed."); *id.* at 116 ("Hence in the well-known constitutional phrase *cruel and unusual punishments*, the *and* signals that cruelty or unusualness alone does not run afoul of the clause . . . .") (italics in original); Br. of Amici Curiae Nev. Law Professors [hereinafter Nev. Law Prof. Br.], at 38–41 (Oct. 3, 2019); ACLU Br. at 11–20.

CLAIM TWO: Deprivation of Opportunity to Seek Clemency

Zane Floyd's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, a reliable sentence, and freedom from cruel and/or unusual punishments because he has been deprived of an opportunity to seek clemency before the Pardons Board. U.S. Const. amends V, VI, VIII, XIV; Nev. Const. Art. I, § 1, 5, 6, 8; Art. 4, § 21; 5, § 13, 14; NRS 176.425.

SUPPORTING FACTS

Article 5, Section 14(2) of the Nevada Constitution allows the Board of Pardons to commute Zane Floyd's death sentence to a sentence of life without the possibility of parole. For Floyd to be able to vindicate his right to seek commutation of his sentence he must be afforded a meaningful opportunity to investigate and present his case for clemency to the Pardons Board.

Floyd has been deprived of the opportunity to seek commutation of his death sentence. Floyd submitted his materials to the State of Nevada Board of Pardons (the Board) on May 27, 2021 to meet the deadline to be placed on the September 21, 2021 Board agenda. However, the State is seeking to execute Floyd in late July before Floyd can appear and present his case before the Board. Thus, proceeding with Floyd's execution now before he has had an opportunity to be heard by the Board violates his state and federal rights to due process of law.

"It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible." *Herrera v. Collins*, 506 U.S. 390, 415 (1993). The United States Supreme Court has held that "some minimal procedural safeguards apply to clemency proceedings." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289

(1998) (O'Connor, J., concurring). "Executive clemency [provides] the 'fail safe' in our criminal justice system," and is never more important than when the request for clemency involves an impending execution." *Herrera*, 506 U.S. at 415 (quoting K. Moore, Pardons: Justice, Mercy, and the Public Interest 131 (1989)).

"[T]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S 319, 333 (1976) (internal quotation marks omitted). *Mathews* identifies three factors courts should consider in evaluating the requirements of due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

The Supreme Court has recognized that "process is not an end in itself' and "its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983).

Floyd's interest in seeking clemency is a compelling interest as it is a crucial fail-safe mechanism to guard against arbitrary and capricious state action. The deprivation of Floyd's life through a state-sanctioned execution is irrevocable. And he has not received even minimal procedural due process protections given that the Pardons Board's next quarterly meeting is not scheduled to occur next until September 21, 2021.

The denial of an opportunity to seek clemency also violates Floyd's constitutional right to equal protection under the laws. By scheduling Floyd's execution before he can appear before the Board, the state arbitrarily abridges the process by which Floyd's petition for clemency may be pursued.

By scheduling Floyd's execution before he can appear before the Board, the state deprives Floyd of the process historically afforded to death row prisoners to pursue clemency. The Fourteenth Amendment's guarantee of equal protection is violated where "discrimination reflects no policy, but simply arbitrary and capricious action." *Baker v. Carr*, 369 U.S. 186, 226 (1962). "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Procedural due process and substantive due process are separate and independent mandates of the Fourteenth Amendment. *Brown v. Supreme Court of Nevada*, 476 F. Supp. 86, 89 (D. Nev. 1979). Denial of adequate process, applied unevenly, has been recognized as a cognizable claim under the Fourteenth Amendment. *See, e.g., Duncan v. State of LA.*, 391 U.S. 145, 148 (1968); *Daniel v. State*, 119 Nev. 498, 517, 78 P.3d 890, 903 (2003).

Floyd will be denied equal protection as he has not received the same process that other death row prisoners have been afforded to pursue clemency. And he will be deprived of due process should his execution occur before he has that opportunity. The deprivation of an opportunity to seek clemency before the Board is prejudicial per se. In the alternative, the State cannot demonstrate beyond a

reasonable doubt that the deprivation of an opportunity to seek clemency is harmless.

CLAIM THREE: Current Law Operates to Prohibit Floyd's Execution by Lethal Injection at Ely State Prison

Zane Floyd's death sentence is invalid under state law and the state and federal constitutional guarantees of due process, equal protection, and freedom from cruel and/or unusual punishment as current law in the State of Nevada precludes the execution from occurring at the Ely State Prison. U.S. Const. amend. V, VIII, XIV; Nev. Const. Art. I, §§ 6, 8(2), Art. IV, § 21; NRS 176.355(3).

SUPPORTING FACTS

Floyd cannot be executed by lethal injection at Ely State Prison (ESP), as NRS 176.355(3) permits executions to only occur at Nevada State Prison (NSP).

The State has requested a hearing wherein it intends to obtain an execution warrant from this Court. Initially, the warrant proffered by the State was compliant with state law as it sought Floyd's execution at NSP, which it referenced correctly as the state prison. However, now the State just filed a pleading on May 10, 2021, where it argues that it made an error and that the location of the execution should have been ESP. While NRS 200.030 permits executions of death sentenced inmates, NRS 176.355 prescribes the manner in which those executions must be carried out. NRS 176.355(3) expressly provides that "[t]he execution must take place at *the* state prison." (Emphasis added). Although an execution chamber exists at ESP, the state prison actually referenced in the statute is the now decommissioned Nevada State Prison, in Carson City, Nevada. Accordingly, because the State intends to use the death chamber at ESP as the execution location Floyd's execution is precluded

by current law and this Court must decline to sign the State's order and warrant requesting his execution at that location.

NRS 176.355 is Nevada's execution statute. It prescribes the method and manner by which lethal injection executions may be carried out within the state, including execution locations. Under NRS 176.355(3), all executions "*must* take place at *the* state prison." *See* NRS 176.355(3) (emphasis added). This provision clearly requires that any execution in Nevada occur at Nevada State Prison, located in Carson City. In constructing NRS 176.355(3), the Legislature purposefully used the definite article "the," denoting its intent to limit executions to a singular location, NSP. *See Freytag v. Commissioner*, 501 U.S. 868, 902 (1991) (Scalia, J., concurring) (use of the definite article in the Constitution's conferral of appointment authority on "the Courts of Law" obviously narrows the class of eligible 'Courts of Law' to those courts of law envisioned by the Constitution"); *Pineda v. Bank of America, N.A.*, 241 P.3d 870, 875 (Cal. 2010) ("Use of the indefinite articles "a" or "an" signals a general reference, while use of the definite article 'the' (or 'these' in the instance of plural nouns) refers to a specific person, place, or thing.").

Moreover, Nevada State Prison was the only "state prison" in existence at the time of NRS 176.355's enactment. ESP and High Desert State Prison were constructed years later and as such could not have been intended to act as "the state prison" referenced in NRS 176.355(3). Although Nevada State Prison is currently decommissioned and other state prisons have been constructed, this fact cannot override the original intent of the Legislature. *See* Antonin Scalia & Bryan

A. Garner, Reading Law: The Interpretation of Legal Texts 135 (2012) (when a known edifice is cited in a statute, the subsequent construction of an edifice that also falls under the statute does not change the original meaning). Thus, this Court must apply NRS 176.355(3) as it is plainly written and cannot amend the statute to include additional state prisons, as this is a task left solely to the Legislature.

Allowing Floyd's execution to occur at ESP, despite NRS 176.355's explicit restriction constitutes a violation of current Nevada law as well as the state and federal constitutions. As a matter of due process, the statute creates a liberty interest in Floyd's favor that cannot be disregarded. Similarly, it violates equal protection principles for Floyd to be treated dissimilarly to similarly situated condemned inmates. Finally, an unlawful execution violates Floyd's right to be free from cruel and/or unusual punishments. As such, this Court must refuse to sign the warrant for his execution that has been sought by the State and set an evidentiary hearing to determine whether any valid execution could be conducted under current law at NSP.

Permitting Floyd's execution to occur in an unlawful manner is prejudicial per se, and no further showing of prejudice is required.

CLAIM FOUR: Floyd's Execution Would Result in Cruel and Unusual Punishment

Zane Floyd's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, a reliable sentence, and freedom from cruel and unusual punishments because the circumstances surrounding his upcoming execution pose a substantial and unjustified risk of causing cruel pain and suffering, which constitutes cruel and/or unusual punishment. U.S. Const. amends V, VI, VIII, XIV; Nev. Const. Art. I, § 1, 5, 6, 8; Art. 4, § 21.

SUPPORTING FACTS

The circumstances surrounding Floyd's upcoming execution constitute cruel and/or unusual punishment in violation of the state and federal constitutions. The last execution in the State of Nevada occurred in 2006, and it was conducted using a lethal injection protocol consisting of sodium thiopental as the first drug in the protocol. Sodium thiopental is a fast-acting barbiturate medication that was used to induce anesthesia so the condemned inmate was insensate and thus unaware when the lethal drugs were administered. Sodium thiopental was the standard drug used in lethal injection protocols across the nation since lethal injection became a method of execution in the 1970s. Sodium thiopental is currently unavailable for use in executions.

NDOC does not have, and does not intend to use, an anesthetic agent that reliably produces unawareness before the lethal drugs are administered. Instead, NDOC will likely use a drug that is experimental precisely because it has not previously been used in an execution and thus has not yet been placed on a list of banned drugs that cannot be purchased in normal commerce by a prison pharmacy.

The choice of a drug based upon what can be obtained through subterfuge rather than on what can reliably induce anesthesia carries a substantial risk of causing cruel pain and suffering.

Floyd's execution is also unconstitutional because NDOC is not prepared to conduct his execution in a manner that complies with constitutional requirements. On May 6, 2021, NDOC Director Charles Daniels testified in federal court regarding the department's lack of preparedness to conduct an execution in the time frame currently sought by the State. Daniels testified he was "still in the process of looking at the various drugs to be used" in NDOC's execution protocol. Ex. 4 at 40, *id.* at 55 (Transcript of Evidentiary Hearing held on May 6, 2021). He repeatedly stated the need to consult with the Chief Medical Officer (Ishan Azzam) and other individuals regarding the execution protocol. *Id.* at 40, 43-44, 48, 76.[5] He also needed to ensure the drugs chosen were available to NDOC. *Id.* at 42. Daniels testified NDOC's pharmacist would order the drugs and do research for him about them. *Id.* at 47-48.

Daniels acknowledged the need to "run through our protocols step-by-step ensuring that we stay within the confines of what we've actually drafted." *Id.* at 41. He referenced the need to "identify any particular issues" that arose during test runs. *Id.* Daniels did not know when the execution protocol would be finalized, but he testified approximately 90 to 120 days were needed. *Id.* at 43-44.

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[5] Daniels later testified he had already met with Dr. Azzam, *id.* at 52, but said he could not recall the date of the meeting. *Id.* at 53. Daniels stated that he expected to meet again with Azzam when new drugs became available. *Id.* at 55-56. That meeting has not currently been scheduled. *Id.*

Director Daniels also acknowledged he would comply with a state court warrant for Floyd's execution, even if it is scheduled to occur in approximately four weeks. Ex. 4 at 45-46, 49-51, 70, 72. Daniels testified his preference would be to "go with the longer date" if given a choice. *Id.* at 74.

The State's insistence in seeking an order for Floyd's execution before NDOC is prepared to conduct one carries a substantial risk of causing cruel pain and suffering. Daniels' testimony, taken at face value, shows NDOC is at the beginning of its deliberative process because he still has not selected the drugs to be used in the execution. If that is true, then important issues such as dosage amounts, drug interactions, arrangements for purchase, preparation of the drugs, test runs on the protocol, and identification of issues that need correction during test runs has not yet occurred. Given the Director's personal preference for more time and NDOC's agreement in federal court to a scheduling order setting forth a timeline of approximately 90 days (from disclosure of the execution protocol through the dispositive motions deadline), *Floyd v. Daniels*, Case No. 3:21-cv-00176-RB-CLB, Rule 26(f) Conference Report at 3-4 (filed May 2, 2021), ECF No. 33 at 3-4, it follows that the State cannot insist the execution warrant be effectuated before that time, including the State's new date of late July, 2021.

The State also cannot perform a constitutional execution at the Nevada State Prison, which is the location where state law designates the execution must occur. Floyd incorporates the allegations of Claim Three as if fully set forth herein. The warrant submitted by the State designates that Floyd's execution will be performed

at NSP, but the Director testified on May 6, 2021, that the execution would be performed at the ESP, as does the State's latest filing. Ex. 4 at 56; Addendum to State's Motion for the Court to Issue Second Supplemental Order of Execution and Second Supplemental Warrant of Execution at 3 (filed May 10, 2021). However, the State argues, "Defendant cites to no statute that requires NDOC to issue assurances of the manner and method or place of execution *before* this Court can issue the Order of Execution." Reply to Opposition to Motion for the Court to Issue Second Supplemental Order of Execution and Second Supplemental Warrant of Execution at 4 (filed May 5, 2021). What is clear is that NDOC is not capable of conducting an execution at the closed and abandoned prison at NSP. Floyd incorporates his allegations in Section II(C)(2, 3) of his Opposition to the State's motion to issue an order and warrant of execution as if fully set forth herein.

NDOC's inability to perform a constitutional execution during the time frame contemplated by the State's order and warrant of execution invalidates Floyd's death sentence. Under state law, executions must be performed using lethal injection and the execution must occur at the Nevada State Prison. The inability to conduct a constitutional execution using those means at the required location means the execution cannot go forward. Moreover, the signing of unenforceable execution orders and the setting of multiple execution dates constitutes a mock execution which violates the constitution by causing needless psychological injury to Floyd. These constitutional violations are prejudicial per se.

CLAIM FIVE: Errors in Penalty Verdict Form

Zane Floyd's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, a reliable sentence, and a fair and impartial jury, because the verdict forms given to the jury for penalty deliberations contained misleading language and an erroneous standard for consideration of the life sentencing options. U.S. Const. amends V, VI, VIII, XIV; Nev. Const. Art. I, § 1, 5, 6, 8; Art. 4, § 21.

SUPPORTING FACTS

The general verdict forms and instructions used in Floyd's case misled jurors by incorrectly requiring mitigating circumstances to outweigh aggravating circumstances in order to impose a life sentence. As explained below, life sentence options were improperly removed from the jury's consideration upon finding the existence of the aggravating circumstances. By stating that the jury's ability to consider a life sentence was dependent upon the weighing of aggravating and mitigating circumstances, the verdict forms and instructions also prevented the jury from considering the life sentencing options. These errors were prejudicial as a jury in Nevada is allowed to impose a life sentence under any circumstances, including those where mitigation is equal to, or outweighed by, statutory aggravating circumstances.

The court provided the jury with two forms for deliberation: a general verdict form, to determine penalty, and a special verdict form, which included a list of

aggravating factors.[6] The jury used both forms. The general verdict form included the following section:

> [H]aving found that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances impose a sentence of,
>
> _____ A definite term of 100 years imprisonment, with eligibility for parole beginning when a minimum of 40 years has served,
>
> _____ Life in Nevada State Prison with the possibility of parole, with eligibility for parole beginning when a minimum of 40 years has been served.
>
> _____ Life in Nevada State Prison without the possibility of parole.
>
> _____ Death.

Ex. 5.

A substantial problem exists with the general verdict form, thus rendering Floyd's death sentence invalid. The verdict form lists all life sentencing options with language stating that each of the sentences can only be imposed if "the aggravating circumstances outweigh any mitigating circumstance." *Id.* This is error, as only death sentences require a finding "that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances." NRS 175.554(3). When a verdict form lists life sentencing options and requires jurors apply a death sentencing standard in choosing one of those options, it is not only error, but plain error which warrants reversal. Ex. 7 (*Petrocelli v. State*, No. 79069, 2021 WL

[6] Exs. 5, 6.

2073794 (May 21, 2021)) (Order of Reversal and Remand) (reversing death sentence after concluding that penalty verdict forms contained erroneous language requiring the jury to weigh aggravating and mitigating circumstances for life sentencing options).

Using this error-filled verdict form—which did not allow the jury to render a verdict for a life sentence without first finding mitigation outweighed aggravating circumstances, conflated death eligibility with death worthiness, and was written in a way that was prejudicial per se to Floyd, and the State cannot demonstrate beyond a reasonable doubt that the error is harmless. Floyd therefore is entitled to a new penalty hearing.

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RELIEF REQUESTED

For the foregoing reasons, Zane Floyd respectfully requests that this Court:

1. Grant his petition as to Claim One and permanently set aside his death sentence and set the case for a non-capital sentencing hearing. In the alternative, Mr. Floyd requests an evidentiary hearing to demonstrate his reduced culpability warrants a categorical exclusion from the death penalty, followed by the permanent setting aside of his death sentence and the scheduling of a non-capital sentencing hearing:

2. Grant his petition as to Claim Two and decline to sign an execution warrant proffered by the State until Mr. Floyd has had an opportunity to seek clemency before the Pardons Board. In the alternative, grant a stay of Mr. Floyd's execution warrant until he has had an opportunity to seek clemency before the Pardons Board. In the alternative, set aside Mr. Floyd's death sentence.

3. Grant his petition as to Claim Three and decline to sign an execution warrant proffered by the State for Mr. Floyd's execution at Ely State Prison. In the alternative, grant Mr. Floyd's motion to strike the motion for execution warrant sought for Mr. Floyd's execution at ESP.

4. Grant his petition as to Claim Four and decline to sign an execution warrant proffered by the State until Mr. Floyd's execution can be constitutionally carried out.

5. Grant his petition as to Claim Five and set aside his death sentence and set the case for a new penalty hearing.

DATED this 3rd day of June, 2021.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

/s/ Jocelyn S. Murphy
JOCELYN S. MURPHY
Assistant Federal Public Defender

VERIFICATION

Under penalty of perjury, the undersigned declares that he is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge except as to those matters stated on information and belief and as to such matters he believes them to be true. Petitioner personally authorized undersigned counsel to commence this action.

DATED this 3rd day of June, 2021.

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with EDCR 8.04(c), the undersigned hereby certifies that on this 3rd day of June 2021, a true and correct copy of the foregoing SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION), was filed electronically with the Eighth Judicial District Court. Service of the foregoing document shall be made via electronic service to:

Alexander Chen
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

/s/ Sara Jelinek
An Employee of the Federal Public Defenders Office, District of Nevada

EXHS

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Attorneys for Zane Michael Floyd

DISTRICT COURT
CLARK COUNTY, NEVADA

ZANE MICHAEL FLOYD, Petitioner, v. WILLIAM GITTERE, Warden, Ely State Prison; AARON FORD; Attorney General, State of Nevada, Respondents.	Case No. A-21-832952-W Dept. No. 17 **EXHIBITS IN SUPPORT OF SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** **(DEATH PENALTY CASE)** **EXECUTION SOUGHT BY THE STATE FOR THE WEEK OF JULY 26, 2021**

Exhibit	Document
1	Declaration of Dr. Natalie Novick Brown, dated Oct. 17, 2006
2	Declaration of Dr. Natalie Novick Brown, dated Feb. 24, 2021
3	Declaration of Herbert Duzant, dated Apr. 9, 2021

Exhibit	Document
4	*Floyd v. Charles Daniels, et al.*, Case No. 3:32-cv-00176-RFB-CLB, United States District Court of Nevada, Transcript of Evidentiary Hearing held on May 6, 2021 (Testimony of Charles Daniels)
5	*State v. Floyd,* Case No. C159897, District Court of Clark County, Nevada, Verdict Forms II-V, filed July 21, 2000
6	*State v. Floyd,* Case No. C159897, District Court of Clark County, Nevada, Special Verdict Forms II-V, filed July 21, 2000
7	*Petrocelli v. State*, Case No. 79069, Supreme Court of the State of Nevada, Order of Reversal and Remand, filed May 21, 2021.

DATED this 3rd day of June, 2021.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

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Alexander Chen
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

/s/ Sara Jelinek
An Employee of the Federal Public Defenders Office, District of Nevada

EXHIBIT 1

EXHIBIT 1

DECLARATION OF NATALIE NOVICK BROWN, Ph.D.

I, Natalie Novick Brown, know and believe:

1. I practice as a psychologist and am licensed in Washington State and Florida. I also am a certified Evaluator for the Department of Corrections and Division of Developmental Disabilities in Washington State.

2. I specialize in the evaluation and treatment of individuals with fetal alcohol impairment. My training in this field began in 1994 when I accepted a postdoctoral fellowship with Dr. Ann Streissguth at the University of Washington. Dr. Streissguth is a pioneer researcher in Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE), which are now referred to as "Fetal Alcohol Spectrum Disorders," or FASD. Up until her retirement earlier this year, Dr. Streissguth was the director of the University's Fetal Alcohol and Drug Unit as well as a prolific research scientist and highly respected international expert in the FASD field. After completing a year of training and research in 1995, I began evaluating and treating youth and adults with FASD or suspected FASD. I estimate that since 1995, I have evaluated and treated approximately 300 children and adults affected by prenatal alcohol exposure. In addition, I currently hold a faculty position at the University of Washington as Clinical Assistant Professor in the Fetal Alcohol and Drug Unit, Department of Psychiatry and Behavioral Medicine. In this position, I consult with staff at the Fetal Alcohol and Drug Unit and screen for fetal alcohol impairment in adults and juveniles referred by the Drug and Mental Health Courts in King County (Seattle), Washington. I also evaluate and diagnose individuals referred by the Division of Developmental Disabilities who may have fetal alcohol impairment. I currently provide individual therapy to a caseload of fetal alcohol impaired youth in an effort to prevent adverse life outcomes and to a caseload of adults with FASD, many of whom are sex offenders in Washington State's Community Protection Program. Over the last 12 years, I have published articles and lectured on the behavioral and developmental effects of prenatal alcohol exposure. In the course of this work, I have attended diagnostic trainings and reviewed many medical evaluations involving FASD diagnoses and am quite familiar with the diagnostic criteria and process of evaluation. Thus, I have developed expertise in FASD through a combination of study, practice, and research.

3. I was retained by the Las Vegas Federal Public Defender, Capital Habeas Unit, to examine records related to Zane Floyd's case. I was asked specifically to determine if he met criteria for an FASD diagnosis, address how the condition might impact a child's functioning in general, and explain how this disorder likely affected Zane Floyd's functioning both as a child and as an adult.

4. I reviewed trial testimony from Tracie Carter, Robert Jay Hall, Zach Emenegger, Dr. Mortillaro, Dr. Dougherty, Dr. Roitman, Jorge L. Abreu, and Minoru Aoki. I also reviewed Voluntary Statements from Zane Floyd and Paulina Atomah and the trial allocution of Zane Floyd.

5. I reviewed summaries of medical interventions involving Valerie Floyd's consumption of alcohol and her drug-related activities. I reviewed Zane Floyd's school records from Princess Ann Elementary, Virginia Beach, Virginia; Boulder Bluff Elementary School, Goose Creek, South Carolina; Marrington Elementary, Charleston, South Carolina; Ellicott Elementary, Ellicott School District, Calhan, Colorado; McClelland Center for Child Study, Pueblo, Colorado; Haaff School, Pueblo, Colorado; various schools in the Clark County School District, Las Vegas, Nevada; Faith Lutheran High School, Las Vegas, Nevada; and records from the Community College of Southern Nevada. I reviewed military records from Zane Floyd's time in the Marines.

6. I reviewed evaluations conducted in 2000 along with the raw data from Frank E. Paul, Ph.D.; David L. Schmidt, Ph.D.; and Edward J. Dougherty, Ed.D. I reviewed an evaluation and raw data from tests conducted in 1989 by Maria J.P. Cardle, Ph.D. I reviewed reports published in 1999 and 2000 by Dr. Jacob O. Camp, M.D. I reviewed the 2000 report by Dr. Thomas F. Kinsora, Ph.D., who critiqued Dr. Schmidt's and Dr. Cardle's reports. I reviewed Dr. Jonathan Mack's 2006 findings of organic brain damage during his examination of Zane Floyd. I also reviewed schoolwork and over 50 photographs of Zane Floyd as an infant and young child.

7. FASD is a permanent birth defect caused by maternal consumption of alcohol during pregnancy. Alcohol is a teratogen that inhibits and disrupts fetal development by causing structural and functional damage to developing organs and systems, including the brain and central nervous system. The damage starts at the cellular level, where ethanol may induce excessive cell death and disrupt cell responses to molecules that regulate neuron proliferation, migration, and differentiation. Because alcohol causes widespread damage throughout the fetus, there is a broad array of physical anomalies and neurobehavioral defects. Hence, the condition is often referred to as a "syndrome." The most serious and pervasive damage occurs in the central nervous system (CNS). Brain imaging studies over the last decade have shown that prenatal alcohol exposure causes significant malformation in structures within the brain (e.g., corpus collosum, basal ganglia, cerebellum) that are necessary for normal development and functioning (e.g., Bookstein et al., 2001, 2002a, 2002b).

8. Fetal Alcohol Syndrome was first recognized and discussed in a public paper by researchers at the University of Washington in 1973 (Jones & Smith, 1973). In addition to a determination of maternal alcohol consumption, these researchers identified three diagnostic features associated with the syndrome: 1) pre- and/or postnatal growth deficiency, 2) a characteristic set of facial anomalies (referred to as "facial dysmorphology"), and 3) CNS damage/dysfunction. Several years later, a study of alcohol related damage in the central nervous system suggested that structural brain damage might be the basis for many of the neurodevelopmental abnormalities classified under the broader heading of "CNS dysfunction" (Clarren & Smith, 1978).

9. By 1978, after more than 250 published case reports, it was clear that FAS was only one of several identifiable disorders associated with maternal alcohol abuse. Hence, the term Fetal Alcohol Effects, or FAE, was developed to classify additional manifestations (Clarren & Smith, 1978). While individuals with FAE did not display all three of the primary facial abnormalities associated

with FAS (i.e., short palpebral fissures, flat philtrum, and thin upper lip), research consistently showed that compared to individuals diagnosed with FAS, those with FAE could suffer from as many or more of the neurodevelopmental deficits (Streissguth & O'Malley, 2000). Thus, even without facial evidence of FAS, the brain damage and resulting cognitive-behavioral problems can be as severe in individuals with FAE as in those with FAS.

10. Diagnostic labels applied to fetal alcohol impairment have changed over time to reflect increasing diagnostic precision. For example, in 1996, there was refinement in the diagnosis by the Institute of Medicine (IOM) to include five categories of diagnosis: Type 1: FAS With Confirmed Maternal Alcohol Exposure; Type 2: FAS Without Confirmed Maternal Alcohol Exposure; Type 3: Partial FAS With Confirmed Maternal Alcohol Exposure; Type 4: Alcohol-related Birth Defects; and Type 5: Alcohol-Related Neurodevelopmental Disorder. FAS Type 1 is the "classic" FAS diagnosis and includes all four of the features typically associated with the syndrome: a) confirmed maternal alcohol exposure, b) characteristic facial abnormalities or dysmorphology, c) pre- and/or postnatal growth retardation, and d) evidence of central nervous system neurodevelopmental abnormalities. FAS Type 2 has all of these features except confirmed maternal alcohol exposure. FAS Type 3 is differentiated from FAS Type 1 by virtue of the fact that only some of the facial abnormalities are present, and in addition to confirmed prenatal alcohol exposure, the individual manifests growth retardation, evidence of CNS neurodevelopmental abnormalities, and a complex pattern of behavioral or cognitive abnormalities that are inconsistent with developmental level and cannot be explained by familial background or environment alone (e.g., learning difficulties, deficits in school performance, poor impulse control, problems in social perception, language deficits, poor capacity for abstraction, specific deficits in mathematical skills, and problems in memory, attention, or judgment). FAS Type 4 (Alcohol-Related Birth Defects, or ARBD) requires confirmed maternal alcohol exposure and one or more congenital defects including malformations and dysplasias of the heart, bone, kidney, vision, or hearing systems. FAS Type 5 requires confirmed maternal alcohol exposure, CNS neurodevelopmental abnormalities, and/or a complex pattern of behavioral or cognitive deficits.

11. The facial dysmorphology associated with FASD is seen in only a minority of cases and, typically, only in young children before they enter puberty. Malformation of the face reflects alcohol consumption during the first trimester of pregnancy when facial features are being formed. However, the brain and central nervous system are being formed throughout the full nine months of pregnancy. Thus, alcohol consumption at any point during gestation can cause brain damage.

12. FASD is diagnosed on Axis 3 by dysmorphologists, pediatricians, other medical doctors, and psychologists – sometimes individually and sometimes as part of a multidisciplinary team. While there is now increased specificity by researchers and governmental agencies regarding the various manifestations of FASD, the same cannot be said for diagnosticians. Consequently, FASD diagnoses may be referred to as Fetal Alcohol Syndrome, Fetal Alcohol Effects, Partial FAS (PFAS), Alcohol-Related Neurodevelopmental Disorder (ARND), Alcohol-Related Birth Defects (ARBD), Static Encephalopathy, or by the umbrella term, Fetal Alcohol Spectrum Disorder (FASD). Although

Streissguth and O'Malley (2000) recently proposed psychiatric nomenclature to broadly categorize all manifestations of fetal alcohol impairment under the nomenclature "fetal alcohol spectrum disorders," or FASD, and include the diagnosis as a mental health disorder in the *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*, this change has not yet been made.

13. While the labels have become more precise and perhaps more confusing, the original diagnostic criteria for FASD established in 1973 have changed very little over time, even after being reconsidered by other groups such as the Fetal Alcohol Study Group of the Research Society on Alcoholism (1980s), the Institute of Medicine (1990s), and the Center for Disease Control (2000). Thus, by the time of Zane Floyd's trial in 2000, which was five years after I completed my FASD postdoctoral fellowship, the syndrome was definitely not a new or novel concept to medicine or psychology.

14. Research has shown that prenatal alcohol exposure causes structural brain damage that affects functioning in the frontal lobe of the brain, particularly the prefrontal cortex, an area that is especially sensitive to the teratogenic effects of ethanol (e.g., Bookstein et al., 2002). Brain imaging research has found that prenatal alcohol exposure seems to target the corpus collosum in particular and is associated with a pattern of deficits in executive functioning in individuals diagnosed with FAS/FAE (Bookstein et al., 2001). Executive functions, which control impulses and channel them into pro-social rather than antisocial behavior, involve cognitive skills such as perception, social awareness, organization, planning, internal ordering, working memory, self-monitoring, inhibition, motor control, regulation of emotion, and motivation. Appropriate socialization depends on intact basic cognitive functioning (Connor et al., 2000). When executive functions are compromised by prenatal alcohol exposure or other sources of brain damage, an individual will:

- have difficulty perceiving, prioritizing, and storing information,
- have difficulty processing and retrieving that information,
- be unable to generalize and apply consequences from past actions to potential future actions,
- lack motivation and initiative,
- need external motivators such as frequent cues or guidance from others,
- be unable to perceive the effect of his/her actions on others or the social inappropriateness of those actions,
- display exaggerated emotions,
- be unable to control behaviors that stem from emotion-evoked urges, and, consequently,
- engage in a wide range of socially (and often legally) inappropriate behaviors.

15. Based upon my knowledge of FASD and its cognitive-behavioral manifestations and review of the case documents listed above, it is my opinion that Zane Floyd meets criteria for a specific FASD diagnosis of *FAS Type 3*. According to IOM diagnostic criteria, Type 3 (or Partial FAS With Confirmed Maternal Alcohol Exposure) requires some components of the FAS facial pattern, growth

retardation, CNS neurodevelopmental abnormalities (e.g., neurological hard or soft signs such as impaired fine motor skills, poor tandem gait, and/or poor eye-hand coordination), and a pattern of behavioral and/or cognitive abnormalities inconsistent with developmental level and unexplained by genetic background or environmental conditions. These abnormalities include learning difficulties, deficits in school performance, poor impulse control, problems in social perception, language deficits, poor capacity for abstraction, specific deficits in mathematical skills, and problems in memory, attention, or judgment. The diagnosis of FAS Type 3 primarily relies upon data prior to Zane Floyd's adolescence and is fully consistent with diagnoses provided by Dr. Mack, whose neuropsychological testing of Zane Floyd this year revealed the type of organic brain damage that is generally seen in individuals diagnosed with confirmed FASD. (Mack 10/13/06) It should be noted that a diagnosis of FAS Type 3 does not rule out additional mental health disorders, such as Attention-Deficit/Hyperactivity Disorder (which has been diagnosed by multiple providers over the course of Mr. Floyd's life), or diagnoses that were beyond the scope of the current analysis (e.g., Posttraumatic Stress Disorder, Dissociative Disorder, substance abuse disorders, personality disorders).

16. Prenatal alcohol exposure is confirmed by the testimony of Mr. Floyd's birth mother at his trial about her drinking pattern during her pregnancy. Growth deficiency is confirmed by birth records. Facial dysmorphology is confirmed through examination of early childhood photographs. A pattern of neurodevelopmental disorders is confirmed by a variety of sources including medical records, school records, childhood evaluations, and family reports. FAS Type 3 is a diagnosis that accounts for *all* of Mr. Floyd's neurodevelopmental and cognitive-behavioral problems and his behavioral history, not only during his childhood but also up to the present time.

17. Neurodevelopmental disorders are the overt behavioral manifestation of underlying brain damage, particularly (but not exclusively) in the frontal and prefrontal cortex of the brain where executive functioning is controlled. "Executive functions" is an umbrella term for the primary abilities that enable a person to develop new patterns of behavior and cognition and to introspect upon them. Executive functions are critically important in unfamiliar situations where one doesn't know from experience or training what to do or in situations where established ways of behaving are no longer useful or appropriate. Thus, the term refers to a whole range of adaptive abilities such as creative and abstract thought, introspection, planning, multi-tasking, impulse control, socialization, and many processes related to the control of memory. In other words, executive functions involve all of the skills that enable individuals to analyze what it is they want, determine how they might get it, decide whether their plan is appropriate, and then carry out their intentions, sometimes changing their approach if they realize it is unproductive or yielding unwanted results. It is also widely accepted that executive functions play a critical part in complex social behaviors such as understanding how our actions impact others. Because it is generally thought that the frontal lobes of the brain play a critical role in all of these functions, it is not uncommon to hear people refer (imprecisely) to executive functions as "frontal lobe functions." Intact executive functioning is a prerequisite for appropriate pro-social behavior. While those with intact executive functioning can make choices about their behavior and consider consequences before acting, those with deficient

executive skills have no choice. They are able to function only to the level that their impairments permit (Connor et al., 2000).

18. Executive function deficits are observed clinically as neurodevelopmental disorders. In infancy, neurodevelopmental deficits are often first noticed in infants who show early evidence of self-regulation problems (e.g., difficulties in self-soothing or excessive non-reactivity to stimuli), over-sensitivity to environmental stimuli, and difficulty in reciprocal social interaction. An example of the latter is an infant who resists the nurturing touches of a caregiver. Examples of neurodevelopmental disorders in early childhood (i.e., toddlers) include delayed development in motor skills (e.g., delays in sitting, standing, crawling, walking, learning to drink from a cup), in verbal skills, in social skills (i.e., learning how to respond reciprocal in interpersonal interactions within the family), in emotional skills (i.e., emotional self-modulation), and in self-regulation of behavioral pace (e.g., hyperactivity versus apathetic passivity). In the elementary school years, neurodevelopmental disorders may manifest in communication disorders, attention deficits, learning disorders, poor impulse control (i.e., behavioral problems), problems in social perception, interpersonal communication deficits, and problems in working memory. In later childhood, or the middle school years, neurodevelopmental disorders may manifest in abstraction deficits (particularly in mathematics as coursework becomes more complex and less dependent upon rote memorization), impulse control and judgment (e.g., pro-social versus antisocial behavior), and socialization deficits. It is often in the adolescent years that that social skills deficits become obvious to professionals outside the school environment. For example, youth who have not developed the ability to make and keep friends begin gravitating to antisocial youth who accept them into their circle on the basis of willingness to engage in antisocial conduct similar to their own. As in Mr. Floyd's case, this is typically the time when alcohol consumption and drug use begin, and rule-breaking behavior escalates to law-breaking behavior. Once an impaired individual enters puberty, which may be delayed a few years compared to age-peers, neurodevelopmental deficits significantly impact the way FASD-affected youth handle their developing sexuality. Maintaining appropriate sexual boundaries is a complex behavior requiring multiple executive skills, including awareness (e.g., perception and understanding of environmental cues), memory (e.g., retention of knowledge about proper social behavior), self-perception (e.g., ability to perceive whether one's behavior is consistent with social boundaries), other-perception (e.g., ability to detect and appreciate how one's behavior is affecting others), and self-regulation (e.g., ability to stop one's behavior if it goes beyond social boundaries). Most unimpaired children learn social and sexual boundaries by assimilating information gradually from parents, television, movies, social interaction with peers, and other environmental sources. However, if the ability to distinguish between appropriate and inappropriate environmental cues and integrate them into one's behavioral repertoire is compromised by neurodevelopmental deficits in multiple areas, the process can go awry. Consequently, sexual boundary violations – both minor and major -- are frequently seen in individuals with executive function deficits. Zane Floyd's history indicates he is no exception.

19. *Prenatal Alcohol Exposure:* Birth mother Valerie Floyd confirms prenatal alcohol exposure. During Zane Floyd's trial, Valerie Floyd testified that at the time she became pregnant with her son,

she was a "hippie" who abused alcohol and used illegal street drugs. (Trial 7/18/00pm, p. 154) She testified that her first son died of SIDS, or Sudden Infant Death Syndrome, after she and her husband placed him in the back of their van while they watched a baseball game. The infant's death was reportedly devastating for her, and she began drinking alcohol heavily to cope. She further testified that she became pregnant with her son Zane during this period of heavy drinking. (Trial 7/18/00pm, p. 152-5) She testified that she drank throughout her pregnancy with Mr. Floyd. (Trial 7/18/00pm, p. 152, 157) Social worker Jorge Abreu, who conducted a psychosocial evaluation of Mr. Floyd, testified at trial that Valerie Floyd told him her substance abuse began as a teenager and "continued through both pregnancies" (Trial 7/17/00pm, p. 40) and that she was drinking alcohol and using drugs including LSD and cocaine "throughout the pregnancy in both cases" (i.e., in her first pregnancy as well as her pregnancy with Zane Floyd). (Trial 7/17/00pm, p. 41) Mr. Abreu further testified that Valerie Floyd told him her first child died of Sudden Infant Death Syndrome. (Trial 7/17/00pm, p. 45) It should be noted that death from SIDS is associated with prenatal alcohol exposure.

20. *Growth Deficiency:* Birth records confirm growth deficiency for Zane Floyd. Growth deficiency is defined as confirmed height or weight below the 10th percentile. A birth certificate issued by Elizabeth Knutson Memorial Hospital in Estes Park, Colorado (Birth Certificate, 9/20/75), indicates that Zane Floyd was born September 20, 1975. He was considered six weeks premature (Alfonso 7/12/00, p. 10; DS9419), which placed his birth at the 34th week of gestation. The 40th week of gestation is typically regarded as the "due date." Zane Floyd weighed 4.875 pounds at birth (4 pounds, 14 ounces or 2.2 kg) and was 16.75 inches long (42.5 cm). (Birth Certificate, 9/20/75) His weight was just below the 50th percentile and below the 10th percentile for height (Fenton, 2003). The length measurement meets criteria for FASD growth deficiency.

21. *Facial Dysmorphology:* Facial dysmorphology is partially confirmed with photographic evidence. Photographs of Zane Floyd when he was an infant and small child display some of the typical facial anomalies associated with FASD. Characteristic features evident in these photos are: small palpebral fissures, ptosis, slight epicanthal folds, elongated upper lip, thin vermillion on upper lip, sunken nasal bridge, short upturned nose, and clown eyebrows.

22. *Neurodevelopmental Disorders:* Multiple neurodevelopmental disorders are confirmed in Zane Floyd's history by multiple sources of evidence. The data in this assessment not only indicate neurodevelopmental disorders consistent with the type of primary disabilities typically seen in individuals diagnosed with FASD but also pervasive adverse life outcomes because his primary disabilities were not diagnosed and treated. According to research in the 1990s, disabilities stemming from FASD are categorized as either "primary" or "secondary" depending upon whether they are a direct manifestation of central nervous system malfunction (i.e., primary disabilities) or whether they are mediated by environmental influences (i.e., secondary disabilities). "Primary disabilities" are defined as functional deficits that stem directly from the structural brain damage and CNS dysfunction caused by prenatal ethanol exposure (e.g., Streissguth et al., 1996). Individuals with FASD are typically born with some or many of these primary disabilities, which may include deficits

in general intelligence (in approximately one-third of affected individuals), learning, attention and activity level (e.g., hyperactivity), communication, socialization, planning and problem solving, and difficulties with adaptive functioning. "Secondary disabilities" are functional deficits that an individual acquires over time that presumably could have been ameliorated if there had been early diagnosis and intervention. Environmental factors exert positive or negative influence on the expression of secondary disabilities but have nothing to do with primary disabilities. However, with effective treatment of primary disabilities, secondary disabilities can be prevented or at least reduced (Streissguth, 1997). Without accurate diagnosis and treatment, secondary disabilities manifest in adolescence and adulthood as extreme problems in psychosocial functioning that lead to adverse life outcomes. Secondary disabilities include mental health problems, disrupted school experience, trouble with the law, confinement, inappropriate sexual behavior, alcohol and drug problems, dependent living, and problems with employment. It was surprising to researchers in the 1990s that a large number of individuals with fetal alcohol impairment displayed secondary disabilities (Streissguth et al., 1996; Streissguth & O'Malley, 2000). For example, 60% had been arrested, charged, and/or convicted of a crime; 50% had been in a confinement setting (i.e., psychiatric hospital, jail, prison, residential substance abuse treatment); and 30% had alcohol or drug abuse problems.

23. Early childhood evidence of neurodevelopmental disorders in Zane Floyd was described by his mother during her testimony at trial. For example, she testified that her son Zane developed slowly as an infant and could not draw circles in school (i.e., motor skill deficits). (Trial 7/18/00pm, p. 159-60) When Mr. Floyd was 13, a psychological evaluation dated April 30, 1989, reported neurological disturbance (i.e., "a slight motor tremor") and noted that he was significantly delayed in achieving all of his early childhood developmental milestones. (Cardle 4/30/89, p. 1) The evaluation also noted a report by both parents of multiple problems: short attention span, easily frustrated, immature, defensive, noncompliant, overly sensitive, physical aggression with other children, and lying. (Cardle 4/30/89, p. 1) Social worker Abreu testified that Mr. Floyd did not begin talking until he was three or four years old (i.e., speech delay), that he shook a lot and his body trembled (i.e., neurological problems), and that he had difficulties with fine motor movement. (Trial 7/17/00pm, p. 50) Mr. Abreu testified that Mr. Floyd was clumsy and would fall often (i.e., gross motor skill deficits). Birth father Michael Floyd testified that his son had problems with hand dominance after beginning school. (Trial 7/18/00am, p. 114) Michael Floyd also testified that his son had difficulties with coordination and motor skills as his hands would shake. (Trial 7/18/00pm, p. 114) Mr. Floyd's Kindergarten teacher from Princess Anne Elementary School noted he had problems with motor skill coordination in her class. (Princess Ann records) While in kindergarten in Boulder Bluff, his teachers were concerned about his physical coordination and development and noted that he needed to work on fine muscle control in his hands. (Boulder Bluff records)

24. Evidence of neurodevelopmental disorders observed when Mr. Floyd was in elementary school came from several sources as well. His mother reported that he had difficulty focusing and completing tasks. (Alfonso 7/12/00, p. 6; DS9967) Kindergarten reports from Boulder Bluff Elementary School indicated multiple deficits in fine motor skills. (Boulder Bluff records) Mr.

Floyd's teacher noted: "We have been very concerned about Zane's physical coordination and development. It is not what it should be by this time." (Boulder Bluff records) A Kindergarten progress report from the Virginia Beach Public School District noted: "Zane is capable of much more self-control than he demonstrates in class." (Virginia Beach records) A 1st grade progress report from Marrington Elementary School in Charleston, South Carolina, noted: "Zane needs to pay attention and follow directions. He can do much better." (Marrington records) The attached report card noted that he had problems controlling his talking, listening attentively, and following directions. (Marrington records) A 2nd grade progress report from Ellicott Elementary School in Calhan, Colorado, noted a deficiency in expressing ideas clearly. (Ellicott records) School reports from 2nd grade confirm a "very poor" attention span, "poor" fine motor skills, and social/emotional delays ("immaturity, very easily upset and frustrated"). (Ellicott records) In 3rd grade, achievement testing found he was below average in language mechanics. (California Achievement Tests, McClelland Center for Child Study) An Academic Progress review for grades 1-5 indicated self-control problems with respect to classroom behavior. (McClelland Center for Child Study records) A note within this progress report pertaining to 4th grade indicated he had a "short attention span" and needed "regular reminding" about his behavior. (McClelland Center for Child Study records) Throughout his school experience, Mr. Floyd was criticized by his teachers for having poor self-control and being inattentive in class despite being diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD) on several occasions during his school experience. (Paul 5/7/00, p. 8) Mr. Floyd was medicated with Ritalin in the 2nd grade in an attempt to address his ADHD, but the medication was discontinued in 5th grade and then started again in 7th grade "due to exacerbation in problem behaviors." (Cardle 4/30/89, p. 1)

25. Dr. Roitman, a child psychiatrist who saw Mr. Floyd when he was 13, testified that neurologist Dr. Kehne was treating him for ADHD at the time. (Trial 7/18/00am, p. 6) Dr. Roitman noted that besides ADHD, there were additional issues that required more extensive analysis (Trial 7/18/00am, p. 7), such as an "information processing learning disability" and the potential for a "permanent emotional problem." (Trial 7/18/00am, p. 11)

26. Recent test results of Mr. Floyd as an adult are consistent with neurodevelopmental problems observed during childhood by parents, teachers, and Drs. Roitman and Cardle. For example, Dr. Dougherty testified that his psychological testing of Mr. Floyd at age 24 "confirmed the prior diagnosis of Attention-Deficit/Hyperactivity Disorder." (Trial 7/18/00pm, p. 13) It should be noted that attention and hyperactivity disorders as well as learning disorders are frequently encountered comorbid diagnoses in individuals diagnosed with FASD (e.g., Streissguth & Kanter, 1997; DSM-IV-TR). Dr. Mack recently observed behaviors during his neuropsychological testing that were consistent with neurodevelopmental dysfunction, such as a mild resting tremor, poor emotional regulation, poor pencil grasp (which he described as a "soft sign" of neurodevelopmental dysfunction), and a tendency to cover test pages with his hand to reduce stimulus complexity (likely a coping behavior for attention deficits). Particularly relevant with respect to Mr. Floyd's uncontrolled aggression during his crimes, Dr. Mack observed "flashes of severe anger" and extreme impulsivity that Mr. Floyd had difficulty controlling even in the highly structured testing

environment. (Mack 10/13/06, Behavioral Observation section).

27. Cognitive deficits and learning problems are other primary disabilities associated with FASD. While FASD is a leading cause of mental retardation in the United States, only 25 percent of individuals affected by prenatal alcohol exposure are mentally retarded. In fact, some individuals diagnosed with FASD have IQs in the above average range. Moreover, individuals with FASD may perform in the average range on IQ tests but show significant discrepancies between Verbal and Performance skills, reflecting learning disorders and underlying brain damage. They also may achieve good school performance in the lower grades but show increasing problems or inconsistent performance as subjects become more complex in higher grades. Mathematics seems to be a particular problem because it requires good working memory skills (i.e., the ability to hold complex information in mind and manipulate it) and increasing abstraction skills as math subjects become more complex. Zane Floyd repeated the second grade (Dougherty 7/13/00, p. 9; DS1086) and began failing subjects in 3rd grade, receiving "Fs" in Arithmetic, Reading, Language, and Social Studies. (Goose Creek records) In 4th grade, his teacher noted that he did not use his time wisely or practice self-control. (Pueblo School District records; ZFloyd006-MISC0310) Adoptive father Michael Floyd testified that he recalled trying to help his son with a math formula during the 3rd or 4th grades that his son simply could not learn. (Trial 7/18/00am, p. 114) There also were occasions when Zane Floyd would see and read instructional material but could not make sense out of them. (Alfonso 7/12/00, p. 16; DS9427) He was expelled during the 5th grade for being "out of control" and had to receive home schooling. (Dougherty 7/13/00, p. 9) He was placed back on Ritalin and within a year, he turned himself around in school and was Captain of the Academic Team. (Dougherty 7/13/00, p. 9) When he was 12, he was diagnosed by child psychiatrist Dr. Roitman with ADHD and prescribed Ritalin, which he took until age 15. (Dougherty 7/13/00, p. 10)

28. A comprehensive psychological evaluation when Mr. Floyd was 13 determined he met criteria for Attention Deficit Disorder, or ADD, along with an adjustment reaction with mixed emotional and behavioral symptoms, developmental coordination disorder, and organization deficits. (Cardle 4/30/89, p. 4) The report indicated that although he had an average IQ as measured on the WISC-R (Full Scale IQ = 101), there was a significant discrepancy between his high average verbal skills and low average performance skills. (Cardle 4/30/89, p. 2) I should note that Dr. Dougherty found convergent evidence for this discrepancy in his evaluation in 2000 when he determined by means of a different IQ test (i.e., Kaufman Adolescent/Adult Intelligence Test) that there was a significant difference between Mr. Floyd's crystallized IQ of 104 and fluid IQ of 84. (Trial 7/18/00pm, p. 17) Dr. Mack recently found additional convergent evidence of this discrepancy in his recent IQ testing with the WAIS-III. (Mack 10/13/06, Intellectual Functions section) Discrepancies of this nature are associated with learning disorders and brain damage. Dr. Cardle's report noted that visual-motor skills were Mr. Floyd's poorest area of functioning. (Cardle 4/30/89, p. 2) Deficits in reasoning abilities were also evident, where it was noted he functioned three years below age-peers. According to Dr. Cardle: "When information needs to be organized by him, or there is a great deal of information he must integrate, Zane seems to have more difficulty utilizing his general reasoning skills." (Cardle 4/30/89, p. 2) It should be noted that organizational ability is an executive skill.

Consistent with Dr. Cardle's analysis, Mr. Floyd recently told Dr. Mack that he had difficulty absorbing what he read because he was distracted. (Mack 10/13/06, Medical/Psychiatric History section) Testing in Dr. Mack's evaluation also revealed perceptual difficulties as well as attention and processing difficulties (i.e., all executive functions). A short-term working memory deficit was noted, both in recalling series of digits, which is a fairly straightforward short-term memory task, and in recalling and encoding more complex information. Consistent with Dr. Cardle's analysis, Mr. Floyd told Dr. Mack in his recent neuropsychological evaluation that his short-term memory was "real bad," that he was unable to remember which card he was playing during card games on his Unit, and that he would constantly forget what he had just said to someone or follow through with a recently stated intention. (Mack 10/13/06, Medical/Psychiatric History section) Dr. Cardle's neuropsychological test results indicated a slightly elevated impairment score, suggesting deficits. The psychologist noted that organizational deficits might affect Mr. Floyd's "overall behavior" and thereby impact his ability to behave appropriately. She also noted "significant emotional difficulties" and "unusual perceptual responsiveness," which she felt might be related to his exaggerated responding and socialization deficits. It is noteworthy that she provided an example of a specific behavior seen frequently in the histories of FASD youth: confabulation. She noted: "It was observed in a group setting that Zane tends to exaggerate or make up stories to 'outdo' other members who may be talking about something that is important to them. This seems to be a habitual response for Zane...." (Cardle 4/30/89, p. 4) It also is noteworthy that the psychologist concluded Mr. Floyd's difficulties "may be related to some subtle frontal lobe dysfunction and/or emotional dysfunction." (Cardle 4/30/89, p. 5) As a result of this extensive psychological evaluation, it was recommended that Mr. Floyd and his family participate in family counseling, that he receive remedial support for his visual-motor skill deficits, and that his parents and teachers provide him with more structure and organization. Records do not indicate that the psychologist's advice was followed. Dr. Cardle concluded her report prophetically: "While Zane may not qualify or have significant cognitive deficits to enable him to receive assistance in academic areas in the school system, he is a child who is extremely at risk for significant continued behavioral and emotional difficulties." (Cardle 4/30/89, p. 5)

29. Mr. Floyd displayed increasing evidence of cognitive disabilities as he entered middle school. In 7th grade, he received "Ds" in math and social science. (Clark County School District records) In 8th grade, he received Fs in several classes, including Study Skills. (Hyde Park records) His academic problems continued as he entered high school. When he was 16, he scored between the 6th and 42nd percentiles on three different aspects of his math skills in the Survey of Basic Skills exam. (Clark County School District records) An 11th grade achievement test indicated significant deficits in math and language skills. (Faith Lutheran High School records) A mid-year transfer dated February 16, 1993, noted that he was on "behavioral probation" and tended to have "little outbursts." (DS8247) A high school grade composite noted decreasing grades in math (i.e., from a B and C in pre-algebra in 10th grade to Ds and Fs in 11th and 12th grades) as the courses became more complex. (Faith Lutheran High School records) While there were a few occasions where Mr. Floyd did well in math, the majority of his school records indicated poor performance in mathematics in particular and overall poor academic performance in general. Because of his academic problems and poor judgment

about priorities, he eventually dropped out of traditional high school and obtained his diploma through night classes so that he could enter into the Marines. (Alfonso 7/12/00, p. 17)

30. Zane Floyd also had social skills deficits, another common neurodevelopmental or primary disability associated with FASD. Children with this diagnosis have significant difficulty making friends. Their social perception deficits interfere with their ability to detect social cues and interact easily with others. They often fabricate stories or exaggerate events in an effort to hold the interest of their peers and fit in. Because they lack awareness of social boundaries, they sometimes stand too close to others or touch them inappropriately. As a result of these skill deficits, their childhood histories typically reflect loneliness and isolation from peers. According to Dr. Cardle, Mr. Floyd recognized at age 13 that he had deficient social skills. (Cardle 4/30/89, p. 4) She observed during her evaluation of him that in a group setting, he would exaggerate or make up stories to "outdo" other group members who were talking about topics of interest to them. (Cardle 4/30/89, p. 4) Dr. Dougherty reported that Mr. Floyd would do anything to avoid rejection from peers (Trial 7/18/00pm, p. 59) and noted that a score at the 99th percentile on the Manson Evaluation indicated Mr. Floyd felt isolated from others and had significant difficulty establishing personal relationships. (Trial 7/18/00pm, p. 26) He also scored in the 99th percentile on a scale reflecting excessive fears, worries, feelings of insecurity, and inadequacy. Dr. Dougherty testified that based in part on results from the Basic Personality Test, Mr. Floyd appeared to be a social introvert with a very weak self-ego. (Trial 7/18/00pm, p. 29-30) Robert Jay Hall, Mr. Floyd's best friend, testified that he met Mr. Floyd when they attended Hyde Park Junior High School, thought of him as the "class clown," and decided to befriend him primarily because he felt sorry for Mr. Floyd's lack of popularity. (Trial 7/18/00am, p. 75)

31. In addition to the neurodevelopmental disorders addressed above, impulse control and judgment deficits are two other primary disabilities typically seen in individuals affected by prenatal alcohol exposure that have important implications in the current matter. Being able to control one's urges and emotional reactions and make appropriate choices are skills essential for pro-social behavior. Zane Floyd had significant deficits in both these areas. For example, Dr. Dougherty testified that a subscale score at the 99th percentile on the Basic Personality Test indicated Mr. Floyd likely was impulsive and prone to engage in risky and reckless behavior. (Trial 7/18/00pm, p. 29) Dr. Dougherty further noted in his testimony that in elementary school, it was difficult for teachers to get Mr. Floyd to control his behavior. Instead of attending to instruction, he acted out. Mr. Floyd's teacher at Princess Anne Elementary school noted he had problems with self-control. (Princess Ann records) During his middle school years, he was expelled for fighting and failing to go to class. (Alfonso 7/12/00, p. 16) Around this same time period, he was referred for psychiatric evaluation due to attention deficits and emotional problems. (Trial 7/18/00pm, p. 51; see also Dr. Cardle 4/30/89)

32. Zane Floyd also displayed deficits in his ability to express his sexuality in appropriate ways, a problem that is observed in about half of all individuals diagnosed with FASD (Streissguth et al., 1996). When he was ten, he was accused of anally penetrating the neighbor's three-year-old son.

(Alfonso 7/12/00, p. 8; DS9969) Although formal charges were never brought, his father and the boy's father were placed on probation for engaging in a fist fight over the incident. During his psychological evaluation with Dr. Cardle, she observed him make several inappropriate sexual comments to peers during group counseling sessions that made the other children uncomfortable. (Cardle 4/30/89, p. 3) In a letter written to a potential girlfriend, Mr. Floyd informed her that he was concerned about dating her because he was recently accused by a female classmate's father of statutorily raping the girl. (Jessica Letters DS10901)

33. Taken as a whole, Zane Floyd displayed almost every major neurodevelopmental disorder that has been associated with the primary disabilities typically seen in individuals with FASD. Beginning in adolescence, he also began displaying a number of adverse life outcomes because his primary disabilities were not accurately diagnosed and treated.

34. Review of data in this case leads to a strong conclusion that Zane Floyd displayed secondary as well as primary disabilities as a result of his brain damage and FASD. According to records, except for intermittent Ritalin to treat two of his problematic neurodevelopmental symptoms (i.e., inattention and hyperactivity), he never received accurate diagnosis or treatment for the wide-ranging primary disabilities inherent in his underlying condition. The lack of accurate diagnosis and treatment in early childhood is an issue that has profound effects on the later life histories of many individuals with FASD. In the case of Zane Floyd, the lack of an accurate diagnosis and treatment was a significant factor in his later mental health problems, substance abuse, disrupted school experience, inappropriate sexual behavior, dependent living, sporadic employment, criminal behavior, and, in particular, his unrestrained brutal aggression in the 1999 sexual assault and murders. Had he received appropriate treatment for his primary disabilities in childhood, it is highly likely that his secondary disabilities would have been more manageable and less extreme, if they had developed at all. This conclusion is based upon multiple studies of secondary disabilities in the 1990s (Streissguth et al., 1996; Streissguth et al., 1999; Yates et al., 1998), including research that I participated in during my postgraduate training.

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

dichotomous issue in individuals with FASD or anyone else, for that matter. In some individuals with FASD, executive functions are severely affected, and there is constant difficulty in functioning in a pro-social manner. In other affected individuals, executive function impairment may appear more noticeable only at certain times, such as when the individual is severely stressed or is under the influence of a substance that compromises executive functioning (e.g., alcohol and/or illegal drugs). This analysis is relevant to Mr. Floyd's behavior on the day of the rape and murders, which apparently occurred shortly after he drank an excessive amount of alcohol, used methamphetamine, and experienced several stressful events: job problems, the death of his cousin, the "loss" of his best friend to homosexuality, the loss of his girlfriend, his unsuccessful return home to live with his parents, the loss of his entire paycheck to gambling, and $10,000 debts that he was behind in paying (Paul 5/7/00, p. 29-30).

36. Mr. Floyd clearly appears to suffer from an elevated sensitivity to alcohol due to his FASD condition that affected his volitional capacity. For example, since his mid-teens, there is no evidence of physical aggression except when under the influence of intoxicating substances. However, when he was drinking in the military, he recalled provoking fights just to pick a fight and not really knowing why. (Alfonso 7/12/00, p. 4) He even reported an incident where he thought it was a good idea to "get into a fight with his locker" while intoxicated, which resulted in severe bruises on his hands. (Counsel Interview with Zane Floyd on October 10, 2005) He eventually received low marks in his competency scores for his excessive drinking and for his fighting and other disruptive behavior. (Alfonso 7/12/00, p. 20) His inability to see the effect of alcohol and drugs on his functioning and see the potential consequences of his continued use were beyond his functional capacity due to his FASD.

37. The fragility of Zane Floyd's executive functioning is a critically important issue in terms of his volitional control capacity. According to the Text Edition of the Diagnostic and Statistical Manual, Fourth Edition (DSM-IV-TR), the essential feature of Substance Intoxication is the development of a reversible substance-specific syndrome caused by recent ingestion of a substance. In Mr. Floyd's case, the "substances" involved methamphetamine and marijuana as well as excessive amounts of alcohol. The loss of volitional control caused by his alcohol and drug abuse combined with the judgment and emotion control impairments he already possessed due to his FASD and caused an exaggerated behavioral response beyond what is typically observed in people not impaired by prenatal alcohol exposure. According to the DSM-IV-TR, in unimpaired individuals, Substance Intoxication can cause "clinically significant maladaptive behavioral or psychological changes" associated with the intoxication, such as belligerence, mood liability, cognitive impairment, impaired judgment, and impaired social functioning – all of which are due to the direct physiological effects of the substance on executive functions within the central nervous system. The Manual further notes that the specific clinical picture in Substance Intoxication "varies dramatically" among individuals and also depends on "the person's tolerance for the substance." In Mr. Floyd's case, these symptoms were significantly magnified at the time he committed his 1999 crimes and may have triggered the Dissociative Disorder noted in Dr. Mack's report. This exaggerated response stems from an interaction between the *temporary* changes that alcohol and drugs cause in the frontal cortex of the

brain where impulses are controlled and the *permanent* deficit in frontal cortex functioning that Mr. Floyd suffered as a result of his prenatal alcohol exposure.

38. By the time of Zane Floyd's trial in 2000, FASD had been recognized for over 25 years as a major known cause of neurodevelopmental disabilities, and the life-long implications of these disabilities had been recognized for 5 years. Follow-up studies in four countries had demonstrated the continuing adverse effects of prenatal alcohol exposure into adolescence and adulthood (Streissguth & Kanter, Eds., 1997). However, when Zane Floyd was a child and teenager, no one knew about the damage and long-term effects that prenatal alcohol exposure could cause. Thus, while he might have been identified as a child at risk and referred for evaluation had he been born in the 1990s, unfortunately he was born too early to be detected in routine screening by medical or school personnel and referred for medical evaluation. Thus, it was the timing of his birth that prevented him from being diagnosed and treated as a child for FASD.

39. Regular and unbridled abuse of alcohol by Mr. Floyd's caregivers undoubtedly interfered with adult recognition that Zane Floyd even had a learning disability, much less a pervasive birth defect that caused significant problems across all major domains of functioning. Although he was diagnosed as a child with ADHD and medicated intermittently until age 15, his parents were in denial regarding the fact that he had a learning disability and unaware that the source of the learning disability and his ADHD was brain damage. Instead of seeking appropriate treatment for problems he couldn't control, they severely disciplined him for poor academic performance. For example, Michael Floyd reported that when school officials told him his son should be placed in special education classes, he told them he wouldn't allow him to be a class with "retards." (Michael Floyd Declaration)

40. Not only were Mr. Floyd's primary disabilities not effectively treated, they were significantly increased by environmental influences (i.e., his parents' alcoholism and abusive parenting). Mr. Floyd reported examples of his father throwing him across the room and into a wall and pummeling him with fists as a method to discipline him for ADHD-related transgressions. (Dougherty 7/13/00, p. 9) He also reported an example of his mother becoming so intoxicated that she mistook the living room coffee table for a bathroom in front of her horrified and embarrassed teenaged son. (Counsel Interview with Zane Floyd, 10/10/05) Robert Jay Hall reported incidents where Valerie Floyd would give the boys beer during their teens, and the three of them would stay up late at night talking. (Trial 7/18/00am, p. 85) Mr. Hall also testified that Michael Floyd threw a 16th birthday party for his son and encouraged the teenagers present to play drinking games, during which several of the teenagers became inebriated. (Trial 7/18/00am, p. 85)

41. Secondary disabilities associated with fetal alcohol impairment are not just modifiable but preventable if an individual is diagnosed early and receives appropriate intervention. According to a four-year study at the University of Washington funded by the Centers for Disease Control and Prevention (1996), specific "risk factors" *increase* the probability that a fetal alcohol impaired individual will go on to develop secondary disabilities, and specific "protective factors" *reduce* that

probability. These risk and protective factors apply to an individual's childhood up to 18 years of age and are mutually exclusive. These mediating factors include the following: living in a nurturing and stable home for at least 72% of childhood, receiving a diagnosis of fetal alcohol impairment prior to age six (which permits positive interventions to be applied early in life), never having experienced violence, living for at least 2.8 years in each household, experiencing a good quality home ("good quality" was operationally defined by 12 specific factors), being FAS rather than FAE (because the facial characteristics make the condition more noticeable to others and therefore more prone to positive intervention), and having basic needs met at least 13% of the time during childhood. Follow-up research (Streissguth et al., 2004) also found that having been sexually or physically victimized in childhood was an additional mediating factor that affected the later expression of inappropriate sexual behavior. Data reviewed in this case revealed that Zane Floyd experienced most of these mediating factors as *risk* factors rather than *protective* factors: he never lived in a "good quality" home (i.e., his early childhood and adolescence were spent in a non-nurturing, unstable home that involved frequent moves, caregiver alcohol abuse, domestic violence, child physical abuse, emotional neglect, and lack of structure), he was not diagnosed with FASD in childhood, and he was frequently the target of his father's violence during his childhood and adolescence. With respect to having his basic childhood needs met, data indicate that this was a secondary disabilities risk factor for Mr. Floyd during his entire childhood.

42. Behavior problems in children are often blamed on poor parenting, and by the time children reach adolescence, any antisocial behavior they display is usually interpreted as willful misconduct. Adolescents and adults are expected to have the developmental capacity to behave in pro-social ways, even if they are exposed to poor parenting and multiple traumas in their childhoods. However, for individuals with fetal alcohol impairment and associated deficits in executive functioning, maintaining good behavior without adequate support is beyond their capability. Defective executive functioning causes them to be highly suggestible and prone to direct influence from others in their lives. If that influence is aggressive or antisocial, they are not neurologically equipped to consider alternative choices and behaviors.

43. When Zane Floyd was born in 1975, little was known about the long-term effects of FAS/FAE on adult functioning. The term "Fetal Alcohol Syndrome" had just been identified publicly (Jones & Smith, 1973). It was not until Zane Floyd was nine that researchers began to publicize information about Fetal Alcohol Effects (Abel, 1984), and he was 14 (i.e., 1989) when Congress finally passed legislation to mandate labels on all alcohol beverage containers sold in the United States that warned against drinking alcohol during pregnancy. Although the term "secondary disabilities" was not widely recognized before the mid-1990s, by the late 1980s there was growing awareness that fetal alcohol impairment caused structural brain damage (West, 1986) and that this damage in turn caused long-term behavioral and developmental disturbances (Spohr & Steinhausen, 1987; Streissguth & Randels, 1988; Streissguth, 1990). By the mid-1990s, knowledge about secondary disabilities was widespread (e.g., Meyer et al., 1990; Phillips, 1992; Streissguth, 1992). For example, in 1992 the Centers for Disease Control and Prevention (CDC) funded a major research project at the University of Washington to study secondary disabilities, and in early 1994, *Alcohol*

Health and Research World (now titled *Alcohol Research and Health)* devoted a full issue to the topic of FAS and other alcohol-related birth defects (see Volume 18, Number 1, 1994) that provided a comprehensive overview of the existing knowledge on the effects of prenatal alcohol exposure. (This issue was later awarded first prize in the technical publications category by the National Association of Government Communicators.) Thus, by the time of Zane Floyd's trial in 2000, any expert in neurodevelopmental disorders could have testified in general about the primary disabilities associated with FASD, and any expert armed with the data provided to me by post-conviction counsel could have testified about the specific impact of this condition on Mr. Floyd's childhood functioning.

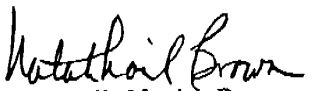
44. With respect to long-term outcomes from untreated FASD, prior to the 2000 trial knowledge about the secondary disabilities associated with fetal alcohol exposure had become a primary focus in research studies. In the mid 1990s, the United States Congress directed the National Institute on Alcohol Abuse and Alcoholism (NIAAA) to prepare a comprehensive report on the subject. In response, NIAAA commissioned the Institute of Medicine (IOM) of the National Academy of Sciences to conduct a study. The resulting seminal report was titled, *Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention, and Treatment* (Stratton et al., 1996). This report critically reviewed the major scientific issues in fetal alcohol research and made a number of recommendations, including the new diagnostic terminology referred to earlier in this declaration (i.e., FAS Types 1-5). By 1996, research at the University of Washington had revealed that secondary disabilities became observable in people with FASD by their young adults years (Streissguth et al., 1996) and specifically identified the risk and protective factors associated with these secondary disabilities. A year later, Streissguth (1997) published a book for the lay public regarding these secondary disabilities. Thus, by 2000, the year of Mr. Floyd's trial, and certainly by his appeal, any expert with knowledge about FASD could have testified about the long-term social and behavioral ramifications of prenatal alcohol exposure in general, and any expert armed with the information provided to me could have testified about the long-term ramifications of FASD in Mr. Zane's life.

45. The awareness that FASD is a birth defect with pervasive and long-range neurodevelopmental effects has led to increasing awareness in the legal profession that a different level of attribution is warranted for individuals with this condition (Fast, Conry, & Loock, 1999; Baumbach, 2002). Rather than assuming they become unmotivated, manipulative, antisocial, and/or self-defeating solely because of poor parenting experiences and free will, research over the last 15 years has shown consistently that *untreated primary disabilities* are the basis for maladaptive behaviors. Notwithstanding the fact that environmental influences can play a significant role in the expression of secondary disabilities, it also has been established in the scientific research that individuals with FASD have structural brain damage that makes it highly unlikely that they will be able to withstand the negative influence of environmental risk factors without appropriate support and treatment. As Streissguth and colleagues noted recently (Streissguth et al., 2004), one of the strongest correlates of adverse outcomes in individuals with FASD is lack of an early diagnosis: "The longer the delay in receiving diagnostic information, the greater the odds of adverse outcomes." Thus, the research indicates that for Zane Floyd's debilitating substance abuse and subsequent brutal

aggression to have been prevented, he needed appropriate intervention in childhood to eliminate or reduce the risk factors he was exposed to and substitute protective factors. Through no fault of his own, this intervention did not happen. Thus, while environmental risk factors were clearly important in his outcome, unlike individuals without brain damage who have the capacity to withstand negative environmental influences and emerge from childhood as pro-social adults, those like Mr. Floyd who are affected by prenatal alcohol exposure but untreated do not have that ability.

46. Zane Floyd is sentenced to death for the crimes he committed while under the influence of alcohol and drugs. Given data in this case that support a diagnosis of FASD, it is clear that substance abuse (a secondary disability) and lack of impulse control and judgment (untreated primary disabilities) rendered him a very dangerous man and were significant factors in his violence. It is equally clear that given his birth defect and the pervasive short-term and long-term ramifications of that condition on his functioning, he had virtually no ability on his own to change the negative course of his life.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Seattle, Washington, on October 17, 2006.



Dr. Natalie Novick Brown

Appendix A
IOM Criteria

In 1996, the Institute of Medicine (IOM) developed five diagnostic categories related to fetal alcohol exposure:

Type 1.
Fetal Alcohol Syndrome (FAS) with Confirmed Maternal Alcohol Exposure

Requires:

a. confirmed maternal alcohol exposure
b. facial dysmorphia, including short palpebral fissures and abnormalities of the premaxillary zone (e.g., flat upper lip, flat philtrum, flat midface)
c. growth retardation, such as low birth weight, lack of weight gain over time, disproportional low weight to height
d. neurodevelopmental abnormalities of the Central Nervous System (CNS), such as small head size at birth and structural brain abnormalities with neurological hard or soft signs (e.g., impaired fine motor skills, neurosensory hearing loss, poor tandem gait, poor eye-hand coordination)

Type 2.
FAS Without Confirmed Maternal Alcohol Exposure

Requires:

b. through d. above

Type 3.
Partial FAS With Confirmed Maternal Alcohol Exposure

Requires:

a. confirmed maternal alcohol exposure
b. some components of the FAS facial pattern
c. growth retardation as in Category 1
d. CNS neurodevelopmental abnormalities as in Category 1
e. Complex pattern of behavioral or cognitive abnormalities inconsistent

with developmental level and unexplained by genetic background or environmental conditions (e.g., learning difficulties, deficits in school performance, poor impulse control, problems in social perception, language deficits, poor capacity for abstraction, specific deficits in mathematical skills, and problems in memory, attention, or judgment)

Type 4.
Alcohol-Related Birth Defects (ARBD)

Requires:

a. confirmed maternal alcohol exposure
b. one or more congenital defects including malformations and dysplasias of the heart, bone, kidney, vision, or hearing systems

Type 5.
Alcohol-Related Neurodevelopmental Disorder (ARND)

Requires:

a. confirmed maternal alcohol exposure
b. CNS neurodevelopmental abnormalities as in Category 1 *and/or*
c. complex pattern of behavioral or cognitive deficits as in Category 3

Appendix B
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EXHIBIT 2

EXHIBIT 2

Declaration of Natalie Novick Brown, Ph.D.

I, Natalie Novick Brown, declare under penalty of perjury that the following is true and correct:

A. BACKGROUND AND QUALIFICATIONS

1. I have been a licensed psychologist in the State of Washington for approximately 25 years. I also am a licensed psychologist in Florida and Alaska.

2. I completed a Bachelor of Arts Degree in Sociology and Psychology from the University of California at Los Angeles (UCLA). In 1994, I obtained a Ph.D. in Clinical Psychology from the University of Washington in Seattle, which included an internship in forensic psychology. I then completed a postdoctoral fellowship in fetal alcohol spectrum disorders (FASD) at the University of Washington, which involved participation in research on the adverse developmental outcomes in FASD (called "secondary disabilities"). My fellowship advisor Ann Streissguth, Ph.D., was a pioneer researcher in the FASD field. Along with Dr. Kenneth Jones and others, Dr. Streissguth was part of the original medical team that first identified fetal alcohol syndrome (FAS) in the United States and published that discovery in *The Lancet* in 1973. Dr. Streissguth subsequently became the first psychologist in the nation to study the long-range developmental and adaptive behavior of children with FASD in large-scale longitudinal studies that spanned more than 30 years.

3. Since my formal training in the early 1990s, my private practice in psychology has involved a specialization in FASD. I have treated and evaluated several hundred people with FASD in clinical and forensic settings. In the forensic context alone, I have conducted over 450 FASD evaluations involving defendants charged with a range of offenses, including capital murder. I have conducted over 60 post-conviction FASD evaluations at the state and federal levels. I have conducted FASD assessments at the request of both defense and government attorneys. The latter included evaluations referred by the court and by Developmental Disabilities Administration in Washington State, and evaluations of crime victims with FASD referred by state attorneys general.

4. I am a Clinical Assistant Professor (courtesy staff) in the University of Washington's School of Medicine, Department of Psychiatry and Behavioral Medicine. In this capacity, I consult with staff at the University of Washington's Fetal Alcohol and Drug Unit regarding criminal behavior in persons with FASD, train judicial staff on FASD in King County, Washington, and conduct pro bono FASD evaluations of crime victims for the Seattle Police Department.

5. I have published over 30 peer-reviewed articles and book chapters on FASD and presented on FASD at many state, national, and international conferences. I helped author the American Bar Association's 2012 Resolution on FASD. Currently, I am editing a book for Springer on evaluating FASD in the forensic setting, which will be published in 2021. I have

been recognized as an FASD expert in approximately 20 state and federal jurisdictions and have testified in numerous capital murder trials and habeas hearings wherein an FASD diagnosis was found to matter to the court. For example, in *Williams v. Stirling*, the Fourth Circuit Court of Appeals ruled FASD was a "cause-and-effect" diagnosis that had direct bearing on offense conduct.

6. A CV that more fully describes my qualifications is attached as Appendix A to this declaration.

B. REFERRAL

7. I evaluated Zane Floyd in 2006 at the request of habeas counsel at the time and diagnosed him with a fetal alcohol spectrum disorder, hereinafter referred to as "FASD" (see Declaration dated 10/17/06).

8. I have been asked by Zane Floyd's current counsel, Office of the Federal Public Defender, District of Nevada, to evaluate Mr. Floyd's adaptive functioning and address the following consultative questions:

   a. Is Zane Floyd's adaptive and functional history consistent or inconsistent with the mental defect associated with FASD, which in DSM-5 is diagnosed generally as Other Specified Neurodevelopmental Disorder (Code 315.8) and specifically as *Neurodevelopmental Disorder Associated with Prenatal Alcohol Exposure* (*ND-PAE*)?

   b. How does Mr. Floyd's ND-PAE/FASD compare to intellectual disability (ID) and attention-deficit/hyperactivity disorder (ADHD)?

   c. Did ND-PAE/FASD make it likely Mr. Floyd had an "immature brain" at the time of the offense given he was 23 years old, and if so, how would that have affected his functioning?

C. SUMMARY OF OPINION

9. Based upon my psychological evaluation of Mr. Floyd, I hold the following opinions to a reasonable level of psychological certainty:

   a. **Zane Floyd's adaptive/functional history is consistent with the mental defect associated with FASD, which in DSM-5 is diagnosed generally as Other Specified Neurodevelopmental Disorder (Code 315.8) and specifically as *Neurodevelopmental Disorder Associated with Prenatal Alcohol Exposure* (*ND-PAE*).**

b. **Mr. Floyd's ND-PAE/FASD is a brain-based, congenital, lifelong, impactful disorder deserving of the rubric "ID Equivalence." Regardless of how severity is measured, Mr. Floyd's FASD is similar in severity to ID but substantially more severe than ADHD, with broad ramifications that have affected all important functional domains in his life. Unlike ADHD, Mr. Floyd's ND-PAE/FASD is a cause-and-effect condition that not only explains his attention deficits, impulsivity, and hyperactive behavior during childhood but explains *all* of his behavior – across his entire lifespan.**

c. **Given that the normally-developing "adolescent brain" does not have mature executive control capacity until at least age 25 and brain development in young adults with FASD lags many years behind rates seen in neurotypical age peers, it is likely Mr. Floyd's brain was not fully developed at the time of the offense due to his ND-PAE/FASD, which would have had an additive and cumulative effect on the brain damage he was born with.**

D. PROCEDURES

10. Collateral interviews were conducted by telephone with *Carolyn Smith* (family friend and social worker), *Jay Hall* (friend), and *Mike Hall* (father of Jay Hall), each of whom was asked to rate Mr. Floyd's behavior on three standardized measures:
    - Behavior Rating Inventory of Executive Function (BRIEF),
    - Vineland Adaptive Behavior Scales – Third Edition (Vineland-3), and
    - Fetal Alcohol Behavior Scale (FABS).

11. Record review consisted of prior mental health evaluation reports/declarations (Drs. Maria Cardle, 1989; David Schmidt, 2000; Thomas Kinsora, 2000; Jakob Camp, 2000; Frank Paul, 2000; Edward Dougherty, 2000; Norton Roitman, 2000; Natalie Novick Brown, 2006; Jonathan Mack, 2006; Jonathan Lipman, 2006); expert penalty phase testimony (Drs. Dougherty and Roitman); penalty phase testimony and declaration of Robert J. Hall; declaration of Robert "Jay" Hall; 9th Circuit Opinion; and NOFAS Amicus.

12. I consulted with Neuropsychologist Paul Connor, PhD (formally trained in FASD at the University of Washington Fetal Alcohol and Drug Unit) regarding test result patterns. At my request, Dr. Connor produced two graphs of Mr. Floyd's neuropsychological test results (see later in this declaration).

13. I also consulted with Stephen Greenspan, PhD, regarding the comparison of FASD with ID and ADHD.

E. BRIEF SUMMARY OF FASD

14. Human behavior is a direct reflection of the anatomy and physiology of the central nervous system (CNS).[1] Consequently, behavior is disrupted to the extent anatomy and physiology of the CNS are disrupted.

A fetus is susceptible to damage from alcohol exposure throughout pregnancy. The first few weeks of pregnancy when brain cells are developing and forming brain structures are especially vulnerable.[2] Within minutes after a pregnant woman consumes alcohol, the substance crosses the placenta and blood-brain barrier, and the blood alcohol level in the fetus equals that of the mother.[3] Prenatal alcohol exposure typically causes widespread structural damage throughout the brain.[4, 5, 6] Even mild structural brain damage that is difficult to see in standard brain scans significantly impairs brain *function*.[7] Research has found there is no "safe" time, amount, or type of alcohol consumption during pregnancy.[8, 9]

Beyond brain damage, prenatal alcohol exposure also may cause defects in cardiac, skeletal, renal, visual, auditory, immune, and other systems.[10]

Alcohol exposure during pregnancy is a major known cause of birth defects, neurodevelopmental impairments, and learning problems in the United States.[11]

"Fetal alcohol spectrum disorder(s) (FASD)" is a non-diagnostic umbrella term that encompasses all of the medical conditions caused by prenatal alcohol exposure that were described in diagnostic guidelines published in 1996 by the Institute of Medicine (IOM).[12] Four medical diagnoses under the FASD umbrella were listed: (a) fetal alcohol syndrome (FAS), (b) partial FAS (pFAS), (c) alcohol related neurodevelopmental disorder (ARND),

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[1] Garrett, B. (2015). Brain and behavior: An introduction to biological psychology. 4th Ed. New York: Sage Publications.
[2] Whitty, J.E., & Sokol, R.J. (1996). Alcohol teratogenicity in humans: critical period, thresholds, specificity and vulnerability. In Spohr, H.L. & Steinhausen, H.C., Eds. *Alcohol, pregnancy and the developing child: Fetal Alcohol Syndrome*. Cambridge, England: Cambridge University Press, 3–13.
[3] Grant, T.M., Novick Brown, N., Dubovsky, D., Sparrow, J., & Ries, R. (2013). *Journal of Addiction Medicine, 7*, 87-95.
[4] Nunez, S.C., Roussotte, F., & Sowell, E.R. (2011). Focus on: Structural and functional brain abnormalities in fetal alcohol spectrum disorders. *Alcohol Research and Health, 34,* 121-132.
[5] Moore, E.M., Migliorini, R., Infante, M. A., & Riley, E.P. (2014). Fetal alcohol spectrum disorders: Recent neuroimaging findings. *Current Developmental Disorders Reports, 1,* 161-172.
[6] Ware, A.L., Infante, M.A., O'Brien, J.W., Tapert, S.F., Jones, K.L., Riley, E.P., & Mattson, S.N. (2015). An fMRI study of behavioral response inhibition in adolescents with and without histories of heavy prenatal alcohol exposure. *Behavioral Brain Research, 278,* 137-146.
[7] https://www.niaaa.nih.gov/sites/default/files/publications/ICCFASD/NCJFCJ_FASD_Guide_Final-12012016.pdf , accessed 1/15/20
[8] Centers for Disease Control and Prevention. (2005). Notice to readers: Surgeon General's advisory on alcohol use in pregnancy. *Morbidity Mortal Weekly Report, 54,* 229.
[9] https://www.niaaa.nih.gov/sites/default/files/publications/ICCFASD/NCJFCJ_FASD_Guide_Final-12012016.pdf , accessed 1/15/20
[10] O'Leary, C.M., Nassar, N., Kurinczuk, J.J., de Klerk, N., Geelhoed, E., Elliott, E.J., & Bower, C. (2010). Prenatal alcohol exposure and risk of birth defects. *Pediatrics,126,* e843-850.
[11] Stratton, K., Howe, C., & Battaglia, F. (Eds.) (1996). Fetal alcohol syndrome: Diagnosis, epidemiology, prevention, and treatment. *The Institute of Medicine Report*. Washington, DC: National Academy Press.
[12] Stratton, K., Howe, C., & Battaglia, F. (Eds.) (1996). Fetal alcohol syndrome: Diagnosis, epidemiology, prevention, and treatment. *The Institute of Medicine Report*. Washington, DC: National Academy Press.

and (d) alcohol related birth defects (ARBD).[13] Together, these four medical diagnoses involve a broad continuum of physical, mental, behavioral, and learning deficits that can result from prenatal alcohol exposure. Prior to the IOM publication in 1996, ARND had been referred to as 'fetal alcohol effect' (FAE). In 2004, a consensus of governmental, research, and advocacy organizations accepted "FASD" as a collective term that included the more specific medical diagnoses described in the 1996 IOM report on FAS.[14] Over the years, the term 'FASD' also has come to include diagnostic terms in the clinical setting, such as static encephalopathy-alcohol exposed (SE-AE), which is equivalent to ARND.[15] Since 2013, the term 'FASD' also includes the specific DSM-5 diagnosis for the CNS dysfunction due to prenatal alcohol exposure, *neurodevelopmental disorder associated with prenatal alcohol exposure (ND-PAE)*.

FAS involves three diagnostic criteria: characteristic facial abnormalities, growth deficiency, and CNS abnormality but does not require evidence of prenatal alcohol exposure because the full spectrum of facial abnormalities in FAS is pathognomonic for prenatal alcohol exposure. Partial FAS requires one or two facial abnormalities, CNS abnormality, and evidence of prenatal alcohol exposure. ARND and SE-AE simply require CNS abnormality and evidence of prenatal alcohol exposure. The CNS abnormality common to all of these medical conditions typically is measured *functionally* but also can be measured *neurologically* and *structurally*.

Importantly, research has found that regardless of diagnosis under the FASD umbrella, brain damage is the same.[16] That is, brain damage in ARND tends to be just as severe as in FAS.

Not every individual exposed to alcohol prenatally will have FASD. The primary determinants of clinically relevant fetal damage include quantity (amount of alcohol per occasion), frequency (how often a pregnant mother drinks), and timing (stage of pregnancy and whether there is drinking just as the fetus is developing a particular feature). Binge drinking and regular heavy drinking carry the greatest risk of severe problems,[17, 18] but even

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[13] Bertrand, J., Floyd, R.L., Weber, M.K., O'Connor, M., Riley, E.P., Johnson, K.A., Cohen, D.E., NTFFAS/E. (2004). Fetal alcohol syndrome: Guidelines for referral and diagnosis. Atlanta, GA: Centers for Disease Control and Prevention. http://www.cdc.gov/ncbddd/fasd/documents/FAS_guidelines_ accessible.pdf , accessed 1/15/20

[14] Warren, K.R., & Hewitt, B.G. (2009). Fetal alcohol spectrum disorders: When science, medicine, public policy, and laws collide. *Developmental Disabilities Research Reviews, 15,* 170-175.

[15] Astley, S.J. (2004). *Diagnostic guide for Fetal Alcohol Spectrum Disorders: The 4-digit diagnostic code, 3rd Ed.* Seattle: FAS Diagnostic and Prevention Network.

[16] Vaurio, L., Riley, E.P., & Mattson, S.N. (2011). Neuropsychological comparison of children with heavy prenatal alcohol exposure and an IQ-matched comparison group. *Journal of the International Neuropsychological Society, 17,* 463-473.

[17] Maier S.E., & West, J.R. (2001). Drinking patterns and alcohol=related birth defects. *Alcohol Research and Health, 25,* 168-169.

[18] May, P.A., Blankenship, J., Marais, A-S., Gossage, J.P., Kalberg, W.O., Joubert, B., Cloete, M., Barnard, R., De Vries, M., Hasken, J.,Robinson, L. K., Adnams, C. M., Buckley, D., Manning, M., Parry, C.D.H., Hoyme, H. E., Tabachnick, B., & Seedat, S. (2013). Maternal alcohol consumption producing fetal alcohol spectrum disorders (FASD): Quantity, frequency, and timing of drinking. *Drug and Alcohol Dependence,* 502-512.

lesser amounts can cause FASD.[19, 20, 21, 22] Maternal characteristics interact with and affect outcomes, such as the mother's age, genetic make-up, number of previous pregnancies (i.e., younger siblings tend to be more affected than older siblings), overall health, diet and nutritional status, lack of prenatal care, adverse living conditions, and things such as stress, co-occurring diseases, mental health conditions, and concomitant use of tobacco and illicit drugs.[23, 24, 25, 26] Also important is the genetic composition of the fetus, which convey varying degrees of vulnerability or resilience.

FASD tends to be a hidden condition that is seldom diagnosed in childhood because most people in this population have ARND rather than FAS and consequently, no obvious physical abnormalities.[27] Such children *look* normal to casual observers but have varying degrees of neurocognitive damage that significantly impairs cognitive and adaptive functioning.[28]

The toxic effects of prenatal alcohol exposure appear to be widespread throughout the entire brain,[29] causing subtle but potent irregularities in brain structure that compromise brain function and directly impact cognition and behavior.[30, 31] Deficits in cognitive functioning often become evident in elementary school and ultimately impair adaptive behavior across the lifespan.[32]

Of the many possible cognitive impairments in FASD, executive dysfunction – a cardinal deficit – is the most serious because the executive system in the prefrontal cortex controls

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[19] Hamilton, D.A., Barto, D., Rodriguez, C.I., Magcalas, C.M., Fink, B.C., Rice, J.P., Bird, C.W., Davies, S., & Savage, D. D. (2014). Effects of moderate prenatal ethanol exposure and age on social behavior, spatial response perseveration errors and motor behavior. Behavioral Brain Research, *269,* 44-54.

[20] Carmichael Olson, H., Streissguth, A.P., Sampson, P.D., Barr, H.M., Bookstein, F.L., & Thiede, K. (1997). Association of prenatal alcohol exposure with behavioral and learning problems in early adolescence. *Journal of the American Academy of Child Adolescent Psychiatry, 36,* 1187-1194.

[21] Jacobson, S.W., Carr, L.G., Croxford, J., Sokol, R.J., Li, T-K, & Jacobson, J.L. (2006). Protective effects of the alcohol dehydrogenase-ADH1B allele in African American children exposed to alcohol during pregnancy. *Journal of Pediatrics, 148,* 37.

[22] Larkby, C.A., Goldschmidt, L., Hanusa, B.H., & Day, N.L. (2011). Prenatal alcohol exposure is associated with conduct disorder in adolescence: Findings from a birth cohort. *Journal of the American Academy of Child and Adolescent Psychiatry, 50,* 262-271.

[23] Jacobson, S. W., Jacobson, J. L., Sokol, R. J., Chiodo, L. M., & Corobana, R. (2004). Maternal age, alcohol abuse history, and quality of parenting as moderators of the effects of prenatal alcohol exposure on 7.5-year intellectual function. *Alcoholism: Clinical and Experimental Research,* 28(11), 1732-1745.

[24] Astley, S. J. (2010). Profiles of the first 1,400 patients receiving diagnostic evaluation for fetal alcohol spectrum disorders at the Washington State Fetal Alcohol Syndrome Diagnostic & Prevention Network. *Canadian Journal of Clinical Pharmacology, 17,* e132-e164.

[25] May, P. A., & Gossage, J. P. (2011). Maternal risk factors for fetal alcohol spectrum disorders: Not as simple as it might seem. *Alcohol Research and Health, 34,* 15-26.

[26] Jonsson, E., Salmon, A., & Warren, K. R. (2014). The international charter on prevention of fetal alcohol spectrum disorder. *Lancet Global Health, 2,* e135-137.

[27] https://www.nofas.org/recognizing-fasd/ , accessed 1/15/20

[28] Chasnoff, I.J., Wells, A.M., Telford, E., Schmidt, C., & Messer, G. (2010). Neurodevelopmental functioning in children with FAS, pFAS, and ARND. *Journal of Developmental and Behavioral Pediatrics, 31,* 192-201.

[29] https://www.niaaa.nih.gov/sites/default/files/publications/ICCFASD/NCJFCJ_FASD_Guide_Final-12012016.pdf , accessed 2/2/20

[30] Nunez, S.C., Roussotte, F., & Sowell, E.R. (2011). Focus on: Structural and functional brain abnormalities in fetal alcohol spectrum disorders. *Alcohol Research and Health, 34,* 121-132.

[31] Moore, E.M., Migliorini, R., Infante, M.A., & Riley, E.P. (2014). Fetal alcohol spectrum disorders: Recent neuroimaging findings. *Current Developmental Disorders Reports, 1,* 161-172.

[32] Riley, E.P., & Vorhees, C.V. (1986). *Handbook of behavioral teratology.* New York: Plenum.

self-regulation, conscious decision-making, and everyday adaptive behavior.[33, 34, 35] Like the term "FASD," "executive functioning" also is an umbrella term that includes a range of higher-order cognitive skills that integrate and coordinate numerous underlying processes in the brain, including sensory input, memory retrieval, considering options, foreseeing consequences and linking cause and effect, overriding and suppressing socially unacceptable responses, modifying emotions and urges to fit socially acceptable norms, and forming intentions and selecting actions.[36] Executive functioning is largely controlled in the prefrontal cortex and neural circuitry linking the prefrontal cortex to the limbic system, both of which have been found in the research to be particularly sensitive to the damaging effects of prenatal alcohol exposure.[37] Compounding this problem, prenatal alcohol exposure also creates hypersensitivity to stress via faulty neurological "hard-wiring" of the hypothalamic-pituitary-adrenal system (HPA axis), which causes *chronic overreaction to stressful events*.[38] However, because of executive function deficits, this population lacks the "top-down" moderating influence of a fully functioning prefrontal cortex. As a result, those with FASD are prone to act out their emotions, particularly in high stress situations that trigger overreaction in the limbic system. Because of executive dysfunction, those with FASD have considerable difficulty handling everyday stressors.

Review of the FASD literature has identified a typical *cognitive profile* in FASD,[39, 40, 41, 42] which involves (a) variable neuropsychological profiles (i.e., a mixture of relative strengths and weaknesses), often with significant discrepancies between IQ index scores,[43, 44, 45] and (b) a *generalized deficit in the processing and integration of complex information.*[46, 47] That is, the more complex a task or situation, the more impaired the processing and integration of

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[33] Hosenbocus, S., & Chahal, R. (2012). A review of executive function deficits and pharmacological management in children and adolescents. *Journal of the Canadian Academy of Child and Adolescent Psychiatry, 21,* 223-229.
[34] Schonfeld, A.M., Paley, B., Frankel, F., & O'Connor, M.J. (2006). Executive functioning predicts social skills following prenatal alcohol exposure. *Child Neuropsychology, 12,* 439-452.
[35] Ware, A.L., Crocker, N., O'Brien, J.W., Deweese, B.N., Roesch, S.C., Coles, C.D.,...Mattson, S.N. (2012). Executive function predicts adaptive behavior in children with histories of heavy prenatal alcohol exposure and attention deficit/hyperactivity disorder. *Alcoholism: Clinical and Experimental Research, 36,* 1431-1441.
[36] Diamond, A. (2013). Executive functions. *Annual Review of Psychology, 64,* 135-168.
[37] Fryer, S.L., McGee, C.L., Matt, G.E., Riley, E.P., & Mattson, S.N. (2007). Evaluation of psychopathological conditions in children with heavy prenatal alcohol exposure. *Pediatrica, 199,* e733–e741.
[38] Keiver, K., Bertram, C.P., Orr, A.P., & Clarren, S. (2015). Salivary cortisol levels are elevated in the afternoon and at bedtime in children with prenatal alcohol exposure. Alcohol, 49, 79-87.
[39] Kodituwakku, P.W. (2009). Neurocognitive profile in children with fetal alcohol spectrum disorders. *Developmental Disabilities Research Review, 15,* 218-224.
[40] Mattson, S.N., Riley, E.P., Gramling, L., Delis, D.C., & Jones, K.L. (1997). Heavy prenatal alcohol exposure with or without physical features of fetal alcohol syndrome leads to IQ deficits. *Journal of Pediatrics, 131,* 718-721.
[41] Kodituwakku, P.W., Kalberg, W., & May, P.A. (2001). The effects of prenatal alcohol exposure on executive functioning. *Alcohol Research and Health, 25,* 192-198.
[42] Sampson, P.D., Streissguth, A.P., Bookstein, F.L., Little, R.E., Clarren, S.K., Dehaene, P., et al. (1997). Incidence of fetal alcohol syndrome and prevalence of alcohol-related neurodevelopmental disorder. *Teratology, 56,* 317-326.
[43] O'Malley, K.D. (2007). *ADHD and fetal alcohol spectrum disorders (FASD).* New York: Nova.
[44] Adubato, S.A., & Cohen, D.E. (2011). *Prenatal alcohol use and fetal alcohol spectrum disorders: Diagnosis, assessment and new directions in research and multimodal treatment.* New Jersey: Bentham Science Publishers Ltd.
[45] Olson, H.C., Feldman, J.J., Streissguth, A.P., Sampson, P.D., & Bookstein, F.L. (1998). Neuropsychological deficits in adolescents with fetal alcohol syndrome: Clinical findings. *Alcoholism: Clinical and Experimental Research, 22,* 1998-2012.
[46] Kodituwakku, P.W., Handmaker, N.S., Cutler, S.K., Weathersby, E.K., & Handmaker, S.D. (1995). Specific impairments in self-regulation in children exposed to alcohol prenatally. *Alcohol: Clinical and Experimental Research, 19,* 1558–1564.
[47] Kodituwakku, 2009, op. cit.

neurological information will be, particularly if there is time pressure, which adds an additional element of complexity.[48] Consequently, in novel social situations where behavior is not guided or structured by some external means, behavior in this population typically reflects *marked* impairment. In contrast, in routine situations that are well-practiced, automatic "motor memory" precludes the need for executive functioning. Importantly, because procedural motor memory developed through repetition governs actions rather than executive functioning,[49] this population tends to do best with familiar tasks where behavior has become routinized due to practice or in structured contexts with predictable rules and consequences and external guidance, both of which reduce the need for independent thinking and decision-making. This is why people with FASD learn best with "hands-on" practice.

Since the everyday world is a very complex place full of surprises, which increases the need for executive functioning, it is not surprising that a deficient *adaptive profile* is a universal finding in the FASD literature, regardless of IQ or particular diagnosis under the FASD umbrella.[50] Rather than IQ, it is higher-level executive functioning that most determines how information is processed and integrated in the brain and ultimately manifests as adaptive behavior. In fact, executive functioning in FASD directly predicts adaptive behavior.[51, 52] DSM-5 defines adaptive functioning as everyday behavior that meets developmental and sociocultural standards for personal independence and social responsibility.[53] More simply put, adaptive behavior is everyday behavior.

F. COLLATERAL INTERVIEWS

[First names are used in this section to facilitate identification.]

15. **Robert J. Hall ("Jay")** was interviewed telephonically for 2.0 hours on October 29, 2020. Jay said he and Zane met in early adolescence and were best friends throughout their teens and into their early 20s. They also lived together for three months in 1999: "I was always at Zane's house in my teens. I'm about a year younger than he is. I was really his only friend. He had a girlfriend at the end of high school. She was two years younger than me. Zane really didn't have any friends his age; they were all younger. My first memories of Zane around the time we started hanging out together were that he was a class clown, always making self-deprecating jokes to get the class to laugh. He would blurt out things in class, look at me and laugh. I think I felt sorry for him at first because when we first met, he was

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[48] Ibid.
[49] Ibid.
[50] Thomas, S.E., Kelly, S.J., Mattson, S.N., & Riley, E.P. (1998). Comparison of social abilities of children with fetal alcohol syndrome to those of children with similar IQ scores and normal controls. *Alcoholism: Clinical and Experimental Research, 22,* 528–533.
[51] Schonfeld, A.M., Paley, B., Frankel, F., & O'Connor, M.J. Executive functioning predicts social skills following prenatal alcohol exposure. *Child Neuropsychology, 12,* 439–452.
[52] Ware, A.L., Crocker, N., O'Brien, J.W., Deweese, B.N., Roesch, S.C., Coles, C.D.,...Mattson, S.N. (2012). Executive function predicts adaptive behavior in children with histories of heavy prenatal alcohol exposure and attention deficit/hyperactivity disorder. *Alcoholism: Clinical and Experimental Research, 36,* 1431-1441.
[53] American Psychiatric Association (2013). *Diagnostic and statistical manual of mental disorders, Fifth Edition.* Arlington, VA: American Psychiatric Association.

being jumped in the parking lot at school, and I stepped in. From that point on, we were best friends." Jay said one of the things he noticed about Zane was how he always seemed to function better in structured environments: "I was the same way, so I noticed that about him." Jay said Zane didn't play organized sports, although he tried out for the basketball team: "He would only get a few inches off the ground to do shots. He was so uncoordinated." Jay reported that he frequently observed Zane's parents drinking alcohol, noting that Valerie drank more often than Mike. Jay said he sometimes observed Mike assaulting Valerie and Zane and occasionally observed Valerie saying "cruel" and "hurtful" things to Zane.

16. **Mike Hall** was interviewed telephonically for 2.0 hours on November 12, 2020. Mike reported that he and his wife befriended Valerie and Mike Floyd when Zane became friends with his son Jay in early adolescence. Mike said his family and the Floyds remained close during both boys' teen years, noting, "A few times over those years, my ex-wife and I would get a call from Valerie, asking for us to come get her and Zane because Mike was drinking and getting out of control. Valerie drank as well, occasionally too much. I remember seeing her intoxicated." Mike recalled his impressions of Zane in adolescence: "He was annoyingly polite. I loved that kid. He seemed kind, gentle, sweet, sad…fragile. He was socially awkward and had a soft, timid voice. He was hard to understand sometimes when he was younger. He also was very uncoordinated and impulsive. These things gave me the impression he was developmentally slow. His sweetness continued into high school. He took my daughter to the prom."

17. **Carolyn Smith** was interviewed telephonically for 2.0 hours on November 25, 2020. According to her report, Carolyn is a retired social worker who lived near the Floyd family and was a "godmother" to Zane Floyd during his childhood: "Zane grew up with alcoholic parents who were always fighting, so our house was like a refuge for him. My husband and I were like his parents." Carolyn was a "very close friend" of Zane's mother Valerie Floyd and first met Zane when he was around 11 years old: "I had a close relationship with Zane and saw him four or five times a week when our two families lived for a year in the same apartment complex. My daughter Brittany was two years old at the time, and Zane played with her almost every day. About a year after our two families met, the Floyds moved into a house around the same time we did, but I regularly saw Zane and his mother several times a month after we moved." Noting the thing she remembered most about Zane in his teens was his hyperactivity, she added. "Zane's mother Val drank a lot. Before her pregnancy with Zane, Val had another baby boy who died. I suspect the death was due to her drinking. Val and Mike liked to party, have people over, barbeque, and drink. They seemed to drink all the time when Zane was young. I often saw them both intoxicated. Val told me back then that she drank alcohol throughout her pregnancy with Zane. This didn't surprise me because her drinking habits weren't normal. My husband and I talked to Val and Mike about how out of control their drinking was, which was how Val and I became close friends. Val had problems with Mike when they drank and had to call the police on him when he hit her." Carolyn noted that when Valerie first met Mike, she was a "mule" for her first husband, concealing drugs on her body as she traveled.

G. STANDARDIZED BEHAVIOR ASSESSMENT

18. Three standardized behavior assessments were administered telephonically to the three collateral individuals interviewed above, each of whom interacted regularly with Mr. Floyd from the time he was an adolescent until his early adult years.

a. **Fetal Alcohol Behavior Scale (FABS)[54]:**

The FABS was developed by researchers at the University of Washington in Seattle to describe the "behavioral essence" of the adaptive behavior deficits associated with FASD. To reduce transparency of the FABS items, which constitute 36 behaviors that differentiate FAS from non-FAS persons, relevant items are imbedded within a lengthier measure (i.e., Personal Behaviors Checklist), which contains 71 items. The behaviors addressed by the FABs are organized into seven categories (Communication and Speech, Personal Manner, Emotions, Motor Skills and Activities, Academic/Work Performance, Social Skills/Interactions, and Bodily/Physiologic Functions). Using a reference sample of 472 patients aged 2 to 51 diagnosed with Fetal Alcohol Syndrome (FAS) or Fetal Alcohol Effects (FAE), the FABS demonstrated high item-to-scale reliability and good test-retest reliability over an average interval of five years, identifying subjects with known or presumed prenatal alcohol exposure in multiple detection studies. A score of 15 or higher on the FABS reliably distinguishes persons with FASD (sample mean/median = 20) from those without FASD (sample mean/median = 5).

The three individuals interviewed in this evaluation (*Carolyn Smith* (family friend and social worker), *Jay Hall* (friend), and *Mike Hall* (father of Jay Hall) rated Mr. Floyd's behavior on the FABS, producing the following results:

Fetal Alcohol Behavior Scale (FABS)

Rater	Relationship	Target Age	Raw Score
Carolyn Smith	Family Friend/Social Worker	12	**25**
Mike Hall	Father of Jay Hall	16	**22**
Jay Hall	Childhood Friend	20	**22**

As shown above, all three collateral witnesses produced behavior ratings that fell significantly above the threshold level of 15 and somewhat above the mean/median score for FASD, indicating that *Mr. Floyd displayed the "signature" behavior profile unique to individuals with FASD, both in childhood and during his young adult years.*

[54] Streissguth, A.P., Bookstein, F.L., Barr, H.M., Press, S., & Sampson, P.D. (1998). A Fetal Alcohol Behavior Scale. *Alcoholism: Clinical and Experimental Research, 22,* 325 – 333.

b. **Vineland Adaptive Behavior Scales – Third Edition (Vineland-3):**

The Vineland-3 is a widely-used measure in mental health that assesses an evaluee's adaptive behavior via ratings from individuals who know him/her well. Behavior items in Vineland-3 involve specific tasks typically performed at different stages of development, which are divided into three broad categories of adaptive behavior: Communication, Daily Living, and Socialization skills. Rather than asking whether the person is *capable* of performing a task, the Vineland-3 assesses whether the person *regularly performs* the task *without prompting or assistance*. The Vineland-3 manual recommends that family members or those who know the evaluee very well function as respondents (i.e., 'raters'). For retrospective assessment, at least two raters are recommended in order to ensure reliability.

The Vineland-3 was administered to *Carolyn Smith* (family friend and social worker), *Jay Hall* (friend), and *Mike Hall* (father of Jay Hall), each of whom rated Mr. Floyd's behavior around the time he/she had regular contact with him: age 12 in the case of Carolyn Smith, age 16 in the case of Mike Hall, and age 20 in the case of Jay Hall.

Adaptive behavior ratings, scored by computer from an algorithm created by the test developer (Pearson), are shown in the table below. In the table, results are converted to standard scores for major domains (Mean = 100, Standard Deviation/SD = 15) and v-scale scores for subdomains (Mean = 15, Standard Deviation/SD = 3) and compared to age-norms.

Vineland-3

Domain / Subdomain	**Carolyn Smith** [Family Friend/Soc Worker]		**Mike Hall** [Jay Hall's Father]		**Jay Hall** [Childhood Friend]	
	Target Age: 12		Target Age: 16		Target Age: 20	
	v-Scale/ Std Score	Percentile	v-Scale/ Std Score	Percentile	v-Scale/ Std Score	Percentile
Receptive	1		1		1	
Expressive	1		1		1	
Written	9		7		7	
COMMUNICATION	**36**	**<1**	**28**	**<1**	**20**	**<1**
Personal	8		8		5	
Domestic	9		9		5	
Community	7		6		4	
DAILY LIVING	**66**	**1**	**51**	**<1**	**32**	**<1**
Interpersonal Relationships	5		9		3	
Play/Leisure Time	2		6		4	
Coping Skills	4		8		5	
SOCIALIZATION	**38**	**<1**	**60**	**<1**	**20**	**<1**
ADAPTIVE COMPOSITE	**48**	**<1**	**48**	**<1**	**25**	**<1**

The Vineland results shown above provide reliable and convergent data that quantify the nature and severity of Mr. Floyd's adaptive behavior in childhood and adulthood. Results

show that compared to other 12- and 16-year-olds, Mr. Floyd's adaptive functioning was *severely impaired* (Adaptive Composite scores = 48, or approximately 3.5 standard deviations below the mean of 100). Such ratings are consistent with Dr. Maria Cardle's psychological evaluation in 1989 when Mr. Floyd was 13. According to Mr. Floyd's childhood friend Jay Hall, Mr. Floyd's functioning was *profoundly impaired* in his early adult years (Adaptive Composite score = 25, or 5.0 standard deviations below the mean).

Vineland-3 scores also show Mr. Floyd's adaptive functioning decreased significantly over time, showing that as adaptive responsibilities and expectations became more complex with advancing age, his adaptive capacity diminished considerably in relation to age peers.

The level of Mr. Floyd's adaptive deficiency reported by all three raters is consistent with the FASD research,[55] as is the pattern of decreasing age-related adaptive ability over the course of the developmental years.[56, 57]

c. **Behavior Rating Inventory of Executive Function (BRIEF):**

The BRIEF is a standardized respondent-based measure[58] that assesses an individual's executive functioning or self-regulation in his/her everyday environment. Items on the BRIEF are rated in the same manner as items on the Vineland-3 (see below), but unlike the Vineland-3 and other adaptive measures, the BRIEF contains validity scales that address response bias.

In order to assess the possibility of biased Vineland-3 behavior ratings in the current evaluation (see above), the BRIEF also was administered to *Carolyn Smith* (family friend and social worker), *Jay Hall* (friend), and *Mike Hall* (father of Jay Hall).

Assessment results on the BRIEF, scored via a computer algorithm supplied by the test developer (Pearson Assessments) are shown in the table below.

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[55] Streissguth, A. P., Barr, H. M., Kogan, J., & Bookstein, F. L. (1996). *Final report: Understanding the occurrence of secondary disabilities in clients with fetal alcohol syndrome (FAS) and fetal alcohol effects (FAE).* Seattle, WA: University of Washington Publication Services.

[56] Jirikowic, T., Kartin, D., & Carmichael Olson, H. (2008). Children with fetal alcohol spectrum disorders: A descriptive profile of adaptive function. *Canadian Journal of Occupational Therapy, 75,* 238-248.

[57] Streissguth, A. P., Bookstein, F. L., Barr, H. M., Sampson, P. D., O'Malley, K., & Young, J. K. (2004). Risk factors for adverse life outcomes for fetal alcohol syndrome and fetal alcohol effects. *Journal of Developmental and Behavioral Pediatrics, 25*(4), 228–238.

[58] Internal consistency was high for the Informant Report normative sample (alpha range = .80-.93 for clinical scales: .95-.98 for indexes and GEC). Using a mixed sample of clinical or healthy adults who were seen for clinical evaluation or research study participation, internal consistency was high for the Informant Report Form (alpha range = .85-.95 for clinical scales; .96-.98 for indexes and GEC). Test-retest correlations across the clinical scales ranged from .91-.94 over an average interval of 4.21 weeks for the Informant Report Form (n = .44). In terms of convergent validity, the Informant Report Form of the BRIEF-A scales, indexes, and GEC demonstrated significant correlations in the expected direction with self- and informant reports on the Frontal Systems Behavior Scale (FrSBe), Dysexecutive Questionnaire (DEX), and Cognitive Failures Questionnaire (CFQ).

BRIEF Reliability Scales

Validity Scale	Clinical Threshold Score	Carolyn Smith [Target Age: 12[	Mike Hall [Target Age: 16]	Jay Hall [Target Age: 20]
Negativity	≥ 6	0	0	0
Inconsistency	≥8	5	2	0
Infrequency	≥3	0	0	0
RESULTS		**VALID**	**VALID**	**VALID**

Results on BRIEF validity scales show that *all three individuals approached the task of rating Mr. Floyd's behavior in a straightforward, unbiased manner*.

H. PRIMARY DISABILITIES

19. Organic brain damage in FASD directly impairs the cognitive skills needed to think adequately and self-regulate. In turn, the cognitive dysfunction in FASD directly impairs adaptive functioning (i.e., real-world behavior) in an empirically demonstrated predictive manner.[59, 60] Regardless of IQ, comprehensive neuropsychological testing in FASD typically finds variable "patchy" cognitive profiles characterized by relative strengths and weaknesses that on average fall below full-scale IQ (i.e., between-test variability), which reflects intermittent exposure to alcohol during gestation even when exposure is heavy and regular.

    At my request, Dr. Paul Connor graphically portrayed Mr. Floyd's cognitive test results documented in previous evaluation reports (see Exhibit 1 below): Dr. Cardle's testing in 1989 when Mr. Floyd was 13; test results from Drs. Dougherty, Paul, and Schmidt in 2000; and Dr. Mack's testing in 2006. Current adaptive assessment results from the Vineland-3 also are included (see last column on the right side of Exhibit 1). In Exhibit 1, direction of deficit is made constant to facilitate 'apples-to-apples' comparison. The horizontal green line in Exhibit 1 depicts z-score mean or average score (i.e., "0") for each test; the horizontal red line depicts the cut-point for a "deficit" finding according to measurement guidelines for FAS published by the Centers for Disease Control[61] (i.e., -1 SD except for IQ, which requires -2 SD).

[59] Shonfeld, A.A., Paley, B., Frankel, F., & O'Connor, M. J. (2006). Executive functioning predicts social skills following prenatal alcohol exposure. *Child Neuropsychology, 12,* 439-452.
[60] Ware, A.L., Crocker, N., O'Brien, J.W., Deweese, B.N., Roesch, S.C., Coles, C.D.,...Mattson, S.N. (2012). Executive function predicts adaptive behavior in children with histories of heavy prenatal alcohol exposure and attention deficit/hyperactivity disorder. *Alcoholism: Clinical and Experimental Research, 36,* 1431-1441.
[61] Bertrand, J., Floyd, L. L., Weber, M. K., O'Connor, M., Johnson, K. A., Riley, E., & Cohen, D. (2004). *Guidelines for identifying and referring persons with fetal alcohol syndrome.* Atlanta, GA: Centers for Disease Control and Prevention.

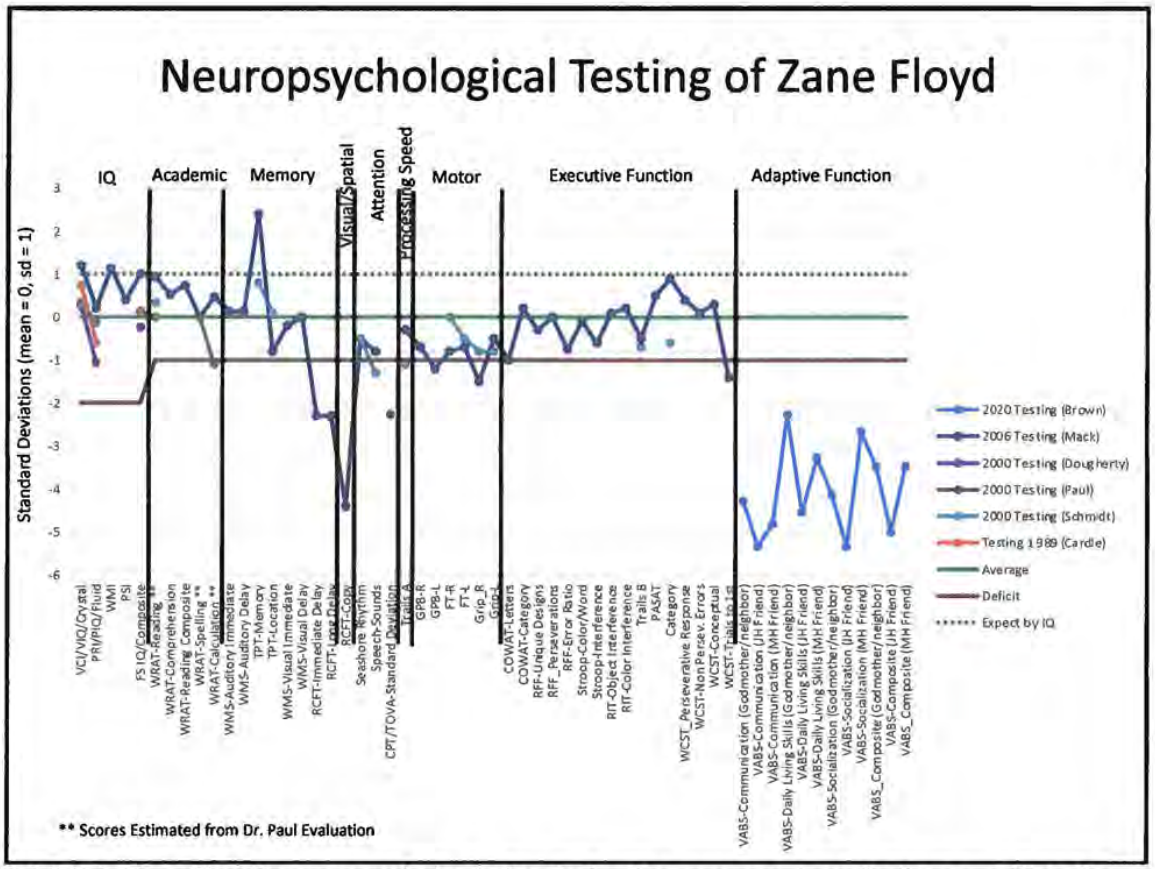

Exhibit 1. Zane Floyd's neuropsychological and adaptive assessment results from age 13 to the present

As can be seen in Exhibit 1, Mr. Floyd's cognitive test results (excluding adaptive functioning) reflect extreme variability, ranging from a high score of 2.4 SDs above the mean on a memory subtest (i.e., ability to remember rather simple geometric shapes he had held and examined with his hands while blindfolded) to a low score of 4.4 SDs below the mean on a visuospatial construction task (i.e., ability to copy a complex figure with significant details and interactions between components). Overall, testing and adaptive assessment found deficiency in the following 10 domains:

Cognitive Domains

- IQ (significant discrepancies among quotient/index scores)
- Attention
- Academic Achievement (math calculation)
- Memory/Learning (increasingly deficient performance with increasing task complexity on visual tasks)
- Visuospatial Construction
- Motor Coordination

- Executive functioning (initial development of problem-solving strategies)

Adaptive Domains

- Communication (Vineland-3 – all 3 raters)
- Daily Living Skills (Vineland-3 – all 3 raters)
- Socialization (Vineland-3 – all 3 raters)

It is notable and consistent with FASD that Mr. Floyd's full-scale IQ varied widely (i.e., 101 when tested by Dr. Cardle, 94 when tested by Dr. Dougherty, 102 when tested by Dr. Paul, and 115 when tested by Dr. Mack). The latter score, which reflects significant improvement in verbal skills, likely was due in part to long-term abstinence from alcohol and drugs while incarcerated. Because of the significant discrepancies in sub-test scores, Mr. Floyd's full-scale IQ scores are not reliable representations of his intellectual functioning. As noted in Paragraph 13, IQ scores in FASD range widely in FASD from the profoundly deficient range to the superior range[62] (e.g., IQs in this population have been recorded as high as 142[63]). When IQs fall in the average range, which generally was the case for Mr. Floyd, significant discrepancies within IQ subtests are diagnostically meaningful.[64]

20. The cognitive deficits in FASD directly impair adaptive functioning. Adaptive functioning reflects everyday real-world capacity to deal with tasks and challenges in contexts that range from semi-structured school environments to completely unstructured community settings. When children exhibit chronic learning, social, and self-regulation problems in the relatively-structured school years, such a pattern essentially predicts that later in life, they will have even greater difficulties in the unstructured real world. While it may be possible for a person to compensate for one or two mild impairments in a single cognitive domain, when there are multiple mild impairments in several areas of the brain, compensation is virtually impossible without external structure and supports.[65] That is, the impact on behavior from a pervasive pattern of mild cognitive impairment is devastating. Deficient adaptive functioning appears to be universal in FASD, regardless of stage of development, instrument used to measure behavior, *or IQ*.[66, 67, 68, 69, 70]

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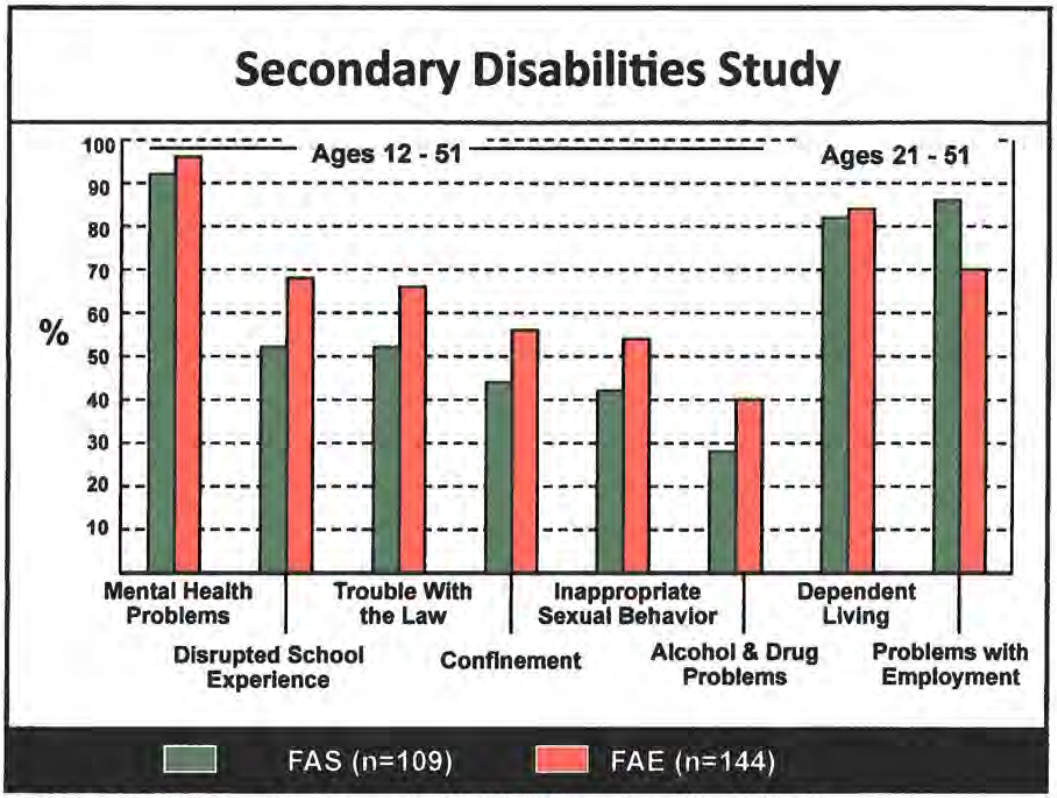
[62] Streissguth, Barr, Kogan, & Bookstein, op. cit.
[63] Ibid.
[64] Ibid.
[65] Livingston, L. A., & Happe, F. (2017). Conceptualizing compensation in neurodevelopmental disorders: Reflections from autism spectrum disorder. *Neuroscience and Biobehavioral Reviews, 80,* 729-742.
[66] Carmichael Olson, H., Feldman, J. J., Streissguth, A. P., Sampson, P. D., & Bookstein, F. L. (1998). Neuropsychological deficits in adolescents with fetal alcohol syndrome: clinical findings. *Alcoholism: Clinical and Experimental Research, 22,* 1998–2012.
[67] Carr, J. L., Agnihotri, S., & Keightley, M. (2010). Sensory processing and adaptive behavior deficits of children across the fetal alcohol spectrum disorder continuum. *Alcoholism: Clinical and Experimental Research, 34,* 1022–1032.
[68] Crocker, N., Vaurio, L., Riley, E.P., & Mattson, S.N. (2009). Comparison of adaptive behavior in children with heavy prenatal alcohol exposure or attention-deficit/hyperactivity disorder. *Alcoholism: Clinical and Experimental Research, 33,* 2015–2023.
[69] Fagerlund, A., Autti-Ramo, I., Kalland, M., Santtila, P., Hoyme, H. E., Mattson, S. N., & Korkman, M. (2012). Adaptive behavior in children and adolescents with foetal alcohol spectrum disorders: A comparison with specific learning disability and typical development. *European Child and Adolescent Psychiatry, 21,* 221-231.
[70] Jirikowic, T., Kartin, D., & Carmichael Olson, H. (2008). Children with fetal alcohol spectrum disorders: a descriptive profile of adaptive function. *Canadian Journal of Occupational Therapy, 75,* 238–248.

21. In Mr. Floyd's case, not only does he have many mild deficits in cognitive functioning, some of his cognitive skills are moderately or severely impaired. As can be seen visually in the Vineland-3 scores depicted in Exhibit 1, the widespread deficits seen in Mr. Floyd's cognitive profile have a *profound* effect on his adaptive behavior. According to Dr. Connor, Mr. Floyd's Vineland-3 results average -4.8 SDs for Communication, -3.4 SDs for Daily Living Skills, -4.0 SDs for Socialization, and -4.0 for overall adaptive functioning.

I. SECONDARY DISABILITIES

22. Nearly 25 years ago, a massive research study sponsored by the CDC[71] identified an adverse developmental trajectory in FASD, characterized by multiple negative life course outcomes or "secondary disabilities." The figure below, taken from this secondary disabilities study and reprinted with permission from the University of Washington's Fetal Alcohol and Drug Unit, shows study results for children, adolescents, and adults with FAS and those with FAE (the outdated diagnostic term for ARND).



Negative developmental outcomes in FASD ("Secondary Disabilities")

[71] Streissguth, Barr, Kogan, & Bookstein, op. cit.

As can be seen above, compared to normally-developing children, those with FASD (i.e., both FAS and FAE/ARND) are at very high risk of several negative developmental outcomes, particularly if they are exposed in childhood to risk factors such as abuse, domestic violence, or neglect.[72] In Mr. Floyd's case, records indicate he was exposed to all three risk factors.

The table below, which assesses Mr. Floyd's life history in the context of the secondary disabilities research, reflects many of the secondary disabilities typically seen in FASD:

Secondary Disabilities Analysis

Secondary Disability	Zane Floyd's History
Disrupted Education	• Special education was recommended by school professionals around first grade but not permitted by the birth mother (Dougherty, 2000) • Repeated 2nd grade (Dougherty, 2000) • Expelled in elementary school for being "out of control" and placed on home instruction (Dougherty, 2000) • Left high school before graduating and did not receive diploma until completing courses at Clark County Adult High School (Dougherty, 2000)
Mental Health Problems	• Medicated with Ritalin for ADHD from first through third grade and again from age 13 to 14 (Dougherty, 2000) *Documented Diagnoses:* • Adjustment reaction with mixed emotional and behavioral symptoms (Cardle, 1989) • ADHD (Cardle, 1989; Paul, 2000; Schmidt, 2000; Mack, 2006) • Developmental Coordination Disorder (Cardle, 1989; Mack, 2006) • Learning Disorder NOS, Dysgraphia/Constructional Dyspraxis (Mack, 2006) • Organizational Deficits (i.e., executive dysfunction) in visual-motor functioning and integrating/organizing information (Cardle, 1989) • Dysthymic Disorder, Primary, early onset (Paul, 2000) • Major Depression, recurrent, without psychotic features (Paul, 2000) • Obsessive Compulsive Disorder (Mack, 2006) • PTSD, chronic (Mack, 2006) • Dissociative Disorder NOS (Mack, 2006) • Pathological Gambling (Paul, 2000) • Sleepwalking Disorder by history (Mack, 2006) • Sexual Disorder NOS (Paul, 2000) • Personality Disorder NOS with avoidant, passive-aggressive, and dependent personality characteristics, severe (Paul, 2000) • Personality Disorder NOS with paranoid, schizoid, and antisocial features (Schmidt, 2000)

[72] Streissguth, Barr, Kogan, & Bookstein, op. cit.

	• Personality Change due to Neurodevelopmental Brain Damage (Mack, 2006) • Avoidant Personality Disorder with antisocial personality features (Mack, 2006) *Relevant Axis III Diagnoses:* • Premature birth and birth weight (4 lbs, 1.5 ozs) • Prenatal alcohol and drug exposure • Prenatal intoxia • History of mental tremors, recurrent ear infections
Substance Abuse	• Used marijuana daily at age 15, began drinking alcohol at age 14/15 and drinking steadily at age 16 (Dougherty, 2000) • Daily use of alcohol, marijuana, and methamphetamine for several months in late teens (Dougherty, 2000) • After passing the physical in the Marine Corps, returned to drug use; arrested for DUI and discharged from the military, asked not to re-enlist because of his drinking problem (Dougherty, 2000) Relevant Diagnoses: • Alcohol Dependence (Paul, 2000); Alcohol Abuse (Schmidt, 2000; Mack, 2006) • Polysubstance Abuse – marijuana, methamphetamine (Schmidt, 2000) • Cannabis Dependence (Paul, 2000; Mack, 2006) • Amphetamine Dependence (Paul, 2000; Mack, 2006) • Cocaine Abuse (Paul, 2000)
Trouble with the Law	• DUI in California • INSTANT OFFENSE (1999)
Confinement	• Incarceration from 1999 to present
Inappropriate Sexual Behavior	• Diagnosed with Sexual Disorder NOS by Dr. Paul (Paul, 2000) • In guilt phase testimony, Tracie Rose Carter testified that Mr. Floyd used a gun to spread her legs apart during sexual activity (Mack, 2006) • Found guilty during trial of 4 counts of sexual assault with the use of a deadly weapon (Mack, 2006)
Employment Problems	• Enlisted in Marine Corps at age 18, promoted to Lance Corporal after boot camp, but was soon discharged and asked not to re-enlist after a DUI (Dougherty, 2000; Mack, 2006)
Dependent Living	• Lived with childhood friend Jay Hall after discharge from Marines, then moved back to parents' home

As can be seen above, *Mr. Floyd's history reflects all 8 of the secondary disabilities identified in the FASD research.*

J. DIAGNOSTIC IMPRESSIONS

23. CNS dysfunction in FASD was diagnosed generally in DSM-IV-TR (2000) as *cognitive disorder not otherwise specified* (i.e., Cognitive Disorder NOS) and now is specifically diagnosed in DSM-5 (2013) as *neurodevelopmental disorder associated with prenatal alcohol exposure* (i.e., ND-PAE). Both DSM diagnoses constitute a "mental defect" in the forensic setting. ND-PAE is the diagnostic category used by DSM-5 to describe the sequelae of developmental, behavioral, intellectual, and functional problems seen in people exposed prenatally to alcohol.

24. DSM-5 diagnostic criteria for ND-PAE generally require evidence of prenatal alcohol exposure, at least one impairment in neurocognitive functioning (i.e., standard score of 70/75 or below on an individually administered IQ test or impairments in executive functioning, learning, memory, or visual-spatial reasoning/organization), at least one impairment in self-regulation (i.e., mood or behavioral regulation, attention, or impulse control), and at least two domains of adaptive impairment (i.e., communication, social communication and interaction, daily living skills, or motor skills), with onset in the developmental period.

    Records reviewed in my previous evaluation (10/17/06) reflect consistency between Mr. Floyd's documented cognitive and adaptive functioning, developmental trajectory, and ND-PAE, as summarized in the analysis below (prepared in consultation with Neuropsychologist Paul Connor).

DSM-5 Criteria for ND-PAE

Criterion	Documented Impairments in Zane Floyd	Source [Testimony or Reports]
Prenatal alcohol exposure	Birth mother Valerie Floyd testified she drank alcohol heavily throughout her pregnancy with Mr. Floyd.	Trial testimony
	Social worker Jorge Abreu, who had conducted a psychosocial evaluation of Mr. Floyd, testified that Valerie Floyd told him her substance use began as a teenager and "continued through both pregnancies" and that she drank alcohol and used drugs, including LSD and cocaine, "throughout the pregnancy" with Mr. Floyd	Trial testimony
Neurocognitive impairments (at least 1)	Intellectual (sub-test discrepancies)	Cardle (1989), Dougherty (2000), Mack (2013)
	Memory (complex visuospatial)	Mack (2013)
	Academic Learning (math calculation)	Paul (2000)
	Visuospatial Construction	Mack (2006)

Self-Regulation impairments (at least 1)	Attention	Paul (2000), Schmidt (2000)
	Impulse Control (initial)	Mack (2006)
	Problem Solving (developing)	Mack (2006)
Adaptive impairments (at least 2)	Communication	Vineland-3 (2020)
	Daily Living Skills	Vineland-3 (2020)
	Socialization	Vineland-3 (2020)
	Motor Coordination	Mack (2006)
Childhood onset	Documented evidence of impairments in childhood	Record review
Disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.	8/8 secondary disabilities	Current analysis
Disorder is not better explained by the direct physiological effects of postnatal use of a substance, a general medical condition other than FASD, a genetic condition, or environmental neglect.	Impairments precede substance use in the teen years No evidence of traumatic brain injury in childhood No evidence of a general medical condition other than prenatal alcohol exposure Environmental neglect may have had an additive and cumulative effect on underlying brain damage but does not explain life history	Current analysis

As can be seen above, *Mr. Floyd's functioning and life history well exceed DSM-5 diagnostic criteria for ND-PAE*, the current diagnosis under DSM-5 for the CNS impairment (or "mental defect") in FASD.

25. **In summary, Zane Floyd's adaptive/functional history is consistent with the mental defect associated with FASD, which in DSM-5 is diagnosed generally as Other Specified Neurodevelopmental Disorder (Code 315.8) and specifically as *Neurodevelopmental Disorder Associated with Prenatal Alcohol Exposure* (*ND-PAE*).**

K. COMPARING FASD TO ADHD AND ID

26. FASD, ADHD, and ID are all classified by DSM-5 as neurodevelopmental disorders, meaning all three disorders typically (a) manifest early in development, often before a child enters grade school; (b) are "characterized by developmental deficits that produce impairments of personal, social, academic, or occupational functioning"; and (c) involve a range of developmental deficits that vary "from very specific limitations of learning or

control of executive functions to global impairments of social skills or intelligence" (DSM-5, p. 31).

27. **Attention-Deficit/Hyperactivity Disorder (ADHD):** In DSM-5, ADHD is described (p. 59) as "a persistent pattern of inattention and/or hyperactivity-impulsivity that interferes with functioning or development..." Three sub-types are identified as: (a) inattention, (b) hyperactivity – impulsivity, and (c) mixed. Most individuals fall in the third, mixed, sub-category. For the first two sub-types, six or more symptoms from a list of behaviors must have persisted "for at least six months (five months for older adolescents and adults) to a degree that is inconsistent with developmental level and that negatively impacts directly on social and academic/ occupational activities" and that are "not solely a manifestation of oppositional behavior, defiance, hostility, or failure to understand tasks or instructions" (for type 1) and "do not occur exclusively during the course of schizophrenia or another psychotic disorder" (for type 2). These symptoms must be evident before age 12. Although ADHD can be diagnosed in adults, most individuals diagnosed with the disorder in childhood cease to manifest the disorder as they enter adulthood.73 Although people with ADHD often do poorly in school because of inattention and interpersonal insensitivity due to impulsivity, there is no cognitive or adaptive functioning criterion for the diagnosis.

28. **Intellectual Disability (ID):** ID has three definitional criteria: significant deficits in intellectual functioning, impaired adaptive functioning, and onset within the developmental period (typically interpreted to mean before age 18). Prong One (intellectual impairment) is measured by a full-scale IQ score of 70-75 or below, although other measures such as Executive Functions can be cited. Adaptive functioning, typically measured through a rating instrument such as the Adaptive Behavior Assessment System (ABAS) or Vineland, has three components: Conceptual, Practical, and Social, summarized into a Composite Adaptive Index. Qualitative evidence such as gullibility and poor risk awareness also are important. Significant deficiency (< 2 standard deviations) has to be shown on standardized instruments for only one of these four indices. As a rule, ID is a lifelong status, although with practice individuals can improve adaptive skills during adulthood.

29. **Fetal Alcohol Spectrum Disorders (FASD):** CNS abnormality in ND-PAE typically is established by multiple cognitive impairments (executive dysfunction and other cognitive impairments) and impairments in adaptive functioning. For the latter, impairments are required in at least two of the three domains usually included in standardized instruments (communication, daily living or practical skills, and socialization), which actually is a more stringent requirement than in ID (where only one impaired adaptive domain is required). In Mr. Floyd's case, Vineland-3 scores fall well below the -2 SD level in communication, daily living skills, and socialization.

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[73] Newton-Howes, G. (20014). What happens when children with attention deficit/hyperactivity disorder grow up? *Journal of the Royal Society of Medicine, 97,* 531-535.

Mr. Floyd was diagnosed in 2006 with partial FAS,[74] a diagnosis that falls under the FASD umbrella. According to IOM criteria,[75] the core diagnostic element in partial FAS (which requires only some of the physical indicia in (a) and (b) is CNS dysfunction. CNS dysfunction stems directly from structural brain damage that directly impairs thinking and behavior throughout the lifespan.[76]

As noted previously, ND-PAE currently represents the CNS dysfunction for *all* of the medical disorders under the FASD umbrella under DSM-5 (i.e., FAS, partial FAS, and ARND) and is "intended to encompass the full range of developmental disabilities associated with exposure to alcohol in utero" (DSM-5, p. 799).

DSM-5 also notes that evidence of CNS dysfunction in ND-PAE varies by developmental stage. Although about half of young children prenatally exposed to alcohol show marked developmental delay in the first three years of life, others may not exhibit signs of CNS dysfunction until they are preschool- or school-age. When children with ND-PAE reach school age, learning difficulties, impairments in executive function, and problems with integrative language functions usually emerge more clearly, and both social skills deficits and challenging behavior may become more evident. As school and other requirements become more complex over the course of development, greater deficits are noted. The CNS dysfunction seen in those with ND-PAE "often leads to decrements in adaptive behavior and to maladaptive behavior with lifelong consequences," as this population has "a higher prevalence of disrupted school experiences, poor employment records, trouble with the law, confinement (legal or psychiatric), and dependent living conditions" (DSM-5, p. 800). As shown in the secondary disabilities table above (Paragraph 22), Mr. Floyd's functional history reflects this developmental course.

30. **FASD ≠ ADHD:** FASD is a medical disorder that occasionally is misunderstood as the functional equivalent of ADHD. This view may reflect the fact that FASD often is not diagnosed in childhood because very high rates of co-occurring attention and/or hyperactivity problems distract providers and tend to get diagnosed as ADHD, thereby masking the underlying medical condition.[77] It is understandable that because both disorders often share attention and self-regulation problems like hyperactivity, FASD would come to be seen incorrectly as the functional equivalent of ADHD. However, the problem with this assumption is that disability severity varies substantially in individuals with neurodevelopmental disorders.

    Researchers in the FASD field[78] have noted the following significant differences between FASD and ADHD, differences that refute the concept of FASD's equivalency with ADHD: (a) etiology and course of the two conditions are very different, in that FASD has a single

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[74] Evaluation report of Zane Floyd by Novick Brown, dated 10/17/06
[75] Stratton, Howe, & Battaglia, op. cit.
[76] Mattson, S. N., Schoenfeld, A., M., & Riley, E. P. (2001). Teratogenic effects of alcohol on brain behavior. *Alcohol Research and Health, 25,* 185-191.
[77] Chambers, C.D., Kalberg, W.O., Zellner, J., Feldman, H., Buckley, D., Kopald, D., Hasken, J.M., et al. (2018). Prevalence of Fetal Alcohol Spectrum Disorders in 4 US Communities. *Journal of the American Medical Association, 319,* 474-482.
[78] e.g., Peadon, E., & Elliott, E. J. (2010). Distinguishing between attention-deficit hyperactivity and fetal alcohol spectrum disorders in children: Clinical guidelines. *Neuropsychiatric Diseases and Treatment, 6,* 509-515.

etiology that is known while ADHD is etiologically multifactorial and typically unknown; (b) FASD has greatly increased mortality risk when compared to ADHD; (c) FASD is far more complex and severe and requires much higher levels of care than ADHD; (d) annual cost of care is over 10 times higher for FASD compared to ADHD; (e) expression of the two conditions is dissimilar in that FASD has a similar male to female ratio while ADHD is three times more prevalent in males; (f) while FASD is a causal factor for ADHD, there is no evidence ADHD is a causal factor for FASD; (g) ADHD gradually decreases in severity across childhood and adolescence while FASD becomes more complex, resulting in more severe adaptive deficiency and greater adversity across the lifespan; and (h) FASD is equivalent to ID in terms of everyday adaptive behavior, which is not the case for ADHD.

Whether measured in terms of depth of impairment for a single defining ability or breadth of impaired abilities and their effects on overall adaptive functioning, FASD is a very severe disorder comparable to ID, and ADHD is a much less severe disorder, as the analysis that follows makes clear.

a. **Definitional Complexity:** One way to measure disability severity is by definitional complexity (i.e., number of domains that must be impaired in DSM-5 to meet diagnostic criteria). Table 1 below compares the three disorders in terms of DSM-5 definitional complexity:

Disorder	Neurocognitive Deficits		Self-Regulatory Deficiency[79]	Adaptive Function Deficits	Significantly Interferes with Functioning	Lifelong	Number of Elements
	Deficient IQ	Executive Function					
FASD	NO	YES	YES	YES	YES	YES	5
ADHD	NO	NO	YES	NO	YES	NO	2
ID	YES	YES	NO	YES	YES	YES	5

Table 1. Extent of definitional complexity in the three disorders

With respect to definitional complexity, FASD and ID are similar in that both require 5 diagnostic elements. In contrast, ADHD is the outlier with only 2 required diagnostic criteria. The only diagnostic element in ID that is not required in FASD is deficient IQ although in FASD, 27% of people with FAS and 9% of those with FAE/ARND have an IQ of 70 or below. Generally in FASD, adaptive functioning tends to fall approximately 2 standard deviations below IQ, regardless of specific diagnosis.[80] Both ID and FASD require adaptive dysfunction: FASD requires at least 2 deficient adaptive domains; ID requires at least 1. As noted previously, no adaptive dysfunction is required in ADHD. FASD (as defined in ND-PAE) and ADHD both require self-regulatory dysfunction. In fact, at its core, ADHD is defined solely by two aspects of deficient self-regulation: attention and impulse control. In contrast to ADHD with respect to the self-regulatory

[79] Impaired mood/behavior regulation
[80] Streissguth, Barr, Kogan, & Bookstein, op. cit.

criterion, FASD is defined by a broader range of self-regulation deficiency: attention, impulse control, and/or mood or behavioral regulation. Overall, considering the range of definitional elements in DSM-5, FASD and ID are tied with respect to diagnostic complexity, and both are substantially more complex and severe than ADHD.

b. **Functional Capacity:** Disability severity also can be compared in terms of how extensively a disorder typically impairs functional capacity (i.e., both cognitive and adaptive functioning). Ratings below in Table 2, arrived at in consultation with Dr. Stephen Greenspan (a national expert on ID), are based on the following scale: 0 = Mild (equal to or less than 10% of the disability's population), 1 = Moderate (11-49% of the disability's population), and 2 = Severe (50% or more of the disability's population).

IMPAIRMENT		FASD	ADHD	ID
Cognitive	IQ	1	0	2
	Academics	2	2	2
	Attention	2	2	2
	Memory	2	1	2
	Visuospatial	2	0	2
	Processing Speed	1	1	2
	Executive Function	2	2	2
Adaptive	Communication	2	0	2
	Daily Living Skills	2	0	2
	Socialization	2	1	2
	Motor	1	0	1
TOTAL DOMAINS OF IMPAIRMENT		19	9	21

Table 2. Extent of functional impairments in the three disorders

Based on the analysis in Table 2 above, FASD and ID are quite similar in terms of widespread functional deficiency in both cognition and adaptive functioning. In contrast, ADHD is mildly affected.

c. **Risk of Negative Outcomes:** Another way of looking at disability severity is risk of adverse developmental outcomes, including secondary disabilities. Table 3 below ranks the three disorders in terms of secondary disabilities and other outcome risks on a 3-point ordinal scale that compares outcome risk: 3 = highest risk, 2 = next highest risk, and 0 = lowest risk.

Adverse Outcome	FASD		ADHD		Mild ID	
	Rate	Rank	Rate	Rank	Rate	Rank
Poverty[81]	50 %[82]	2	1.2%[83]	0	31.3%[84]	1
Homelessness	60 %[85]	1	≤24 %[86]	0	≤63 %[87]	2
ACEs[88]	5.3[89]	2	2.1[90]	0	2.5[91]	1
Mental health problems	94 %[92]	2	66 %[93]	1	≤57 %[94]	0
Disrupted schooling	60 %[95]	2	28[96]	1	20[97]	0
Dependent living	83 %[98]	1	44 %[99]	0	89 %[100]	2

[81] In 1919, poverty in the United States was 11.8% of the general population. See: https://fas.org/sgp/crs/misc/R46000.pdf
[82] Streissguth, Barr, Kogan, & Bookstein, op. cit.
[83] Danielson, M. L., Bitsko, R. H., Ghandour, R. M., Holbrook, J. R., Kogan, M. D., & Blumberg, S. J. (2016). Prevalence of parent-reported ADHD diagnosis and associated treatment among U.S. children and adolescents, 2016. *Journal of Clinical Child and Adolescent Psychology, 47,* 199-212.
[84] Ibid.
[85] Streissguth, Barr, Kogan, & Bookstein, op. cit.
[86] Stone, B., Dowling, S., & Cameron, A. (2018). Cognitive impairment and homelessness: A scoping review. *Health and Social Care Community, 27,* e125-e142.
[87] Mercier, C., & Picard, S. (2011). Intellectual disability and homelessness. *Journal of Intellectual Disability Researhc, 55,* 441-449.
[88] Number of ACEs in the general population is 1.7 on average. See: Kambeitz, C., Klug, M. G., Greenmyer, J., Popova, S., & Burd, L. (2019). Association of adverse childhood experiences and neurodevelopmental disorders in people with fetal alcohol spectrum disorders (FASD) and non-FASD controls. BMC Pediatrics, 19, 498 https://doi.org/10.1186/s12887-019-1878-8
[89] Ibid.
[90] Semiz, U. B., Oner, O., Cengiz, F. F., & Bilici, M. (2017). Childhood abuse and neglect in adult attention-deficit/hyperactivity disorder. *Psychiatry and Clinical Psychopharmacology, 27,* 344-348.
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[92] Streissguth, Barr, Kogan, & Bookstein, op. cit.
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[95] Streissguth, Barr, Kogan, & Bookstein, op. cit.
[96] Fried, R., Petty, C., Faraone, S.V., Hyder, L.L., Day, H., Biederman, J. (2016). Is ADHD a risk factor for high school dropout? A controlled study. *Journal of Attention Disorders, 20(5),* 383-9.
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Employment problems	79 %[101]	2	16 %[102]	0	21 %[103]	1
Substance abuse	35[104]	1	52 %[105]	2	5 %[106]	0
Trouble with the law	61 %[107]	2	12 %[108]	1	≤8.6 %[109]	0
Social isolation	57 %[110]	2	31-36 %[111]	0	~50 %[112]	1
Victimization	72 %[113]	2	7.3 %[114]	0	17.5 %[115]	1
TOTALSCORE	19		5		9	

Table 3. Adverse outcome risk in the three disorders

Based on ratings of adverse outcome risk in Table 3, it is clear people with FASD are at much greater risk of a negative developmental trajectory than those with ADHD or ID. Much of this risk stems from lack of early diagnosis and appropriate interventions.[116] In contrast, ID and ADHD tend to get diagnosed early in life, which significantly improves the odds of intervention (and protection in the case of ID). Overall, both ADHD and ID are mild severity disabilities compared to FASD in terms of negative life course outcomes. Notably, most people with FASD as well as ID cannot live independently in society as adults.[117]

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[101] Streissguth, Barr, Kogan, & Bookstein, op. cit.
[102] Kuriyan, A. B., Pelham Jr., W. E., Molina, B. S. G., Waschbusch, D. A., Gnagy, E. M., Sibley, M. H., Babinski, D. E., Walther, C., Cheong, J. W., Yu, J., & Kent, K. M. (2012). Young adult educational and vocational outcomes of children diagnosed with ADHD. *Journal of Abnormal Child Psychology, 31,* 27-41.
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[104] Streissguth, Barr, Kogan, & Bookstein, op. cit.
[105] Carpentier, P. J. (2012). ADHD and addiction. In J. C> Verster, K. Brady, M. Galanter, & P. Contrad (Eds.), *Drug abuse and addiction in medical illness.* New York: Springer.
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[110] Streissguth, Barr, Kogan, & Bookstein, op. cit.
[111] Sasser, T. R., Kalvin, C. B., & Bierman, K. L. (2016). Developmental trajectories of clinically significant attention-deficit/hyperactivity disorder (ADHD) symptoms from Grade 3 through 12 in a high-risk sample: Predictors and outcomes. *Journal of Abnormal Psychology, 125,* 207-219.
[112] Ibid.
[113] Streissguth, Barr, Kogan, & Bookstein, op. cit.
[114] Hellstrom, L. (2019). A systematic review of polyvictimization among children with attention deficit hyperactivity or autism spectrum disorder. International Journal of Environmental Research and Public Health, 16, 2280; doi:10.3390/ijerph16132280
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[116] Streissguth, Barr, Kogan, & Bookstein, op. cit.
[117] Burd, L., & Kerbeshian, J. (2013). Fetal alcohol spectrum disorders: Commentary. *International Journal of Alcohol and Drug Research, 2,* 3-6.

31. **ID Equivalence:** Whether measured by definitional complexity, functional capacity, outcome risk, or any other logical metric, FASD is a much more severe disorder than ADHD and, in some cases, ID and therefore is well-deserving of being viewed under the rubric of "ID Equivalence." The bases for FASD-ID similarity and FASD/ADHD dissimilarity are multifaceted and compelling, as described below:

    a. **Etiology:** Both ID and FASD stem from permanent structural brain damage. ADHD is etiologically multifactorial (and typically unknown). While FASD is a causal factor for both ID and ADHD, there is no evidence ADHD or ID are causal factors for FASD.

    b. **Diagnostic Protocol:** Typically, ID and ADHD are diagnosed by a single provider (e.g., mental health professional or pediatrician) in the context of relatively minimal testing (in DSM-5, ID requires IQ testing and adaptive assessment; ADHD does not require any testing). In contrast, FASD is diagnosed by a multidisciplinary team comprised of a neuropsychologist to conduct comprehensive cognitive testing to address the multiple domains that must be deficient per diagnostic criteria, an adaptive functioning specialist (usually a psychologist) to conduct standardized adaptive behavior assessment and assess documented life history for consistency with FASD, and a medical doctor to assess physical indicia of FASD (e.g., facial and growth abnormalities, brain damage). Thus, of the three conditions, FASD requires more resources to diagnose.

    c. **Cognitive Dysfunction:** While IQ distinguishes between ID and FASD in the majority of individuals with FASD, executive and everyday adaptive functioning in both conditions tends to be identical.[118] As noted previously, significant discrepancies in IQ domains are seen frequently in persons with FASD,[119] which makes full-scale IQ an inaccurate way to classify functional deficiency in FASD.[120] Full-scale IQ also has become less important in ID according to DSM-5 as "intellectual" deficiency now is defined as a broad array of mixed impairments that mostly involve executive dysfunction (i.e., reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, practical understanding). Meta-analyses have found that persons with ADHD have full-scale IQs (FSIQs) that are only 9 points lower than neurotypical controls[121, 122]; in contrast to ADHD, average IQ in FAS is 79 (21 points lower than neurotypical controls).[123] A meta-analysis that directly compared IQ in FASD and ADHD found full-scale IQ was 16 points lower in FASD compared to ADHD.[124] Executive functioning also

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[118] Greenspan, S., Novick Brown, N., & Edwards, W. (2016). FASD and the concept of "intellectual disability equivalence." In M. Nelson & M. Trussler (Eds.), Fetal alcohol spectrum disorders in adults: Ethical and legal perspectives. Switzerland: Springer.
[119] Bertrand et al., op. cit.
[120] Greenspan, Novick Brown, & Edwards, op. cit.
[121] Barkley, R. A., DuPaul, G. J., & McMurray, M. B. (1990). Comprehensive evaluation of attention deficit disorder with and without hyperactivity as defined by research criteria. *Journal of Consulting Clinical Psychology, 58,* 775-789.
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[123] Streissguth, Barr, Kogan, & Bookstein, op. cit.
[124] Kingdon, D., Cardoso, C., & McGrath, J. J. (2016). Research review: Executive function deficits in fetal alcohol spectrum disorders and attention-deficit/hyperactivity disorder – A meta-analysis. *Journal of Child Psychology and Psychiatry, 57,* 116.-131.

is similar in FASD and ID but different from both in ADHD. Executive functioning tends to be universally impaired in FASD as well as ID,[125] but not all children with ADHD have executive functioning impairments.[126, 127] In fact, a 15-study meta-analysis that compared executive functioning in FASD and ADHD found persons with FASD performed significantly worse on cognitive measures of executive functioning than those with ADHD.[128] In addition, a 51-study meta-analysis found more extensive executive dysfunction in FASD compared to ADHD, particularly in executive skills requiring complex mental effort.[129]

There also is a fundamental difference in the qualitative nature of the attention deficit seen in FASD versus ADHD. Children with FASD have greater difficulty with *encoding* (i.e., capacity to hold information temporarily in working memory while performing mental operations on it) and *set-shifting* (i.e., ability to flexibly shift attention from one stimulus facet to another when appropriate), while children with ADHD have greater difficulty with *focusing* (i.e., concentrating attention on a particular task) and *sustaining attention* (i.e., staying on task).[130, 131]

d. **Adaptive Dysfunction:** Both ID and FASD require adaptive impairment in DSM-5 (at least one deficient adaptive domain in ID, and at least two deficient adaptive domains in FASD), typically making people with ID and FASD indistinguishable from each other in terms of everyday behavior.[132] Moreover, adaptive deficits in FASD tend to worsen with age, with adolescents showing arrested development that persists well into the adult years.[133, 134, 135] In stark contrast to both FASD and ID, ADHD involves a very narrow band of dysfunction, affecting only one (attention) and sometimes two (attention plus executive functioning) cognitive domains, with no adaptive behavior deficiency. Most people with ADHD are able to support themselves and live independently in their adults years, while only a very small percentage of adults with ND-PAE can do both.[136]

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[125] Kodituwakku, P. W. (2009). Neurocognitive profile in children with fetal alcohol spectrum disorders. *Developmental Disabilities Research Reviews, 15,* 218-224.
[126] Nigg, J. T., Wllcutt, E. G., Doyle, A. E., & Sonuga-Barke, E. J. S. (2005). Causal heterogeneity in attention-deficit/hyperactivity disorder: Do we need neuropsychologically impaired subtypes? *Biology and Psychiatry, 57,* 1224-1230.
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[128] Khoury, J. E., & Milligan, K. (2019). Comparing executive functioning in children and adolescents with fetal alcohol spectrum disorders and ADHD: A meta-analysis. *Journal of Attention Disorders, 13,* 1801-1815.
[129] Kingdon, Cardoso, & McGrath, op. cit.
[130] Coles, C. D. (2001). Fetal alcohol exposure and attention: Moving beyond ADHD. *Alcohol Research and Health, 25,* 199-203.
[131] Peadon, E., & Elliott, E. J. (2010). Distinguishing between attention-deficit hyperactivity and fetal alcohol spectrum disorders in children: Clinical guidelines. *Neuropsychiatric Disease and Treatment, 6,* 509-515.
[132] Greenspan, Novick Brown, & Edwards, op. cit.
[133] Crocker, N., Vaurio, L., Riley, E. P., & Mattson, S. N. (2009). Comparison of adaptive behavior in children with heavy prenatal alcohol exposure or attention-deficit/hyperactivity disorder. *Alcoholism: Clinical and Experimental Research, 33,* 2015-2023.
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[136] Burd, L., & Popova, S. (2019). Fetal alcohol spectrum disorders: Fixing our aim to aim for the fix. *International Journal of Environmental Research and Public Health, 16,* 1–6.

e. **Comorbidity:** Unlike ADHD, FASD has extremely high rates of comorbidity. For example, a systematic review of prevalence studies that compared rates of comorbid mental disorders and neurodevelopmental disorders in FASD versus normally-constituted age-peers found that those with FASD were 45 times more likely to be diagnosed with ADHD, 22 times more likely to be diagnosed with ID, 13 times more likely to be diagnosed with oppositional defiant disorder, nearly 12 times more likely to be diagnosed with a psychotic disorder, 10.6 times more likely to be diagnosed with depression, and 10 times more likely to be diagnosed with a learning disorder.[137]

f. **Likelihood of Misdiagnosis:** In the United States, 99.9% of people with FASD are undiagnosed or misdiagnosed.[138] In cases where attention and/or hyperactivity symptoms are prominent, such symptoms tend to get diagnosed as ADHD; in cases involving deficient IQ, ID typically is diagnosed, concealing underlying FASD. Notably, FASD is the leading cause of both ID and ADHD.[139] In children with FASD, average or low-average IQs in the context of learning disabilities, self-regulation problems, social deficits, and interpersonal difficulties often lead teachers and providers to attribute the difficulties to parenting deficiency. Moreover, when such symptoms occur in the context of attention problems and hyperactivity, providers misdiagnose ADHD, which is far more familiar than FASD to medical and mental health professionals. Under DSM-IV-TR, nearly all mental health professionals were inexperienced in FASD because there was no diagnosis specific to the condition until DSM-5 was published in 2013. As recently as 2015, a study found that 80% of pediatricians could not accurately diagnose FAS in children presenting with developmental and behavioral problems.[140] Consequently, prior to 2013, if a child had attention and/or hyperactivity problems, such symptoms were diagnosed as ADHD, with cognitive symptoms beyond attention and hyperactivity (e.g., learning disabilities, self-regulation problems, social deficits and interpersonal difficulties) attributed to a "severe" type of ADHD. Thus, unlike ADHD and ID, FASD is very much a hidden disability. Unfortunately, once children with FASD are misdiagnosed with ADHD, treatment tends to be limited to stimulant medication, with *no* developmental disabilities interventions during childhood for the pervasive brain-based cognitive dysfunction in FASD.

g. **Course:** Symptom manifestation in ID and FASD is lifelong and quite different from ADHD. Symptoms of ADHD often are eliminated or significantly reduced with medication; symptoms are permanent in FASD and ID.[141, 142] Symptom manifestation in ADHD gradually decreases in severity across childhood and adolescence (i.e., research

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[137] Weyrauch, D., Schwartz, M., Hart, B., Klug, M. G., & Burd, L. (2017). Comorbid mental disorders in fetal alcohol spectrum disorders: A systematic review. *Journal of Developmental and Behavioral Pediatrics, 38,* 283-291.
[138] Popova, S., Dozet, D., & Burd, L. (2020). Fetal alcohol spectrum disorder: Can we change the future? *Alcoholism: Clinical and Experimental Research, 44,* 815-819.
[139] Burd, L. (2016). FASD and ADHD: Are they related and how? BMC Psychiatry, 16, 325. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5032242/
[140] Stein, M. T. (2015). Misdiagnosis of fetal alcohol spectrum disorders in children presenting with developmental and behavioral problems. *Journal of Developmental and Behavioral Pediatrics,* http://dx.doi.org/10.1097/DBP.0000000000000146
[141] Oesterheld et al., 1998
[142] Peadon & Elliott, 2010

finds ADHD prevalence in adolescence is about half the childhood rate, and prevalence estimates continue to decrease by 50 percent more in adulthood[143]). In contrast, symptom course in ID remains relatively stable over the developmental years into adulthood, but FASD becomes more complex and debilitating,[144] leading to greater adaptive severity in adulthood.[145]

h. **Cost of Care:** Estimated annual cost of care is high in both ID ($32,000[146]) and FASD ($23,000[147]). In contrast, estimated annual cost of care in ADHD is $5,000.[148] Beyond the personal costs of medical and mental health needs, FASD also is an important public health and social problem that imparts a large financial burden on such sectors as the healthcare system, mental health and substance abuse treatment services, foster care, criminal justice system, and long-term care.[149] In research directly comparing the cost of care in FASD versus ADHD, the annual cost of care in FASD was found to be over 10 times higher than in ADHD.[150]

i. **Mortality:** Life expectancy for males in the general population is 76 years.[151] In contrast, life expectancy is 74 years in ID, [152] 61 years in ADHD,[153] and only 34 years in FASD. [154] Thus, FASD has a greatly increased risk of mortality compared to ADHD and ID.

32. **In summary, Zane Floyd's ND-PAE/FASD is a brain-based, congenital, lifelong, impactful disorder deserving of the rubric "ID Equivalence." Regardless of how severity is measured (e.g., definitional complexity, diagnostic protocol, functional capacity, risk of negative outcomes, cognitive dysfunction adaptive dysfunction, comorbidity, likelihood of misdiagnosis, course, annual cost of care, mortality), Mr. Floyd's FASD is similar in severity to ID but substantially more severe than ADHD, with broad ramifications that have affected all important functional domains in his life. Unlike ADHD, Mr. Floyd's ND-PAE/FASD is a cause-and-effect condition with clear**

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[143] Caye, A., Swanson, J., Thapar, A., Sibley, M., Arseneault, L., Hechtman, L., Arnold. L. E., Niclasen, J., Moffitt, T., & Rohde, L. A. (2016). Life span studies of ADHD: Conceptual challenges and predictors of persistence and outcome. *Current Psychiatry Reports, 18,* e1-e11.

[144] Streissguth, A. P. (1994). A long-term perspective of FAS. *Alcohol Health and Research World, 18,* 74-81.

[145] Kambeitz, C., Klug, M. G., Greenmyer, J., Popova, S., & Burd, L. (2019). Association of adverse childhood experiences and neurodevelopmental disorders in people with fetal alcohol spectrum disorders (FASD) and non-FASD controls. BMC Pediatrics, 19, 498 https://doi.org/10.1186/s12887-019-1878-8

[146] Friedman, C. (2017). A national analysis of Medicaid home and community based services waivers for people with intellectual and developmental disabilities: FY 2015. *Intellectual and Developmental Disabilities, 55,* 281-302.

[147] https://www.webmd.com/baby/news/20181204/fetal-alcohol-costs-23000-a-year-per-case

[148] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4123753/

[149] Popova, S., Lange, S., Burd, L., & Rehm, J. (2016). Economic burden of Fetal Alcohol Spectrum Disorder in Canada in 2013. *Alcohol and Alcoholism, 51,* 367–375.

[150] https://www.nofas.org/faulty-opinion-could-harm-individuals-with-fasd/

[151] Life expectancy for males in the U.S. has hovered around age 76 for the past two decades. See: https://www.cdc.gov/nchs/data/hestat/life-expectancy/life-expectancy-2018.htm#Table1

[152] Bittles, A. H., Petterson, B. A., Sullivan, S. G., Hussain, R., Glasson, E. J., & Montgomery, P. D. (2002). The influence of intellectual disability on life expectancy. *Journals of Gerontology, 57,* m470-m472.

[153] Barkley, R. A., & Fischer, M. (2019). Hyperactive child syndrome and estimated life expectancy at young adult follow-up: The role of ADHD persistence and other potential predictors. *Journal of Attention Disorders,* 23, 907-923.

[154] Thanh, N. X., & Jonsson, E. (2016). Life expectancy of people with fetal alcohol syndrome. *Journal of Population Therapeutics and Clinical Pharmacology, 23,* e53-e59.

etiology informed by five decades of science: prenatal alcohol exposure causes brain damage, which causes cognitive and adaptive dysfunction that leads to catastrophic consequences in some situations. Unlike ADHD, which only explains attention deficits, impulsivity, and hyperactive behavior during childhood, ND-PAE/FASD explains *all* of Mr. Floyd's behavior – across his entire lifespan.

L. BRAIN MATURITY

Normal Brain Development

33. The mature brain is composed of more than 100 billion neurons,[155] the information processing cells in the brain. Neurons make connections with other neurons to form information processing networks that are responsible for our thoughts, sensations, feelings, and actions. The adult brain is estimated to have more than 60 trillion neuronal connections.[156] The largest and most important brain information processing networks are the *neocortex* (e.g., frontal, occipital, parietal, and temporal lobes) and *subcortical nuclei* that relay information to and from the neocortex. The subcortical nuclei are clusters of neurons located deep in the brain that serve as signal relay centers for communication within the neocortex and with the rest of the body. Because both the neocortex and subcortical nuclei contain the cell bodies of neurons, they are gray in appearance and thus are called "gray matter." Populations of neurons connect to one another via fibers that extend to and from the cell bodies of individual neurons. There are two kinds of connecting fibers: axons that send electrochemical signals from neurons and dendrites that receive such input. Because axons are wrapped in a white fatty substance called myelin that, like insulation on a telephone wire, makes transmission of electrochemical signals more efficient, these fiber pathways of brain are referred to as "white matter."

34. Brain development continues for an extended period postnatally. Generally, phylogenetically older cortical areas (e.g., brain regions associated with more basic functions) mature earlier than newer cortical regions (i.e., brain regions involved in executive functioning, attention, and motor coordination).[157] Frontal lobe maturation progresses in a back-to-front direction, beginning in the primary motor and sensory cortices and ending with the prefrontal cortex developing last.

35. Imaging studies show increases in gray matter density in childhood followed by losses in density during adolescence and early adulthood, which correlates with synaptic pruning.[158] Myelination, which speeds neuronal transmission, occurs throughout childhood and increases

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[155] Pakkenberg, B., & Gundersen H, J. (1997). Neocortical neuron number in humans: effect of sex and age. The Journal of *Comparative Neurology, 384(2),* 312–320.
[156] Stiles, J., & Jernigan, T. L. (2010). The basics of brain development. *Neuropsychological Reviews, 20(4),* 327-348.
[157] Gogtay, N., Giedd, J. N., Lusk, L., Hayashi, K. M., Greenstein, D., Vaituzis, A. C., Nugent, III, T. F., Herman, D. H., Clasen, L. S., Toga, A. W.Rapoport, J. L., & Thompson, P. M. (2004). Dynamic mapping of human cortical development during childhood through early adulthood. *Proceedings of the National Academy of Sciences, 101(21),* 8174-8179.
[158] Rakic, P. (1996) in Child and Adolescent Psychiatry, ed. Lewis, M. (Williams and Wilkins, Baltimore), pp. 9–30.

in mid-to-late adolescence,[159, 160] with pronounced increases in the density of myelinated axons in the neocortex well into the 20s,[161, 162] providing evidence of prolonged neocortical maturation.[163, 164, 165, 166] MRI studies also indicate that growth in cortical white matter volume persists into early adulthood,[167, 168, 169, 170], with the greatest maturational delay in areas of the brain that govern self-regulation (prefrontal cortex, inferior parietal lobe, and anterior cingulate cortex).[171, 172, 173, 174, 175, 176, 177, 178, 179] In fact, synaptic pruning in the prefrontal cortex has been shown to continue until age 30 years.[180]

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[159] Yakovlev, P. I., & Lecours, A. (1967). The myelogenetic cycles of regional maturation of the brain. In: A. Minkowski (Ed.), *Regional development of the brain in early life.* Oxford: Blackwell Science.
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[165] Cope, L. M., Hardee, J. E., Martz, M. E., Zudker, R. A., Nichols, T. E., & Heitzeg, M. M. (2020). Developmental maturation of inhibitory control circuitry in a high-risk sample: A longitudinal fMRI study. *Developmental Cognitive Neuroscience, 43,* https://doi.org/10.1016/j.dcn.2020.100781
[166] Steinberg, L. (2009). Should the science of adolescent brain development inform public policy? *American Psychologist, 64,* 739-750.
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[168] Gogtay, N., Giedd, J.N., Lusk, L., Hayashi, K.M., Greenstein, D., Vaituzis, A.C., et al. (2004). Dynamic mapping of human cortical development during childhood through early adulthood. *Proceedings of the National Academy of Sciences, 101,* 8174–8179.
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36. Functionally, self-regulation – a central diagnostic criterion in ND-PAE – is the byproduct of interactions between neural processes that support controlled, reasoned, and deliberative thought ("executive processing") and those that drive reactive, emotional, and reward-sensitive responding ("affective processing").[181] The affective processing system is the first to mature in normally developing adolescent brains. In fact, one of the most important structural and functional brain changes during adolescence is maturation of limbic and paralimbic areas associated with reward processing (e.g., amygdala, ventral striatum, orbitofrontal cortex, ventromedial prefrontal cortex, and superior temporal sulcus).[182, 183, 184, 185] The affective system also includes neural circuits that mediate reward-sensitivity,[186] which is thought to influence "sensation-seeking"[187] as well as valuation and prediction of reward and punishment.[188, 189, 190] The executive processing system is the last brain area to fully develop. During the course of normal brain development, connections between the prefrontal cortex and other self-regulatory brain regions become stronger and more efficient through pruning of unused neuronal connections, which decreases gray matter, and myelination (sheathing/insulating) of neurons, which increases white matter. In healthy brains, both processes support improved executive control and multitasking (i.e., planning, motivation, evaluating future consequences, weighing risk and reward, judgment, and decision making while simultaneously moderating strong unconscious neural impulses from the amygdala).[191, 192, 193, 194] Development of these neural connections in late adolescence and early adulthood is thought to result in relatively late maturation of "top-down" control systems that gradually strengthen their influence over early emerging and largely subcortical "bottom-up" systems that are highly responsive to rewarding and emotional stimuli.[195]

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[181] Smith, A. R., Chain, J., & Steinberg, L. (2013). Impact of socio-emotional context, brain development, and pubertal maturation on adolescent risk-taking. *Hormones and Behavior, 64,* 323-332.
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[195] Casey, B. J., Getz, S., & Galvan, A.(2008). The adolescent brain. *Developmental Review, 28(1),* 62–77.

Behavioral evidence for delayed maturation in self-regulatory frontal regions is especially evident on tasks requiring inhibitory self-control.[196, 197]

37. Although the still-maturing self-regulatory system in adolescents and young adults generally is adequate to support reasoned decision making in minimally arousing situations,[198, 199, 200] in situations involving stress or other strong impulses from the amygdala, asynchronous maturation leaves the brain's affective processing system in a state of hypersensitivity during a period of time when the deliberative processing system is not yet mature enough to compensate for such heightened arousal, thereby increasing vulnerability to risky and reckless behavior.[201, 202, 203, 204]

Brain Development in FASD

38. Born with widespread brain damage, people with FASD also exhibit *abnormal and delayed brain maturation across the developmental years*. Using magnetic resonance imaging (MRI) and diffusion tensor imaging (DTI) to study structural integrity and functional connectivity, studies consistently find significant maturational alterations and delays in the prefrontal cortex[205, 206] and its microstructure[207, 208, 209] in children, adolescents, and adults with prenatal alcohol exposure (PAE) compared to normally-developing age-peers. In stark contrast to normal changes in brain architecture during adolescence that improve speed and efficiency of neurochemical communication, convergent longitudinal research finds that individuals with PAE show: (a) blunted volume changes in grey matter in adolescence, indicating

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[207] Lebel, C., Mattson, S.N., Riley, E.P., Jones, K.L., Adnams C.M., May, P.A., et al. (2012). A longitudinal study of the long-term consequences of drinking during pregnancy: heavy in utero alcohol exposure disrupts the normal processes of brain development. *Journal of Neuroscience, 32,* 15243–15251.
[208] Treit et al., op. cit.
[209] De Guio, F., Mangin, J.F., Rivière, D., Perrot, M., Molteno, C.D., Jacobson, S.W., et al. (2014). A study of cortical morphology in children with fetal alcohol spectrum disorders. *Human Brain Mapping, 35,* 2285-2296.

compromised pruning and diminished plasticity in the cerebral cortex, as well as (b) delayed white matter myelination. Together, these brain development anomalies in PAE significantly impair global network efficiency, speed of information processing, and executive self-regulation.

39. Longitudinal MRI studies focused on brain development in PAE versus brain development in unexposed individuals consistently find structural abnormalities in the former. For example, in a longitudinal study[210] using MRI to measure cortical volume changes over time, normal processes of brain maturation were significantly delayed or disrupted in children and adolescents with PAE. While unexposed controls showed a plastic cortex with a prolonged pattern of cortical volume increases in childhood followed by equally vigorous volume decreases in adolescence (i.e., an inverted "U" shaped pattern), individuals with PAE showed only volume loss in most cortical areas across the developing years. Another longitudinal MRI study[211, 212] similarly found significantly less cortical thinning over time in self-regulatory brain regions (i.e., frontal, parietal, and limbic) in adolescents with PAE. In another longitudinal study that used a large sample size to follow brain development from age 7-18, researchers[213] found subjects with PAE consistently had smaller volumes than control subjects in structures throughout the brain, with significantly different trajectories of brain activation in visuospatial attention and working memory tasks compared to controls (i.e., in contrast to unexposed subjects who exhibited *increasing* brain activation during development, those with PAE exhibited *decreasing* brain activation). In a review of 64 MRI studies that compared PAE groups to unexposed control groups,[214] results indicated smaller total brain volume as well as smaller volume of both white and grey matter in specific cortical regions. The most consistently reported structural MRI findings were alterations in the shape and volume of the corpus callosum, as well as smaller volume in the basal ganglia and hippocampi. Resting-state functional MRI studies reported reduced functional connectivity between cortical and deep grey matter structures.

40. DTI, a process that measures water diffusion in brain tissue, provides exquisitely sensitive measures of white matter microstructure in vivo. A review of 23 DTI studies conducted on children, adolescents, and adults with PAE[215] found nearly universal diffusion abnormalities,

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[210] Lebel, C., Mattson, S.N., Riley, E.P., Jones, K.L., Adnams, C.M., May, P.A. , et al. (2012). A longitudinal study of the long-term consequences of drinking during pregnancy: heavy in utero alcohol exposure disrupts the normal processes of brain development. *Journal of Neuroscience, 32(44),* 15243–51.

[211] Treit, S., Zhou, D., Lebel, C., Rasmussen, C., Andrew, G., & Beaulieu, C. (2014). Longitudinal MRI reveals impaired cortical thinning in children and adolescents prenatally exposed to alcohol. *Human Brain Mapping, 35(9),* 4892-4903.

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[214] Donald, K. A., Eastman, E., Howells, F. M., Adnams, C., Riley, E. P., Woods, R. P., Narr, K. L., & Stein, D. J. (2015). Neuroimaging effects of prenatal alcohol exposure on the developing human brain: A magnetic resonance imaging review. *Acta Neuropsychiatrica, 27(5),* 251-269.

[215] Sherbaf, F. G., Aarabi, M. H., Yazdi, M. H., & Haghshomar, M. (2018). White matter microstructure in fetal alcohol spectrum disorders: A systematic review of diffusion tensor imaging studies. *Human Brain Mapping, 40(3),* 1017-1036.

with no brain regions spared. Such findings indicate delayed maturation of axonal tracts over the course of brain development, mostly through disruptions in the myelination process. Specifically, there was convergent evidence of impaired integrity in communication networks throughout the brain: (a) *association fibers* (axons connecting cortical areas within the same cerebral hemisphere), (b) *projection fibers* (white matter tracts connecting the cortex with deeper brain regions), and (c) *callosal tracts* (fibers connecting the right and left cerebral hemispheres). In other words, there was impaired white matter integrity in communication tracts throughout the brain throughout development. Moreover, in studies that also investigated brain-behavior links, abnormalities in white matter pathways important in self-regulation (e.g., corpus callosum, cerebellar peduncles, cingulum, and longitudinal fasciculi connecting frontal and temporoparietal regions) were consistently associated with extent of alcohol exposure and severity of cognitive/behavioral symptoms.

41. **In summary, given that the normally-developing "adolescent brain" does not have mature executive control capacity until at least age 25 and brain development in young adults with FASD lags many years behind rates seen in neurotypical age peers, it is likely Mr. Floyd's brain was not fully developed at the time of the offense due to his ND-PAE/FASD, which would have had an additive and cumulative effect on the brain damage he was born with.**

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 24, 2021

Natalie Novick Brown, PhD
Clinical and Forensic Psychologist

Appendix A
Resume

EXHIBIT 3

EXHIBIT 3

DECLARATION OF HERBERT DUZANT

I, Herbert Duzant, hereby declare as follows:

1. I am employed with the Federal Public Defender for the District of Nevada (FPD) as a Capital Habeas Investigator. I am assigned to Zane Floyd's case and have conducted both fact and mitigation investigations into his case and background.

2. The United States is currently in the midst of the worst global public health crisis in over 100 years. The United States Secretary of Health and Human Services declared COVID-19 a public health emergency on January 31, 2020. On March 12, 2020, a Declaration of Emergency was issued in the state of Nevada, which was followed by the first in a series of shelter in place directives and measures on March 17, 2020. On March 13, 2020, the President of the United States declared a National Emergency. The pandemic has forced the unprecedented closure of much of the country for the past year and as will be discussed, COVID-19 travel restrictions have hindered the ability to conduct a thorough and effective investigation for clemency on Mr. Floyd's behalf.

3. In order to properly represent Mr. Floyd in his clemency application, the defense team determined that it was important to: (1) explain how Mr. Floyd's life experiences affected his involvement in the crime, including his Fetal Alcohol Spectrum Disorder, his lifetime of trauma, and his time in service to our nation as a Marine stationed at Guantanamo Bay, Cuba; (2) show that Mr. Floyd is deeply remorseful for the offenses for which he has been convicted; (3) demonstrate that Mr. Floyd poses no threat of future criminal violence in prison and can live out his life constructively there; and (4) paint a detailed portrait of who Mr. Floyd was before the incident in question which will make clear Mr. Floyd

is deserving of commutation of his death sentence to a sentence of life without the possibility of parole. These goals can only be meaningfully pursued through a factual case review and investigation conducted according to prevailing standards of practice for capital defense. That, in turn, requires travel and in-person contact with relevant sources of information. *See Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 677, 689 (2008) (noting the need for "face-to-face, one-on-one interviews" in capital cases).

4. The global pandemic however has limited the ability to travel due to the risk of serious illness or death for myself, members of the defense team and our families, expert witnesses, witnesses we wish to interview, and Mr. Floyd.

5. The defense team began to plan and prioritize the work that was required for Mr. Floyd's clemency investigation well before last year's shutdowns in March 2020 and the filing of the petition for writ of certiorari in the United States Supreme Court in June 2020. The team identified over twenty-five witnesses who needed to be interviewed on Mr. Floyd's behalf, and a number of experts who needed to be retained. It was decided in February 2020 that in-person witness interviews would begin in earnest during the first two weeks of April 2020, but those plans were derailed by COVID-19 related shelter-in-place directives, travel restrictions, and closures here in Nevada as well as the other states where witnesses were located. We were also restricted from traveling during the earlier months of the pandemic because of delays in receiving ordered personal protective equipment (PPE). The lack of masks, hand sanitizer, sanitizing wipes, and other protective materials prevented the team from conducting any fieldwork within the state or around the country. We

created travel plans for the Spring and Summer of 2020 because we believed, as many in the nation did at that time, that warmer weather would bring a great reduction in the infection rate of the virus. However, contrary to the understanding at the time, the nation experienced large surges in infection following the Memorial Day, Fourth of July, and Labor Day holidays.

6. Two witnesses who were in the Las Vegas area were willing to be interviewed with proper safety measures in place during the Summer of 2020, and the interviews took place thereafter.

7. The other witnesses, however, live in Arizona, California, Colorado, Michigan, Missouri, Texas, and Washington, where the rates of infection were high during and following the summer months. Further, the pandemic rendered domestic air travel a serious health risk not only to employees of this office but also to the witnesses we wished to interview.

8. When the number of COVID-19 cases began to trend downward at the end of September and beginning of October, I and another member of the defense team were able to fly to Texas and Arizona to interview a handful of witnesses. However, the planning and efforts to secure everyone's safety in making these trips took significant time to plan and execute.

9. The other scheduled out-of-state witness interviews however had to be cancelled in the late Fall and Winter due to the tremendous spike in COVID-19 related illness and death and the inability to travel safely.

10. Further, during this entire time period, members of the FPD were at times required to telework and conduct their duties remotely. Work on Mr. Floyd's case then was affected by technological issues and lack of access to case records, and the inability to order and review records

in-person at different government agencies. All of this unfortunately slowed the work on Mr. Floyd's clemency petition.

11. Realizing the ability to travel would be severely curtailed for several months, some interviews of out-of-state witnesses were conducted by video conference and telephone calls. These interviews were only introductory in nature, however, because video and telephone interviews are not a satisfactory substitute for an in-person meeting.

12. A clemency case review and investigation seek to place in perspective the biological, psychological, and social history of the defendant. This is done by conducting several face-to-face in-person interviews with the family members, caretakers, teachers, classmates, physicians, coworkers, friends, and other members of the defendant's community who have knowledge of the defendant and his family. Maximizing the accuracy of information provided in an interview requires rapport building with witnesses to establish trust. While some information can be easy to share, many topics that must be explored are highly sensitive. A competent interview will sometimes delve into shameful family secrets which can re-traumatize those interviewed. This rapport occurs though person-to-person interviews, where one can make eye contact and invite warm and welcoming body language that gives the witness the space and support to speak truthfully and expansively about sensitive topics. In-person communication also provides witnesses with the ability to trust that not one else is listening, and that they are not being electronically recorded against their will or permission. Physical face-to-face communications foster an environment of confidentiality and trust.

13. At the present time, we have determined the need to interview and memorialize statements from over fifteen witnesses, located in five

states. These witnesses include family members, friends, former coaches, and military personnel who served with Mr. Floyd in the Marines. And while it is still recommended that travel only take place when completely necessary, we are willing to complete this travel as efficiently and safely as we can. With that said though, interviewing that many witnesses in various geographical areas of the United States during a pandemic will be a herculean task, particularly with the rate of COVID-19 infections again on the rise in almost two dozen states across the country.

14. In addition to interviewing witnesses, the team needs to have in-person contact with Mr. Floyd, not only to include his input in our presentation materials, but also to prepare him for his clemency hearing and to obtain mental health evaluations. However, the defense team has not had in-person access to Mr. Floyd at Ely State Prison since March 2020 when the Nevada Department of Corrections ceased all legal and personal visits. And at this point it is still unknown when Ely State Prison will reopen. It is our understanding that Mr. Floyd has received one COVID-19 vaccine but is over a month away from receiving his second dose and being fully protected by the vaccine.

15. Additionally, at least one expert witness will need to visit with Mr. Floyd for an interview and evaluation. But until Ely State Prison reopens for visits, this is impossible.

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16. The efforts to complete the investigation for Mr. Floyd's clemency petition are ongoing. However, the difficulties created by the COVID-19 pandemic continue to impair the investigation and development of material facts as stated above.

I declare under penalty of perjury that the forging is true and correct, and that this declaration was executed on April 9, 2021, in Clark County, Nevada.

Herbert Duzant, FPD Investigator

EXHIBIT 4

EXHIBIT 4

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ZANE M. FLOYD, Plaintiff, vs. CHARLES DANIELS, Director, Nevada Department of Corrections; HAROLD WICKHAM, NDOC Deputy Director of Operations; WILLIAM GITTERE, Warden, Ely State Prison; WILLIAM REUBART, Associate Warden at Ely State Prison; DAVID DRUMMOND, Associate Warden at Ely State Prison; IHSAN AZZAM, Chief Medical Officer of the State of Nevada; DR. MICHAEL MINEV, NDOC Director of Medical Care, DR. DAVID GREEN, NDOC Director of Mental Health, Defendants.	Case No. 3:21-cv-00176-RFB-CLB Las Vegas, Nevada Thursday, May 6, 2021 10:35 a.m. EVIDENTIARY HEARING

C E R T I F I E D C O P Y

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THE HONORABLE RICHARD F. BOULWARE, II,
UNITED STATES DISTRICT JUDGE

APPEARANCES: See next page

COURT REPORTER: Patricia L. Ganci, RMR, CRR
United States District Court
333 Las Vegas Boulevard South, Room 1334
Las Vegas, Nevada 89101

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

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INDEX OF EXAMINATIONS

than -- is there anything different than what we've discussed here?

MR. GILMER: I think it -- it talks about how broad the deliberative process privilege is pertaining to issues and documents, especially. But that was because that case was specific to a document-seeking issue. I think it also would apply to testimony outside that confines, and that anything and everything predecisional is covered even -- and it talks at great length about facts and how they can be intertwined. So that is what I thought it was important to bring it to the Court's attention.

THE COURT: Okay. Thank you, Mr. Gilmer. I appreciate that.

All right. Director Daniels, if you wouldn't mind stepping forward, please.

I'm sorry, right up here, Director Daniels.

Watch your step there.

COURTROOM ADMINISTRATOR: Please raise your right hand.

CHARLES DANIELS, having duly been sworn, was examined and testified as follows:

COURTROOM ADMINISTRATOR: Thank you.

THE COURT: You can go ahead and take your seat. And if you could state your full name for the record. And since you're in front of the Plexiglas, Director Daniels, you can take your mask down.

THE WITNESS: Thank you, Your Honor.

Good morning. My name is Charles Daniels. I'm sorry, did you ask the spelling?

Yes. Charles, C-H-A-R-L-E-S. Last name Daniels, D-A-N-I-E-L-S.

EXAMINATION OF CHARLES DANIELS

BY THE COURT:

Q. Okay. So, Director Daniels, let's -- let's just start off with the most basic question. Why isn't the protocol finalized?

A. Sir, the -- Your Honor, the protocol has not been finalized for several reasons. There's a requirement that I seek counsel with primarily the Chief Medical Officer of the state. I'm still in the process of looking at various drugs to be used. I believe that I don't have a greater responsibility than to ensure that I do this right, and I need to consult with as many individuals as possible to ensure that I'm doing this right.

There are also costs, heavy significant costs, associated with putting on one of these executions. So --

Q. Can you tell me a little bit about that. Because I'm not aware of that. Can you tell me, when you say that, what type of costs?

A. Yes.

Q. You mean in terms of the protocol, can you explain that a little bit?

A. Well, yes, because for anything that we decide we want to

do, whether it's regarding security, gathering intelligence, providing the appropriate staff that would have to come in and/or experts and/or contractors from other areas, we will have to have them come out. We're going to have to provide lodging. All the minutia that no one would think about that --

Q. Right.

A. -- we have to plan for. I have to have redundancy built in to any issues that I may have.

I also have to work in coordination with other state law enforcement authorities, medical authorities, examiners.

We have to coordinate and move all of those people around. But, more importantly, I have to ensure I have enough staff to deal with any, and I mean any, contingency. There's no do-over button in -- in executions.

Q. Right.

A. So I have to ensure that I have all of that. I have to bring people up. We have to run through our protocols step-by-step ensuring that we stay within the confines of what we've actually drafted.

Q. Okay.

A. And if we identify any particular issues, then we need to mitigate that right there. And if we can't overcome it, then we need to make everyone else aware that there has been a change.

I have to ensure that the condemned individual is maintained in a safe place, that he has access to his attorneys,

and that for the most part we will ensure that he gets what he has coming to him as it relates to whatever the constitutional needs are and/or what the expectations are of the people of the State to include the judiciary as well as our -- the executive branch of our Government and so on.

But all of this requires a lot of moving pieces as it relates to especially the security apparatus, bringing people out, ensuring that they know step-by-step what they need to do.

There's also, of course, I have to ensure that my equipment works, that I have everything that I need, that we're able to test it ensure that it works.

That -- I also have to ensure that the drugs that are available. I have to -- that I have available or we think we have available are things we have in stock that would also expire depending on how long things go along.

So I have -- there's a lot of moving parts. And not to mention, of course, just the court proceedings and the attorneys and all of those people that are involved.

Coroners, EMTs, the clergy, all of those people that are involved. It's serious.

I would think that the expectation would be of Mr. Floyd and his -- and his representatives that I do everything possible to ensure that if we actually go through that it's done right in accordance with provisions that are outlined in the Eighth Amendment of the U.S. Constitution.

Cruel and unusual punishment, I take that very seriously. It's personal for me. But I understand my obligations and my duties towards the people of the state as well as all of the other inmates as well as Mr. Floyd.

Q. Okay.

So you've outlined a fair number of considerations that you have to factor in to your decision, including the -- again, the time and the experts and redundancy.

Let me ask you this question. When do you expect that your protocol will be finalized?

A. Sir, I do not know when it will be finalized, because as long as I have an opportunity to conduct my due diligence, consult with more individuals, consult more sources -- and also I have to take into consideration as soon as the potential drugs are identified, there may be a huge push to have that via court order in some court we can't use that or there's some claim saying that that's no longer available to you.

Q. Right.

A. And so I have to take into consideration that I can do most of my planning in advance, but it would be incumbent upon me to ensure that I have the best information available, I think, which is in everyone's best interests. I still have to consult with the -- with the Chief Medical Officer of the state. And until I do that, because it's a requirement, then I really have to know where -- where I am at with that individual as well

because I can't proceed without that consultation.

Q. Well, do you think it will take three months?

A. Your Honor, I don't know.

Q. Well, you have to give me some date. I mean, it's not going to take five years, right?

A. Sir, it would not. Your Honor, it would not.

Q. Okay. So give me what you think would be the outside limit of the decision.

I also have to make important decisions here, Director Daniels, and as it relates to how the Court has to rule, right.

And so you need to at least tell me -- given what you've said, it's clear that you've thought about this process and are still thinking about it and are potentially still gathering information, but it seems to me that the NDOC has to have some timeline, in part because of the timing of when these drugs might be available, as to when it's going to make a decision.

So what would be the outer boundaries of that decision?

A. Your Honor, very good question. So here's what my response would be. After I am able to consult with the Chief Medical Officer and then look at all of our security apparatuses and so, I would say 90 to 120 days --

Q. Okay.

A. -- would be sufficient.

Q. Well, and, again, I appreciate that you have a lot of things

that you've said, and there may be many things, Director Daniels, that we won't even take into consideration. So some of the things that you had mentioned just about the redundancy and, obviously, if someone were to get sick, for example, whoever the medical officer is who I presume would be monitoring this, if something were to happen that you have to find someone else, they have to go through the whole procedure again, potentially testing. And so I appreciate that in terms of the timing.

So one other --

A. Your Honor, may I ask you a question, sir?

Q. Yes, go ahead. But I didn't have anything else. I was just saying I have an understanding, given what you said, of how much goes into this decision. And it's certainly not the Court's intent in asking the question, Director Daniels, I want to be clear, of sort of deciding one way or another when or how you should do it. I just -- in terms of making the decision in this case, I also need to know what would be appropriate and fair in terms of the timing for you and also for Mr. Floyd's counsel in terms of preparation. That's why I'm asking you -- that's why I asked you that question.

I'm sorry. If there's something else you wanted to add, you can.

A. Yes, Your Honor. And I just want to be clear. You asked me to opine, which I did. I'm seeking to ensure that you get the information you need.

But I want to also just point out that there are some statutory limits as to what I must do once the actual signed warrant and order for the death to proceed. I will honor that unless --

Q. I appreciate that.

A. -- otherwise stayed.

Q. Right.

A. So I didn't want to give the impression that I'm controlling the timeline. I am obligated by statute to stay within the appropriate timeline.

Q. No, I -- I did not interpret your comments, Director Daniels, to somehow suggest that you wouldn't abide by a legitimate Court order from this Court or from State Court. I did not in any way take that from your testimony, because I don't think that's what you were suggesting.

I think what I understood was you are opining just about your process of deliberation, as you've said how seriously you take it, all the different factors that have to be considered, and the point at which, you know, if given an opportunity to weigh in on that process, how much would be potentially the outer limits of that decision. So I appreciate that.

Let me see if I have any more questions, and then I'll turn this over to counsel.

(Pause.)

BY THE COURT:

Q. One question I had, which is also helpful is, Director Daniels, do you have any information about how long it takes to acquire information about the drugs?

So, in other words, I would imagine as part of your process you want to acquire information about a particular drug in terms of how it has been used, what it's approved for, what may be its side effects or interaction effects.

Do you have any information about how long it takes just to get the information? Not the drug itself. I'm not asking you about how long once you make a request to obtain it, but just to get the information. Because one of the issues in this case, of course, Director Daniels, is how quickly could potentially Mr. Floyd's counsel get access to some of this information.

Do you have anything that you could share about how long it takes to get this information about the potential drugs? Without identifying a specific drug.

A. Your Honor, thank you for your question.

I am clearly not a pharmacist, but we have a Director of Pharmacy Services and that's the individual that would order all of our drugs, but also would be the one to do some basic research from a professional standpoint.

Now, it's also my understanding that research is available on most drugs, but to the depth in which you get into

questionable or nonprescription types of usage, what its -- you know, its intended use, I think there's probably a better person to respond to that question.

Q. Okay.

A. From the laymen's term, we can -- we can Google it.

Q. Right.

A. But that would not be enough for me, and I would share with my Director of Pharmacy, "I need more than the Google version." I need to be able to discuss and understand the efficacy and all of those things that go around the utilization of the compounds that make the drugs.

I am not qualified to do that, but I would seek counsel to better understand it.

Q. Right. So you would -- you would ask other people to provide you with as much information as possible that's not so scientific such that you can't, sort of, obviously process that, but that gives you the full range of information that would allow you to be able to make an informed decision?

A. Your Honor, yes. I would seek additional consultation with professionals in that field to better understand.

THE COURT: Okay. All right.

Thank you, Director Daniels. I don't know that I have more questions at this time.

Mr. Gilmer, is there something else that you wanted to be able to ask Director Daniels?

And then, Mr. Anthony, I'll turn to you.

MR. GILMER: Thank you, Your Honor. There's just a couple of points I would like to clarify with regard to the timeline. Would you like me to do it from here or from the podium?

THE COURT: Oh, no. Do it from there, please.

DIRECT EXAMINATION OF CHARLES DANIELS

BY MR. GILMER:

Q. Director Daniels, I think you tried to clarify your question with regard to the 90 to 100 days to finalize a protocol, but then also indicated that you would abide by any warrants or orders requiring you to move forward.

So if the execution warrant was issued by a Court the week of June 7th, as has been suggested has been thought, do you -- would you still think that you would need 90 to 100 days to finish or would you be able to complete the process in order to be able to comply with that Court order?

A. In the event a warrant were to actually come out giving a date, I would comply.

At some point in time I could continue to review information, but at the end of the day it's a requirement, it's a duty of mine as Director of the Nevada Department of Corrections, to execute the wishes of the judiciary and the will of the people.

THE COURT: Let me ask you this question about that.

If you are ordered, for example, to perform an execution in four days, right, and you didn't feel you could adequately do that and safely do that, would you not have an obligation to inform the Court that it couldn't be done consistent with your constitutional obligation at the NDOC not to perform an execution without violation of the Eighth Amendment?

THE WITNESS: I would certainly consult my -- my legal counsel on that matter and bring up my objections and/or concerns. And while I certainly cannot speak for any other entity, I can tell you a violation of the Eighth Amendment is something that would be taken with great caution and care. And that would -- in my opinion, I would do the right thing.

THE COURT: Well, and I'm not asking for your legal opinion.

THE WITNESS: Yes.

THE COURT: Because I think Mr. Gilmer would and has adequately, as always, represented the legal positions of the NDOC. But I'm just responding to your question -- excuse me. I'm responding to your answer in response to Mr. Gilmer's questions about the performance of an execution if you are ordered June 7th, because it seems to me that there might be a point at which you were ordered to perform an execution, given what you said, that you simply couldn't perform and not violate the Eighth Amendment. And the question would come up, what would you do in that circumstance, if you know.

And it sounds like what you said, just to confirm, that you'd have to speak with your attorneys before you decided how to proceed. Is that right?

THE WITNESS: That would be my response.

THE COURT: Okay. That makes sense.

Mr. Gilmer, go ahead. I'm sorry.

MR. GILMER: Thank you, Your Honor.

And, also, I know that was a hypothetical, but under Nevada law that could never happen within four days. So ...

THE COURT: Well, no, I understand that. I mean, partly what the purpose really was with me to help me understand Director Daniels' response to your question. It was not to sort of lay out the fact that that would happen.

Yes, I think that I would be -- well, I don't think that it could happen in Nevada law and I don't think that any Court would order that either.

MR. GILMER: Understood.

THE COURT: But that was the purpose of that question.

Go ahead, Mr. Gilmer.

MR. GILMER: Thank you. I believe I only have one more question, Director Daniels, and it's always, you know, a very bad thing for a lawyer to say one more question because it's generally not true. But I believe I only have one more question.

BY MR. GILMER:

Q. And that is you mentioned that you have to consult with the Chief Medical Officer before making any final decisions.

You're not suggesting that you have not already met with Dr. Azzam, correct?

You have already met with him. Is that correct?

A. Correct. I have already met with Dr. Azzam.

Q. Okay. Thank you. I just wanted to make sure that was clear for the record.

MR. GILMER: I have nothing else at this time, Your Honor.

THE COURT: Okay.

Mr. Anthony?

MR. ANTHONY: Mr. Levenson will be handling the examination of the witness, Your Honor.

THE COURT: Okay. So what I would like for you to do is switch positions just because we have the Plexiglas there, preferably.

All right. Go ahead, Mr. Levenson.

MR. LEVENSON: Thank you.

CROSS-EXAMINATION OF CHARLES DANIELS

BY MR. LEVENSON:

Q. Good morning, Director Daniels.

A. Good morning.

Q. So to clarify, you -- I believe you originally said you had not met with the CMO. Is that incorrect? You have met with

your CMO?

A. I said I would -- I believe my testimony was that I would need or be required to meet with the CMO. We have already had one meeting.

Q. And when -- I'm sorry.

When was that meeting? What was the date of that meeting?

A. I do not recall the date.

THE COURT: Do you know how many months ago it was or weeks ago?

THE WITNESS: It was weeks ago.

THE COURT: Weeks ago.

And one question I had, Director Daniels, is, when were you first informed as to the fact that the State would be seeking a warrant of execution on June 7th? I'm not asking who informed you, but when do you recall you were first told that information?

THE WITNESS: Your Honor, I cannot recall the date. It wasn't very long ago. I do believe it was in April.

THE COURT: In April?

THE WITNESS: In April.

THE COURT: So, again, as it relates to how long you have been involved in this process of your deliberation, given that timing, it sounds as if you have been involved in this deliberative process for around 30 days or so?

THE WITNESS: Thank you for the question, Your Honor.

I'm not sure of the day and I don't want to give testimony that someone could impeach, but it's -- I believe it was back in April.

THE COURT: So you don't think -- for example, it wasn't January or February?

THE WITNESS: No.

THE COURT: That you recall.

THE WITNESS: Your Honor, I do not recall that.

THE COURT: So you recall it being some time in April, maybe late March.

THE WITNESS: Potentially, yes.

THE COURT: Okay. I'm just -- I'm just trying to get a rough estimate as to the timing of that as to when you were first, sort of, informed of when you would have to start this process. Because I would imagine, Director Daniels, that once you get that information, as you've indicated, there is a lot of work that has to be done to finalize the protocol. So the moment you hear that you start working, correct, when you hear that information?

THE WITNESS: Yes, Your Honor. I -- I will share with you, as I found out, of course, I obviously researched what was done during the last protocol. And in addition to that, then I went to the location, the site, where we would carry that out, met with the warden, and we went through the protocols there

step-by-step.

I was very deliberative in terms of what I wanted to see and I wanted to see what we had. And, of course, we're now in the process of changing the protocols to meet the new threads, ideas, and so on.

So we've made some changes and they're still working on putting that together. But a lot of this, of course, will still have to be completed at a little later date when we have more additional information. Because a lot will change based on who we communicate with, how long we, for instance, would have a contract to get various people here, would those people still be available, and so on. So there's a few things that are still in the works.

THE COURT: Well, and in terms of the information you don't have, are you still waiting for or seeking any information about drugs that may be used?

THE WITNESS: Yes, Your Honor.

THE COURT: Okay. Thank you.

Go ahead, Mr. Levenson.

BY MR. LEVENSON:

Q. Do you expect to meet again with Dr. Azzam?

A. My response is that I do expect to meet with him in the future or as additional pharmaceuticals become available that I want to consult with him about. So each time there's a new pharmaceutical that we haven't previously discussed, I would

then seek consultation with Dr. Azzam.

Q. So have any meanings been currently arranged?

A. Not future meetings.

Q. You mentioned that you went to the site where the execution was going to take place. The Clark County District Attorney's Office notices that site as Nevada State Prison.

Are you in disagreement with that?

THE COURT: I'm sorry. When you say "Nevada State Prison?"

MR. LEVENSON: I'm saying Nevada State Prison, Your Honor. That's the warrant, the current warrant. That's the execution, Nevada State Prison in Carson City.

THE COURT: Okay. I wasn't sure if, Mr. Levenson, you are identifying a specific facility. If you are, then it would be helpful to say that, or if you were trying to point out that the language wasn't specific. I wasn't sure the nature of your question.

So if you're asking about a specific location, that's fine. It would be helpful, I think for the witness, but also for me to know what you're actually asking.

MR. LEVENSON: Correct.

BY MR. LEVENSON:

Q. So it's identified as the Nevada State Prison in Carson City.

Do you agree that's where the execution would take

place?

A. The execution, as I know it to be, would be at Ely State Prison.

Q. You spoke about the protocol, the prior protocol. That would be in the Scott Dozier case. Was that right?

A. Yes.

Q. Are you aware of the findings by Judge Togliatti in 2017 about the use of a paralytic drug in the execution protocol?

MR. GILMER: Your Honor, I object to that. It calls for a legal conclusion. It's also addressing a factual finding that was vacated by the Nevada Supreme Court.

THE COURT: Well, I mean, are you objecting to him -- objecting to him indicating whether or not he was aware of it? They haven't asked the follow-up question yet, Mr. Gilmer.

MR. GILMER: Understood.

THE COURT: I think you're anticipating the next question.

MR. GILMER: I'll table the objection to the next question, Your Honor.

THE COURT: I'll be shocked if Director Daniels had not been informed at least of the decision. I think you're waiting for the next question.

But you can go ahead and answer that question. Were you aware of that decision by Judge Togliatti, Director Daniels?

THE WITNESS: Your Honor, yes, I was aware of it.

THE COURT: Okay.

BY MR. LEVENSON:

Q. Director Daniels, I want to go back to a question that the Judge asked you. You mentioned that the costs involved were something that you would -- would take additional time for you to -- to release a final protocol.

You mentioned staffing. Wouldn't staffing be the same no matter what the protocol is?

A. No, that would not be the same.

Q. Could you explain that?

What would be different with -- with the particular drugs you used and your staffing?

MR. GILMER: Your Honor, I'm going to object to that as I think that would delve into deliberative process and also safety and security issues.

MR. LEVENSON: Your Honor, he --

THE COURT: So, hold on.

So, Mr. Gilmer, let me ask you this question. Could Director Daniels respond to how many, without naming who the people would be in terms of their title, positions might be affected by the different types of drugs?

Because I think part of the question relates to just how many people are involved in this process. I wouldn't necessarily ask Director Daniels to identify anyone by title because I think there could be legitimate security or other

issues related to that. But what about just how many people would be affected by a potential difference in the drug?

MR. GILMER: Perhaps, that could be answered, Your Honor. The concern I have is that he said it depends on what his final decision is, because he said it depends on what the drugs are. So that seems to me as if it would dive into deliberative processes into the final decision. So that's the concern. I think if it's as extremely narrow as you indicated, perhaps that's something Director Daniels may answer.

THE COURT: Why don't we try this. Director Daniels, how many positions do you think are implicated by choices of drugs? So choosing one drug versus another, without identifying which positions that are involved in the execution would be implicated, how many positions would be implicated by a choice in drugs, as far as you understand it?

THE WITNESS: Your Honor, I can't answer that as narrowly as possible because I would have to utilize a lot of staff and they would have to come from many places. But it would also, unfortunately, have me disclose sources, methods, numbers, security apparatus, and the specialized people that I need to ensure the security.

Your Honor, I'm very hesitant to talk about those issues publicly.

THE COURT: So -- so then how about this. In terms of your -- what you were referencing, it seems like what you were

saying is that you didn't want to assume that for the variety of drugs that may be under consideration or could be under consideration that the same personnel would be used for all. Is that fair?

THE WITNESS: That would be a fair question -- a fair assumption.

THE COURT: Okay.

THE WITNESS: Yes.

THE COURT: Mr. Gilmer, does that work? Because I think that was the nature of what -- what Mr. Levenson was trying to get at, which is that Director Daniels is basically saying there are many moving parts and staff are affected by that and staff potentially could be affected, without naming who they are and without naming the drugs, could be affected by the choice of drugs. Is that correct, Dr. Daniels -- I mean, Director Daniels.

THE WITNESS: Your Honor, yes.

THE COURT: Okay. Move on from there, Mr. Levenson.

BY MR. LEVENSON:

Q. You mentioned another component, an EMT. Does the changing of the -- does the finalization of the protocol determine how many EMTs you would need?

A. Yes, it could.

Q. How?

MR. GILMER: Your Honor, that clearly would go into the

deliberative process and determinations.

THE COURT: Okay. And I would direct you not to answer at this time, Director Daniels.

BY MR. LEVENSON:

Q. Director Daniels, you mentioned a coroner, and I'm presuming -- let me ask the question. Would the protocol dictate how many coroners you had at the scene?

(Pause.)

THE WITNESS: Your Honor, I would really not like to answer any questions regarding my processes and procedures, how many, who many. That's an issue for us. We have to -- for instance, I'll explain.

There's confidentialities built into the processes. We have redundancy built in. We may cancel one of two or cancel two of three at the last moment. And I don't want to be pigeonholed into saying, well, this is all you have, then later on who is it.

I need to have control over the mechanisms to --

THE COURT: I appreciate that, Director Daniels.

THE WITNESS: -- perform my judicial responsibilities.

THE COURT: I appreciate that. So you don't have to answer further.

So, Mr. Levenson, what I would ask you to do is -- because I do think there are legitimate security issues regarding individuals who may be identified by profession within

the State, and we should avoid those types of questions.

I haven't ruled on that. And so I don't want to get into that, but I think that's part of the Director's hesitancy, which I think is a legitimate concern at this point in time.

So why don't we move on.

MR. LEVENSON: Certainly, Your Honor.

BY MR. LEVENSON:

Q. In your meeting with Dr. Azzam, Director Daniels, did you offer him multiple choices for a drug protocol?

MR. GILMER: Objection, Your Honor. That calls for questions regarding predecisional and deliberative process.

MR. LEVENSON: Can I respond, Your Honor?

THE COURT: Sure.

MR. LEVENSON: We think it has independent relevance separate and apart from the deliberative process. This goes to when the protocol is going to be finalized. We are alleging bad faith on the part of NDOC and its release of the drug protocol, so this goes to intent.

If Dr. Azzam was only offered one drug protocol, then the protocol was pretty much finalized at that point. That's why we have this question.

THE COURT: Well, the protocol hasn't been finalized yet and so I think part of the issue is -- you're right, Mr. Levenson, it could potentially go to that after the protocol has in fact been finalized.

So part of the issue with respect to your bad faith arguments, which I can appreciate, is that they are premature, some of them, at this point in time because we don't know what the final protocol is. I'm not saying you shouldn't ask those questions, Mr. Levenson, because I think they could potentially be relevant for the Court's consideration. But for now I am going to sustain the objection and allow for the privilege to be asserted for that question.

MR. LEVENSON: Okay.

BY MR. LEVENSON:

Q. Director Daniels, what actions have you taken with respect to finalizing the execution protocol since your meeting with Dr. Azzam?

MR. GILMER: Objection, Your Honor. I believe that also calls for a deliberative process privilege and also could delve into safety and security concerns as well as Director Daniels has previously testified.

THE COURT: Sustained. I'll allow for the privilege to be asserted conditionally at this time.

BY MR. LEVENSON:

Q. Director Daniels, in your declaration filed with this Court on April 30th, that's ECF Number 22-10, at paragraphs 9 through 11 you state that NDOC did not have midazolam in its possession. Is that correct?

A. That is correct.

Q. Now, when you say it is not available for NDOC, what do you mean by that?

A. In consultation with my pharmacy chief indicated that that drug was no longer available to the -- to NDOC. That was a decision made well before I arrived, and I did not get into the details as to why.

Q. So you're not sure why it is unavailable to NDOC. Is that what I understand?

A. My understanding is that I'm not 100 percent sure as to why, which is why I will not testify as to why. All I know is I've been told that that -- that medication is not available to us.

THE COURT: I'm sorry. When you say "it's not available," it obviously is available in terms of being available for purchase. You're not saying that it's not available generally for purchase.

THE WITNESS: To NDOC.

THE COURT: And are you saying that because that's an NDOC policy or are you saying that because there's some other reason why you all cannot obtain it? And it's important because there -- it's one thing if NDOC has made a determination to do that, potentially. But it's another thing if, essentially, the company or someone else decided not to provide it.

Can you explain why it's not available?

THE WITNESS: Your Honor, I arrived -- my first day of work was December 3rd of '19. There were a lot of things that I

just didn't know because I wasn't a part of the organization or understand all the history.

Once I engaged in learning more about this process here in this state, I started asking about, well, individual items that were based on the last one.

THE COURT: Right.

THE WITNESS: And it was told to me -- the chief pharmacist explained to me -- I'm sorry. She's actually the Pharmacy Director -- indicated to me that that is no longer available to us. I did not get into the reasons why.

THE COURT: Okay. Okay.

THE WITNESS: It wasn't relevant to me. I wanted to know what we did have available --

THE COURT: Got it.

THE WITNESS: -- as opposed to what we did not.

THE COURT: Okay. Thank you, Director Daniels.

Go ahead, Mr. Levenson.

BY MR. LEVENSON:

Q. With regard to your obtaining midazolam, in your declaration at paragraph 10 you state that it cannot be purchased or, quote, otherwise obtained.

What does "otherwise obtained" mean in --

THE COURT: I think, Mr. Levenson, he's already gone over this. Let's move on from this question, please.

BY MR. LEVENSON:

Q. Are you able to receive drugs from other Department of Corrections?

MR. GILMER: Your Honor, I object. I think that seeks a legal conclusion.

THE COURT: Okay. I'm going to sustain that, but, Mr. Levenson, perhaps you could be more specific about what the nature is of what you're asking. I'm not sure I understand myself either, if you're talking about particular agencies, or it would be helpful to give some more detail.

BY MR. LEVENSON:

Q. Could you -- could you receive the drugs from, let's say, the Arizona Department of Corrections as opposed to going through a pharmacy?

A. Thank you.

MR. GILMER: Again, I just would like to object to that question because I think it calls for a legal conclusion as to where he can purchase drugs from other states. There's --

THE COURT: So, Mr. Gilmer, maybe I'm not understanding your -- your objection. What I understood the question to be is not asking Director Daniels for a legal conclusion, but whether or not he understood even as part of this process whether or not there would be access to -- without him deciding whether or not he's chosen to pursue it or not, whether or not there would be access to drugs from other corrections facilities outside of the State of Nevada. That limited question. And I think that that

would avoid the legal conclusion that you are objecting to.

So could you answer that -- that question, Director Daniels? Are you aware of whether or not you could obtain any drugs for the protocol from other state Departments of Corrections outside of Nevada?

THE WITNESS: Your Honor, I do not know. I have not directed my pharmacy chief to attempt to do so nor do I know if that's a common practice or if she has or has not. I don't know.

THE COURT: Okay. Thank you, Director Daniels.

BY MR. LEVENSON:

Q. Director Daniels, what other drugs are not available to NDOC usage for this execution?

MR. GILMER: Objection, Your Honor. That calls for the deliberative process privilege. And I believe that asking those questions would delve into his thoughts and opinions with regard to potential protocols.

MR. LEVENSON: May I respond, Your Honor?

THE COURT: Yes.

MR. LEVENSON: The director and his counsel put this issue -- they waived this issue because they put in their declaration and their pleadings that midazolam was not available. So that would infer that they have waived the issue as far as what is not available.

What we understand is that they're worried about drug

companies finding out that their drugs will be used. We're talking about drugs that will not be used. So it doesn't seem to have the same public concern nor, as I said, they have put this -- this in issue.

MR. GILMER: Brief response, Your Honor?

THE COURT: We don't -- I don't need the brief response because what I'm going to do is I'm going to reserve on this issue. As indicated, I'm going to have Director Daniels and Dr. Azzam come back on Monday. I'm going to look at these privilege issues that are being raised today.

So there will be an opportunity, Mr. Levenson, potentially for the Court to revisit this later. I think -- I do think with respect to midazolam it's different because that was specifically identified in the affidavit. And so that's different than other hypothetical drugs that NDOC may or may not have access to.

I'm not saying I wouldn't direct an answer, but let's move on from there. I'm going to reserve ruling on that.

So, Director, you do not have to answer that question.

Go ahead, Mr. Levenson.

BY MR. LEVENSON:

Q. And, Director, you said that you needed approximately 90 to 100 days to -- to finalize a protocol.

Have you voiced any concerns to anyone that you could potentially have to formulate and carry out an execution within

the next four weeks?

MR. GILMER: Objection, Your Honor, as I believe that mischaracterized the evidence in part or his testimony in part with regard to the 90 and 120-day timeline.

THE COURT: Is that the only portion you're objecting to?

MR. GILMER: What was the second part of the question?

THE COURT: Because I -- I thought -- I want to -- the question was -- and we can take out the 90 and 120 days -- have you voiced any concerns to any State officials or other public officials about the ability of the NDOC to effectively and safely carry out an execution within 30 days.

MR. GILMER: Your Honor, I object to that question to the extent that that could also delve into the deliberative process as well as potential attorney/client issues depending on how that answer was asked.

THE COURT: So that's why I asked you about your objection earlier, Mr. Gilmer, because I would have anticipated that you would have reasserted it. That's why I just rephrased it. I didn't expect that he would answer because I expect that you would in fact object. But I wanted just to restate it clearly, as I understood it, for the record.

I'm going to allow for that objection to be asserted at this time and again sustain it conditionally.

MR. LEVENSON: Can I have a moment, Your Honor?

THE COURT: Sure. Take your time.

(Plaintiff's counsel conferring.)

MR. LEVENSON: Let me try again, Your Honor.

BY MR. LEVENSON:

Q. Director Daniels, do you have any concerns about having to effectuate an execution within -- possibly within four weeks?

A. I do not have any concerns. In reference to the previous question, I was opining based on a very deliberate question that I responded to.

However, I am clearly aware of my duties as the Director of the Nevada Department of Corrections. And if given an executed warrant and order, I will execute my duties. I -- there's always an opportunity to know more and learn more, but at some point in time you still have to execute your duties. And that's how I see this process.

THE COURT: But, again, Director, you wouldn't understand the duty to perform an execution that you couldn't legally perform. And what I mean by that is, for example, if you actually didn't have the drugs that you thought were appropriate for the execution, let's say there was an incident where they were destroyed inadvertently, you're not saying you would nonetheless go through with an execution even though you don't think you could safely perform it, correct?

THE WITNESS: Your Honor, I would clearly alert those in my chain of command as well as my legal counsel as to the

fact that I don't have the appropriate tools to complete these tasks. And that would be part of my duty to obviously stay within the scope of cruel and unusual punishment that's listed in the Eighth Amendment.

THE COURT: No. Okay. I just wanted to receive that clarification. It sounded as if you were saying you would do it regardless, but I didn't understand that to be your testimony. And I think what you're saying is that if you didn't think that you had the material, you're saying that you would alert the appropriate individuals or speak with Mr. Gilmer about what the options would be. Is that right?

THE WITNESS: Yes, Your Honor.

THE COURT: Okay.

BY MR. LEVENSON:

Q. Director Daniels, how do you reconcile your testimony that you -- that it would be good to have a longer period of time to effectuate an execution with the fact that you would -- might have to prepare and complete an execution with four weeks? How do you reconcile those two pieces of testimony?

MR. GILMER: Objection, asked and answered. Just answered that in the last question.

THE COURT: Overruled. I think it's slightly different.

You can answer that question?

THE WITNESS: Would you repeat the question, sir?

BY MR. LEVENSON:

Q. Certainly.

How do you reconcile your previous testimony that a longer period of time to effectuate an execution would be good with the fact that you are talking about having to go through an execution in four weeks?

A. Once again, the issue was I was asked to opine on time. And in most circumstances, if most of us are put in a situation in which we have more time to deliberate, more time to discuss, we would take advantage of that. However, that does not mean that I would not be prepared to take the information I had available to me as long as it was consistent with what the State law requires, our statute, as well as the Constitution.

I guess the analogy would be you could never make the -- perfect the enemy of the good. I would always opt for more and always opt for better. However, given the circumstances and the statute, I would go with the best information I had available. And if I did not believe that I could move forward in a way that would be consistent with the Constitution, the State Constitution, then I would apprise the appropriate individuals.

So I don't see a conflict in my testimony. I was just asked to opine. I opined, but I'm prepared to do my job.

THE COURT: But let me ask you this question, I think this may help to clarify this. It sounds to me as if what

you're saying is if you were given more time you would take more time because of the seriousness of this process and all the factors you'd have to consider, right?

THE WITNESS: Your Honor, exactly. I think the people of the state deserve the fact that the Director of the Department of Corrections sees this as a very, very serious issue. There is no greater responsibility than if you are going to be tasked with, as a part of your duties, to take a life that you do the best you can, learn as much as you can, and keep growing and learning as often, but sooner or later the day will come.

THE COURT: Well, let me ask you this question. If you had the ability to decide the date and the date was 30 days from now versus 90 days from now, which date would you choose?

THE WITNESS: Your Honor, last time I opined, that's how we got here.

THE COURT: Well, but, Director, I want you to be direct and honest with us.

THE WITNESS: I --

THE COURT: And I think you opined because what you're saying is it's a deliberative process and you want to be deliberative.

I appreciate that this question may be uncomfortable, but the fact is we're looking at, as you said, very serious issues here. There is a potential for this execution to proceed

possibly in 30 days, and I have to consider that.

And what you seem to have said to me is, "There are a lot of factors to consider. I don't necessarily have all of the information, even about the drugs." If you were given the choice, wouldn't you choose 90 days over 30 days?

THE WITNESS: If given the choice --

THE COURT: Yes.

THE WITNESS: -- I would go with the longer date.

However, the statutory limits are already set --

THE COURT: And I understand that.

THE WITNESS: -- I would obviously operate within the scope of the statute.

THE COURT: Director Daniels, I'm not asking you, right, whether or not you think, because I think you've said this, you could still -- you think you could still potentially perform NDOC an execution within 30 days. And you have said that if you didn't think you could do that, you would -- you would inform authorities. So I don't think that you're somehow suggesting with your answer that you wouldn't perform the duties. I know that's a concern of yours, but that's not what I take from it.

But you've acquired a great deal of information. It's helpful for me in terms of understanding this process and understanding what I have to consider for me to have that information as well. So I appreciate your candor. Thank you.

Mr. Levenson?

BY MR. LEVENSON:

Q. Director Daniels, I want to understand something you testified to previously. You talked about the timing of the release of the protocol somehow being based on companies seeing the drugs that were going to be used.

Can you explain that?

(Pause.)

MR. GILMER: Your Honor, I think there's an objection to that question because I don't remember that testimony, but I'm not sure exactly what the objection is.

If Mr. Daniels knows what he's asked -- I guess maybe it's vague. I'm not sure that question is answerable.

But obviously if Director Daniels can --

THE COURT: I think what Mr. Levenson is asking is if Director Daniels could be more detailed about your, sort of, reference to the possibility that you have to factor in a manufacturer coming in and saying, "We don't want to have our drugs used," and there might be litigation around that, and that creates something for you to consider in terms of finalizing the protocol. I think you said something like that in terms of your prior testimony.

Would that be fair that you have to at least consider that possibility in terms of what may be available to you in terms of the execution protocol?

THE WITNESS: I will respond based on what I believe to be the question. And at the end of the day, we know that as much research as I could possibly do, I will take that time to research and then consult with the Chief Medical Officer.

However, early disclosure of that information could provide some with an opportunity to create legal roadblocks for whatever reason. I -- I'm not in the head of any of these companies.

THE COURT: Right.

THE WITNESS: But I do understand that as I'm working the information that I received then deciding what information I want to present to the Chief Medical Officer.

I also have to take into consideration that there may be some legal challenges that will be generated through many groups. It can be anti-death penalty groups or so on. But I am cognizant of that.

But the primary issue is always the due diligence of me understanding the drugs and what the compounds and having professionals explain to me what this does, what the dosage would be, all of those -- those individual issues that I'm not qualified to make.

So I'm taking in the totality of the act -- of the execution process and our protocols, as well as our ability to secure the tools that we need to effectuate the will of the people.

THE COURT: Does a consideration of a possible litigation by a manufacturer factor into your timing of the finalization of the protocol?

THE WITNESS: (Pause.)

Your Honor, will you rephrase your question, please?

THE COURT: Sure. Does the consideration -- does a consideration of the possibility of litigation by a manufacturer to prevent use of a drug factor into your determination about the timing of the finalization of the protocol?

MR. GILMER: Your Honor, I'm always loath to object to a Judge's question.

THE COURT: No --

MR. GILMER: That gets into deliberative process.

THE COURT: That's fine. Again, part of it is, Mr. Gilmer, is I want -- I have to also know which questions you think would be covered. So I know, Mr. Gilmer, that you're respectful of the Court, but you will always object if you think it's appropriate. And I think you will continue to do so.

I'm going to sustain that objection to my own question, conditionally, with the understanding that I'll have to go back and look at that.

So -- but I do want to -- I do want to make sure, Mr. Gilmer, again, even if I ask a question, you're well aware of the fact that you can object and assert the privilege.

We have to figure out on a question-by-question basis

what the nature of the privilege is that's being asserted so I can rule on that later.

So, I appreciate that. And, again, I have no doubt that you'll continue to object as you see appropriate regardless of who asks the questions.

Mr. Levenson, please go ahead.

MR. LEVENSON: Just a moment, Your Honor.

(Plaintiff's counsel conferring.)

BY MR. LEVENSON:

Q. Director Daniels, do you have any plans to consult with any other individuals --

MR. GILMER: Objection.

BY MR. LEVENSON:

Q. -- as you formulate the protocol?

MR. GILMER: Objection, Your Honor, that goes into his deliberative process as to who he may seek opinions from.

THE COURT: Sustained.

(Plaintiff's counsel conferring.)

MR. LEVENSON: Your Honor, can I just revisit that for a moment? I believe that Director Daniels actually said in his testimony that he might be consulting with other people and I wanted to explore that. So I think he put the -- put it in issue.

THE COURT: I'll go back and take a look at the transcript. I think to the extent that Director Daniels

identified any individual process, you could potentially ask about that, but I think that the privilege would extend to him providing a sort of fulsome and detailed overall description of his deliberations and process, which is what I think the question invites.

And as I understand it, Mr. Gilmer, that's your objection to it. Is that correct?

MR. GILMER: Yes, Your Honor.

THE COURT: All right. So for now I'll continue to sustain that objection.

MR. LEVENSON: I don't think we have any other questions at the moment, Your Honor.

THE COURT: All right.

Mr. Gilmer, do you have any additional questions?

MR. GILMER: Your Honor, I have questions, but since you said Director Daniels will be back on Monday, I'll just reserve and ask those -- all those questions at that time.

THE COURT: Okay. Well, any questions you think will be helpful as it relates to deciding the privilege issue, Mr. Gilmer?

MR. GILMER: No, Your Honor. I do not.

THE COURT: All right.

Mr. Pomerantz, Ms. Ahmed, do you have any questions that you would like to ask of Director Daniels? Certainly you are free to do so as well.

MR. POMERANTZ: May I have a moment, Your Honor?

THE COURT: Sure. Take your time.

(Defense counsel conferring.)

MS. AHMED: Your Honor, thank you for asking. We don't have any questions for the witness.

THE COURT: Well, and I'll allow you an opportunity on Monday when we come back to be able to ask questions. Again, I know that you all are fairly new on this case and so you may need some time to be able to delve deeper. So I'll allow you to be able to reserve on that issue as relates to questions for Director Daniels.

MS. AHMED: Thank you, Your Honor.

THE COURT: All right. So for now, thank you, Director Daniels, for your testimony. I appreciate it.

I, unfortunately, am going to require that you come back on Monday and I appreciate again your time for that, but as I'm sure you understand, this is a very significant case and issue that we have to resolve. And so we're going to set a time and date. But you're excused for now, sir.

THE WITNESS: Yes, Your Honor. Thank you very much.

THE COURT: Thank you.

All right. Let's think a little bit then about next steps here. Mr. Gilmer, I want to start with you. As you are aware, in civil cases oftentimes when a privilege is asserted, a privilege log needs to be created so the Court can figure out

EXHIBIT 5

EXHIBIT 5

VER

209

FILED IN OPEN COURT
JUL 21 2000 @ 11:30AM 20
SHIRLEY B. PARRAGUIRRE, CLERK
BY Carole D'Aloia
CAROLE D'ALOIA DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
ZANE MICHAEL FLOYD,
Defendant.

Case No.: C159897
Dept. No.: V
Docket: H

VERDICT

WE, the Jury in the above entitled case, having found the Defendant, ZANE MICHAEL FLOYD, Guilty of Count II - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON of THOMAS MICHAEL DARNELL, and having found that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances impose a sentence of,

___ A definite term of 100 years imprisonment, with eligibility for parole beginning when a minimum of 40 years has served,

___ Life in Nevada State Prison With the Possibility of Parole, with eligibility for parole beginning when a minimum of 40 years has been served.

___ Life in Nevada State Prison Without the Possibility of Parole.

√ Death.

DATED at Las Vegas, Nevada, this 21ST day of July, 2000.

FOREPERSON

CCPD-290
ZANE FLOYD - 3/15/06

207

VER

FILED IN OPEN COURT
JUL 21 2000 @ 11:30 AM 20
SHIRLEY B. PARRAGUIRRE, CLERK
BY Carole D'Aloia
CAROLE D'ALOIA DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
ZANE MICHAEL FLOYD,
Defendant.

Case No.: C159897
Dept. No.: V
Docket: H

VERDICT

WE, the Jury in the above entitled case, having found the Defendant, ZANE MICHAEL FLOYD, Guilty of Count III - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON of DENNIS TROY SARGENT, and having found that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances impose a sentence of,

___ A definite term of 100 years imprisonment, with eligibility for parole beginning when a minimum of 40 years has been served.

___ Life in Nevada State Prison With the Possibility of Parole, with eligibility for parole beginning when a minimum of 40 years has been served.

___ Life in Nevada State Prison Without the Possibility of Parole.

✓ Death.

DATED at Las Vegas, Nevada, this 21st day of July, 2000.

FOREPERSON

CCPD-288
ZANE FLOYD - 3/15/06

208

VER

FILED IN OPEN COURT
JUL 21 2000 @ 11:30 AM 20
SHIRLEY B. PARRAGUIRRE, CLERK
BY Carole D'Aloia
CAROLE D'ALOIA DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
ZANE MICHAEL FLOYD,
Defendant.

Case No.: C159897
Dept. No.: V
Docket: H

VERDICT

WE, the Jury in the above entitled case, having found the Defendant, ZANE MICHAEL FLOYD, Guilty of Count IV - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON of CARLOS CHUCK LEOS, and having found that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances impose a sentence of,

___ A definite term of 100 years imprisonment, with eligibility for parole beginning when a minimum of 40 years has been served.

___ Life in Nevada State Prison With the Possibility of Parole, with eligibility for parole beginning when a minimum of 40 years has been served.

___ Life in Nevada State Prison Without the Possibility of Parole.

_✓_ Death.

DATED at Las Vegas, Nevada, this 21st day of July, 2000.

FOREPERSON

CCPD-289
ZANE FLOYD - 3/15/06

206

VER

FILED IN OPEN COURT
JUL 21 2000 @ 11:30 AM 20
SHIRLEY B. PARRAGUIRRE, CLERK
BY Carole D'Aloia
CAROLE D'ALOIA DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
ZANE MICHAEL FLOYD,
Defendant.

Case No.: C159897
Dept. No.: V
Docket: H

VERDICT

WE, the Jury in the above entitled case, having found the Defendant, ZANE MICHAEL FLOYD, Guilty of Count V - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON of LUCILLE TARANTINO, and having found that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances impose a sentence of,

___ A definite term of 100 years imprisonment, with eligibility for parole beginning when a minimum of 40 years has been served.

___ Life in Nevada State Prison With the Possibility of Parole, with eligibility for parole beginning when a minimum of 40 years has been served.

___ Life in Nevada State Prison Without the Possibility of Parole.

√ Death.

DATED at Las Vegas, Nevada, this 21st day of July, 2000.

Lou Martinetti.
FOREPERSON

CCPD-287
ZANE FLOYD - 3/15/06

EXHIBIT 6

EXHIBIT 6

213

VER

FILED IN OPEN COURT
JUL 21 2000 @ 11:30 AM 20
SHIRLEY B. PARRAGUIRRE, CLERK
BY Carole D'Aloia
CAROLE D'ALOIA DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
ZANE MICHAEL FLOYD,
Defendant.

Case No.: C159897
Dept. No.: V
Docket: H

SPECIAL VERDICT

WE, the Jury in the above entitled case, having found the Defendant, ZANE MICHAEL FLOYD, Guilty of Count II - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON of THOMAS MICHAEL DARNELL, designate that the aggravating circumstance or circumstances which have been checked below have been established beyond a reasonable doubt.

✓ 1. 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.

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

✓ 3. The Defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree.

DATED at Las Vegas, Nevada, this 20th day of July, 2000.

Lou Westerfield
FOREPERSON

212

VER

FILED IN OPEN COURT
JUL 21 2000 @ 11:30 AM 20
SHIRLEY B. PARRAGUIRRE, CLERK
BY Carole D'Aloia
CAROLE D'ALOIA DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
ZANE MICHAEL FLOYD,
Defendant.

Case No.: C159897
Dept. No.: V
Docket: H

SPECIAL VERDICT

WE, the Jury in the above entitled case, having found the Defendant, ZANE MICHAEL FLOYD, Guilty of Count III - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON of DENNIS TROY SARGENT, designate that the aggravating circumstance or circumstances which have been checked below have been established beyond a reasonable doubt.

✓ 1. 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.

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

✓ 3. The Defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree.

DATED at Las Vegas, Nevada, this 21ST day of July, 2000.

FOREPERSON

CCPD-293
ZANE FLOYD - 3/15/06

211

VER

FILED IN OPEN COURT
JUL 21 2000 @ 11:30 AM 20
SHIRLEY B. PARRAGUIRRE, CLERK
BY Carole D'Aloia
CAROLE D'ALOIA DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
ZANE MICHAEL FLOYD,
Defendant.

Case No. C159897
Dept. No.: V
Docket: H

SPECIAL VERDICT

WE, the Jury in the above entitled case, having found the Defendant, ZANE MICHAEL FLOYD, Guilty of Count IV- MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON of CARLOS CHUCK LEOS, designate that the aggravating circumstance or circumstances which have been checked below have been established beyond a reasonable doubt.

✓ 1. 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.

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

✓ 3. The Defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree.

DATED at Las Vegas, Nevada, this 21st day of July, 2000.

FOREPERSON

CCPD-292
ZANE FLOYD - 3/15/06

210

VER

FILED IN OPEN COURT
JUL 21 2000 @ 11:30 AM 20
SHIRLEY B. PARRAGUIRRE, CLERK
BY Carole D'Aloia
CAROLE D'ALOIA DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
ZANE MICHAEL FLOYD,
Defendant.

Case No.: C159897
Dept. No.: V
Docket: H

SPECIAL VERDICT

WE, the Jury in the above entitled case, having found the Defendant, ZANE MICHAEL FLOYD, Guilty of Count V - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON of LUCILLE TARANTINO, designate that the aggravating circumstance or circumstances which have been checked below have been established beyond a reasonable doubt.

✓ 1. 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.

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

✓ 3. The Defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree.

DATED at Las Vegas, Nevada, this 20th day of July, 2000.

FOREPERSON

CCPD-291
ZANE FLOYD - 3/15/06

EXHIBIT 7

EXHIBIT 7

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRACY PETROCELLI, A/K/A JOHN SYLVESTER MAIDA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79069

FILED

MAY 21 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder and robbery with the use of a deadly weapon. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.[1]

In 1982, appellant Tracy Petrocelli was convicted, pursuant to a jury verdict, of robbery with the use of a deadly weapon and first-degree murder and sentenced to death for the first-degree murder. On appeal, this court affirmed Petrocelli's convictions and death sentence. *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), *superseded in part by statute as stated in Thomas v. State*, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004). After being granted relief as to the death sentence, *see Petrocelli v. Baker*, 869 F.3d 710 (9th Cir. 2017), Petrocelli received a second penalty hearing. On May 16, 2019, a jury again sentenced Petrocelli to death. This appeal followed.

Petrocelli argues that the unused verdict forms for sentences of life with and without the possibility of parole contained erroneous language that required a finding "that any mitigating circumstance or circumstances

[1]The Honorable Kristina Pickering, Justice, did not participate in the decision in this matter.

are not sufficient to outweigh the aggravating circumstance found." Because Petrocelli did not object to the verdict forms, we consider "whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights." *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (internal quotation marks omitted).

To impose a death sentence, a jury must "find[ ] at least one aggravating circumstance and further find[ ] that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." NRS 175.554(3); *see also* NRS 200.030(4); *Hollaway v. State*, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 351 P.3d 725 (2015). Consistent with those requirements, when a jury returns a death sentence, its written verdict must designate the aggravating circumstance(s) found and "state that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." NRS 175.554(4). There are no similar requirements when a jury imposes a sentence less than death. Yet the verdict forms for the other sentencing options used in this case included the statement about mitigating circumstances not outweighing the aggravating circumstances that is required only for a verdict imposing a death sentence. The inclusion of this language is error that is plain from a casual inspection of the record.

Having concluded there is clear error, we must determine whether "the error affected [Petrocelli's] substantial rights, by causing actual prejudice or a miscarriage of justice." *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (internal quotation marks omitted); *see also Jeremias v. State*, 134 Nev. 46, 49, 412 P.3d 43, 51 (2018) ("Under Nevada law, a plain error affects a defendant's substantial rights when it causes

actual prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)."). Petrocelli conceded both aggravating circumstances alleged. Thus, the defense case against a death sentence focused on the jury's weighing determination—"the consideration of aggravating factors together with mitigating factors to determine what penalty shall be imposed." *Lisle*, 131 Nev. at 366, 351 P.3d at 732 (alteration and internal quotation marks omitted). But the verdict forms for the lesser sentencing options contained erroneous language regarding the weighing determination. Under these circumstances, we conclude that the error affected Petrocelli's substantial rights and he is entitled to a new sentencing hearing. Accordingly, we conclude Petrocelli has demonstrated plain error, and we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Hardesty

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Silver

cc: Hon. Egan K. Walker, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

HERNDON, J., with whom PARRAGUIRRE, J. agrees, dissenting:

I respectfully disagree with my colleagues as I do not believe that there was any error in the verdict forms used at Petrocelli's second penalty hearing. Even if error could be found, it did not affect Petrocelli's substantial rights and therefore reversal is not warranted.

First, Petrocelli did not object to the three verdict forms that were used and did not propose any other verdict forms to be added to the packet of verdict forms submitted to the jury, thereby precluding discussion before the district court about the challenged language and appellate review. The lack of objection to the forms is particularly significant, and not surprising, given that the defense clearly focused their penalty hearing strategy on requesting mercy as opposed to making any substantial presentation that Petrocelli was not eligible for the death penalty. During the settling of the penalty hearing jury instructions, the trial court stated the following:

> [T]he defense perspective in the case has clearly been not to argue whether or not Mr. Petrocelli is death eligible, not explicitly conceding that he is death eligible or that an aggravator exists beyond a reasonable doubt, but instead simply positioning him for mercy.
>
> Said more clearly, the defense position has been since voir dire and throughout the case consistent and it has consistently been, my words, not theirs, he is aged, he is frail and he has served 37 years, give him life without, that is the appropriate punishment.

Petrocelli offered no response to this statement and shortly thereafter, indicated he had no objection to the proposed verdict forms, while also not offering any other verdict forms for the court's consideration. Further, Petrocelli, during closing argument, conceded the existence of the alleged

aggravators and told the jury from the outset of his argument that they would have three sentencing options, which would obviously have included the death penalty. Although Petrocelli briefly referenced the law regarding the mitigation versus aggravation weighing process outlined in the jury instructions, he did not spend any time arguing that the actual mitigation evidence presented should be found to outweigh the aggravators; rather, he focused his argument on how the mitigation evidence involving his age, medical circumstances, and time already spent in prison without significant disciplinary issues, should warrant a decision that the death penalty was not the appropriate sentencing choice. In response to overwhelming evidence, Petrocelli made the difficult but reasonable strategic decision to view death eligibility as having been proven and focus on a request for mercy. The lack of any challenge to the submitted verdict forms and Petrocelli's arguably intentional act of not submitting any other proposed verdict forms comport with this strategy of asking the jury to use its discretion and impose a sentence less than death.

Second, I do not believe the verdict forms were clearly erroneous; rather, they were at worst, incomplete. The trial court gave the jury a packet with three verdict forms, one for each of the sentencing options: life with the possibility of parole, life without the possibility of parole, and the death penalty. What Petrocelli now challenges is that each of the two non-death penalty verdict forms contained the same language as the death penalty verdict form, i.e., that the jury had found "that any mitigating circumstance or circumstances are not sufficient to outweigh the aggravating circumstance found." This language is legally correct in circumstances where the jury has decided that any mitigation evidence does not outweigh the aggravators that have been proven and including it on a verdict form is not error. While NRS 175.554(4) does not require a finding

that the mitigating circumstances are insufficient to outweigh the aggravating circumstances before the jury can impose a sentence less than death, the presence of such language does not automatically render the verdict forms incorrect. The jury is required to first engage in the weighing process, i.e., whether any mitigating evidence outweighs any aggravators that had been found, regardless of what sentencing option the jury then selects. The verdict forms reflecting that weighing process decision does not at all render them in any way invalid. Indeed, the jury would have been well within its prerogative to determine, as the verdict forms state, that any mitigating circumstances were insufficient to outweigh the aggravating circumstances *and* that the appropriate sentence was life with or without parole.[1] At most, the verdict forms could be viewed as incomplete as, had Petrocelli requested it, the trial court could have given two more verdict forms, one for each non-death penalty sentencing option, with language on each stating that any mitigation circumstance or circumstances outweighed the aggravators found.

Third, even assuming error in the unused verdict forms, I do not believe it affected Petrocelli's substantial rights. *See Jeremias v. State*, 134 Nev. 46, 49, 412 P.3d 43, 51 (2018) (listing elements of plain-error review). The jury was properly instructed on the capital sentencing process and were told that it "must first determine whether the State has proven beyond a reasonable doubt that an aggravating circumstance or

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[1]It is worth noting that, by imposing the death penalty, the jury must have concluded that there were no mitigating circumstances sufficient to outweigh the aggravating circumstances found by the jury. NRS 200.030(4)(a). Thus, had the jury used its discretion to impose a sentence less than death and used either of the challenged verdict forms, the language at issue would have been correct.

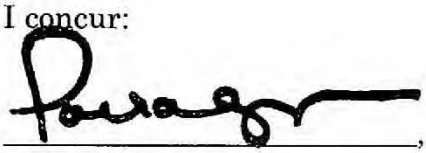
circumstances exist[,] . . . whether a mitigation circumstance or circumstances exist[,] . . . and whether any mitigation circumstances outweigh the aggravating circumstance or circumstances." It was then instructed that "[b]ased upon your findings . . . you must then determine whether the defendant should be sentenced to death or life imprisonment with or without the possibility of parole." The jury was also instructed that "the Defendant is entitled to a verdict of one of the alternatives less than death" "[i]f you have a reasonable doubt as to the existence of the aggravating circumstances in this case, or if you find the mitigating circumstance or circumstances are sufficient to outweigh the aggravating circumstance or circumstances found, *or if you for any other reason decline to impose the death penalty*." (Emphasis added.) It thus was emphasized that the ultimate decision to impose the death penalty was within the jury's discretion even if it found at least one aggravating circumstance and that the mitigating circumstances did not outweigh the aggravating circumstance(s). Where a jury has been properly instructed on all its options, no relief is warranted based on an incomplete or erroneous verdict form. *See Harris v. State*, 134 Nev. 877, 884, 432 P.3d 207, 213 (2018) (affirming conviction for first-degree murder despite the fact that the jury was not given a verdict form on voluntary manslaughter), *cert. denied*, ___ U.S. ___, 139 S. Ct. 2671 (2019); *McNamara v. State*, 132 Nev. 606, 621, 377 P.3d 106, 116 (2016) (affirming conviction despite the failure to include a lesser-included offense on the verdict form). *Harris* is particularly applicable to the instant case as the jury in that case was properly instructed on the law surrounding the offense of voluntary manslaughter and then the voluntary manslaughter sentencing option was left off of the verdict forms, leading this court to conclude that the verdict forms were incomplete but the error was harmless in light of the overwhelming

evidence of Harris's guilt of first-degree murder. 134 Nev. at 884, 432 P.3d at 213. Here, the jury was properly instructed on the capital sentencing process, and then additional verdict forms premised on a finding of mitigating evidence outweighing the aggravators were not added to the verdict forms packet, in large part because Petrocelli did not request them. At worst, this rendered the verdict forms packet incomplete. Because there was overwhelming evidence of death eligibility, including concessions by Petrocelli in argument to the existence of the aggravators and a strategy focusing on mercy as opposed to any real challenge to death eligibility, any alleged error in providing incomplete verdict forms would be harmless. And because the jury determined that the State had proven two aggravating circumstances and that the mitigating circumstances did not outweigh the aggravating circumstances and then exercised its discretion to impose the greatest penalty, I cannot conclude that any alleged error related to the verdict forms for lesser punishments warrants relief.

Based on the above, I respectfully dissent.

_____, J.
Herndon

I concur:



_____, J.
Parraguirre

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DISTRICT COURT
CLARK COUNTY, NEVADA

ZANE MICHAEL FLOYD,
#1619135

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-21-832952-W
99C159897

DEPT NO: XVII

STATE'S RESPONSE TO PETITIONER'S THIRD PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: JULY 2, 2021
TIME OF HEARING: 8:30AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction).

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On June 8, 1999, the State charged ZANE MICHAEL FLOYD (hereinafter "Petitioner") by way of Criminal Complaint with four counts of Murder with Use of a Deadly Weapon, three counts of Attempt Murder with Use of a Deadly Weapon, five counts of Sexual Assault with Use of a Deadly Weapon, one count of Burglary While in Possession of a Firearm, and one count of First Degree Kidnapping with Use of a Deadly Weapon. The State also filed a Notice of Reservation to Seek the Death Penalty. On June 25, 1999, the State filed an Amended Criminal Complaint adding an additional charge of Attempt Murder with Use of a Deadly Weapon.

On June 28, 1999, the State charged Petitioner by way of Information, and two amendments thereafter, as follows: Count 1 – Burglary While in Possession of a Firearm (Felony – NRS 205.060); Count 2 – Murder with Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165); Count 3 – Murder with Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165); Count 4 – Murder with Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165); Count 5 – Murder with Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165); Count 6 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165, 193.330); Count 7 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165, 193.330); Count 8 – First Degree Kidnapping with Use of a Deadly Weapon (Felony – NRS 200.310, 200.320, 193.165); Count 9 – Sexual Assault with Use of a Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165); Count 10 –Sexual Assault with Use of a Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165); Count 11 – Sexual Assault with Use of a Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165); and Count 12 – Sexual Assault with Use of a Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165). On July 6, 1999, the State filed a Notice of Intent to Seek the Death Penalty.

Petitioner's jury trial commenced on July 11, 2000. On July 19, 2000, the jury returned a verdict finding Petitioner guilty on all counts. At the penalty hearing, the State introduced

three aggravating circumstances in support of a death sentence. On July 21, 2000, the same jury returned a verdict of death.

On August 11, 2000, Petitioner filed a Motion for New Trial. The State filed its Opposition on August 17, 2000. On August 21, 2000, the district court denied the Motion for New Trial. The Order was filed on August 24, 2000.

On August 31, 2000, the district court adjudicated Petitioner guilty, and sentenced him to death for Counts 2, 3, 4, and 5. The Judgment of Conviction and the Order of Execution were filed on September 5, 2000.

On September 11, 2000, Petitioner filed a direct appeal with the Nevada Supreme Court. The Nevada Supreme Court affirmed Petitioner's conviction on March 13, 2002. The Court denied Petitioner's subsequent Motion for Rehearing on May 7, 2002. Appellate counsel then filed a Petition for Writ of Certiorari to the United States Supreme Court, which was denied on February 24, 2003. Remittitur issued on March 26, 2003.

On June 19, 2003, Petitioner filed his first Petition for Writ of Habeas Corpus (Post-Conviction). The State filed its Response on July 24, 2003. Petitioner then filed a Supplemental Petition through counsel, David Schieck, Esq., on October 6, 2004. The State filed its Supplemental Opposition on December 7, 2004. On January 18, 2005, the district court denied Petitioner's Petition. The Findings of Fact, Conclusions of Law and Order was filed on February 4, 2005.

Petitioner filed a Notice of Appeal on March 9, 2005, appealing the denial of his post-conviction Petition. On February 16, 2006, the Nevada Supreme Court affirmed the denial of Petitioner's Petition for Writ of Habeas Corpus. Remittitur issued on April 14, 2006.

On April 14, 2006, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court and requested stay and abeyance. Stay and abeyance was granted on April 25, 2007, for exhaustion of state court remedies.

Petitioner then filed his second successive Petition for Writ of Habeas Corpus (Post-Conviction) on June 8, 2007. The State filed its Opposition on August 18, 2007. Petitioner filed his Reply on August 28, 2007. Following argument by both parties on December 13,

2007, the district court ordered an evidentiary hearing. Following the hearing on February 22, 2008, where Petitioner's former counsel, David Schieck, Esq. testified, the district court denied Petitioner's second Petition. The Findings of Fact, Conclusions of Law and Order was filed on April 2, 2008.

On April 7, 2008, Petitioner filed a Notice of Appeal from the denial of his second Petition for Writ of Habeas Corpus (Post-Conviction). On November 17, 2010, the Nevada Supreme Court affirmed the district court's denial of the second Petition. Remittitur issued February 18, 2011. The Nevada Supreme Court also denied Petitioner's request for Rehearing.

On September 22, 2014, the United States District Court denied Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction). Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit on October 22, 2014. On October 11, 2019, the United States Court of Appeals for the Ninth Circuit issued an Order affirming the United States District Court's denial of Petitioner's Petition for Writ of Habeas Corpus.

On November 2, 2020, the United States Supreme Court denied Petitioner's Petition for Writ of Certiorari. On November 5, 2020, Mandate was filed giving the judgment of the United States Court of Appeals for the Ninth Circuit full effect.

On April 14, 2021, the State filed a Motion Seeking an Execution Warrant. The same day, Petitioner filed a Motion to Transfer Case Under EDCR 1.60(H) and Motion to Disqualify the Clark County District Attorney's Office. On April 15, 2021, the State filed a Motion for the Court to Issue Second Supplemental Order of Execution and Second Supplemental Warrant of Execution. On April 21, 2021, Petitioner filed an Opposition to Motion for the Court to Issue Second Supplemental Order of Execution and Second Supplemental Warrant of Execution. Petitioner filed an Amended Opposition on April 26, 2021.

On April 26, 2021, the State filed an Opposition to Petitioner's Motion to Disqualify the Clark County District Attorney's Office and a Response to his Motion to Transfer Case Under EDCR 1.60(H). Petitioner filed both his Replies on April 29, 2021. On May 5, 2021, the State filed its Reply to Petitioner's Opposition to Motion for the Court to Issue Second Supplemental Order of Execution and Second Supplemental Warrant of Execution. On April

10, 2021, the State filed an Addendum to State's Motion for the Court to Issue Second Supplemental Order of Execution and Second Supplemental Warrant of Execution.

On May 11, 2021, Petitioner filed a Motion to Strike, or Alternatively, Motion to Stay the Second Supplemental Order of Execution and Second Supplemental Warrant of Execution. The State filed its Opposition to the Motion to Strike on May 13, 2021. Petitioner filed a Reply on May 20, 2021. On June 4, 2021, this Court denied Petitioner's Motion to Strike.

Following a hearing on May 14, 2021, this Court denied both Petitioner's Motion to Disqualify the Clark County District Attorney's Office and Motion to Transfer Case Under EDCR 1.60(H). This Court entered the Decision and Order Denying Petitioner's Motion to Disqualify the Clark County District Attorney's Office on May 18, 2021.

On April 15, 2021, Petitioner filed his third Petition for Writ of Habeas Corpus (Post-Conviction). Following a hearing on May 6, 2021, in the United States District Court, District of Nevada, Petitioner filed the instant Amended Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Third Petition") on May 11, 2021.

ARGUMENT

I. PETITIONER'S CLAIMS 2, 3, AND 4 ARE NOT COGNIZABLE CLAIMS FOR A HABEAS PETITION

A petition for writ of habeas corpus should only address (1) relief from a judgment of conviction or sentence in a criminal case; or (2) challenges to the computation of time that a petition has served pursuant to a judgment of conviction. NRS 34.720. "Habeas corpus is a unique remedy that is governed by its own statutes regarding procedure and appeal. Mazzan v. State, 109 Nev. 1067, 863 P.2d 1035 (1993). Given that habeas corpus is a statutorily created remedy, the claims raised must fit within the statutory scheme.

Claims 2, 3, and 4 in his Petition are claims that are outside the realm permitted by statute. Petitioner argues in Claim 2 that his due process is being deprived because he has not had an opportunity to seek clemency. In Claim 3 he argues that he cannot be executed at Ely State Prison. Finally in Claim 4 he argues that his execution would constitute cruel and unusual punishment. None of these three claims have anything to do with the validity of his judgment

of conviction or sentence as required by NRS 34.720. Moreover, as to Claim 4, "[A] claim challenging the constitutionality of Nevada's lethal-injection protocol is not cognizable in a postconviction petition for writ of habeas corpus." McConnell v. State, 125 Nev. 243, 212 P.3d 307 (2009) In denying the petition, the McConnell Court held that the petition was challenging the manner in which a death sentence was to be carried out, which is separate from the validity of the judgment of conviction or sentence. Id.

The instant third post-conviction Petition is not the proper vehicle to challenge his ability to seek clemency (Claim 2). It is not the proper vehicle to challenge where his execution will take place (Claim 3). It is not the proper vehicle to challenge the execution protocol (Claim 4). Petitioner's substantive claims of why this Court should not sign the Order of Execution and Warrant should not be raised in a post-conviction Petition and should be raised by challenging the Order itself. A post-conviction habeas is not the proper remedy. Therefore, Claims 2, 3, and 4 should all be dismissed as non-cognizable claims.

II. THIS THIRD PETITION IS TIME-BARRED

Petitioner's instant third Petition for Writ of Habeas Corpus was not filed within one year of the filing of the Remittitur. Thus, this third Petition is time-barred. Pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
>
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late despite evidence presented by the Petitioner that he purchased postage through the prison and mailed the petition within the one-year time limit.

In the instant case, Petitioner filed a direct appeal, and Remittitur issued on March 26, 2003. Petitioner filed the instant third Amended Petition on May 11, 2021—over eighteen years after the Remittitur from his direct appeal. Therefore, the instant third Petition is time-barred. Dickerson, 114 Nev. at 1087, 967 P.2d at 1133–34. Absent a showing of good cause to excuse this delay, the instant Petition must be dismissed.

III. THIS THIRD PETITION SHOULD BE DISMISSED BECAUSE IT IS SUCCESSIVE AND AN ABUSE OF THE WRIT

This third petition is successive because Petitioner failed to raise any of these grounds in a prior petition or direct appeal. NRS 34.810 gives the district court authority to dismiss a petition.

Pursuant to NRS 34.810:

> 1. The court shall dismiss a petition if the court determines that:
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief; or
> (3) Raised in any other proceeding that the petitioner has taken to secure relief from the petitioner's conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner

None of these claims were (1) presented to the trial court; (2) raised on direct appeal or a prior petition; or (3) raised in any other proceeding. The Nevada Supreme Court has held that "[A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier

proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

Furthermore, substantive claims are beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Under NRS 34.810(3), a Petitioner may only escape these procedural bars if they meet the burden of establishing good cause and prejudice. Where a Petitioner does not show good cause for failure to raise claims of error upon direct appeal, the district court is not obliged to consider them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

Here, Petitioner was convicted at trial and proceeded to file a direct appeal, a first postconviction petition for a writ of habeas corpus, a second postconviction for a writ of habeas corpus, a federal petition for a writ of habeas corpus, and now the instant third postconviction petition for writ of habeas corpus. Petitioner has never raised any of these grounds on any prior petitions despite having the ability to do so.

NRS 34.810(2) reads:

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

(emphasis added).

Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v.

State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that "where a Petitioner previously has sought relief from the judgment, the Petitioner's failure to identify all grounds for relief in the first instance should weigh against consideration of the successive motion.")

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Here, this is Petitioner's third post-conviction Petition. Petitioner did not raise the instant claims on direct appeal, in his first Petition, in his second Petition, or in a federal Petition. Instead, Petitioner raises these claims for the first time now, over eighteen years later. Third Petition, at 20-22. Accordingly, this third Petition is an abuse of the writ, procedurally barred, and therefore, must be dismissed.

IV. APPLICATION OF THE PROCEDURAL BARS IS MANDATORY

The Nevada Supreme Court has held that the district court has a *duty* to consider whether a Petitioner's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the Petitioner's petition was "untimely, successive, and an abuse of the writ" and that the Petitioner failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the district court and ordered the Petitioner's petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074. Therefore, application of the procedural bars is mandatory.

V. THE STATE AFFIRMATIVELY PLEADS LACHES

Certain limitations exist on how long a Petitioner may wait to assert a post-conviction request for relief. Consideration of the equitable doctrine of laches is necessary in determining whether a Petitioner has shown 'manifest injustice' that would permit a modification of a sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated: "Application of the doctrine to an individual case may require consideration of several factors, including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the Petitioner's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev. 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction…" The Nevada Supreme Court has observed, "[P]etitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a

workable system dictates that there must exist a time when a criminal conviction is final." Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the statute requires the State plead laches. NRS 34.800(2).

The State affirmatively pleads laches in this case given that over eighteen years have elapsed between the issuing of Remittitur and the filing of the instant third Petition. In order to overcome the presumption of prejudice to the State, Petitioner has the heavy burden of proving a fundamental miscarriage of justice. See Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). Based on Petitioner's representations and on what he has filed with this Court thus far, Petitioner has failed to meet that burden.

As discussed earlier, the one-year time bar began to run from the date the of the Remittitur on March 26, 2003. The third Petition was filed on May 11, 2021 – *over eighteen years* later. Because more than eighteen years have elapsed between the Remittitur and the filing of the instant third Petition, NRS 34.800 directly applies in this case, and a presumption of prejudice to the State arises. Therefore, pursuant to NRS 34.800, this third Petition should be dismissed under the doctrine of laches.

VI. PETITIONER CANNOT ESTABLISH GOOD CAUSE TO OVERCOME THE MANDATORY PROCEDURAL BARS

A showing of good cause and prejudice may overcome procedural bars. However, Petitioner cannot demonstrate good cause to explain why his Petition is untimely.

"To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim *was not reasonably available at the time of default*." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Rather, to find good cause, there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

A petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506-07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Further, to establish prejudice, the Petitioner must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

In the instant case, Petitioner cannot establish good cause to overcome the mandatory procedural bars because he cannot demonstrate that this claim was not reasonably available at the time of default. Clem, 119 Nev. at 621, 81 P.3d at 525.

A. Claim One

Petitioner asserts that he is raising Claim One now for the first time in the instant third Petition because the claim is based on "new scientific evidence demonstrating the equivalence" of fetal alcohol spectrum disorder (FASD) as an intellectual disability. Third Petition, at 20.

The "new scientific evidence" that Petitioner relies on are two separate Declarations of Dr. Natalie Novick Brown from October 17, 2006, and February 24, 2021. See Petitioner's "Exhibit 1" and "Exhibit 2." The first Declaration, "Exhibit 1" from October 17, 2006, explains that the Las Vegas Federal Public Defender, Capital Habeas Unit, retained Dr. Novick Brown to examine Petitioner's FASD. See "Exhibit 1" at 1. "Exhibit 1" was prepared for the purposes of Petitioner's second Petition, which was previously denied by the district court. Petitioner raised similar claims regarding his FASD in his second Petition, claiming that trial

counsel was ineffective for failing to investigate and present evidence of his FASD at trial. Second Petition, filed June 8, 2007, at 75-99. Similarly, Petitioner raised the issue that he was actually innocent of the offense because he committed it in a "dissociative fugue" based on his FASD. Id. at 109-110.

The second Declaration, "Exhibit 2" from February 24, 2021, was once again prepared by Dr. Novick Brown for the Las Vegas Federal Public Defender, Capital Habeas Unit, to address whether Petitioner's FASD is consistent with the DSM-5, and if it compares to an intellectual disability. See "Exhibit 2" at 2. Dr. Novick Brown's second Declaration and Petitioner's third Petition both revolve around the Diagnostic and Statistical Manual of Mental Disorders 5 (DSM-5) to prove that Petitioner's FASD renders him ineligible for execution. Petitioner constantly refers to this as "new scientific evidence," but fails to address why this claim is only being raised now for the first time eighteen years later. The DSM-5 was last updated in 2013. Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) (May 18, 2013). Petitioner fails to address how this is "new scientific evidence" when this was available for him to raise in 2013—over eight years ago.

Petitioner relies on Dr. Novick Brown's second Declaration to claim that he "meets the current diagnosis under the DSM-5 for the CNS impairment in FASD." Third Petition, at 27. He claims that his "FASD diagnosis under the DSM-5, ND-PAE, is a brain-based, life-long impactful, disorder deserving of the classification 'ID Equivalence.'" Id. at 32. Even if this were true, Petitioner does not and cannot address why he failed to raise this for the last eight years when this evidence was available in the DSM-5 as of 2013. Thus, this is hardly "new scientific evidence" to establish good cause to overcome the mandatory procedural bars.

Moreover, Petitioner claims that because of this DSM-5 "new scientific evidence" from 2013, he is ineligible for execution because of Roper v. Simmons, 543 U.S. 551, 578, 125 S. Ct. 1183, 1200 (2005). Third Petition, at 33-36. Petitioner claims that executing him with the United States Supreme Court precedent of Roper would be cruel and unusual punishment. Id. at 33-38. It is undisputed that Roper held that execution of individuals who were under 18 years of age at the time of their capital crimes is prohibited by the Eighth Amendment. Roper,

at 551, 125 S. Ct. at 1184. And it is undisputed that Petitioner committed these murders at the age of twenty-three. Third Petition, at 36. Petitioner claims that this "rationale of *Roper* extends to individuals age twenty-three because the human brain continues to develop beyond the age of eighteen," without any legal support that this assertion is true. Id. at 34. It is simply false that Petitioner is exempt from execution because he committed these murders at the age of twenty-three. Even if this were the case, once again, Petitioner cannot explain how Roper establishes good cause to overcome the mandatory procedural bars.

Petitioner claims that executing him would constitute cruel and unusual punishment because of his diagnosis under the DSM-5 and his mental age under Roper. Third Petition, at 37-38. However, Petitioner cannot demonstrate to this Court how this is "new scientific evidence" and could not have been raised earlier. At the absolute earliest, Petitioner could have raised these claims from the DSM-5 and Roper in 2013 when the DSM-5 was last updated. But, strategically, Petitioner through the Federal Public Defender's Office once again asks Dr. Novick Brown for a second Declaration in an attempt to delay his execution. The State has routinely raised this issue to this Court for the last two months that Petitioner is repeatedly filing anything he can to delay his execution further. The instant third, procedurally barred Petition is nothing short of a meritless attempt to further delay the execution. Therefore, Petitioner cannot demonstrate good cause to overcome the mandatory procedural bars and explain why he waited to provide this "new scientific evidence" to this Court until immediately after the State filed the Order of Execution. As such, this Petition must be dismissed.

B. Claim Two

Petitioner claims that he is raising Claim Two for the first time in the instant third Petition because the "factual basis for Claim [Two] was not known until the State announced it intended to seek a warrant for Floyd's execution without giving Floyd the opportunity to pursue clemency." Third Petition, at 21. After the jury returned a verdict of death against Petitioner back in 2000, he was obviously aware of the potential to be executed. Petitioner had the potential to seek clemency since 2000—he did not have to wait till the State filed the Warrant of Execution to pursue clemency.

In Nevada, the Pardons Board's constitutional power to grant pardons and commutations of sentences is exclusive. Nev. Const. art. 5, § 14. There is no due process right for a Petitioner to clemency. Niergarth v. State, 105 Nev. 26, 28, 768 P.2d 882, 883 (1989). Moreover, the Nevada Supreme Court has held that parole is not a constitutional right, but a right bestowed by "legislative grace." Goldsworthy v. Hannifin, 86 Nev. 252, 256, 468 P.2d 350, 353 (1970). Thus, Petitioner has no right to clemency or to apply for a Pardon before this Court can issue the Order of Execution or sign the Warrant. By waiting twenty-one years to apply for clemency, Petitioner cannot establish good cause to explain why this claim was untimely and just raised for the first time in his third Petition.

C. Claim Three

Petitioner claims that he can establish good cause to overcome the mandatory time-bar of his third claim because "[t]he State has only just notified Floyd that it intends to effectuate his execution at the Ely State Prison." Third Petition, at 21. Petitioner's third claim is essentially the same claim he raised in his recent Motion to Strike, which this Court has denied.

Petitioner claims that the execution is precluded under NRS 176.355(3), because all executions "must take place at the state prison." Third Petition, at 46-48. Petitioner asserts that the closed Nevada State Prison in Carson City is the only state prison in Nevada where the execution can be held. Petitioner concedes that there are two Nevada "state prisons," including Ely State Prison and High Desert State Prison. Id. at 47. It is unclear why the execution must take place at the decommissioned Nevada State Prison, and not any other state prison in Nevada.

Moreover, the Nevada State Legislature approved $860,000 in 2015 to fund a brand-new execution chamber at Ely State Prison. See www.reviewjournal.com/crime/nevadas-new-86000-execution-chamber-is-finished-but-gathering-dust/. If the legislature's intent were for executions to take place only at the Nevada State Prison in Carson City, the legislature would not have approved almost a million dollars to construct a new execution chamber at Ely State Prison. Petitioner has clearly known of the potential to be executed at Ely State Prison for

almost six years once the legislature approved almost a million dollars to construct the new execution chamber.

Therefore, Petitioner cannot establish good cause to overcome the mandatory procedural bars for this claim. Petitioner claims that the State has only "just notified" him of the intent to execute at Ely State Prison. However, Petitioner has been on notice that the execution will take place at Ely State Prison once the legislature approved almost a million dollars for the new execution chamber. Petitioner has already raised this claim in his Motion to Strike, which was denied by this Court. This is simply another claim he is raising attempting to delay the execution. Thus, Petitioner cannot establish good cause for this claim.

D. Claim Four

Lastly, Petitioner's fourth claim is newly raised in this Petition because it is based on a hearing held in federal court on May 6, 2021. Third Petition, at 22; See Petitioner's "Exhibit 4." Petitioner claims that the testimony from the hearing proves that NDOC is not capable of conducting an execution which complies with state and federal constitutions. Third Petition, at 22. Petitioner's assertion is without merit and cannot establish good cause to overcome the mandatory procedural bars.

NRS 176.355(1) provides that a sentence of death in Nevada "must be inflicted by an injection of a lethal drug." NRS 176.355(2)(b) requires the Director of the Department of Corrections to "[s]elect the drug or combination of drugs to be used for the execution after consulting with the State Health Officer." However as mentioned in State v. McConnell, the Nevada Supreme Court concluded that the method of lethal injection is not appropriate for a petition for a writ of habeas corpus, and it is certainly not appropriate to support any good cause for this delay. 120 Nev. 1043, 1056, 102 P.3d 606, 616 (2004). Moreover, the United States Supreme Court has held that the ultimate authority to determine the lethal injection protocol is left to the Department of Corrections. Hill v. McDonough, 547 U.S. 573, 577, 126 S. Ct. 2096, 2100 (2006). The specific protocol under which Petitioner's execution is to be carried out is within the discretion of the Nevada Department of Corrections. NRS 176.355.

Therefore, the method of lethal injection itself is not unconstitutional and is determined by NDOC.

Petitioner unjustifiably asserts that his execution is unconstitutional because "NDOC is not prepared to conduct his execution in a manner that complies with constitutional requirements." Third Petition, at 50. Petitioner repeatedly asserts that NDOC is not prepared to go forward with an execution—then cites to Director Daniels testimony where he testifies that they are "still in the process of looking at the various drugs to be used." Id. Not once does Director Daniels testify that the execution will be unconstitutional, in fact if anything the Director said if there were an order to execute, he would lawfully perform his duty. Instead, Director Daniels testified that the protocol has not been finalized. "Exhibit 4" at 40. Director Daniels testimony only explains that NDOC is running through protocols and procedures and that there are a lot of moving parts NDOC is processing while finalizing the protocol and execution. Id. at 40-44. Petitioner claims that his execution will be unconstitutional, when it is undisputed the protocol has not been finalized yet. Thus, it is unclear how the Petitioner can claim his execution will be unconstitutional, when the final protocol has not been determined.

In sum, Petitioner's instant third Petition is nothing more than another attempt to further delay his execution. This Petition amounts to a time-barred, successive, meritless post-conviction habeas petition. Moreover, he cannot establish good cause to overcome the procedural bars for all four claims. These claims are meritless and further examples of how Petitioner is making any argument to further delay his execution. Petitioner has exhausted all appellate remedies. Therefore, Petitioner cannot establish good cause to explain why his Petition was untimely, and the instant third Petition must be denied as procedurally barred.

E. Newly raised Claim 5

The State is aware and understands that Petitioner intends to file an amended petition that incorporates a claim based on the recently issued Order in Petrocelli v. State, No. 79069, 2021 WL 2073794 (May 21, 2021). Although the State understands there will be additional briefing, the verdict forms in Petrocelli were entirely different from the ones used in Petitioner's conviction.

The fact that this case was recently decided, however, was not an impediment external to the defense in not raising this claim earlier. The verdict form in this case has not changed since Petitioner's conviction. Thus, there is simply no good cause for this delay.

Furthermore, the issue in Petrocelli was that multiple verdict forms were proffered to the jury which all indicated that the aggravators outweighed the mitigators. Thus three total but separate verdict forms were offered, but all of the forms erroneously carried the language that the aggravating circumstances exist but that the mitigating circumstances do not outweigh the aggravating circumstances regardless of the verdict chosen. These forms were an error of law in that the only verdict in which the aggravating circumstances outweigh the mitigating circumstances is in a verdict imposing the death sentence, not life with or without the possibility of parole.

This situation is entirely different from the Petitioner Floyd's case because first the jury were required to identify the aggravators for each of the four victims. Then the jury appropriately selected the only option possible where the aggravators outweighed the mitigators and imposed a sentence of death. The verdict form used here was not one that would have led to unnecessary confusion as did the multiple verdict forms that were used in Petrocelli.

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CONCLUSION

Petitioner's instant third Petition is nothing more than a meritless argument to further delay his execution. Petitioner cannot establish good cause to overcome the mandatory procedural bars. Therefore, the State respectfully requests that Petitioner's third and procedurally barred Petition for Writ of Habeas Corpus (Post-Conviction) be DENIED.

DATED this 4th day of June, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ Alexander Chen
ALEXANDER CHEN
Chief Deputy District Attorney
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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and foregoing, was made this 4th day of June 2021, by email to:

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Employee of the District Attorney's Office

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ZANE M. FLOYD, Defendant.	CASE#: 99C159897 CASE#: A-21-832952-W DEPT. XVII

BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE

FRIDAY, JUNE 4, 2021

RECORDER'S TRANSCRIPT OF HEARING:
STATE'S MOTION AND NOTICE OF MOTION FOR THE COURT TO ISSUE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION.
DEFENDANT'S MOTION TO STRIKE, OR ALTERNATIVELY, MOTION TO STAY THE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION.

APPEARANCES:

For the State: ALEXANDER G. CHEN, ESQ.
Chief Deputy District Attorney
BRIANNA STUTZ, ESQ.
Deputy District Attorney

For the Defendant: BRAD D. LEVENSON, ESQ.
DAVID ANTHONY, ESQ.
Assistant Federal Public Defenders

RECORDED BY: KRISTINE SANTI, COURT RECORDER

Las Vegas, Nevada, Friday, June 4, 2021

[Hearing commenced at 8:35 a.m.]

THE COURT: Good morning, everyone.

MR. CHEN: Good morning.

THE COURT: We have two motions on calendar this morning. I think the first one we should handle is the motion to strike -- everyone have a seat -- and that was filed by counsel for Mr. Floyd.

MR. ANTHONY: Judge, we also -- if the Court would entertain it, both Mr. Chen and I are ready to argue the motion for reconsideration of the disqualification motion. If you would entertain that, we're ready to go on that as well.

THE COURT: I haven't reviewed that because it's set for next week, I believe.

MR. ANTHONY: Next Friday; correct.

THE COURT: Yeah, I just --

MR. ANTHONY: Okay.

THE COURT: -- haven't looked at it. I mean, I know it exists, I have not reviewed it.

So I think the motion to strike should be argued first.

MR. LEVENSON: Your Honor, may I approach the lectern.

THE COURT: Absolutely.

MR. LEVENSON: So Mr. Floyd's motion to strike the State's order and warrant of execution is predicated on Nevada Statute 176.355, the title of the statute is called Method, Time, and Place. This was a

statute that was passed in 1967. There is no dispute that at the time that the statute was passed that when the legislature said "the state prison" what they were referring to was the Nevada State Prison. It was the only state prison in existence at the time.

If we look at the rules of statutory construction that apply here we have a couple things to look at, first of all the statute uses the word "the" and "the" is a definite article. As a rule of statutory construction the word "the" refers to a specific reference. It doesn't say "a state prison" and it doesn't say "any state prison." This is a rule of statutory construction; it has been followed by appellate courts in Nevada.

The plain language also says state prison singular, which means we're talking about one place. The State's proffered execution warrant that they initially proffered to the Court similarly acknowledged that when they used the word "the state prison" what they were referring to is the Nevada State prison.

There's also a preexisting historical understanding. We cited to Your Honor the *Kramer* case, the *Kramer* case was from the 1940s and it was based on a predecessor statute where the Nevada Supreme Court recognized that the word "the state prison" was a reference to the Nevada State Prison located just outside of Carson City, Nevada.

The legislature also has a long history of requiring that executions take place at the Nevada State Prison. My understanding, from looking at the historical society regarding the Nevada State Prison, is that the legislature first passed the statute in 1901 requiring that after 1903 all executions had to take place at the Nevada State Prison. Before

that executions took place at the county seat where the defendant was convicted. So there is legislative intent starting in 1901 and it carries forward all the way until 1967 when the legislature passed the current version of NRS 176.355.

The State's arguments are few in their opposition to our motion. The first thing the State correctly acknowledges is that there was only one state prison in existence when the statute was enacted. The next argument that the State raises is what I would characterize as a strawman. The State argues that the statute doesn't say there is only one state prison. Well, of course not. It just talks about "the state prison."

The State also argues -- and I think this is the point where we have the most tension between the parties -- is the State argues correctly that the legislature apportioned money to fund the execution chamber in Ely, Nevada, at Ely State Prison.

So the argument the Court needs to sort out is -- and for the purposes of this argument, we will assume that the legislature had an oversight. I don't think any of us would debate that when the legislature apportioned the money for Ely State Prison that they -- at that time wanted executions to take place at the Ely State Prison. For purposes of argument, I'm willing to acknowledge that.

The question the Court has to answer is, can you take the intent of the legislature in 2015 and can you transfer it and import it to the intent of the legislature in 1967? The answer to that question has to be no. There is controlling authority cited in Mr. Floyd's reply brief citing to

the *Orr Ditch* case that talks about when you assess legislative intent you do so at the time the statute was enacted. You don't look at subsequent events, like the funding of the Ely State Prison, and say we can transfer the intent of the legislature in 2015 and say that that's what the legislature was assuming in 1967.

Again, we're willing to acknowledge that the legislature made an oversight here. But the way the democratic process works is that if a statute needs to be amended, it needs to be amended by the legislature. The one thing that we know for certain is that courts do not amend statutes. So where as Your Honor could probably look at the totality of these circumstances and say, well, they apportioned the money for the Ely State Prison, that can't suffice to say that the statute meant something that it absolutely did not mean to the legislature when they passed the statute in 1967.

Now, the State still has the warrant that they've proffered to the Court, it's still the one for Mr. Floyd's execution at the Nevada State Prison, they acknowledged in an addendum that they recently filed that that was a mistake. So at this point Your Honor doesn't have a corrected warrant, I don't know if the State's intention is to ask the Court at some point to interlineate to correct the typographical error, but the bottom line is, from Mr. Floyd's perspective, we do not want to delay, we do not want to hold back an argument that we know is going to be a real imminent argument at the point that the State asked this Court to interlineate, to correct the location from the Nevada State Prison to the Ely State Prison.

It's our argument that the language of the statute is plain, the

intent of the legislature is plain, and that authority from the Nevada Supreme Court does not allow this Court to transfer the intent of the legislature from 2015 into the intent of the legislature in 1967.

For those reasons we would ask that the Court grant our motion to strike the State's supplemental warrant to the extent that it's going to be corrected to say that the execution should occur at Ely State Prison.

THE COURT: When the Nevada State Prison in Carson City was closed, would that in effect abolish the death penalty, pending amending the statute?

MR. LEVENSON: I believe as a practical matter, Your Honor, I believe it would, unless the Department of Corrections announce that they were prepared to have the execution go forward at the place designated under state law, which is the Nevada State Prison. So if it is the warrant that's before the Court, without being corrected or interlineated, it would not be inconsistent with Nevada state law for the execution to proceed at that location. But until that statute is amended by the legislature, effectively that would mean that an execution could not take place at the Ely State Prison.

THE COURT: 176.355(3), as you had mentioned, says must take place at the state prison. Isn't Ely State Prison the state prison?

MR. LEVENSON: Well, Ely State Prison is a state prison, High Desert State Prison is a state prison, Lovelock is a state prison. So no argument that it is not a state prison. What I can say for certain is that it is not the state prison that was the intent of the legislature when they

passed the statute in 1967.

THE COURT: Well, we only had one state prison back --

MR. LEVENSON: That's correct, Your Honor.

THE COURT: -- when the statute was created.

MR. LEVENSON: That's correct.

THE COURT: Okay. Thank you.

Mr. Chen.

MR. CHEN: Thank you, Your Honor.

I don't have much to add, other than, based on the Court's questions, we would agree with the point that, in essence, if you believe --

THE COURT: I wasn't necessarily agreeing or disagreeing. I just wanted to pose that question -- I'm going to pose it to you as well -- is that the statute says the state prison, at the time it was Carson City.

MR. CHEN: And I misspoke in saying that. But just in terms of that philosophy, and that line of questioning, Your Honor, what we would say is effectively if this Court were to rule that it has to take at the state prison, then I would point out that the state prison isn't in a -- now that's -- I can't think of the word right now -- but it's lower case state prison. So it's just at the state prison, which to us specifies that it has to take place at a Nevada state prison, such as Ely.

But what I was also going to say was that you look at the plain language of a statute, but then, in addition, if you're going to do statutory interpretation, the case law is clear it can't lead to an absurd result. Clearly, if this Court were to find that the state prison is only one place

that's now closed, and was open at the time, it would lead to an absurd result, because although Nevada has passed the death penalty, has the death penalty, has not abolished the death penalty. By this Court ruling that the statute applies only to the one place that used to be near Carson City, it would lead to an absurd result. And that's -- cases like *Sheriff versus Burcham*, 124 Nevada 1247.

So our position would be that certainly when this statute was created the legislature intended for a death penalty to take place at a prison, at the time there was only one prison. So, for instance, there were no public shows of exhibition, shows of power, executing people in public as it happened centuries ago, this was going to take place at a Nevada sanctioned location, which would be the prison, Your Honor.

So to that I think this -- it's clear. And then you look at what's happened subsequently, I think Mr. Anthony referenced, that the legislature, again, when addressing the death penalty, has addressed funding Ely State Prison where executions could take place. I think it is clear that the legislature intends for it to happen at a Nevada state prison, such as Ely State Prison.

THE COURT: All right. Thank you.

Yes, Counsel.

MR. LEVENSON: Your Honor, may I briefly reply.

THE COURT: Absolutely.

MR. LEVENSON: First of all, I think I might need to correct what I said. I wanted to make sure I answered the Court's question correctly, when the Court asked, would this mean that the death penalty

was abolished, the answer is clearly no, there was not an intent to abolish the death penalty. What I would say is that this is something that the legislature could easily fix, if they wanted to. That's the way the democratic process should work and that there could be a special session. The legislature could do whatever they feel is appropriate. But the important thing is that the people's representatives need to be able to amend statutes if they don't conform to our current understanding.

Secondly, and finally, what I would say is that there's no debate that Ely State Prison is a state prison. And the term keeps being used of "a state prison." But what we're talking about is we're talking about the plain language and we're talking about a definite article and we're talking about a singular location.

Thank you, Your Honor.

THE COURT: In the statute -- and I had thought about this prior to today's argument -- the state prison is in lower case and I don't know if that has any impact on your position. Again, at the time there was only one state prison, so they said the state prison. Should my interpretation be that that's all that existed at the time, the intent was to send it to a state prison, the state prison, because there was only one. I mean, they wouldn't say anything else because there was only one.

And so am I to interpret that that language means -- it can only be held at Carson City?

MR. LEVENSON: Well, just to be clear, I believe the Nevada State Prison is actually not literally in Carson City. I believe it's just outside by one mile, so just to be clear about the record.

But to answer the Court's question, given the legislative history, and given the plain language of the statute, particularly when they use the word "the", the definite article, and they use a singular for state prison, that is a specific reference. And so the preexisting understanding that the legislature had, and that the Nevada Supreme Court had, interpreting those statues should be what controls here and it controls their legislative intent.

THE COURT: All right. Thank you.

I think first and foremost any legislative interpretation by any Court is to make sure that -- or to interpret a statute, one, by its plain meaning, but also so that we have an absurd result. At the time of this statute there was only one prison. Could the legislative back, when that statute was enacted, said the state prison or any other prisons that may be created in the future in any other county, perhaps. But I don't know if they would have done it at the time. I think the proper statutory construction would be not to lead to an absurd result, and Ely is a state prison, and I think the intent was to have it at a state prison and no other facility, Ely is a state prison. So I'm going to deny the motion to strike.

Now, we have the second motion filed in this matter by the State, motion issue second supplemental order of execution and second supplemental warrant of execution.

So let me hear from the State first.

MR. CHEN: And for the purpose of today, Your Honor, I actually only want to address the order and the reason being the warrant wouldn't actually be signed anytime soon, from my proposed date of

July 26th, we couldn't actually seek it until 15 to 30 days prior anyway.

So what I'm asking the Court to do is to consider signing the order of execution. Now, NRS 176.505 actually doesn't indicate that the State is the one who's to request this. We're certainly to request the warrant of execution. But the order of execution simply says that it's supposed to happen when the remitter comes and when they've exhausted all their legal appeals.

Now, this Court, it came down in November where the Supreme Court of the United States had rejected the final petition of writ of habeas corpus, that was done in federal court. So this Court might not have known. So, basically, when the State was made aware we started gathering the information. We did file to make the request. But formally I don't necessarily think it's even on the District Attorney's Office to make the request for the order, I think that that's just something that legally, and as the statute says, it shall be done.

So it would be our position that he's exhausted his appeals, that a warrant should be -- or I'm sorry -- an order should be issued.

Now, I understand that currently there are multiple lawsuits that are occurring, both federal court, there's petitions here, I understand that there's -- I believe they've also filed another state action in state court. So I understand that legal processes will take place and are going to happen. However, even if this Court were to file an order of execution for that week of July 26, it doesn't mean that, A, this court couldn't stay it if it felt the need to stay it at any point in time. Additionally, the federal court may very well step in and order a stay.

But even until that order is even signed I don't think that there's anything for any party to stay, because otherwise there's really no pending actions. If anything gets stayed, it would mean that we're staying the petition for writ of habeas corpus, we're staying all the things that actually need to be litigated in this case.

So in getting the order my hope is to let the legal processes play out. If for any reason this Court is not comfortable filing a warrant of execution at a later date, by all means I'm sure the Court will let us know that there are reasons that it's not comfortable signing it. But at this stage I think the statute mandates that it be done, and I think that it would be appropriate for the Court to issue the order at this time.

THE COURT: All right. Thank you.

Counsel.

MR. LEVENSON: Your Honor, the parties agree on the relevant statute and the legal standard that applies. Under NRS 176.505, the question that this Court is required to ask is whether legal reasons exist that prevent the execution of judgment. The State acknowledges that there are several pending actions, there's a pending petition for writ of habeas corpus, there's a declaratory judgment action in Department 14, there are several pending actions, and there's also Mr. Floyd's opportunity to seek further review, either from the Nevada Supreme Court, or to seek review of the Court's order on the transfer motion.

So when -- so in response to the State's argument that you could just issue the order and then stay it later if you thought so, our

position is that is plainly contrary to the statute. Under 505 the Court must ask whether legal reasons exist that prohibit the execution of judgment.

The other thing that I would just mention, as a practical matter, is that that puts a lot of stress on the Department of Corrections. If the Court goes forward and signs an order of execution, and then later has to modify the date, the warden and his staff put forth supposedly a lot of effort to prepare for executions. It's very expensive. They have to do training. They have to do run-throughs. So I would say that we shouldn't play any games where we start off with an arbitrary date and then later find that we're not actually giving the Department of Corrections the time that they need. And I think that's an important thing to keep in mind because it's not just us here in court, it's also another process that exists outside of this court.

The other thing I would say to Your Honor is is that we currently have status checks set for every three weeks. So it's not like this is a case that's going to slip through the cracks, the Court's kept us on a tight schedule. We're obtaining rulings on our motions. We also have a pending state petition where the Court is going to rule. And so it's our position that given all of these protective measures, and given what the statute requires, which is that there be legal cause for -- or a finding of no legal cause, we believe that the Court is simply not in a position to make that finding as we sit here today.

The one thing that I believe is very clear is that due to the outstanding litigation that we have, I don't think that there's any

reasonable possibility that we would be concluded by the week of July 26. We have -- in front of Your Honor, we have an argument scheduled for July 2nd, that argument will be an argument regarding the state petition that's pending before Your Honor in the habeas case.

If there is an evidentiary hearing that the Court chooses to order, we're not going to be able to proceed with the execution. Even if there is not, the Court would need to produce its findings of fact and conclusions of law. Those would need to be done with a notice of entry of order. That's a lot of things to get done if we're hearing argument on July 2nd. That's a very tight timeframe. I don't think, particularly given this procedural posture, that this Court can make the conclusions the statute requires that there are not legal reasons that exist.

And, finally, I think the other important point is is that that doesn't include appellate review, that doesn't include what the Nevada Supreme Court would have to do to look at these issues, like the motions and also the petition.

So I don't think that there's any doubt that that process of appellate review could not occur by July 26.

And one of the things I would add is is that the issues that we've brought to the Court are issues of first impression. The issue about the state prison, the issue about the disqualification of the prosecutor's office, the issue about -- well, actually, I need to back up on the transfer motion, but those are novel issues that need to be decided by an appellate court as well, and that cannot be done by our current deadline of July 26.

It's our position that we would not be able to obtain meaningful appellate review if this Court went forward on the arbitrary schedule that the State is proposing.

The other thing that we need to do, and I imagine that we might get to this today, Your Honor, is we still need to set responsive dates for the two motions for leave to file an amended petition and a second amended petition. And I'm hoping that we'll be able to do that today, but even if we do that today, that also would trigger another briefing schedule. And obviously our hope would be that we can resolve all those matters by July 2nd. But if we still have real concerns that we're not going to be concluded with all the litigation in time for the Court to prepare findings to determine whether an evidentiary hearing is warranted and to have appellate review.

So in the State's reply they assert that the motions have been fully litigated but we know that's not true. Right now we have the ability under the local rules to file objections to the Court's ruling on the transfer motion. As the Court may be aware, we're currently waiting on a written order from the Court so we can be able to go to the next step. And so I know that -- I've been in touch with the Court's law clerk about that but I think it's very important that we're able to get an order on the transfer motion.

One thing that I would also say to Your Honor, and I don't -- I know that it is prohibited to file a renewed motion under the local rules, but as I was preparing for this hearing, Your Honor, I discovered what I believed to be controlling authority in this jurisdiction as to the transfer

motion. I was able to locate a Nevada Supreme Court case from 1969 called *Rainsberger v State*, which actually says that successor in office means a particular department.

And so I don't want to reargue the motion, but I would like to make a request for Your Honor that I be allowed to at least have a limited opportunity for leave to argue for reconsideration and to direct the Court's attention to the *Rainsberger* case and it's from 1969. And the issue there was whether the warrant had the issue from a particular department and the Nevada Supreme Court held that it did and it had to be the one that was the court of conviction.

I have a copy of the *Rainsberger* case that I can provide to Your Honor, if necessary. Also I have a copy for the State.

But I'm not going to reargue the motion. I would just like the Court to consider the *Rainsberger* case when it issues its written order on the transfer motion.

Would the Court prefer that I approach the Court with the case or should I --

THE COURT: I'll take the copy of the case, provide the State a copy of that particular Nevada Supreme Court Case.

MR. CHEN: Thank you.

THE COURT: Thank you.

MR. LEVENSON: And I can answer any questions that the Court has about *Rainsberger*, it's a very brief opinion, it's about three sentences long.

THE COURT: Oh, -- yeah, let me just look at it now if it's only

three sentences long.

Is that it?

MR. LEVENSON: What I did, Your Honor, is I also included information from the district court case file to show that it was a department specific ruling.

[Pause in proceedings]

THE COURT: Go ahead, Counsel.

MR. LEVENSON: Thank you, Your Honor.

I'd like to move on briefly. I believe that the relevant statute that the Court will need to apply with respect to the State petition is NRS 176.487. Those are the issues that the Court needs to consider when determining whether a stay of execution should exist.

As the Court may recall from our petition we plead excuses to overcome procedural default affirmatively in the introduction to our petition. At this point in time I understand that the State will be responding to our petition.

But as the Court sits here right now, the Court cannot conclude in the present procedural posture that the claims that we've raised are necessarily procedurally defaulted. In fact, there are many of them that were not ripe before the State proceeded to seek an execution warrant. So we have good reasons to bring these claims in a petition now and these are claims that have not been previously considered by any district court or any state court.

And it's our position that before these issues are fully briefed, and before the procedural arguments have been briefed, then the

considerations that exist in 176.487 all militate in favor of this Court staying any decision to sign an execution order until the State and the Court had at least had an opportunity to see what the procedural arguments are. Because we have affirmatively alleged that we can overcome the procedural bars that would normally apply to a successive State petition.

Furthermore, Your Honor, another consideration that we raised in our opposition briefing is that Mr. Floyd still intends to seek commutation of his death sentence with the Pardons Board. Mr. Floyd has submitted a timely application for commutation of his death sentence by the May 30th deadline; that would allow Mr. Floyd to be placed on the Pardons Board September 21st, 2021, meeting agenda. And we would submit that until we've had an opportunity to have the Pardons Board at least consider the application and to put on -- put it on their calendar, that this Court shouldn't sign the execution order today. The Court should see whether or not Mr. Floyd is going to be able to be put on the calendar. We have no reason to believe that the Pardons Board would prejudge this case without giving Mr. Floyd an opportunity to present his request for clemency to the Pardons Board. So we would argue that that is another reason that the Court should and must consider, and a reason why the Court should not sign the State's execution order.

Finally, Your Honor, there's also a declaratory judgment action that's pending in Department 14. It argues that NDOC has received an unlawful delegation of authority from the legislative branch regarding the execution protocol without sufficient guidelines. Department 14 will need

to have adequate time to consider that argument. The current argument is scheduled for June 8th in front of Department 14. But if the Court were to sign the execution order now, it could jeopardize the ability for Mr. Floyd to seek meaningful review in Department 14, and also to seek any appellate review that might be available to him.

Finally, Your Honor, as far as the argument about representations regarding the Nevada Attorney General's Office, our position is is that if the Court is going to accommodate the Department of Corrections, which I think that we agreed last time that we would do, that we should actually hear from them before we set an arbitrary execution date. That is an issue that occurred in the Dozier matter back in 2017. There was an execution date set, the Department of Corrections was not prepared to go, and we had to come back to court to get another supplemental warrant of execution to accommodate the Department of Corrections. So I believe that the Court should be considering those factors as well.

And I believe that there's also considerations of judicial economy that warrant resolving these matters first before moving onto an execution order.

Finally, the last thing that I would say is that there's also the concern that the Department of Corrections legitimately has for the spread of COVID-19 in the prison system and that's something that the Department hasn't been asked to talk about or to opine about. But nonetheless that presents a serious risk for people who come in outside of the prison. Right now the prison requires negative COVID test for

people before they're even allowed into the prison.

I would submit, Your Honor, that if we're talking about spectators, if we're talking about media, if we're talking about the victims' family, or if we're talking about the defendant's family, that's a lot of people to put together in one place at one time. And empirically, from the few executions that did occur in 2020, those turned out to be super spreader events for COVID-19, it ended up getting correctional officers sick, witnesses sick, media individuals sick.

And so I think that for all of those reasons I believe that there is no rush for the Court to sign an order of execution specifying July 26 as the date for an execution.

And the last argument I would make, Your Honor, is that even if the Court was inclined to sign the order of execution, the Court could interlineate the date out because there's no reason to have a particular date in an order of execution. Even if the Court was going to sign the order of execution, it doesn't need to have a particular date specified. That's what's done in the warrant. And the State has already talked with the Court about its intentions with respect to the warrant. So we believe that there's not a reason for the date to be specified in the order.

Thank you, Your Honor.

THE COURT: All right. Thank you.

Let me hear from the State.

MR. CHEN: Thank you, Your Honor.

Our reading of 176.505 is that it does say that it must be a judgment at a specified time, that's the specific language, then the

warrant has to coordinate with the order itself.

In terms of the appellate review that Mr. Anthony is speaking of though, I mean, at some point this has to be final. And they have every right to litigate, and I understand that they're challenging every decision that this Court has made. I'm sure that in federal court, if things don't go the way that they're hoping, they'll challenge those decisions as well. But at some point the State's position is there needs to be some finality.

And just as an example, Mr. Anthony, who's a fine attorney, he handled Mr. Floyd's post-conviction petition back in 2005, I believe. He filed it. He raised a number of claims and then now in 2021 he's still the attorney raising additional claims. If at some point the Court doesn't just have the order in place, the litigation theoretically could last forever.

Even if a Court were to stay this matter, they have to only stay it a reasonable time to accomplish what it is that needs to be accomplished. If the Court never sets a date in certain, then there really is no goal, and theoretically this litigation will just continue for years and years and years without any order, without any warrant even being possible. Because I do believe that they will never find a good time to do this. I don't believe that at any point Defendant Floyd or his counsel will think that, yes, we agree that the protocol is so great or that the procedures are so great or everything is inline, that we agree that this is an execution that should take place.

So because of that I think that we just need to push everything forward and let the legal processes play out in the way that they do. And if someone stays it pursuant to statute, that happens. But at this point I

think it is appropriate for an order.

THE COURT: All right. Thank you.

Counsel, you had mentioned that July 26 is too early, again, we still need the warrant of execution, I mean, that has to be filed and various appeal issues are going to be ongoing. You had mentioned that if this Court issues a particular decision today, that -- and we have some other motions pending in petition -- that it gives you limited time to take, whatever decision I make, whatever decision -- I think you said Department 14 -- and I know there's a federal action pending as well. And you said that July 26 is not enough time either to get a stay from the higher court or request a stay from the trial court, whether District Court 14, 17, Supreme Court. If I set a date of execution in August, wouldn't that solve the issue of the -- how fast you have to get all the paperwork completed to pursue your appellate rights -- or your client's appellate rights? I'm just concerned about just not having a date. Because as we know, without a deadline nothing happens, I mean, that's just the reality of it, nothing happens without a deadline.

MR. LEVENSON: Well, the short answer, Your Honor, is that I think an August date would still be problematic from the perspective of appellate review; that would require the Nevada Supreme Court to act on multiple matters in a very short amount of time. So I'm concerned about that.

If we are taking the timeframe based on what was happening in federal court, that would still put us at a timeframe around September at the very minimum, from, you know, what's been going on in federal court.