IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE MICHAEL FLOYD,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 83436

RESPONDENT'S ANSWERING BRIEF

Appeal From the Denial of a Third Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUE(S)

1. Whether the district court had authority to rule on Floyd's petition for writ of habeas corpus.
2. Whether the district court erred in denying Floyd's claim that he was being denied an opportunity to seek clemency.
3. Whether the district court erred in denying Floyd's claim that he is categorically ineligible for the death penalty.
4. Whether the district court erred in denying his claim that he must be executed at the Nevada State Prison.
5. Whether the district court erred in denying his claim that the verdict forms in his case were incorrect.

STATEMENT OF THE CASE

Appellant Zane Floyd (hereinafter "Floyd") is appealing from the denial of his third petition for writ of habeas corpus. In July of 2000, Floyd was convicted by way of jury trial to 4 counts of Murder With Use Of A Deadly Weapon; 1 count of

Burglary While In Possession Of A Firearm; 1 count of Attempt Murder With Use Of A Deadly Weapon; and 4 counts of Sexual Assault With Use Of A Deadly Weapon. 12 PA 2768. Judge Sobel, who at the time was the presiding judge in Department 5, presided over the trial.

As to the four counts of murder, the jury found beyond a reasonable doubt that there were no mitigating circumstances to outweigh the aggravating circumstances and sentenced Floyd to a punishment of death on each of the counts. A Judgment of Conviction reflecting the entirety of his sentence was filed on September 5, 2000.

Floyd filed a timely direct appeal, but his judgment of conviction was affirmed by this Court in Case No. 36752, filed on March 13, 2002. Remittitur issued on August 15, 2002.

Upon Remittitur being issue from the denial of Floyd's direct appeal, counsel was appointed for Floyd's first petition for writ of habeas corpus (post-conviction). Following briefing by the parties, the district court denied the petition in an order filed on February 4, 2005. Floyd timely appealed the denial of his petition for writ of habeas corpus, but this Court affirmed the district court's ruling in Case No. 44868 filed on February 16, 2006. Remittitur from the denial of his appeal was filed on March 15, 2006.

Subsequently, Floyd then filed a second petition for writ of habeas corpus (post-conviction) in district court. While Floyd's counsel raised several issues in his

second petition, one of the areas that Floyd sought relief was regarding his trial counsel's alleged ineffectiveness for not arguing that he could not commit first degree murder because he could not form the necessary intent due to his neurological disorders, which included Fetal Alcohol Syndrome.

Although the district court ultimately denied all of the issues in Floyd's second petition, it did hold a hearing on the limited issue of whether counsel on his first post-conviction petition (and the appeal that followed the denial of his first petition) for failed to raise issues related to Floyd's alleged Fetal Alcohol Syndrome. Ultimately, the district court determined that Floyd's first post-conviction counsel was not ineffective per the standard set forth in Strickland and denied his second petition.

Floyd once again appealed the denial of his second petition to this Court, and this Court affirmed the denial in Case No. 51409 in an order filed on November 17, 2010. Not only did this Court affirm the district court's denial of the second petition as procedurally barred, but this Court also addressed Floyd's actual innocence claim based on his Fetal Alcohol Syndrome. However in denying the claim, this Court pointed out that evidence related to this issue was presented at trial and that the claim was facially insufficient to prove actual innocence. Remittitur was issued on February 14, 2011.

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SUMMARY OF THE ARGUMENT

The district court properly denied Floyd's Third Petition for Writ of Habeas Corpus (Post-Conviction). Floyd's Third Petition contained arguments that are not appropriate for a petition for writ of habeas corpus, and they were untimely filed without good cause. Moreover, in addition to the procedural defects that support the district court's denial of the petition, Floyd's claims also fail on the merits.

ARGUMENT

I. FLOYD'S PETITION WAS UNTIMELY, SUCCESSIVE, AND AN ABUSE OF THE WRIT

Although the district court's final order did not mention the procedural bars, it was proper for the district court to deny Floyd's third petition for writ of habeas corpus. This Court will affirm a decision of the district court even if it reached the result for an incorrect reason. Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970). A district court has a duty imposed by law to only consider claims when the claims are not barred under NRS 34.726, NRS 34.810, NRS 34.800, or the previous law of the case. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005). "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969).

NRS 34.726 requires that the petition be filed within 1 year after the entry of judgment of conviction or remittitur from the appellate court absent a showing of

good cause for the delay. NRS 34.810 states a petition should be dismissed when it is the result of a trial and the grounds for the petition could have been "(1) presented to the trial court; (2) raised in a direct appeal or a prior petition for writ of habeas corpus or postconviction relief; or (3) raised in any other proceeding that the petition has taken to secure relief from the petitioner's conviction and sentence." NRS 34.800 indicates a petition may be dismissed if the delay in filing (a) prejudices the respondent or the State of Nevada in responding to the petition, unless the petition shows that the petition is based upon grounds of which the petitioner could not have knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred, or (b) prejudices the State of Nevada in its retrial of the petitioner, unless the petitioner demonstrates that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence." NRS 34.800(b) establishes a presumption of prejudice to the State occurs when a petition is filed over 5 years after the judgment of conviction or decision on appeal.

Here, Floyd filed his third petition on April 15, 2021. Remittitur from his original judgment of conviction was filed on August 15, 2002. Based on NRS 34.726(1), his petition was not filed within the statutory requirement that the petition be filed within 1 year after the appellate court issued its remittitur. As such, the

district court should have dismissed the petition on the grounds that it was untimely file.

Floyd's third petition also violated NRS 34.810 because his petition included grounds that he either did, or could have, raised on direct appeal or in previous petitions. Moreover, his petition was successive because it sought relief on matters that had already been considered, denied, and upheld in his second petition. Finally, Floyd's petition was abuse of the writ because it included new and different grounds for relief. Pursuant to the rules that govern post-conviction petitions, Floyd's third petition was subject to multiple mandatory procedural bars. Id., at 231, 112 P.3d 1074.

Given that Floyd has exhausted his appellate remedies, the filing of any petition or appeal now creates incredible prejudice to the State of Nevada. Floyd's third petition was filed after the State had already secured an order and warrant of execution for Floyd. His continuing litigation of "new" claims is a mere attempt for him to delay his sentence. If courts are required to continue entertaining and allowing him to appeal the denial of subsequent petitions, then the procedural requirements will serve no purpose and Floyd will be able to prolong his sentence indefinitely.

II. THE DISTRICT COURT HAD AUTHORITY TO DENY FLOYD'S THIRD PETITION

Floyd claims that it was error for the district court to rule on his third petition because the petition should have been transferred to Department 5. Floyd had

already litigated this issue by way of a motion seeking to have the case transferred, and then he re-argued the same issue below in the form of a petition for writ of habeas corpus. Floyd then also filed a Petition for Writ of Mandamus seeking to have this Court intervene on this matter. This Court recently denied the Petition for Writ of Mandamus in an Order dated February 24, 2022. S. Ct. No. 83167.

This Court reviews for abuse of discretion a district court's denial of a habeas petition. Rubio v. State, 124 Nev. 1032, 1047, 194 P.3d 1224, 1234 (2008). Though this Court reviews the district court's application of the law de novo, it gives deference to a district court's factual findings in habeas matters. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013).

A petition for writ of habeas corpus should only address (1) relief from a judgment of conviction or sentence in a criminal case; or (2) challenges to the computation of time that a petition has served pursuant to a judgment of conviction. NRS 34.720. "Habeas corpus is a unique remedy that is governed by its own statutes regarding procedure and appeal. Mazzan v. State, 109 Nev. 1067, 863 P.2d 1035 (1993). Given that habeas corpus is a statutorily created remedy, the claims raised must fit within the statutory scheme.

NRS 34.730 governs the filing of a petition for writ of habeas corpus. According to NRS 34.730(3)(b), the petition must "[W]henever possible, [be] assigned to the original judge or court." When construing statutory language, courts

are to avoid an absurd or unreasonable result and will avoid any interpretation that nullifies all or part of the statute. Speer v. State, 116 Nev. 677, 5 P.3d 1063 (2000).

As a preliminary matter, the district court made a record that the judge who previously presided over the trial is no longer a sitting judge. 11 PA 2657. Thus, it would not be possible to have a former judge preside over the case.

Then turning to the second part of NRS 34.730(3)(b), the question would be whether the original court could hear the matter. The district court acknowledged that Floyd's case was part of a random re-assignment of all cases from Department 5 to Department 17 on December 28, 2008. 11 PA 2659. Thus, the district court found that he was in fact the successor judge for Floyd's case. Id. In its final order, the district court pointed out that the Nevada Supreme Court has upheld the Eighth Judicial District Court's re-assignment of cases, thus Department 17 was an appropriate department to rule on any motions or petitions. 13 PA 3109-3110. In denying the transfer in this petition, the district court indicated that it was relying on its previous decision that was made in the criminal case number. 13 PA 3159.

Where a judge is no longer in office, this Court has consistently approved of rules that have allowed for a successor judge to take the place of a judge who is no longer serving. Moore v. City of Las Vegas, 92 Nev. 402, 552 P.2d 244 (1976). For instance in Moore, this Court upheld a district court rule that permitted a successor judge to hear a case when the original judge was unable. As this Court pointed out,

the rule was in place to prevent judge shopping, but when the judge becomes unavailable due to an event beyond the control of any of the parties then it would make sense that the rule should be adapted.

The same can be said in this case. Judge Sobel presided over Floyd's trial in 2000. Judge Sobel happened to be the presiding judge of a judicial department that was given the number 5. The fact that Judge Sobel happened to be in Department 5 during that year was completely random. There was no added significance to the department number. Ultimately, all of Judge Sobel's cases were part of a re-assignment to Department 17. Thus, it was appropriate for Department 17 to make the rulings in the case. Since it was not possible for the same judge to hear this case now, the random re-assignment of this case should prevail.

When the matter was raised again with regards to Floyd's petition, the district court applied the same logic and law as it had relied upon to deny Floyd's motion to have other aspects of the case transferred. As such, the district court did not abuse its discretion in ruling that it had jurisdiction to rule on Floyd's third petition for writ of habeas corpus.

III. THE DISTRICT COURT DID NOT ERR IN RULING THAT FLOYD DID NOT HAVE A DUE PROCESS RIGHT TO SEEK CLEMENCY

Floyd argued that his sentence was invalid because he has been deprived of an opportunity to seek clemency. The district court properly denied this claim. First,

this was an improper subject matter for a petition for writ of habeas corpus as it falls outside the scope of the statute. NRS 34.720 states that a petition for writ of habeas corpus apply only to (1) requests of relief from a judgment of conviction or sentence in a criminal case; or (2) challenges to the computation of time that a person has served pursuant to a judgment of conviction. Floyd's request for clemency had to do with neither.

The United States Supreme Court has held that state clemency proceedings rarely if ever are appropriate subjects for judicial review. Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 , 101 S.Ct. 2460, 2464 (1981). An inmate has no constitutional or inherent right to the commutation of his sentence. Id. Even when a person has received a sentence of death, there is still no due process when seeking clemency. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 118 S.Ct. 1244 (1998). As the United States Supreme Court and well as this Court have both acknowledged, clemency is a matter of grace and not a judicial right. Id., *see also* Niergarth v. State, 105 Nev. 26, 28, 768 P.2d 882, 883 (1989).

The process for seeking clemency is no different from the types of laws that granted clemency in the cases previously discussed. Article 5, Section 14 of the Nevada Constitution speaks to the State Board of Pardons. The Board of Pardons Commissioners consist of the governor, justices of the supreme court, and the attorney general. Art. 5, Sec.14(1). NV Const. Art. 5, Sec.14(1).

Chapter 213 of the Nevada Administrative Code ("NAC") contains the provisions governing and related to the Board of Pardons Commissioners. "Clemency" is defined as "the remission or lessening of a punishment to which a person convicted of a crime was sentenced and includes the remission of a fine or forfeiture, the commutation of a punishment, the granting of a pardon and the restoration, in whole or in part, of the civil rights of a person convicted of a crime." NAC 213.011.

According to NAC 213.019, the NAC "do not grant any person a right to the remission of a fine or forfeiture, the commutation of a punishment, the granting of a pardon or the restoration of any civil rights…" and the NAC does not "create any such right or interest in liberty or property or establish a basis for any cause of action against the State."

The provisions of the NAC are subject to the same principles of statutory interpretation of the NRS. Silver State Elec. V. State, Dep't of Tax, 123 Nev. 80, 85, 157 P.3d 710, 713 (2007). "When the text of a statute is plain and unambiguous, [the court] should…not go beyond that meaning." Star Ins Co. v Neighbors, 122 Nev. 733, 776, 138 P.3d 507, 510 (2006).

NAC 213.019 clearly states that an individual does not have a right to seek clemency. The language plainly says that there is no basis for any cause of action against the State. Thus, not only is this not an issue that was properly raised in a

petition for writ of habeas corpus, it is an issue that should not and cannot be raised at all. Floyd has no right to seek clemency.

Finally, nothing has prevented Floyd from seeking clemency. According to his appeal, he has applied for clemency. His problem however is that he has not heard if he will be granted a hearing. As the NAC states, this matter lies solely with the members of the Board of Pardons and whether any member wishes to put the matter before the Board.

Ultimately, an individual who has received a death sentence is subject to multiple layers of scrutiny. This case has had multiple appeals, petitions, and publicity. The appeals and petitions are even being heard and decided by this Court. Moreover, should any warrant and order of execution be filed, the Supreme Court rules require that notice be given to the Supreme Court. Presumably, any person belonging to the Board could elect to have this matter heard by the Board, but no hearing has been scheduled. Nothing in the Nevada Constitution, the Nevada Revised Statutes, or the Nevada Administrative Code mandates that a person submitting an application for clemency is guaranteed notice of the status of his or her application or any particular result. Thus, the district court did not err in denying Floyd's claim that he was not given an opportunity to apply for clemency.

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IV. THE DISTRICT COURT DID NOT ERR IN DENYING FLOYD'S FASD CLAIM

Floyd now claims that he is categorically exempt from the death penalty because he suffers from Fetal Alcohol Spectrum Disorder ("FASD"). Floyd argued that he raised the claim for the first time in his third petition because the claim is based on new scientific evidence demonstrating the equivalence of FASD as an intellectual disability. 6 PA 1386.

A. Floyd should have been procedurally barred from raising this claim

Floyd correctly points out that the State's argument before the district court was that Floyd was procedurally barred from making this claim. Floyd's third petition was untimely, successive, and the denial of his fetal alcohol syndrome disorder (FASD) claim was the law of the case.

As mentioned before, a district court has a duty imposed by law to only consider claims when the claims are not barred under NRS 34.726, NRS 34,810, NRS 34.800, or the previous law of the case. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005).

The issue regarding Floyd's FASD was previously litigated in his second petition. Floyd raised his FASD-related claims in two forms. First, he argued that his counsel was ineffective for not presenting evidence that he suffers from FASD. Second, he argued that he was "actually innocent" because his FASD, combined with other mental conditions, prevented him from forming the intent to commit

premeditated and deliberate murder. Before it rejected Floyd's second petition, the district court conducted an evidentiary hearing regarding the FASD evidence and whether counsel's conduct fell below the reasonable standard per Strickland.

Following the evidentiary hearing that the district court conducted regarding trial counsel's failure to raise a FASD claim, the district court found that trial counsel's conduct fell within the realm of reasonableness, thus Floyd was not prejudiced and would not be entitled to relief. Furthermore, this court rejected the appeal following the denial of Floyd's second petition that his FASD claim, along with other claims, rendered him "actually innocent" of first-degree murder and ineligible for the death penalty. Thus, this is now the law of the case and he was not permitted to bring this procedurally barred petition.

Moreover, to the extent that he feels there is good cause because of cases like Atkins v. Virginia (2002), Roper v. Simmons (2005), and FASD as it relates to the DSM-5 (2013), he has provided no sufficient explanation for why he waited so long to raise this claim. Other than the fact that he is not looking for a way to delay the proceedings, there is has been no good cause for his untimely filing.

B. Floyd has not suffered prejudice because there is no "functional equivalent" standard

Floyd argues that he is ineligible for the death penalty because his FASD amounts to a functional equivalent of being intellectually disabled. The district court in its order indicated that the seminal case on individuals suffering from mental

retardation being exempt from the death penalty, Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002), sets forth a bright line test for intellectual disability based on one's IQ. 14 PA 3489. Atkins did not mandate a particular way of identifying defendants that would be considered intellectually disabled, but it did generally set forth three separate requirements that must be met: "[I]t must be shown that a defendant has both (1) significantly subaverage intellectual functioning and (2) deficits in adaptive behavior, and that (3) the onset of both factors occurred before the age of 18." Atkins, 536 U.S., at 318, 122 S.Ct 2242. Atkins made a categorical rule that those determined to be intellectually disabled may not be executed, but it did not set forth a bright-line rule solely based on one's IQ.

However even if the district court erred in believing that Atkins set forth a strict rule regarding IQ, the district court was still correct in its ultimate denial of Floyd's petition because he still did not present sufficient evidence to the district court that he is an individual that suffers from an intellectual disability thereby precluding him from the death penalty. Again, this court will affirm a decision of the district court even if it reached the result for an incorrect reason. Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

The district court was able to consider Floyd's IQ as a factor against his mental retardation. Before the district court, Floyd's counsel orally represented that Floyd's IQ was previously determined to be in the 80s or 90s. 13 PA 3159. In actuality,

Floyd's IQ varied between scores of 94, 101, 102, and 115 when he was previously tested. 11 PA 2573. The "new scientific evidence" that Floyd relied on for his claim is hardly new at all. Floyd relied on two declarations of Dr. Natalie Novick Brown from October 17, 2006, and February 24, 2021. 11 PA 2434, 11 PA 2559. The first Declaration, which Floyd listed as "Exhibit 1" of his Petition, from October 17, 2006, explains that the Las Vegas Federal Public Defender, Capital Habeas Unit, retained Dr. Novick Brown to examine Petitioner's FASD. "Exhibit 1" was prepared for the purposes of Petitioner's second Petition, which was previously denied by the district court. Petitioner raised similar claims regarding his FASD in his second Petition, claiming that trial counsel was ineffective for failing to investigate and present evidence of his FASD at trial. Similarly, Petitioner raised the issue that he was innocent of the offense because he committed it in a "dissociative fugue" based on his FASD.

The second Declaration, "Exhibit 2" of his Petition, dated February 24, 2021, was once again prepared by Dr. Novick Brown for the Las Vegas Federal Public Defender, Capital Habeas Unit, to address whether Petitioner's FASD is consistent with the DSM-5, and if it compares to an intellectual disability. Dr. Novick Brown's second Declaration and Petitioner's third Petition both revolve around the Diagnostic and Statistical Manual of Mental Disorders 5 (DSM-5) to prove that Petitioner's FASD renders him ineligible for execution. Petitioner constantly refers

to this as "new scientific evidence," but fails to address why this claim is only being raised now for the first time eighteen years later. The DSM-5 was last updated in 2013. Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) (May 18, 2013). Petitioner fails to address how this is "new scientific evidence" when this was available for him to raise in 2013—over eight years ago.

Floyd relied on Dr. Novick Brown's second Declaration to claim that he "meets the current diagnosis under the DSM-5 for the CNS impairment in FASD." He claimed that his "FASD diagnosis under the DSM-5, ND-PAE, is a brain-based, life-long impactful, disorder deserving of the classification 'ID Equivalence.'" Even if this were true, Petitioner does not and cannot address why he failed to raise this for the last eight years when this evidence was available in the DSM-5 as of 2013. Thus, this is hardly "new scientific evidence" to establish good cause to overcome the mandatory procedural bars.

Moreover, Floyd claimed that because of this DSM-5 "new scientific evidence" from 2013, he is ineligible for execution because of Roper v. Simmons, 543 U.S. 551, 578, 125 S. Ct. 1183, 1200 (2005). Floyd attempts to make a novel argument that executing him with the United States Supreme Court precedent of Roper would be cruel and unusual punishment. Roper, however, held that execution of individuals who were under 18 years of age at the time of their capital crimes is prohibited by the Eighth Amendment. Roper, at 551, 125 S. Ct. at 1184. Under the

plain rule established by Roper, Floyd would not be entitled to relief because he committed his murders at the age of twenty-three.

Being unable to establish that his IQ entitles him to relief under Atkins, and unable to establish that he was under the age of 18 under Roper, Floyd makes a hopeful plea that the "rationale of *Roper* extends to individuals age twenty-three because the human brain continues to develop beyond the age of eighteen," without any legal support that this assertion is true. It is simply false that Floyd is exempt from execution because he committed these murders at the age of twenty-three.

Floyd claimed that executing him would constitute cruel and unusual punishment because of his diagnosis under the DSM-5 and his mental age under Roper. Strategically, Floyd through the Federal Public Defender's Office once again asked Dr. Novick Brown for a second Declaration to delay his execution. The State has routinely raised this issue to this Court for the last two months that Petitioner is repeatedly filing anything he can to delay his execution further. Floyd's third petition, under the guise of FASD, is nothing short of an attempt to further delay his execution. As such, the district court did not err in denying this clear attempt to delay the proceedings through the filing of this claim.

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V. DISTRICT COURT DID NOT ERR IN DENYING FLOYD'S CLAIM THAT THE EXECUTION MUST TAKE PLACE AT THE NEVADA STATE PRISON

Floyd incorrectly challenged where his execution would take place by filing a habeas petition. The district court did not abuse its discretion in denying this claim. A petition for writ of habeas corpus should only address (1) relief from a judgment of conviction or sentence in a criminal case; or (2) challenges to the computation of time that a petition has served pursuant to a judgment of conviction. NRS 34.720.

Much like the drugs used in an execution are not properly brought in a habeas petition, where the execution takes place is also not an issue that can be brought in a habeas petition. *See* McConnell v. State, 125 Nev. 243, 212 P.3d 307 (2009). Thus, it was proper for the district court to deny this claim because it is an abuse of the writ. Floyd first challenged this issue when he objected to the State's request for an order and warrant of execution. Floyd then filed a petition for writ of mandamus challenging the validity of an order and warrant of execution that sought to have his execution carried about at the Ely State Prison, where the execution chamber is located. This was the proper way to challenge the validity of the order and warrant of execution. On February 24, 2022, this Court filed an Order denying Floyd's Petition for Writ of Mandamus regarding this exact issue. S.Ct. No. 83225. This is now the law of the case, and the district court did not err in rejecting Floyd's claim.

VI. THE DISTRICT COURT DID NOT ERR IN DENYING THE PETITION BASED UPON THE VERDICT FORM

There was no error in the verdict form used in Floyd's case. In order to impose a death sentence a jury must find "at least one aggravating circumstance and further find that there are no mitigating circumstance(s) sufficient to outweigh the aggravating circumstances or circumstances found." NRS 175.554(3).

The Petrocelli decision that Floyd cites is different from the case at hand. Petrocelli v. State, No. 79069, 2021 WL 2073794 (May 21, 2021) (unpublished disposition). In that case, a separate verdict form was given to the jury for each possible outcome (a sentence of death, life without parole, and life with parole). For the verdict forms that had an option for a sentence of life with and without the possibility of parole, they incorrectly contained language "that any mitigating circumstance or circumstances are not sufficient to outweigh the aggravating circumstance found." This was a misstatement of the law because the aggravating circumstances need not outweigh the mitigating circumstances in order for the jury to impose a sentence of less than death. This Court was persuaded by the fact that the erroneous language in the forms had to do with the weighing determination, thus it could not be said that Petrocelli's substantial rights were not affected by the erroneous language.

There were two forms that were used to support Floyd's ultimate sentence. The first form was a special verdict form that listed the aggravators that were

established beyond a reasonable doubt. In this case, the jury found all three of the listed aggravators to be present beyond a reasonable doubt for each of the murder victims. 12PA2946-2949.

The other form was the verdict form. There were actually four verdict forms used, one for each of the four victims murdered. 12PA2941-2944. Other than the listed victim's name on the form, each form was identical to the next. The form, stating that the jury had found Floyd guilty of Murder of the First Degree With Use of a Deadly Weapon, then reads as follows:

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

12PA2941-2944.

Given that the jury was left to pick the sentence that it felt was reasonable, there was no confusion that the jury was required to choose a sentence of death. Clearly the way the form was written allowed for the jury to choose any of the four possible options. The difference in Petrocelli was that there were separate forms that

all used the standard required for a death verdict. The incorrect language in the two verdict forms for a sentence of less than death lent itself to the possibility that the jury was confused in deciding what verdict it could impose.

Given that Floyd cannot demonstrate that his substantial rights were affected, the district court did not err in denying this claim.

CONCLUSION

The State respectfully requests that this Court AFFIRM the district court's denial of Floyd's Third Petition for Writ of Habeas Corpus.

Dated this 24th day of February, 2022

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 5,345 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 24th day of February, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 24, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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