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 13 OF 14

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DOCUMENT	DATE	VOLUME	PAGE(S)
Amended State Petition	05.11.2021	10 – 11	2474 – 2530
Civil Order to Statistically Close Case	12.08.2021	14	3496
Decision and Order Denying Motion to Disqualify Clark County District Attorney's Office	05.18.2021	11	2681 – 2684
Decision and Order denying Defendant's Motion for Reconsideration	06.09.2021	13	3040
Decision and Order Denying Defendants Motion to Transfer Case Under EDCR 1.60(H)	06.04.2021	13	3005 – 3007
Exhibits in Support of Amended Petition for WHC	05.11.2021	11	2531 – 2647
Exhibits in Support of Motion for Leave to File Amended PWHC	05.11.2021	10	2354 – 2473
Exhibits in Support of Motion to Strike, or Alternatively, Motion to Stay the Second Supplemental Order of Execution and Second Supplemental Warrant of Execution	05.11.2021	10	2321 – 2346
Exhibits in Support of Motion to Transfer	04.14.2021	2–6	0010 – 1366

DOCUMENT	DATE	VOLUME	PAGE(S)
Exhibits in Support of Objection to Order Denying Motion to Transfer Case Under EDCR 1.60(H)	06.22.2021	13	3122 – 3147
Exhibits in Support of Petition for Writ of Habeas Corpus	04.15.2021	6	1414 – 1485
Exhibits in Support of Reply to Response to Second Amended Petition for Writ of Habeas Corpus (Post–Conviction)	06.18.2021	13	3092 – 3105
Exhibits in Support of Second Amended Petition for Writ of Habeas Corpus	06.03.2021	12	2823 – 2959
Exhibits to Motion for Leave to File Second Amended Petition	06.03.2021	11 – 12	2705 – 2765
Exhibits to Objection to Order to Denying Motion to Transfer Case Under EDCR 1.60(H	06.09.2021	13	3017 – 3036
Exhibits to Second Amended Petition in Support of Claim Two	08.10.2021	13 – 14	3178 – 3483
Minute Order	05.14.2021	11	2652 – 2653
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Motion for leave to file amended petition	05.11.2021	10	2357 – 2353

DOCUMENT	DATE	VOLUME	PAGE(S)
Motion for Leave to File Second Amended Petition	06.03.2021	11	2699 – 2704
Motion for Reconsideration	05.19.2021		2685 – 2693
Motion to Disqualify	04.15.2021	6	1486 – 1500
Motion to Strike, or Alternatively, Motion to Stay the Second Supplemental Order of Execution and Second Supplemental Warrant of Execution	05.11.2021	10	2307 – 2320
Motion to Transfer	04.14.2021	1	0001 – 0009
Notice of Appeal	08.26.2021	14	3493 – 3495
Notice of Dept Reassignment 17	04.16.2021	7	1501 – 1502
Notice of Entry and Findings of Fact and Conclusions of Law, and Order	08.16.2021	14	3484 – 3492
Objection to Order Denying Motion to Transfer Case Under EDCR 1.60(H)	06.22.2021	13	3111 – 3121
Objection to Order to Denying Motion to Transfer Case Under EDCR 1.60(H)	06.09.2021	13	3008 – 3016

DOCUMENT	DATE	VOLUME	PAGE(S)
Order Denying Defendant's Objection to Order Denying Defendant's Motion to Transfer Case Under EDCR 1.60(H)	06.21.2021	13	3109 – 3110
Petition for Writ of Habeas Corpus	04.15.2021	6	1367 – 1413
Recorder's Transcript of Hearing: All Pending Motions, May 14, 2021	05.14.2021	11	2654 – 2680
Recorder's Transcript of Hearing: Defendant's Motion for Stay of Proceedings Pending Resolution of Petition for Writ of Mandamus and Prohibition of the Nevada Supreme Court, July 9, 2021	07.09.2021	13	3163 – 3177
Recorder's Transcript of Hearing: Petition for Writ of Habeas Corpus, July 9, 2021	07.09.2021	13	3149 – 3162

DOCUMENT	DATE	VOLUME	PAGE(S)
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, June 4, 2021	06.04.2021	12 – 13	2979 – 3004
Reply to Opposition to Motion to Disqualify the Clark County District Attorney's Office	04.29.2021	10	2286 – 2299
Reply to Opposition to Motion to Strike	05.20.2021	11	2694 – 2698
Reply to Response to Motion to Transfer Case Under EDCR 1.60(H)	04.29.2021	10	2300 – 2306
Reply to State's Response to Second Amended Petition for Writ of Habeas Corpus (Post–Conviction)	06.18.2021	13	3048 – 3091
Second Amended Floyd State Petition	06.03.2021	12	2766 – 2822

DOCUMENT	DATE	VOLUME	PAGE(S)
State's Opposition to Defendant's Motion to Disqualify Clark County District Attorney's Office	04.26.2021	10	2271 – 2285
State's Opposition to Motion to Strike	05.13.2021	11	2648 – 2651
State's Response to Defendant's Motion to Transfer Case Under EDCR 1.60(H)	04.26.2021	7 – 10	1503 – 2270
State's Response to Defendant's Objection to Order Denying Motion to Transfer Case Under EDCR 1.60(H)	06.17.2021	13	3041 – 3047
State's Response to Petitioner's Third Petition for Writ of Habeas Corpus	06.04.2021	12	2960 – 2978

One thing I want to clarify is is that when the State mentions the execution protocol, there still is no execution protocol. And that was the reason we were setting status checks in the first place. I think that the Court would be in a position at our next status check to make a much more reasonable determination regarding what seems reasonable to the Department of Corrections and to the Court and to the State and to Mr. Floyd once we have more information about the protocol. But to just say right now that August would be good enough, I don't think that we can conclude that as we sit here today.

THE COURT: What date do you want, besides no date?

MR. LEVENSON: Well, Your Honor, I think what we would be appropriate is to have the date be set from the Nevada Supreme Court's disposition of -- a final disposition of these matters. I believe what the statute say is that if there was an order of affirmance, and if any petitions for writ of mandamus were denied, the State statutory scheme says that that's the point at which an execution order and warrant could be signed and could be effectuated, is once those appellate remedies are exhausted there's -- the State statute is actually paired up to the date of an order of affirmance from the Nevada Supreme Court.

So I would say that's the date that we're looking at, would be the date on which the Nevada Supreme Court issues an order of affirmance or also denying any petitions for writ of mandamus.

THE COURT: All right. Thank you.

Anything further by the State?

MR. CHEN: No, thank you, Your Honor.

THE COURT: All right. I'm going to issue a written decision on or before Monday of next week on this particular motion.

And there was one other matter, I think, that we could take care of.

[Colloquy between the Court and the Law Clerk]

THE COURT: Apparently in the A case there's a motion for appointment of counsel, and that's -- I'm not sure when that is set for.

MR. ANTHONY: It's not -- I don't believe it's set yet, Your Honor.

THE COURT: Apparently I'm being told it's set on the 25th.

MR. ANTHONY: Okay.

THE COURT: And, obviously, I'm assuming there's no objection, I mean, I -- definitely I will appoint your office as counsel. So that motion is granted today. No oppositions been filed.

MR. ANTHONY: Your Honor, we do have one more matter, we had filed a petition and an amended petition and a second amended petition. I know Mr. Chen is answering today on the first two, the petition and the amended petition; that still leaves the second amended petition, which adds one more claim based on some new law that came out, *Petrocelli*. And so right now the briefing schedule is we have two weeks to reply and then the argument is July 2nd. It would be wonderful if we could argue all three petitions; that would be one more claim by -- on that July 2nd deadline. And I don't know how that briefing schedule would look, but it's only one more claim.

THE COURT: Any objection by the State?

MR. CHEN: No, Your Honor. If they file something timely, then we'll do our best to file something by the date that the Court is going to hear the petition. So we'll get everything done at once.

THE COURT: Is July 2nd a homicide day or is it non-homicide?

THE CLERK: Non-homicide.

THE COURT: July 2nd is fine.

MR. CHEN: Okay.

THE COURT: Okay? The parties agree on that.

MR. ANTHONY: Oh, and, Your Honor, I'm sorry, we have an order of transcript request, proposed order, that we'd like to file with the Court.

THE COURT: You have to file it electronically, but -- and I'll sign off on that, if it's submitted through electronic means. You can get it to -- as soon as you get back to your office, file it. Before I leave today, I'll sign it electronically.

MR. ANTHONY: And then we also wanted to request that this -- these hearings be -- be pursued under Rule 250 where we have daily transcript request since we're going to have a lot of hearings and it's a -- it is a death penalty case, and an important one with an execution date, that we have that request before the Court.

THE COURT: That's fine. I'll order daily transcripts for any of the hearings.

MR. ANTHONY: Thank you.

MR. CHEN: Thank you.

THE COURT: Okay. All right. Thank you, Counsel. Have a

good weekend.

MR. CHEN: You as well.

MR. ANTHONY: Thank you, Your Honor.

[Hearing concluded at 9:16 a.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Gina Villani
Court Recorder/Transcriber
District Court Dept. IX

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ZANE MICHAEL FLOYD,

Defendant.

CASE NO: 99C159897

DEPT NO: XVII

DECISION AND ORDER DENYING DEFENDANTS MOTION TO TRANSFER CASE UNDER EDCR 1.60(H)

DATE OF HEARING: MAY 14, 2021
TIME OF HEARING: 8:30 AM

THIS MOTION having come on for hearing before the Honorable MICHAEL VILLANI, District Judge, on the 14th day of May 2021, with the Defendant not being present. The Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the Decision on Defendant's Motion to Transfer Case Under EDCR 1.60(H).

On December 28, 2008, all Department XVII's civil and criminal caseloads were transferred to Department III, and all of Department V's civil and criminal caseloads were transferred to Department XVII. The transfer of cases from Department V to Department XVII included the instant case. As of December 31, 2020, Department V only hears civil matters. *See* Administrative Order 20-25. Moreover, since 2008, while this matter was still pending before the Nevada Supreme Court, neither party objected to the transfer of the instant case to Department XVII. Additionally, since late 2008, the original Judge.

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EDCR 1.60(a) grants the authority of the Chief Judge to "assign and re-assign all cases pending in District Court. Furthered, pursuant to EDCR 1.30(b)(5), the Chief Judge has the authority to determine the regular and special assignments of District Court Judges.

On July 1, 2017, the Eighth Judicial District created the Homicide Team. See Administrative Order 17-05. The Order provided that four departments would exclusively hear homicide cases to increase case management efficiency. In 2018, Department XVII was assigned to the Homicide Team. Additionally, Department XVII was assigned the present matter in 2008 and in 2018 assigned to hear all homicide matters.

Therefore, THIS COURT FINDS that Department XVII is the proper Department to preside over the instant case.

ORDER

THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion to Transfer Case Under EDCR 1.60(H) is hereby denied.

DISTRICT JUDGE

MICHAEL P. VILLANI

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 4th day of June, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DAVID ANTHONY
BRAD D. LEVENSON
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BY */s/ Samantha Albrecht*
Samantha Albrecht
Court Clerk for Judge Villani

OBJ

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DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff.

v.

ZANE M. FLOYD,

Defendant.

ZANE M. FLOYD,

Petitioner.

v.

WILLIAM GITTERE, ET AL.,

Respondents.

Case No.
Related Case Nos. 99C159897
A-21-832952-W
Dept. No. XXVII

OBJECTION TO ORDER DENYING MOTION TO TRANSFER CASE UNDER EDCR 1.60(H)

Date of Hearing:
Time of Hearing:

(DEATH PENALTY CASE)

EXECUTION SCHEDULED FOR THE WEEK OF JULY 26, 2021

POINTS AND AUTHORITIES

I. Introduction

Defendant Zane Floyd was convicted of four counts of first-degree murder and other offenses and sentenced to death. Department 5 was the court of conviction and the court that heard the two subsequent post-conviction matters in Floyd's case.

On April 14, 2021, the State filed a motion for the district court[1] to issue a second supplemental order and warrant of execution. The State's motion was filed in Department 17, which was the department designated in the Odyssey electronic filing system to hear the case. However, the docket did not reflect the existence of any order transferring the case to Department 17 from Department 5, the date of such transfer, or the reason for it.

On April 14, 2021, Floyd filed a motion to transfer the case from Department 17 back to Department 5 under EDCR 1.60(h). Floyd's motion was based in part upon NRS 176.495(1), 176.505(1, 2), and 34.730(3)(b). Argument was held on the motion on May 14, 2021, and the district court denied the motion from the bench. 5/14/21 TT at 9. During the proceedings, the district court provided to counsel what appeared to be an internal court document stating the case was transferred from Department 5 to Department 17 on December 28, 2008.[2]

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[1] This pleading refers to the "district court" as the Honorable Michael P. Villani, the judge in Department 17.

[2] Ex. 1 (*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Court Minutes, May 14, 2021). The document the court disclosed in open court was not filed in, and is not reflected in, the docket of this case in Odyssey. Ex. 5 (*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Internal Court Document, Undated).

At a subsequent hearing on June 4, 2021, counsel for Floyd directed the district court's attention to the case of *Rainsberger v. State*, 85 Nev. 22, 22, 449 P.2d 254, 254 (1969), and asked the court to reconsider its decision as *Rainsberger* was controlling authority dictating a decision in Floyd's favor on the transfer motion. 6/4/21 TT at 15-17. Later in the afternoon of June 4, 2021, the district court issued its written order denying Floyd's motion to transfer the case. Ex. 2. The *Rainsberger* case was not addressed by the district court.

Under EDCR 1.60(h), Floyd hereby files this objection to the district court's order denying his motion to transfer the case.[3] This objection is timely filed. *See id.* (referencing time for filing objections under EDCR 2.34(f)); EDCR 2.34(f) (requiring written objections to be served in five days from service of order).

II. Relevant Statutory Provisions

Chapters 34 and 176 of the Nevada Revised Statutes dictate that only the judicial department that entered the conviction has jurisdiction to issue an execution warrant. The relevant statutory provisions are the following:

NRS 176.495(1) provides:

> If for any reason a judgment of death has not been executed, and remains in force, *the court in which the conviction was had* must, upon application of the Attorney General or the district attorney of the county in which the conviction was had, cause another warrant to be drawn,

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[3] EDCR 1.60(h) states: "Any objection to the ruling must be heard by the presiding judge of the division from which the case was reassigned in the same manner as objections to a discovery recommendation under Rule 2.34(f)." This objection has been filed with the presiding judge of the civil division and the criminal division as Floyd is litigating this motion in the criminal case (Case No. 99C159897) and the civil one (Case No. A-21-832952-W) EDCR 1.60(a) ("the civil presiding judge shall have the authority to assign or reassign civil cases pending in the civil/criminal division; and the criminal presiding judge shall have the authority to assign or reassign criminal cases pending in the civil/criminal division.").

> signed by the judge and attested by the clerk under the seal of the court, and delivered to the Director of the Department of Corrections.

(Emphasis added).

Subsection 3 of former NRS 176.495 is also relevant to the issue of legislative intent and that subsection provided:

> Where sentence was imposed by a district court composed of three judges, *the district judge before whom the confession or plea was made, or his successor in office*, shall designate the week of execution, the first day being Monday and the last day being Sunday, and sign the warrant.

(Emphasis added) (repealed June 9, 2003, Laws 2003, chapter 366, § 4).

NRS 176.505(1, 2) provides:

> When remittitur showing the affirmation of a judgment of death has been filed with the clerk of the court from which the appeal has been taken, *the court in which the conviction was obtained* shall inquire into the facts, and, if not legal reasons exist prohibiting the execution of the judgment, shall make and enter an order requiring the Direct of the Department of Corrections to execute the judgment at a specified time. The presence of the defendant in the court at the time the order of execution is made and entered, or the warrant is issued, is not required.
>
> When an opinion, order dismissing appeal or other order upholding a sentence of death is issued by the appellate court of competent jurisdiction pursuant to chapter 34 or 177 of NRS, *the court in which the sentence of death was obtained* shall inquire into the facts and, if no legal reason exists prohibiting the execution of the judgment, shall make and enter an order requiring the Director of the Department of Corrections to execute the judgment during a specified week. The presence of the defendant in the court when the order of execution is made and entered, or the warrant is issued, is not required.

(Emphasis added).

Finally, NRS 34.730(3) provides:

> Except as otherwise provided in this subsection, the clerk of the district court shall file a petition as a new action separate and distinct from any original proceeding in which a conviction has been had. If a petition challenges the validity of a conviction or sentence, it must be:
>
> (a) Filed with the record of the original proceeding to which it relates; and
>
> (b) Whenever possible, assigned to *the original judge or court*.

(Emphasis added).

III. Argument

The district court erred in denying Floyd's motion to transfer the case back to Department 5 for issuance of an order and warrant of execution as well as for consideration of Floyd's state petitions. The Nevada Revised Statutes refer to a specific court as the only one with jurisdiction to enter an execution order and warrant. The statutes refer to the court in which the conviction was had, the court in which the death sentence was obtained, the district court before whom the confession or plea was made, and the court's successor in office. Similarly, the statutes refer to the original judge or court as the one to whom a post-conviction matter is assigned. In each instance, the only court that can hear the matter is Department 5, not Department 17.

The State did not respond to Floyd's statutory arguments in its response to Floyd's motion to transfer the case. The district court's order also completely fails to cite or address any of the statutory provisions cited in Floyd's motion. Instead, the district court's order is based upon Administrative Orders and rules of the Eighth

Judicial District Court. However, the statutes passed by the Legislature are controlling over any court rules or administrative orders to the extent any inconsistency exists. *Lauer v. Eighth Judicial District Court*, 62 Nev. 78, 85, 140 P.2d 953, 956 (1943). Therefore, the administrative orders and court rules cited by the district court do not dictate the resolution of Floyd's motion.[4]

The Nevada Supreme Court addressed the very issue presented here in Floyd's favor in *Rainsberger v. State*, 85 Nev. 22, 22, 449 P.2d 254, 254 (1969). In *Rainsberger*, the defendant pleaded guilty before Judge John C. Mowbray to a capital offense and was sentenced to death by a three-judge panel. *Rainsberger v. State*, 81 Nev. 92, 399 P.2d 129 (1965). At the time, Judge Mowbray was the judge in Department 3 of the Eighth Judicial District Court. Ex. 3 at 266 (Political History of Nevada, Chapter 6, The Nevada Judiciary (12th ed. 2016). Judge Mowbray resigned on October 1, 1967. *Id.* An execution warrant was subsequently issued for Mr. Rainsberger's execution by the Honorable Howard W. Babcock, from Department 6. *Id.*

On appeal, the defendant argued the execution warrant was invalid under NRS 176.495. Specifically, the defendant "contends that the warrant of execution rendered on April 9, 1968, directing death by the administration of lethal gas on May 2, 1968 is invalid because the judge who signed the warrant was not the

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[4] Moreover, the district court's reliance on its status as a "murder judge" is not relevant when the alleged transfer occurred several years before the murder court was even created by the Chief Judge in 2017. Ex. 2 at 1-2 (*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Decision and Order Denying Defendants Motion to Transfer Case Under EDCR 1.60(H), June 4, 2021).

successor in office of the judge who heard the plea of guilty as required by NRS 176.495(3)." *Rainsberger*, 85 Nev. at 22, 449 P.2d at 254. The Nevada Supreme Court found the question whether the warrant was valid was moot. *Id.* However, the court remanded the case for a new warrant with instructions: "The new warrant should be drawn and signed by the judge of *Department Three* of the Eighth Judicial District Court in accordance with NRS 176.495(3)." *Id.* (emphasis added).

The Nevada Supreme Court's instructions on remand in *Rainsberger* dictate that the district court erred in holding that it had jurisdiction to issue an execution warrant for Floyd. To the extent the district court addressed Floyd's statutory arguments at all, the court erred in holding it was the successor in office to the court in Department 5. This interpretation of successor in office is overly broad and not supported by the precise statutory language in NRS 176.495 and 176.505. Moreover, the Nevada Supreme Court has recognized the term "successor in office" refers specifically to the judge that took the place of the position of the prior judge, not just any subsequent judge on the Nevada Supreme Court. *Calloway v. Reno*, 116 Nev. 250, 253 n.1, 993 P.2d 1259, 1261 n.1 (2000) ("Justice Maupin is successor in office to former Chief Judge Steffen, and Justice Agosti is successor in office to former Chief Justice Springer."). This Court must accordingly hold that the district court erred in failing to grant Floyd's motion to transfer the case.

Moreover, the district court failed to address Floyd's arguments with respect to the improper transfer of his petitions under NRS 34.730(3)(b). Floyd objected to the transfer of his state petition, which was transferred to Department 17 because

the court had the criminal case. Ex. 4 (*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Notice of Department Reassignment, Apr. 16, 2021). NRS 34.730(3)(b) requires assignment of a state petition to "the original judge or court." The district court's interpretation of the statute reads the term "original" out of the statute. As explained above, the district court never addressed these statutory arguments, but this Court must do so and hold that the state petition was improperly transferred to Department 17.

IV. Conclusion

For the foregoing reasons, Floyd respectfully requests that this Court sustain his objection and transfer the criminal case and the state petitions to Department 5 under EDCR 1.60(h).

DATED this 9th 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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of June, 2021, a true and correct copy of the foregoing OBJECTION TO ORDER DENYING MOTION TO TRANSFER CASE UNDER EDCR 1.60(H), was filed manually with the Eighth Judicial District Court Clerk. Electronic service of the foregoing document shall be made to opposing counsel by prior agreement via email listed as follows:

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Chief Deputy District Attorney
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An Employee of the Federal Public Defenders Office, District of Nevada

EXH

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Attorneys for Zane M. Floyd

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff.

v.

ZANE M. FLOYD,

Defendant.

ZANE M. FLOYD,

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v.

WILLIAM GITTERE, ET AL.,

Respondents.

Case No.
Related Case Nos. 99C159897
A-21-832952-W
Dept. No. XXVII

EXHIBITS TO OBJECTION TO ORDER DENYING MOTION TO TRANSFER CASE UNDER EDCR 1.60(H)

Date of Hearing:
Time of Hearing:

(DEATH PENALTY CASE)

EXECUTION SCHEDULED FOR THE WEEK OF JULY 26, 2021

EXHIBIT NO.	DOCUMENT
1.	*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Court Minutes, May 14, 2021.
2.	*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Decision and Order Denying Defendant's Motion to Transfer Case, June 4, 2021.
3.	Political History of Nevada, Chapter 6, The Nevada Judiciary (12th ed. 2016).
4.	*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Notice of Department Reassignment, Apr. 16, 2021.
5.	*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Internal Court Document, Undated.

DATED this 9th 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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of June, 2021, a true and correct copy of the foregoing EXHIBITS TO OBJECTION TO ORDER DENYING MOTION TO TRANSFER CASE UNDER EDCR 1.60(H), was filed manually with the Eighth Judicial District Court Clerk. Electronic service of the foregoing document shall be made to opposing counsel by prior agreement via email listed as follows:

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EXHIBIT 1

EXHIBIT 1

99C159897

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor COURT MINUTES May 14, 2021

99C159897 The State of Nevada vs Zane M Floyd

May 14, 2021 3:00 AM Minute Order

HEARD BY: Villani, Michael COURTROOM: Chambers

COURT CLERK: Samantha Albrecht

RECORDER:

REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

- On October 11, 2019, the 9th Circuit of Appeals denied Defendant s Petition for Writ of Habeas corpus. On November 2, 2020, the United State Supreme Court denied certiorari. On April 14, 2021, Defendant filed his Motion to Disqualify Clark County District Attorney s Office. Said motion is based up the argument that two Deputy District Attorneys are presently working as State Senators. It is argued that such a situation violates the separation of powers doctrine and, therefore, the entire Clark County District Attorney s office should be disqualified from representing the State of Nevada in the present case. Nev. Const. Art 3, 1 provides the following:

The powers of the Government of the State of Nevada shall be divided into three separate departments, the legislature, the executive and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in cases expressly directed or permitted in this constitution.

The Defense does not dispute that the Senators in question are on leave of absence from the District Attorney s office while the legislature is in session. NRS 252.070(1) provides:

All district Attorneys may appoint deputies, who are authorized to transact official business relating to those duties of the office set forth in NRS 252.080 and 252.090 to the same extent as their principals and perform such duties as the as the district attorney may from time to time direct. The

appointment of a deputy district attorney must not be construed to confer upon that deputy policy making authority for the office of the district attorney or the county by which the deputy district attorney is employed.

Senators Cannizzaro and Scheible are on leave of absence from the District attorney s office and, therefore are not performing executive branch functions under their current status as legislators, they are being compensated by the legislative branch of government opposed to the executive branch, and while serving in the legislature they are not under the control of the elected District Attorney. As such, the Court finds that under the present scenario there is not a separation of powers violation.

The Court will prepare a formal order in a pleading format consistent with the above on May 18, 2021.

CLERK'S NOTE: A copy of this Minute Order was provided by e-mail to: David Anthony, David_Anthony@fd.org; Brad Levenson, Brad_Levenson@fd.org; Alexander Chen, alexander.chen@clarkcountyda.com; and Brianna Stutz, brianna.stutz@clarkcountyda.com. 5/14/2021 sa

EXHIBIT 2

EXHIBIT 2

Electronically Filed
6/4/2021 9:35 AM
Steven D. Grierson
CLERK OF THE COURT

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ZANE MICHAEL FLOYD,

Defendant.

CASE NO: 99C159897

DEPT NO: XVII

DECISION AND ORDER DENYING DEFENDANTS MOTION TO TRANSFER CASE UNDER EDCR 1.60(H)

DATE OF HEARING: MAY 14, 2021
TIME OF HEARING: 8:30 AM

THIS MOTION having come on for hearing before the Honorable MICHAEL VILLANI, District Judge, on the 14th day of May 2021, with the Defendant not being present. The Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the Decision on Defendant's Motion to Transfer Case Under EDCR 1.60(H).

On December 28, 2008, all Department XVII's civil and criminal caseloads were transferred to Department III, and all of Department V's civil and criminal caseloads were transferred to Department XVII. The transfer of cases from Department V to Department XVII included the instant case. As of December 31, 2020, Department V only hears civil matters. *See* Administrative Order 20-25. Moreover, since 2008, while this matter was still pending before the Nevada Supreme Court, neither party objected to the transfer of the instant case to Department XVII. Additionally, since late 2008, the original Judge.

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EDCR 1.60(a) grants the authority of the Chief Judge to "assign and re-assign all cases pending in District Court. Furthered, pursuant to EDCR 1.30(b)(5), the Chief Judge has the authority to determine the regular and special assignments of District Court Judges.

On July 1, 2017, the Eighth Judicial District created the Homicide Team. See Administrative Order 17-05. The Order provided that four departments would exclusively hear homicide cases to increase case management efficiency. In 2018, Department XVII was assigned to the Homicide Team. Additionally, Department XVII was assigned the present matter in 2008 and in 2018 assigned to hear all homicide matters.

Therefore, THIS COURT FINDS that Department XVII is the proper Department to preside over the instant case.

ORDER

THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion to Transfer Case Under EDCR 1.60(H) is hereby denied.

DISTRICT JUDGE

MICHAEL P. VILLANI

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 4th day of June, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DAVID ANTHONY
BRAD D. LEVENSON
411 E. BONNEVILLE, STE. 250
LAS VEGAS, NV 89101

BY */s/ Samantha Albrecht*
Samantha Albrecht
Court Clerk for Judge Villani

EXHIBIT 3

EXHIBIT 3

POLITICAL HISTORY OF NEVADA

(TWELFTH EDITION)

Issued by
BARBARA K. CEGAVSKE
Nevada Secretary of State

Produced jointly with the Research Division
of the Legislative Counsel Bureau

TABLE OF CONTENTS

Political History of Nevada

Chapter 6

The Nevada Judiciary

District—Counties	*Name*	*Year*
No. 2—Washoe (Dept. 4)	Craven, Thomas O.	1967-1971
No. 2—Washoe (Dept. 5)	Gezelin, Emile (Appointed July 1, 1967; elected 1968.)	1967-1971
No. 3—Eureka and Lander	Sexton, John F.	1967-1971
No. 4—Elko	Wright, George F.	1967-1971
No. 5—Mineral, Esmeralda, and Nye	Breen, Peter (Died November 24, 1967.)	1967
	Mann, Kenneth (Appointed January 2, 1968, to election following.)	1968-1969
	Mann, Kenneth (Elected to unexpired term.)	1969-1971
No. 6—Pershing and Humboldt	Leighton, Donald M. (Died, June 19, 1967.)	1967
	Young, Llewellyn A. (Appointed August 15, 1967, to election following.)	1967-1969
	Young, Llewellyn A. (Elected to unexpired term.)	1969-1971
No. 7—White Pine and Lincoln	Wilkes, Roscoe	1967-1971
No. 8—Clark (Dept. 1)	Sundean, Clarence	1967-1971
No. 8—Clark (Dept. 2)	Compton, William P.	1967-1971
No. 8—Clark (Dept. 3)	Mowbray, John C. (Resigned October 1, 1967.)	1967
	Wartman, Alvin Nicholls (Appointed October 1, 1967; resigned October 14, 1969.)	1967-1969
	Wines, Taylor (Appointed October 14, 1969; resigned January 15, 1970.)	1969-1970
	Morse, William (Appointed January 18, 1970, to unexpired term.)	1970-1971
No. 8—Clark (Dept. 4)	O'Donnell, Thomas J.	1967-1971
No. 8—Clark (Dept. 5)	Mendoza, John F.	1967-1971
No. 8—Clark (Dept. 6)	Babcock, Howard W. (Appointed July 1, 1967; elected 1968.)	1967-1971

Statutes of Nevada 1971, Chapter 521, p. 1087, created the same eight judicial districts. District No. 1 had two judges, District No. 2 had six judges, District No. 8 had nine judges, and the rest had one each. On and after July 1, 1972, District No. 8 had 10 judges.

EXHIBIT 4

EXHIBIT 4

Electronically Filed
4/16/2021 4:51 PM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
****

Zane Floyd, Plaintiff(s) vs. William Gittere, Defendant(s)	Case No.: A-21-832952-W Related 99C159897 Department 17

NOTICE OF DEPARTMENT REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled action has been randomly reassigned to Judge Michael Villani.

☒ This reassignment is due to: Per NRS 34.730, case assigned to same judge as the criminal case.

ANY TRIAL DATE AND ASSOCIATED TRIAL HEARINGS STAND BUT MAY BE RESET BY THE NEW DEPARTMENT.

Any motions or hearings presently scheduled in the FORMER department will be heard by the NEW department as set forth below.

Motion to Disqualify Attorney, on 06/25/2021, at 8:30 AM.

PLEASE INCLUDE THE NEW DEPARTMENT NUMBER ON ALL FUTURE FILINGS.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Patricia Azucena-Preza
Patricia Azucena-Preza
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that this 16th day of April, 2021

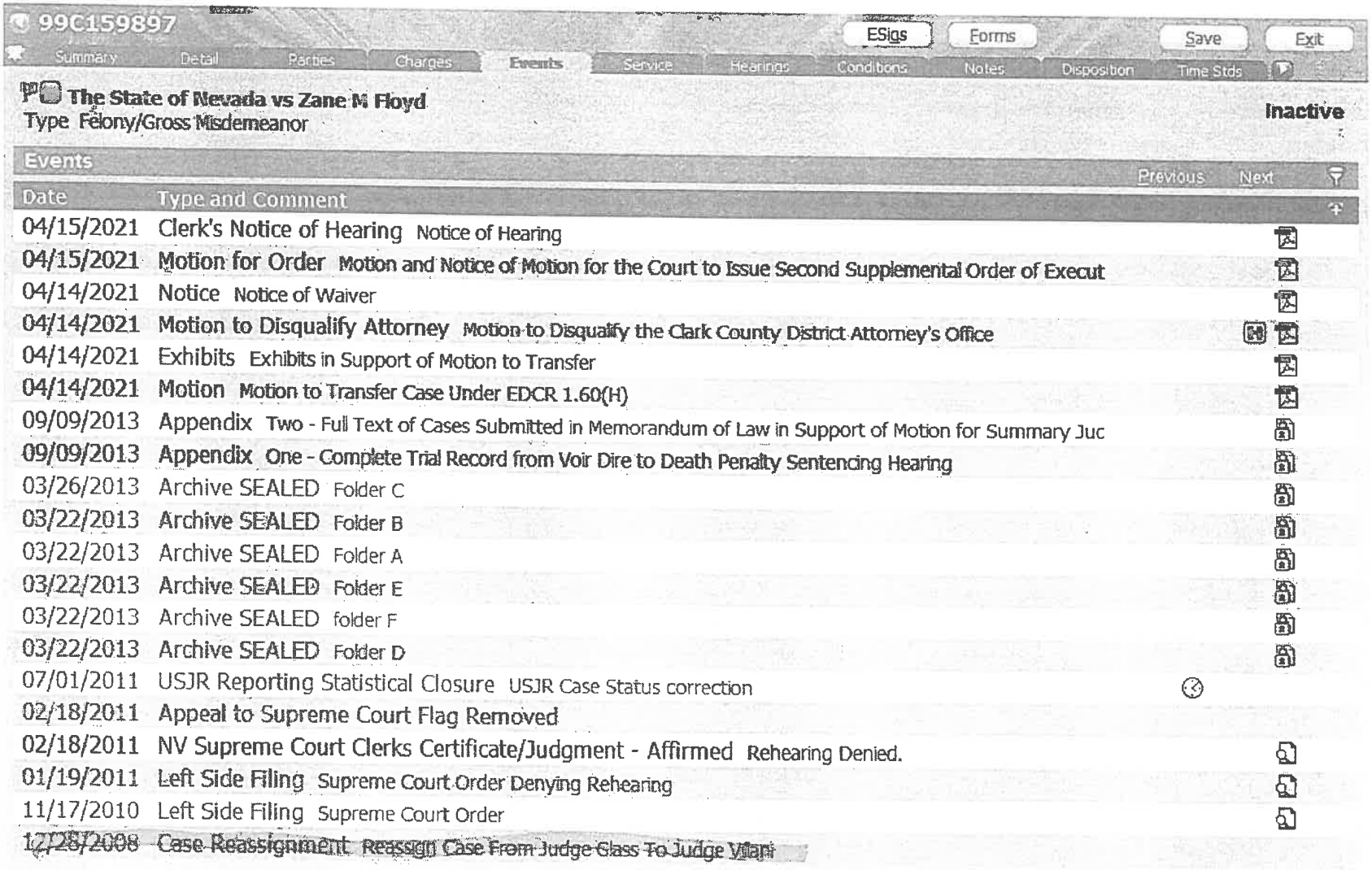
☒ The foregoing Notice of Department Reassignment was electronically served to all registered parties for case number A-21-832952-W.
David_Anthony@fd.org
Brad_Levenson@fd.org
AHerr@ag.nv.gov
rgarate@ag.nv.gov
motions@clarkcountyda.com

/s/ Patricia Azucena-Preza

Patricia Azucena-Preza
Deputy Clerk of the Court

EXHIBIT 5

EXHIBIT 5



99C159897

ESigs | Forms | Save | Exit

Summary | Detail | Parties | Charges | Events | Service | Hearings | Conditions | Notes | Disposition | Time Stds

The State of Nevada vs Zane M Floyd

Type Felony/Gross Misdemeanor

Inactive

Events

Previous | Next

Date	Type and Comment
04/15/2021	Clerk's Notice of Hearing Notice of Hearing
04/15/2021	Motion for Order Motion and Notice of Motion for the Court to Issue Second Supplemental Order of Execut
04/14/2021	Notice Notice of Waiver
04/14/2021	Motion to Disqualify Attorney Motion to Disqualify the Clark County District Attorney's Office
04/14/2021	Exhibits Exhibits in Support of Motion to Transfer
04/14/2021	Motion Motion to Transfer Case Under EDCR 1.60(H)
09/09/2013	Appendix Two - Full Text of Cases Submitted in Memorandum of Law in Support of Motion for Summary Juc
09/09/2013	Appendix One - Complete Trial Record from Voir Dire to Death Penalty Sentencing Hearing
03/26/2013	Archive SEALED Folder C
03/22/2013	Archive SEALED Folder B
03/22/2013	Archive SEALED Folder A
03/22/2013	Archive SEALED Folder E
03/22/2013	Archive SEALED folder F
03/22/2013	Archive SEALED Folder D
07/01/2011	USJR Reporting Statistical Closure USJR Case Status correction
02/18/2011	Appeal to Supreme Court Flag Removed
02/18/2011	NV Supreme Court Clerks Certificate/Judgment - Affirmed Rehearing Denied.
01/19/2011	Left Side Filing Supreme Court Order Denying Rehearing
11/17/2010	Left Side Filing Supreme Court Order
12/28/2008	Case Reassignment Reassign Case From Judge Glass To Judge Villani

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ZANE MICHAEL FLOYD,

Defendant.

CASE NO: 99C159897

DEPT NO: XVII

DECISION AND ORDER

DATE OF HEARING: June 11, 2021
TIME OF HEARING: 8:30 AM

THIS MATTER being considered upon the pleading on file herein:

This COURT FINDS there is no change in circumstances and this court prior decision is not clearly erroneous to Reconsider Defense's prior Motion to Disqualify Clark County District Attorney's Office.

ORDER

IT IS HEREBY ORDERED that Defense Motion for Reconsideration DENIED.

Date: June, 17, 2021

DISTRICT JUDGE

MICHAEL P. VILLANI

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ZANE MICHAEL FLOYD,
#1619135

Defendant.

CASE NO: 99C159897

DEPT NO: XVII

STATE'S RESPONSE TO DEFENDANT'S OBJECTION TO ORDER DENYING MOTION TO TRANSFER CASE UNDER EDCR 1.60 (H)

DATE OF HEARING: MAY 14, 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 Defendant's Objection to Order Denying Motion to Transfer Case Under EDCR 1.60 (H).

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 "Defendant") 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 Defendant 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.

Defendant's jury trial commenced on July 11, 2000. On July 19, 2000, the jury returned a verdict finding Defendant 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 against Defendant.

On August 11, 2000, Defendant 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 Defendant 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, Defendant filed a direct appeal with the Nevada Supreme Court. The Nevada Supreme Court affirmed Defendant's conviction on March 13, 2002. The Court denied Defendant'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, Defendant filed his first Petition for Writ of Habeas Corpus (Post-Conviction). The State filed its Response on July 24, 2003. Defendant 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 Defendant's Petition. The Findings of Fact, Conclusions of Law and Order was filed on February 4, 2005.

Defendant 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 Defendant's Petition for Writ of Habeas Corpus. Remittitur issued on April 14, 2006.

On April 14, 2006, Defendant 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.

Defendant 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. Defendant 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 Defendant's former counsel, David Schieck, Esq. testified, the district court denied Defendant's second Petition. The Findings of Fact, Conclusions of Law and Order was filed on April 2, 2008.

On April 7, 2008, Defendant 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 Defendant's request for Rehearing.

On September 22, 2014, the United States District Court denied Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). Defendant 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 Defendant's Petition for Writ of Habeas Corpus.

On November 2, 2020, the United States Supreme Court denied Defendant'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 Order and Execution of Warrant. The same day, Defendant filed the instant Motion to Transfer Case Under EDCR 1.60(H) (hereinafter "Motion"), and Motion to Disqualify the Clark County District Attorney's Office.

On May 14, 2021, the parties argued the motions regarding the transfer of this case as well as the disqualification of the Clark County District Attorney's Office. The District Court denied both motions in orders that were filed on June 4, 2021. On June 9, 2021, Defendant filed an objection to the order that denied his motion to transfer. The State now responds.

ARGUMENT

The State stands by its prior response that it filed on April 26, 2021. However, this is meant to serve as a supplement based upon Defendant's current objection.

When a literal and plain meaning leads to an unreasonable or absurd result, the court may consider other sources for the statute's meaning. State v. Friend, 118 Nev. 115 (2002).

NRS 176.495 is the statute that governs the issuance of a new warrant of execution. The plain language of the statute indicates that the "court in which the conviction was had "must draw up a warrant "signed by the judge."Similarly, NRS 176.505, which contains the requirements for an order of execution, also calls for the "court in which the conviction was obtained" to issue the order.

It is undisputed that the Defendant was convicted in District Court Department 5. However, cases that were in Department 5 have been re-assigned over the years. As indicated in Department XVII's Order, on December 28, 2008, Department V's civil and criminal caseloads were transferred to Department XVII. Thus, even though the number of the department is different, the court in which the conviction was obtained is now titled as Department XVII.

Defendant cites Rainsberger v. State as his support for transferring the case to Department V. 85 Nev. 22 (1969). However Rainsberger dealt with a provision of NRS 176.495 that no longer exists. At the time Rainsberger was decided, the court was reading a 1967 version of NRS 176.495(3) which allowed for a three judge panel to impose the death penalty, and it was up to the district court that took the plea or his "successor in office" to issue the warrant of execution. This provision was eliminated by the Legislature in 2003. *See* AB 13, page 2084. Thus, Rainsberger can be distinguished for this case.

However, Department XVII is in fact the successor department that has been tasked with Defendant's case. The case was properly re-assigned by the Chief Judge of the Eighth Judicial District Court pursuant to Rule 1.60 of the Eighth Judicial District Court rules. Although Defendant argues that the rules and administrative orders should not matter, those rules have been adopted and approved by the Nevada Supreme Court. The Legislature has given the Supreme Court the ability to make these rules pursuant to NRS 2.120.

Based on Defendant's request, he is not only asking that the order and warrants of execution be signed by Department V, but he also adds that his third petition for writ of habeas corpus (post-conviction) should also be handled by Department V. As noted in the State's original reply, Department V is a civil department not handling criminal cases. NRS

34.730(3)(b) says that it is only "whenever possible" that the original judge or court hears the petition. However, it is not possible based upon the assignment of cases and the types of courts that now make up the district court. Thus, Department XVII, which has taken the cases from Department V, should also hear the petition for writ of habeas corpus.

CONCLUSION

The district court did not err in refusing to transfer the case. As such, the State requests that this court deny Defendant's objection.

DATED this 17th 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
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155
(702) 671-2750

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing State's Response to Defendant's Objection to Order Denying Motion to Transfer Case Under EDCR 1.60 (H), was made this 17th day of June, 2021, by electronic transmission to:

BRAD LEVENSON
Email: brad_levenson@fd.org
DAVID ANTHONY
Email: david_anthony@fd.org
Ecf_nvchu@fd.org

BY */s/ E. Davis*
Employee for the District Attorney's Office

AC//ed

RPLY
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(702) 388-5819 (Fax)

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

REPLY TO RESPONSE TO SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

Date of Hearing: July 2, 2021
Time of Hearing: 8:30 a.m.

(DEATH PENALTY CASE)

EXECUTION SOUGHT BY THE STATE FOR THE WEEK OF JULY 26, 2021

Petitioner Zane Michael Floyd replies to the State's Response to his Second Amended Petition for Writ of Habeas Corpus (Post-Conviction) (the Petition). Floyd bases this Reply on the attached memorandum of points and authorities and the entire file in this matter.

DATED this 18th 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

TABLE OF CONTENTS

MEMORANDUM OF POINTS AND AUTHORITIES

I. FLOYD'S CLAIMS ARE PROPERLY BEFORE THIS COURT

A. Floyd's claims are cognizable in his petition.

The State acknowledges that Floyd's claims are cognizable in a habeas proceeding to the extent they challenge his death sentence. Resp. at 5. The State does not acknowledge that, as to Claims Two, Three, and Four, Floyd argues the state law and state and federal constitutional arguments pleaded in his petition invalidate his sentence. In Section II below, Floyd explains why his claims are meritorious and why his death sentence is invalid. At most, the State's arguments implicate the merits of Floyd's claims. They do not render them non-cognizable.

In Claim Two, Floyd argues his death sentence is invalid because the State seeks to execute him before his clemency petition can be heard by the Pardons Board. Floyd's argument is that at the time of the offenses for which he was convicted, there was (and is) a state constitutional and statutory right to seek clemency before the Pardons Board. Nev. Const. art. 5, § 14. In Section II below, Floyd argues the State threatens to arbitrarily deprive him of those rights by seeking his execution before he has an opportunity to be put on the Pardons Board's September 2021 meeting agenda. This deprivation is serious enough that it implicates the validity of the sentence itself.

The very authority cited by the State in arguing against the merits of Floyd's claim demonstrates Claim Two is cognizable in a habeas corpus proceeding. Resp. at 15. In *Niergarth v. State*, 105 Nev. 26, 768 P.2d 882 (1989), the petitioner filed a petition for writ of habeas corpus arguing new authority from the Nevada Supreme

Court that affected the calculation of good time credits "rendered the sentence he is presently serving illegal." *Id*. at 28, 768 P.2d at 883. The Nevada Supreme Court did not reject the petitioner's claim as non-cognizable. Instead, the Court addressed and rejected the petitioner's claim that the new decision "did not declare the sentences appellant is serving to be illegal." *Id*. The same thing is true with respect to Claim Two in Floyd's petition as it concerns the cognizability of his claims: the pertinent issue is the validity of Floyd's death sentence given the State's arbitrary deprivation of his right to seek commutation of his death sentence. The issue is not one of cognizability.

Similarly, Claims Three and Four are cognizable to the extent they implicate the validity of Floyd's sentence. While the line between cognizable and non-cognizable claims is not always easy to draw, several courts have recognized that to the extent the petitioner's claims require statutory changes by the Legislature to remedy they implicate the validity of the sentence itself. For example, in *Nance v. Commissioner*, 994 F.3d 1335 (11th Cir. 2021), the court held that the petitioner's method of execution challenge must be brought in habeas because the alternative method of execution proffered by the plaintiff was not permitted under state law and required action by the legislature. *Id*. at 1337. And in *Adams v. Bradshaw*, 826 F.3d 306 (6th Cir. 2016), the court held the petitioner's challenge to lethal injection was cognizable in habeas proceedings because the petitioner argued that lethal injection was unconstitutional in all its forms. *Id*. at 321.

Nance and *Adams* are instructive as to the cognizability of Claims Three and Four. As argued in Claim Three, Floyd contends his death sentence is invalid because state law prevents his execution from occurring at Ely State Prison (ESP). Notwithstanding the State's initial waffling on this issue and its continuing failure to proffer an execution warrant requiring Floyd's execution at ESP, there no longer appears to be any dispute the State intends to execute Floyd at ESP not at the Nevada State Prison (NSP). Consequently, for Floyd's death sentence to occur at all, the Legislature must amend NRS 176.355 to specify that executions can occur at ESP. Until that happens, Floyd's death sentence is invalid. Similarly, if the Nevada Department of Corrections (NDOC) is not prepared to conduct Floyd's execution in a constitutional manner then the death sentence is invalid. Claims Three and Four are accordingly cognizable in a habeas corpus proceeding.

B. Floyd's Petition is not time barred.

There is no dispute that Floyd's present petition was filed more than one year after the issuance of remittitur from the Nevada Supreme Court's decision in direct appeal. Therefore, the issue is whether Floyd can show the delay in filing the instant petition is not his fault under NRS 34.726(1)(a) and that he will suffer actual prejudice if his petition is dismissed. NRS 34.726(1)(b). The parties agree that Floyd can overcome the time bar if he can demonstrate "good cause to excuse [the] delay" in filing his petition. Resp. at 7. Alternatively, Floyd can overcome the procedural bars asserted by the State if he can demonstrate that a fundamental miscarriage of justice would occur if this Court does not consider his claims. Both exceptions to procedural default apply here.

In Claim One, Floyd argues that he is exempt from the death penalty due to his Fetal Alcohol Spectrum Disorder (FASD) and its equivalency to Intellectual Disability (ID), which in combination with new neurological evidence, shows the diminished culpability of young adults in Floyd's position. This claim is timely because the emerging consensus of the medical and legal community with respect to equivalence between intellectual disability and FASD did not exist at the time of the prior state proceedings in Floyd's case. As with other constitutional claims involving categorical exclusion from the death penalty, the existence of such categorical exclusions does not arise from a single event, but rather comes about due to a confluence of factors. Eventually, categorical exclusions arise due to the evolving standards of decency that inform the contours of the Eighth Amendment's prohibition on cruel and unusual punishments. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). Based on the medical and legal consensus that now exists, such a categorical exemption can now be found by the Court, and Floyd's claim is timely for this reason.

Alternatively, the existence of a categorical exemption for FASD means that Floyd can overcome the procedural default bars raised by the State based on actual innocence of the death penalty. *Cf. Ybarra v. State*, 127 Nev. 47, 50, 247 P.3d 269, 271 (2011) (noting prior reversal of district court's finding of procedural default of intellectual disability claim and remanding for consideration of merits). As

explained in Section II below, Floyd's claim is meritorious which means that he can demonstrate actual innocence of the death penalty.

In Claim Two, Floyd argues that his death sentence is invalid because the State intends to arbitrarily deprive him of his right to seek clemency before the Pardons Board before his execution. Floyd's claim was not ripe until his litigation culminating in the denial of his first federal habeas petition was final upon the denial of certiorari by the United States Supreme Court in November of 2020. As Floyd explained in his petition filed on April 15, 2021, an impediment to completing the investigation in support of his clemency petition existed at the time due to the COVID-19 pandemic. Now that the pandemic has somewhat subsided, Floyd completed the needed investigation and submitted a timely application to the Pardons Board by May 30, 2021, to get placed on the Board's September meeting agenda. The relevant constitutional deprivation occurred after that time with the State's insistence upon seeking Floyd's execution during the week of July 26, 2021, months before the Board's next meeting. The factual basis for Floyd's claim in the instant Petition did not exist before that time, which means his claim is timely.

The State claims that Floyd "had the potential to seek clemency since 2000" "and did not have to wait till the State filed the Warrant of Execution to pursue clemency." Resp. at 14-15. According to the State, because of his tardiness, Floyd does not deserve a meaningful chance now to present his case to the Pardons Board. *Id.* However, the Board of Pardons "will not consider an application for a pardon or the commutation of a punishment submitted by a person sentenced to the death

penalty unless the person has exhausted all available judicial appeals." NAC 213.120(1). Because Floyd has consistently been involved in litigation and appeals in state and federal courts concerning his conviction and sentence since 2000, the State's argument is incorrect. The State's position is irreconcilably inconsistent with its subsequent acknowledgment that "Petitioner has no right to . . . apply for a Pardon before this Court can issue the Order of Execution or sign the Warrant." *Id.* at 15.[1] The State's acknowledgment repels its argument regarding procedural default based on the alleged untimely assertion of Floyd's claim.

In Claim Three, Floyd argues his death sentence is invalid because state law prevents him from being executed at the ESP. The State acknowledges Floyd's assertions of good cause to overcome procedural default, Resp. at 15, but fails to respond to them. To reiterate, Floyd could not have raised his claim earlier because his first warrant of execution designated NSP as the location for the execution. Floyd did not even have a factual basis for his claim when the State filed its motion seeking a Second Supplemental Order and Warrant of Execution because the warrant specified NSP as the location of the execution. It was not until the State filed its addendum, on May 10, 2021, that Floyd learned that the State intended for the execution to take place at ESP. There can be no rational dispute that Floyd's claim was timely asserted in his amended petition, which was filed on May 11, 2021.

[1] The Court has now issued an order of execution so by even the State's argument, Floyd's claim should be granted.

In Claim Four, Floyd argued his death sentence was invalid because NDOC is not prepared to conduct a constitutional execution. The State acknowledges the factual basis for Floyd's claim was not available to him until the Director of NDOC testified in federal court on May 6, 2021. Resp. at 16. As to procedural default, the State argues "Petitioner's assertion is without merit and cannot establish good cause to overcome mandatory procedural bars." *Id*. Therefore, it appears that, at most, the State argues Floyd cannot overcome procedural default because the claim lacks merit.[2] To the extent that is the State's argument, the merits of Floyd's claim are addressed below in Section II.

In Claim Five, Floyd argued his death sentence was invalid because the penalty verdict forms misled the jury with respect to their ability to consider the life sentencing options. Floyd argued good cause exists to overcome any procedural default because the Nevada Supreme Court's decision in *Petrocelli v. State*, 2021 WL 2073794 (Nev. May 21, 2021) (unpublished disposition),[3] constitutes intervening law. The State argues Floyd cannot demonstrate good cause because the "verdict form in this case has not changed since Petitioner's conviction." Resp. at 18. But Floyd did not argue a new factual basis provided good cause to raise the claim. He argued the new intervening *Petrocelli* decision constitutes a new *legal* basis for his claim. Floyd's claim is timely raised from the date of *Petrocelli*.

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[2] The State also conflates arguments regarding cognizability with those involving procedural default. Resp. at 17. Floyd addressed the cognizability of his arguments above.

[3] This case is cited as persuasive authority, *see* NRAP 36(c)(3).

C. Floyd's Petition is not successive or an abuse of the writ.

The same arguments Floyd raised above with respect to the timeliness of his claims also show that he can demonstrate cause and prejudice to overcome the successive petition bar of NRS 34.810(3)(a, b). With the potential exception of Claim One, the State does not argue that any claim in Floyd's petition has been previously raised. NRS 34.810(2). Floyd will address Claim One and then provide additional reasons, apart from those argued above in Section I(B), that demonstrate his petition is not successive.

In its order, dated June 7, 2021, the Court rejected Claim One because "[t]he Nevada Supreme Court as well [as] the Federal District Court of Nevada and the United States Court of Appeals for the Ninth Circuit have ruled upon said claim." Order at 2. At the time of this Court's order, Floyd had not yet received an opportunity to file this instant reply to the State's response to his petition. Floyd's present claim of categorical exclusion from the death penalty is different than the claim he previously raised. In his second state petition, Floyd raised a claim of ineffective assistance of trial counsel for failure to investigate and present evidence of FASD at the sentencing hearing. The ineffective assistance claim Floyd previously raised was not addressed on the merits by this Court or by the Nevada Supreme Court on appeal. Instead, Floyd's ineffective assistance claims were found procedurally defaulted. *Floyd v. State*, 126 Nev. 711, 367 P.3d 769, 2010 WL 4675234, at *1 (2010).

While Floyd raised an actual innocence claim upon which FASD was a component, he did not argue that he was categorically exempt from the death

penalty under the Eighth Amendment. Instead, "Floyd asserted that due to Fetal Alcohol Spectrum Disorder, Attention Deficit Hyperactivity Disorder, Dissociative Disorder, long term drug use, and the use of alcohol and methamphetamine, he was incapable of premeditating and deliberating and that his own admissions of premeditation were undermined because he was 'in the throes of a dissociative state' when the statements were made." *Floyd*, 2012 WL 4675234, at *2. Floyd's present claim is not limited to a mere mental state defense to the crime.

The Nevada Supreme Court's decision also demonstrates that the court did not apprehend Floyd's claim as asserting a categorical exemption. Instead, the court characterized Floyd's claim as "whether additional mitigating evidence can be sufficient to render a person actually innocent of the death penalty." *Id.* at *2 n.2.

Floyd acknowledges the Nevada Supreme Court has subsequently rejected the argument that additional mitigating evidence alone establishes actual innocence. *Lisle v. State*, 131 Nev. 356, 363-68, 351 P.3d 725, 730-34 (2015). Floyd's present claim is not that FASD is just another mitigating factor that can be balanced against the aggravating circumstances. Instead, his argument is that FASD is equivalent in moral culpability to intellectual disability. As to the latter condition, actual innocence is not predicated upon a balancing of aggravating and mitigating evidence. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the High Court recognized ID as necessitating a categorical exemption because limiting it to a mitigating factor was insufficient to protect this class of defendants. *Id.* at 320 (recognizing "the lesser ability of mentally retarded defendants to make a

persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors"). Floyd's argument here is that due to evolving standards of decency, individuals with FASD should now be treated the same way as those with ID. As with ID, FASD is no longer simply another mitigating factor to weigh against aggravation: it is a reason for Floyd to be found categorically exempt from the death penalty, regardless of the evidence in aggravation. As explained above, this precise issue has not been previously raised or decided in a prior petition. Therefore, Floyd's claim is not successive as having been previously raised.

Finally, with respect to Claims One through Four, the fact that these issues were not ripe in prior state proceedings is an independent reason why Floyd's claims are not barred as successive under NRS 34.810(2). *Cf. Panetti v. Quarterman*, 551 U.S. 930, 943-44 (2007). In *Panetti*, the petitioner raised a claim that he was incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). Even though the claim was re-raised in a successive habeas petition, the Court held the claim was not procedurally barred as successive because it was not ripe before the petitioner's execution was imminent: "We conclude, in accord with this precedent, that Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern the filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe." *Id.* at 945. Here, the State does not address the ripeness of Floyd's claims and how they were not available in prior proceedings when his execution was not imminent. As in *Panetti*, this Court should find Floyd's claims are

not successive and that he can demonstrate good cause for the failure to raise them in prior proceedings. NRS 34.810(3)(a).

D. The State's assertion of laches should be rejected.

The State affirmatively pleads laches. Resp. at 10-11. While NRS 34.800 permits dismissal of a petition, it does not require it. The first provision of the laches bar explicitly states: "A petition *may* be dismissed." NRS 34.800(1) (emphasis added). This permissive language defeats the State's argument that the laches provision must bar consideration of the Petition. Resp. at 11. In addition, the State has not made an attempt to demonstrate that it has been prejudiced by any delay, which is a component of laches.

To the extent Floyd is required to rebut an assertion of prejudice, NRS 34.800(2), he can do so as the claims he raises don't require the State to re-try him. A finding in Floyd's favor would mean at most the death penalty was no longer a sentencing option and that Floyd should be resentenced at a non-capital sentencing hearing. In such circumstances, the State does not have the same concerns with respect to the memories of witnesses as non-capital sentencing hearings can be litigated using pre-sentencing reports.

For these reasons, this Court should decline to find Floyd's petition barred by laches as the Nevada Supreme Court has done on prior occasions. In *Robins v. State*, 385 P.3d 57 at *4 n.3 (Nev. 2016) (unpublished disposition), the Nevada Supreme Court noted the laches "statute clearly uses permissive language." *Id.* (emphasis added). Similarly, in *Weber v. State*, No. 62473, 2016 WL 3524627, at *3 n.1 (Nev. June 24, 2016) (unpublished disposition), the Nevada Supreme Court

declined the State's argument that laches barred a capital habeas petitioner's petition. In *Weber*, the State pleaded laches, the petitioner declined to address laches, and the Nevada Supreme Court noted it "could have summarily affirmed the district court's decision" to apply laches, but did not. *Id.*; *see also Lisle v. State*, 131 Nev. 356, 360, 351 P.3d 725, 728-29 (2015) (disregarding the State's assertion of laches). Thus, the permissive language of the NRS 34.800 allows the Court to not apply laches here, and the circumstances in Floyd's case described above demonstrate why the Court should not do so.

II. FLOYD'S CLAIMS ARE MERITORIOUS

The State argus that Floyd cannot establish good cause to overcome the state procedural bars because he cannot demonstrate that his claims were not reasonably available at the time of the default. Resp. at 12-18. As shown below, the State is incorrect.

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

In Claim One, Floyd argued that he is categorically exempt from the death penalty because he suffers from Fetal Alcohol Spectrum Disorder (FASD), stemming from prenatal exposure to alcohol and that his FASD exempts him from capital punishment for two reasons. 2nd Amend. Pet. at 25–39. In Claim One (A), Floyd argued that FASD is equivalent to Intellectual Disability (ID) and therefore exempts Floyd from execution under the reasoning of *Atkins v. Virginia*, 536 U.S. 304 (2002). *Id.* at 26–33. And in Claim One (B), Floyd argued that his age at the time of the incident, functionally impacted by FASD, exempts him from execution

under the logic of *Roper v. Simmons*, 543 U.S. 551 (2005). *Id.* at 34–37. The State argues that both subparts should be denied. Resp. at 12-14. Floyd disagrees, as discussed below.

A. Floyd suffers from FASD.

The State does not deny that Floyd suffers from FASD. *See* Resp. at 13. And Floyd has established that he meets the current diagnosis under the DSM-5 for the Central Nervous System (i.e., brain) impairment in FASD. Ex. 2 at ¶¶19, 24-25, 28-29; 2nd Amend. Pet. at 28–29. The Petition also established that Floyd suffers from secondary disabilities from his FASD including disrupted education, mental health problems, substance abuse, and dependent living. Ex. 2 at ¶22; 2nd Amend. Pet. at 29.

Floyd's FASD categorically exempts him from the death penalty for the reasons discussed below.

B. Floyd is ineligible for execution under *Atkins* because FASD is equivalent to intellectual disability.

In Claim One (A), Floyd argued that FASD is equivalent to Intellectual Disability (ID) and therefore Floyd is excluded from the class of persons eligible for the death penalty under the logic of *Atkins v. Virginia*, 536 U.S. 304 (2002). 2nd Amend. Pet. at 26–33. The State implies a substantive challenge to Claim One (A) without offering a single legal argument against either FASD's equivalence to ID or against the logical application of *Atkins* to FASD by reason of this equivalence. To the extent that the State declines to concede FASD's ID equivalence and Floyd's subsequent ineligibility for execution, the State is incorrect.

1. FASD is equivalent to intellectual disability.

"The term 'Intellectual Disability (ID) equivalence' refers to accommodations that are made by legal and other governmental entities . . . to people who—because of brain impairment *function as if they have ID* but fail to qualify for the ID label . . . because their IQ scores are a few points too high." Stephen Greenspan, Natalie Novick Brown, & William Edwards, *FASD and the Concept of "Intellectual Disability Equivalence," in Fetal Alcohol Spectrum Disorders in Adults: Ethical and Legal Perspectives*, International Library of Ethics, Law, and the New Medicine 241 (M. Nelson & M. Trussler eds., 2016) (emphasis added).[4] According to experts, "Fetal Alcohol Spectrum Disorder (FASD) is a logical candidate for such an accommodation." *Id.* FASD merits ID equivalence for four reasons.

First, FASD and ID are both classified by DSM-5 as neurodevelopmental disorders. Ex. 2 at ¶26. However, while ID is diagnosed by a single provider in the context of relatively minimal testing, an FASD diagnosis requires a multidisciplinary team comprised of a neuropsychologist, adaptive functioning specialist (usually a psychologist), and a medical doctor. Ex. 2 at ¶31.

Second, both ID and FASD stem from permanent structural brain damage. Ex. 2 at ¶31. In individuals with FASD, "[t]he toxic effects of prenatal alcohol exposure appear to be widespread throughout the entire brain, causing subtle but potent irregularities in brain structure that compromise brain function and directly impact cognition and behavior." Ex. 2 at ¶14. Moreover, while symptom course in ID

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[4] https://www.nofas.org/wp-content/uploads/2017/02/FASD-and-the-Concept-of-Intellectual-Disability-Equivalence.pdf (Last visited June 11, 2021).

remains relatively stable over the developmental years into adulthood, FASD symptoms become *more* complex and debilitating, leading to a *greater* adaptive severity into adulthood. *Id.* at ¶31 (emphasis added).

Third, FASD is equal to and in some cases a more severe disorder than ID. Ex. 2 at ¶31. According to the DSM-5, disability severity may be measured by definitional complexity, functional capacity, and outcome risk. ID and FASD are comparably definitionally complex, as both require five diagnostic elements to diagnose. Similarly, FASD and ID effect comparable functional impairment, as FASD impairs nineteen domains of functional capacity while ID impairs twenty-one. However, FASD presents significantly higher risks of adverse developmental outcomes. *See* Ex. 2 at ¶30. FASD has negative developmental outcomes in nineteen areas, while ID has negative developmental outcomes in only nine. *Id.*

Fourth, while some individuals with FASD have average or above average IQ, executive and everyday adaptive functioning in both ID and FASD tends to be identical. Ex. 2 at ¶31. Executive functioning tends to be universally impaired in FASD as well as ID. *Id.* It is also higher-level executive functioning—not IQ—that most determines how information is processed and integrated in the brain and ultimately manifests as adaptive behavior (real-world behavior). *Id.* at ¶14. Thus, deficient adaptive functioning also appears to be universal in FASD, regardless of stage of development, instrument used to measure behavior, or IQ. *Id.* at ¶20.

In summary, FASD is a permanent, brain-based, profoundly severe disorder with broad ramifications for all functional domains of everyday life. For Floyd,

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. Ex. 2 at ¶9. For these reasons, FASD merits a determination of categorical ID equivalence.

2. FASD/ID equivalence renders Floyd categorically exempt from the death penalty under the reasoning of *Atkins*.

The State does not address whether FASD/ID equivalence categorically excludes individuals with FASD, including Floyd, from the class of persons eligible for the death penalty. Resp. at 13. A simple application of the logic offered by the Supreme Court in *Atkins* however supports Floyd's argument.

In *Atkins*, the Supreme Court reasoned that defendants suffering from ID were categorically excluded from execution, at least in part, because the retributive and deterrent justifications for the death penalty could not apply to these individuals. 536 U.S. at 318–19. This logic applies with equal force to those suffering from FASD.

Of the stated interest in retribution, the Court declared that "the interest in seeing that the offender gets his 'just deserts'—the severity of the appropriate punishment necessarily depends on the *culpability* of the offender." *Id.* at 319 (emphasis added). And, although the Court found that individuals with ID could be tried and punished for criminal offenses, it also maintained that "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses. . . they do not act with the level of *moral culpability* that characterizes the most serious adult criminal conduct." *Id.* at 306 (emphasis added). These deficits in impulse control

and judgment represent two primary disabilities seen in individuals suffering from FASD. *See, e.g.,* Ex. 1 at ¶31. The litany of executive functions permanently damaged by prenatal exposure to alcohol leading to FASD include "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." Ex. 2 at ¶14. Because fundamental, functional deficits in judgment and impulse control diminish the moral culpability of a defendant, this diminution applies equally to the real-world effects of ID and FASD. Put simply, defendants with FASD, like those with ID, do not possess the individual blameworthiness required by the Court to justify the most severe, retributive punishment.

The Court in *Atkins* also determined that the intended deterrent effect of the death penalty could not apply to individuals with ID. *Atkins,* 536 U.S. at 320. The Court explained:

> The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, *the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses*—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

Id. (emphasis added). Because the functional adaptive profiles of FASD and ID are essentially identical, there is no practical distinction to be drawn between the two disabilities in this context. In terms of real-world behavior, an individual with

FASD will be no more likely than an individual with ID to engage in the type of complex reasoning necessary to restrain impulsive behavior. And, because FASD particularly damages impulse control functions, it is unlikely that an individual with FASD will control their conduct exclusively based on the possibility of execution as a penalty. Thus, the deterrent effect suggested by the Court will apply no more—and possibly less—to an individual suffering from FASD than it does to a defendant with ID.

The logic that dictates categorical exclusion of individuals with ID from receiving a capital sentence under *Atkins* applies equally to those suffering from FASD. The punishment excluded for defendants with ID cannot be justified either by reason of retribution or deterrence for those suffering from FASD. As such, Floyd's condition makes him ineligible for the death penalty under the Eighth Amendment's (and Nevada Constitution's counterpart, Article I, Section 6) bar on cruel and unusual punishment. Therefore, this Court must permanently set aside Floyd's death sentence and remand the case for resentencing where the death penalty is not a sentencing option.

C. Floyd is ineligible for execution because of his age at the time of the incident.

The State controverts Claim One (B) exclusively because Floyd was twenty-three at the time of the incident. Resp. at 14. In *Roper v. Simmons*, the Supreme Court held that the Eighth Amendment categorically bars juvenile offenders from receiving sentences of death. 543 U.S. 551, 578 (2005). In reaching this determination, the Court applied a two part-test, considering (1) whether a national

consensus indicated opposition to the practice of executing juveniles and (2) whether the Court, exercising independent judgment, disapproved the proportionality of the punishment in light of the relative culpability of youthful offenders. *Id.* at 564. At that time, the Court interpreted the protections of the Eighth Amendment to extend only to those under the age of eighteen when their crimes were committed. *Id.* at 574. Today, the Court's own two-pronged Eighth Amendment analysis establishes that *Roper*'s protections necessarily extend beyond the age of eighteen to all youthful offenders who have not yet achieved the level of brain development that marks a transition to adulthood.

Addressing the second prong, the *Roper* Court found that the death penalty represents a disproportionate punishment for juveniles based on their diminished culpability. *See id.* at 575. In forming that conclusion, the Court relied on scientific and sociological studies and reports. *See, e.g., id.* at 569–70; *see also Miller v. Alabama*, 567 U.S. 460, 471 (2012) ("Our decisions rested not only on common sense—on what 'any parent knows'—but on science and social science as well."). And while the Court's fundamental distinction between the developing juvenile brain and the mature adult brain finds support in current scholarship, the Court's arbitrarily formulated cutoff at age eighteen does not.

1. Contemporary scholarship disapproves an arbitrary line drawn at eighteen years.

A statement from the Young Adult Development Project at Massachusetts Institute of Technology succinctly captures the perspective of much contemporary scholarship on the human brain: "The brain isn't fully mature at 16, when we are

allowed to drive, or at 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car."[5] In fact, recent scholarship in science and social science considering exactly the issues that influenced the *Roper* Court—maturity, vulnerability to influence, and incomplete identity formation—establishes a period of juvenile development that lasts well into the mid-twenties.

The *Roper* Court based its determination that juvenile offenders cannot face execution, in part, on the generalization that "lack of maturity and an underdeveloped sense of responsibility" in young people often result in "impetuous and ill-considered actions and decisions." *Roper,* 543 U.S. at 569. The Court opined that "adolescents are overrepresented statistically in virtually every category of reckless behavior." *Id.* In fact, "the prevalence of several types of risk behavior peaks not during adolescence but during emerging adulthood (ages 18–25)." Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 Am. Psychol. 469, 474–75 (2000). Recent scholarship in neurology suggests a link between this behavior and typical asynchronous development in the human brain that continues through the teens until the mid-twenties. *See* Teena Willoughby, Marie Good, Paul J.C. Adachi, Chloe Hamza & Royette Tavernier, *Examining the link between adolescent brain development and risk taking from a social–developmental perspective*, 89 Brain & Cognition 70–78, 70

[5] https://hr.mit.edu/static/worklife/youngadult/brain.html (last visited June 14, 2021).

(2014);[6] *see also* Ex. 2 at ¶36. Specifically, models of brain development suggest that young people may experience a temporal gap between the early maturing of the affective system and the later maturing of the cognitive control system. Willoughby et al. at 70. The affective system, which controls processing that drives reactive, emotional, and reward-sensitive responding, is the first to mature in normally developing adolescent brains. Ex. 2 at ¶36. In contrast, the cognitive control network, responsible for planning, judgment, and inhibition, is thought not to be fully mature until the mid-twenties. Willoughby et. al. at 70–71. This imbalance in development between the prefrontal cortex, responsible for reasoning and higher function, and the brain's "dopamine-producing reward centers" make young people "'more vulnerable to impulsivity,' less capable of emotional reasoning, and more likely to make 'errors in self-regulation.'" John H. Blume, Hannah L. Freedman, Lindsey S. Vann & Amelia Courtney Hritz, *Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles from Eighteen to Twenty-One*, 98 Tex. L. Rev. 921, 932 (2020). The period from eighteen to twenty-five, not merely the period of earlier adolescence, represents "a time of heightened vulnerability to risky and reckless behavior" because of the brain's incomplete and asynchronous development. *See id.* at 932–33.

Recent studies also show that young people in their late teens and early twenties are particularly susceptible to outside influences and pressures. *See* Blume et. al. at 933. While their brains are not fully physiologically developed, young

[6] https://doi.org/10.1016/j.bandc.2014.07.006 (last visited June 14, 2021).

people are experiencing profound and rapid changes in social control during this period as they move from high school into the realms of employment and higher education. *See id.* Young people also experience a "sensitivity to environmental factors in terms of stability of personality features during this phase." *Id.* And, young people often navigate this transitional period in relative isolation while experiencing a degree of self-sufficiency for the first time in their lives. "[T]o a large extent, emerging adults pursue their identity explorations on their own, without the daily companionship of either their family of origin or their family to be." Arnett at 474. Scholarship suggests that this period from eighteen to twenty-five represents the phase of youth described by the *Roper* Court: "a time and condition of life when a person may be most susceptible to influence and to psychological damage."

Finally, as the *Roper* decision reflects, adolescence was once viewed as the period when most identity formulation occurs in young people. *See* Arnett at 473. The Court rested its calculation of reduced culpability for juveniles at least in part on a sense that "the character of a juvenile is not as well formed as that of an adult" as young people's personality traits are "more transitory" and "less fixed." *Roper,* 543 U.S.at 570. Now, however, "research has shown that identity achievement has rarely been reached by the end of high school." Arnett at 473. Not only does identity development continue through the late teens and twenties, "most identity exploration takes place in emerging adulthood [ages 18–25] rather than adolescence [ages 10–18]. Arnett, at 473. The developmental phase from ages eighteen to

twenty-five is defined, at least in part, by "the dynamic, changeable, fluid quality of the period." Arnett, at 477.

Contemporary scholarship supports the Court's fundamental approach to assessing juvenile culpability—"children are different." *Miller,* 576 U.S. at 481. But the line drawn by the Court at age eighteen bisects the period of development recognized by science and social science as one of incomplete physiological and psychological maturation. This distinction arbitrarily sets individuals under eighteen on one side of an imagined line while those in their late teens and early twenties, still neurologically and socially immature, fall on the other. The Court's own logic and Eighth Amendment jurisprudence foreclose such a senseless distinction. "The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Roper,* 543 U.S. at 572–73. The Eighth Amendment dictates that all youthful offenders, and not merely those under the age of eighteen, are exempt from the disproportionate punishment of execution.

2. Extending *Roper* to juveniles over eighteen finds support in at least one state court.

At least one court has already applied the Supreme Court's two-prong analysis and declared that *Roper* must apply to young offenders over eighteen. *See Commonwealth of Kentucky v. Bredhold*, No. 14-CR-161, 2017 WL 8792559 (Ky.Cir.Ct. Aug. 1, 2017) *vacated as moot by Commonwealth v. Bredhold*, 599 S.W.3d 409 (Ky. 2020), *cert. denied sub nom. Diaz v. Kentucky*, 141 S. Ct. 1233

(2021).[7] Applying the Supreme Court's two-prong test, the Kentucky Circuit Court found that the national consensus and proportionality assessment mandated protection against execution for petitioners who committed their crimes after their eighteenth birthdays.[8]

The Kentucky court found, correctly, that the science underlying the decision in *Roper* indicates diminished culpability for young people over the age initially identified by the Court. *See Bredhold,* at *3–*7. The decision pointed to recent psychological and neurological research that demonstrates that individuals in their late teens and early twenties are "less mature than their older counterparts" across the domains implicated by *Roper*—impulsiveness, vulnerability to influence, and incomplete character development. *See id; Roper,* 543 U.S. at 569–70. "If the science in 2005 mandated the ruling in *Roper*," the court declared, "the science in 2017 mandates this ruling." *Bredhold,* at *4.[9]

In short, the determination of the Kentucky court that *Roper* requires exemption for individuals over the age of eighteen finds greater support in science,

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[7] The Supreme Court of Kentucky vacated and remanded based on a determination that the petitioners lacked standing. 599 S.W.3d at 423. However, the Court expressed a willingness to consider psychological and neurological evidence concerning young offenders if the petitioners were convicted and sentenced to death. *Id.*

[8] The Kentucky court addressed *Roper*'s applicability to juveniles aged eighteen to twenty-one. *Bredhold,* at *1.

[9] Maryland's highest court is currently considering whether to allow anyone sentenced to prison before turning twenty-five to seek a new sentence after serving fifteen years in prison. *See* https://www.baltimoresun.com/news/crime/bs-md-cr-sentencing-review-rules-change-20210616-yczdcgpcdnbrlnlx7op3a4cvaa-story.html (last visited June 17, 2021).

social science, and death penalty statistics than it did four years ago when the decision was announced.

3. Floyd is ineligible for execution under *Roper* because FASD irreparably delayed brain maturation.

The reasoning that requires the extension of *Roper* to young offenders over eighteen is particularly applicable to Floyd, who functions cognitively below his chronological age because of permanent physiological damage associated with FASD. Individuals born with FASD consistently exhibit abnormal and delayed brain maturation across their developmental years when compared with the trajectory of their normally developing peers. Ex. 1 at ¶ 38. Specifically, 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. Ex. 1 at ¶14. It is the delayed development of the prefrontal cortex in the typical young brain that neuroscientists now associate with the tendency toward impulsivity, recklessness, and errors in self-regulation. *See* Blume et. al., at 932–33. Since the normally-developing young brain does not have mature executive control capacity until at least age twenty-five and brain development in young adults with FASD lags many years behind rates seen in neurotypical age peers, it is likely Floyd's brain was not fully developed at the time of his offense due to his PAE/FASD. Ex.2 at ¶41. This developmental delay would have had an additive and cumulative effect on the brain damage he was born with, rendering Floyd functionally less mature and more juvenile than his chronological age. *See* Ex. 2 at ¶41.

Put simply, the concerns that justified the Court's decision in *Roper*—that juveniles lack maturity, are vulnerable to pressure, and lack a fixed sense of character—apply with equal force to young people in their late teens and early twenties and particularly to Floyd, whose cognitive development was significantly delayed and impaired because of his FASD. The Court has made clear that the Eighth Amendment's bar on cruel and unusual punishment cannot support the execution of juvenile offenders. As such, Floyd is categorically ineligible for execution and Floyd's sentence of death should be vacated and permanently set aside.

CLAIM TWO: Deprivation of Opportunity to Seek Clemency

In Claim Two of the Petition, Floyd argued that he was being denied the opportunity to seek clemency because the State had set his execution date in July and the Nevada Board of Pardons meeting to hear his application was in late September, months after his execution date. 2nd Amend. Pet. at 40-43. The State argues that Floyd has no right to clemency and his claim is untimely. Resp. at 14-15. The State is incorrect on both counts. Floyd addressed the issue of procedural default in Section I above and addresses the merits of his claim below.

A. Floyd should have the opportunity to appear before the Board of Pardons because there are due process protections afforded to the opportunity to seek clemency when a life interest is at stake.

Unlike his liberty interest, Floyd's life interest is not extinguished as long as he is alive. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (O'Connor, J., concurring). Based on certain minimal due process rights established and described in Justice O'Connor's *Woodward* concurrence, denying Floyd the opportunity to seek clemency violates his right to due process. Alternatively, because Nevada has memorialized its clemency process by statute, denying Floyd access to it constitutes a violation of his due process rights.

1. Floyd's life interest has not been extinguished, and he is therefore entitled to some procedural safeguards regarding his life.

A life interest is given more constitutional protections than a liberty interest. *Woodard*, 523 U.S. at 289 (1998) (O'Connor, J., concurring). Justice O'Connor's concurrence in the plurality decision has since been treated by courts as binding

precedent. *See, e.g.*, *Hall v. Barr*, No. 17-cv-2587-TSC, 2020 WL 6743080, at *3 (D.C. Cir. Nov. 16, 2020) (citing *Woodard*, 523 U.S. at 289) (referring to Justice O'Connor's concurrence as "controlling Supreme Court precedent"); *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1268, 1269 n.2 (11th Cir. 2014) (recognizing that Justice O'Connor's concurrence "set binding precedent").

In *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981), the Supreme Court held that clemency proceedings are not the business of courts, and therefore are not afforded the same procedural due process protections required in the judicial system. However, Justice O'Connor's *Woodard* concurrence distinguished capital cases from non-capital cases, noting that while *Dumschat* was correct that a liberty interest is extinguished through fair conviction and sentencing, a life interest is unique. *Woodard*, 523 U.S. at 289 (a life interest is not extinguished as long as a person is still alive).[10]

A person's life interest is afforded "some *minimal* procedural safeguards" in clemency proceedings. *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 794 F.3d 1327, 1331 (11th Cir. 2015) (citing *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring)). This has also been described as a "modicum of due process." *Spivey v. Bd. of Pardons and Paroles*, 279 F.3d 1301, 1304 (11th Cir. 2002) (Brakett, J., dissenting).

[10] Even the *Woodard* plurality recognizes a life interest is deserving of more due process protections than a liberty interest, contending that a person on death row has a right not to be summarily executed by prison guards. 523 U.S. at 273.

2. Denial of the opportunity to appear before the Board is a violation of Floyd's minimal procedural due process safeguards.

In *Woodard*, Justice O'Connor explained there are certain situations in which a person's right to procedural due process may be violated during the clemency process. 523 U.S. at 289 (O'Connor, J., concurring). She posited a scenario where an executive official flipped a coin to determine whether a person was granted clemency or "where the State arbitrarily denied a prisoner any access to its clemency process" which served as examples of what might constitute a violation of the minimal due process safeguards. *Id.* Protecting people against the "arbitrary action of government" is "the touchstone of due process." *Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). If a state official "deliberately interfered with the efforts of [a] petitioner to present evidence to the Governor," this may constitute a deprivation of those minimal due process rights. *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000).

Here, state officials are interfering with Floyd's ability to seek clemency. By aggressively pushing to execute Floyd in July, months prior to the September Board of Pardons meeting, the State is denying him "any access" to Nevada's clemency process. *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring); *see Wilson v. United States District Court*, 161 F.3d 1185, 1187 (9th Cir. 1998). By barring Floyd from the mere possibility of a hearing, the State is violating those minimal due process safeguards specified in Justice O'Connor's concurrence. In other words, the State has created a clemency application process and extended it to death row inmates,

and then excluded Floyd from the process. By preventing Floyd from appearing before the Board due to his execution date, the State is preventing the Board of Pardons from reviewing the clemency evidence.

The Nevada Supreme Court has previously addressed clemency due process rights in *Niergarth v. State*, broadly stating there are no due process rights in clemency. 105 Nev. 26, 28, 768 P.2d 882, 883 (1989). However, *Niergarth* was not a capital case, meaning that the interest at stake was a person's liberty, not his life. *Id.* Further*, Niergarth* is not controlling here because the court only addressed a procedural change: there, the court discussed due process rights *within* the clemency process, not the right to be heard in the first place. *Id.*

Years later, the Nevada Supreme Court in *Moore v. State* stated there were no due process rights to clemency, even for capital cases. 128 Nev. 920, 381 P.3d 643, 2012 WL 3139870, *6 (Nev. 2012). However, the court in *Moore* was specifically addressing the fact that there is little right to recourse for defects in the clemency process itself and within the context of an ineffective assistance of counsel claim. *See id.* Floyd's case is unique from *Moore* and *Niergarth* because he is being barred access to those procedures entirely as a result of State action.

To that end, the Nevada Supreme Court has never been asked to address the issue here: are a defendant's due process rights violated if he/she is given the opportunity to seek clemency from the Pardons Board, but the State insists the defendant be executed before the date the Board sets for hearing the defendant's case. The simple answer is, "Yes."

3. Denying Floyd access to Nevada's established clemency process violates his right to due process.

Once a state has established a system through which a person may seek clemency, denying them the opportunity to access that system is a violation of that person's constitutional due process rights.

The Supreme Court recognizes that "clemency is extended mainly as a matter of grace" and falls under the scope of executive, and not judicial, power. *Woodard*, 523 U.S. at 280–81. However, "if the state actively interferes with a prisoner's access to the very system that it has itself established for considering clemency petitions, due process is violated." *Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003).

Nevada has established its clemency process by statute. NRS 213, et seq. Further, the legislature has specifically designated procedures for death penalty sentence commutation. NRS 213.080.[11] Based upon *Noel*, Nevada's prior creation of a clemency process now prohibits the State from interfering with Floyd's access to it. 336 F.3d at 649. By denying Floyd the ability to have his case heard before the Board of Pardons, the State is undeniably interfering with its own entrenched process.

B. Conclusion.

Floyd merely seeks the opportunity to have his case considered before the Board of Pardons, an institution Nevada introduced as a last resort for defendants

[11] Nevada has also made alternative notice requirements for death penalty cases. NRS 213.030.

who have exhausted all other options. Preventing Floyd from pursuing this violates his due process right to be heard.

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

The State asks this Court to ignore relevant canons of statutory construction and only adopt those it presumes are favorable to its argument. Resp. at 15-16.[12] The execution chamber constructed at ESP is immaterial in determining NRS 176.355's legislative intent at the time of enactment in 1967. The Legislature's intent in 1967 cannot be gleaned from separate conduct that occurred forty-eight years later. Additionally, interpreting NRS 176.355 as the Legislature intended would not result in absurdity. In fact, all the Legislature would need to do is simply amend the statute. However, interpreting NRS 176.355 as the State suggests would lead not only to absurdity, but also inappropriate results, by requiring this Court to adopt the functions of the Legislature and expand NRS 176.355's text and intent.

Executions must occur at NSP because NRS 176.355 clearly states that executions take place at "the" state prison, not "a" or "any" state prison. *Compare* NRS 176.355, *with* Tex. Code Crim. Proc. Art. 43.19 (stating executions "shall take place at *a* location designated by the Texas Department of Criminal Justice) (emphasis added), *and* Ga. Code § 17-10-44 (providing that "[t]he Department of Corrections shall provide *a* place for the execution of the death sentence) (emphasis added). If the Legislature intended executions to occur at any Nevada prison it would have specified such in the text of the statute. The Legislature's decision to limit executions to only NSP is further evidenced by its use of "the," which signifies

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[12] Floyd replies to both the arguments raised in the State's response **and** to the State's argument made during the hearing on Floyd's motion to strike the warrant on June 4, 2021.

a singular noun, despite other state prisons existing during NRS 176.355's enactment.

In 1967, NSP, Northern Nevada Correctional Center, and Warm Springs Correctional Center were all operating Nevada state prisons, in fact, Warm Springs Correctional Center was located in Carson City, along with NSP.[13] Considering this, it is clear that the Legislature purposefully used "the" to distinguish its intent that executions must take place at NSP and "not any other state prison in Nevada" as the State argues. *See* Resp. at 15.

Moreover, it is also erroneous to conclude that NRS 176.355's location requirement encompasses all prisons, merely because the term "state prison" is in lowercase letters. First, reading the statute in this manner is prohibited as it would render "the" unnecessary and superfluous. *See S. Nevada Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117, 173 (2005) (quoting *Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990)) (internal quotation marks omitted) (when interpreting a statute courts should consider "provisions as a whole so as to read them in a way that would not render words or phrase superfluous or make a provision nugatory."). And, "[l]ike all the other words in a statute, the articles count." *People v. Hayden*, 127 N.E.3d 823, 842 (Ill. 2018). Second, nothing mandates that the words be capitalized in order to memorialize

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[13] *See* Nevada Department of Corrections, http://doc.nv.gov/Facilities/NNCC_Facility/ (last visited June 8, 2021); Nevada Department of Corrections, http://doc.nv.gov/Facilities/WSCC_Facility/ (last visited June 8, 2021). Notably, despite both prisons being located in Carson City there was never any confusion that the "state prison" referenced was NSP, not Warm Springs Correctional Center.

intent. Indeed, the Legislature, and others have referred to NSP in other contexts without capitalizing the "s" or "p."[14] This follows even more so when, like NRS 176.355, a statute refers to a specific person, place, or thing, but doesn't use its proper noun.

Third, a subsequent lowercase noun does not defeat the particularizing effect of a definite article. In *Hayden*, the court analyzed whether a statute which used the term "the victim" included any victim or a specific person. 127 N.E.3d at 842-43. The court concluded that by using "the," a definite article, before a noun, the Legislature limited the scope of the term to specifically named victims in a prosecution case and not any victim. *Id.* This holding impliedly acknowledged that a lowercase noun does not negate the effects of a definite article. *Id.* Similarly here, interpreting "the state prison" as including "all" or "any" prison in Nevada "would require a decontextualization in defiance of the definite article." *Id.*; *see also Brooks v. Zabka*, 450 P.2d 653, 655 (Co.1969) (en banc) (concluding that although Legislature used the term "the tax levy" in ordinance, the definite article was intended to implicate a specific property tax mill levy.).[15]

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[14] *See* Ex. 8 at 1-3 (discussing NSP without capitalizing "state" or "prison."); Ex. 9 (referring to NSP as the "state prison," without capitalization).

[15] This concept is also illustrated by reviewing other state's execution statutes. For example, Indiana mandates that "execution[s] must take place inside the walls of *the state prison*." *See* Ind. Code § 35-38-6-5 (emphasis added). The term "state prison" is not capitalized, yet all executions occur at the Indiana State Prison. Likewise, Florida provides that "[t]he sheriff shall deliver a person sentenced to death to *the state prison* to await the death warrant." Fl. Stat. 922.111. Although "state prison" is in lowercase letters, executions only occur at Florida State Prison.

Thus, the Legislature's decision to not capitalize the term "state prison" should not repel the Legislature's intent in using the definite article. Finally, the State argues Floyd cannot establish good cause for this claim because he had notice that his execution would occur at ESP in 2015. *See* Resp. at 16. However, Floyd can demonstrate good cause to overcome any applicable procedural default rules based on lack of notice. Floyd did not receive actual notice of his execution location until May 10, 2021 when the State filed its addendum to its motion for a second supplemental warrant and order of execution. Prior to that Floyd did not have any other notice that his execution would occur at ESP. And, as explained above, there were ripeness and standing issues that existed in 2015 that would have prevented Floyd from raising his claim earlier. All of Floyd's legal paperwork stated his execution would occur at NSP. No execution had ever been carried out at ESP. And, the Legislature had not changed NRS 176.355 which requires executions to occur at NSP.

Accordingly, because ESP is "a" state prison, not "the" state prison, the State's Second Supplemental Warrant for Execution is precluded by current law and Floyd's death sentence is invalid.

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

In Claim Four of the Second Amended Petition, Floyd argued that his upcoming execution posed a substantial and unjustified risk of causing pain and suffering, which constitutes cruel and/or unusual punishment. 2nd Amend. Pet. at 47–50. The State argues that Claim Four is not cognizable on habeas because it is a method of execution claim. Resp. at 16–17. The State is incorrect.

Floyd is not raising a method of execution claim but rather, is arguing that, pursuant to the NDOC Director's own testimony, NDOC will not be ready to perform an execution in a constitutionally appropriate manner and thus, Floyd's execution would be unconstitutional. For the reasons stated in the Petition (2nd Amend. Pet. at 47-50) and above, the Court should grant Floyd relief on this claim.

CLAIM FIVE: Errors in Penalty Verdict Form

The State misunderstands the Nevada Supreme Court's significant holding in *Petrocelli v. State*, No. 79069, 2021 WL 2073794 (May 21, 2021)) (Order of Reversal and Remand). Resp. at 17-18. The issues in *Petrocelli* are analogous to Floyd's case. While *Petrocelli* did involve multiple verdict forms, and the case at hand only involves one, that fact is inconsequential as the form Floyd's jury used still stated erroneous and misleading language creating the same problem—confusing the jury as to what is required before imposing a life sentence. If the weighing of aggravating and mitigating factors is connected to a life sentencing option that verdict form is erroneous, and constitutes a misstatement of law, because that finding isn't necessary to impose a life sentence. Thus, the form used in Floyd's trial falls under the ruling in *Petrocelli* and constitutes reversible error.

Moreover, Floyd can demonstrate good cause to overcome any applicable procedural default rules based upon new law, in *Petrocelli,* that was not available at the time of Floyd's previous petitions. *See Rippo v. State*, 134 Nev. 411, 419, 423 P.3d 1084, 1095 (2018) (holding that delay is not a petitioner's fault where it is caused by an impediment external to the defense); *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) ("A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default."). Contrary to the State's assertions, this claim was not previously available to Floyd, as the Nevada Supreme Court had not recognized the language in capital penalty verdict forms as erroneous until *Petrocelli*. To deny Floyd's Petition on

untimeliness grounds would substantially prejudice Floyd, as his jury decided his sentence based upon a misstatement of law.

Because Floyd timely asserted good cause based on new intervening authority and will suffer actual prejudice if his petition is dismissed, this Court should find that Floyd can overcome the procedural bars, decide his claim on the merits, and vacate his death sentences.

III. CONCLUSION

For the foregoing reasons, Floyd requests that this Court grant the Petition. In the alternative, Floyd requests that this Court order an evidentiary hearing in order for him to show cause and prejudice to overcome the procedural default bars raised by the State. Floyd requests that this Court defer consideration of the State's Second Supplemental Warrant of Execution until his petition is fully litigated.

DATED this 18th day of June, 2021.

Respectfully submitted
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DAVID ANTHONY
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CERTIFICATE OF SERVICE

In accordance with EDCR 8.04(c), the undersigned hereby certifies that on this 18th day of June 2021, a true and correct copy of the foregoing REPLY TO RESPONSE TO 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:

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/s/ Sara Jelinek
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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

EXHIBITS IN SUPPORT OF REPLY TO RESPONSE TO SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

Date of Hearing: July 2, 2021
Time of Hearing: 8:30 a.m.

(DEATH PENALTY CASE)

EXECUTION WARRANT SOUGHT BY THE STATE FOR THE WEEK OF JULY 26, 2021

Exhibit No.	Document
8	Legislative Commission of the Legislative Counsel Bureau State of Nevada, Report to the Legislative Commission of its Subcommittee for Study of the Nevada Prison System, 61st Sess., at 1-3 (1980).
9	*Cafferata, Patty. Capital Punishment Nevada Style,* Nevada Lawyer, vol. 18, no. 6, June 2010.

DATED this 18th day of June, 2021.

Respectfully submitted
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CERTIFICATE OF SERVICE

In accordance with EDCR 8.04(c) the undersigned hereby certifies that on this 18th day of June, 2021, a true and correct copy of the foregoing **EXHIBITS IN SUPPORT OF REPLY TO RESPONSE TO SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**, was filed electronically with the Eighth Judicial District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

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

EXHIBIT 8

EXHIBIT 8

I. INTRODUCTION AND BACKGROUND

Legislative concern about the adequacy of the Nevada state prison can be traced back over several legislative sessions. Recently, this concern has manifested itself in the appropriation of funds to build new and remodel existing prison facilities, the passage of several legislative measures to streamline and improve prison administration and accounting procedures and appropriations to expand prison staffing and upgrade the salaries of certain prison staff.

The interim study of the condition of the state prison, mandated by A.C.R. 1 of the 1977 legislative session, was an outgrowth of concern about escapes, assaults on prisoners and staff and other recent events at the prison which raised many questions about the department's operations. Of particular concern to the 59th session of the legislature was the adequacy of the department to: (1) Protect society through proper security and control of prisoners, (2) Ensure the safety of inmates and staff, and (3) Provide for the well-being and rehabilitation of the inmates.

In line with the mandate in A.C.R. 1 to study the condition of the state prison, the subcommittee decided to evaluate the entire operation and administration of the department of prisons. The subcommittee believed, however, that other aspects of the criminal justice system, such as sentencing and paroling practices which may affect the operation of the prison through fluctuation in inmate population, were beyond the scope of its charge.

The subcommittee's study included: (1) A review of a substantial number of publications and articles dealing with prison administration, operation and reform, (2) Communication with numerous state, federal and private organizations engaged in, or familiar with, the study of correctional system reform, (3) The review of national and state standards and draft model legislation pertaining to the status of prisoners and the operation of adult correctional institutions, (4) Private interviews and correspondence with prison administrators, staff and inmates, and (5) Unannounced visits and formal tours of prison facilities.

Subcommittee meetings were held in Carson City (on August 13, 1977; December 22 and 23, 1977; and March 31 and April 1, 1978), and in Las Vegas (on October 21 and 22, 1977). On December 22, 1977, the subcommittee devoted 12 hours to

taking testimony from inmates housed at the maximum, medium, and women's institutions.

The subcommittee had formal tours of the northern Nevada prison facilities on August 12, 1977, and of the Southern Nevada correctional center on October 21, 1977. A subcommittee of the subcommittee conducted an unannounced tour of prison facilities on December 20 and 21, 1977. Staff made numerous informal and unannounced visits to the prison facilities during the course of the study.

The subcommittee put several formal questions to the department. These questions and the department's responses are attached to this report as Appendix A and B, respectively. The department's responses include a description of its operations.

As of this writing, the subcommittee notes the current constitutional questions raised by a rash of suits against many states' prisons. Aspects of the operations of prisons in Alabama, Arkansas, Florida, Louisiana, Mississippi, New Mexico, Wyoming, and Rhode Island have been declared unconstitutional (9).* Prison facilities have come under court order in many states.

In Nevada, a class action civil suit is now pending in the United States District Court for the District of Nevada which attacks a wide range of both the department's operations and its treatment of inmates.** The resolution of this suit could have far reaching procedural and fiscal impacts on the operation of Nevada's prison system. Regardless of the outcome of the suit, the subcommittee believes that the adoption of the subcommittee's recommendations will act to dissuade future judicial intervention into the administration of Nevada's prison system.

The subcommittee notes that volumes of national and state standards and model legislation, relating to the treatment of offenders and the operation of adult correctional institutions, have been written in recent years. Certain of the subcommittee's recommendations make reference to these standards.

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* These and other numbers in parentheses at the end of sentences refer to items in the footnote section at the end of the narrative of the report.

** See Maginnis v. Wolff, File No. 77-022, BRT, U. S. Dist. Court - Nevada, November 25, 1977.

In the interest of space, however, the report does not provide reference to or summarize many of the standards reviewed in the study or in the preparation of this report. Copies of relevant standards are available for any member's review in the legislative counsel bureau. Certain of the relevant standards and model legislation are: The American Bar Association's Tentative Draft Standards Relating To The Legal Status Of Prisoners, the "Setting For Corrections" portion of the proposed Nevada Criminal Justice Standards and Goals, the American Correctional Association's Manual Of Standards For Adult Correctional Institutions, the National Conference Of Commissioners On Uniform State Laws Draft Uniform Corrections Act, and the "Corrections" standards proposed by The National Advisory Commission on Criminal Justice Standards and Goals (19, 20, 22, 26, 27).

The Nevada Department of prisons is headed by the board of state prison commissioners (created by article 5, section 21 of the Nevada constitution), composed of the governor, who is president of the board, the attorney general and the secretary of state. The board has full control of all grounds, buildings, labor and property of the department. The department is administered by a director, who is the chief administrative and fiscal officer.

Each of the department's institutions are headed by a superintendent, in classified service, who is responsible to the director for the administration of his institution, including the execution of all policies and the enforcement of all regulations of the department pertaining to the custody, care and training of offenders under his jurisdiction. The law provides for a deputy director; however, no person occupied this position as of the writing of this report. Much of the law pertaining to the operation of Nevada's prisons is found in chapter 209 of the Nevada Revised Statutes.

The department states its mission is:

> To provide supervision of persons entrusted to our care, and to meet their basic human needs, and to provide meaningful programs that will instill values essential in the development of positive change in attitude and behavior.

The department of prisons operates four institutions, three in northern and one in southern Nevada. Northern Nevada institutions include: The Nevada state prison and the women's correctional center located near Stewart, Nevada. The department's southern Nevada institution, the Southern Nevada correctional

EXHIBIT 9

EXHIBIT 9

PA3100

All photos in article courtesy of The Nevada Historical Society.

CAPITAL PUNISHMENT NEVADA STYLE

Since 1860, one woman and 74 men have been executed for committing murder in Nevada. The first legal executions were carried out by hanging, in the county where the murder occurred. After 1903, 10 murderers were sent to the gallows at the state prison in Carson City. The method of execution has evolved as the legislature sought more humane ways to put murderers to death. On rare occasions, when more than one killer was found guilty, they were both executed at the same time.

BY PATTY CAFFERATA, ESQ.

The first gas chamber at the Nevada State Prison in Carson City.

...da State Prison and its officers, circa 1880.

ONLY WOMAN EXECUTED IN NEVADA

At 10:47 a.m. on June 20, 1890, the trap doors dropped. Elizabeth died minutes before Josiah, becoming the only woman executed in Nevada history.

The only woman executed in Nevada, convicted murderer Elizabeth Potts died with her husband and partner in crime.

The husband and wife team of Josiah (age 44) and Elizabeth (age 40) Potts was hanged for the murder of Miles Faucett in Carlin, Elko County. In a carefully calculated plan, Elizabeth, who was already married to Josiah, married Faucett in California in March 1887. When her first marriage was discovered, Elizabeth fled back to Josiah. Obsessed, Faucett followed her and lived in the Potts' barn for a few months.

Sometime after January 1, 1888, after signing all his property over to the Josiah, Faucett mysteriously disappeared. In September, the Potts sold their house and moved to Wyoming.

When the new owners found human bones in the cellar, the Elko County sheriff charged the Potts with Faucett's murder. Josiah's story was that, once confronted about his alleged attempt to molest the Potts' daughter, Faucett killed himself. Alone, Josiah dragged the body to the cellar, set it on fire and later cut the body up.

The jury did not buy the story and the couple was sentenced to hang. Troubled by imposing a death sentence on a woman, District Court Judge Rensselaer Biglow unsuccessfully argued on appeal that both sentences should be commuted because she was the guiltier of the two.

Witnesses watched as the murderers walked up the 13 steps to the gallows platform in the Elko County jail yard. The couple sat quietly while the guards bound their hands with leather straps. Their shoes were removed, ropes slipped around their necks and black hoods placed over their heads.

LARGEST NUMBER OF MURDERERS EXECUTED TOGETHER

Four train robbers were hanged at the state penitentiary for the murder of Jack Welsh on a freight train moving through Humboldt County. The murderers included ex-cons and repeat offenders T. F. Gorman and John Sevener, 20-year-old Albert Lindeman, aka Frank William, and 17-year-old Fred Roberts.

They took $1.25 from Welsh and then tried to push him off the train. Clinging to the side ladder, Welsh pled for his life. Sevener beat Welch with a revolver, kicked him in the face and stomped on his hands. When Roberts riddled Welsh with bullets, Welsh fell off the train. Incredibly, the next morning, Welsh was discovered alongside the tracks and taken to the Winnemucca hospital, where he lived long enough to describe the crime and to identify his assailants.

Sevener, Gorman and Roberts were tried twice before they were convicted and sentenced to death. Lindeman was tried separately and convicted. Ironically, before the trial, a lynch mob gathered outside the jail planning to string Lindeman up. The sheriff spirited him to the state prison for safekeeping. Lindeman als

continued on page 8

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CAPITAL PUNISHMENT NEVADA STYLE

continued from page 7

received a death sentence and the four were hanged in the second execution at the state prison on November 17, 1905. (The first inmate hanged at the prison was John Hancock on September 5, 1905.)

ONLY MURDERER EXECUTED BY THE FIRING SQUAD

After January 1, 1912, the legislature allowed the condemned to choose between the gallows or firing squad. Two murderers selected death by shooting, but only one was executed; the other's sentence was commuted.

On May 14, 1913, Serbian Andrija Mircovich was executed for the stabbing death of John Gregovich at the Tonopah & Goldfield Railway depot. Mircovich believed that Gregovich cheated him when handling the distribution of Andrija's cousin Chris Mircovich's estate. A recent arrival to the country, 33-year-old Andrija spoke little English and had little understanding of the probate system in Nevada.

Mircovich preferred the firing squad to the noose, claiming it would be quicker. Warden George Cowing tried to talk Mircovich out of the firing squad but failed. This prompted Cowing to order a 1,000-pound execution machine or "shooting gallery of steel." The equipment included a steel cage with three Maxim silencers and three Model 1899 .30-.30 Savage rifles. After the machine arrived at the prison, Cowing wanted nothing more to do with the execution and resigned. Denver Dickerson, a former Lieutenant Governor and warden, was appointed warden.

Sketch of execution grounds at State Prison where first official shooting will take place. Artist Day shows the firing room with muzzles of guns protruding through port holes, also the chair against the box filled with sand in which the condemned man will be strapped. One of the vises with rifle is also shown. On the wall is shown one of the guard houses and the famous electric fence.

Sketch of the "shooting gallery of steel," an automated firing squad machine used only once.

The three guards, selected by drawing names out of a hat, entered the firing chamber and then 12 witnesses were admitted to a roped-off area in the yard.

At about 11:30 a.m., guards marched Mircovich to the yard, where he was strapped to the chair bolted to a platform. He refused a black cap or blindfold, stating he wanted to see. Prison Doctor McLean pinned a heart-shaped target on his chest. Mircovich kept his head up high as instructed.

The guns were secured on stationary stands inside the firing chamber shed. Two rifles were loaded with soft-nosed ball cartridges and one gun was loaded with a blank. All the distances had been carefully measured and tested for accuracy. Each guard checked the aim on the rifle to be sighted on the defendant's heart.

The command to fire was given and the bullets met their mark. Doctor McLean declared the death instantaneous. The autopsy showed the two balls within 2/3 inches of each other in Mircovich's heart.

The design of the shooting cage prevented the witnesses from knowing who fired the fatal shots and the guards from seeing Mircovich die. The cage was never used again. Mircovich was the last murderer to be executed at the prison – until the gas chamber was installed.

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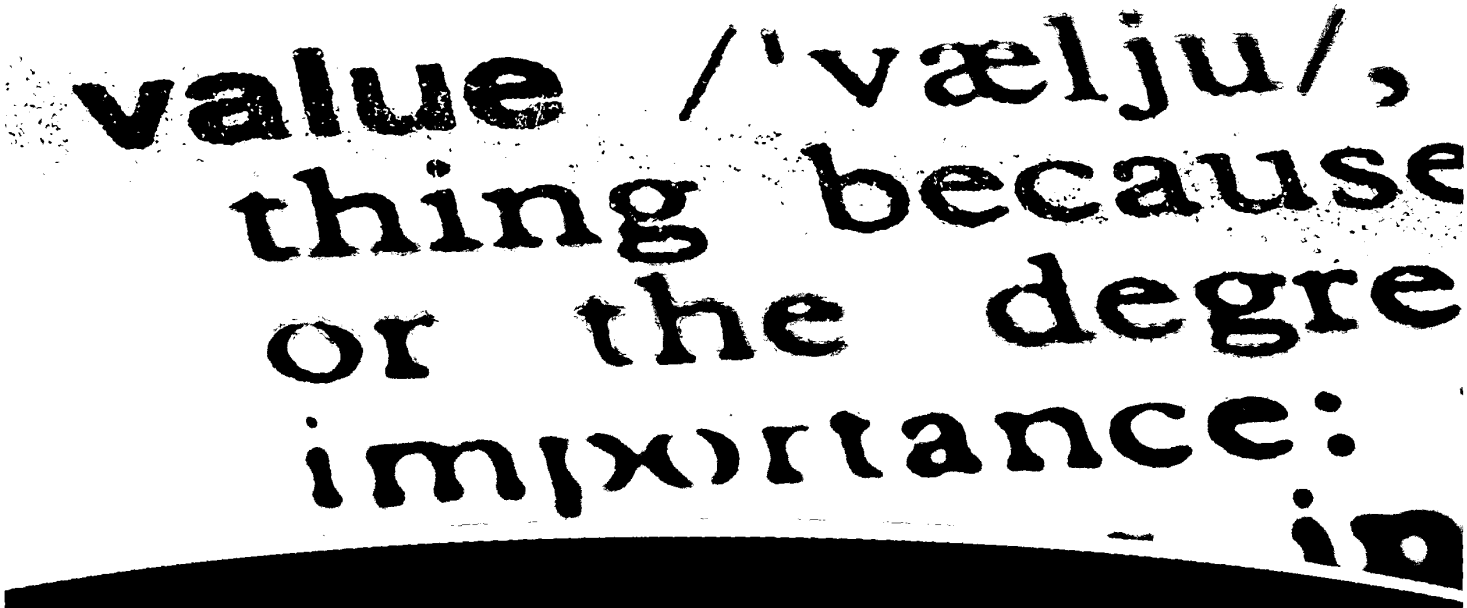

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CAPITAL PUNISHMENT NEVADA STYLE

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ONLY DUAL HANGING AT THE STATE PRISON

Shoshone "Indian Johnny" (last name never recorded) and Joe Ibapah, a member of the Goshute tribe, were executed together at the prison for the murder of Fred Foreman in Montello, Elko County in December 1905. After drinking Jamaican Ginger (a patent medicine containing 70-80 percent alcohol) all day, the pair saw a light in a railroad tie house near the railroad tracks.

They discovered Fred Foreman, a white man, sleeping in there and demanded he buy them some more liquor. He said he could not because he had only one leg and walked with a crutch. Ibapah testified that Johnny gave him a knife and said, "I'll hold his hands and you cut his throat." Ibapah said he killed Foreman by cutting his throat from ear to ear. After the brutal killing, they jabbed out Forman's left eye and broke his right arm, then rolled his body into the fire and piled ties on top of him. At trial, Antelope Jack, Chief of the Goshute tribe, testified that Ibapah was a good boy, until his father gave him liquor when he was 12, and added that Ibapah killed his father because he had cut and hurt his mother many times.

Sentenced to death, they went to the gallows at the state prison around noon on December 3, 1906.

Nevada's first gas chamber.

FIRST EXECUTION IN A GAS CHAMBER IN THE COUNTRY

In March 1921, the Nevada Legislature sought again to provide a more humane method of execution, garnering national attention when it became the first state to use poisonous gas to execute a murderer. Three men were set for execution on February 8, 1924. Gee Jon was executed, but the other defendants' sentences were commuted.

Warden Denver Dickerson also presided over this first execution in the gas chamber. Twenty-nine-year-old Gee

Jon, a member of the famous Hop Sing Tong in San Francisco, was convicted of killing Tom Quong Kee in his Mina cabin in a "tong" war. Allegedly, Kee was a member of a rival tong. Hughie Sing and Jon hired Reno cabby George Pappas to drive them to Mina. The men sent Pappas to buy some beer while they walked to Kee's cabin and murdered him. At trial, Sing testified they went to Mina to kill Kee and Jon fired the two shots that killed him.

Using prison labor, the state constructed a squat, stone building lined with steel in the center of the yard. Observers watched through a window, standing behind a black line painted on the floor of the yard. Jon's thighs were strapped to the plain, unpainted pine chair with his arms linked to the thigh straps. Hydrocyanic (HCN) gas, smelling like almonds, was sprayed into the 10-by-12-foot room; Jon's movements ceased within six minutes.

Although Hughie Sing was also sentenced to die in the gas chamber for Kee's murder, his sentence was commuted.

In the 1930s, the state built a new "gas house." The chamber was described as having white walls and large windows for observation like a finely built surgery suite – almost cheery.

ONLY DUAL EXECUTION IN THE GAS CHAMBER

On July 15, 1954, the only dual execution in the gas chamber took place.

Ex-cons Frank Pedrini (age 47) and Leroy Linden (age 35) murdered Clarence Dodd. He picked them up hitchhiking in Winnemuca on Highway 40 (now Interstate 80). A carpenter, Dodd was returning home to California after visiting his mother. They forced Dodd off the highway near Mustang, holding him at gunpoint on the Truckee riverbank.

Linden's story was that he went to buy beer in the Mustang Station and came back to find Pedrini and Dodd on the ground. They told Dodd they were going to tie him up, leave him and drive his car to Reno. Linden claimed he walked away from them to watch the highway. Pedrini asked Dodd if he had any rope, and Dodd apparently said, "Yes, in the trunk." Dodd retrieved a length of binder twine. Linden claimed he heard

continued on page 12

PRO BONO HONOR ROLL

The State Bar of Nevada Board of Governors and the Access to Justice Commission extend a special thanks to the following attorneys who generously accepted cases in March 2010 through the Legal Aid Center of Southern Nevada, Washoe Legal Services, Nevada Legal Services and Volunteer Attorneys for Rural Nevadans.

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CAPITAL PUNISHMENT NEVADA STYLE

continued from page 11

a shot and ran to where the men were. Pedrini said he did it because Dodd had seen his tattoo on his hand and would be able to identify him.

Pedrini's story differed from Linden's. He claimed they both tugged on the 30-inch piece of binder twine to strangle Dodd. Then, they covered the body with rocks. Hunters found Dodd's garroted body in December.

In January 1954, Linden confessed, implicating Pedrini. The killers had extensive criminal records and allegedly met as cellmates in the Folsom State Prison in California. While Pedrini does not fit the description of a serial killer, he had served time for two previous murders.

Washoe County District Attorney Jack Streeter and his deputy Dyer Jensen prosecuted the murderers, while Bruce Thompson and Leslie Gray defended them at trial. The jury found the men guilty and sentenced them to death.

Pedrini got his last wish: he wanted to die with Linden and insisted they be executed together. They entered the gas chamber two minutes apart and were strapped in the metal chairs at 6:05 a.m. After the door was closed, the HCN gas was released at 6:10 a.m. Linden's heart stopped by 6:18 a.m. Pedrini's heart stopped by 6:19 a.m. ■

CONCLUSION

In Nevada's first 43 years (1860 to 1903), 30 executions were carried out by hanging. Then, the state executed one murderer using a firing squad. From 1924 through 1979, 32 men died from inhaling the lethal gas in the gas chamber.

Since 1985, lethal injection has been used to carry out a death sentence. Three drugs are administered, first to sedate, then to paralyze the muscles and cease breathing and finally potassium chloride to cause a deadly heart attack. From 1985 to 2006, 12 murderers have been put to death by injection, all but one "voluntarily," meaning they dropped their appeals and did not oppose their executions.

Of the 80 men currently on death row, Edward Wilson has been there the longest, since 1979. He was sentenced for killing Reno Police Officer Jimmy Hoff.

In the last 107 years (1903-2010), 45 murderers have been executed in Nevada. Since 1860, the total number of executions in Nevada is 75.

PATTY CAFFERATA is the former district attorney of Lincoln, Lander and Esmeralda counties. She wishes to thank the Nevada State Prison official who answered numerous questions on the statistics regarding capital punishment and Nevada Archivist II Chris Driggs for finding prison records and related documents.

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ZANE MICHAEL FLOYD,
#1619135

Defendant.

CASE NO: 99-C-159897-1

DEPT NO: X

ORDER DENYING DEFENDANT'S OBJECTION TO ORDER DENYING DEFENDANT'S MOTION TO TRANSFER CASE UNDER EDCR 1.60 (H)

DATE OF HEARING: JUNE 18, 2021
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 18 day of June, 2021, the Defendant not being present, but Defendant represented by DAVID ANTHONY and BRAD LEVENSON of the Federal Public Defender's Office, the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and the Court having heard the arguments of counsel and having reviewed the pleadings on file herein:

THIS COURT FINDS that this case was part of a random re-assignment of cases from Department V to Department XVII. The Nevada Supreme Court has upheld the Eighth Judicial District Court's re-assignment of cases. Therefore, Department XVII is the proper court that can issue the order and warrant of execution.

IT IS HEREBY ORDERED that the Defendant's motion shall be denied.

DATED this _____ day of June, 2021.

Dated this 21st day of June, 2021

DISTRICT JUDGE

C59 03A 31F4 CC4E
Tierra Jones
District Court Judge

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

The State of Nevada vs Zane M Floyd	CASE NO: 99C159897 DEPT. NO. Department 17

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DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff.

v.

ZANE M. FLOYD,

Defendant.

ZANE M. FLOYD,

Petitioner.

v.

WILLIAM GITTERE, ET AL.,

Respondents.

Case Nos. 99C159897
A-21-832952-W

Dept. No. VII

OBJECTION TO ORDER DENYING MOTION TO TRANSFER CASE UNDER EDCR 1.60(H)

Date of Hearing:
Time of Hearing:

(DEATH PENALTY CASE)

EXECUTION SCHEDULED FOR THE WEEK OF JULY 26, 2021

HEARING TO BE SCHEDULED IN DEPARTMENT VII

NOTICE OF HEARING ON OBJECTION TO ORDER DENYING MOTION TO TRANSFER CASE UNDER EDCR 1.60(H)

PLEASE TAKE NOTICE that the above entitled Objection to Order Denying Motion to Transfer Case Under EDCR 1.60(H) will come on for hearing before this Court in Department No. ___ on the ___ day of _____, 2021, at _____am/pm located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89101.

DATED this ___ 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

POINTS AND AUTHORITIES

I. Introduction

Defendant/Petitioner Zane Floyd was convicted of four counts of first-degree murder and other offenses and sentenced to death. Department 5 was the court of conviction and the court that heard the two subsequent post-conviction matters in Floyd's case.

On April 14, 2021, the State filed a motion for the district court[1] to issue a second supplemental order and warrant of execution. The State's motion was filed in Department 17, which was the department designated in the Odyssey electronic filing system to hear the case. However, the docket did not reflect the existence of any order transferring the case to Department 17 from Department 5, the date of such transfer, or the reason for it.

On April 14, 2021, Floyd filed a motion to transfer the case from Department 17 back to Department 5 under EDCR 1.60(h). Floyd's motion was based in part upon NRS 176.495(1), 176.505(1, 2), and 34.730(3)(b). Argument was held on the motion on May 14, 2021, and the district court denied the motion from the bench. 5/14/21 TT at 9. During the proceedings, the district court provided to counsel what

[1] This pleading refers to the "district court" as the Honorable Michael P. Villani, the judge in Department 17. Reference to the district courts plural refers to Judge Villani and the Honorable Tierra D. Jones, the judge in Department 10 who heard Floyd's initial objection under EDCR 1.60(h).

appeared to be an internal court document stating the case was transferred from Department 5 to Department 17 on December 28, 2008.[2]

At a subsequent hearing on June 4, 2021, counsel for Floyd directed the district court's attention to the case of *Rainsberger v. State*, 85 Nev. 22, 22, 449 P.2d 254, 254 (1969), and asked the court to reconsider its decision as *Rainsberger* was controlling authority dictating a decision in Floyd's favor on the transfer motion. 6/4/21 TT at 15-17. Later in the afternoon of June 4, 2021, the district court issued its written order denying Floyd's motion to transfer the case. Ex. 2. The *Rainsberger* case was not addressed by the district court.

Floyd filed a timely objection with the district court in Department 10 as required under EDCR 1.60(h).[3] Argument was heard on the objection on June 18, 2021. On June 21, 2021, the court issued its written order denying Floyd's objection. Department 10's denial of the objection was substantially the same as the order denying the initial motion. Ex. 6. Specifically, the court held Floyd's case was properly transferred to Department 17 under the rules of the Eighth Judicial

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[2] Ex. 1 (*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Court Minutes, May 14, 2021). The document the court disclosed in open court was not filed in, and is not reflected in, the docket of this case in Odyssey. Ex. 5 (*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Internal Court Document, Undated).

[3] EDCR 1.60(h) states: "Any objection to the ruling must be heard by the presiding judge of the division from which the case was reassigned in the same manner as objections to a discovery recommendation under Rule 2.34(f)." Floyd's initial objection was filed with the presiding judge of the civil division and the criminal division as Floyd is litigating this motion in the criminal case (Case No. 99C159897) and the civil one (Case No. A-21-832952-W) EDCR 1.60(a) ("the civil presiding judge shall have the authority to assign or reassign civil cases pending in the civil/criminal division; and the criminal presiding judge shall have the authority to assign or reassign criminal cases pending in the civil/criminal division.").

District Court and that the "Nevada Supreme Court has upheld the Eight Judicial District Court's re-assignment of cases." *Id.*

Under EDCR 1.60(h), Floyd hereby files this objection to the district courts' orders denying his motion to transfer the case and denial of the initial objection to the denial of his motion to transfer the case. This objection is timely filed. *See id.* (referencing time for filing objections under EDCR 2.34(f)); EDCR 2.34(f) (requiring written objections to be served in five days from service of order).

II. Relevant Statutory Provisions

Chapters 34 and 176 of the Nevada Revised Statutes dictate that only the judicial department that entered the conviction has jurisdiction to issue an execution warrant. The relevant statutory provisions are the following:

NRS 176.495(1) provides:

> If for any reason a judgment of death has not been executed, and remains in force, *the court in which the conviction was had* must, upon application of the Attorney General or the district attorney of the county in which the conviction was had, cause another warrant to be drawn, signed by the judge and attested by the clerk under the seal of the court, and delivered to the Director of the Department of Corrections.

(Emphasis added).

Subsection 3 of former NRS 176.495 is also relevant to the issue of legislative intent and that subsection provided:

> Where sentence was imposed by a district court composed of three judges, *the district judge before whom the confession or plea was made, or his successor in office*, shall designate the week of execution, the first day being Monday and the last day being Sunday, and sign the warrant.

(Emphasis added) (repealed June 9, 2003, Laws 2003, chapter 366, § 4).

NRS 176.505(1, 2) provides:

> When remittitur showing the affirmation of a judgment of death has been filed with the clerk of the court from which the appeal has been taken, *the court in which the conviction was obtained* shall inquire into the facts, and, if not legal reasons exist prohibiting the execution of the judgment, shall make and enter an order requiring the Direct of the Department of Corrections to execute the judgment at a specified time. The presence of the defendant in the court at the time the order of execution is made and entered, or the warrant is issued, is not required.
>
> When an opinion, order dismissing appeal or other order upholding a sentence of death is issued by the appellate court of competent jurisdiction pursuant to chapter 34 or 177 of NRS, *the court in which the sentence of death was obtained* shall inquire into the facts and, if no legal reason exists prohibiting the execution of the judgment, shall make and enter an order requiring the Director of the Department of Corrections to execute the judgment during a specified week. The presence of the defendant in the court when the order of execution is made and entered, or the warrant is issued, is not required.

(Emphasis added).

Finally, NRS 34.730(3) provides:

> Except as otherwise provided in this subsection, the clerk of the district court shall file a petition as a new action separate and distinct from any original proceeding in which a conviction has been had. If a petition challenges the validity of a conviction or sentence, it must be:
>
> (a) Filed with the record of the original proceeding to which it relates; and
>
> (b) Whenever possible, assigned to *the original judge or court*.

(Emphasis added).

III. Argument

The district courts erred in denying Floyd's motions to transfer the case and objection to the denial of the motion to transfer the case back to Department 5 for issuance of an order and warrant of execution as well as for consideration of Floyd's state habeas petitions. The Nevada Revised Statutes refer to a specific court as the only one with jurisdiction to enter an execution order and warrant. The statutes refer to the court in which the conviction was had, the court in which the death sentence was obtained, the court before whom the confession or plea was made, and the court's successor in office. Similarly, the statutes refer to the original judge or court as the one to whom a post-conviction matter is assigned. In each instance, the only court that can hear the criminal and habeas matters is Department 5, not Department 17.

The State did not respond to Floyd's statutory arguments in its initial response to Floyd's motion to transfer the case.[4] The district courts' orders also fail to cite or address any of the statutory provisions cited in Floyd's motion. Instead, the district courts' orders are based upon Administrative Orders and rules of the Eighth Judicial District Court. However, the statutes passed by the Legislature are controlling over any court rules or administrative orders to the extent any inconsistency exists. *Lauer v. Eighth Judicial District Court*, 62 Nev. 78, 85, 140

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[4] In its response to the objection filed in Department 10, the State argued for the first time that Floyd's interpretation of legislative intent would lead to absurd results (but it never identified why the result was in any way absurd), Resp. at 4; the State acknowledged *Rainsberger* was controlling but purported to distinguish the case because subsection 3 of NRS 176.495 was repealed, *id.*; and it argued that the court in Department 17 was the successor in office to Department 5 because the case was appropriately transferred by court rule. *Id.*

P.2d 953, 956 (1943). Therefore, the administrative orders and court rules cited by the district courts do not dictate the resolution of Floyd's motion.[5]

The Nevada Supreme Court addressed the very issue presented here in Floyd's favor in *Rainsberger v. State*, 85 Nev. 22, 22, 449 P.2d 254, 254 (1969). In *Rainsberger*, the defendant pleaded guilty before the Honorable John C. Mowbray to a capital offense and was sentenced to death by a three-judge panel. *Rainsberger v. State*, 81 Nev. 92, 399 P.2d 129 (1965). At the time, Judge Mowbray was the judge in Department 3 of the Eighth Judicial District Court. Ex. 3 at 266 (Political History of Nevada, Chapter 6, The Nevada Judiciary (12th ed. 2016). Judge Mowbray resigned on October 1, 1967. *Id.* An execution warrant was subsequently issued for Mr. Rainsberger's execution by the Honorable Howard W. Babcock, from Department 6. *Id.*

On appeal, the defendant argued the execution warrant was invalid under NRS 176.495. Specifically, the defendant "contends that the warrant of execution rendered on April 9, 1968, directing death by the administration of lethal gas on May 2, 1968 is invalid because the judge who signed the warrant was not the successor in office of the judge who heard the plea of guilty as required by NRS 176.495(3)." *Rainsberger*, 85 Nev. at 22, 449 P.2d at 254. The Nevada Supreme Court found the question whether the warrant was valid was moot. *Id.* However,

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[5] Moreover, the district court's reliance on its status as a "murder judge" is not relevant when the alleged transfer occurred several years before the murder court was even created by the Chief Judge in 2017. Ex. 2 at 1-2 (*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Decision and Order Denying Defendants Motion to Transfer Case Under EDCR 1.60(H), June 4, 2021).

the court remanded the case for a new warrant with instructions: "The new warrant should be drawn and signed by the judge of *Department Three* of the Eighth Judicial District Court in accordance with NRS 176.495(3)." *Id.* (emphasis added).

The Nevada Supreme Court's instructions on remand in *Rainsberger* dictate that the district courts erred in holding that the court in Department 17 had jurisdiction to issue an execution order and warrant for Floyd. To the extent the district courts addressed Floyd's statutory arguments at all, the courts erred in holding the court in Department 17 was the successor in office to the court in Department 5. This interpretation of successor in office is overly broad and not supported by the precise statutory language in NRS 176.495 and 176.505. Moreover, the Nevada Supreme Court has recognized the term "successor in office" refers specifically to the judge that took the place of the position of the prior judge, not just any subsequent judge on the Nevada Supreme Court. *Calloway v. Reno*, 116 Nev. 250, 253 n.1, 993 P.2d 1259, 1261 n.1 (2000) ("Justice Maupin is successor in office to former Chief Judge Steffen, and Justice Agosti is successor in office to former Chief Justice Springer."). This Court must accordingly hold that the district courts erred in failing to grant Floyd's motion to transfer the case and his objection to the denial of the motion.

Moreover, the district courts both failed to address Floyd's arguments with respect to the improper transfer of his state habeas petitions under NRS 34.730(3)(b). Floyd objected to the transfer of his state petition, which was transferred to Department 17 because the court had the criminal case. Ex. 4 (*State*

of Nevada v. Zane Floyd, Case No. 99C159897, Clark County District Court, Notice of Department Reassignment, Apr. 16, 2021). NRS 34.730(3)(b) requires assignment of a state petition to "the original judge or court." The district courts' interpretation of the statute reads the term "original" out of the statute. As explained above, the district courts never addressed these statutory arguments, but this Court must do so and hold that the state petition was improperly transferred to Department 17.

IV. Conclusion

For the foregoing reasons, Floyd respectfully requests that this Court sustain his objection and transfer the criminal case and the state petitions to Department 5 under EDCR 1.60(h).

DATED this 22nd 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

CERTIFICATE OF SERVICE

In accordance with EDCR 8.04 (c), the undersigned hereby certifies that on this 22nd day of June, 2021, a true and correct copy of the foregoing OBJECTION TO ORDER DENYING MOTION TO TRANSFER CASE UNDER EDCR 1.60(H), was filed electronically with the Eighth Judicial District Court Clerk. Electronic service of the foregoing document shall be made to opposing counsel listed as follows:

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

EXH

RENE L. VALLADARES
Federal Public Defender
Nevada Bar No. 11479
DAVID ANTHONY
Assistant Federal Public Defender
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Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)

Attorneys for Defendant/Petitioner Zane M. Floyd

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

v.

ZANE M. FLOYD,

Defendant.

ZANE M. FLOYD,

Petitioner,

v.

WILLIAM GITTERE, ET AL.,

Respondents.

Case No. 99C159897
A-21-832952-W

Dept. No. VII

EXHIBITS TO OBJECTION TO ORDER DENYING MOTION TO TRANSFER CASE UNDER EDCR 1.60(H)

Date of Hearing:
Time of Hearing:

(DEATH PENALTY CASE)

EXECUTION SCHEDULED FOR THE WEEK OF JULY 26, 2021

HEARING TO BE SCHEDULED IN DEPARTMENT VII

EXHIBIT NO.	DOCUMENT
1.	*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Court Minutes, May 14, 2021
2.	*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Decision and Order Denying Defendants Motion to Transfer Case Under EDCR 1.60(H), June 4, 2021
3.	Political History of Nevada, Chapter 6, The Nevada Judiciary (12th ed. 2016).
4.	*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Notice of Department Reassignment, Apr. 16, 2021.
5.	*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Internal Court Document, Undated.
6.	*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Order Denying Defendant's Objection to Order Denying Defendant's Motion to Transfer Case Under EDCR 1.60 (H), June 21, 2021

DATED this 22nd 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

CERTIFICATE OF SERVICE

In accordance with the EDCR 8.04 (c), the undersigned hereby certifies that on this 22nd day of June, 2021, a true and correct copy of the foregoing EXHIBITS TO OBJECTION TO ORDER DENYING MOTION TO TRANSFER CASE UNDER EDCR 1.60(H), was filed electronically with the Eighth Judicial District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

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

99C159897 The State of Nevada vs Zane M Floyd

May 14, 2021 08:30 AM All Pending Motions

HEARD BY: Villani, Michael COURTROOM: RJC Courtroom 11A

COURT CLERK: Albrecht, Samantha

RECORDER: Georgilas, Cynthia

REPORTER:

PARTIES PRESENT:

Alexander G. Chen	**Attorney for Plaintiff**
Bradley D. Levenson	**Attorney for Defendant**
Brianna Vega Stutz	**Attorney for Plaintiff**
David S. Anthony	**Attorney for Defendant**
State of Nevada	**Plaintiff**

JOURNAL ENTRIES

STATE'S MOTION AND NOTICE OF MOTION FOR THE COURT TO ISSUE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION...MOTION TO TRANSFER CASE UNDER EDCR 1.60 (H)...DEFENDANT'S MOTION TO STRIKE, OR ALTERNATIVELY, MOTION TO STAY THE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION...DEFENDANT'S MOTION TO DISQUALIFY THE CLARK COUNTY DISTRICT ATTORNEY'S OFFICE

Defendant not present, presence waived.

Mr. Anthony argued, as to the Motion to Transfer Case, that certain issues were not in dispute and the statutes passed by the legislature control. Mr. Anthony stated the case was heard in Department 5 and requested a hearing to determine why the case was transferred, or in the alternative to transfer the case to Department 1. Court noted Department 5's cases were transferred to Department 17 on 12/28/2008, according to a printout from Odyssey. Mr. Chen stated the defense was so strict regarding the language of the statute, noted this case was 20 years old and all death penalty cases were randomly assigned to the four homicide tracks. Court FINDS the case was transferred in 2008, he is the successor Judge, and the creation of the homicide team allows him to hear this case, therefore COURT ORDERED, Motion to Transfer Case DENIED.

Court confirmed the argument on the Motion to Disqualify would be related to separation of powers. Argument by Mr. Levenson regarding identifiable impropriety and the likelihood of public suspicion. Mr. Levenson reviewed the procedural history of the case and read various media articles in Court. Court inquired regarding the status of the two Senators and Mr. Levenson stated they can not be on leave as it is not permitted by the Attorney General's Opinion 357. Mr. Chen argued the Court's ruling should not be based on social media and noted the Senators were not compensated by the District Attorney's Office while performing their duties. Mr. Chen stated the Attorney General and the District Attorney are the only ones that can request a Warrant of Execution. Upon Court's inquiry, Mr. Chen advised their position

was that the two Senators were employees of the office but not the public officers. Mr. Levenson argued the person appointed would be acting on behalf of the District Attorney's Office. Court stated it would consider the arguments presented and therefore, COURT ORDERED, matter UNDER ADVISEMENT with a decision to be issued before 5:00 pm today.

Court noted parties agreed to continue the other two Motions. Colloquy regarding scheduling conflicts. Mr. Levenson advised they would be going back to Federal Court next week and requested 30 day status checks. COURT FURTHER ORDERED, State's Motion for the Court to Issue Second Supplemental Order of Execution and Defendant's Motion to Strike CONTINUED.

NDC

6/4/2021 8:30 AM STATE'S MOTION AND NOTICE OF MOTION FOR THE COURT TO ISSUE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION

6/4/2021 8:30 AM DEFENDANT'S MOTION TO STRIKE, OR ALTERNATIVELY, MOTION TO STAY THE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION

EXHIBIT 2

EXHIBIT 2

Electronically Filed
6/4/2021 9:35 AM
Steven D. Grierson
CLERK OF THE COURT

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ZANE MICHAEL FLOYD,

Defendant.

CASE NO: 99C159897

DEPT NO: XVII

DECISION AND ORDER DENYING DEFENDANTS MOTION TO TRANSFER CASE UNDER EDCR 1.60(H)

DATE OF HEARING: MAY 14, 2021
TIME OF HEARING: 8:30 AM

THIS MOTION having come on for hearing before the Honorable MICHAEL VILLANI, District Judge, on the 14th day of May 2021, with the Defendant not being present. The Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the Decision on Defendant's Motion to Transfer Case Under EDCR 1.60(H).

On December 28, 2008, all Department XVII's civil and criminal caseloads were transferred to Department III, and all of Department V's civil and criminal caseloads were transferred to Department XVII. The transfer of cases from Department V to Department XVII included the instant case. As of December 31, 2020, Department V only hears civil matters. *See* Administrative Order 20-25. Moreover, since 2008, while this matter was still pending before the Nevada Supreme Court, neither party objected to the transfer of the instant case to Department XVII. Additionally, since late 2008, the original Judge.

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///

EDCR 1.60(a) grants the authority of the Chief Judge to "assign and re-assign all cases pending in District Court. Furthered, pursuant to EDCR 1.30(b)(5), the Chief Judge has the authority to determine the regular and special assignments of District Court Judges.

On July 1, 2017, the Eighth Judicial District created the Homicide Team. See Administrative Order 17-05. The Order provided that four departments would exclusively hear homicide cases to increase case management efficiency. In 2018, Department XVII was assigned to the Homicide Team. Additionally, Department XVII was assigned the present matter in 2008 and in 2018 assigned to hear all homicide matters.

Therefore, THIS COURT FINDS that Department XVII is the proper Department to preside over the instant case.

ORDER

THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion to Transfer Case Under EDCR 1.60(H) is hereby denied.

DISTRICT JUDGE

MICHAEL P. VILLANI

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 4th day of June, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DAVID ANTHONY
BRAD D. LEVENSON
411 E. BONNEVILLE, STE. 250
LAS VEGAS, NV 89101

BY */s/ Samantha Albrecht*
Samantha Albrecht
Court Clerk for Judge Villani

EXHIBIT 3

EXHIBIT 3

POLITICAL HISTORY OF NEVADA

(TWELFTH EDITION)

Issued by
BARBARA K. CEGAVSKE
Nevada Secretary of State

Produced jointly with the Research Division
of the Legislative Counsel Bureau

TABLE OF CONTENTS

Political History of Nevada

Chapter 6

The Nevada Judiciary

District—Counties	*Name*	*Year*
No. 2—Washoe (Dept. 4)	Craven, Thomas O.	1967-1971
No. 2—Washoe (Dept. 5)	Gezelin, Emile (Appointed July 1, 1967; elected 1968.)	1967-1971
No. 3—Eureka and Lander	Sexton, John F.	1967-1971
No. 4—Elko	Wright, George F.	1967-1971
No. 5—Mineral, Esmeralda, and Nye	Breen, Peter (Died November 24, 1967.)	1967
	Mann, Kenneth (Appointed January 2, 1968, to election following.)	1968-1969
	Mann, Kenneth (Elected to unexpired term.)	1969-1971
No. 6—Pershing and Humboldt	Leighton, Donald M. (Died, June 19, 1967.)	1967
	Young, Llewellyn A. (Appointed August 15, 1967, to election following.)	1967-1969
	Young, Llewellyn A. (Elected to unexpired term.)	1969-1971
No. 7—White Pine and Lincoln	Wilkes, Roscoe	1967-1971
No. 8—Clark (Dept. 1)	Sundean, Clarence	1967-1971
No. 8—Clark (Dept. 2)	Compton, William P.	1967-1971
No. 8—Clark (Dept. 3)	Mowbray, John C. (Resigned October 1, 1967.)	1967
	Wartman, Alvin Nicholls (Appointed October 1, 1967; resigned October 14, 1969.)	1967-1969
	Wines, Taylor (Appointed October 14, 1969; resigned January 15, 1970.)	1969-1970
	Morse, William (Appointed January 18, 1970, to unexpired term.)	1970-1971
No. 8—Clark (Dept. 4)	O'Donnell, Thomas J.	1967-1971
No. 8—Clark (Dept. 5)	Mendoza, John F.	1967-1971
No. 8—Clark (Dept. 6)	Babcock, Howard W. (Appointed July 1, 1967; elected 1968.)	1967-1971

Statutes of Nevada 1971, Chapter 521, p. 1087, created the same eight judicial districts. District No. 1 had two judges, District No. 2 had six judges, District No. 8 had nine judges, and the rest had one each. On and after July 1, 1972, District No. 8 had 10 judges.

EXHIBIT 4

EXHIBIT 4

Electronically Filed
4/16/2021 4:51 PM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
****

Zane Floyd, Plaintiff(s) vs. William Gittere, Defendant(s)	Case No.: A-21-832952-W Related 99C159897 Department 17

NOTICE OF DEPARTMENT REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled action has been randomly reassigned to Judge Michael Villani.

☒ This reassignment is due to: Per NRS 34.730, case assigned to same judge as the criminal case.

ANY TRIAL DATE AND ASSOCIATED TRIAL HEARINGS STAND BUT MAY BE RESET BY THE NEW DEPARTMENT.

Any motions or hearings presently scheduled in the FORMER department will be heard by the NEW department as set forth below.

Motion to Disqualify Attorney, on 06/25/2021, at 8:30 AM.

PLEASE INCLUDE THE NEW DEPARTMENT NUMBER ON ALL FUTURE FILINGS.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Patricia Azucena-Preza
Patricia Azucena-Preza
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that this 16th day of April, 2021

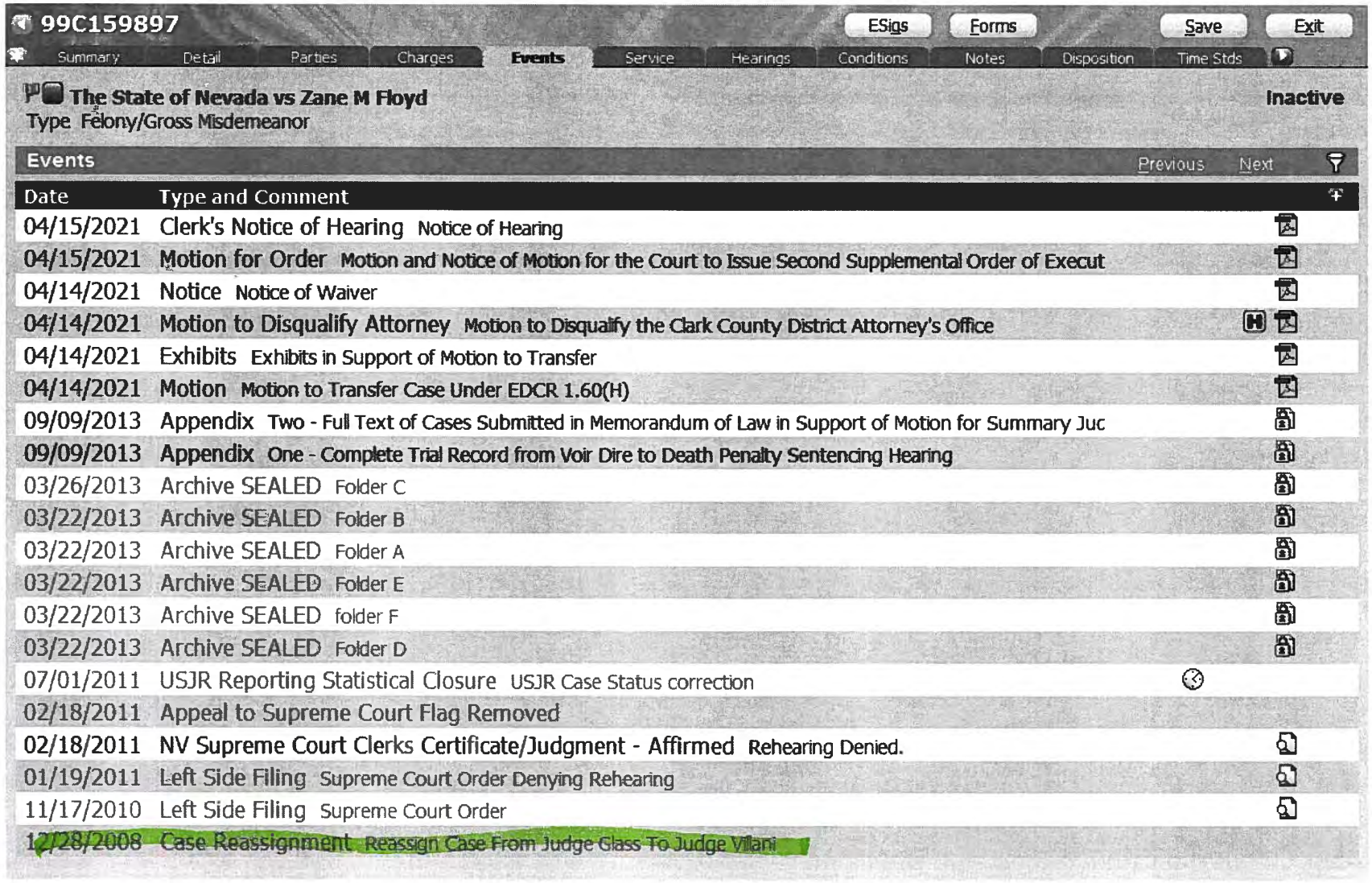
☒ The foregoing Notice of Department Reassignment was electronically served to all registered parties for case number A-21-832952-W.
David_Anthony@fd.org
Brad_Levenson@fd.org
AHerr@ag.nv.gov
rgarate@ag.nv.gov
motions@clarkcountyda.com

/s/ Patricia Azucena-Preza

Patricia Azucena-Preza
Deputy Clerk of the Court

EXHIBIT 5

EXHIBIT 5


99C159897
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Forms
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Summary
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Parties
Charges
Events
Service
Hearings
Conditions
Notes
Disposition
Time Stds
The State of Nevada vs Zane M Floyd
Inactive
Type Felony/Gross Misdemeanor
Events
Previous
Next
Date
Type and Comment
04/15/2021 Clerk's Notice of Hearing Notice of Hearing
04/15/2021 Motion for Order Motion and Notice of Motion for the Court to Issue Second Supplemental Order of Execut
04/14/2021 Notice Notice of Waiver
04/14/2021 Motion to Disqualify Attorney Motion to Disqualify the Clark County District Attorney's Office
04/14/2021 Exhibits Exhibits in Support of Motion to Transfer
04/14/2021 Motion Motion to Transfer Case Under EDCR 1.60(H)
09/09/2013 Appendix Two - Full Text of Cases Submitted in Memorandum of Law in Support of Motion for Summary Juc
09/09/2013 Appendix One - Complete Trial Record from Voir Dire to Death Penalty Sentencing Hearing
03/26/2013 Archive SEALED Folder C
03/22/2013 Archive SEALED Folder B
03/22/2013 Archive SEALED Folder A
03/22/2013 Archive SEALED Folder E
03/22/2013 Archive SEALED folder F
03/22/2013 Archive SEALED Folder D
07/01/2011 USJR Reporting Statistical Closure USJR Case Status correction
02/18/2011 Appeal to Supreme Court Flag Removed
02/18/2011 NV Supreme Court Clerks Certificate/Judgment - Affirmed Rehearing Denied.
01/19/2011 Left Side Filing Supreme Court Order Denying Rehearing
11/17/2010 Left Side Filing Supreme Court Order
12/28/2008 Case Reassignment Reassign Case From Judge Glass To Judge Villani

EXHIBIT 6

EXHIBIT 6

Electronically Filed
06/21/2021 10:43 AM
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ZANE MICHAEL FLOYD,
#1619135

Defendant.

CASE NO: 99-C-159897-1

DEPT NO: X

ORDER DENYING DEFENDANT'S OBJECTION TO ORDER DENYING DEFENDANT'S MOTION TO TRANSFER CASE UNDER EDCR 1.60 (H)

DATE OF HEARING: JUNE 18, 2021
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 18 day of June, 2021, the Defendant not being present, but Defendant represented by DAVID ANTHONY and BRAD LEVENSON of the Federal Public Defender's Office, the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and the Court having heard the arguments of counsel and having reviewed the pleadings on file herein:

THIS COURT FINDS that this case was part of a random re-assignment of cases from Department V to Department XVII. The Nevada Supreme Court has upheld the Eighth Judicial District Court's re-assignment of cases. Therefore, Department XVII is the proper court that can issue the order and warrant of execution.

IT IS HEREBY ORDERED that the Defendant's motion shall be denied.

Dated this 21st day of June, 2021

DATED this _____ day of June, 2021.

DISTRICT JUDGE

C59 03A 31F4 CC4E
Tierra Jones
District Court Judge

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

The State of Nevada vs Zane M Floyd	CASE NO: 99C159897 DEPT. NO. Department 17

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 6/21/2021

ECF Notificiations CHU	ecf_nvchu@fd.org
Amanda White	awhite@ag.nv.gov
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Frank Toddre	ftoddre@ag.nv.gov
Steven Wolfson	motions@clarkcountyda.com
Eileen Davis	Eileen.davis@clarkcountyda.com
Sara Jelinek	Sara_Jelinek@fd.org
Heather Ungermann	ungermannh@clarkcountycourts.us
Brad Levenson	brad_levenson@fd.org
David Anthony	david_anthony@fd.org

99C159897

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **June 28, 2021**

99C159897 The State of Nevada vs Zane M Floyd

June 28, 2021 **3:00 AM** **Minute Order**

HEARD BY: Bell, Linda Marie **COURTROOM:** No Location

COURT CLERK: Yolanda Orpineda

JOURNAL ENTRIES

- Mr. Floyd has filed an Objection to Judge Jones' Order Denying Motion to Transfer Case Under EDCR 1.60(H). The Chief Judge has multiple conflicts in this matter pursuant to Nevada Revised Code of Judicial Conduct Rules 2.11(A)(1) and 2.11(A)(2)(b). As a result, the Chief Judge declines to hear this matter which was already determined by the presiding criminal Judge.

CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve. // yo 06/28/21

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7/20/2021 12:29 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

ZANE FLOYD, Plaintiff, vs. WILLIAM GITTERE, Defendant.	CASE#: A-21-832952-W DEPT. XVII

BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE

FRIDAY, JULY 9, 2021

RECORDER'S TRANSCRIPT OF HEARING:
PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the State:	ALEXANDER G. CHEN, ESQ. Chief Deputy District Attorney
For the Defendant:	BRADLEY D. LEVENSON, ESQ. DAVID S. ANTHONY, ESQ. Assistant Federal Public Defenders

RECORDED BY: KRISTINE SANTI, COURT RECORDER

Las Vegas, Nevada, Friday, July 9, 2021

[Case called at 9:38 a.m.]

THE COURT: And we have the writ argument.

MR. LEVENSON: Yes.

THE COURT: Go ahead.

MR. LEVENSON: Thank you, Your Honor. We raised five claims in our second amended petition. The State has addressed all five. I'm just only going to deal with three of them today unless the Court has questions on the other two, we'd be glad to entertain them.

The first one I want to talk about is the clemency issue, which is claim two. In this Court's June 7th, 2021 order granting the State's motion to issue the second supplemental order of execution and supplemental warrant of execution, the Court addressed Mr. Floyd's claim raised in his petition. That claim argued that Floyd is being deprived the opportunity to seek clemency. The Court addressed this issue though that was raised in the first -- I believe in the original petition. And the Court stated the issue was mute because the Pardon's Board was meeting on June 2nd and Floyd's execution had been pushed to late July.

However, Floyd's case was not before Pardon's Board in June through no fault of his own. The deadlines for submitting applications were in February, months before the State noticed us that they would be putting this case on for an execution. So the next earliest date for Mr. Floyd to appear before the Clemency Board is September 21st.

We have filed a timely application to the board for that meeting. The board has acknowledged the receipt of Mr. Floyd's materials, which include the clemency application, a 20-minute video presentation, and 15 declarations from experts, family and friends who support the clemency request. Thus the claim that's raised in the second amended petition which is before this Court has not been addressed by this Court. And that is will Mr. Floyd's opportunity to be heard by the Clemency Board, his due process right, or his right to be heard be violated by the State pushing the execution.

So now actually if this 120 days in the future this may not be ripe yet. I'm guess at this point we'll have to see -- what I'd like to do is argue it, because if something happens in this case to come back to the Court at least the Court will have this information before it.

THE COURT: All right. Thank you.

MR. LEVENSON: So as I said, Mr. Floyd has filed a timely notice of application. It's before the board. There's no reason to think that the board will not hear Mr. Floyd's case due to the magnitude of the penalty, which is the penalty of death. There's no reason to believe that Mr. Floyd's case will not be before the board due to the fact that he is not a volunteer and this is the first time Nevada has tried to execute a non-volunteer since 1996. And there's no reason to believe that the board is not interested in hearing Mr. Floyd's case for clemency, which includes the fact that he had honorable service to our country as a Marine in 1995 through 1998 where he served in Guantanamo Bay, Cuba.

As we know from other cases before it, this case could be put before the board as late as the day before the hearing. So we know that he could be placed on the agenda September 20th. So the State's rush to execute Mr. Floyd before the board's September meeting would deprive Mr. Floyd of his opportunity for the basic right to be heard before the Clemency Board.

And to be clear, Mr. Floyd's ask is very small. He's just asking for the opportunity to appear before the board versus the magnitude of a death penalty before he has that opportunity. So if there are no other questions I'll turn to claim three.

THE COURT: Okay. On the -- have they -- does the -- has board advised you that you do in fact have that September 21st date? I mean, is that a firm date?

MR. LEVENSON: They have not yet. And but we understand from working with the board before again that they can put Mr. Floyd's case on calendar up to the day before.

THE COURT: Okay.

MR. LEVENSON: And there are certain deadlines that they need collecting materials and then sending materials out to the board. We have not heard anything except the acknowledgment that all of our paperwork has been received.

THE COURT: Well any potential execution is not going to take place until at least November. And I know --

MR. ANTHONY: Correct.

THE COURT: -- there's a stay in Federal Court just from me

reading the newspaper, I just being a citizen. But I've now issued a stay of 120 days from today, so that's November basically --

MR. LEVENSON: Correct.

THE COURT: -- 9th.

MR. LEVENSON: So I guess in the event that something happens sooner, the Court has the information before it.

THE COURT: Okay. I appreciate that.

MR. LEVENSON: Turning to claim three, which is the Nevada State Prison versus Ely State Prison. Again we -- the Court has ruled on this. We don't wish to reargue it. But there is one piece of information we wanted the Court to have for purposes of the second amended petition, which upon further investigation there was incorrect information given by both sides prior to the prior arguments.

In 1967 when NRS 176.355 was written or at least last amended, the information before the Court then was there was only one prison in existence which was NSP. And now we know there are three. There was Warm Springs, NNCC, and the Nevada State Prison. And so based on that we still argue that the clear legislative purpose to use the word we to distinguish its intent that executions must take place at NSP and not any other prison. So I think, again, important information for the Court to have before making a ruling on the petition.

And then the last claim I'd like to address is claim, one, which is the Fetal Alcohol Spectrum Disorder, Intellectual Disability, *Roper versus Simmons* claim. In that same June 7th order I spoke about before, this Court stated that this claim had been before the Nevada

Supreme Court, the Federal District, and the Ninth Circuit before. But this is not the same claim, Your Honor. The claim that was before those courts was an IAC claim for failing to investigate and present evidence of FASD. This is a categorical exclusion for the death penalty claim with recent science showing that FASD is equivalent to ID and we go into it very fully in both our petition and our reply. And so it's a very different claim that was raised before and that's why we ask this Court to take a look at it because it wasn't heard before.

We also would point this court to *Common Law versus Kentucky*, which is a Kentucky Circuit Court case which agreed with the national consensus and proportionality assessment mandated protection -- mandating protections against executions for petitioners who were over the age of 18. Science shows that the brain matures up to the age of 25. And with the case of Mr. Floyd who suffers from FASD, those with FASD suffer brain damage such that their brains mature at a much slower rate than an atypical neuron person.

So with that, we believe that one because FASD is very equivalent to ID and a person with ID, Intellectual Disability, cannot be executed, that would be a categorical exclusion. And at the age of 18 is a not a firm cutoff and that Mr. Floyd was 23 at the time of the crime should be considered ineligible for the execution as well.

Granted, Your Honor, this is certainly a novel issue. But novel issues start in the trial courts and then they percolate up to the US Supreme Court. So this is this Court's opportunity to make novel law and see where it goes.

THE COURT: All right. Thank you.

Mr. Chen.

MR. CHEN: Thank you. I would agree with Mr. Levenson that this would be creating new law, because what they're essentially asking this Court to do is to combine and *Roper* and *Atkins* and which was the age and the intellectual disability and kind of mesh the two together to make it the standard a functional equivalent of someone who's under 18.

If the Court were to read the *Roper* case it would see that 18 was a bright-line cutoff. And I think the defense even mentions in that particular case that the majority was making this 18 year old rule without any consideration for how much ability or intellect the minor could actually have in this entire -- in the case. So that's a bright-line rule. I don't think that there's any authority to now make a claim that he has the functional equivalent at the time of someone who was under 18.

The last petition where they filed a claim about FASD they talk extensible about the brain injury that he had and about the brain composition and everything else. So I don't think -- I think that this is just a time barred claim. I don't think that there's any grounds to raise this now. And I think that it should be dismissed as a successive and untimely claim, which they really could have raised earlier but they haven't.

And I understand that their claim is somewhat different now. They're making Eighth Amendment claim rather than an ineffective assistance of counsel claim. But they made Eighth Amendment claims in their prior petition in 2007 as well. They didn't make this specific one,

but if we were to allow counsel to go back and make multiple arguments over the same general premise, we would again be here indefinitely and that would be an abuse of the writ. So I don't think that there's any reason for this Court to now rule on this particular issue.

In terms of the clemency issue, I'll only touch on it briefly. Certainly they have an ability to seek this, but there's certainly no right to it and I know that they said that they've worked with it before. So anyone who does go before that board or at least is going to be before the board, there's an extensive write-up, there's an extensive investigation that takes place, a packet gets issued, letters get submitted. That process takes a long time. So if this Court were to somehow rule that he has a right to go before that board, again essentially that could be years down the road if it's something that they wanted to do. So I don't think that there's any authority that he has any right to actually seek that, and especially not in a post-conviction petition.

Finally with the Ely State Prison and the language, they have a current petition or they're -- maybe they're filing soon a petition that's going to address that specific issue. I still stand by the fact that that's not appropriate for post-conviction petition. They have filed something and they're going to seek a petition on a writ of mandamus of prohibition I assume to the Nevada Supreme Court. That would be the proper vehicle for that, but not in a petition for writ of habeas corpus here.

But that's all I have for right now.

THE COURT: And on, counsel, any reply brief and you can

reply arguments used on, you know, the *Atkins* issue, anything additional to add?

I mean, you know, it seems to me that the argument that perhaps kids -- individuals mature up until age 23 age 25. Don't we need a bright-line test as far some cutoff, save and except ID issues?

MR. LEVENSON: So, very good question. Currently the US Supreme Court does have a bright-line rule of 18. But the *Roper* case came out quite a while ago. And there is an emerging body of science that shows that 18 should not be the hard cutoff. I agree, but we said this early that this a novel argument. It's not been ruled upon by higher courts, but other courts have started to agree to this. I mentioned the *Kentucky versus* -- the *Kentucky* case from the superior court there. They agreed that you couldn't have a hard cutoff at 18.

So I believe our not only our second amended petition but the reply goes into the law review articles and science articles that talk about the emerging science that shows that you cannot have a hard cutoff at 18, that it expands up to 25 because some -- the brain of an average person matures much later than 18. So again, there is no case law except lower body state courts that have addressed this issue.

As far as *Atkins*, there is a lot of and I can't find it right now in my brief and I apologize, but there are four or five points that show that FASD is actually more severe in many ways than someone with ID. They both have the same adaptive deficit problems. The IQ is not the same obviously. FASD, people with FASD don't always have a lower IQ, but the court's look at adaptive deficits more strongly now in even

Atkins claims than they look at just IQ. There's brain damage, executive function, they both have the same impairment, so if you look at the list that we have in our brief, you will see that there are a lot more issues that show that FASD and ID are comparable.

Again it's novel. There's an emerging body of science that shows the similarity between these two. Certainly if the Court, since the court gave us a stay we would be glad to present this evidence to the Court in an evidentiary hearing with experts that we already have lined up.

THE COURT: Was Mr. Floyd ever tested for IQ at the time of the trial and/or more recently?

MR. LEVENSON: Not recently and I do not believe at that time of the trial. I believe that we have some older IQ tests, but not at the time of trial.

THE COURT: Do you agree, Mr. Chen, on that question of IQ testing?

MR. CHEN: I thought that they had done some at the earlier stages. I know there were at least 6 experts that came in to evaluate him at the last hearing or at the trial stage or prior to the trial stage. So I thought that this is something that had actually been covered. I could be mistaken. But I'm quite certain it was.

MR. LEVENSON: I believe -- I'm sorry, Mr. Anthony reminded me, as many of us were not here during this time. In the first federal post-conviction that our office handled there was IQ testing done --

THE COURT: Okay.

MR. LEVENSON: -- by Dr. Schmidt.

THE COURT: And you recall what the level was?

MR. LEVENSON: I do not. I do not.

THE COURT: Was it borderline to *Atkins* standard?

MR. LEVENSON: I do not believe it was, Your Honor. I think it was probably in 80s or 90s. But I would want to go back and look at that to see if when in fact it was -- if they looked at it for [indiscernible] effect or retesting possibilities.

But what I would say is regarding IQ is for someone with FASD you might not have a lower IQ but you will have all the other elements and that's why it's equivalent. It's certainly not the same, but it's equivalent to ID with all the other damages.

THE COURT: All right. Thank you.

On the first issue brought up on the clemency issue, I agree there's not a right to that. I had previously ruled on that and so my previous decisions stands that I made in the C case. We're in A case today.

On the issue of Ely state Prison versus Nevada State Prison or the other three prisons here, I find again that the decision of the Court in the C case applies. It's issue preclusion in this case and I do believe the new prison under the statute is allowed to perform the execution in this particular matter.

I am going to follow the US Supreme Court bright-line test of on the *Atkins* issue as far as the IQ goes. I think that is appropriate on these circumstances of this case. I don't find sufficient information here

to warrant that this Court grant the petition on this issue. I don't find that the FASD rises to the level of Intellectually Disabled. And so for those reasons I'm denying the petition.

Mr. Chen, could you please prepare an order for it today's decision? And I think that's it for today and I will see everybody -- we'll set a status check on that 120 days.

THE CLERK: Yeah, we --

THE COURT: I don't know if we gave that date yet.

THE CLERK: Yeah, we gave --

MR. ANTHONY: You did, Your Honor, November 12th --

THE CLERK: Yeah.

MR. ANTHONY: -- at 8:30.

THE COURT: All right.

THE CLERK: Yeah.

THE COURT: All right, is there any -- I'm just curious -- any decision by the Federal Court. I know Judge Boulware issued a stay there. Was there a status check or -- I mean, --

MR. ANTHONY: We have our next status check with Judge Boulware this Tuesday.

THE COURT: Okay.

MR. ANTHONY: And we do have a briefing schedule in the Ninth Circuit Court of Appeals.

THE COURT: And that's based upon the recent testimony or information you received from the Prison Warden as far as the protocol, the cocktail if you call it that.

MR. ANTHONY: The director --

THE COURT: Right, director.

MR. ANTHONY: The director of the department.

THE COURT: It just -- I mean, it has nothing to do with what I'm doing here. I just seems to me that information should have been provided to you a lot earlier.

MR. ANTHONY: We certainly agree, Your Honor, and I think that's going to be an issue that the parties are going to litigate in the Court of Appeals.

THE COURT: No, it just seems like here it is, now let's fight over it. You know, it just seemed like there was too many months delayed as far as getting both sides that information. And I don't know why that occurred, but and that's not in front of me. That's just --

MR. ANTHONY: We agree. I think it would inspire more public confidence if there was more transparency literally, Your Honor.

THE COURT: Just so we're clear, that was layman's opinion. I have not read the briefs in that issue. But it just seems to me that you should have a protocol, it should be in writing and here it is and we're -- you know, we're not going to hold three months or four months, however it took you gentlemen to obtain that information. Just seem more information the quicker a case can get resolved one way or the other.

MR. ANTHONY: Well we wholeheartedly agree with that, Your Honor.

THE COURT: Again, that's a layman's opinion. Don't cite me in a brief, please. I have not read the points and authorities. All right,

have a great after -- weekend, gentlemen.

MR. ANTHONY: Thank you, Your Honor.

MR. CHEN: Thank you.

[Hearing concluded at 9:56 a.m.]

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Jessica Kirkpatrick

Jessica Kirkpatrick
Court Recorder/Transcriber

Electronically Filed
7/20/2021 12:24 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ZANE M. FLOYD, Defendant.	CASE#: 99C159897 DEPT. XVII

BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE

FRIDAY, JULY 9, 2021

RECORDER'S TRANSCRIPT OF HEARING:

DEFENDANT'S MOTION FOR STAY OF PREOCEEDINGS PENDING RESOLUTION OF PETITION FOR WRIT OF MANDAMUS AND PROHIBITION OF THE NEVADA SUPREME COURT

APPEARANCES:

For the State:	ALEXANDER G. CHEN, ESQ. Chief Deputy District Attorney
For the Defendant:	BRADLEY D. LEVENSON, ESQ. DAVID S. ANTHONY, ESQ. Assistant Federal Public Defenders

RECORDED BY: KRISTINE SANTI, COURT RECORDER

Las Vegas, Nevada, Friday, July 9, 2021

[Case called at 9:18 a.m.]

THE COURT: Okay. Page 3 is State versus Zane Floyd. We'll handle that first, and then page is the petition which is under the A designation. So page 3 is under the C designation. And this is defendant's motion for State proceeding pending petition writ of mandamus and writ of prohibition to the Nevada Supreme Court.

Go ahead, counsel. Appearances please if you haven't already advised the Clerk.

MR. ANTHONY: Thank you, Your Honor, David Anthony from the Federal Public Defender for Mr. Floyd. Also appearing with me is Brad Levenson from the Federal Public Defender. And Mr. Floyd is in the custody of the Department of Corrections. And we waive his appearance for the purposes of this hearing.

THE COURT: Counsel, it's -- just so we're clear, is he requesting and/or are you requesting that his appearance be waived until further notice?

MR. ANTHONY: Yes, Your Honor.

THE COURT: Okay. All right, so we don't have to keep double checking on that. And we have Mr. Chen on behalf of the State. So, go ahead counsel on the motion for the C case.

MR. ANTHONY: Your Honor, may I approach the lectern?

THE COURT: Sure.

MR. ANTHONY: Also, Your Honor, before I begin there's also

the motion just filed to vacate the order of execution. I don't know if that's going to be something that we're going to discuss today. The State filed a response to that last night. And the reason that I bring that up is because that would implicate whether there will be argument today on the warrant of execution. And obviously if there is going to be, then we would ask to be able to argue the motion to vacate the order of execution.

THE COURT: Is that on calendar today, because my calendar is not showing that motion?

MR. ANTHONY: It was --

THE COURT: The only one I have is motion to stay.

MR. ANTHONY: It was placed on the calendar for August 6th, and so that was the notice we got from the Clerk's Office. The only reason I bring that up is because if there's also going to be an argument on the warrant, then that argument would need to come in front of it, because it's a motion requesting that the order and the warrant be vacated. And so I just wanted to bring that to the Court's attention. I don't know what the Court's preference would be, whether we're going to argue that in the warrant on August 6th. But I just wanted to flag that before we start, because I don't know if we're going to be getting into the warrant today or not.

THE COURT: Do you believe that the -- that motion should be heard the same day or --

MR. ANTHONY: I do, Your Honor.

THE COURT: -- before this one?

MR. ANTHONY: I do, Your Honor.

THE COURT: Okay.

MR. ANTHONY: Because it would obviously come in front of it. Because if the motion to vacate is granted the Court wouldn't be signing the warrant.

THE COURT: Understood.

Mr. Chen, on that issue.

MR. CHEN: Yes. Your Honor, yesterday I did file -- I tried to write it very briefly, because I knew that we were under a time crunch. The Federal Public Defender's Office had filed a number of things and I wanted to just kind of do a summation for the Court as to what has happened in various court proceedings, so that the Court could make an informed decision today. Hopefully the Court was able to see that but as I mentioned I tried to keep it very brief.

But essentially I think all of the things whether it's the motion to strike or the motion to stay are all pretty much the same issue that's being raised as to whether or not this warrant of execution should be issued today or not. So I would be okay if the Court is prepared to just hear everything all at once. Because I do think it's part and parcel to the same thing.

THE COURT: Right. I think it is appropriate -- I agree with you counsel that we hear that motion you said August 6th, that we hear that first and then this motion. And then what happens on that motion this one to follow. And if you want so I'll just go ahead and continue this motion to the August 6th date and that would be at 8:30.

MR. ANTHONY: *Thank* you, Your Honor. And just for clarification, the means that we'd be arguing the warrant on the same day, August 6th?

THE COURT: Yeah, yes.

MR. ANTHONY: Okay. And in light of that, Your Honor, I will direct my attention to the stay motion and we will address the motion to vacate on August 6th.

THE COURT: Okay, thank you. And then on the petition, can we do that today or do you --

MR. ANTHONY: We're prepared, Your Honor, to argue that today.

THE COURT: Okay. I've got my notepad. I've reviewed the briefs. Go ahead, counsel.

So, Your Honor, as to the motion that we requested a stay, I think the first thing that is very important to point out is that the State effectively concedes that three of the four factors that the Nevada Supreme Court has set forth for granting a stay exists here under the *Hansen* case. They've acknowledged that the object of the writ would be defeated if it wasn't addressed at the current time. They have not addressed the issue of irreparable prejudice to Mr. Floyd.

The only remaining factor under *Hansen* is the reasonable likelihood of success. And as *Hansen* holds, once the other factors militate in favor of a stay, the test that the Court is going to apply is has Mr. Floyd raised, a "substantial" case and is this an important legal issue? And so that's the test that the Court needs to apply today.

One of the things that we should be clear about is just because the Court has denied the underlying disqualification motion doesn't mean that we can't also meet the *Hansen* standard and it's our position that we can meet the *Hansen* standard for several reasons.

One of the things that the State argues in their pleading is that they argue under a reasonable likelihood of success that this is a "obscure issue that is being raised". I would like to direct the Court's attention to the State's own litigation conduct in the Molen and the Plumblee cases. And in the Plumblee cases, the State argued directly to the contrary to what the State is arguing today. In Plumblee and Molen the State argued in their pleadings that this was an issue of "widespread importance". And so I think that the Court needs to understand that the State has taken the position in other proceedings before District Courts here in this county that this is an issue of widespread importance.

And the other thing that the State acknowledges in their pleading is that there's a possibility that would exist that a stay may be issued by the Nevada Supreme Court. Under the rules however, this court under NRAP 8(a) is required to make an initial assessment as to whether a stay is appropriate. The fact that a district court in this county has vacated two criminal convictions on this very issue, I believe is very probative evidence that under *Hansen* we can make a substantial case on an important legal issue. And even the State argued in Molen and in Plumblee that this was an issue of widespread importance.

Finally, Your Honor, as to the issues in the reply, I -- we

directed the Court's attention to the recent order from Chief Justice Hardesty, where Justice Hardesty ordered the State to file a response to the petition. We would also argue to the Court that under *Hansen* that is also a very strong indication that we can make a substantial case and there is no doubt whatsoever that this is an important legal issue. So given that three of the four *Hansen* factors are unaddressed and given that the only remaining issue is the reasonable likelihood factor, we believe that applying the *Hansen* test must result in a conclusion that is appropriate for the Court to issue a stay so the Nevada Supreme Court can address an issue that they clearly have concerns with. And for that reason we would submit that a stay is appropriate.

And if the Court has any other questions I'm prepared to answer them.

THE COURT: No, I do not, thank you.

Mr. Chen.

MR. CHEN: Thank you. The difference between the Molen and Plumblee matters that Mr. Anthony just cited versus the petition that's in this particular case is that in those cases Ms. Scheible who also sometimes serves as a senator was the actual prosecutor in those cases. We're talking about a case here where the individual was convicted years ago before anyone was in the legislature. We're talking about someone who hasn't touched this case. Neither of those senators has had any involvement in this case.

And from what I recall about the oral argument regarding the disqualification motion, was they were kind of saying disqualified not

based on the separation of powers issue. They were saying disqualified because the public would not have confidence in the proceedings, which is a different type of argument than an actual separation of powers argument. So I don't think that the Plumblee and Molen matters are pertinent to this. I think it's a very different situation. So I just wanted to distinguish that.

In terms of the striking everything and the stay, I think I pointed out yesterday that yes this District Court does have authority to grant a stay if it feels it's necessary. But I just said that the Supreme Court, if they wish, would be in the best position because this is something that they're interested in hearing about on this particular argument. So I just feel that they would be in the best position to issue a stay necessary and that for this proceedings here we would just follow the statute and the statutes that are provided for the death penalty. So that's all I have to supplement today, Your Honor.

THE COURT: Is there any indication from the Supreme Court as to when they were planning to hear the matter?

MR. CHEN: There's no indication, Your Honor. I can say that even though I do view these as completely different topics from the Plumblee and Molen matter, I filed those petitions in, I want to say, December of last year and then they invited amicus and other things. So the briefing, I believe, has now been submitted more or less. But we still don't have a decision. But it has been many months that they've been considering that particular matter.

THE COURT: I'm sorry, so when was the final brief submitted

to the Supreme Court?

MR. CHEN: I want to say the last amicus brief was submitted maybe a month or two ago.

THE COURT: And is that correct, counsel, or what was the last date of -- or the last brief that's been submitted to the Supreme Court by whatever entity?

MR. ANTHONY: Your Honor, I'll be perfectly honest. I don't have that information in front of me. I don't have any reason to disbelieve Mr. Chen's representations regarding that. Obviously we can look that up and provide that information to the Court. I also had a -- just a couple points in reply, but I can wait if --

THE COURT: Sure.

Anything else, Mr. Chen?

MR. CHEN: No, thank you.

THE COURT: Okay. Go ahead, counsel.

MR. ANTHONY: Your Honor, just a couple points. The one thing that it appears that we agree on from counsel's argument is that the Nevada Supreme Court is interested in this issue. One of the things that Mr. Chen was discussing was is that there were many entities that have filed amicus briefs, including the Legislative Counsel Bureau. That is a strong indication that this is an issue of great importance in the state.

The other thing that I would like to point out is that when Mr. Chen purports to distinguish the cases, one thing that I'd like to point out is that the remedy in the Plumblee and Molen cases was a very drastic

remedy. It was vacating judgments of conviction. And one thing I would like to point out that I believe makes our case even more attractive of a vehicle to the Nevada Supreme Court is that we're only making an ask regarding the identity of counsel for the State who argues on the State's behalf. I would respectfully submit to Your Honor that that fact that is a less drastic remedy is a reason why the Nevada Supreme Court would have even more of an interest in having Mr. Floyd's case before them than perhaps the situation in Plumblee and Molen when there's a very drastic remedy that's being requested.

Secondly, I just want to make very clear the State argues that this motion was not based on separation of powers. That is absolutely incorrect. We began our very first motion by starting with Article 3 section (1).

THE COURT: I agree with you counsel.

MR. ANTHONY: Okay, then --

THE COURT: So no, I mean, I agree with you on that.

MR. ANTHONY: Oh, then no other comments, Your Honor.

THE COURT: All right. And this is an issue, if I recall, I mean, I don't have those pleadings in front of me right now, I mean, of the original motions that we do not have a previous answer for the Supreme Court on the separation of powers issue. I know there was some arguments that the Court should apply the analogy of this case and the State had a similar argument to the contrary. I think they do wish to address this issue and they're going to do this.

I am -- I will grant the stay. I do want to set a status check on

the stay for -- is there anything else that's on calendar now with the Nevada Supreme Court, I mean, where you have an actual date?

MR. ANTHONY: Your Honor, there's no actual dates but I think this is a good segue to just let the Court know that we filed an extraordinary writ with the Court on the transfer motion. We just got the order from Chief Judge Bell last week recusing herself, so Judge Jones' order in Department 10 is final. So I just wanted the Court to know that we had filed a writ as to the transfer motion. We haven't heard anything from the Nevada Supreme Court yet as to that.

Then there was one other thing, Your Honor. There was also the order that the Court requested from the State denying our motion to strike and that was on June 4th. And so I -- we did want to follow-up with the Court about getting that written order, because we also have an intent to file a writ on that issue as well. That's the issue about whether the executions under state law would need to take place at the Nevada State Prison. So I just wanted to address the Court's questions about outstanding matter, but yes, no dates from Nevada Supreme Court though.

THE COURT: Okay. Mr. Chen, on the June 4th order?

MR. CHEN: So, Your Honor, there was some confusion and I know I spoke with counsel about this. The Court had issued a written order and that was the one where it told the State that to issue the order of execution in which we did submit.

My reading of the order was it seemed like the Court had already taken time to explain its decision in the order that it filed, so all it

was asking the State to do was file an order of execution. Counsel seems to have a different reading of it that they thought it was also for us to prepare a separate order above and beyond what the Court had already issued. So I had submitted a proposed order which more or less recapped what the Court had already said in its written order. I didn't know if it was necessary, but we kind of had a discrepancy in terms of whether the Court was actually expecting kind of like a findings or if it was just for us to prepare an order of execution.

THE COURT: Has that been submitted to chambers?

MR. CHEN: It was submitted to the inbox email, correct?

THE COURT: Okay. When was that submitted?

MR. CHEN: Right around when we had that conversation so --

MR. ANTHONY: About two weeks ago.

MR. CHEN: -- about two weeks ago.

THE COURT: Did we get that?

Apparently the order was forwarded on to us June 28th.

MR. ANTHONY: Excuse me?

THE COURT: It was put in the inbox on June 28th. I'm not saying it was signed. I'm saying -- we have this true order. I don't know if you're familiar with that it's called True Orders, because we don't touch paper anymore. So it went into the True Order's inbox June 28th. I was not aware of that, so I haven't seen it. So, I mean, I apologize. I mean, I just haven't seen it. So we will pull that up and I will look at it and refresh my recollection and look at the minutes as well, okay.

And so the stay, counsel, if you could prepare a formal order for granting the stay. I do want a status check on the stay, 120 days from today.

MR. ANTHONY: Yes, Your Honor.

THE COURT: And I know we don't do it a lot in criminal cases, but I always think it's the best to do this. We do it in civil cases, have Mr. Chen on all orders sign off approve as to form and content. Now I know sometimes the orders people don't agree and again sometimes form and content doesn't mean you agree with the analysis; it's just what the Court said. And this is a simple on the stay, but you just have them sign off approve as to form and content.

MR. ANTHONY: Understood, Your Honor.

MR. CHEN: Can I ask, Your Honor, since the Court is granting a stay for 120 days, the current order of execution is for July 26th. So it does sound like at this point the Court probably would just strike that order since nothing is going to happen right now.

THE COURT: Correct.

MR. CHEN: I don't see a point in coming back on August 6th right now.

THE COURT: Do you agree, counsel --

MR. ANTHONY: We agree, Your Honor.

THE COURT: -- since I granted your motion?

Okay. And then we can rest those motions. I mean, we'll see what's transpiring from now until 120 days from today.

MR. ANTHONY: Yes, Your Honor.

THE COURT: Okay. I think that's best for judicial economy and also just because I am sure the Supreme Court is going to address these issues, hopefully sooner than later.

MR. CHEN: Should we hear back sooner, Your Honor, we would just ask permission that we could put it back on calendar to reset something sooner than the 120 days, if for whatever reason we do hear back in an expedited fashion.

THE COURT: If they make some decision, please put it back on -- either side can put it back on calendar.

MR. CHEN: Perfect.

THE COURT: All right.

THE CLERK: So we'll come back for a status check it looks like November the 12th, 8:30.

THE COURT: It's interesting issue on the separation of powers. We'll see how it --

MR. ANTHONY: Certainly it's very novel.

THE COURT: No, I mean, it's -- see how it pan -- I mean, see how it pans out. I look forward to it.

MR. ANTHONY: Thank you, Your Honor.

THE COURT: Thank you.

THE CLERK: Judge, should I leave the August 6th on or taking that it out?

THE COURT: August 6th date vacated, right?

MR. ANTHONY: Yes.

THE COURT: Yeah.

THE CLERK: Okay. Thank you.

THE COURT: Thank you, counsel.

[Hearing concluded at 9:37 a.m.]

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Jessica Kirkpatrick

Jessica Kirkpatrick
Court Recorder/Transcriber

EXHS

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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

EXHIBITS TO SECOND AMENDED PETITION IN SUPPORT OF CLAIM TWO

(DEATH PENALTY CASE)

Exhibit	Document
8	Clemency Application, dated May 27, 2021
9	Clemency Video (DVD) (Manually filed)

DATED this 10th day of August, 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

CERTIFICATE OF SERVICE

In accordance with EDCR 8.04 (c), the undersigned hereby certifies that on this 10th day of August, 2021, a true and correct copy of the foregoing EXHIBITS TO SECOND AMENDED PETITION IN SUPPORT OF CLAIM TWO 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/ Celina Moore
An Employee of the
Federal Public Defenders Office,
District of Nevada

EXHIBIT 8

EXHIBIT 8

State of Nevada

Board of Pardons

Application for Commutation of Death Sentence

ZANE MICHAEL FLOYD

Submitted by:
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Attorney for Applicant

Application for Clemency

To the Nevada State Board of Pardons Commissioners

Zane Michael Floyd hereby requests you to:

1. **File this application for clemency**
2. **Place Mr. Floyd's case on the September 21, 2021 Pardons Board Agenda,**
3. **Grant a stay of Mr. Floyd's execution under Nev. Rev. Stat. § 176.415(1) until his case can be placed on the September 21, 2021 Pardons Board meeting, and**
4. **Thereafter commute Mr. Floyd's death sentences to sentences of life imprisonment without the possibility of parole**

BOARD OF PARDONS
Application for Commutation of Sentence - Page 1 of 2

Name: Zane Floyd **Location:** Ely State Prison **NDOC #** 66514

This application is designed for inmates currently serving a sentence imposed by a Nevada Court. **Applications that are not complete may be rejected.** After completing the application, return it to your caseworker or to the Warden of the institution where you are housed. Wardens will forward the application to the Director of Corrections. **Applications must be received by the Warden by 5:00 P.M. on November 20, 2020.** Inmates housed outside of the NDOC must submit their application no later than 5:00 P.M. November 25, 2020 to the NDOC Director at: PO Box 7011, Carson City, NV 89702 or 5500 Snyder Ave, Building 17, Carson City, NV 89701.

NOTE: Submit only ONE application.

Please indicate your answer by checking the YES or NO box after each question	YES	NO
Have you been housed in disciplinary segregation for any period of time within the past 36 months?		X
Have you been found guilty of a major disciplinary infraction within the past 24 months or do you have a major disciplinary charge pending?		X
Have you been found guilty of three or more minor/general disciplinary infractions within the past 18 months?		X
Are you eligible for release on parole to the community prior to March 31, 2022?		X
Were you revoked on your current sentence **or** are you serving a single sentence that you received while you were on parole?		X
Have you been denied release on parole to the community on your current sentence?		X
Do you have any unresolved criminal charges?		X
Is your case under appeal in a Nevada or Federal Court, **or** do you have plans to appeal your case in the future?	X	
Was a victim injured during the commission of the crime?	X	
Are you projected to discharge from prison before March 31, 2022?		X
Do you have any consecutive sentences still to be served?	X	
Are you currently validated by the NDOC as a member of a street or prison-based gang?		X
Were there any co-defendants in this case? If so, please provide their names:		X

If you are serving a sentence of Death or Life Without, please answer the following:

What year did you commit the offense that resulted in the sentence of Death or Life Without?	1999

BOARD OF PARDONS
Application for Commutation of Sentence - Page 2 of 2

Name: Zane Floyd	NDOC #: 66514
Court that rendered judgment (i.e., 8th JD, 2nd JD etc): 8th JD	
Current NDOC facility: Ely State Prison	
Current age: 45	Age when brought to prison on this charge: 24
US Citizen?: Yes / No	Sex: Male / Female
What is your projected sentence expiration date? N/A	
Please provide the conviction(s), the punishment imposed and your current sentence structure (please use additional sheet of paper if necessary): Please see attached sheet.	
Please list any prior felony convictions in this or any other state or jurisdiction: None.	
Please indicate the action you wish to be taken on your case by the Pardons Board: Commutation of death sentence to life without parole on all counts.	
Please indicate why your request should be considered by the Pardons Board (please use an additional sheet of paper if necessary)? Please see attached clemency application.	
FOR OFFICE USE ONLY	
STAFF COMMENTS:	

Zane Floyd Clemency Application

Convictions and punishments

Count I - Burglary while in possession of a firearm: 72 – 180 months.

Counts II, III, IV, V – First-degree murder w/ use of a deadly weapon: death by lethal injection.

Count VI – Attempt murder w/ use of a deadly weapon: 96 – 240 months plus equal and consecutive enhancement.

Count VII – First degree kidnapping w/ use of a deadly weapon: life with parole eligibility after 60 months.

Counts VIII, IX, X, and XI – Sexual assault w/ use of deadly weapon: life with parole eligibility after 120 months to run consecutively with an additional life sentence of 120 months.

Sentence Structure

Counts VI and VII are served consecutive to Count VIII.

Count IV served consecutive to Count VIII.

Count X served consecutive to Count IX.

Count XI served consecutive to count X.

Introduction

"Each of us is more than the worst thing we've ever done." (Bryan Stevenson, Just Mercy). And the same is true for Zane Floyd. Zane is a United States Military Veteran, a loyal son, and an individual who is described as a good and decent person who cared about friends and family members. But Zane Floyd is also an individual who was born with brain damage caused by his mother's prenatal consumption of alcohol.[1]

Zane also endured a childhood full of physical, mental, and verbal violence from his stepfather, which created feelings of inadequacy and lack of self-worth and confidence.

At an early age Zane was sent to doctors for neurological and psychological evaluations. It was determined Zane was in need of special education classes, but his stepfather denied Zane the opportunity to attend such classes because *he* believed he could "toughen" up Zane and "fix" him.

In school, Zane was socially awkward and bullied, which led him to spend a lot of his time alone. Zane has always felt that he was in a constant battle with himself. While trying to live up to his stepfather and grandfather's "macho" expectations, as an only child Zane worked to keep the peace between his alcoholic parents. And, at the same time, always feeling that the bottom was going to drop out of his life at any time, Zane navigated his young life as well as he was able. He did not have a father or other male role model to mentor or guide him, only males who disregarded him.

As a result of his lengthy childhood trauma, resulting post-traumatic stress disorder (PTSD), as well as a pre-genetic disposition for addiction due to his FASD and multi-generational history of addiction, Zane began abusing drugs and alcohol as a method of self-medication while a teenager.

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[1] Zane has since been diagnosed with fetal alcohol spectrum disorder (FASD).

Zane joined the United States Marine Corps at age 18 in order to escape his stepfather, and to prove his worth to others, and after basic training was sent to Guantanamo Bay, Cuba (Gitmo) where he served in a combat like setting, exacerbating his PTSD and psychiatric disorders. For those stationed at Gitmo, drinking was a way of life and Zane's drinking became worse. After serving four years, Zane left the military in 1998 with an honorable discharge and various medals and accommodations. Zane tried but failed to successfully transition back into civilian life.

Unable to find gainful employment, Zane moved back into his parents' home, where he lacked the structure offered by the military, and again turned to drugs and alcohol. In a military mindset, and suffering from a psychotic break due to methamphetamine use, Zane loaded his weapon, put on his military uniform, walked to a nearby grocery store, and killed four individuals and wounded a fifth.

While Zane committed an unspeakable act, he is not an irredeemable person. He did not choose to be born with FASD, he did not choose to be mentally and physically abused by his parents, nor did he choose to suffer from PTSD.

In fact, prior to the events of June 1999, Zane had never been arrested or in trouble with the law other than one driving under the influence charge in the military. Individuals from Zane's past describe him as a good and decent person, eager to make people laugh, and willing to help anyone in need.

The jury at Zane's trial did not hear the majority of this significant mitigating evidence before sentencing Zane to death. The jury also did not have the information that has been proffered to the Board regarding Zane's exemplary institutional history over the last twenty years.

As will be discussed in this clemency application, to understand Zane's life trajectory is to understand that he is not a danger to others, he has great remorse for his actions, he proudly served our country as a United States Marine, and that serving a life term in prison is the appropriate sentence that should be imposed here. These are compelling reasons why this Board should grant commutation of Zane's sentences to life without the possibility of parole.

Zane Floyd was born to a mother who drank and took drugs.

Zane's mother, Valerie Floyd, was a troubled woman. From an early age she abused drugs and alcohol, and at one point in her early twenties, was homeless and suffered a mental breakdown after escaping her parents' home. Valerie returned to her parents' house where she was admitted to a psychiatric hospital and underwent electroshock therapy. Decl. of K. Hodson at 3,[2] ¶¶2-3. Escaping her parents' home a second time, Valerie moved to Kodiak, Alaska, where she met Jim Cobis, Zane's biological father. Decl. of K. Hodson at 3, ¶3; Decl. of J. Cobis at 93, ¶3.

Cobis, who met Valerie in a nightclub, did not realize she was severely addicted to alcohol. Decl. of J. Cobis at 93, ¶2. The two married and were together for three years. During that time, Valerie went out drinking four to five nights a week, frequenting bars that were open 24 hours a day. She drank morning and night and ran up large tabs at the local bars. Decl. of J. Cobis at 93, ¶4.

[2] These references are to the bates number at the bottom of each declaration and report that are included as exhibits.

After the death of their first son, Francisco, from sudden infant death syndrome,[3] Valerie sunk into a deep depression and her drinking became even more severe. She also developed an addiction to Valium and became involved in illegal drug transactions. Decl. of J. Cobis at 93-94, ¶¶6-7.

It was in this dysfunctional environment, a woman addicted to drugs and alcohol who had received electroshock therapy for psychological issues, that Zane was conceived. During the early months of her pregnancy, Valerie continued drinking, smoked cigarettes and marijuana, and abused cocaine and possibly other drugs. Decl. of J. Cobis at 94, ¶9.

Valerie and James Cobis ended their relationship during Valerie's first trimester of pregnancy. Valerie first moved into the home of a drinking buddy in Kodiak, and then returned to Colorado to her parents' home. Decl. of J. Cobis at 94, ¶¶10-11. Back in Colorado, Valerie continued to drink (five days out of seven) and abuse drugs (marijuana and possibly cocaine) during her entire pregnancy. Decl. of J. Cobis at 94, ¶11; Decl. of K. Hodson at 3, ¶5.

On September 23, 1975, Zane Floyd was born. He was one and a half months premature and weighed less than five pounds. Zane was transported by helicopter from the local hospital to one in Denver where he spent time in an incubator requiring oxygen. Report of Dr. Mack at 183. Zane was born with FASD, which was undiagnosed most of his life. Report of Dr. Brown at 101, 119-21; Report of Dr. Cardle at 234.

Fetal Alcohol Spectrum Disorder

FASD is a mental disorder found in the Diagnostic and Statistical Manual of Mental Health Disorders, Fifth Edition (DSM-5). Under the DSM-

[3] Valerie drank and abused substances during her pregnancy with her first child. Decl. of J. Cobis at 93, ¶6; Decl. of K. Hodson at 3, ¶4.

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). Report of Dr. Brown at 104. 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.* ND-PAE/FASD is a brain-based, congenital lifelong impactful disorder with pervasive and long-standing neurodevelopmental effects. Report of Dr. Brown at 103.

A fetus is susceptible to damage from alcohol exposure throughout the mother's pregnancy. And the first few weeks of the pregnancy, when brain cells are developing and forming structures, are especially vulnerable to alcohol's poisonous effects. Prenatal alcohol exposure typically causes widespread structural damage to the brain. Report of Dr. Brown at 104.

The toxic effects of prenatal alcohol exposure appear to be widespread throughout the entire brain, causing subtle but potent irregularities in brain structure that compromise brain function and directly impact cognition and behavior. Report of Dr. Brown at 106.

Organic brain damage in FASD directly impairs the cognitive skills needed to think adequately and self-regulate one's behavior. Report of Dr. Brown at 113. In turn, cognitive dysfunction in FASD impairs adaptive functioning in the community. *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. Report of Dr. Brown at 106-07. Prenatal alcohol exposure creates hypersensitivity to stress via faulty neurological hard-wiring of the hypothalamic-pituitary-adrenal system which causes chronic

overreaction to stressful events. *Id* at 107. 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. Report of Dr. Brown at 108.

Zane's mother drank heavily from the very beginning of her pregnancy to the end, causing widespread damage to Zane's brain, in utero. Evidence of such damage became apparent almost immediately.

Valerie meets Mike Floyd; Zane's early years uncover problems, now known to be associated with FASD.

Valerie was always seeking approval of the men in her life. And once Zane was born, Valerie wanted desperately for Zane to have a father. This led Valerie to marry a mechanic, Gary Poprocki, when Zane was about two years old. But Valerie fled that marriage a brief six weeks after marrying, when her new husband began physically abusing her. Decl. of K. Hodson at 3, ¶6.

Valerie met Mike Floyd in 1979, a short time after her brief failed marriage to Poprocki. Zane was already three years old at the time. Valerie and Mike married within three months. Mike adopted Zane when Zane was about five years old.

Mike thought Zane was a good kid but recognized early on that Zane had constant problems. Mike believed that many of these problems stemmed

from Valerie's drinking while she was pregnant with Zane. Valerie admitted to Mike that she drank, abused drugs, and smoked cigarettes while pregnant.

Zane had many delayed developmental milestones including walking and talking. Zane also had difficulty with tremors and fine motor skills. Report of Dr. Mack at 183.

Deficits in cognitive functioning often become evident in elementary school, as was the case with Zane.

By the second grade Zane was prescribed Ritalin for his diagnosed attention deficit disorder (ADD). Report of Dr. Mack at 183; Report of Dr. Cardle at 234. Zane had a short attention span and was hyperactive. Decl. of T. Delagardelle at 91, ¶4. But even with the Ritalin, Zane still struggled in school.

By the third grade Zane was already behind other students, failing arithmetic, reading, language/phonics, and social studies. Zane's struggles in school continued both in middle school and high school. Report of Dr. Mack at 181-82.

Due to Mike's job, Zane's family moved approximately ten times during Zane's elementary school years, which created further stress for both Zane and his family. Report of Dr. Cardle at 234.

Zane was referred by his middle school for both a neurological and psychological evaluation due to very poor attention span, fine motor skills problems, immaturity, and poor frustration tolerance. A child psychiatrist prescribed Zane imipramine, an anti-depressant. And a psychologist noted significant deficiency in cognitive functioning based on his performance skills. Report of Dr. Cardle at 234-38. Based upon the referrals, it was recommended that Zane attend special education classes. Instead, Mike sought to toughen Zane into shape. Decl. of C. Hodson at 1, ¶9. Mike would

not accept that Zane had special needs requiring intervention and systems of support. Decl. of K. Hodson at 103-04, ¶8.

Most likely due to his FASD and adaptive functioning deficits, Zane was socially awkward and spent a lot of time alone. Decl. of M. Hall at 97, ¶4; Decl. of J. Hall at 88, ¶7. Zane also lacked self-confidence, which might have been connected to his learning difficulties. Decl. of M. Hall at 97, ¶4; Decl. of C. Hodson at 1, ¶4. Zane further dealt with a recurring problem of how others saw him. Decl. of M. Hall at 97, ¶4; Decl. of C. Hodson at 2, ¶14. Zane desperately sought approval from friends and family but never seemed to achieve that goal. Decl. of K. Hodson at 3, ¶7; Decl. of C. Hodson at 1, ¶7.

Zane met his best friend, Robert "Jay" Hall, around the sixth grade when they were both eleven. The two lived in the same neighborhood and attended the same schools over the next ten years. The two also spent a great deal of time in each other's homes. Zane was loved by the Hall family and became a de facto Hall family member. Decl. of J. Hall at 88, ¶3; Decl. of M. Hall at 97, ¶2; Decl. of T. Delagardelle at 91, ¶2; Decl. of C. Hodson at 1, ¶6; Decl. of A. Hall at 86, ¶2.

Jay remembers that in the sixth grade, Zane would sit in the back of the classroom and crack jokes and do whatever he could to make people laugh. Most of the jokes were self-deprecating and at his own expense. Many of the kids in the class laughed, but Zane did not realize they were laughing at him. Decl. of J. Hall at 88, ¶4.

Zane was also bullied in school because the other kids thought he was "weird." Sometimes kids waited outside the school for Zane. Jay walked Zane home to make sure no one picked on him or beat him up. Decl. of J. Hall at 88, ¶5. Zane never achieved popularity at school.

Zane's father Mike was a good little league and high school baseball player and briefly played baseball in the military. Mike wanted Zane to do well in baseball too, but Zane was not the best athlete and struggled. Decl. of M. Eoff at 99, ¶5.

At age 13, Michael Eoff became Zane's little league baseball coach for two seasons. Eoff used to pick up Zane from his home and drive him to practice, and then back home again. The two talked baseball nonstop during these trips. Eoff found Zane to be a good and respectful kid. Decl. of M. Eoff at 99, ¶2.

Zane, who showed up at every game, played catcher. And while Zane was not a natural athlete, he tried hard and ultimately became better by the time he turned 15. Decl. of M. Eoff at 99, ¶4.

Coach Eoff only saw Zane angry one time. During the first season, Eoff brought in another batter to replace Zane. Zane threw his bat and used profanity. Eoff was surprised by this behavior because it was so out of character for Zane. Valerie told the coach that Zane was experiencing side effects from a medication he was taking, which caused mood swings. Decl. of M. Eoff at 99, ¶7. This was around the time Zane was prescribed the anti-depressant, imipramine. Report of Dr. Mack at 183.

While Mike Floyd completely missed his son's first season of play, he attended each of the games the second season. He sat behind the dugout screaming at Zane. Coach Eoff could tell that Zane was emotionally impacted by Mike's behavior. Eoff asked Mike to stop yelling at Zane and to move to another area, but Mike ignored the request. Decl. of M. Eoff at 99, ¶5.

Zane's FASD is a cause-and-effect condition that not only explains his learning disabilities, attention deficits, and hyperactive behavior in

childhood, but explains all of his behavior across his entire lifespan including his social awkwardness, and struggle with self-doubt and lack of confidence.

Zane's abusive relationship with his stepfather.

Mike and Zane's relationship was complicated as Mike was a terrifying parental figure. Zane knew his father loved him, but he also knew Mike acted in ways that showed the opposite.

Mike was extremely hard on Zane and became emotionally and physically abusive. Decl. of C. Hodson at 1, ¶8; Decl. of K. Hodson at 4, ¶8. Mike also controlled Zane by intimidation, fear, and violence. Decl. of J. Hall at 88, ¶9.

Zane's Aunt Sue remembers a time when the Floyds were visiting the family ranch in Colorado. Zane was about 5 years old. One night, when everyone was eating dinner, Mike was yelling so much at Zane, that Zane was shaking and unable to eat. Zane appeared terrified of Mike. Decl. of K. Hodson at 4, ¶9.

When Zane was growing up, Mike's job kept him away from the family home about half the time. When Mike was gone, Zane felt relaxed and safe. But as the time approached for Mike to come back home, Zane would get in countdown mode and become tense and nervous. Zane did not have the tools to deal with his father. Zane's mother also did not have the tools to be able to protect Zane.

Carolyn and Herbert Smith lived across the hall from the Floyd family when they moved into a Las Vegas apartment complex in 1988. The two couples socialized almost daily. Zane was 8 or 9 years old at the time. Carolyn, who was a social worker, saw things in Zane that others did not. Decl. of C. Smith at 240, ¶¶3-4. Carolyn and Zane became close, and Zane

referred to her as his "godmother." Zane was like a son to Carolyn. Decl. of C. Smith at 240, ¶4.

Carolyn often spoke to Zane when he was feeling down. Zane trusted Carolyn and confided in her. Decl. of C. Smith at 240, ¶7.

Often times Mike was the source of Zane's bad feelings. Mike was a macho man who thought that Zane was "soft." Mike wanted Zane to be more like him—tough and good at sports. But Zane had a hard time living up to Mike's expectations. This caused Zane to suffer from self-doubt, a lack of confidence, and a poor self-image. Decl. of C. Smith at 240, ¶8.

When Mike yelled at Zane, Zane would often tremble and visibly shrink. Zane just could not live up to Mike's expectations. Decl. of C. Hodson at 1, ¶8; Decl. of C. Smith at 240, ¶8.

Zane's maternal cousin Cole grew up with Zane in Las Vegas. Decl. of C. Hodson at 1, ¶¶1-3. Cole remembers an incident when Zane was terrified of his father. Zane, Mike, and Cole were riding in Mike's car during a hot Las Vegas summer day. Mike did not like to run the car's air-conditioner, nor did he like to roll down the windows. When Cole reached over to roll down the window closest to him, Zane placed his hand on Cole's arm and nervously pleaded with him not to do it saying, "it would be bad." Zane looked terrified and Cole did not know why. Then one day Zane rolled down the car window by mistake. Mike yelled at the top of his lungs and hit Zane. Cole was shocked but then understood why Zane was so fearful of Mike. Decl. of C. Hodson at 1, ¶10.

Jay Hall saw many episodes where Mike abused Zane. When Zane was around 14 or 15, Mike allowed Zane and Jay to drink with him. On one occasion, they all got drunk, and Mike started talking trash about Zane living under his roof and having to follow his rules. Without warning, Mike punched

Zane very hard in the jaw. Zane fell backwards and started crying. Decl. of J. Hall at 88, ¶9.

On another occasion, Mike had purchased a season pass for the Wet N' Wild water park. Zane accidentally lost his season pass and when Zane confessed to his father, Mike picked him up by the hair and threw him against the window of the car. Decl. of J. Hall at 89, ¶10.

Zane's relationship with his father was not his only source of anguish. Zane's maternal grandfather, Wayne Cool Hodson, was retired from the Navy. People described the grandfather as a John Wayne personality type. Zane deeply admired his grandfather and sought his approval. But his grandfather did not return the affection and did not show Zane much attention or respect. This hurt Zane especially because his grandfather favored some of his other grandchildren. This reinforced Zane's self-doubts and inferiority complex. Decl. of C. Hodson at 2, ¶11; Decl. of J. Hall at 89, ¶11.

Familial drinking and drugs.

Mike and Valerie were social drinkers. Decl. of C. Smith at 240, ¶10. But they were also alcoholics. Decl. of J. Hall at 88, ¶8. When Mike drank, he became aggressive. When Valerie drank, she became dismissive of Zane and socially inappropriate.

Mike's physical abuse of Zane was particularly bad when he drank. Valerie would call friends and ask if Zane could come to their house because she was afraid Mike would hurt Zane. Decl. of M. Hall at 97, ¶6; Decl. of C. Smith at 241, ¶12. Sometimes Valerie fled with Zane for her own safety. Decl. of M. Hall at 97, ¶6. On one occasion Valerie called Carolyn and Herbert Smith and asked Herbert to come over and speak with Mike. Mike had hit

Valerie on the head and the police were called. Decl. of C. Smith at 240, ¶11. Herbert often had to go to the Floyd home to calm Mike and the situation. Decl. of C. Smith at 241, ¶12.

Mike also had no boundaries about underage drinking. When Zane had his 16th birthday, he invited some school mates over to celebrate. Mike served all the kids alcohol, even though they were under legal age. When the parents of the kids came to retrieve them, they found their children under the influence. Many of the parents refused to let their children socialize with Zane again. Decl. of K. Hodson at 4, ¶11.

Valerie's drinking intensified at social gatherings. She would often pass out before the evening was over. Valerie also became verbally abusive to Zane when she drank too much. Decl. of J. Hall at 88, ¶8.

Zane had positive attributes notwithstanding his deficits.

Despite his being born with brain damage due to his mother's drinking, despite the physical and emotional abuse he suffered at the hands of his stepfather, and despite the alcoholism of his parents, Zane was a good person. When interviewed, people used the following terms to describe Zane: a good and easygoing kid; a big teddy bear; well behaved and polite; respectful; good hearted; peaceful; kind; well-mannered; sweet; polite; quiet; and never rude. And people noted that Zane was wonderfully kind to individuals he did not even know and treated everyone like a gentleman. Decl. of J. Hall at 88, ¶6; Decl. of R. Floyd at 85, ¶3; Decl. of T. Delagardelle at 91, ¶3; Decl. of M. Eoff at 99, ¶2; Decl. of C. Smith at 240, ¶¶5-6; Decl. of C. Hodson at 1, ¶4; Decl. of M. Hall at 97, ¶3; Decl. of A. Hall at 86, ¶3.

Carolyn Smith's daughter Brittany thought of Zane as a big brother and protector. Decl. of C. Smith at 240, ¶4. Zane's cousins Steven and Josh

felt the same. Zane was also protective of his young cousin Cole and did not let anyone bully Cole. Decl. of C. Hodson at 1, ¶5.

Carolyn even trusted Zane to babysit her daughter. And Jay's mother Tracey trusted Zane to take her daughter Aubra to the prom. Decl. of T. Delagardelle at 91, ¶3; Decl. of A. Hall at 86, ¶3.

Zane is also described as someone who was not mean-spirited or a troublemaker, non-threatening, and did not get into fights with others or become violent, even when he was bullied. Decl. of T. Delagardelle at 91, ¶3; Decl. of R. Floyd at 85, ¶3; Decl. of J. Hall at 88, ¶6; Decl. of C. Smith at 240, ¶6.

Zane's genetic predisposition to addiction.

Zane came from a multi-generational family of alcoholics and drug users.

Zane's mother, an alcoholic herself, came from a family of alcoholics. And Zane's biological father also struggled with alcohol and marijuana abuse as did his father, his brothers and sisters, and his first cousin. Decl. of J. Cobis at 94, ¶¶14-15.

Persons with FASD have a predisposition to addiction. Based on his own multi-generational history of addiction, and due to his FASD, it is no surprise that Zane turned to alcohol and drugs.

Zane experimented with beer at the age of 5. By the age of 14 to 15, he was drinking beer and alcohol on a weekly basis. At the height of his consumption, he was drinking a fifth of Jack Daniel's every day. Zane would on occasion drink until he blacked out.

Drugs were prevalent in the Las Vegas neighborhood where Zane grew up. There was a drug house nearby that many of the kids went to get high. A

neighbor of Zane's, and a fellow classmate, became addicted to crack cocaine and later died.

Zane's own addiction to drugs, mainly marijuana, escalated when he switched from a religious school to a public high school. He then began using methamphetamine, cocaine, and occasionally acid.

By the time he joined the military, Zane was drinking a lot and his life seemed to lack direction. Decl. of J. Hall at 89, ¶12.

Zane joins the United States Marines to serve his country.

There are various theories why Zane joined the Marines at age 18. Some believe that Zane was trying to prove his "manliness." Decl. of M. Hall at 97, ¶7; Decl. of C. Hodson at 2, ¶12. Others believed he joined the military to please his father, his grandfather, and virtually all the men in his family. Decl. of C. Smith at 241, ¶13. In reflection, Zane says he joined the military to escape his father.

No matter the reason, most people who knew Zane were surprised he joined the military, not to mention the Marines, known to be the toughest branch of the military.

When Zane told his father of his interest in joining the Marines, Mike tried to convince him to join another branch instead, like the Navy or Air Force. Mike did not feel that Zane was cut out for the Marines because of the strenuous physicality and psychological stress involved. This fortified Zane's intent to join the Marines and prove that he was the toughest of men.

Jay Hall too was surprised about Zane's decision to join the Marines. To Jay, Zane did not seem to be the Marine type. Decl. of J. Hall at 89, ¶12.

However, Zane was determined to enlist in the Marines and do well there. Decl. of M. Hall at 97, ¶7.

Life at Guantanamo Bay (Gitmo): 1995 to 1996.

Highly stressful Gitmo conditions.

Following bootcamp, Zane's first assignment as a Marine infantryman was Naval Station Guantanamo Bay, Cuba (Gitmo), where he served a one-year tour of duty.

Zane's military commander while at Gitmo was Captain Robert Salasko. Decl. of R. Salasko at 152, ¶¶2-3. Serving with Zane was fellow infantryman Scott Rollenhagen. Decl. of S. Rollenhagen at 155, ¶¶2-3.

There was a lack of popular knowledge, even in the Marines, regarding the difficulty of the environment at Gitmo. Salasko, a 30-year veteran of the Marine Corps., who served a tour of duty in Iraq, described Gitmo as intense and stressful, not an easy tour, and something one lived 24 hours a day while there. Decl. of R. Salasko at 152, ¶4.

According to Salasko, the level of conditioning and readiness at Gitmo was like those hostile combat assignments in Iraq and Afghanistan. To that end, the Cubans and the American troops fired at one another, there were perimeter breaches, and riots occurred in the refugee camps where Cubans and Haitians were kept. Anything could happen at any moment, so the troops were not allowed to let down their guard. Decl. of R. Salasko at 152, ¶5.

Marines based at Gitmo had multiple missions including patrolling the fence line separating the Cuban zone from the American zone and serving as a contingency force in the event of refugee riots. Decl. of R. Salasko at 152, ¶6; Decl. of S. Rollenhagen at 155-56, ¶9.

When Marines were not out patrolling, they lived in hardstand four story buildings like those on a typical Marine base. When Marines went on patrol, they lived in tents. Decl. of R. Salasko at 152, ¶7.

Marines at Gitmo worked a two-week cycle: a week of patrolling, keeping an eye on the Cuban Frontier Brigade (the enemy), and then one week of barracks time where one would train in weapon and mortar firing, clean weapons, and serve as a contingency force. Marines went on roving patrols as well as worked the guard towers using night vision goggles and thermal sites to surveil. Marines routinely went on patrols with live ammunition in their M-16 rifles. Gitmo was an operational environment as opposed to a training environment. Troops would work 12-hour shifts at the fence line. The armed Cuban soldiers were only 100 feet away. At times one could hear the Cubans because they were so close. Decl. of R. Salasko at 152, ¶6; Decl. of S. Rollenhagen at 155-56, ¶9.

Rollenhagen remembers that the tour of duty at Gitmo for an enlisted person, like him and Zane, was a difficult assignment. Once a new infantry person arrived at Gitmo, he would receive training on how to respond and handle riots on the island and would be forced to keep riot gear at the ready. Decl. of S. Rollenhagen at 155, ¶8. An ever-present danger was the possibility that refugees would riot and overrun the base. Decl. of S. Rollenhagen at 155, ¶¶8-9.

The primary interaction with refugees was riot suppression. When refugees would riot and head toward the "critical infrastructure areas" of the Navy base, Marines would take up a blocking position: weapons on safe but fixed bayonets to project a show of strength to deter the refugees from moving towards the American base. In one instance, a Marine bayoneted a charging refugee. There were a few times when refugees attempted to grab Marine weapons. Decl. of R. Salasko at 153, ¶10. Zane experienced this.

There was a Cuban mine field between the American side and the Cuban side. The Cubans had planted anti-personnel mines on their side and

the field was not well marked. The Cuban mines would maim as opposed to kill an individual. Once a victim had detonated a mine, his friends who came to rescue him would also encounter mines inflicting further casualties. Despite warnings not to do so, several brave Marines entered the Cuban minefield to rescue a Cuban resulting in a detonation causing the loss of a Marine's leg from the knee down. There were an estimated 300,000 mines planted in the aftermath of the Bay of Pigs invasion. Decl. of S. Rollenhagen at 156, ¶10; Decl. of R. Salasko at 153, ¶13.

There were weekly detonations on the Cuban side when Zane and Rollenhagen were stationed there. Decl. of S. Rollenhagen at 156, ¶10. Salasko recalled an incident where a Cuban, who had lost his leg because of a detonation, was crawling towards the American fence line. Eventually the Americans cut a hole in the fence and went out and got the Cuban and brought him to the American side. Marines were aware that asylum seekers would frequently be shot by Cubans attempting to get to the base. Decl. of R. Salasko at 153, ¶14.

The American minefield on the other hand was well marked and consisted of anti-tank mines designed to stop Russian made tanks used by the Cubans. If a person stepped on a mine, they would meet certain death. Decl. of R. Salasko at 153, ¶12.

Rollenhagen remembered a situation where the Cuban forces used spotlights and detected a Cuban asylum seeker swimming in the Bay. The Cuban soldiers pulled the swimmer from the water, took him to the shore, kicked and beat him, and then threw him in the back of a truck and drove him away. Decl. of S. Rollenhagen at 156, ¶12; Decl. of R. Salasko at 153, ¶14.

Salasko remembers a swimming Cuban family was literally harpooned and brought into a Cuban patrol boat and beaten. Decl. of R. Salasko at 153, ¶11.

The average Gitmo Marine, including Zane, saw something like this at least once but was powerless to help these people whose only crime was seeking freedom. Decl. of S. Rollenhagen at 156, ¶12.

The Cuban and Haitian refugees, who numbered between 30,000 and 40,000, lived in tents either on the golf course or near the beach. This population greatly outnumbered the military troops who numbered at most about 1,000. Decl. of R. Salasko at 152, ¶8; Decl. of S. Rollenhagen at 155, ¶7.

Zane called his father in the middle of the night while at Gitmo to discuss some of the things that he was going through. Zane told Mike that his greatest concern was that the Cuban soldiers would point their weapons at the American soldiers, but the Americans were not permitted to point back or respond in any way. Zane developed anxiety over the constant threat of being shot, having to stay on guard all the time, and felt completely helpless. Decl. of R. Floyd at 85, ¶5. Zane also told his father about seeing people blown up on the mine fields and other traumatic experiences.

Zane also called his cousin Steven while the two were both serving in the military (Steven was in the Navy). Zane told Steven about his traumatic experiences in Gitmo including seeing people blown up in the mine fields. Even though the two were talking by phone, Steven could tell that Zane was deeply impacted by his experiences there.

Mental health problems and drinking at Gitmo.

Drinking, depression, PTSD, and suicide were problems for those serving our country at Gitmo.

There was a lot of drinking mainly because there was little to do when not on patrol. And drinking also took the edge off the stress troops were experiencing. It was not uncommon for Marines at Gitmo to drink the entire weekend until Monday rolled around. As Rollenhagen admits, "it was not the healthiest pastime but there was not much else to do to relieve the tension." Decl. of S. Rollenhagen at 156, ¶13.

There were also PTSD issues among the troops. This led to alcoholism, as well as depression and suicides. Decl. of R. Salasko at 153, ¶15.

There was no extra mental health screening before troops were assigned to Gitmo. The military was so desperate for troops at the time that there was a rush to get men on the ground. Decl. of R. Salasko at 153, ¶16. There were no mental health resources in Gitmo other than a base Chaplain. In the event of a suicide, a counselor would be flown in. Decl. of R. Salasko at 153-54, ¶17.

Floyd receives accommodations and medals while serving his country.

At the conclusion of his tour of duty at Gitmo, Captain Salasko composed a "Letter to Gaining Command" introducing each Marine who served under him to their new commander. Salasko wrote such a letter on behalf of Zane. The letter stated the following:

> Zane had served in a real-world screening and recognizant operations against the First Cuban Frontier Brigade; Zane had demonstrated astute proficiency and meticulous attention to detail in the rules of engagement application and the employment of deadly force; Zane had personally conducted over 120 live patrols against an adversarial force armed with small arms and anti-personnel mines, and that he personally led over forty real world patrols with fifty percent of his squad under one year of service; Zane was responsible for patrol preparation, patrol execution, and

> the recommendation of future operations; and that Zane was in a compound filled with 40,000 Haitian and Cuban refugees who were seeking US asylum and had expertise in riot control.

Decl. or R. Salasko at 154, ¶19.

During his service as a Marine, Zane was awarded the following decorations, medals, badges, citations, and campaign ribbons:

1. **National Defense Services Medal**

The National Defense Service Medal is a service award of the United States Armed Forces established by President Dwight D. Eisenhower in 1953. It is awarded to every member of the US Armed Forces who has served during any one of four specified periods of armed conflict or national emergency from 1950 to the present.

2. **Joint Meritorious Unit Commendation**

Authorized by the Secretary of Defense on June 10, 1981, this award was originally called the Department of Defense Meritorious Unit Award. It is awarded in the name of the Secretary of Defense to joint activities for meritorious achievement or service, superior to that which is normally expected, for actions in the following situations: combat with an armed enemy of the United States, a declared national emergency, or under extraordinary circumstances that involve national interests.

3. **Humanitarian Service Medal**

The Humanitarian Service Medal (HSM) is a military service medal of the United States Armed Forces which was created on January 19, 1977 by President Gerald Ford. The medal may be awarded to any member of the United States military who distinguishes himself or herself by meritorious participation in specified military acts or operations of a humanitarian nature.

4. **Overseas Ribbon**

 An Overseas Service Ribbon is a service military award of the United States military which recognizes those service members who have performed military tours outside the borders of the United States of America.

5. **Coast Guard Meritorious Unit Commendation**

 The Meritorious Unit Commendation is awarded to units for exceptionally meritorious conduct in performance of outstanding service for at least six continuous months during the period of military operations against an armed enemy occurring on or after 1 January 1944.

6. **Meritorious Unit Commendation**

 The Meritorious Unit Commendation (MUC; pronounced muck) is a mid-level unit award of the United States Armed Forces. The U.S. Marine Corps awards Navy MUC for valorous or meritorious achievement or service in combat or non-combat.

7. **Good Conduct Medal**

 The Good Conduct Medal is one of the oldest military awards of the United States Armed Forces. The Marine Corps Good Conduct Medal was established on 20 July 1896. Members of the Marine Corps must have three consecutive years of honorable and faithful service to be eligible for the medal.

8. **<u>Rifle Marksman Badge</u>**

A marksmanship badge is a U.S. military badge or a civilian badge which is awarded to personnel upon successful completion of a weapons qualification course (known as marksmanship qualification badges) or high achievement in an official marksmanship competition (known as marksmanship competition badges). The U.S. Army and the U.S. Marine Corps are the only military services that award marksmanship qualification badges.

(Zane's father threw away his medals and accommodations. The photograph above is a recreation of Zane's actual awards.)

Zane's alcohol use in the military.

With the exception of two alcohol-related incidents, Zane's service in the Marines was exemplary.

The first alcohol-related incident occurred in June 1996, while Zane was stationed at Gitmo and involved drinking while on duty. From his military records, it appeared Zane was drinking in the barracks, which was considered "on duty," but at the time it occurred, Zane was "off duty." Other marines in the barracks were also drinking, including higher ranking Marines. Yet Zane, then a mere Private, was the only one reported for the offense. Report of Dr. Castro at 7-8. Zane did not implicate anyone else in this drinking incident and alone accepted his punishment. This behavior is in keeping with military culture of not "ratting out" a fellow Marine. There does not appear to be any other adverse actions taken against Zane for this incident, and Zane completed the remainder of his tour at Gitmo without incident. Report of Dr. Castro at 8.

Ideally, Zane should have received alcohol counseling and treatment for his drinking problem while stationed at Gitmo. Most likely, though, the Marine Corps simply did not take seriously incidents like drinking in the barracks. Report of Dr. Castro at 8-9. A tour of duty at Gitmo was stressful and leadership at Gitmo might have simply permitted Marines, like Zane, to use alcohol as a means to cope and destress from their duties, while ignoring the short- and long-term behavioral health consequences. It is also possible there was no alcohol treatment program at Gitmo at that time.

Less than a year later, in May 1997 while stationed at Camp Pendleton as a firearms instructor, Zane received a second write-up for alcohol use, this time for driving under the influence (DUI). This incident led to Zane participating in a 12-week alcohol use treatment program. However, due to

this second alcohol-related incident, Zane was told by his commanding officer that he would not be approved to re-enlist. Just a year after this incident, Zane left the military with an honorable discharge on July 4, 1998, and returned to Las Vegas. Report of Dr. Castro at 8.

Alcohol use in the Marines is a serious problem. Zane's use of alcohol as a means to alleviate stress and boredom is typical. Many Marines are no doubt high functioning alcoholics, yet alcohol use tends to be tolerated, as long as it does not lead to serious incidents. Zane should have received help for his alcohol problem, and the absence of such was a failure in military leadership. Report of Dr. Castro at 9-10.

The lack of transition resources for Marines separating from military service.

Marines with emotional and psychological struggles were not provided re-entry resources to transition back to civilian life. And those who reenlisted were often sent to their next assignment without being provided a chance to decompress or process the traumatic experiences they endured at Gitmo. Decl. of R. Salasko at 154, ¶18. Zane was one of those Marines who would have benefited from re-entry resources.

Transitioning from the military to civilian life is difficult. Three quarters of all service members leaving the military are faced with numerous challenges not faced before, like locating a place to live and finding a job. And with respect to employment, veterans struggle to find a job that provides them with the same pay and benefits that the military provided them. Veterans also have to start paying for things that were provided to them in the military like food, utilities, and medical and dental care. Most veterans have little life experience living in a civilian world, especially if they joined

the military while still living with their parents, as was the case with Zane. Report of Dr. Castro at 10.

When Zane returned to civilian life, he could not find a good paying job and eventually had to move back in with his parents. Zane saw himself as a failure for losing the prestige associated with being a Marine and for having to struggle working odd low-paying jobs. Decl. of J. Hall at 89, ¶18; Decl. of A. Hall at 86, ¶5; Report of Dr. Castro at 13.

While there are many jobs in the military that translate to civilian jobs, Zane did not have one of those jobs. He was a weapons specialist trainer and there are not many jobs in the civilian world for weapons specialist trainers, especially for someone who was relatively junior and at such a low rank. Report of Dr. Castro report at 12.

In the 1990s, the only program in place to assist military personnel transitioning from active duty back to civilian life was the Transition Assistance Program (TAP). This program assisted retiring service members find meaningful and well-paid employment and required a comprehensive physical and mental health examination before separation. However, at the time Zane separated from the military, most units would not permit Marines to attend these courses as the military wanted servicemembers to work up until the last day before they separated. The culture during that time was to get every last bit of work out of those leaving the military. In some sense, the Marines were being "punished" for leaving the military, and attending TAP classes was considered "shaming." Like so many of his fellow Marines, Zane did not have the advantage of the TAP program. Report of Dr. Castro at 11.

Many veterans also leave the military with significant physical and psychological issues that have not be diagnosed or treated. Zane experienced this challenge as well. Report of Dr. Castro at 13.

The Marine Corps is also a hypermasculine, combat focused branch of the military. Marines pride themselves on being the Nation's rapid reaction force. Junior enlisted service members, like Zane, have the most difficult time transitioning back to civilian life. These service members whose military occupation was combat arms, such as Zane's, also have greater difficulty transitioning back to their civilian communities. Report of Dr. Castro at 14.

Today, veterans enjoy many more benefits and have many more programs to access when they leave the military than were available to Zane's generation of veterans. First, since the wars in Iraq and Afghanistan, all separating service members must attend TAP. And second, the federal, state, and local governments provide much more support for veterans, especially in the employment area. There are also hundreds of non-profit agencies that are specifically focused on helping veterans transition back to their communities. Report of Dr. Castro at 11, 13.

Zane's rocky reentry back to civilian life and downward spiral.

Everyone who knew Zane saw a marked difference in his personality and behavior when he came home from the Marines. People described him as a different person who clearly had been negatively impacted by his service.

When he returned to civilian life, Zane seemed lost; he could not figure out who he was or what he wanted to do. And while Zane did well in the structured environment of the military, he was lost when he was left to his own devices in his new civilian role. Mike Floyd noticed that Zane had no direction. Mike also noted that Zane kept to himself and was less outgoing when he got home.

Zane's best friend Jay realized that Zane's entire personality had changed. Zane was unhappy, more introverted, and lacked his normal joking

humor. His overall demeanor was somber and serious. Zane also seemed less joyful and was not the bubbly person that he was prior to his military service. Decl. of J. Hall at 89, ¶17. Jay's sister Aubra saw similar problems. Decl. of A. Hall at 86, ¶4.

Zane spoke to Jay about his experiences at Gitmo. Zane told Jay about seeing people being blown up in the mine fields. Decl. of J. Hall at 89, ¶13. Zane also spoke about a bayonetting of a Cuban civilian who ran up to Zane's company in a threatening manner. Decl. of J. Hall at 89, ¶14.

Zane also spoke to Jay about how the Cuban and Haitian refugees were trying to flee their desperate circumstances, but Zane and his fellow troops had to round them up into detention camps. Zane wanted to help the refugees but felt completely powerless to do so. Decl. of J. Hall at 89, ¶15.

Carolyn Smith, Zane's "godmother," is a Clinical Social Worker by profession and has a foundational knowledge of mental health assessments. She also noticed an overall change in Zane's demeanor and emotional affect. Prior to his military service Zane was always laughing, smiling, and displaying a joyful spirit. But when he came home it seemed like the joy was gone. He no longer laughed or smiled, and he was much more serious. Decl. of C. Smith at 241, ¶14. It was clear to Carolyn that Zane needed counseling to help him transition back to civilian life. Instead, he was left on his own to figure things out. Carolyn was very concerned about his wellbeing. Decl. of C. Smith at 241, ¶16.

Zane's cousin Cole and Aunt Sue noted that Zane returned from the military more aggressive. Decl. of C. Hodson at 2, ¶13; Decl. of K. Hodson at 4, ¶12.

Zane also seemed distracted and had a habit of silently sitting and staring off into the distance. When Carolyn asked Zane what he was thinking

about, Zane would talk about his military service including the stress he felt during his time at Gitmo. Decl. of C. Smith at 241, ¶15. Zane also told Cole and Sue Hodson about the things he saw and did while at Gitmo. Decl. of K. Hodson at 4, ¶12; Decl. of C. Hodson at 2, ¶13.

When Zane spoke about his military experiences, Carolyn saw that he had a strange look on his face as if he was transported back in time and reliving the experiences. Decl. of C. Smith at 241, ¶16.

Zane talked with Mike Hall about some of the bad things he experienced while stationed in Gitmo. Mike, who was a retired Marine, realized that Zane had been negatively impacted by what he experienced. Decl. of M. Hall at 97, ¶8. Zane also told his mother about the negative things he saw at Gitmo. Decl. of R. Floyd at 85, ¶5.

Cole and Sue Hodson remember Zane's first Thanksgiving home from military service. Zane did not seem comfortable at the gathering. Zane left early to avoid being around people. Zane said something to the effect that no one wanted him around anyway. Decl. of K. Hodson at 4, ¶12; Decl. of C. Hodson at 2, ¶13.

Many of those around him noticed that Zane would speak for hours about weapons training. Zane also talked a lot about how guns worked and fired. Before the military Zane was not fixated on weaponry. Decl. of C. Smith at 241, ¶¶15-16; Decl. of K. Hodson at 4, ¶12; Decl. of C. Hodson at 2, ¶13; Decl. of J. Hall at 89, ¶19; Decl. of A. Hall at 86, ¶6. As becoming a U.S. Marine was Zane's greatest accomplishment, it appeared he had nothing else to talk about.

Tragically, Zane's first several months after leaving the military were not that unusual. Serving in the military provides a job in which there is real meaning. The mission of the military is viewed by society as honorable and

worthy, and Zane was extremely proud to be a Marine. Report of Dr. Castro at 12.

The day of the incident.

On the morning of the shooting, Zane ingested methamphetamine and experienced a methamphetamine-induced psychosis (MIP). Report of Dr. Castro at 14.

The most common features of MIP include flat affect, impulsivity, and dissociation, which may be accompanied by violent behavior. An individual undergoing a MIP episode can be highly suicidal. Report of Dr. Castro at 15. During a MIP, the individual is not in control and does not perceive what is happening as real. MIP episodes may occur long after the drug use ceases yet recur with re-exposure or repeated stressful life events. Report of Dr. Castro at 15, 18.

While typically psychotic breaks and the associated dissociative state are accompanied by significant physical incapacitation, here Zane was able to perform numerous highly complex and coordinated actions which he was able to do based upon his Marine training and experiences. Report of Dr. Castro at 18.

Training in the Marine Corps consists of learning a task by performing a series of actions in a specific order over and over until performing that task becomes automatic. It is very common for Marines who were engaged in combat to describe their subsequent behavior where they returned fire, maneuvered on the battlefield, and killed numerous insurgents as "going on autopilot." These Marines while in combat were clinically in a "dissociative" state; they were doing what they were trained to do. And often they do not remember all the actions they performed.

For Zane, the entire episode can be accounted for by the training that he underwent while a Marine. Getting dressed in the military gear, the camouflaging of his shotgun with the bathrobe, the route he took to the grocery store, the loading and firing of the shot gun, his movements through the store, and acquiring "targets" were all acts that would have been second nature to Zane based on his military training. These acts were likely performed while he was "on autopilot," while experiencing a MIP. Report of Dr. Castro at 19.

It is doubtful that Zane will ever be able to fully recount what happened given his mental state at the time. Nevertheless, all the available evidence indicates that Mr. Floyd was in a methamphetamine-induced psychotic state. Report of Dr. Castro at 21.

Suicide by proxy.

Suicidal thoughts are heightened during MIP and Zane possessed numerous risk factors for dying by suicide: he lost his job, he lost all his money gambling at blackjack, his girlfriend broke up with him, and he was forced to move back in with his parents because he couldn't pay his rent. To Zane, his prospects and future were bleak, and he viewed himself as a "loser." Zane was actively suicidal. Report of Dr. Castro at 20.

After the incident.

After the shooting, Zane was still experiencing a MIP. Report of Dr. Castro at 14. Almost everyone who saw the news the morning of the shooting did not recognize Zane.

When Carolyn Smith saw the news coverage, she had a difficult time recognizing Zane. He had an empty look on his face that Carolyn had never

seen before. It was clear to her that Zane was not in his right mind. Decl. of C. Smith at 241, ¶18.

Jay and Aubra saw the news footage of Zane being arrested and thought that Zane did not look like himself. He had a distant and empty expression on his face like he was not there. Jay and Aubra had never seen Zane in that state in all the years they had known each another. Decl. of J. Hall at 88, ¶20; Decl. of A. Hall at 86, ¶9. Jay and Aubra were shocked by the crime because it was completely out of character for Zane. Zane had led a life free of violence and criminality. Decl. of J. Hall at 90, ¶21; Decl. of A. Hall at 87, ¶10.

Jay's mother Tracey also watched the news coverage and thought that Zane was unrecognizable. Tracey only knew it was Zane because his name appeared on the screen. She had to look at the news coverage for a while before she was able to tell it was Zane. His face looked distant and empty. It was clear to Tracey that Zane was not all there. Decl. of T. Delagardelle at 91, ¶8.

Zane's father was completely shocked by the incident because never in a million years could he have imagined Zane being capable of doing this act. Zane's Uncle Randy agreed. The shooting was completely out of character for the Zane he knew. Zane was a kind and gentle person, not a killer. Randy believed that Zane must have been out of his mind at the time. Decl. of R. Floyd at 85, ¶6.

Zane's cousin Cole also believed the incident was out of character for Zane and believed that drug use must have been involved. Decl. of C. Hodson at 2, ¶15.

Coach Eoff heard about the shootings and turned on the television. He did not recognize Zane as the boy he had coached. Decl. of M. Eoff at 99, ¶8.

Mike Floyd, Ted King, and Carolyn Smith remember Zane's closet after he was arrested. The only outfits Zane kept in his closet after returning from the Marines were his military uniforms. Each uniform had been meticulously pressed and equally spaced on hangers as if he measured them. It was clear Zane was still stuck in a military mindset. This clearly was not normal behavior. Decl. of C. Smith at 241, ¶17.

(This photo has been recreated)

Post-arrest statements.

Zane's post-arrest statements can best be described as confused. He was constantly searching for answers as to why he shot the people in the grocery store. Zane repeatedly said, "I don't know why!," when asked by the police, "Why did you do it?" When listening to his post-arrest statements, the tone and pitch of Zane's voice and speech presents as if he is still in a

psychotic state: his speech is slurred, almost as if he is out of breath. Report of Dr. Castro at 20.

At one point Zane said, "I am thinking what's it going to be like to shoot somebody?" However, this is not a declarative answer to the question, "Why did you do it?" Nor is it a definitive statement of his motivation. It is a searching question that he is asking of himself and is not meant to avoid responsibility but to understand himself. Report of Dr. Castro at 20-21.

The only definitive statement that Zane made involves the uncertainty about his own mental sanity, "I don't know what's wrong with me!" This was a cry for help, a statement of desperation. Report of Dr. Castro at 20.

Other considerations deserving of the Board's consideration in favor of commutation: FASD, Intellectual Disability (ID), and Juvenile Brain Development.

Zane suffers from neurodevelopmental disorder associated with prenatal alcohol exposure (ND-PAE/FASD).

As mentioned earlier, Zane meets the diagnostic criteria under the DSM-5 for the CNS impairment in FASD. Report of Dr. Brown at 119-21. First, Zane's mother has a well-documented history of drinking while pregnant. Report of Dr. Brown at 119. Second, psychological testing from 1989, 2000, and 2006 demonstrate that Zane suffers from neurocognitive impairments including intellectual deficiencies, memory deficits, and academic learning disabilities. Report of Dr. Brown at 113-20. Third, Zane suffers from impairments in three areas of self-regulation: attention, impulse control, and problem solving. Report of Dr. Brown at 119-20. And fourth, Zane suffers from adaptive impairments in four areas: communication, daily

living skills, socialization, and motor coordination. Report of Dr. Brown at 110-13, 119-20.

Further, Zane's FASD is long standing from infancy, and his FASD causes clinically significant distress or impairment in social, occupational, or other important areas of functioning. Report of Dr. Brown at 119-20.

Zane also suffers from secondary disabilities from his FASD. According to studies, children with FASD are at a very high risk of negative developmental outcomes. Report of Dr. Brown at 116-18. In Zane's case, the secondary disabilities include disrupted education, mental health problems, substance abuse, employment problems, and dependent living. *Id.*

FASD is Intellectual Disability (ID) Equivalent from the perspective of Zane's moral culpability.

FASD and Intellectual Disability (ID)[4] are both classified by the 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. Report of Dr. Brown at 120-21.

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

[4] Intellectual disability was formerly referred to as mental retardation.

function deficits; deficits that significantly interfere with functioning; and deficits that constitute a lifelong disorder. Report of Dr. Brown at 122-26.

The adaptive functioning component is a more stringent requirement for FASD (impairments in two categories) while ID only requires one impaired adaptive domain. *Id.*

FASD impairs nineteen domains of functional capacity while ID impairs twenty-one. Both are similar in terms of widespread functional deficiency in both cognition and adaptive functioning in the community. Report of Dr. Brown at 122-26.

Another way of comparing the two diagnoses 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. Report of Dr. Brown at 122-26. 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." Report of Dr. Brown at 127.

Both ID and FASD stem from permanent structural brain damage. Report of Dr. Brown at 127. 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 identify 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 with Zane, which makes full scale IQ an inaccurate way to classify functional deficiency in FASD. Report of Dr. Brown at 113-15, 127. 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. Report of Dr. Brown at 128.

Of particular interest is that FASD is the leading cause of ID and is misdiagnosed or undiagnosed more than ID. Report of Dr. Brown at 129. 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. Report of Dr. Brown at 129. 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.*

Zane's death sentence should be commuted to life without parole.

Zane Floyd's FASD is similar to ID with broad ramifications that have affected all important functional domains in his life. Report of Dr. Brown at 130-31. The litany of deficits suffered by Zane are akin to those identified by the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 318, 320–21 (2002), and require his exclusion from the class of persons that demonstrate a sufficient level of culpability to be executed.

Thus, like the categorical exclusion of an individual with ID to capital punishment, *Atkins*, 536 U.S. at 320–21, here, Floyd's FASD too should make him ineligible for the death penalty.

Due to Zane's pre-existing FASD and PTSD, he suffered psychological injury while serving in the military.

As discussed, FASD can result in significant and life-long changes in individuals. Without question additional traumatic experiences associated with military service can exacerbate the effects of pre-existing FASD and PTSD. Report of Dr. Castro at 6.

And while the military is a highly structured environment, one in which Zane was able to function, he most likely suffered from a phenomenon called "suffering while functioning." This is highly prevalent within the military due to the mental health stigma which exists that impedes Marines from seeking and receiving the mental and behavioral health care services needed. Report of Dr. Castro at 6.

Zane should be granted clemency 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.

The reasoning in *Roper* should be extended to Zane, who committed the offense at age twenty-three. Although *Roper* drew a cut-off at age eighteen, the rationale of *Roper* extends to individuals like Zane at 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." *Roper*, 543 U.S. at 574. This reasoning is particularly applicable to individuals like Zane whose cognitive functioning is actually below that of their chronological age. Report of Dr. Brown at 136.

Moreover, people with FASD exhibit abnormal and delayed brain maturation across the developmental years. Report of Dr. Brown at 134. Studies have found 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 have significantly impaired: global network efficiency, speed of information processing, and executive self-regulation. *Id.*

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 Zane'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 with which he was born. Report of Dr. Brown at 136.

Zane has always been remorseful for his actions.

Since his arrest, Zane has always taken responsibility for his actions and has been remorseful.

Mike Floyd saw Zane soon after his arrest. Zane had a difficult time remembering the events but was very remorseful. Zane also became withdrawn following the shootings.

Jay's mother, Tracey, and her daughter Aubra also went to see Zane soon after his arrest. At first Zane was not coherent. It took about a week before he seemed more like himself. But Zane took responsibility for his actions and was very remorseful from the start. Decl. of T. Delagardelle at 91, ¶9; Decl. of A. Hall at 87, ¶11; Decl. of J. Hall at 90, ¶22.

Carolyn Smith also visited with Zane after his arrest. While Zane did not have much memory of his actions and could not explain what was going through his mind at the time, he was deeply remorseful, ashamed, and horrified by his actions. Zane took responsibility and felt terrible for the harm he caused the victims and their families. Decl. of C. Smith at 241, ¶18.

Zane Floyd is deserving of commutation of his death sentence by the Board.

Zane Floyd committed an unspeakable act and took the lives of innocent people while severely injuring others. Impaired by his FASD, and indoctrinated by his father and grandfather that alcohol, weapons, and heroism were indispensable to male life, Zane transformed his military training and experiences into binge drinking, target practice, and weapons cleaning and disassembling. On the morning of the Albertson's shooting, Zane replayed this routine to a tragic end.

But Zane is not the "worst of the worst."[5] Nor is he "evil" or a "natural born killer." Rather, he is a person who was born with—and is still suffering from—pre-natal exposure to alcohol, which caused brain damage which has affected his entire life trajectory. Further, his traumatic upbringing led to PTSD, which became worse during his service to the country while an enlisted Marine.

Zane also abused drugs and alcohol. This addiction was caused by a psychological need to self-medicate to deal with the stressors in his life. His addiction was also a result of a genetic predisposition to addiction caused by a history of familial abuse and by his FASD.

[5] The United States Supreme Court has recognized that the death penalty is reserved for those defendants who are "the worst of the worst." *Kansas v. Marsh*, 548 U.S. 163, 206 (2006).

Importantly, Zane did not choose any of these insults, nor did he have control over them. Instead, he was born with these issues, due to no fault of his own.

Zane Floyd has many positive traits, as discussed above. Other than this one senseless act, Zane is known to those who love him as a gentle, loving, and kind person who would do anything for anyone. Further, Zane served his country in the Marines, the toughest branch of the military, and was awarded a multitude of awards and medals for that service.

Zane's own father Mike, who has always been a supporter of the death penalty, acknowledges that what Zane did was terrible. But Mike still believes his son's life should be spared, because Zane was not in his right mind at the time of the incident, and he had never been in trouble with the law before (other than a DUI). *See* NRS 200.033(1) (capital offense mitigated by absence of significant criminal history). Also, Zane was not a violent person, nor had he ever been violent before this offense.

Jay Hall's mother Tracey is a very conservative person and has always supported the death penalty. But she too does not believe that Zane should be executed. He was a good kid who did something terrible, but that one act does not define who he was or is as a person. Zane has redeeming qualities and Tracey truly believes that this one incident would not have happened had Zane not been on drugs and not in his right mind. Zane also took responsibility for his actions and showed sincere remorse from the start. Decl. of T. Delagardelle at 92, ¶10. Tracey's daughter echoes similar thoughts about Zane saying that those who know him best understand this his life has so many positive dimensions. Decl. of A. Hall at 87, ¶12.

Zane's cousin, Steven King, is himself a military PTSD survivor and believes that Zane's PTSD is a reason to spare his life. Steven's PTSD stems

from his being deployed to provide humanitarian relief after a great tsunami hit off the Indian Ocean. Steven saw countless dead bodies floating in the ocean. This traumatic experience led to his experiencing nightmares, insomnia, anxiety, and hallucinations. Steven believes that non-combat related PTSD is a larger problem of which most people are not aware. Steven also believes that Zane would not have committed the offense if Zane had received the support he needed for his issues.

Steven describes Zane as a gentle teddy bear who protected people and was never a bully. To Steven, Zane is quintessentially a good person and the incident for which he was convicted does not represent the person he is or was. Steven's entire family loves Zane very much and they all would be negatively impacted by his death.

Zane also does not present a danger to others. He has spent over twenty years in prison and his institutional record has been exemplary. There has never been any suggestion that Zane poses any danger to staff or other inmates while in custody. He is not a threat to the community nor a threat to other prisoners or correctional staff.

Zane has always done well in a structured setting, and even thrives on it, as shown by his military service.

Zane has also learned to control his behavioral issues and by maturation, has aged out of others.

Zane has also been properly diagnosed and he understands his illness and how to adapt to his current setting. While serving a life sentence without the possibility of parole is a harsh consequence for his acts, prison is the best place for Zane Floyd. There is no need to execute him.

The Pardons Board should commute Zane Floyd's death sentence as all of the factors militating in favor of granting clemency are present in his case.

This Board is authorized to commute Zane Floyd's death sentences to sentences of life imprisonment without possibility of parole, under state law. In pertinent part, the Nevada Constitution provides that:

> The State Board of Pardons Commissioners may, upon such conditions and with such limitations and restrictions as they may think proper, remit fines and forfeitures, commute punishments . . . and grant pardons, after convictions, in all cases, except treason and impeachments. . . .

Nev. Const. Art. 5 Sect. 14 (1); *see* Nev. Rev. Stat. § 213.080 (commutation of death sentence).

Clemency is "an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts from a crime he has committed." *United States v. Wilson*, 32 U.S. 150, 160 (1833). As an act of grace, it may be, and normally is, bestowed on grounds other than the issue of guilt or innocence of the applicant, or the legality of the procedures by which he or she was convicted. In *Herrera v. Collins*, 506 U.S. 390 (1993), Chief Justice Rehnquist noted that "[c]lemency is deeply rooted in our Anglo-American tradition of law and is an historic remedy for preventing miscarriages of justice where the judicial process has been exhausted." *Herrera,* at 411-12. In the same opinion, the Chief Justice noted that clemency is "the fail-safe" in our criminal justice process. *Id.* at 415.

The clemency power is a "broad discretionary power to temper retribution with mercy, to correct error and to do justice where the rigorous inflexibility of the judicial system has not adjusted to compelling social

needs." Caleb Foote, *Pardon Policy in a Modern State*, 39 Prison J. 3 (April, 1959). Clemency has also been described as "society's last chance to be sure that the person sentenced to death is one truly deserving of the death penalty because there may be new evidence mitigating the crime or factors pointing away from the guilt of the defendant." George Kostolampros, *Article 905.2 (B) and State v. Loyd: Introducing an Unnecessary Consideration in the Imposition of the Death Penalty by Informing the Jury of the Governor's Power to Grant Clemency*, 8 Widener J. Pub. L. 149, 159 (1998).

> What becomes evident from a brief review of the executive's power to grant clemency is that it is a power deeply rooted in our American tradition of separation of powers. The executive's decision in granting clemency is an act of grace, but it is an act of grace that is political in nature. Therefore, the executive's power to grant clemency is quite different than an acquittal by a jury because the executive's decision is based on factors that the jury cannot consider.

Id. at 158-59.

The United States Supreme Court has also recognized that fundamental considerations of due process are inherent in the clemency process. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 280-81 (1998) (recognizing that "the heart of executive clemency" is to "grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations."); *see Wilson v. United States District Court*, 161 F.3d 1185, 1187 (9th Cir. 1998).

This Board must consider all the factors presented in this application and the accompanying exhibits. The Board should look beyond the fact of the conviction and sentence and recognize that, in conscience and mercy, Zane

Floyd's death sentence should be commuted to life without the possibility of parole.

Dated this 27th day of May, 2021.

Respectfully submitted,

RENE VALLADARES
Federal Public Defender
For the District of Nevada

Brad D. Levenson
_____
Brad D. Levenson
Assistant Federal Public Defender

Attorneys for Applicant

ZANE FLOYD
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For Commutation of Sentence

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Declaration of Cole Calloway-Hodson

I, Cole Calloway-Hodson, hereby declare as follows:

1. My name is Cole Calloway-Hodson. I am thirty-nine years old and currently reside in Randolph County, Missouri. My mother is Kathleen Susan Hodson ("Susan"). Susan was the sister of Valerie Floyd, Zane Floyd's mother. Valerie passed away in 2005.

2. I am the Pastor of the Redeemer Church of Moberly, in Moberly, MO.

3. Zane is six years older than me, but we grew up together. Zane used to stay with me and my Colorado family during summers and holidays, and I would stay with Zane and his parents, Valerie and Mike, on other occasions. My mother and I also lived in Las Vegas for a year and stayed with Zane's family in their guest house on Oakey.

4. Zane was socially awkward and did not have many friends. Zane also lacked self-confidence which might have been connected to his learning disability. Zane was a good-hearted person who was wonderfully kind, even to people he did not know.

5. Zane was good to me and was very protective. Zane did not allow anyone in the neighborhood to pick on or bully me.

6. Zane was constantly with his best friend, Jay Hall. There were a couple of other friends that cycled through with Zane, but not more than three or four. I found Zane's friends to be as socially awkward as Zane. I also believe the Zane kept his circle of friends small so as to protect himself.

7. Zane desperately sought approval from friends and family but never seemed to achieve this goal.

8. It was apparent to me that Mike and Zane loved one another and had a real father-son relationship. But Mike could not give Zane the type of love and encouragement that Zane so desperately needed.. When Mike yelled at Zane, Zane often trembled and visually shrank. It seemed like Zane never lived up to Mike's expectations.

9. Mike did not recognize that Zane was a child with special needs. Instead he acted as if he could "tough" Zane into shape.

10. I recall riding in Mike's car with Zane one hot summer day. Mike did not like to run the car air conditioner nor did he like rolling down the windows. When I reached over to roll down my window to get some fresh air, Zane placed his hand on my arm and nervously pleaded with me not do it saying "it would be bad." Zane looked terrified and I did not know why until Zane rolled down his window by mistake one day. Mike yelled loudly and Zane was scared. I then understood why Zane was so fearful.

11. Zane deeply admired our grandfather, Wayne Cool Hodson, and sought his approval, but our grandfather never showed Zane much attention or respect. I was our grandfather's favorite and Zane sometimes mentioned this to me in an envious manner, but he never mistreated or blamed me for the circumstances. Zane was more hurt than anything else.

12. Zane tried to prove to himself and others that he was "man enough" but he often fell short of expectations. I believe that Zane's desire to prove his "manliness" was part of his motivation to join the marines. I also believe he might have joined the marines to reinvent himself.

13. I noticed a big change in Zane's personality when he came home from the Marines. He was more assertive and talked a lot about guns and the things he saw and did while in Guantanamo Bay, Cuba. I recall Zane's first Thanksgiving shortly after he returned home in the months leading up to the incident. Zane did not seem comfortable at the gathering. We knew that Zane could not reenlist and our grandfather, a decorated military veteran, spoke in a way that was critical of Zane. Zane still sought our grandfather's approval, but it was obvious that our grandfather was disappointed in Zane. Zane left the gathering early to avoid being around everyone. Zane said something to the effect that no one wanted him around anyway.

14. I believe one of the reoccurring problems in Zane's perception of how others saw and treated him was that he believed people frequently questioned his manhood and his sexuality. This included his father Mike, his grandfather, neighborhood kids, and his classmates at school. I suspected that Zane may have been gay, but this was never something that I could bring up in a conversation because I did not want to make him upset.

15. I believe that Zane's drug abuse was a major factor in the incident because he would never had done such acts had he been in his right mind. It just was not in Zane's character.

16. Valerie was Zane's champion. It seemed like she was the only one in the world who loved him unconditionally. This is the reason that he was so devastated when she passed away.

17. I was with Mike at Ely State Prison when Mike broke the news to Zane that his mother had passed. Zane tried to maintain his composure around the other inmates, but he completely lost it when he was told his mother died. Zane was inconsolable.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on May 3, 2021 in Moberly, Missouri.

Cole Calloway-Hodson

Declaration of Kathleen Susan "Sue" Hodson

I, Kathleen Susan Hodson, hereby declare as follows:

1. My name is Kathleen Susan Hodson. I am sixty-seven years old and currently reside in Randolph County, Missouri. My sister was Valerie Floyd, Zane Floyd's mother. Valerie passed away in 2005.

2. I was eight years younger than Valerie. As far as I can remember, Valerie had a troubled relationship with our parents. She was sent away to finish high school in Arizona because she was sneaking out with a boy my father didn't approve of.

3. Valerie left home when I was 8. After high school and a short stint in college, she moved to Long Beach, California to live with our aunt (fathers sister). Eventually she got hooked on heroin and started roaming the streets. Our family did not know what happened to Valerie until they received a call from authorities in California informing us that Valerie had become a homeless drug addict and experienced a mental breakdown. Our parents paid for Valerie's flight home. When she arrived back in Colorado, her hair was a mess, her clothes were disheveled, her hygiene was poor, and she had traveled all the way from California with only one shoe on her feet. Valerie was admitted to a psychiatric hospital and underwent electroshock therapy. Valerie deeply resented our parents' decision to permit electroshock therapy. Valerie left home again when I was 14 and moved to Alaska where she met Jim Cobis, Zane's biological father.

4. I believe that Valerie abused drugs while she was pregnant with her first child, Francisco Cobis. Francisco died a crib death before he was a year old.

5. Valerie returned home to Colorado when she was a few months pregnant with Zane. During her pregnancy with Zane, Valerie abused alcohol not less than five days out of seven usually until she became intoxicated. She also smoked marijuana several times a week and smoked cigarettes daily. I would not be surprised if Valerie was also using cocaine and other harder substances during her pregnancy because they were easy to come by and she struggled with addictions to these substances prior to her pregnancy.

6. Valerie sought the approval of the men in her life. Valerie also did not believe that Zane should be raised without a father. For these reasons Valerie married a mechanic when Zane was either two or three years old. When her new husband started to abuse her, Valerie fled. The marriage lasted only about six weeks.

7. Zane desperately sought approval from friends and family but never seemed to achieve this goal.

8. Mike and Zane loved one another and had a real father-son relationship. However,

Mike was extremely hard on Zane and sometimes emotionally and physically abused him. When Mike yelled at Zane, Zane often trembled and visually shrank. It seemed like Zane never lived up to Mike's expectations. Mike also did not recognize that Zane was a child with special needs.

9. I remember a time when Zane was about 5, the Floyds came to visit us in Colorado. Mike, Valerie, and Zane were eating dinner one night when I walked in. Mike was yelling at Zane about something and Zane was visibly shaking and unable to eat. It was clear Zane was terrified of Mike.

10. Zane deeply admired his grandfather, Wayne Cool Hodson, and sought his approval, but his grandfather never showed Zane much attention or respect. Cole was their grandfather's favorite and Zane sometimes mentioned this to Cole, but he never mistreated or blamed Cole for the circumstances. Zane was more hurt than anything else.

11. When Zane turned sixteen, he had a birthday party and invited some peers over to the house. Mike ended up serving all the kids alcohol, even though they were underage. When the parents arrived to take their children home, they found their kids intoxicated. Many of the parents did not let their children socialize again with Zane.

12. I noticed a big change in Zane's personality when he came home from the Marines. He was more assertive and talked a lot about guns and the things he saw and did while in Guantanamo Bay, Cuba. I recall Zane's first Thanksgiving shortly after he returned home. Zane did not seem comfortable at the gathering. We knew that Zane could not reenlist due to his drinking problems and Zane's grandfather, a decorated military veteran, spoke in a way that was critical of Zane. Zane still sought his grandfather's approval, but it was obvious that the grandfather was disappointed in Zane. Zane left the gathering early to avoid being around everyone. Zane said something to the effect that no one wanted him around anyway.

13. After Zane's arrest in 1999, Valerie and I had a falling out. Valerie told me to stay away from Zane. I wanted to help Zane but respected my sister's wishes and ceased contact with Zane.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on May 3, 2021 in Moberly, Missouri.

Kathleen Susan Hodson

REPORT OF DR. CARL ANDREW CASTRO, Ph.D.

I have been asked by current counsel for Zane Floyd, the Office of the Federal Public Defender, District of Nevada, to provide an analysis and insight into Mr. Floyd's military service, his transition to civilian life, his mental state on the day of crimes due to his methamphetamine use, and his state of mind during his post-arrest statements. My findings on these questions are set forth below.

BIOGRAPHY

Dr. Carl Castro is currently Professor and Director of the Military and Veteran Programs at the Suzanne Dworak-Peck School of Social Work at the University of Southern California. Dr. Castro is one of the leading military behavioral theorists in the world. Before joining the University of Southern California, Professor Castro served in the U.S. Army for over 30 years. He began his military career as an infantryman in 1981, and completed two tours in Iraq, as well as serving on peacekeeping missions to Saudi Arabia, Bosnia and Kosovo, retiring at the rank of colonel. While on active duty, he conducted the first-ever behavioral health assessment of service members while they were still conducting active combat operations, setting a new standard of care for service members during combat. Dr. Castro has chaired numerous NATO and international research teams and he is currently Chair of a NATO research group on Military Veteran Transitions and Co-Chair of a team exploring Veteran Radicalization; a Fulbright Scholar; and member of several Department of Defense and Veteran Affairs advisory boards. His current research efforts are broad and include: (a) the exploration of the military culture that leads to acceptance and integration of diverse groups; (b) understanding and ameliorating the effects of military trauma and stress on service members, family, and unit readiness; (c) the prevention of suicides and violence such as sexual assault and bullying within the military; and (d) evaluating the process of transitioning into the military and transitioning from military service back to civilian life.

ANALYSIS

If a person suffers from Fetal Alcohol Spectrum Disorder (FASD) and Post-traumatic Stress Disorder (PTSD) before joining the military, can combat-like and other traumatic military experiences have an exacerbated impact on their mental health?

Fetal Alcohol Spectrum Disorder (FASD) can result in significant and life-long changes in individuals when mothers drink alcohol during pregnancy. These effects often include physical, behavioral, mental and/or learning disabilities. Without question, additional traumatic experiences associated with military service may exacerbate the effects of FASD. Likewise, traumatic events that result in post-traumatic stress disorder (PTSD) prior to joining the military can be exacerbated by other types of traumatic events, including combat-like events that often occur in the military.

The military is a highly structured work environment. Thus, it is possible that a Marine, such as Mr. Floyd, would have been able to not only function in the Marine Corps, but would have been able to do so at a fairly high level, despite his FASD and family and drug use history. This phenomenon has been referred to as "suffering while functioning." It is thought to be highly prevalent within the military due to the mental health stigma that exists that impedes Marines and all service members from seeking and receiving the mental and behavioral health care services they need.

Alcohol Use/Abuse Involving Mr. Floyd

With the exception of two alcohol-related incidents, Mr. Floyd's service in the Marine Corps was exemplary. He successfully completed Marine Corps basic and advanced training. Mr. Floyd received numerous letters of appreciation and accommodation while serving. And he appeared to be well liked. Mr. Floyd also completed a highly stressful, one-year tour of duty in Guantanamo Bay (GITMO). Mr. Floyd received an Honorable discharge from active duty.[1]

Mr. Floyd's military records include two Counseling Statements that he acknowledges receiving by signature that document separate incidences involving the inappropriate use of alcohol. The first instance occurred on July 11, 1996 while Mr. Floyd was stationed at GITMO and involved drinking while on duty. At first glance this is a serious charge. One that could have easily resulted in a Court Martial, with Mr. Floyd spending time in a military jail. That this outcome did not happen indicates that there is more to the story.

From other documents reviewed, Mr. Floyd relays that this incident involved drinking alcohol in the barracks, a location that was considered "on duty." When the incident occurred, Mr. Floyd was off duty. Further, Mr. Floyd states that other Marines were also drinking in the barracks, including higher ranking Marines, one at the rank of sergeant, yet he was the only one reported for the offense. To further the injustice, Mr. Floyd claims that the sergeant who reported him for drinking in

[1] Following his conviction in the instant case, Mr. Floyd was discharged from the Marine Corps Reserve with Under Other than Honorable Conditions.

the barracks was also drinking, and only reported him to cover up for his own misconduct. It should be noted that at the time Mr. Floyd held the rank of Private, the lowest rank.

Mr. Floyd claims not to have implicated anyone else in this drinking incident. He accepted his punishment alone. Such behavior is in keeping with the military culture of not "ratting out" or turning in a fellow Marine. The sergeant who turned in Mr. Floyd violated this ethos. Other than the single Counseling Statement there does not appear to be any other adverse actions taken against Mr. Floyd for this incident. Mr. Floyd successfully completed the remainder of his one-year tour at GITMO without any further disciplinary issues.

Less than a year later (May 25, 1997), while stationed at Camp Pendleton, California, Mr. Floyd received his second Counseling Statement for driving under the influence (DUI). It appears that this incident led to Mr. Floyd participating in a 12-week alcohol use/abuse treatment program. Yet, in the documents provided, it could not be confirmed that Mr. Floyd actually participated in such a program, nor the outcome of his participation if he did participate. It was also during this time that Mr. Floyd's promotion to corporal was denied due to the DUI and that Mr. Floyd was told the Commanding Officer would not approve his request to re-enlist. Just over a year after the second alcohol-related incident, Mr. Floyd left the military on July 4, 1998, returning to Las Vegas.

Ideally, Mr. Floyd should have received alcohol counseling and treatment for his drinking problem while stationed at GITMO. Yet given that an assignment at

GITMO is a one-year tour of duty and given that the event occurred during the middle of Mr. Floyd's tour there, it might have been deemed impractical to begin an alcohol prevention and treatment program at that time. It is also likely that the Marine Corps simply did not take incidents like drinking in the barracks seriously. Other than the single Counseling Statement no other actions were taken. Duty at GITMO during this time was highly stressful. Mr. Floyd reported experiencing numerous highly stressful and traumatic events while stationed at GITMO that were corroborated by his Commanding Officer (Col. (retired) Robert Salasko). The leadership at GITMO might have simply allowed the Marines to use alcohol as a means to cope and "destress" from the duties there, while ignoring the possible short-term and long-term behavioral health consequences, as well as its impact on military readiness. Finally, there simply might not have been an alcohol prevention and treatment program available at GITMO that Mr. Floyd could have participated in. Regardless of the reason, Mr. Floyd should have received help for his alcohol problem. That he did not was a failure in military leadership.

Mr. Floyd readily admitted after his arrest that prior to joining the Marine Corps he was a chronic user of drugs and alcohol, and that he stopped using drugs once he decided to join the Marine Corps. While there is no reason to doubt him regarding the use of drugs, his alcohol use certainly continued, and likely escalated. Alcohol use in the Marine Corps is a serious problem. Mr. Floyd's use of alcohol as means to alleviate stress and boredom is typical. Many Marines are no doubt high

functioning alcoholics, yet alcohol use tends to be tolerated as long as it does not lead to serious incidents like DUIs or domestic and physical violence.

Can you explain what the military did, if anything, in mid to late 1990s to transition military personnel, especially Marines, back into civilian life? Are things different today?

Transitioning out of the military back to the civilian community is difficult. Service members leaving the military are faced with numerous challenges that they have never before faced. Separating service members first must find a place to live and most importantly find a job. Research has found that nearly three-quarters of all service members do not have a job when they leave the military and most separating service members either move back home with their parents or move in with their significant other. Military veterans frequently struggle to find a job that provides them with the same pay and benefits that the military provides them. Military veterans also have to start paying for things that were provided to them by the military such as food, utilities, medical and dental care to name but a few. Most military veterans have little life experiences in living in a civilian world, especially if they join the military while still living at home with their parents.

In the 1990s, the military did have a Transition Assistance Program (TAP), operated by the Department of Labor, to assist military personnel transitioning from active duty military service back to civilian life. The focus of the TAP program then and now was to help the separating service member find meaningful, well paid employment. Another important feature of the TAP in the 1990s and today is that all retiring service members must receive a comprehensive physical and mental

health examination that is placed in the service member's official medical records. These records are then used by the VA to determine medical care eligibility. However, in the 1990s this program was only required for those service members retiring from active duty. Other service members could attend the TAP classes on a voluntary basis. However, very few service members who were not retiring attended TAP classes. Most units would not allow Marines or Soldiers to attend these courses as they wanted Marines and Soldiers leaving the military to work up until the last day before they separated. The culture during this time was to get every last bit of work out of those leaving the military. In some sense one may think of Marines and Soldiers as being "punished" for leaving the military. Attending TAP classes would be considered "shaming."

It has only been since the wars in Iraq and Afghanistan that transition support programs have been expanded to assist **all** separating service members. Today every service member must attend TAP. It should be noted that the TAP exists today only exist because Congress mandated it. The Department of Defense opposed a TAP for all service members when it was first proposed. The active military initially saw little value in helping service members successfully transition back to their civilian communities. Medical and mental health evaluations are still not a requirement of the TAP unless the service member is retiring. Much of this is now changing. However, it has been a slow and difficult process. Unfortunately, Mr. Floyd would not have had access to the services and support that are provided to Marines leaving the military today.

Following his honorable discharge from the military, Mr. Floyd went on a downward spiral: he could not find gainful employment, lacked focus, turned to alcohol and drugs, and had to move back into his parents' home. Based on the lack of transition services he received, is this a typical outcome?

Tragically, Mr. Floyd's path after the military happens far too often. Serving in the military provides a job in which there is real meaning. The mission of the military is viewed by society as honorable and worthy. There is no nation in the world that supports its military like the U.S. By all reports, Mr. Floyds mother and stepfather, who was a retired Navy veteran, were extremely proud of Mr. Floyd serving in the Marine Corps. Mr. Floyd was extremely proud to be a Marine. It appears that Mr. Floyd wanted to re-enlist yet was told that he would not be allowed to do so because of his drinking problem. Overall, one could conclude that except for his alcohol incidents that Mr. Floyd had a fairly successful military career.

It appears that Mr. Floyd had very little time to prepare for this transition back to civilian life. While there are many jobs in the military that translate to civilian jobs, Mr. Floyd did not have one of those jobs. Mr. Floyd was a weapons specialist trainer and there are not many jobs in the civilian world for weapons specialist trainers, especially someone who is relatively junior and at such a low rank.

For many veterans, it is difficult to find a well-paying job in which they derive personal meaning and satisfaction. Initially, veterans will bounce around from one job to another until they find the job that suits them. Often veterans

struggle to relate to their civilian boss, often thinking their civilian boss is an "idiot" or does not understand veterans. Most veterans cannot afford a place of their own when they leave the military and are forced to move back home with their parents because they have no other place to go. Naturally, many veterans see this as taking a step backwards, having to start all over again. It is humbling. Many veterans feel as if they wasted years of their life serving in the military. Many veterans also leave the military with significant physical and psychological issues that have not be diagnosed or treated.

Mr. Floyd experienced nearly all of these transition challenges. Mr. Floyd left the military and struggled to find a job that he liked and one in which he got along with his boss. He held several jobs in a fairly short period of time and was unemployed the morning of the shootings. In fact, he also just moved back with his parents because he could no longer pay his rent. Mr. Floyd never adequately addressed his mental and behavioral health issues. His drinking behavior involving alcohol was a major problem that continued once he left the military. Mr. Floyd also began using drugs again, especially methamphetamine. Although Mr. Floyd was eligible for VA care and services, there is no indication that he knew about the services or attempted to use them.

Today, veterans enjoy many more benefits and have many more programs to access when they leave the military than were available to Mr. Floyd's generation of veterans. The federal, state, and local governments provide much more support for veterans, especially in the employment area. There are also hundreds of non-profit

agencies that are specifically focused on helping veterans transition back to their communities.

What are the special or specific transition concerns related to servicemen leaving the Marine Corps., apart from the other branches of the military?

The Marine Corps is a hypermasculine, combat focused branch of the military. Marines pride themselves on being the Nation's rapid reaction force: ready to go anywhere in the world to engage in combat operations at a moment's notice. It has been demonstrated, for example, that junior enlisted service members, such as Mr. Floyd, have the most difficult time transitioning back to civilian life. Further, those service members whose military occupation was combat arms, such as Mr. Floyd's, also have greater difficulty transitioning back to their civilian communities. This is primarily because the employment options are much more limited for junior-ranking combat Marines and Soldiers. They lack experience and job skills. Today, there are many programs to assist these Marines and Soldiers that simply did not exist when Mr. Floyd left the Marine Corps.

Was Mr. Floyd experiencing a psychotic break before, during, and immediately following the crimes?

The evidence presented at trial is consistent with Mr. Floyd experiencing a methamphetamine-induced psychosis (MIP) episode prior to, during, and after the shootings.

The biological bases for methamphetamine abuse are the highly rewarding effects it produces due to increase dopamine release from the brain involving