No. _____

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

ZANE FLOYD, Petitioner,

v.

WILLIAM GITTERE, Warden, et al., Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITIONER'S APPENDIX

CAPITAL CASE

ERIC SCHNAPPER*
University of Washington
School of Law
Box 353020
Seattle, WA 98195
(206) 616-3167

RENE L. VALLADARES
Federal Public of Nevada
DAVID ANTHONY
BRAD D. LEVENSON
ELLESSE HENDERSON

Assistant Federal Public Defenders
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)
*Counsel of Record

APPENDIX

APPENDIX A

Amended Opinion affirming denial of habeas relief, *Floyd v. Filson, et al*., United States Court of Appeals for the Ninth Circuit, Case No. 14-99012 (Feb. 3, 2020)

949 F.3d 1128
United States Court of Appeals, Ninth Circuit.

Zane FLOYD, Petitioner-Appellant,
v.
Timothy FILSON; Adam Paul Laxalt, Attorney General, Respondents-Appellees.

No. 14-99012
|
Argued and Submitted January 31, 2019 San Francisco, California
|
Filed October 11, 2019
|
Amended February 3, 2020

Synopsis

Background: After his murder conviction and death sentence were affirmed on direct appeal, 118 Nev. 156, 42 P.3d 249, and his state habeas petition was denied, petitioner sought federal habeas relief based on alleged ineffective assistance by trial counsel. The United States District Court for the District of Nevada, Philip M. Pro, J., 2012 WL 3598257, dismissed in part and, 2007 WL 1231734, stayed federal proceedings to allow petitioner to exhaust his claims in state court. After state court denied second habeas petition, 2010 WL 4675234, petitioner's federal habeas proceedings were reopened. The District Court, Pro, J., 2014 WL 7240069, denied petition and issued certificate of appealability. Petitioner appealed.

Holdings: The Court of Appeals, Friedland, Circuit Judge, held that:

[1] trial counsel's failure to present expert testimony showing that petitioner suffered from fetal alcohol spectrum disorder (FASD) did not amount to ineffective assistance;

[2] trial counsel's failure to question each prospective juror about his or her exposure to media coverage of shooting and ability to consider mitigating evidence did not amount to ineffective assistance;

[3] trial counsel did not provide ineffective assistance when cross-examining State's penalty-phase psychological expert witness;

[4] Nevada Supreme Court's rejection of petitioner's claim that testimony of victim's mother during penalty phase violated his due process rights was not contrary to or unreasonable application of clearly established federal law;

[5] prosecutor's improper comments characterizing jury's role in imposing death penalty did not so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment; and

[6] prosecutor's improper statement implying that jury could sentence petitioner to death to send message, rather than making individualized determination, did not so infect trial with unfairness as to make the resulting conviction a denial of due process.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review; Petition for Rehearing; Petition for Rehearing En Banc.

West Headnotes (32)

[1] **Habeas Corpus** Review de novo

The Court of Appeals reviews a district court's denial of habeas corpus de novo.

[2] **Habeas Corpus** Federal Review of State or Territorial Cases

Habeas Corpus Federal or constitutional questions

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), the Court of Appeals may grant a habeas petitioner relief only if the state court's rejection of his claims (1) was contrary to or involved an unreasonable application of clearly established federal law, or (2) was based on an unreasonable determination of the facts.

28 U.S.C.A. § 2254(d)(1).

[3] **Habeas Corpus** Federal Review of State or Territorial Cases

Habeas Corpus Federal or constitutional questions

On federal habeas review, although an appellate panel may look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent, that precedent cannot refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that the Supreme Court has not announced. 28 U.S.C.A. § 2254(d)(1).

[4] **Habeas Corpus** Cause and prejudice in general

Habeas Corpus State court decision on procedural grounds, and adequacy of such independent state grounds

Unless a petitioner can show cause and prejudice, federal courts in habeas actions will not consider claims decided in state court on a state law ground that is independent of any federal question and adequate to support the state court's judgment.

[5] **Habeas Corpus** Discretion and necessity in general

Only a habeas petitioner who asserts a colorable claim to relief is entitled to an evidentiary hearing.

[6] **Criminal Law** Deficient representation and prejudice in general

To succeed on an ineffective assistance of counsel claim, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that, if so, there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S. Const. Amend. 6.

[7] **Criminal Law** Death Penalty

On an ineffective assistance of counsel claim, to determine the risk of prejudice at the penalty phase of a capital trial, the Court of Appeals considers whether it is reasonably probable that the jury otherwise would have concluded that the balance of aggravating and mitigating circumstances did not warrant death in light of the totality of the evidence against the defendant. U.S. Const. Amend. 6.

[8] **Criminal Law** Presentation of evidence in sentencing phase

Trial counsel's failure to present mitigation evidence in the form of expert testimony showing that defendant suffered from fetal alcohol spectrum disorder (FASD) did not prejudice defendant in penalty phase of capital murder trial, and thus could not amount to ineffective assistance; given that jury already had evidence before it that defendant suffered from developmental problems and emotional instability that might have been related to his mother's alcohol use during pregnancy and that defendant killed four people at random and without apparent motive, it was unlikely that any juror would have viewed formal FASD diagnosis as mitigating factor outweighing aggravating factors. U.S. Const. Amend. 6.

[9] **Criminal Law** Presentation of evidence in sentencing phase

Trial counsel's failure to present mitigation evidence in the form of testimony from consulting military and mental health expert about defendant's military service and early life did not prejudice defendant in penalty phase of capital murder trial, and thus could not amount to ineffective assistance; expert's testimony would have been largely cumulative of the evidence of defendant's substance abuse and mental health struggles that were presented at trial. U.S. Const. Amend. 6.

[10] **Criminal Law** Jury selection and composition

Trial counsel's response to trial court's purported pretextual removal of prospective juror for cause was not deficient performance in capital murder trial, and thus was not ineffective assistance, where counsel attempted to rehabilitate prospective juror, who had expressed hesitation about the death penalty, to allay court's concerns. U.S. Const. Amend. 6.

[11] **Jury** Personal opinions and conscientious scruples

Trial court's dismissal of allegedly biased prospective juror for cause based upon her statement that she could not consider sentence of life with parole was not warranted in capital murder trial, where juror retracted her statement after trial court clarified that she was only required to at least consider the sentence.

[12] **Criminal Law** Jury selection and composition

Trial counsel's response to trial court's refusal to excuse allegedly biased prospective juror for cause was not deficient performance in capital murder trial, and thus was not ineffective assistance, where counsel used peremptory challenge to strike juror from the jury pool. U.S. Const. Amend. 6.

[13] **Criminal Law** Jury selection and composition

Trial counsel's response to trial court's allegedly prejudicial voir dire format, in which prosecution questioned all prospective jurors before defense was permitted to question any, was not deficient performance in capital murder trial, and thus was not ineffective assistance, where counsel objected to the format by moving for attorney conducted, sequestered individual voir dire. U.S. Const. Amend. 6.

[14] **Criminal Law** Jury selection and composition

Trial counsel's failure to question each prospective juror about his or her exposure to media coverage of defendant's shooting and ability to consider mitigating evidence was not deficient performance in capital murder trial, and thus was not ineffective assistance, where questionnaires that every juror completed asked about the issues, and trial court asked all jurors if there was anyone who felt unable to set aside what they heard about the case. U.S. Const. Amend. 6.

[15] **Criminal Law** Presentation of evidence in sentencing phase

Trial counsel did not provide deficient performance when cross-examining State's penalty-phase psychological expert witness in capital murder trial, and thus did not provide ineffective assistance, where counsel elicited testimony from expert that he had only interviewed defendant for 90 minutes, counsel attempted to undermine expert's reliance on defendant's test scores, and counsel pointed out that another expert had looked at same data and diagnosed defendant with dissociative personality disorder, rather than borderline personality disorder. U.S. Const. Amend. 6.

[16] **Criminal Law** Other particular issues in death penalty cases

Trial counsel's failure to argue that statement about burden of proof should be included in jury instruction at penalty phase of capital murder trial was not deficient performance, and thus was not ineffective assistance, where argument was untested, was extension of newly minted law, and was likely to fail. U.S. Const. Amend. 6.

[17] **Criminal Law** Objecting to instructions

Trial counsel's failure to challenge guilt-phase jury instruction that premeditation could be as instantaneous as successive thoughts of the mind

did not prejudice defendant in capital murder trial, and thus could not amount to ineffective assistance; jury had before it significant evidence that defendant's premeditation occurred in more than an instant, including that he told his sexual assault victim that he planned to kill people and that then defendant walked for 15 minutes carrying shotgun used to perpetrate murders. U.S. Const. Amend. 6.

[18] **Constitutional Law** Instructions

Not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. U.S. Const. Amend. 14.

[19] **Habeas Corpus** Assignment of errors and briefs

Habeas petitioner forfeited on appeal his argument that substantial evidence did not support Nevada's jury instruction for "great risk of death" aggravating circumstance in capital murder trial, where petitioner failed to articulate his argument in his opening brief.

[20] **Habeas Corpus** Discovery and disclosure

Nevada Supreme Court's conclusion on direct appeal of capital murder conviction that defense expert's report was not privileged work product, such that petitioner's constitutional rights were not violated when State's expert referred to defense expert's test results, was not contrary to or unreasonable application of controlling Supreme Court precedent, and thus, federal habeas relief was not warranted; mandatory disclosure schemes were permissible in criminal trials if they did not structurally disadvantage the defendant, and Nevada provided for reciprocal discovery. 28 U.S.C.A. § 2254(d)(1); Nev. Rev. St. § 174.234.

[21] **Habeas Corpus** Questions of local law

A state court's misreading of state law is not a ground for federal habeas relief.

[22] **Habeas Corpus** Death sentence

Nevada Supreme Court's rejection of petitioner's claim that testimony of victim's mother during penalty phase of capital murder trial violated his due process rights was not contrary to or unreasonable application of clearly established federal law, and thus, federal habeas relief was not warranted; although mother's testimony about kidnapping incident and victim's developmental difficulties had limited relevance and high risk of prejudice, it was not unreasonable for court to conclude that admission of the testimony did not render the trial fundamentally unfair, given the strength of prosecution's aggravating case. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

[23] **Constitutional Law** Prosecutor

On a prosecutorial misconduct claim, the relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[24] **Constitutional Law** Prosecutor

On a prosecutorial misconduct claim, in determining whether prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process, courts look to various factors, including the weight of the evidence, the prominence of the comment in the context of the entire trial, whether the prosecution misstated the evidence, whether the judge instructed the jury to disregard the comment, whether the comment was invited by defense counsel in its summation, and whether defense counsel had an adequate opportunity to rebut the comment. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[25] **Criminal Law** Statements as to Facts and Arguments

On a prosecutorial misconduct claim, it is not enough that the prosecutors' remarks were undesirable or even universally condemned because the effect on the trial as a whole needs to be evaluated in context.

[26] **Habeas Corpus** Prosecutorial and police misconduct; argument

Nevada Supreme Court did not unreasonably apply clearly established federal law in determining that prosecutor's improper comment that petitioner had committed the worst massacre in city's history was harmless in capital murder trial, and thus, federal habeas relief was not warranted; although the comment came late in the trial and was not invited by defense, comment was not egregiously inflammatory, and the weight of evidence against petitioner was considerable. 28 U.S.C.A. § 2254(d)(1).

[27] **Sentencing and Punishment** Arguments and conduct of counsel

Prosecutor's improper comments characterizing jury's role in imposing death penalty did not so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment in capital murder trial, where defense counsel emphasized jury's responsibility during his closing argument, and jury instructions stated that jurors had to assume that sentence would be carried out. U.S. Const. Amend. 8.

[28] **Constitutional Law** Proceedings

Sentencing and Punishment Arguments and conduct of counsel

Prosecutor's improper statement implying that jury could sentence defendant to death to send message, rather than making individualized determination, did not so infect capital murder trial with unfairness as to make the resulting conviction a denial of due process; harm of statement was mitigated, in part, by jury instructions emphasizing jury's responsibility to weigh aggravating and mitigating circumstances, and both defense and prosecution repeatedly emphasized and relied on specific details of crime at hand. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[29] **Habeas Corpus** Certificate of probable cause

A habeas petitioner meets his burden for a certificate of appealability if he can make a substantial showing of the denial of a constitutional right, accomplished by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. 28 U.S.C.A. § 2253(c)(2).

[30] **Habeas Corpus** Particular issues and problems

Challenge to Nevada's lethal injection protocol brought by habeas petitioner, who was sentenced to death for murder, was unripe for federal review, where manufacturer of Nevada's supply of drug used as part of lethal injection protocol obtained injunction prohibiting its product's use in executions, and appeal of the injunction was pending.

[31] **Habeas Corpus** Particular issues and problems

A method-of-execution challenge is not ripe in a federal habeas proceeding when the respondent state has no protocol that can be implemented at the time of the challenge.

[32] **Criminal Law** Trial in general; reception of evidence

Criminal Law Other particular issues in death penalty cases

Trial counsel's failure to challenge various courtroom security measures did not prejudice defendant in guilt phase or punishment phase of capital murder trial, and thus did not amount to ineffective assistance; given overwhelming evidence of defendant's guilt and the weight of aggravating factors against him, security measures had no substantial effect on jury's verdicts. U.S. Const. Amend. 6.

Attorneys and Law Firms

***1133** Brad D. Levenson (argued) and David Anthony, Assistant Federal Public Defenders; Rene Valladares, Federal Public Defender; Office of the Federal Public Defender, Las Vegas, Nevada; for Petitioner-Appellant.

Jeffrey M. Conner (argued), Deputy Assistant Attorney General; Heidi Parry Stern, Chief Deputy Attorney General; Adam Paul Laxalt, Attorney General; Office of the Attorney General, Las Vegas, Nevada; for Respondents-Appellees.

H. Louis Sirkin, Santen & Hughes, Cincinnati, Ohio, for Amicus Curiae National Association for Public Defense.

Thomas C. Sand and Nicholas H. Pyle, Miller Nash Graham & Dunn LLP, Portland, Oregon, for Amicus Curiae The National Organization on Fetal Alcohol Syndrome.

Elizabeth Ballart and William Leiner, Disability Rights California, Oakland, California, for Amici Curiae Disability Law Center of Alaska, Disability Rights California, National Disability Rights Network, and Nevada Disability Advocacy & Law Center.

John L. Krieger, Dickinson Wright PLLC, Las Vegas, Nevada; Justin J. Bustos, Dickinson Wright PLLC, Reno, Nevada; for Amici Curiae Canadian Criminal Justice Professors, Litigators, and Expert Witnesses.

Lisa Rasmussen, Law Office of Lisa Rasmussen, Las Vegas, Nevada, for Amici Curiae The Directors of the Three Research Centers of Birmingham City University's School of Law.

Appeal from the United States District Court for the District of Nevada, D.C. No. 2:06-cv-00471-PMP-CWH, Philip M. Pro, District Judge, Presiding

Before: Marsha S. Berzon, John B. Owens, and Michelle T. Friedland, Circuit Judges.

***1134 ORDER**

The opinion filed on October 11, 2019, reported at 940 F.3d 1082, is amended as follows.

On page 1091 of the opinion, following <whether Floyd can overcome his procedural default and obtain federal review of the merits of his ineffective assistance claims.>, insert the footnote <The arguments in Floyd's opening and reply briefs regarding section 34.726 of the Nevada Revised Statutes address the same ineffective assistance of counsel claims as do his *Martinez* arguments. In Floyd's petition for rehearing, he argues that we should reach other constitutional claims that were also procedurally defaulted by section 34.726. Floyd forfeited any such argument by failing to present it in his opening brief. *See* *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).>.

On page 1092 of the opinion, replace <Floyd's counsel emphasized Floyd's developmental problems and mental illness> with <Floyd's counsel emphasized Floyd's developmental problems and emotional instability>.

On page 1092 of the opinion, replace <Floyd's other mental illnesses> with <Floyd's other developmental problems>, and delete <on his mental state>.

On pages 1092–93 of the opinion, replace <the jury already had evidence before it that Floyd suffered from some mental illness and that his illness might have been related to his mother's alcohol use during pregnancy> with <the jury already had evidence before it that Floyd suffered from some developmental problems and that his issues might have been related to his mother's alcohol use during pregnancy>.

On page 1093 of the opinion, replace <mental illness> with <developmental problems>.

On page 1098 of the opinion, in the current footnote 5, replace <*Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001)> with <*Arpin*, 261 F.3d at 919>.

With these amendments, the panel has unanimously voted to deny Appellant's petition for panel rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc is accordingly **DENIED.** No further petitions for panel rehearing or rehearing en banc will be entertained.

OPINION

FRIEDLAND, Circuit Judge:

In 1999, Petitioner-Appellant Zane Michael Floyd shot and killed four people at a Las Vegas supermarket. A Nevada jury found Floyd guilty of four counts of first-degree murder, as well as several related offenses, and sentenced him to death. After the Nevada Supreme Court upheld his conviction and sentence on direct appeal and denied a petition for postconviction relief, Floyd sought a writ of habeas corpus in the United States District Court for the District of Nevada. Following a stay during which Floyd filed an unsuccessful second petition for postconviction relief in state court, the district court denied the federal habeas petition but issued a certificate of appealability as to various claims now before us. We affirm the district court's decision and deny Floyd's motion to expand the certificate of appealability.

I.

A.

Before dawn one morning in June 1999, Floyd called an escort service and asked ***1135** the operator to send a female escort to his parents' home in Las Vegas, where he had been living since his discharge from the U.S. Marine Corps the previous year. When a young woman sent by the service arrived, Floyd threatened her with a shotgun and forced her to engage in vaginal and anal intercourse, digital penetration, and oral sex. At one point he removed a shell from his shotgun and showed it to her, telling her that her name was on it. He later put on a Marine Corps camouflage uniform and told her that he planned to kill the first nineteen people he saw that morning. Commenting that he would have already shot her had he had a smaller gun on him, he told the woman she had one minute to run before he would shoot her. She escaped.

Floyd then walked about fifteen minutes to an Albertsons supermarket near his home. When he arrived at 5:15 am, he immediately began firing on store employees. He shot and killed four Albertsons employees and wounded another. The store's security cameras captured these events.

When Floyd exited the store, local police were waiting outside. Officers arrested him, and he quickly admitted to shooting the people in the Albertsons. Prosecutors charged Floyd with offenses that included multiple counts of first-degree murder and indicated that they would seek the death penalty.

B.

Numerous psychiatric experts examined Floyd and explored his background. On the day of his arrest, Floyd's public defenders retained Dr. Jakob Camp, a forensic psychiatrist who examined Floyd for three hours. Dr. Camp concluded that Floyd did not suffer from a mental illness that would impair his ability to stand trial, noted that Floyd's experiences during and after his time in the Marines might have had a bearing on his actions that day, and suggested that counsel obtain Floyd's adolescent health records to learn more about an attention deficit/hyperactivity disorder ("ADHD") diagnosis for which Floyd had been previously treated with the drug Ritalin. Floyd's counsel eventually obtained records from two doctors who had treated Floyd's mental health issues as an adolescent that confirmed this type of diagnosis. Those doctors had diagnosed Floyd with attention deficit disorder ("ADD"), although they had also determined that Floyd did not have any significant cognitive deficits.

Shortly before trial, defense counsel also retained clinical neuropsychologist Dr. David L. Schmidt to conduct a full examination of Floyd. Dr. Schmidt concluded that Floyd suffered from ADHD and polysubstance abuse, but that he showed "[n]o clear evidence of chronic neuropsychological dysfunction." He also diagnosed Floyd with a personality disorder that included "[p]aranoid, [s]chizoid, and [a]ntisocial [f]eatures."

Discouraged by Dr. Schmidt's findings, which they worried would make Floyd unsympathetic to a jury, counsel turned to clinical neuropsychologist Dr. Thomas Kinsora. After reviewing Dr. Schmidt's report and a report from Floyd's childhood doctor, Dr. Kinsora was highly critical of Dr. Schmidt's work, questioning the validity of the tests that Dr. Schmidt had conducted. Dr. Kinsora advised Floyd's counsel that it was "not clear whether or not a more comprehensive assessment would have revealed ongoing deficits or not," but that he "wouldn't be surprised to find some continued evidence of neurological problems" in light of the findings of one of the doctors who had examined Floyd as an adolescent. The defense subsequently un-endorsed Dr. Schmidt as an expert, but not before the state trial court ordered it to provide the ***1136** prosecution a copy of Dr. Schmidt's report along with the associated raw testing data.

Defense counsel also retained Dr. Frank E. Paul, a clinical psychologist and retired Navy officer, who investigated and described in detail Floyd's background and life history. Floyd's mother told Dr. Paul that she had used drugs and alcohol heavily earlier in her life, including when she was pregnant with her first child, but that she "stopped drinking and all drug use when she found herself pregnant with [Floyd] ... but continued to smoke tobacco." Dr. Paul also learned of an incident in which Floyd, at the age of eight, was accused of anally penetrating a three-year-old boy. Dr. Paul further learned that Floyd began using drugs and alcohol extensively in high school. Dr. Paul described Floyd's Marine Corps deployment to the U.S. base at Guantanamo Bay, Cuba as difficult, explaining that Floyd struggled with the stress and monotony of the deployment and drank extremely heavily during that period. Defense counsel originally named Dr. Paul as an expert but did not call him at trial and never disclosed Dr. Paul's report to the prosecution.

At the guilt phase of Floyd's trial, the jury convicted him of four counts of first-degree murder with use of a deadly weapon, one count of attempted murder with use of a deadly weapon, one count of burglary while in possession of a firearm, one count of first-degree kidnapping with use of a deadly weapon, and four counts of sexual assault with use of a deadly weapon.

During the penalty phase of Floyd's trial, the State argued that three statutory aggravating factors justified application of the death penalty: killing more than one person, killing people at random and without apparent motive, and knowingly creating a risk of death to more than one person. In arguing that mitigating circumstances weighed against imposition of the death penalty, the defense called (among other witnesses) two experts hired by defense counsel: Dr. Edward Dougherty, a psychologist specializing in learning disabilities and education; and Jorge Abreu, a consultant with an organization specializing in mitigation defense.

Dr. Dougherty diagnosed Floyd with ADHD and a mixed personality disorder with borderline paranoid and depressive features. He also discussed the "prenatal stage" of Floyd's development, and commented that his mother "drank alcohol, and she used drugs during her pregnancy," including "during the first trimester." In rebuttal, the prosecution called Dr. Louis Mortillaro, a psychologist with a clinical neuropsychology certificate, who had briefly examined Floyd and reached conclusions similar to Dr. Schmidt's based on Dr. Schmidt's testing. Abreu painted a detailed picture of Floyd's life, drawing on many of the same facts that Dr. Paul's report had mentioned. He particularly noted Floyd's mother's heavy drinking, including during her pregnancies.

During closing arguments, defense counsel urged the jury to refrain from finding that a death sentence was warranted. The mitigating factors defense counsel relied on in closing included Floyd's difficult childhood, his alcohol and substance abuse, his stressful military service, his ADD/ADHD, and his mother's substance abuse while she was pregnant with him.

After three days of deliberation, the jury sentenced Floyd to death. It found that all three statutory aggravating factors were present and that they outweighed Floyd's mitigating evidence.

C.

New counsel represented Floyd on his direct appeal, which the Nevada Supreme Court denied. *Floyd v. State*, 118 Nev. 156, 42 P.3d 249 (2002) (per curiam). The U.S. Supreme Court then denied certiorari. ***1137** *Floyd v. Nevada*, 537 U.S. 1196, 123 S.Ct. 1257, 154 L.Ed.2d 1033 (2003). Floyd filed a state petition for a writ of habeas corpus a little over a year later. The state trial court denied the petition on the merits, and the Nevada Supreme Court affirmed. *Floyd v. State*, No. 44868, 178 P.3d 754, 2006 Nev. LEXIS 851 (Nev. Feb. 16, 2006).

Floyd then filed a pro se habeas petition in the U.S. District Court for the District of Nevada. *See* 28 U.S.C. § 2254(a). The federal public defender was appointed as counsel and filed an amended petition with new allegations, including alleged ineffective assistance by Floyd's trial counsel. The district court agreed with the State that Floyd had not exhausted these new claims in state court and stayed the federal proceedings so he could do so.

Floyd filed a second state habeas petition that included the new claims of ineffective assistance of trial counsel. The state trial court denied this petition on the merits and as untimely filed. The Nevada Supreme Court affirmed, holding that Floyd's second petition was untimely and successive. *Floyd v. State*, No. 51409, 2010 WL 4675234 (Nev. Nov. 17, 2010).

The federal district court then lifted the stay and reopened Floyd's habeas proceedings. It ultimately granted in part the State's motion to dismiss, concluding that Floyd's new claims that the Nevada Supreme Court had denied as untimely —including his new ineffective assistance of trial counsel claims—were procedurally defaulted, and that Floyd had not shown cause and prejudice for failing to raise his ineffective assistance of trial counsel claims in his first petition. *See* *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The district court went on to deny Floyd's remaining claims on the merits, but it issued a certificate of appealability as to several issues, including whether Floyd could show cause and prejudice for the default of his ineffective assistance of trial counsel claims.

Floyd appealed, pressing each of the certified issues and also arguing that we should expand the certificate of appealability to encompass two more. We evaluate each of his arguments in turn.

II.

[1] We review a district court's denial of habeas corpus de novo. *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004).

[2] **[3]** The Antiterrorism and Effective Death Penalty Act ("AEDPA") applies to Floyd's habeas petition. Under AEDPA, we may grant Floyd relief only if the Nevada Supreme Court's rejection of his claims "(1) was contrary to or involved an unreasonable application of clearly established federal law, or (2) was based on an unreasonable determination of the facts." *Davis v. Ayala*, 576 U.S. 257, 135 S. Ct. 2187, 2198, 192 L.Ed.2d 323 (2015). "[C]learly established federal law" in this context refers to law "as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). "Although an appellate panel may ... look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent," that precedent cannot "refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that th[e] Court has not announced." *Marshall v. Rodgers*, 569 U.S. 58, 64, 133 S.Ct. 1446, 185 L.Ed.2d 540 (2013) (per curiam).

III.

Floyd asserts numerous claims of ineffective assistance of trial counsel. He raised most of these claims for the first time in his second state petition, prompting the Nevada Supreme Court to deny ***1138** them as untimely and successive. *Floyd v. State*, No. 51409, 2010 WL 4675234, at *1 (Nev. Nov. 17, 2010). The Nevada Supreme Court held that the ineffective assistance of counsel claims raised for the first time in Floyd's second state habeas petition were procedurally barred under section 34.726 of the Nevada Revised Statutes, which states that absent "good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year" after conviction or remittitur of any denied appeal "taken from the judgment." Nev. Rev. Stat. § 34.726(1).

[4] Unless a petitioner can show "cause and prejudice," federal courts in habeas actions will not consider claims decided in state court on a state law ground that is independent of any federal question and adequate to support the state court's judgment. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Floyd and the State disagree about whether section 34.726, as applied in his case, is adequate to bar federal review. [1] Floyd contends that when he filed his second state habeas petition in 2007, Nevada did not clearly and consistently apply section 34.726 to bar successive petitions alleging ineffective assistance of counsel in capital cases. He further argues that, even if the state law is adequate, he can establish cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182

L.Ed.2d 272 (2012), based on ineffective assistance of initial state habeas counsel in failing to raise claims of ineffective assistance of trial counsel.

[5] Given that Floyd's underlying ineffective assistance of trial counsel claims lack merit, we need not resolve whether the state law is adequate or, if it is, whether Floyd can overcome his procedural default and obtain federal review of the merits of his ineffective assistance claims.[2] *See* *Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002). Even if we held in Floyd's favor on either of those questions and thus reached the merits of Floyd's ineffective assistance of trial counsel claims, we would affirm the district court's denial of relief.[3]

A.

[6] **[7]** To succeed on an ineffective assistance of counsel claim, Floyd must show that his counsel's performance "fell below an objective standard of reasonableness," and that, if so, there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***1139** *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). With respect to the prejudice requirement, the Supreme Court has cautioned that "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). To determine the risk of such prejudice at the penalty phase of a capital trial, we consider whether it is reasonably probable that the jury otherwise "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death" in light of "the totality of the evidence" against the petitioner. *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052.

B.

Floyd's primary ineffective assistance of trial counsel claim is that his trial counsel failed to investigate and present mitigation evidence showing that Floyd suffers from fetal alcohol spectrum disorder ("FASD") as a result of his mother's alcohol consumption while he was in utero. In support of this claim, Floyd offers a report from FASD expert Dr. Natalie Novick Brown. After reviewing the trial court record and other experts' examinations of Floyd, Dr. Brown concluded that Floyd suffered from FASD and that the disorder could explain his actions on the day of the shooting. Floyd argues it is reasonably probable that had jurors been presented with evidence of FASD and its effects, they would have spared him a death sentence. Floyd acknowledges that trial counsel consulted seven experts, none of whom diagnosed Floyd with FASD, but he contends that those experts were inadequately prepared and lacked the expertise to present proper mitigating evidence regarding FASD.

[8] We need not resolve whether Floyd's counsel's performance was deficient in failing to present expert testimony that Floyd suffers from FASD. Even assuming it was, there is no reasonable probability that, had the jury heard from an FASD expert, it would have concluded that mitigating factors outweighed aggravating factors such that Floyd did not deserve a death sentence.

The State presented an extremely weighty set of aggravating factors at sentencing. First, the State charged that Floyd "created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person." Nev. Rev. Stat. § 200.033(3). Second, it alleged that Floyd killed more than one person (indeed, four) during the course of the offense that led to his conviction. *See* *id.* § 200.033(12). Third, it alleged that the killings were at random and without apparent motive, because Floyd "just went to a place where he knew 18 people would be and shot everybody he could see." *See* *id.* § 200.033(9). The jury unanimously found that all three aggravating circumstances existed with regard to all four victims.

In response, Floyd's counsel emphasized Floyd's developmental problems and emotional instability, issues exacerbated by his early life experiences and military service. Counsel's mitigation arguments included multiple references to Floyd's mother's drinking while Floyd was in utero —a point that both mitigation consultant Abreu and Dr. Dougherty emphasized as well. Counsel and Dr. Dougherty both explicitly opined that Floyd's mother's substance abuse might be to blame for Floyd's mental condition. All in all, Floyd's counsel argued that Floyd acted "under the influence of extreme mental or emotional disturbance," and that he "suffer[ed] from the effects, early effects of his mother's drinking, her ingested alcohol, drugs early on in her pregnancy."

Consistent with these defense arguments, the mitigation instructions submitted ***1140** to the jury included that Floyd's "[m]other use[d] alcohol and drugs during early pregnancy," that Floyd had been born prematurely, that the murders were committed while Floyd was under the influence of "[e]xtreme [m]ental or [e]motional [d]isturbance," and that Floyd had been "[i]nsufficiently [t]reated for ADHD [and] other [e]motional-[b]ehavioral [p]roblems including [d]epression." Maternal alcohol and drug use was the first mitigating factor on the list.

Given the defense's focus on Floyd's mother's drinking during pregnancy and its effects, testimony by an FASD expert would likely not have changed any juror's balancing of mitigating versus aggravating circumstances. For Floyd to have been prejudiced by the lack of testimony by an FASD expert, at least one juror would have had to have considered a formal FASD diagnosis more severe and debilitating than ADD/ADHD and Floyd's other developmental problems, which the defense had suggested included effects of his mother's drinking and drug use during pregnancy, but without using FASD terminology. In other words, at least one juror would have had to view a formal FASD diagnosis as a weightier mitigating factor than those presented. And that juror would have had to have placed so much additional weight on the FASD defense as to cause the mitigating circumstances to outweigh the State's significant aggravating evidence, even though they did not on the record before the jury. Both the limited additional contribution of the FASD mitigating factor as compared with the mitigation evidence presented and the especially shocking nature of Floyd's crime, during which he killed multiple unarmed people at close range, without provocation, and in their workplace, makes that switch in outcome unlikely. Given that the jury already had evidence before it that Floyd suffered from some developmental problems and that his issues might have been related to his mother's alcohol use during pregnancy, and given the extreme aggravating circumstances, it seems very unlikely—and so not reasonably probable—that any juror would have had these reactions.

This conclusion comports with our previous holdings that a capital petitioner is not necessarily prejudiced when counsel fails to introduce evidence that differs somewhat in degree, but not type, from that presented in mitigation. In *Bible v. Ryan*, 571 F.3d 860 (9th Cir. 2009), for instance, we held that a capital petitioner was not prejudiced by his attorney's failure to introduce medical evidence that he suffered from neurological damage. *Id.* at 870. We reasoned that because counsel presented evidence that the petitioner might have had brain damage from persistent drug and alcohol abuse, along with evidence of childhood events that could have led to brain damage, medical evidence of neurological damage would have been different only in degree. *Id.* at 871. Floyd's FASD argument resembles that of the petitioner in *Bible*—the jury heard the evidence that would have supported the FASD diagnosis as well as the implication that the evidence explained Floyd's behavior. And like the petitioner in *Bible*, who "murdered a nine-year-old child in an especially cruel manner," Floyd "has a significant amount of aggravating circumstances that he would need to overcome," *id.* at 872, making it unlikely that the jury would have imposed a different sentence based on mitigating evidence that differed only in degree from that which Floyd presented at trial.

Floyd urges us to follow the Fourth Circuit's decision in *Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019), *petition for cert. docketed*, No. 18-1495 (May 31, 2019), in which that court affirmed a district court's conclusion that a capital petitioner's counsel had performed constitutionally deficiently in failing to present evidence of ***1141** fetal alcohol syndrome in mitigation, and that the petitioner was prejudiced by this failure. *Id.* at 319. In some cases, FASD evidence might be sufficiently "different from ... other evidence of mental illness and behavioral issues" to raise a reasonable probability that a juror would not have imposed the death penalty had it been presented. *Id.* at 318. But much distinguishes Floyd's case from that of the petitioner in *Williams*. Floyd's lawyers and experts explicitly argued that his mother's alcohol use while she was pregnant led to his developmental problems in some form and therefore helped explain his actions, whereas trial counsel in *Williams* investigated the petitioner's mother's drinking "as evidence of [the petitioner's] difficult childhood, not of [fetal alcohol-related disorders]" and never offered evidence to the jury that the drinking could have caused Williams's cognitive issues. *Id.* at 309. The State submitted against Floyd three aggravating factors, all involving a multiple-victim shooting, whereas in *Williams* "the State only presented one aggravating factor: that the [single] murder occurred in the commission of a kidnapping." *Id.* at 318. The jury that

imposed the death sentence on Floyd did not report difficulty reaching a verdict, whereas in *Williams* "the jury sent a note to the trial court stating it was deadlocked nine to three in favor of death." *Id.* at 308. In short, the petitioner in *Williams* was prejudiced because his lawyers presented a much weaker-than-available mitigation argument that was insufficient to overcome an also weak aggravating argument that clearly troubled some jurors. [4] That was not the situation here. We also note that our conclusion is consistent with the Fifth Circuit's in *Trevino v. Davis*, 861 F.3d 545 (5th Cir. 2017), *cert. denied*, —— U.S. ——, 138 S. Ct. 1793, 201 L.Ed.2d 1014 (2018), in which that court rejected an ineffective assistance of counsel claim relating to the failure to present mitigating evidence of an FASD diagnosis because the evidence would have been outweighed by what the court viewed as very substantial aggravating evidence. *Id.* at 549–51.

[9] Floyd further argues that counsel provided deficient performance in the penalty phase by failing to call Dr. Paul, the consulting military and mental health expert, to testify about Floyd's military service, early life, and other matters. We are skeptical that declining to call this expert was constitutionally deficient. *See* *Hinton v. Alabama*, 571 U.S. 263, 275, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014) ("The selection of an expert witness is a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after thorough investigation of [the] law and facts,' is 'virtually unchallengeable.' " (alterations in original) (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052)). Even assuming that counsel's choice in this regard was deficient, it did not prejudice Floyd. Like Floyd's FASD evidence, Dr. Paul's testimony would have been largely cumulative of the evidence of Floyd's substance abuse and mental health struggles actually presented at trial, and the testimony therefore would have done little to offset the weighty aggravating evidence against Floyd.

C.

Floyd argues that his trial counsel's conduct during jury selection amounted to ***1142** ineffective assistance of counsel. We disagree. Much of his argument supposes that various decisions by the trial court prejudiced him during jury selection, that those decisions were erroneous, and that his counsel was ineffective in failing to object to or otherwise remedy these errors. But most of the trial court decisions he challenges were not errors at all, and with respect to any that may have been errors, we conclude that his counsel acted within the bounds of professional competence in responding to the court's decisions.

[10] For example, Floyd contends that his counsel erred in failing to successfully object to the trial court's dismissal of two prospective jurors. Floyd first argues that the trial court improperly or pretextually removed one venireperson from the venire for cause. Even assuming that the trial court erred in doing so, this does not show that Floyd's counsel was ineffective. On the contrary, Floyd's counsel attempted to rehabilitate the prospective jurors who had expressed hesitation about the death penalty, including the juror in question, and to allay the court's concerns. After the juror stated that she had scruples about the death penalty, counsel elicited a response from her that she "would have to follow the law." But she then admitted that she would "invariably in all cases give a sentence less than death," and the trial court dismissed her for cause.

Floyd next argues that the court improperly dismissed a second venireperson for improper concerns about language ability. After it came to light that this prospective juror was not a native English speaker, defense counsel questioned him about his degree from an English-speaking university. Nonetheless, the court concluded that the juror's English fluency was insufficient, stating that it could "not take a chance where the stakes [were] so high to both sides."

That the trial court dismissed these two potential jurors does not mean that counsel's attempts to rehabilitate them were deficient and that competent counsel would have sufficiently rehabilitated the two to keep them on the jury, especially because the court appears to have had legitimate concerns about both.

[11] **[12]** Floyd similarly argues that because the trial court refused to excuse allegedly biased venirepersons for cause, counsel wasted peremptory challenges on striking those individuals from the jury pool. It appears, however, that the trial court made no error by refusing to dismiss the prospective jurors in question. One of them, for instance, retracted her statement that she could not consider a sentence of life with parole after the trial court clarified that she was only required to "at least consider" it. And again, even if the trial court erred, Floyd's counsel's reaction was within the realm of permissible strategic choices: counsel chose

between the two (admittedly unattractive) options of spending a peremptory challenge or taking the risk of seating a juror that counsel had concluded would be unfavorable to Floyd. In other words, Floyd's counsel was not ineffective for attempting to make the best of the trial court's alleged errors.

[13] Finally, Floyd contends in general terms that the voir dire format, in which the prosecution questioned all prospective jurors before the defense was permitted to question any, was prejudicial or caused his counsel to be ineffective. We struggle to discern precisely Floyd's theory of deficient performance or of prejudice. Even assuming that the trial court's format was prejudicial, counsel did object to it by moving for "attorney conducted, sequestered individual *voir dire*." Trial counsel's attempt to challenge the trial court's procedures shows diligence, not ineffectiveness.

***1143** **[14]** Moreover, Floyd's lawyers had the opportunity to individually question numerous prospective jurors, eliciting information about their views on topics including the death penalty, psychology, alcoholism, and how they would behave in a jury room. Counsel's decision not to further question each venireperson about his or her exposure to media coverage of the shooting and ability to consider mitigating evidence was not deficient. The questionnaires that every prospective juror completed asked about these issues, and the trial court asked all prospective jurors if "there [is] anybody among you who feels unable to set aside what they've read, seen, or heard" about the case. Floyd's counsel were entitled to rely on those responses, and their mere failure to inquire further does not render their performance deficient. *See* *Fields v. Woodford*, 309 F.3d 1095, 1108 (9th Cir. 2002) ("[W]e cannot say that failure to inquire beyond the court's voir dire was outside the range of reasonable strategic choice or that it would have affected the outcome."); *Wilson v. Henry*, 185 F.3d 986, 991 (9th Cir. 1999) (rejecting argument "that trial counsel rendered ineffective assistance by failing to focus on his client's criminal history during voir dire to discover potential juror prejudice and determine whether jurors could follow limiting instructions on such a history").

D.

[15] Floyd's counsel was not ineffective in cross-examining the State's penalty-phase psychological expert witness, Dr. Mortillaro. Dr. Mortillaro reviewed the guilt-phase record materials and other psychological experts' reports and data, including Dr. Schmidt's unfavorable test results that the defense provided the prosecution in discovery before it unendorsed Dr. Schmidt. Dr. Mortillaro also interviewed Floyd himself. Based on these materials, Dr. Mortillaro opined that —contrary to defense expert Dr. Dougherty's testimony— Floyd had not suffered brain damage, was of average IQ, did not suffer delusions, could tell right from wrong, and was not mentally ill.

On cross-examination, defense counsel elicited testimony from Dr. Mortillaro that he had only interviewed Floyd for about ninety minutes and that he had only received Dr. Dougherty's report the day before. Counsel also attempted to undermine Dr. Mortillaro's reliance on Floyd's scores from tests administered by Dr. Schmidt as the basis for Dr. Mortillaro's conclusion, arguing that the results should have been thrown out entirely. Counsel succeeded in getting Dr. Mortillaro to admit that any individual psychologist has significant discretion in deciding whether the test score was valid enough to allow reliance on the raw data. Counsel then pointed out that Dr. Dougherty had looked at the same data and diagnosed Floyd with dissociative personality disorder rather than borderline personality disorder, and he elicited an admission from Dr. Mortillaro that individuals with borderline personality disorder may show dissociative symptoms.

Finally, counsel attempted to undermine Dr. Mortillaro's minimization of Floyd's ADD/ADHD. Counsel presented Dr. Mortillaro with his own prior testimony from another matter in which Dr. Mortillaro had stated "that 70 percent of those with attention deficit [disorder] still have it as an adult." Dr. Mortillaro also conceded that even if a patient were to "outgrow" ADD or ADHD, the fallout from the childhood disorder "would stay with them."

Floyd generally faults counsel for choosing to rely on cross-examination of Dr. Mortillaro rather than calling Floyd's other consulting expert, Dr. Kinsora, to rebut Dr. Mortillaro's testimony. The caselaw does not support Floyd's argument. In prior cases in which we and other circuits ***1144** have recognized constitutionally deficient cross-examination, there were glaring failures to ask even basic questions, not—as here—a strategic choice between one means of undermining the witness and another. *See, e.g.*, *Reynoso v. Giurbino*, 462 F.3d 1099, 1112–13 (9th Cir. 2006) (counsel ineffective for failing to ask *any* questions about a $25,000 reward that might have motivated key witnesses' testimony against the defendant); *Higgins v. Renico*, 470 F.3d 624,

633 (6th Cir. 2006) (ineffective assistance where counsel did not cross-examine key prosecution witness at all because he felt unprepared to do so, even though he "had plenty of ammunition with which to impeach [the witness's] testimony").

Floyd does not contend that counsel failed altogether to cross-examine Dr. Mortillaro about key issues, but rather that he failed to do so in a manner that Floyd now believes would have been more effective. But Floyd's counsel did attempt to impeach Dr. Mortillaro's testimony, including with information counsel obtained from experts he had hired. This was not constitutionally deficient performance.

E.

Floyd argues that his trial counsel was ineffective for failing to object to various jury instructions. Many of the arguments against the instructions Floyd now challenges would not have been legally supported or would have been foreclosed by then-governing law, so counsel was not ineffective for failing to raise them.

[16] First, we disagree with Floyd that the jury should have been instructed at the penalty phase that it could impose a death sentence only if it found that aggravating factors outweighed mitigating factors beyond a reasonable doubt. Floyd contends that the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), required that the jury instructions include such a statement about burden of proof. The Court in *Apprendi* held that, subject to an exception for prior convictions, "any *fact* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. 2348 (emphasis added). Floyd characterizes the balance of aggravating and mitigating circumstances as a "fact" governed by this rule.

The federal courts of appeals that have considered this argument have uniformly rejected it, holding that a jury's balancing inquiry in a capital case is a subjective and moral one, not a factual one. *See* *United States v. Gabrion*, 719 F.3d 511, 532–33 (6th Cir. 2013) (en banc); *United States v. Runyon*, 707 F.3d 475, 516 (4th Cir. 2013); *United States v. Barrett*, 496 F.3d 1079, 1107–08 (10th Cir. 2007); *United States v. Fields*, 483 F.3d 313, 346 (5th Cir. 2007); *United States v. Sampson*, 486 F.3d 13, 31–32 (1st Cir. 2007); *United States v. Purkey*, 428 F.3d 738, 749–50 (8th Cir. 2005).[5] Floyd's proposed instruction thus hardly flowed naturally from *Apprendi*, which did not involve a capital case and ***1145** was decided just months before Floyd's trial began. Floyd's counsel was not deficient for failing to make an argument that was untested, an extension of newly minted law, and (judging from the weight of subsequent authority) likely to fail. *See* *Engle v. Isaac*, 456 U.S. 107, 134, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) ("[T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.").

Second, Floyd's counsel was not ineffective for failing to challenge on constitutional grounds the penalty-phase jury instructions for the aggravating circumstance that "[t]he murder was committed upon one or more persons at random and without apparent motive." At the time of Floyd's trial, the Nevada Supreme Court had already rejected an identical constitutional challenge to this aggravating factor. *See* *Geary v. State*, 112 Nev. 1434, 930 P.2d 719, 727 (1996). Counsel was not ineffective for failing to raise this argument.

[17] Third, no *Strickland* violation occurred when Floyd's counsel declined to challenge a guilt-phase jury instruction that premeditation, an element of first-degree murder, "may be as instantaneous as successive thoughts of the mind." Even assuming that this instruction was improper and that counsel's decision not to challenge it was unreasonable, no prejudice resulted from use of the instruction. The jury had before it significant evidence that Floyd's premeditation occurred in more than an instant. Among other things, he told his sexual assault victim that he planned to kill the first nineteen people he saw, then walked for fifteen minutes carrying the shotgun that he used to perpetrate the murders. Even if counsel had succeeded in striking the "instantaneous premeditation" instruction, there is no reasonable probability that the jury would have found a lack of premeditation as a result. *See* *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

F.

Floyd's remaining claim of ineffective assistance—that his trial counsel should have objected to Nevada's use of the "great risk of death" aggravating circumstance—was raised and adjudicated in state court, so we review it under AEDPA's deferential standards. The claim fails under those standards.

[18] **[19]** Floyd contends that his trial counsel should have objected to this aggravating circumstance as duplicative of another aggravating circumstance—the "multiple murders" factor—that the State charged. *See* Nev. Rev. Stat. § 200.033(3). Initial post-conviction counsel presented a nearly identical argument [6] to the Nevada Supreme Court, which rejected it on the merits. The Nevada Supreme Court held that the two aggravators were based on different facts and served different state interests. It reasoned that "[o]ne is directed against indiscriminately dangerous conduct by a murderer, regardless of whether it causes more than one death; the other is directed against murderers who kill more than one victim, regardless of whether their conduct was indiscriminate or precise." ***1146** *Floyd v. State*, No. 44868, 178 P.3d 754, 2006 Nev. LEXIS 851 (Nev. Feb. 16, 2006). Floyd argues in a conclusory fashion that this decision was "arbitrary and capricious" such that it was contrary to or an unreasonable application of clearly established federal law, but he cites no controlling Supreme Court precedent relevant to this argument. His briefing focuses entirely on the legislative history of Nevada's aggravating factors and what he contends are two conflicting strains of doctrine in that state's jurisprudence on the "great risk of death factor." These state law issues are not grounds for federal habeas relief, and we are aware of no clearly established federal law that the Nevada Supreme Court's determination might have contravened. *See* 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (holding that "clearly established Federal law" refers only to U.S. Supreme Court decisions at time of alleged violation).

IV.

[20] Floyd argues that his constitutional rights were violated when the State's expert, Dr. Mortillaro, made reference during his testimony to test results that he had obtained from Floyd's expert, Dr. Schmidt. The Nevada Supreme Court's conclusion on direct appeal that no constitutional error occurred, *Floyd v. State*, 118 Nev. 156, 42 P.3d 249, 258–59 (2002) (per curiam), was not contrary to or an unreasonable application of controlling Supreme Court caselaw.

[21] Floyd argues at length that the Nevada Supreme Court wrongly determined that Dr. Schmidt's report was not privileged work product. [7] Although the Nevada Supreme Court drew on federal authority in reaching that conclusion, Floyd "simply challenges the correctness of the state evidentiary rulings," and "he has alleged no deprivation of federal rights" that could entitle him to relief. *Gutierrez v. Griggs*, 695 F.2d 1195, 1197 (9th Cir. 1983). He similarly argues that the Nevada Supreme Court misapplied its own precedent, but a state court's misreading of *state* law is not a ground for federal habeas relief.

Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), does not support Floyd's challenge to the use of Schmidt's report either. The Supreme Court in *Ake* held that "due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation ***1147** at the sentencing phase" of a capital case. *Id.* at 84, 105 S.Ct. 1087. Floyd received ample psychiatric evaluations and assistance prior to sentencing, so *Ake* has little bearing here.

Floyd further contends that our extension of *Ake* in *Smith v. McCormick*, 914 F.2d 1153, 1158–59 (9th Cir. 1990), should have compelled the Nevada Supreme Court to reach a different result. In *Smith*, we held that a capital defendant's due process rights [8] were violated when, instead of permitting an independent psychiatric evaluation, the trial court ordered a psychiatrist to examine the defendant and report directly to the court at a resentencing hearing. *Id.* at 1159–60. We reasoned that the petitioner's "counsel was entitled to a confidential assessment of such an evaluation, and the strategic opportunity to pursue other, more favorable, arguments for mitigation." *Id.* at 1160.

Floyd appears to argue that because, under *Smith*, a defendant is entitled to a confidential assessment of the state-provided psychiatric assessment and the chance to pursue

other strategies, he was entitled to claw back a document that was disclosed in connection with designating an expert to testify after he reversed course and removed the expert from his witness list. The holding in *Smith* did not encompass what Floyd seeks here, so the Nevada Supreme Court did not act contrary to our precedent. And, in any event, Floyd's proposed rule is not clearly established by any Supreme Court decision. *Marshall v. Rodgers*, 569 U.S. 58, 64, 133 S.Ct. 1446, 185 L.Ed.2d 540 (2013) (per curiam).

Indeed, the Supreme Court has held that mandatory disclosure schemes are permissible in criminal trials as long as they do not structurally disadvantage the defendant. *See Wardius v. Oregon*, 412 U.S. 470, 472, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) ("We hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules *unless reciprocal discovery rights are given to criminal defendants*." (emphasis added)). Nevada provides for reciprocal discovery, as it did at the time of Floyd's trial, so *Wardius* was not contravened here. *See* Nev. Rev. Stat. § 174.234 (1999).

V.

Floyd next contends that the trial court violated his constitutional rights by failing to grant a change of venue. [9] He argues that the district court erred when it rejected this claim in part on the ground that, of the 115 news articles Floyd submitted with his federal habeas petition to attempt to show that the jury was exposed to prejudicial pretrial publicity about his case, only three were in the record before the state courts. Relying on *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), the district court reasoned that ***1148** AEDPA limited its review to those materials before the state courts that had rejected Floyd's venue claim. *See id.* at 185, 131 S.Ct. 1388 ("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court.").

The district court did not err. Floyd argues that, under *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc), the district court misapplied *Pinholster* to bar consideration of his 112 new articles. Floyd's reliance on *Dickens* is misplaced. In *Dickens*, we held that AEDPA (as interpreted in *Pinholster*) did not bar a federal court from considering new evidence introduced to support a *Martinez* motion alleging ineffective assistance of trial and postconviction counsel as cause and prejudice for a procedural default. *Dickens*, 740 F.3d at 1319–20. Here, by contrast, Floyd faults the district court for failing to consider new evidence in the context of a change of venue claim decided on its merits in the state court and so reviewed under AEDPA deference. Floyd's theory about how the Nevada Supreme Court erred has nothing to do with trial counsel's performance and therefore does not implicate the *Dickens* rule.

Because Floyd makes no argument beyond the district court's refusal to consider these documents—which we conclude was not error—we need not consider whether the Nevada Supreme Court's denial of Floyd's venue claim was contrary to or unreasonably applied clearly established federal law.

VI.

[22] Floyd argues, as he did on direct appeal, that the trial court violated his constitutional rights by permitting the mother of victim Thomas Darnell to testify extensively during the penalty phase about her son's difficult life and previous experiences with violent crime. The Nevada Supreme Court held that parts of Nall's testimony "exceeded the scope of appropriate victim impact testimony" and should not have been admitted under state evidentiary law, but that their admission did not unduly prejudice Floyd such that it rendered the proceeding fundamentally unfair. *Floyd v. State*, 118 Nev. 156, 42 P.3d 249, 262 (2002) (per curiam). The Nevada Supreme Court's rejection of this claim was not contrary to or an objectively unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d).

The prosecution called Mona Nall, Darnell's mother, to offer victim impact testimony during the penalty phase of trial. Nall told the jury how Darnell had thrived in the face of serious learning and developmental disabilities, going on to form close relationships with his family and members of the community. She testified that "the hurt has gone so deep" for those affected by his death. Nall also recounted an incident years earlier in which Darnell and his family had

been kidnapped by two men who held the family hostage and sexually assaulted Nall's daughter. Defense counsel objected twice to this testimony and the trial court admonished the prosecution to "get to th[e] point."

The Nevada Supreme Court did not unreasonably apply the relevant clearly established federal law in rejecting Floyd's claim that this testimony violated his due process rights. In *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the Supreme Court held that in a penalty-phase capital trial, "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." *Id.* at 827, 111 S.Ct. 2597. The Court added that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial ***1149** fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* at 825, 111 S.Ct. 2597 (citing *Darden v. Wainwright*, 477 U.S. 168, 179–83, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)).

Like the Nevada Supreme Court, we are troubled by the admission of some of Nall's testimony. That court determined that although *Payne* did not necessarily bar Nall's testimony about the hostage-taking and kidnapping incident, those parts of her testimony should not have been admitted under state evidentiary law because of its limited relevance and high risk of prejudice. We are additionally concerned about the propriety of Nall's testimony about Darnell's early life and developmental difficulties because of its limited relevance to Floyd's impact on the victims (or on people close to and surviving them) and its potential risk of prejudice. Eliciting extensive testimony about a horrible crime that had nothing to do with the defendant risks inappropriately affecting jurors who might feel that the victim's family should be vindicated for all of its tragedies, not just for the one caused by Floyd.

Nevertheless, it was not unreasonable for the Nevada Supreme Court to conclude that the admission of Nall's testimony did not render Floyd's trial fundamentally unfair. Given the strength of the prosecution's aggravating case against Floyd, it seems unlikely that the jury was substantially swayed by the irrelevant parts of Nall's testimony. The same characteristics that made Nall's testimony so objectionable —that it had nothing to do with Floyd's crimes or, at times, with Floyd's victims—could have diminished the testimony's effect on the jury.

The prosecutor indirectly referenced the irrelevant portions of Nall's testimony in closing argument when he commented on "the tremendous tragedies ... that Mona has suffered and had suffered with her son over the years, so many tragedies, so many hardships." But this comment lacked detail and was in the context of a long description of the victim impact of Floyd's crime, so the prosecution does not appear to have relied extensively on the improper testimony. In the face of the robust aggravating evidence that the State presented, the Nevada Supreme Court did not unreasonably apply clearly established Supreme Court law by holding that Floyd was not prejudiced by Nall's statement or by the prosecutor's references to it, so there was no due process violation. *See* *Payne*, 501 U.S. at 825, 111 S.Ct. 2597. For the same reasons, any error in permitting Nall's testimony about Darnell's early life was harmless as there is no evidence that the testimony had "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 638, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (quotation marks omitted).

VII.

Floyd challenges numerous statements made by the prosecution as misconduct amounting to constitutional error.[10] We agree that a subset of these statements was improper, but we hold that the impropriety is not a ground for habeas relief under the relevant standards of review.

[23] **[24]** **[25]** The due process clause provides the constitutional framework against which we evaluate Floyd's claims of prosecutorial misconduct. "The relevant question" under clearly established law "is whether the prosecutors' comments 'so infected the trial with unfairness as to make ***1150** the resulting conviction a denial of due process.' " *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)); *see also* *Parker v. Matthews*, 567 U.S. 37, 45, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012) (per curiam) (holding that *Darden* provides relevant clearly established law on habeas review of claims that statements

by prosecutors amounted to prosecutorial misconduct). In making that determination, courts look to various

> *Darden* factors—i.e., the weight of the evidence, the prominence of the comment in the context of the entire trial, whether the prosecution misstated the evidence, whether the judge instructed the jury to disregard the comment, whether the comment was invited by defense counsel in its summation and whether defense counsel had an adequate opportunity to rebut the comment.

Hein v. Sullivan, 601 F.3d 897, 914 (9th Cir. 2010). As the Supreme Court emphasized in *Darden*, "it is not enough that the prosecutors' remarks were undesirable or even universally condemned," 477 U.S. at 181, 106 S.Ct. 2464 (citation omitted), because the effect on the trial as a whole needs to be evaluated in context. *See* *United States v. Young*, 470 U.S. 1, 17–20, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (prosecutor's exhortation that the jury "do its job" and statements of personal belief were improper, but they did not have prejudicial effect on the trial as a whole in light of the comments' context and overwhelming evidence of guilt).

A.

[26] In his direct appeal and first habeas petition, Floyd presented several claims that the prosecutor's statements amounted to misconduct; we review those adjudicated claims under AEDPA. We agree with the Nevada Supreme Court that the prosecutor's contention that Floyd had committed "the worst massacre in the history of Las Vegas" was improper. *Floyd v. State*, 118 Nev. 156, 42 P.3d 249, 260–61 (2002) (per curiam). That court's further determination that the comment was harmless, *id.* at 261, was not unreasonable. Although the Nevada Supreme Court cited the state's codified harmless error doctrine, *see* Nev. Rev. Stat. § 178.598, and not *Darden*, its reasoning can also be understood as concluding that Floyd had not shown that the misconduct "so infected the trial with unfairness" as to work a denial of his due process rights. *Darden*, 477 U.S. at 181, 106 S.Ct. 2464 (quotation marks omitted).

This conclusion was not objectively unreasonable under the *Darden* factors. Although the "worst massacre" comment came late in the trial and was not invited by the defense, the weight of the evidence against Floyd and the fact that the comment was not egregiously inflammatory make the Nevada Supreme Court's determination reasonable. In *Darden*, for instance, the prosecutor made a series of comments far more inflammatory than this one.[11] The Supreme Court nonetheless held that those comments did not render the petitioner's trial fundamentally unfair ***1151** in light of the defense's response and the strong evidence against the petitioner. *Id.* at 180–83, 106 S.Ct. 2464. And although the trial court here did not specifically direct jurors to ignore the prosecutor's "worst massacre" comments, it did instruct them that "arguments and opinions of counsel are not evidence." The Nevada Supreme Court's determination was therefore neither contrary to nor an unreasonable application of *Darden*.

B.

Floyd raised additional claims in his second state habeas petition that statements by the prosecutor amounted to misconduct. The Nevada Supreme Court held that those claims were procedurally barred, *Floyd v. State*, No. 51409, 2010 WL 4675234, at *1 (Nev. Nov. 17, 2010), but because the State has forfeited any objection to the district court's decision to review them on the merits nonetheless, we consider them de novo.

[27] Most of these claims are meritless, but we note two troubling arguments made by the prosecution. We find improper one set of statements characterizing the jury's role in imposing the death penalty. At the penalty phase, the prosecution told the jury that "you're not killing him," that "[y]ou are part of a shared process," and that "even after you render your verdict, there's a process that continues." These comments suggested that other decisionmakers might ultimately decide whether Floyd received the death penalty. They therefore present concerns under *Caldwell v. Mississippi*, 472 U.S. 320, 328–29, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), which held that the Eighth Amendment

makes it "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."

Nevertheless, these comments did not "so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment." *Id.* at 340, 105 S.Ct. 2633. The statements did not quite as clearly suggest to the jury that Floyd would not be executed as did the offending remark in *Caldwell*. *See* *id.* at 325–26, 105 S.Ct. 2633 ("[Y]our decision is not the final decision"; "[T]he decision you render is automatically reviewable by the Supreme Court."). Defense counsel emphasized the jury's responsibility during his closing argument, telling the jurors, "[w]e sit before you and we ask whether or not you're going to kill somebody." Moreover, the jury instructions clearly stated that the jurors "must assume that the sentence will be carried out." This sufficiently avoided any "*uncorrected* suggestion that the responsibility for any ultimate determination of death will rest with others," so as to not require reversal. *Id.* at 333, 105 S.Ct. 2633 (emphasis added).

[28] The prosecution also argued during the penalty phase that the death penalty "sends a message to others in our community, not just that there is a punishment for a certain crime, but that there is justice." This statement inappropriately implies that the jury could sentence Floyd to death to send a message, rather than making "an *individualized* determination." *Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The harm of this statement was mitigated in part by jury instructions that emphasized the jury's responsibility to weigh the specific aggravating and mitigating circumstances of the case. Both the defense and the prosecution also repeatedly emphasized and relied on the specific details of the crime at hand, encouraging the jury to make a determination based on the individual facts of the case. Finally, we agree with the district court's holding that, in ***1152** context, these comments did not "incite the passions of the jurors" and "did not include any overt instruction to the jury to impose the death penalty ... to send a message to the community." In light of the other arguments made at trial, and the strong evidence against Floyd, the improper argument by the prosecution did not "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181, 106 S.Ct. 2464 (quotation marks omitted).

VIII.

Floyd advances on appeal two claims outside the certificate of appealability issued by the district court. These uncertified claims challenge Nevada's lethal injection protocol and courtroom security measures that caused certain jurors to see Floyd in prison garb and restraints. We construe this portion of his briefing as a motion to expand the certificate of appealability. 9th Cir. R. 22-1(e).

[29] A petitioner meets his burden for a certificate of appealability if he can make "a 'substantial showing of the denial of a constitutional right,' accomplished by 'demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.' " *Turner v. McEwen*, 819 F.3d 1171, 1178 n.2 (9th Cir. 2016) (first quoting 28 U.S.C. § 2253(c)(2); and then quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)). Floyd makes no such showing here, and we therefore deny his motion to expand the certificate of appealability.

[30] **[31]** First, Floyd's uncertified challenge to Nevada's lethal injection protocol—a three-drug sequence of the anesthetic midazolam, the opioid fentanyl, and the paralytic cisactracurium—is not yet ripe. In 2018, the manufacturer of Nevada's supply of midazolam brought an action to enjoin its product's use in executions. The manufacturer won, obtaining a preliminary injunction, *Alvogen v. Nevada*, No. A-18-777312-B (Nev. Dist. Ct. Sept. 28, 2018), which is currently on appeal to the Nevada Supreme Court. *See* *State v. Alvogen, Inc.*, Nos. 77100, 77365, 2019 WL 5390459 (Nev. 2019). As a result, for all practical purposes, Nevada presently has no execution protocol that it could apply to Floyd. A method-of-execution challenge is not ripe when the respondent state has no protocol that can be implemented at the time of the challenge. *See* *Payton v. Cullen*, 658 F.3d 890, 893 (9th Cir. 2011) (claim unripe because no protocol in place following state court invalidation of existing protocol). We cannot determine what drugs Nevada might attempt to use to execute Floyd, and we cannot adjudicate the constitutionality of an unknown protocol. Floyd's claim is therefore unripe for federal review because "the injury is speculative and may never occur." *Portman v. County*

of Santa Clara, 995 F.2d 898, 902 (9th Cir. 1993) (citation omitted).

[32] Second, Floyd's uncertified and procedurally defaulted argument that his trial counsel was ineffective for failing to challenge various courtroom security measures fails. In Floyd's second state habeas petition and instant federal petition, he contended that his trial counsel failed to object to the trial court's forcing him to appear at voir dire in a prison uniform and restraints. The Nevada Supreme Court dismissed this claim as untimely and successive because it was first raised in Floyd's second state petition, *Floyd v. State*, No. 51409, 2010 WL 4675234, at *1 (Nev. Nov. 17, 2010), and the district court dismissed it as procedurally defaulted. As with Floyd's other defaulted ineffective assistance of counsel claims, because of the underlying claim's ***1153** weakness, we need not resolve whether the state law under which it was deemed defaulted is adequate or whether Floyd may show cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012).

In light of the overwhelming evidence of Floyd's guilt and the weight of the aggravating factors against him, any reasonable jurist would agree that the courtroom security measures had no substantial effect on the jury's verdicts. *See* *Walker v. Martel*, 709 F.3d 925, 930–31 (9th Cir. 2013) (reversing the grant of habeas relief on a shackling-related ineffective assistance claim because the prejudicial effect of shackles was "trivial" compared to aggravating evidence against defendant who killed multiple victims during armed robberies); *Larson v. Palmateer*, 515 F.3d 1057, 1064 (9th Cir. 2008) (holding that when evidence against the defendant is overwhelming, prejudice from shackling is mitigated). Even if trial counsel should have objected to the restraints, Floyd was not prejudiced by that failure. *See* *Harrington v. Richter*, 562 U.S. 86, 111, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (explaining that *Strickland*'s prejudice prong "asks whether it is reasonably likely the result would have been different." (quotation marks and citation omitted)).

We therefore deny the motion to expand the certificate of appealability as to both uncertified claims.

IX.

For the foregoing reasons, we **AFFIRM** the district court's denial of habeas relief.

All Citations

949 F.3d 1128, 20 Cal. Daily Op. Serv. 875, 2020 Daily Journal D.A.R. 823

Footnotes

1 The Nevada Supreme Court also held that Floyd's new claims were barred by section 34.810 of the Nevada Revised Statutes, which requires dismissal of claims that could have been raised in an earlier proceeding. Nev. Rev. Stat. § 34.810(1)(b)(3). On appeal, the State does not contest the district court's determination that this application of section 34.810 was inadequate, and so it does not bar federal review, because the rule was not consistently applied at the time of Floyd's purported default.

2 The arguments in Floyd's opening and reply briefs regarding section 34.726 of the Nevada Revised Statutes address the same ineffective assistance of counsel claims as do his *Martinez* arguments. In Floyd's petition for rehearing, he argues that we should reach other constitutional claims that were also procedurally defaulted by section 34.726. Floyd forfeited any such argument by failing to present it in his opening brief. *See* *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

3 Nor is a remand to the district court for further evidentiary development appropriate because only "a habeas petitioner who asserts a *colorable* claim to relief ... is entitled to an evidentiary hearing." *Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir. 1994) (emphasis added).

4 Floyd's postconviction investigator interviewed one juror who stated that evidence of a "serious mental illness" would have "weighed heavily" in her sentencing-phase deliberations. It does not follow that this juror would have deemed FASD a sufficiently severe condition to mitigate Floyd's offenses, especially because she appears to have considered insufficient the existing evidence of potential ties between maternal alcohol use and Floyd's state of mind.

5 We have never directly ruled on this question—nor do we today—but we have at least twice expressed our skepticism of Floyd's view. *See* *Ybarra v. Filson*, 869 F.3d 1016, 1030–31 (9th Cir. 2017); *United States v. Mitchell*, 502 F.3d 931, 993–94 (9th Cir. 2007). Floyd also argues that counsel should have requested a reasonable doubt instruction based on the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which applied the principle from *Apprendi* to hold that every sentence-enhancing fact, "no matter how the State labels it," must be found beyond reasonable doubt. *Id.* at 602. *Ring* was decided two years after Floyd's trial. In addition, *Ybarra* and *Mitchell*, as well as other circuits' decisions rejecting that argument, post-date *Ring* and thus defeat this version of Floyd's claim as well.

6 To the extent Floyd is now making a new argument that this aggravating circumstance was impermissibly vague, we hold that argument lacks merit. "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." *Middleton v. McNeil*, 541 U.S. 433, 437, 124 S.Ct. 1830, 158 L.Ed.2d 701 (2004) (per curiam). To the extent that Floyd is making a new argument in his reply brief that substantial evidence did not support this jury instruction, we hold that Floyd forfeited any such argument by failing to articulate it in his opening brief. *See* *Arpin*, 261 F.3d at 919.

7 Floyd argues that his counsel were ordered to turn over Dr. Schmidt's report "before defense counsel had even seen the report of their expert." That assertion is misleading. The court ordered the defense to provide a copy of Dr. Schmidt's report "before the close of business on June 15, 2000." Dr. Schmidt's report is dated June 13, 2000. In his declaration, Floyd's counsel describes a phone call with Dr. Schmidt on June 14 where Dr. Schmidt informed counsel that he was "unable to find any neurological basis for Mr. Floyd's actions." "Upon talking with Dr. Schmidt," counsel "became skeptical about the quality of his testing and decided to hire Dr. Kinsora" to review Dr. Schmidt's testing and analysis. So Floyd's counsel knew basically what would be in Dr. Schmidt's report before they turned it over, whether or not they had seen the actual report. Counsel had the opportunity to withdraw Dr. Schmidt as an expert before turning over his report, as they previously had done with Dr. Paul, but failed to do so. And Floyd's counsel admits that there was "no strategic reason to turn over a report that [they] were not sure about using." In light of this timeline, Floyd's argument that the prosecution's use of Dr. Schmidt's data violated the work-product privilege might be more accurately framed as a result of a poor strategic choice on defense counsel's part not to withdraw Dr. Schmidt as an expert, which could in turn be grounds for an ineffective assistance of counsel claim. *See* *McClure v. Thompson*, 323 F.3d 1233, 1242–43 (9th Cir. 2003). But no such claim is before us.

8 Floyd asserted in passing in his opening brief before this court that the disclosure and use of Dr. Schmidt's report violated his Fifth Amendment rights against self-incrimination but provided no developed argument supporting that assertion. We therefore express no view on that issue. *See e.g.*, *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review." (internal citations omitted)).

9 In Floyd's opening brief, he asserts in a section heading that the district court also erred by failing to consider his claim that the trial court violated his rights by refusing to sever the sexual assault charges against him from the murder charges. But he does not actually argue this point or explain the alleged error, so we consider any such argument forfeited. *See* *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

10 The district court determined that Floyd had exhausted all of these claims, and the State does not challenge that ruling.

11 *Darden* enumerated a few of the prosecutor's statements: "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." "I wish [the victim] had had a shotgun in his hand when he walked in the back door and blown [the petitioner's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun." "I wish someone had walked in the back door and blown his head off at that point." "He fired in the boy's back, number five, saving one [round]. Didn't get a chance to use it. I wish he had used it on himself." "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." 477 U.S. at 180 n.12, 106 S.Ct. 2464.

APPENDIX B

Opinion affirming denial of habeas relief, *Floyd v. Filson, et al*., United States Court of Appeals for the Ninth Circuit, Case No. 14-99012 (Oct. 11, 2019)

KeyCite Red Flag - Severe Negative Treatment
Opinion Amended and Superseded on Denial of Rehearing en banc by Floyd v. Filson, 9th Cir.(Nev.), February 3, 2020

940 F.3d 1082
United States Court of Appeals, Ninth Circuit.

Zane FLOYD, Petitioner-Appellant,
v.
Timothy FILSON; Adam Paul Laxalt, Attorney General, Respondents-Appellees.

No. 14-99012
|
Argued and Submitted January 31, 2019 San Francisco, California
|
Filed October 11, 2019

Synopsis

Background: After his murder conviction and death sentence were affirmed on direct appeal, 118 Nev. 156, 42 P.3d 249, and his state habeas petition was denied, petitioner sought federal habeas relief based on alleged ineffective assistance by trial counsel. The United States District Court for the District of Nevada, Philip M. Pro, J., 2012 WL 3598257, dismissed in part and, 2007 WL 1231734, stayed federal proceedings to allow petitioner to exhaust his claims in state court. After state court denied second habeas petition, 2010 WL 4675234, petitioner's federal habeas proceedings were reopened. The District Court, Pro, J., 2014 WL 7240069, denied petition and issued certificate of appealability. Petitioner appealed.

Holdings: The Court of Appeals, Friedland, Circuit Judge, held that:

[1] trial counsel's failure to present expert testimony showing that petitioner suffered from fetal alcohol spectrum disorder (FASD) did not amount to ineffective assistance;

[2] trial counsel's failure to question each prospective juror about his or her exposure to media coverage of shooting and ability to consider mitigating evidence did not amount to ineffective assistance;

[3] trial counsel did not provide ineffective assistance when cross-examining State's penalty-phase psychological expert witness;

[4] Nevada Supreme Court's rejection of petitioner's claim that testimony of victim's mother during penalty phase violated his due process rights was not contrary to or unreasonable application of clearly established federal law;

[5] prosecutor's improper comments characterizing jury's role in imposing death penalty did not so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment; and

[6] prosecutor's improper statement implying that jury could sentence petitioner to death to send message, rather than making individualized determination, did not so infect trial with unfairness as to make the resulting conviction a denial of due process.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (32)

[1] **Habeas Corpus** Review de novo

The Court of Appeals reviews a district court's denial of habeas corpus de novo.

[2] **Habeas Corpus** Federal Review of State or Territorial Cases

Habeas Corpus Federal or constitutional questions

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), the Court of Appeals may grant a habeas petitioner relief only if the state court's rejection of his claims (1) was contrary to or involved an unreasonable application of clearly established federal law, or (2) was based on an unreasonable determination of the facts. 28 U.S.C.A. § 2254(d)(1).

1 Cases that cite this headnote

[3] **Habeas Corpus** Federal Review of State or Territorial Cases

Habeas Corpus Federal or constitutional questions

On federal habeas review, although an appellate panel may look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent, that precedent cannot refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that the Supreme Court has not announced. 28 U.S.C.A. § 2254(d)(1).

[4] **Habeas Corpus** Cause and prejudice in general

Habeas Corpus State court decision on procedural grounds, and adequacy of such independent state grounds

Unless a petitioner can show cause and prejudice, federal courts in habeas actions will not consider claims decided in state court on a state law ground that is independent of any federal question and adequate to support the state court's judgment.

[5] **Habeas Corpus** Discretion and necessity in general

Only a habeas petitioner who asserts a colorable claim to relief is entitled to an evidentiary hearing.

[6] **Criminal Law** Deficient representation and prejudice in general

To succeed on an ineffective assistance of counsel claim, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that, if so, there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[7] **Criminal Law** Death Penalty

On an ineffective assistance of counsel claim, to determine the risk of prejudice at the penalty phase of a capital trial, the Court of Appeals considers whether it is reasonably probable that the jury otherwise would have concluded that the balance of aggravating and mitigating circumstances did not warrant death in light of the totality of the evidence against the defendant. U.S. Const. Amend. 6.

[8] **Criminal Law** Presentation of evidence in sentencing phase

Trial counsel's failure to present mitigation evidence in the form of expert testimony showing that defendant suffered from fetal alcohol spectrum disorder (FASD) did not prejudice defendant in penalty phase of capital murder trial, and thus could not amount to ineffective assistance; given that jury already had evidence before it that defendant suffered from mental illness that might have been related to his mother's alcohol use during pregnancy and that defendant killed four people at random and without apparent motive, it was unlikely that any juror would have viewed formal FASD diagnosis as mitigating factor outweighing aggravating factors. U.S. Const. Amend. 6.

[9] **Criminal Law** Presentation of evidence in sentencing phase

Trial counsel's failure to present mitigation evidence in the form of testimony from consulting military and mental health expert about defendant's military service and early life did not prejudice defendant in penalty phase of capital murder trial, and thus could not amount to ineffective assistance; expert's testimony would have been largely cumulative of the evidence of defendant's substance abuse and mental health struggles that were presented at trial. U.S. Const. Amend. 6.

[10] **Criminal Law** Jury selection and composition

Trial counsel's response to trial court's purported pretextual removal of prospective juror for cause was not deficient performance in capital murder trial, and thus was not ineffective assistance, where counsel attempted to rehabilitate prospective juror, who had expressed hesitation about the death penalty, to allay court's concerns. U.S. Const. Amend. 6.

[11] **Jury** Personal opinions and conscientious scruples

Trial court's dismissal of allegedly biased prospective juror for cause based upon her statement that she could not consider sentence of life with parole was not warranted in capital murder trial, where juror retracted her statement after trial court clarified that she was only required to at least consider the sentence.

[12] **Criminal Law** Jury selection and composition

Trial counsel's response to trial court's refusal to excuse allegedly biased prospective juror for cause was not deficient performance in capital murder trial, and thus was not ineffective assistance, where counsel used peremptory challenge to strike juror from the jury pool. U.S. Const. Amend. 6.

[13] **Criminal Law** Jury selection and composition

Trial counsel's response to trial court's allegedly prejudicial voir dire format, in which prosecution questioned all prospective jurors before defense was permitted to question any, was not deficient performance in capital murder trial, and thus was not ineffective assistance, where counsel objected to the format by moving for attorney conducted, sequestered individual voir dire. U.S. Const. Amend. 6.

[14] **Criminal Law** Jury selection and composition

Trial counsel's failure to question each prospective juror about his or her exposure to media coverage of defendant's shooting and ability to consider mitigating evidence was not deficient performance in capital murder trial, and thus was not ineffective assistance, where questionnaires that every juror completed asked about the issues, and trial court asked all jurors if there was anyone who felt unable to set aside what they heard about the case. U.S. Const. Amend. 6.

[15] **Criminal Law** Presentation of evidence in sentencing phase

Trial counsel did not provide deficient performance when cross-examining State's penalty-phase psychological expert witness in capital murder trial, and thus did not provide ineffective assistance, where counsel elicited testimony from expert that he had only interviewed defendant for 90 minutes, counsel attempted to undermine expert's reliance on defendant's test scores, and counsel pointed out that another expert had looked at same data and diagnosed defendant with dissociative personality disorder, rather than borderline personality disorder. U.S. Const. Amend. 6.

[16] **Criminal Law** Other particular issues in death penalty cases

Trial counsel's failure to argue that statement about burden of proof should be included in jury instruction at penalty phase of capital murder trial was not deficient performance, and thus was not ineffective assistance, where argument was untested, was extension of newly minted law, and was likely to fail. U.S. Const. Amend. 6.

[17] **Criminal Law** Objecting to instructions

Trial counsel's failure to challenge guilt-phase jury instruction that premeditation could be as instantaneous as successive thoughts of the mind

did not prejudice defendant in capital murder trial, and thus could not amount to ineffective assistance; jury had before it significant evidence that defendant's premeditation occurred in more than instant, including that he told his sexual assault victim that he planned to kill people and then defendant walked for 15 minutes carrying shotgun used to perpetrate murders. U.S. Const. Amend. 6.

[18] **Constitutional Law** Instructions

Not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. U.S. Const. Amend. 14.

[19] **Habeas Corpus** Assignment of errors and briefs

Habeas petitioner forfeited on appeal his argument that substantial evidence did not support Nevada's jury instruction for "great risk of death" aggravating circumstance in capital murder trial, where petitioner failed to articulate his argument in his opening brief.

[20] **Habeas Corpus** Discovery and disclosure

Nevada Supreme Court's conclusion on direct appeal of capital murder conviction that defense expert's report was not privileged work product, such that petitioner's constitutional rights were not violated when State's expert referred to defense expert's test results, was not contrary to or unreasonable application of controlling Supreme Court precedent, and thus, federal habeas relief was not warranted; mandatory disclosure schemes were permissible in criminal trials if they did not structurally disadvantage the defendant, and Nevada provided for reciprocal discovery. 28 U.S.C.A. § 2254(d)(1); Nev. Rev. St. § 174.234.

[21] **Habeas Corpus** Questions of local law

A state court's misreading of state law is not a ground for federal habeas relief.

[22] **Habeas Corpus** Death sentence

Nevada Supreme Court's rejection of petitioner's claim that testimony of victim's mother during penalty phase of capital murder trial violated his due process rights was not contrary to or unreasonable application of clearly established federal law, and thus, federal habeas relief was not warranted; although mother's testimony about kidnapping incident and victim's developmental difficulties had limited relevance and high risk of prejudice, it was not unreasonable for court to conclude that admission of the testimony did not render the trial fundamentally unfair, given the strength of prosecution's aggravating case. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

[23] **Constitutional Law** Prosecutor

On a prosecutorial misconduct claim, the relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. U.S. Const. Amend. 14.

2 Cases that cite this headnote

[24] **Constitutional Law** Prosecutor

On a prosecutorial misconduct claim, in determining whether prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process, courts look to various factors, including the weight of the evidence, the prominence of the comment in the context of the entire trial, whether the prosecution misstated the evidence, whether the judge instructed the jury to disregard the comment, whether the comment was invited by defense counsel in its summation, and whether defense counsel had an adequate opportunity to rebut the comment. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[25] **Criminal Law** Statements as to Facts and Arguments

On a prosecutorial misconduct claim, it is not enough that the prosecutors' remarks were undesirable or even universally condemned because the effect on the trial as a whole needs to be evaluated in context.

[26] **Habeas Corpus** Prosecutorial and police misconduct; argument

Nevada Supreme Court did not unreasonably apply clearly established federal law in determining that prosecutor's improper comment that petitioner had committed the worst massacre in city's history was harmless in capital murder trial, and thus, federal habeas relief was not warranted; although the comment came late in the trial and was not invited by defense, comment was not egregiously inflammatory, and the weight of evidence against petitioner was considerable. 28 U.S.C.A. § 2254(d)(1).

[27] **Sentencing and Punishment** Arguments and conduct of counsel

Prosecutor's improper comments characterizing jury's role in imposing death penalty did not so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment in capital murder trial, where defense counsel emphasized jury's responsibility during his closing argument, and jury instructions stated that jurors had to assume that sentence would be carried out. U.S. Const. Amend. 8.

[28] **Constitutional Law** Conduct and comments of counsel; argument

Sentencing and Punishment Validity

Prosecutor's improper statement implying that jury could sentence defendant to death to send message, rather than making individualized determination, did not so infect capital murder trial with unfairness as to make the resulting conviction a denial of due process; harm of statement was mitigated, in part, by jury instructions emphasizing jury's responsibility to weigh aggravating and mitigating circumstances, and both defense and prosecution repeatedly emphasized and relied on specific details of crime at hand. U.S. Const. Amend. 14.

[29] **Habeas Corpus** Certificate of probable cause

A habeas petitioner meets his burden for a certificate of appealability if he can make a substantial showing of the denial of a constitutional right, accomplished by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. 28 U.S.C.A. § 2253(c)(2).

[30] **Habeas Corpus** Particular issues and problems

Challenge to Nevada's lethal injection protocol brought by habeas petitioner, who was sentenced to death for murder, was unripe for federal review, where manufacturer of Nevada's supply of drug used as part of lethal injection protocol obtained injunction prohibiting its product's use in executions, and appeal of the injunction was pending.

[31] **Habeas Corpus** Particular issues and problems

A method-of-execution challenge is not ripe in a federal habeas proceeding when the respondent state has no protocol that can be implemented at the time of the challenge.

2 Cases that cite this headnote

[32] **Criminal Law** Trial in general; reception of evidence

Criminal Law Other particular issues in death penalty cases

Trial counsel's failure to challenge various courtroom security measures did not prejudice defendant in guilt phase or punishment phase of capital murder trial, and thus did not amount to ineffective assistance; given overwhelming evidence of defendant's guilt and the weight of aggravating factors against him, security measures had no substantial effect on jury's verdicts. U.S. Const. Amend. 6.

Attorneys and Law Firms

***1086** Brad D. Levenson (argued) and David Anthony, Assistant Federal Public Defenders; Rene Valladares, Federal Public Defender; Office of the Federal Public Defender, Las Vegas, Nevada; for Petitioner-Appellant.

Jeffrey M. Conner (argued), Deputy Assistant Attorney General; Heidi Parry Stern, Chief Deputy Attorney General; Adam Paul Laxalt, Attorney General; Office of the Attorney General, Las Vegas, Nevada; for Respondents-Appellees.

Appeal from the United States District Court for the District of Nevada, Philip M. Pro, District Judge, Presiding, D.C. No. 2Presiding, D.C. No. 2:06-cv-00471-PMP-CWH

Before: Marsha S. Berzon, John B. Owens, and Michelle T. Friedland, Circuit Judges.

OPINION

FRIEDLAND, Circuit Judge:

***1087** In 1999, Petitioner-Appellant Zane Michael Floyd shot and killed four people at a Las Vegas supermarket. A Nevada jury found Floyd guilty of four counts of first-degree murder, as well as several related offenses, and sentenced him to death. After the Nevada Supreme Court upheld his conviction and sentence on direct appeal and denied a petition for postconviction relief, Floyd sought a writ of habeas corpus in the United States District Court for the District of Nevada. Following a stay during which Floyd filed an unsuccessful second petition for postconviction relief in state court, the district court denied the federal habeas petition but issued a certificate of appealability as to various claims now before us. We affirm the district court's decision and deny Floyd's motion to expand the certificate of appealability.

I.

A.

Before dawn one morning in June 1999, Floyd called an escort service and asked the operator to send a female escort to his parents' home in Las Vegas, where he had been living since his discharge from the U.S. Marine Corps the previous year. When a young woman sent by the service arrived, Floyd threatened her with a shotgun and forced her to engage in vaginal and anal intercourse, digital penetration, and oral sex. At one point he removed a shell from his shotgun and showed it to her, telling her that her name was on it. He later put on a Marine Corps camouflage uniform and told her that he planned to kill the first nineteen people he saw that morning. Commenting that he would have already shot her had he had a smaller gun on him, he told the woman she had one minute to run before he would shoot her. She escaped.

Floyd then walked about fifteen minutes to an Albertsons supermarket near his home. When he arrived at 5:15 am, he immediately began firing on store employees. He shot and killed four Albertsons employees and wounded another. The store's security cameras captured these events.

When Floyd exited the store, local police were waiting outside. Officers arrested him, and he quickly admitted to shooting the people in the Albertsons. Prosecutors charged Floyd with offenses that included multiple counts of first-degree murder and indicated that they would seek the death penalty.

B.

Numerous psychiatric experts examined Floyd and explored his background. On the day of his arrest, Floyd's public defenders retained Dr. Jakob Camp, a forensic psychiatrist who examined Floyd for three hours. Dr. Camp concluded that Floyd did not suffer from a mental illness ***1088** that would impair his ability to stand trial, noted that Floyd's experiences during and after his time in the Marines might have had a bearing on his actions that day, and suggested that counsel obtain Floyd's adolescent health records to

learn more about an attention deficit/hyperactivity disorder ("ADHD") diagnosis for which Floyd had been previously treated with the drug Ritalin. Floyd's counsel eventually obtained records from two doctors who had treated Floyd's mental health issues as an adolescent that confirmed this type of diagnosis. Those doctors had diagnosed Floyd with attention deficit disorder ("ADD"), although they had also determined that Floyd did not have any significant cognitive deficits.

Shortly before trial, defense counsel also retained clinical neuropsychologist Dr. David L. Schmidt to conduct a full examination of Floyd. Dr. Schmidt concluded that Floyd suffered from ADHD and polysubstance abuse, but that he showed "[n]o clear evidence of chronic neuropsychological dysfunction." He also diagnosed Floyd with a personality disorder that included "[p]aranoid, [s]chizoid, and [a]ntisocial [f]eatures."

Discouraged by Dr. Schmidt's findings, which they worried would make Floyd unsympathetic to a jury, counsel turned to clinical neuropsychologist Dr. Thomas Kinsora. After reviewing Dr. Schmidt's report and a report from Floyd's childhood doctor, Dr. Kinsora was highly critical of Dr. Schmidt's work, questioning the validity of the tests that Dr. Schmidt had conducted. Dr. Kinsora advised Floyd's counsel that it was "not clear whether or not a more comprehensive assessment would have revealed ongoing deficits or not," but that he "wouldn't be surprised to find some continued evidence of neurological problems" in light of the findings of one of the doctors who had examined Floyd as an adolescent. The defense subsequently un-endorsed Dr. Schmidt as an expert, but not before the state trial court ordered it to provide the prosecution a copy of Dr. Schmidt's report along with the associated raw testing data.

Defense counsel also retained Dr. Frank E. Paul, a clinical psychologist and retired Navy officer, who investigated and described in detail Floyd's background and life history. Floyd's mother told Dr. Paul that she had used drugs and alcohol heavily earlier in her life, including when she was pregnant with her first child, but that she "stopped drinking and all drug use when she found herself pregnant with [Floyd] ... but continued to smoke tobacco." Dr. Paul also learned of an incident in which Floyd, at the age of eight, was accused of anally penetrating a three-year-old boy. Dr. Paul further learned that Floyd began using drugs and alcohol extensively in high school. Dr. Paul described Floyd's Marine Corps deployment to the U.S. base at Guantanamo Bay, Cuba as difficult, explaining that Floyd struggled with the stress and monotony of the deployment and drank extremely heavily during that period. Defense counsel originally named Dr. Paul as an expert but did not call him at trial and never disclosed Dr. Paul's report to the prosecution.

At the guilt phase of Floyd's trial, the jury convicted him of four counts of first-degree murder with use of a deadly weapon, one count of attempted murder with use of a deadly weapon, one count of burglary while in possession of a firearm, one count of first-degree kidnapping with use of a deadly weapon, and four counts of sexual assault with use of a deadly weapon.

During the penalty phase of Floyd's trial, the State argued that three statutory aggravating factors justified application of the death penalty: killing more than one person, killing people at random and without apparent motive, and knowingly creating ***1089** a risk of death to more than one person. In arguing that mitigating circumstances weighed against imposition of the death penalty, the defense called (among other witnesses) two experts hired by defense counsel: Dr. Edward Dougherty, a psychologist specializing in learning disabilities and education; and Jorge Abreu, a consultant with an organization specializing in mitigation defense.

Dr. Dougherty diagnosed Floyd with ADHD and a mixed personality disorder with borderline paranoid and depressive features. He also discussed the "prenatal stage" of Floyd's development, and commented that his mother "drank alcohol, and she used drugs during her pregnancy," including "during the first trimester." In rebuttal, the prosecution called Dr. Louis Mortillaro, a psychologist with a clinical neuropsychology certificate, who had briefly examined Floyd and reached conclusions similar to Dr. Schmidt's based on Dr. Schmidt's testing. Abreu painted a detailed picture of Floyd's life, drawing on many of the same facts that Dr. Paul's report had mentioned. He particularly noted Floyd's mother's heavy drinking, including during her pregnancies.

During closing arguments, defense counsel urged the jury to refrain from finding that a death sentence was warranted. The mitigating factors defense counsel relied on in closing included Floyd's difficult childhood, his alcohol and substance abuse, his stressful military service, his ADD/ADHD, and his mother's substance abuse while she was pregnant with him.

After three days of deliberation, the jury sentenced Floyd to death. It found that all three statutory aggravating factors were present and that they outweighed Floyd's mitigating evidence.

C.

New counsel represented Floyd on his direct appeal, which the Nevada Supreme Court denied. *Floyd v. State*, 118 Nev. 156, 42 P.3d 249 (2002) (per curiam). The U.S. Supreme Court then denied certiorari. *Floyd v. Nevada*, 537 U.S. 1196, 123 S.Ct. 1257, 154 L.Ed.2d 1033 (2003). Floyd filed a state petition for a writ of habeas corpus a little over a year later. The state trial court denied the petition on the merits, and the Nevada Supreme Court affirmed. *Floyd v. State*, No. 44868, 2006 WL 5435970, 2006 Nev. LEXIS 851 (Nev. Feb. 16, 2006).

Floyd then filed a pro se habeas petition in the U.S. District Court for the District of Nevada. *See* 28 U.S.C. § 2254(a). The federal public defender was appointed as counsel and filed an amended petition with new allegations, including alleged ineffective assistance by Floyd's trial counsel. The district court agreed with the State that Floyd had not exhausted these new claims in state court and stayed the federal proceedings so he could do so.

Floyd filed a second state habeas petition that included the new claims of ineffective assistance of trial counsel. The state trial court denied this petition on the merits and as untimely filed. The Nevada Supreme Court affirmed, holding that Floyd's second petition was untimely and successive. *Floyd v. State*, No. 51409, 2010 WL 4675234 (Nev. Nov. 17, 2010).

The federal district court then lifted the stay and reopened Floyd's habeas proceedings. It ultimately granted in part the State's motion to dismiss, concluding that Floyd's new claims that the Nevada Supreme Court had denied as untimely —including his new ineffective assistance of trial counsel claims—were procedurally defaulted, and that Floyd had not shown cause and prejudice for failing to raise his ineffective assistance of trial counsel claims in his first petition. *See* ***1090** *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The district court went on to deny Floyd's remaining claims on the merits, but it issued a certificate of appealability as to several issues, including whether Floyd could show cause and prejudice for the default of his ineffective assistance of trial counsel claims.

Floyd appealed, pressing each of the certified issues and also arguing that we should expand the certificate of appealability to encompass two more. We evaluate each of his arguments in turn.

II.

[1] We review a district court's denial of habeas corpus de novo. *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004).

[2] **[3]** The Antiterrorism and Effective Death Penalty Act ("AEDPA") applies to Floyd's habeas petition. Under AEDPA, we may grant Floyd relief only if the Nevada Supreme Court's rejection of his claims "(1) was contrary to or involved an unreasonable application of clearly established federal law, or (2) was based on an unreasonable determination of the facts." *Davis v. Ayala*, —— U.S. ——, 135 S. Ct. 2187, 2198, 192 L.Ed.2d 323 (2015). "[C]learly established federal law" in this context refers to law "as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). "Although an appellate panel may ... look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent," that precedent cannot "refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that th[e] Court has not announced." *Marshall v. Rodgers*, 569 U.S. 58, 64, 133 S.Ct. 1446, 185 L.Ed.2d 540 (2013) (per curiam).

III.

Floyd asserts numerous claims of ineffective assistance of trial counsel. He raised most of these claims for the first time in his second state petition, prompting the Nevada Supreme Court to deny them as untimely and successive. *Floyd v. State*, No. 51409, 2010 WL 4675234, at *1 (Nev. Nov. 17, 2010). The Nevada Supreme Court held that the ineffective assistance of counsel claims raised for the first time in Floyd's second state habeas petition were procedurally barred under section 34.726 of the Nevada Revised Statutes, which states that absent "good cause shown for delay, a petition that

challenges the validity of a judgment or sentence must be filed within 1 year" after conviction or remittitur of any denied appeal "taken from the judgment." Nev. Rev. Stat. § 34.726(1).

[4] Unless a petitioner can show "cause and prejudice," federal courts in habeas actions will not consider claims decided in state court on a state law ground that is independent of any federal question and adequate to support the state court's judgment. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Floyd and the State disagree about whether section 34.726, as applied in his case, is adequate to bar federal review. [1] Floyd contends that when he filed his second state habeas petition in 2007, Nevada did not clearly and consistently apply ***1091** section 34.726 to bar successive petitions alleging ineffective assistance of counsel in capital cases. He further argues that, even if the state law is adequate, he can establish cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), based on ineffective assistance of initial state habeas counsel in failing to raise claims of ineffective assistance of trial counsel.

[5] Given that Floyd's underlying ineffective assistance of trial counsel claims lack merit, we need not resolve whether the state law is adequate or, if it is, whether Floyd can overcome his procedural default and obtain federal review of the merits of his ineffective assistance claims. *See Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002). Even if we held in Floyd's favor on either of those questions and thus reached the merits of Floyd's ineffective assistance of trial counsel claims, we would affirm the district court's denial of relief. [2]

A.

[6] **[7]** To succeed on an ineffective assistance of counsel claim, Floyd must show that his counsel's performance "fell below an objective standard of reasonableness," and that, if so, there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). With respect to the prejudice requirement, the Supreme Court has cautioned that "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). To determine the risk of such prejudice at the penalty phase of a capital trial, we consider whether it is reasonably probable that the jury otherwise "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death" in light of "the totality of the evidence" against the petitioner. *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052.

B.

Floyd's primary ineffective assistance of trial counsel claim is that his trial counsel failed to investigate and present mitigation evidence showing that Floyd suffers from fetal alcohol spectrum disorder ("FASD") as a result of his mother's alcohol consumption while he was in utero. In support of this claim, Floyd offers a report from FASD expert Dr. Natalie Novick Brown. After reviewing the trial court record and other experts' examinations of Floyd, Dr. Brown concluded that Floyd suffered from FASD and that the disorder could explain his actions on the day of the shooting. Floyd argues it is reasonably probable that had jurors been presented with evidence of FASD and its effects, they would have spared him a death sentence. Floyd acknowledges that trial counsel consulted seven experts, none of whom diagnosed Floyd with FASD, but he contends that those experts were inadequately prepared and lacked the expertise to present proper mitigating evidence regarding FASD.

[8] We need not resolve whether Floyd's counsel's performance was deficient in failing to present expert testimony that Floyd suffers from FASD. Even assuming it was, there is no reasonable probability that, had the jury heard from an FASD expert, it would have concluded that ***1092** mitigating factors outweighed aggravating factors such that Floyd did not deserve a death sentence.

The State presented an extremely weighty set of aggravating factors at sentencing. First, the State charged that Floyd "created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person." Nev. Rev. Stat. § 200.033(3). Second, it alleged that Floyd killed more than one person (indeed, four) during the course of the offense that led to his conviction. *See id.* § 200.033(12). Third, it alleged that the killings were at random

and without apparent motive, because Floyd "just went to a place where he knew 18 people would be and shot everybody he could see." *See* *id.* § 200.033(9). The jury unanimously found that all three aggravating circumstances existed with regard to all four victims.

In response, Floyd's counsel emphasized Floyd's developmental problems and mental illness, issues exacerbated by his early life experiences and military service. Counsel's mitigation arguments included multiple references to Floyd's mother's drinking while Floyd was in utero —a point that both mitigation consultant Abreu and Dr. Dougherty emphasized as well. Counsel and Dr. Dougherty both explicitly opined that Floyd's mother's substance abuse might be to blame for Floyd's mental condition. All in all, Floyd's counsel argued that Floyd acted "under the influence of extreme mental or emotional disturbance," and that he "suffer[ed] from the effects, early effects of his mother's drinking, her ingested alcohol, drugs early on in her pregnancy."

Consistent with these defense arguments, the mitigation instructions submitted to the jury included that Floyd's "[m]other use[d] alcohol and drugs during early pregnancy," that Floyd had been born prematurely, that the murders were committed while Floyd was under the influence of "[e]xtreme [m]ental or [e]motional [d]isturbance," and that Floyd had been "[i]nsufficiently [t]reated for ADHD [and] other [e]motional-[b]ehavioral [p]roblems including [d]epression." Maternal alcohol and drug use was the first mitigating factor on the list.

Given the defense's focus on Floyd's mother's drinking during pregnancy and its effects, testimony by an FASD expert would likely not have changed any juror's balancing of mitigating versus aggravating circumstances. For Floyd to have been prejudiced by the lack of testimony by an FASD expert, at least one juror would have had to have considered a formal FASD diagnosis more severe and debilitating than ADD/ADHD and Floyd's other mental illnesses, which the defense had suggested included effects on his mental state of his mother's drinking and drug use during pregnancy, but without using FASD terminology. In other words, at least one juror would have had to view a formal FASD diagnosis as a weightier mitigating factor than those presented. And that juror would have had to have placed so much additional weight on the FASD defense as to cause the mitigating circumstances to outweigh the State's significant aggravating evidence, even though they did not on the record before the jury. Both the limited additional contribution of the FASD mitigating factor as compared with the mitigation evidence presented and the especially shocking nature of Floyd's crime, during which he killed multiple unarmed people at close range, without provocation, and in their workplace, makes that switch in outcome unlikely. Given that the jury already had evidence before it that Floyd suffered from some mental illness and that his illness might have been related ***1093** to his mother's alcohol use during pregnancy, and given the extreme aggravating circumstances, it seems very unlikely—and so not reasonably probable—that any juror would have had these reactions.

This conclusion comports with our previous holdings that a capital petitioner is not necessarily prejudiced when counsel fails to introduce evidence that differs somewhat in degree, but not type, from that presented in mitigation. In *Bible v. Ryan*, 571 F.3d 860 (9th Cir. 2009), for instance, we held that a capital petitioner was not prejudiced by his attorney's failure to introduce medical evidence that he suffered from neurological damage. *Id.* at 870. We reasoned that because counsel presented evidence that the petitioner might have had brain damage from persistent drug and alcohol abuse, along with evidence of childhood events that could have led to brain damage, medical evidence of neurological damage would have been different only in degree. *Id.* at 871. Floyd's FASD argument resembles that of the petitioner in *Bible*—the jury heard the evidence that would have supported the FASD diagnosis as well as the implication that the evidence explained Floyd's behavior. And like the petitioner in *Bible*, who "murdered a nine-year-old child in an especially cruel manner," Floyd "has a significant amount of aggravating circumstances that he would need to overcome," *id.* at 872, making it unlikely that the jury would have imposed a different sentence based on mitigating evidence that differed only in degree from that which Floyd presented at trial.

Floyd urges us to follow the Fourth Circuit's decision in *Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019), *petition for cert. docketed*, No. 18-1495 (May 31, 2019), in which that court affirmed a district court's conclusion that a capital petitioner's counsel had performed constitutionally deficiently in failing to present evidence of fetal alcohol syndrome in mitigation, and that the petitioner was prejudiced by this failure. *Id.* at 319. In some cases, FASD evidence

might be sufficiently "different from ... other evidence of mental illness and behavioral issues" to raise a reasonable probability that a juror would not have imposed the death penalty had it been presented. *Id.* at 318. But much distinguishes Floyd's case from that of the petitioner in *Williams*. Floyd's lawyers and experts explicitly argued that his mother's alcohol use while she was pregnant led to his mental illness in some form and therefore helped explain his actions, whereas trial counsel in *Williams* investigated the petitioner's mother's drinking "as evidence of [the petitioner's] difficult childhood, not of [fetal alcohol-related disorders]" and never offered evidence to the jury that the drinking could have caused Williams's cognitive issues. *Id.* at 309. The State submitted against Floyd three aggravating factors, all involving a multiple-victim shooting, whereas in *Williams* "the State only presented one aggravating factor: that the [single] murder occurred in the commission of a kidnapping." *Id.* at 318. The jury that imposed the death sentence on Floyd did not report difficulty reaching a verdict, whereas in *Williams* "the jury sent a note to the trial court stating it was deadlocked nine to three in favor of death." *Id.* at 308. In short, the petitioner in *Williams* was prejudiced because his lawyers presented a much weaker-than-available mitigation argument that was insufficient to overcome an also weak aggravating argument that clearly troubled some jurors. [3] That was not the situation ***1094** here. We also note that our conclusion is consistent with the Fifth Circuit's in *Trevino v. Davis*, 861 F.3d 545 (5th Cir. 2017), *cert. denied*, —— U.S. ——, 138 S. Ct. 1793, 201 L.Ed.2d 1014 (2018), in which that court rejected an ineffective assistance of counsel claim relating to the failure to present mitigating evidence of an FASD diagnosis because the evidence would have been outweighed by what the court viewed as very substantial aggravating evidence. *Id.* at 549–51.

[9] Floyd further argues that counsel provided deficient performance in the penalty phase by failing to call Dr. Paul, the consulting military and mental health expert, to testify about Floyd's military service, early life, and other matters. We are skeptical that declining to call this expert was constitutionally deficient. *See* *Hinton v. Alabama*, 571 U.S. 263, 275, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014) ("The selection of an expert witness is a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after thorough investigation of [the] law and facts,' is 'virtually unchallengeable.' " (alterations in original) (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052)). Even assuming that counsel's choice in this regard was deficient, it did not prejudice Floyd. Like Floyd's FASD evidence, Dr. Paul's testimony would have been largely cumulative of the evidence of Floyd's substance abuse and mental health struggles actually presented at trial, and the testimony therefore would have done little to offset the weighty aggravating evidence against Floyd.

C.

Floyd argues that his trial counsel's conduct during jury selection amounted to ineffective assistance of counsel. We disagree. Much of his argument supposes that various decisions by the trial court prejudiced him during jury selection, that those decisions were erroneous, and that his counsel was ineffective in failing to object to or otherwise remedy these errors. But most of the trial court decisions he challenges were not errors at all, and with respect to any that may have been errors, we conclude that his counsel acted within the bounds of professional competence in responding to the court's decisions.

[10] For example, Floyd contends that his counsel erred in failing to successfully object to the trial court's dismissal of two prospective jurors. Floyd first argues that the trial court improperly or pretextually removed one venireperson from the venire for cause. Even assuming that the trial court erred in doing so, this does not show that Floyd's counsel was ineffective. On the contrary, Floyd's counsel attempted to rehabilitate the prospective jurors who had expressed hesitation about the death penalty, including the juror in question, and to allay the court's concerns. After the juror stated that she had scruples about the death penalty, counsel elicited a response from her that she "would have to follow the law." But she then admitted that she would "invariably in all cases give a sentence less than death," and the trial court dismissed her for cause.

Floyd next argues that the court improperly dismissed a second venireperson for improper concerns about language ability. After it came to light that this prospective juror was not a native English speaker, defense counsel questioned him about his degree from an English-speaking university. Nonetheless, the court concluded that the juror's English

fluency was insufficient, ***1095** stating that it could "not take a chance where the stakes [were] so high to both sides."

That the trial court dismissed these two potential jurors does not mean that counsel's attempts to rehabilitate them were deficient and that competent counsel would have sufficiently rehabilitated the two to keep them on the jury, especially because the court appears to have had legitimate concerns about both.

[11] **[12]** Floyd similarly argues that because the trial court refused to excuse allegedly biased venirepersons for cause, counsel wasted peremptory challenges on striking those individuals from the jury pool. It appears, however, that the trial court made no error by refusing to dismiss the prospective jurors in question. One of them, for instance, retracted her statement that she could not consider a sentence of life with parole after the trial court clarified that she was only required to "at least consider" it. And again, even if the trial court erred, Floyd's counsel's reaction was within the realm of permissible strategic choices: counsel chose between the two (admittedly unattractive) options of spending a peremptory challenge or taking the risk of seating a juror that counsel had concluded would be unfavorable to Floyd. In other words, Floyd's counsel was not ineffective for attempting to make the best of the trial court's alleged errors.

[13] Finally, Floyd contends in general terms that the voir dire format, in which the prosecution questioned all prospective jurors before the defense was permitted to question any, was prejudicial or caused his counsel to be ineffective. We struggle to discern precisely Floyd's theory of deficient performance or of prejudice. Even assuming that the trial court's format was prejudicial, counsel did object to it by moving for "attorney conducted, sequestered individual *voir dire*." Trial counsel's attempt to challenge the trial court's procedures shows diligence, not ineffectiveness.

[14] Moreover, Floyd's lawyers had the opportunity to individually question numerous prospective jurors, eliciting information about their views on topics including the death penalty, psychology, alcoholism, and how they would behave in a jury room. Counsel's decision not to further question each venireperson about his or her exposure to media coverage of the shooting and ability to consider mitigating evidence was not deficient. The questionnaires that every prospective juror completed asked about these issues, and the trial court asked all prospective jurors if "there [is] anybody among you who feels unable to set aside what they've read, seen, or heard" about the case. Floyd's counsel were entitled to rely on those responses, and their mere failure to inquire further does not render their performance deficient. *See* *Fields v. Woodford*, 309 F.3d 1095, 1108 (9th Cir. 2002) ("[W]e cannot say that failure to inquire beyond the court's voir dire was outside the range of reasonable strategic choice or that it would have affected the outcome."); *Wilson v. Henry*, 185 F.3d 986, 991 (9th Cir. 1999) (rejecting argument "that trial counsel rendered ineffective assistance by failing to focus on his client's criminal history during voir dire to discover potential juror prejudice and determine whether jurors could follow limiting instructions on such a history").

D.

[15] Floyd's counsel was not ineffective in cross-examining the State's penalty-phase psychological expert witness, Dr. Mortillaro. Dr. Mortillaro reviewed the guilt-phase record materials and other psychological experts' reports and data, including Dr. Schmidt's unfavorable test ***1096** results that the defense provided the prosecution in discovery before it un-endorsed Dr. Schmidt. Dr. Mortillaro also interviewed Floyd himself. Based on these materials, Dr. Mortillaro opined that—contrary to defense expert Dr. Dougherty's testimony—Floyd had not suffered brain damage, was of average IQ, did not suffer delusions, could tell right from wrong, and was not mentally ill.

On cross-examination, defense counsel elicited testimony from Dr. Mortillaro that he had only interviewed Floyd for about ninety minutes and that he had only received Dr. Dougherty's report the day before. Counsel also attempted to undermine Dr. Mortillaro's reliance on Floyd's scores from tests administered by Dr. Schmidt as the basis for Dr. Mortillaro's conclusion, arguing that the results should have been thrown out entirely. Counsel succeeded in getting Dr. Mortillaro to admit that any individual psychologist has significant discretion in deciding whether the test score was valid enough to allow reliance on the raw data. Counsel then pointed out that Dr. Dougherty had looked at the same data and diagnosed Floyd with dissociative personality disorder rather than borderline personality disorder, and he elicited an admission from Dr. Mortillaro that individuals with borderline personality disorder may show dissociative symptoms.

Finally, counsel attempted to undermine Dr. Mortillaro's minimization of Floyd's ADD/ADHD. Counsel presented Dr.

Mortillaro with his own prior testimony from another matter in which Dr. Mortillaro had stated "that 70 percent of those with attention deficit [disorder] still have it as an adult." Dr. Mortillaro also conceded that even if a patient were to "outgrow" ADD or ADHD, the fallout from the childhood disorder "would stay with them."

Floyd generally faults counsel for choosing to rely on cross-examination of Dr. Mortillaro rather than calling Floyd's other consulting expert, Dr. Kinsora, to rebut Dr. Mortillaro's testimony. The caselaw does not support Floyd's argument. In prior cases in which we and other circuits have recognized constitutionally deficient cross-examination, there were glaring failures to ask even basic questions, not—as here—a strategic choice between one means of undermining the witness and another. *See, e.g.*, *Reynoso v. Giurbino*, 462 F.3d 1099, 1112–13 (9th Cir. 2006) (counsel ineffective for failing to ask *any* questions about a $25,000 reward that might have motivated key witnesses' testimony against the defendant); *Higgins v. Renico*, 470 F.3d 624, 633 (6th Cir. 2006) (ineffective assistance where counsel did not cross-examine key prosecution witness at all because he felt unprepared to do so, even though he "had plenty of ammunition with which to impeach [the witness's] testimony").

Floyd does not contend that counsel failed altogether to cross-examine Dr. Mortillaro about key issues, but rather that he failed to do so in a manner that Floyd now believes would have been more effective. But Floyd's counsel did attempt to impeach Dr. Mortillaro's testimony, including with information counsel obtained from experts he had hired. This was not constitutionally deficient performance.

E.

Floyd argues that his trial counsel was ineffective for failing to object to various jury instructions. Many of the arguments against the instructions Floyd now challenges would not have been legally supported or would have been foreclosed by then-governing law, so counsel was not ineffective for failing to raise them.

[16] First, we disagree with Floyd that the jury should have been instructed at the ***1097** penalty phase that it could impose a death sentence only if it found that aggravating factors outweighed mitigating factors beyond a reasonable doubt. Floyd contends that the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), required that the jury instructions include such a statement about burden of proof. The Court in *Apprendi* held that, subject to an exception for prior convictions, "any *fact* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. 2348 (emphasis added). Floyd characterizes the balance of aggravating and mitigating circumstances as a "fact" governed by this rule.

The federal courts of appeals that have considered this argument have uniformly rejected it, holding that a jury's balancing inquiry in a capital case is a subjective and moral one, not a factual one. *See* *United States v. Gabrion*, 719 F.3d 511, 532–33 (6th Cir. 2013) (en banc); *United States v. Runyon*, 707 F.3d 475, 516 (4th Cir. 2013); *United States v. Barrett*, 496 F.3d 1079, 1107–08 (10th Cir. 2007); *United States v. Fields*, 483 F.3d 313, 346 (5th Cir. 2007); *United States v. Sampson*, 486 F.3d 13, 31–32 (1st Cir. 2007); *United States v. Purkey*, 428 F.3d 738, 749–50 (8th Cir. 2005).[4] Floyd's proposed instruction thus hardly flowed naturally from *Apprendi*, which did not involve a capital case and was decided just months before Floyd's trial began. Floyd's counsel was not deficient for failing to make an argument that was untested, an extension of newly minted law, and (judging from the weight of subsequent authority) likely to fail. *See* *Engle v. Isaac*, 456 U.S. 107, 134, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) ("[T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.").

Second, Floyd's counsel was not ineffective for failing to challenge on constitutional grounds the penalty-phase jury instructions for the aggravating circumstance that "[t]he murder was committed upon one or more persons at random and without apparent motive." At the time of Floyd's trial, the Nevada Supreme Court had already rejected an identical constitutional challenge to this aggravating factor. *See* *Geary v. State*, 112 Nev. 1434, 930 P.2d 719, 727

(1996). Counsel was not ineffective for failing to raise this argument.

[17] Third, no *Strickland* violation occurred when Floyd's counsel declined to challenge a guilt-phase jury instruction that premeditation, an element of first-degree murder, "may be as instantaneous as successive thoughts of the mind." Even assuming that this instruction was improper and that counsel's decision not to challenge it was unreasonable, no prejudice resulted from use of the instruction. The jury had before it significant evidence that Floyd's premeditation occurred in more ***1098** than an instant. Among other things, he told his sexual assault victim that he planned to kill the first nineteen people he saw, then walked for fifteen minutes carrying the shotgun that he used to perpetrate the murders. Even if counsel had succeeded in striking the "instantaneous premeditation" instruction, there is no reasonable probability that the jury would have found a lack of premeditation as a result. *See* *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

F.

Floyd's remaining claim of ineffective assistance—that his trial counsel should have objected to Nevada's use of the "great risk of death" aggravating circumstance—was raised and adjudicated in state court, so we review it under AEDPA's deferential standards. The claim fails under those standards.

[18] **[19]** Floyd contends that his trial counsel should have objected to this aggravating circumstance as duplicative of another aggravating circumstance—the "multiple murders" factor—that the State charged. *See* Nev. Rev. Stat. § 200.033(3). Initial post-conviction counsel presented a nearly identical argument [5] to the Nevada Supreme Court, which rejected it on the merits. The Nevada Supreme Court held that the two aggravators were based on different facts and served different state interests. It reasoned that "[o]ne is directed against indiscriminately dangerous conduct by a murderer, regardless of whether it causes more than one death; the other is directed against murderers who kill more than one victim, regardless of whether their conduct was indiscriminate or precise." *Floyd v. State*, No. 44868, 2006 WL 5435970, 2006 Nev. LEXIS 851 (Nev. Feb. 16, 2006). Floyd argues in a conclusory fashion that this decision was "arbitrary and capricious" such that it was contrary to or an unreasonable application of clearly established federal law, but he cites no controlling Supreme Court precedent relevant to this argument. His briefing focuses entirely on the legislative history of Nevada's aggravating factors and what he contends are two conflicting strains of doctrine in that state's jurisprudence on the "great risk of death factor." These state law issues are not grounds for federal habeas relief, and we are aware of no clearly established federal law that the Nevada Supreme Court's determination might have contravened. *See* 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (holding that "clearly established Federal law" refers only to U.S. Supreme Court decisions at time of alleged violation).

IV.

[20] Floyd argues that his constitutional rights were violated when the State's expert, Dr. Mortillaro, made reference during his testimony to test results that he had obtained from Floyd's expert, Dr. Schmidt. The Nevada Supreme Court's conclusion on direct appeal that no constitutional error occurred, *Floyd v. State*, 118 Nev. 156, 42 P.3d 249, 258–59 (2002) (per curiam), was not contrary to or an unreasonable ***1099** application of controlling Supreme Court caselaw.

[21] Floyd argues at length that the Nevada Supreme Court wrongly determined that Dr. Schmidt's report was not privileged work product. [6] Although the Nevada Supreme Court drew on federal authority in reaching that conclusion, Floyd "simply challenges the correctness of the state evidentiary rulings," and "he has alleged no deprivation of federal rights" that could entitle him to relief. *Gutierrez v. Griggs*, 695 F.2d 1195, 1197 (9th Cir. 1983). He similarly argues that the Nevada Supreme Court misapplied its own precedent, but a state court's misreading of *state* law is not a ground for federal habeas relief.

Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), does not support Floyd's challenge to the use of Schmidt's report either. The Supreme Court in *Ake* held that "due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase" of a capital case. *Id.* at 84, 105 S.Ct. 1087. Floyd received ample

psychiatric evaluations and assistance prior to sentencing, so *Ake* has little bearing here.

Floyd further contends that our extension of *Ake* in *Smith v. McCormick*, 914 F.2d 1153, 1158–59 (9th Cir. 1990), should have compelled the Nevada Supreme Court to reach a different result. In *Smith*, we held that a capital defendant's due process rights [7] were violated when, instead of permitting an independent psychiatric evaluation, the trial court ordered a psychiatrist to examine the defendant and report directly to the court at a resentencing hearing. *Id.* at 1159–60. We reasoned that the petitioner's "counsel was entitled to a confidential assessment of such an evaluation, and the strategic opportunity to pursue other, more favorable, arguments for mitigation." *Id.* at 1160.

***1100** Floyd appears to argue that because, under *Smith*, a defendant is entitled to a confidential assessment of the state-provided psychiatric assessment and the chance to pursue other strategies, he was entitled to claw back a document that was disclosed in connection with designating an expert to testify after he reversed course and removed the expert from his witness list. The holding in *Smith* did not encompass what Floyd seeks here, so the Nevada Supreme Court did not act contrary to our precedent. And, in any event, Floyd's proposed rule is not clearly established by any Supreme Court decision. *Marshall v. Rodgers*, 569 U.S. 58, 64, 133 S.Ct. 1446, 185 L.Ed.2d 540 (2013) (per curiam).

Indeed, the Supreme Court has held that mandatory disclosure schemes are permissible in criminal trials as long as they do not structurally disadvantage the defendant. *See* *Wardius v. Oregon*, 412 U.S. 470, 472, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) ("We hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules *unless reciprocal discovery rights are given to criminal defendants*." (emphasis added)). Nevada provides for reciprocal discovery, as it did at the time of Floyd's trial, so *Wardius* was not contravened here. *See* Nev. Rev. Stat. § 174.234 (1999).

V.

Floyd next contends that the trial court violated his constitutional rights by failing to grant a change of venue. [8] He argues that the district court erred when it rejected this claim in part on the ground that, of the 115 news articles Floyd submitted with his federal habeas petition to attempt to show that the jury was exposed to prejudicial pretrial publicity about his case, only three were in the record before the state courts. Relying on *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), the district court reasoned that AEDPA limited its review to those materials before the state courts that had rejected Floyd's venue claim. *See* *id.* at 185, 131 S.Ct. 1388 ("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court.").

The district court did not err. Floyd argues that, under *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc), the district court misapplied *Pinholster* to bar consideration of his 112 new articles. Floyd's reliance on *Dickens* is misplaced. In *Dickens*, we held that AEDPA (as interpreted in *Pinholster*) did not bar a federal court from considering new evidence introduced to support a *Martinez* motion alleging ineffective assistance of trial and postconviction counsel as cause and prejudice for a procedural default. *Dickens*, 740 F.3d at 1319–20. Here, by contrast, Floyd faults the district court for failing to consider new evidence in the context of a change of venue claim decided on its merits in the state court and so reviewed under AEDPA deference. Floyd's theory about how the Nevada Supreme Court erred has nothing to do with trial counsel's performance and therefore does not implicate the *Dickens* rule.

Because Floyd makes no argument beyond the district court's refusal to consider ***1101** these documents—which we conclude was not error—we need not consider whether the Nevada Supreme Court's denial of Floyd's venue claim was contrary to or unreasonably applied clearly established federal law.

VI.

[22] Floyd argues, as he did on direct appeal, that the trial court violated his constitutional rights by permitting the mother of victim Thomas Darnell to testify extensively during the penalty phase about her son's difficult life and previous experiences with violent crime. The Nevada Supreme Court held that parts of Nall's testimony "exceeded the scope of appropriate victim impact testimony" and should not have been admitted under state evidentiary law, but that their admission did not unduly prejudice Floyd such that it rendered the proceeding fundamentally unfair. *Floyd v. State*, 118 Nev. 156, 42 P.3d 249, 262 (2002) (per curiam). The Nevada Supreme Court's rejection of this claim was not contrary to or an objectively unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d).

The prosecution called Mona Nall, Darnell's mother, to offer victim impact testimony during the penalty phase of trial. Nall told the jury how Darnell had thrived in the face of serious learning and developmental disabilities, going on to form close relationships with his family and members of the community. She testified that "the hurt has gone so deep" for those affected by his death. Nall also recounted an incident years earlier in which Darnell and his family had been kidnapped by two men who held the family hostage and sexually assaulted Nall's daughter. Defense counsel objected twice to this testimony and the trial court admonished the prosecution to "get to th[e] point."

The Nevada Supreme Court did not unreasonably apply the relevant clearly established federal law in rejecting Floyd's claim that this testimony violated his due process rights. In *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the Supreme Court held that in a penalty-phase capital trial, "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." *Id.* at 827, 111 S.Ct. 2597. The Court added that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* at 825, 111 S.Ct. 2597 (citing *Darden v. Wainwright*, 477 U.S. 168, 179–83, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)).

Like the Nevada Supreme Court, we are troubled by the admission of some of Nall's testimony. That court determined that although *Payne* did not necessarily bar Nall's testimony about the hostage-taking and kidnapping incident, those parts of her testimony should not have been admitted under state evidentiary law because of its limited relevance and high risk of prejudice. We are additionally concerned about the propriety of Nall's testimony about Darnell's early life and developmental difficulties because of its limited relevance to Floyd's impact on the victims (or on people close to and surviving them) and its potential risk of prejudice. Eliciting extensive testimony about a horrible crime that had nothing to do with the defendant risks inappropriately affecting jurors who might feel that the victim's family should be vindicated for all of its tragedies, not just for the one caused by Floyd.

Nevertheless, it was not unreasonable for the Nevada Supreme Court to conclude that the admission of Nall's testimony did ***1102** not render Floyd's trial fundamentally unfair. Given the strength of the prosecution's aggravating case against Floyd, it seems unlikely that the jury was substantially swayed by the irrelevant parts of Nall's testimony. The same characteristics that made Nall's testimony so objectionable—that it had nothing to do with Floyd's crimes or, at times, with Floyd's victims—could have diminished the testimony's effect on the jury.

The prosecutor indirectly referenced the irrelevant portions of Nall's testimony in closing argument when he commented on "the tremendous tragedies ... that Mona has suffered and had suffered with her son over the years, so many tragedies, so many hardships." But this comment lacked detail and was in the context of a long description of the victim impact of Floyd's crime, so the prosecution does not appear to have relied extensively on the improper testimony. In the face of the robust aggravating evidence that the State presented, the Nevada Supreme Court did not unreasonably apply clearly established Supreme Court law by holding that Floyd was not prejudiced by Nall's statement or by the prosecutor's references to it, so there was no due process violation. *See* *Payne*, 501 U.S. at 825, 111 S.Ct. 2597. For the same reasons, any error in permitting Nall's testimony about Darnell's early life was harmless as there is no evidence that the testimony had "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 638, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (quotation marks omitted).

VII.

Floyd challenges numerous statements made by the prosecution as misconduct amounting to constitutional error.[9] We agree that a subset of these statements was improper, but we hold that the impropriety is not a ground for habeas relief under the relevant standards of review.

[23] **[24]** **[25]** The due process clause provides the constitutional framework against which we evaluate Floyd's claims of prosecutorial misconduct. "The relevant question" under clearly established law "is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)); *see also* *Parker v. Matthews*, 567 U.S. 37, 45, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012) (per curiam) (holding that *Darden* provides relevant clearly established law on habeas review of claims that statements by prosecutors amounted to prosecutorial misconduct). In making that determination, courts look to various

> *Darden* factors—i.e., the weight of the evidence, the prominence of the comment in the context of the entire trial, whether the prosecution misstated the evidence, whether the judge instructed the jury to disregard the comment, whether the comment was invited by defense counsel in its summation and whether defense counsel had an adequate opportunity to rebut the comment.

Hein v. Sullivan, 601 F.3d 897, 914 (9th Cir. 2010). As the Supreme Court emphasized in *Darden*, "it is not enough that the prosecutors' remarks were undesirable or even universally condemned," 477 U.S. at 181, 106 S.Ct. 2464 (citation omitted), because the effect on the trial as a whole ***1103** needs to be evaluated in context. *See* *United States v. Young*, 470 U.S. 1, 17–20, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (prosecutor's exhortation that the jury "do its job" and statements of personal belief were improper, but they did not have prejudicial effect on the trial as a whole in light of the comments' context and overwhelming evidence of guilt).

A.

[26] In his direct appeal and first habeas petition, Floyd presented several claims that the prosecutor's statements amounted to misconduct; we review those adjudicated claims under AEDPA. We agree with the Nevada Supreme Court that the prosecutor's contention that Floyd had committed "the worst massacre in the history of Las Vegas" was improper. *Floyd v. State*, 118 Nev. 156, 42 P.3d 249, 260–61 (2002) (per curiam). That court's further determination that the comment was harmless, *id.* at 261, was not unreasonable. Although the Nevada Supreme Court cited the state's codified harmless error doctrine, *see* Nev. Rev. Stat. § 178.598, and not *Darden*, its reasoning can also be understood as concluding that Floyd had not shown that the misconduct "so infected the trial with unfairness" as to work a denial of his due process rights. *Darden*, 477 U.S. at 181, 106 S.Ct. 2464 (quotation marks omitted).

This conclusion was not objectively unreasonable under the *Darden* factors. Although the "worst massacre" comment came late in the trial and was not invited by the defense, the weight of the evidence against Floyd and the fact that the comment was not egregiously inflammatory make the Nevada Supreme Court's determination reasonable. In *Darden*, for instance, the prosecutor made a series of comments far more inflammatory than this one.[10] The Supreme Court nonetheless held that those comments did not render the petitioner's trial fundamentally unfair in light of the defense's response and the strong evidence against the petitioner. *Id.* at 180–83, 106 S.Ct. 2464. And although the trial court here did not specifically direct jurors to ignore the prosecutor's "worst massacre" comments, it did instruct them that "arguments and opinions of counsel are not evidence." The Nevada Supreme Court's determination was therefore neither contrary to nor an unreasonable application of *Darden*.

B.

Floyd raised additional claims in his second state habeas petition that statements by the prosecutor amounted to misconduct. The Nevada Supreme Court held that those claims were procedurally barred, *Floyd v. State*, No. 51409, 2010 WL 4675234, at *1 (Nev. Nov. 17, 2010), but because the State has forfeited any objection to the district court's decision to review them on the merits nonetheless, we consider them de novo.

[27] Most of these claims are meritless, but we note two troubling arguments made by the prosecution. We find improper one set of statements characterizing the ***1104** jury's role in imposing the death penalty. At the penalty phase, the prosecution told the jury that "you're not killing him," that "[y]ou are part of a shared process," and that "even after you render your verdict, there's a process that continues." These comments suggested that other decisionmakers might ultimately decide whether Floyd received the death penalty. They therefore present concerns under *Caldwell v. Mississippi*, 472 U.S. 320, 328–29, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), which held that the Eighth Amendment makes it "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."

Nevertheless, these comments did not "so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment." *Id.* at 340, 105 S.Ct. 2633. The statements did not quite as clearly suggest to the jury that Floyd would not be executed as did the offending remark in *Caldwell*. *See id.* at 325–26, 105 S.Ct. 2633 ("[Y]our decision is not the final decision"; "[T]he decision you render is automatically reviewable by the Supreme Court."). Defense counsel emphasized the jury's responsibility during his closing argument, telling the jurors, "[w]e sit before you and we ask whether or not you're going to kill somebody." Moreover, the jury instructions clearly stated that the jurors "must assume that the sentence will be carried out." This sufficiently avoided any "*uncorrected* suggestion that the responsibility for any ultimate determination of death will rest with others," so as to not require reversal. *Id.* at 333, 105 S.Ct. 2633 (emphasis added).

[28] The prosecution also argued during the penalty phase that the death penalty "sends a message to others in our community, not just that there is a punishment for a certain crime, but that there is justice." This statement inappropriately implies that the jury could sentence Floyd to death to send a message, rather than making "an *individualized* determination." *Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The harm of this statement was mitigated in part by jury instructions that emphasized the jury's responsibility to weigh the specific aggravating and mitigating circumstances of the case. Both the defense and the prosecution also repeatedly emphasized and relied on the specific details of the crime at hand, encouraging the jury to make a determination based on the individual facts of the case. Finally, we agree with the district court's holding that, in context, these comments did not "incite the passions of the jurors" and "did not include any overt instruction to the jury to impose the death penalty ... to send a message to the community." In light of the other arguments made at trial, and the strong evidence against Floyd, the improper argument by the prosecution did not "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181, 106 S.Ct. 2464 (quotation marks omitted).

VIII.

Floyd advances on appeal two claims outside the certificate of appealability issued by the district court. These uncertified claims challenge Nevada's lethal injection protocol and courtroom security measures that caused certain jurors to see Floyd in prison garb and restraints. We construe this portion of his briefing as a motion to expand the certificate of appealability. 9th Cir. R. 22-1(e).

[29] A petitioner meets his burden for a certificate of appealability if he can make "a 'substantial showing of the denial of a ***1105** constitutional right,' accomplished by 'demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.' " *Turner v. McEwen*, 819 F.3d 1171, 1178 n.2 (9th Cir. 2016) (first quoting 28 U.S.C. § 2253(c)(2); and then quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)). Floyd makes no such showing here,

and we therefore deny his motion to expand the certificate of appealability.

[30] **[31]** First, Floyd's uncertified challenge to Nevada's lethal injection protocol—a three-drug sequence of the anesthetic midazolam, the opioid fentanyl, and the paralytic cisactracurium—is not yet ripe. In 2018, the manufacturer of Nevada's supply of midazolam brought an action to enjoin its product's use in executions. The manufacturer won, obtaining a preliminary injunction, *Alvogen v. Nevada*, No. A-18-777312-B (Nev. Dist. Ct. Sept. 28, 2018), which is currently on appeal to the Nevada Supreme Court. *See State v. Alvogen, Inc.*, Nos. 77100, 77365 (Nev. 2019). As a result, for all practical purposes, Nevada presently has no execution protocol that it could apply to Floyd. A method-of-execution challenge is not ripe when the respondent state has no protocol that can be implemented at the time of the challenge. *See* *Payton v. Cullen*, 658 F.3d 890, 893 (9th Cir. 2011) (claim unripe because no protocol in place following state court invalidation of existing protocol). We cannot determine what drugs Nevada might attempt to use to execute Floyd, and we cannot adjudicate the constitutionality of an unknown protocol. Floyd's claim is therefore unripe for federal review because "the injury is speculative and may never occur." *Portman v. County of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993) (citation omitted).

[32] Second, Floyd's uncertified and procedurally defaulted argument that his trial counsel was ineffective for failing to challenge various courtroom security measures fails. In Floyd's second state habeas petition and instant federal petition, he contended that his trial counsel failed to object to the trial court's forcing him to appear at voir dire in a prison uniform and restraints. The Nevada Supreme Court dismissed this claim as untimely and successive because it was first raised in Floyd's second state petition, *Floyd v. State*, No. 51409, 2010 WL 4675234, at *1 (Nev. Nov. 17, 2010), and the district court dismissed it as procedurally defaulted. As with Floyd's other defaulted ineffective assistance of counsel claims, because of the underlying claim's weakness, we need not resolve whether the state law under which it was deemed defaulted is adequate or whether Floyd may show cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012).

In light of the overwhelming evidence of Floyd's guilt and the weight of the aggravating factors against him, any reasonable jurist would agree that the courtroom security measures had no substantial effect on the jury's verdicts. *See* *Walker v. Martel*, 709 F.3d 925, 930–31 (9th Cir. 2013) (reversing the grant of habeas relief on a shackling-related ineffective assistance claim because the prejudicial effect of shackles was "trivial" compared to aggravating evidence against defendant who killed multiple victims during armed robberies); *Larson v. Palmateer*, 515 F.3d 1057, 1064 (9th Cir. 2008) (holding that when evidence against the defendant is overwhelming, prejudice from shackling is mitigated). Even if trial counsel should have objected to the restraints, Floyd was ***1106** not prejudiced by that failure. *See* *Harrington v. Richter*, 562 U.S. 86, 111, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (explaining that *Strickland*'s prejudice prong "asks whether it is reasonably likely the result would have been different." (quotation marks and citation omitted)).

We therefore deny the motion to expand the certificate of appealability as to both uncertified claims.

IX.

For the foregoing reasons, we **AFFIRM** the district court's denial of habeas relief.

All Citations

940 F.3d 1082, 19 Cal. Daily Op. Serv. 10,127, 2019 Daily Journal D.A.R. 9769

Footnotes

1 The Nevada Supreme Court also held that Floyd's new claims were barred by section 34.810 of the Nevada Revised Statutes, which requires dismissal of claims that could have been raised in an earlier proceeding.

Nev. Rev. Stat. § 34.810(1)(b)(3). On appeal, the State does not contest the district court's determination that this application of section 34.810 was inadequate, and so it does not bar federal review, because the rule was not consistently applied at the time of Floyd's purported default.

2 Nor is a remand to the district court for further evidentiary development appropriate because only "a habeas petitioner who asserts a *colorable* claim to relief ... is entitled to an evidentiary hearing." *Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir. 1994) (emphasis added).

3 Floyd's postconviction investigator interviewed one juror who stated that evidence of a "serious mental illness" would have "weighed heavily" in her sentencing-phase deliberations. It does not follow that this juror would have deemed FASD a sufficiently severe condition to mitigate Floyd's offenses, especially because she appears to have considered insufficient the existing evidence of potential ties between maternal alcohol use and Floyd's state of mind.

4 We have never directly ruled on this question—nor do we today—but we have at least twice expressed our skepticism of Floyd's view. *See Ybarra v. Filson*, 869 F.3d 1016, 1030–31 (9th Cir. 2017); *United States v. Mitchell*, 502 F.3d 931, 993–94 (9th Cir. 2007). Floyd also argues that counsel should have requested a reasonable doubt instruction based on the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which applied the principle from *Apprendi* to hold that every sentence-enhancing fact, "no matter how the State labels it," must be found beyond reasonable doubt. *Id.* at 602, 122 S.Ct. 2428. *Ring* was decided two years after Floyd's trial. In addition, *Ybarra* and *Mitchell*, as well as other circuits' decisions rejecting that argument, post-date *Ring* and thus defeat this version of Floyd's claim as well.

5 To the extent Floyd is now making a new argument that this aggravating circumstance was impermissibly vague, we hold that argument lacks merit. "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." *Middleton v. McNeil*, 541 U.S. 433, 437, 124 S.Ct. 1830, 158 L.Ed.2d 701 (2004) (per curiam). To the extent that Floyd is making a new argument in his reply brief that substantial evidence did not support this jury instruction, we hold that Floyd forfeited any such argument by failing to articulate it in his opening brief. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

6 Floyd argues that his counsel were ordered to turn over Dr. Schmidt's report "before defense counsel had even seen the report of their expert." That assertion is misleading. The court ordered the defense to provide a copy of Dr. Schmidt's report "before the close of business on June 15, 2000." Dr. Schmidt's report is dated June 13, 2000. In his declaration, Floyd's counsel describes a phone call with Dr. Schmidt on June 14 where Dr. Schmidt informed counsel that he was "unable to find any neurological basis for Mr. Floyd's actions." "Upon talking with Dr. Schmidt," counsel "became skeptical about the quality of his testing and decided to hire Dr. Kinsora" to review Dr. Schmidt's testing and analysis. So Floyd's counsel knew basically what would be in Dr. Schmidt's report before they turned it over, whether or not they had seen the actual report. Counsel had the opportunity to withdraw Dr. Schmidt as an expert before turning over his report, as they previously had done with Dr. Paul, but failed to do so. And Floyd's counsel admits that there was "no strategic reason to turn over a report that [they] were not sure about using." In light of this timeline, Floyd's argument that the prosecution's use of Dr. Schmidt's data violated the work-product privilege might be more accurately framed as a result of a poor strategic choice on defense counsel's part not to withdraw Dr. Schmidt as an expert, which could in turn be grounds for an ineffective assistance of counsel claim. *See McClure v. Thompson*, 323 F.3d 1233, 1242–43 (9th Cir. 2003). But no such claim is before us.

7 Floyd asserted in passing in his opening brief before this court that the disclosure and use of Dr. Schmidt's report violated his Fifth Amendment rights against self-incrimination but provided no developed argument

supporting that assertion. We therefore express no view on that issue. *See e.g.*, *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review." (internal citations omitted)).

8 In Floyd's opening brief, he asserts in a section heading that the district court also erred by failing to consider his claim that the trial court violated his rights by refusing to sever the sexual assault charges against him from the murder charges. But he does not actually argue this point or explain the alleged error, so we consider any such argument forfeited. *See* *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

9 The district court determined that Floyd had exhausted all of these claims, and the State does not challenge that ruling.

10 *Darden* enumerated a few of the prosecutor's statements: "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." "I wish [the victim] had had a shotgun in his hand when he walked in the back door and blown [the petitioner's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun." "I wish someone had walked in the back door and blown his head off at that point." "He fired in the boy's back, number five, saving one [round]. Didn't get a chance to use it. I wish he had used it on himself." "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." 477 U.S. at 180 n.12, 106 S.Ct. 2464.

APPENDIX C

Amended Judgment denying Petitioner's motion for evidentiary hearing, denying Petitioner's Second Amended Petition for Writ of Habeas Corpus and granting a limited Certificate of Appealability, *Floyd v. Baker, et al*, United States District Court of Nevada, Case No. 2:06-cv-00471-PMP-CWH (Dec.18, 2014)

✎AO450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

DISTRICT OF Nevada

Zane Floyd

Petitioner,

V.

Renee Baker,
Attorney General Catherine Cortez Masto

Respondents.

AMENDED JUDGMENT IN A CIVIL CASE

Case Number: 2:06-cv-00471-PMP-CWH

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☐ **Notice of Acceptance with Offer of Judgment.** A notice of acceptance with offer of judgment has been filed in this case.

IT IS ORDERED AND ADJUDGED

that petitioner's motion for evidentiary hearing (ECF No. 135) is DENIED.

FURTHER ORDERED that petitioner's second amended petition for writ of habeas corpus (ECF Nos. 66 and 95) is DENIED.

FURTHER ORDERED that petitioner is granted a certificate of appealability with respect to the following issues:
- the claim in Floyd's second amended petition for writ of habeas corpus, in Claim 10A, that the prosecutors made improper closing arguments, and the related claims in Claims 1D(1), 1J, 10B, 16, and 17A, and the request for an evidentiary hearing with respect to those claims;
- the claim in Floyd's second amended petition for writ of habeas corpus regarding the testimony of a prosecution expert witness based in part on test results obtained by a defense expert, who was identified by the defense as a testifying expert, but who, after the defense changed its mind, was not called to testify (Claim 4B(1));
- the claim in Floyd's second amended petition for writ of habeas corpus regarding Mona Nall's victim impact testimony, regarding the kidnapping of Thomas Darnell's family and the sexual assault of his sister (part of Claim 7);
- the court's determination, in ruling on the respondents' motion to dismiss, that the statute of limitations at Nev. Rev. Stat. 34.726 was adequate to support application of the procedural default doctrine; and
- the issue whether Floyd can establish cause and prejudice, under Martinez v. Ryan, 134 S.Ct. 296 (2013), to overcome his procedural default of the following claims: Claims 1A, 1B, 1D (in part), and 17 (in part); Claims 1C, 1F, 1G, and 2, as incorporated by reference into Claim 1; and Claim 5, when considered as a new claim under Dickens v. Ryan, 740 F.3d 1302, 1319-20 (9th Cir.2014) (en banc) cert. denied Dickens v. Arizona 522 U.S. 920 (1997).

With respect to all other issues, petitioner is denied a certificate of appealability.

December 18, 2014
Date

/s/ Lance S. Wilson
Clerk

/s/ Molly Morrison
(By) Deputy Clerk

APPENDIX D

Order denying Petitioner's motion for evidentiary hearing, denying Petitioner's Second Amended Petition for Writ of Habeas Corpus, and granting a limited Certificate of Appealability, *Floyd v. Baker, et al*., United States District Court of Nevada, Case No. 2:06-cv-00471-PMP-CWH (Dec. 17, 2014)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ZANE FLOYD, Petitioner, vs. RENEE BAKER, *et al.*, Respondents.	)	2:06-cv-0471-PMP-CWH **ORDER**

Introduction

This action is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Zane Floyd, a Nevada prisoner sentenced to death. The case is before the court for resolution of the merits of the claims remaining in Floyd's second amended petition for a writ of habeas corpus, and with respect to a motion for evidentiary hearing. The court denies the second amended petition. The court finds that an evidentiary hearing is not warranted, and denies the motion for evidentiary hearing. The court grants Floyd a certificate of appealability with respect to three of his claims.

Background Facts and Procedural History

In its March 13, 2002, decision on Floyd's direct appeal, the Nevada Supreme Court described, as follows, the factual background of the case, as revealed by the evidence at trial:

> Early in the morning on June 3, 1999, Floyd telephoned an "outcall" service and asked that a young woman be dispatched to his apartment. As a result, a twenty-year-old woman came to Floyd's apartment around 3:30 a.m. As soon as she arrived, Floyd threatened her with a shotgun and forced her to engage in vaginal intercourse, anal intercourse, digital penetration, and fellatio. At one point he ejected a live shell from the gun, showed it to the woman, and said that her name was on it. Eventually Floyd put on Marine Corps camouflage clothing and said that he was going to go out and kill the first people that he saw. He told the woman that he had left his smaller gun in a friend's vehicle or he could have shot her. Eventually he told her she had 60 seconds to run or be killed. The woman ran from the apartment, and around 5:00 a.m. Floyd took his shotgun and began to walk to an Albertson's supermarket which was about fifteen minutes by foot from his apartment.
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> Floyd arrived at the supermarket at about 5:15 a.m. The store's security videotape showed that immediately after entering the store, he shot Thomas Michael Darnell in the back, killing him. After that, he shot and killed two more people, Carlos Chuck Leos and Dennis Troy Sargeant. Floyd then encountered Zachary T. Emenegger, who attempted to flee. Floyd chased him and shot him twice. Floyd then leaned over him and said, "Yeah, you're dead," but Emenegger survived. Floyd then went to the rear of the store where he shot Lucille Alice Tarantino in the head and killed her.
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> As Floyd walked out the front of the store, Las Vegas Metropolitan Police Department (LVMPD) officers were waiting for him. He went back in the store for a few seconds and then came out again, pointing the shotgun at his own head. After a police officer spoke with him for several minutes, Floyd put the gun down, was taken into custody, and admitted to officers that he had shot the people in the store.
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> The jury found Floyd guilty of four counts of first-degree murder with use of a deadly weapon, one count of attempted murder with use of a deadly weapon, one count of burglary while in possession of a firearm, one count of first-degree kidnapping with use of a deadly weapon, and four counts of sexual assault with use of a deadly weapon.
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> The jury found the same three aggravating circumstances in regard to each of the murders: the murder was committed by a person who knowingly created a great risk of death to more than one person by means which would normally be hazardous to the lives of more than one person; the murder was committed at random and without apparent motive; and the defendant had, in the immediate proceeding, been convicted of more than one murder. For each murder, the jury imposed a death sentence, finding that the aggravating circumstances outweighed any mitigating circumstances. For the other seven offenses, the district court imposed the maximum terms in prison, to be served consecutively. The court also ordered restitution totaling more than $180,000.00.

Floyd v. State, 118 Nev. 156, 161-63, 42 P.3d 249, 253-54 (2002), *cert. denied*, 537 U.S. 1196 (2003), *overruled in part by Grey v. State*, 124 Nev. 110, 178 P.3d 154 (2008) (copies of the opinion

are in the record at Petitioner's Exhibit 6, and Respondents' Exhibit 7).[1] Floyd pursued a direct appeal to the Nevada Supreme Court, and that court affirmed Floyd's conviction and sentence on March 13, 2002. *Id.*

On June 19, 2003, Floyd filed a petition for writ of habeas corpus in the state district court, and he filed a supplement to that petition on October 6, 2004. Respondents' Exhibits 9, 11. That petition was denied in an order filed on February 4, 2005. Petitioner's Exhibit 9; Respondents' Exhibit 13. On appeal, on February 16, 2006, the Nevada Supreme Court affirmed the denial of the habeas petition. Petitioner's Exhibit 12; Respondents' Exhibit 18.

On April 16, 2006, this court received from Floyd a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, initiating this federal habeas corpus action (ECF No. 1). The court appointed the Federal Public Defender to represent Floyd, and counsel appeared on his behalf on May 22, 2006 (ECF Nos. 6, 8). Counsel filed a first amended habeas petition on Floyd's behalf on October 23, 2006 (ECF No. 18).

On January 25, 2007, respondents filed a motion to dismiss (ECF No. 27), contending that several claims in Floyd's first amended habeas petition were not exhausted in state court, and contending that certain of Floyd's claims were not cognizable in a federal habeas proceeding. While the motion to dismiss was pending, on March 29, 2007, Floyd filed a motion for leave to conduct discovery (ECF No. 35). On April 25, 2007, on account of the unexhausted claims in Floyd's first amended petition, the court stayed the action pending exhaustion of Floyd's claims in state court. *See* Order entered April 25, 2007 (ECF No. 47). The court denied the motion to dismiss without prejudice, and denied the motion for leave to conduct discovery as moot. *Id.*

On June 8, 2007, Floyd filed a second state habeas petition in state district court. Petitioner's Exhibit 396; Respondents' Exhibit 20. On February 22, 2008, the state district court held an

[1] The exhibits referred to in this order as "Petitioner's Exhibits" were filed by Floyd and are found in the electronic record for the case at ECF Nos. 1, 2, 3, 67, 68, 69, 70, 71, and 72. The exhibits referred to in this order as "Respondents' Exhibits" were filed by respondents and are found in the electronic record at ECF Nos. 28, 29, 78, 111, 112, 113, 125, and 126.

evidentiary hearing on one narrow issue: whether post-conviction counsel in Floyd's prior state proceeding was ineffective in failing to pursue relief based on Floyd's alleged organic brain damage. Respondents' Exhibit 25 (transcript). On April 2, 2009, the state district court entered an order denying relief. Respondents' Exhibit 26. Floyd appealed, and on November 17, 2010, the Nevada Supreme Court affirmed the lower court's ruling. Petitioner's Exhibit 386; Respondents' Exhibit 31.

On March 16, 2011, Floyd filed a motion (ECF No. 59) reporting that the further state-court proceedings had been completed, and requesting that the stay of this case be lifted. That motion was granted, and the stay of this action was lifted on March 22, 2011. *See* Order entered March 22, 2011 (ECF No. 61).

On June 13, 2011, Floyd filed a second amended petition for writ of habeas corpus (ECF No. 66), which is now the operative petition in this federal habeas corpus action.

Respondents filed a motion to dismiss Floyd's second amended petition, contending that several claims in that petition are barred by the doctrine of procedural default (ECF No. 77).

While the parties were briefing the motion to dismiss, Floyd filed a motion for leave of court to amend his second amended petition, to add a Claim 17 to the petition (ECF No. 91). The respondents did not oppose that motion (*see* ECF No. 93). The court granted the motion (ECF No. 94), and allowed Floyd to file a supplement to his second amended petition, adding Claim 17. Floyd filed that supplement, adding Claim 17, on January 30, 2012 (ECF No. 95).[2]

On August 20, 2012 (ECF No. 114), the court granted in part, and denied in part, respondents' motion to dismiss. The court order dismissed Claims 1A, 1B, 1C, 1D (in part), 1E, 1F, 1G, 2, 3, 4 (in part), 6, 8, 11, 12, 14, 15, and 17 (in part). *See* Order entered August 20, 2012 (ECF No. 114). In all other respects, the court denied the motion to dismiss. Floyd filed a motion for

[2] In this order, the court refers to Floyd's entire petition, as filed on June 13, 2011, and as further amended to add Claim 17 on January 30, 2012, as Floyd's "second amended petition."

reconsideration of the August 20, 2012 order (ECF No. 116), and the court denied that motion on February 22, 2013 (ECF No. 119).[3]

On June 19, 2013, respondents filed an answer (ECF No. 127), responding to the remaining claims in Floyd's second amended petition. On January 6, 2014, Floyd filed a reply (ECF No. 134). Respondents filed a response to Floyd's reply on March 6, 2014 (ECF No. 138).

Along with his reply, on January 6, 2014, Floyd filed a motion for evidentiary hearing (ECF No. 135). Respondents filed an opposition to that motion on March 17, 2014 (ECF No. 140). Floyd filed a reply on April 11, 2014 (ECF No. 144).

Standard of Review of the Merits of Floyd's Remaining Claims

Because this action was initiated after April 24, 1996, the amendments to 28 U.S.C. § 2254 enacted as part of the Antiterrorism and Effective Death Penalty Act (AEDPA) apply. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (9th Cir.2000), overruled on other grounds by *Lockyer v. Andrade*, 538 U.S. 63 (2003). 28 U.S.C. § 2254(d) sets forth the primary standard of review under AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

[3] In their briefing of the merits of Floyd's remaining claims, Floyd and the respondents argue that the court should reconsider certain aspects of the August 20, 2012 order. *See, e.g.*, Answer (ECF No. 127), pp. 47-48; Reply (ECF No. 134), pp. 2-5; Response to Reply (ECF No. 138), pp. 23-25. Floyd also seeks reconsideration of the August 20, 2012 order in his motion for evidentiary hearing. *See* Motion for Evidentiary Hearing (ECF No. 135); Reply in Support of Motion for Evidentiary Hearing (ECF No. 144). Floyd has previously litigated a motion for reconsideration of the August 20, 2012 order, and the court denied that motion. *See* Order entered February 22, 2013 (ECF No. 119). Respondents could have, but did not in a timely manner, seek reconsideration of the August 20, 2012 order. The court has considered the arguments now asserted by the parties in this regard, and determines that there is no compelling reason for the court, at this point, to reconsider the August 20, 2012 order.

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

A state court decision is an unreasonable application of clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous; the state court's application of clearly established law must be objectively unreasonable. *Id*. (quoting *Williams*, 529 U.S. at 409).

The Supreme Court has further instructed that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 786 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has stated "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id*. (citing *Lockyer*, 538 U.S. at 75); *see also Cullen v. Pinholster*, __ U.S. __, 131 S.Ct. 1388, 1398 (2011) (describing the AEDPA standard as "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt" (internal quotation marks and citations omitted)).

The state court's "last reasoned decision" is the ruling subject to section 2254(d) review. *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010). If the last reasoned state-court decision adopts or substantially incorporates the reasoning from a previous state-court decision, a federal habeas court may consider both decisions to ascertain the state court's reasoning. *See Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir.2007) (en banc).

If the state supreme court denies a claim but provides no explanation for its ruling, the federal court still affords the ruling the deference mandated by section 2254(d); in such a case, the petitioner is entitled to federal habeas corpus relief only if "there was no reasonable basis for the state court to deny relief." *Harrington*, 131 S.Ct. at 784.

The analysis under section 2254(d) looks to the law that was clearly established by United States Supreme Court precedent at the time of the state court's decision. *Wiggins v. Smith*, 539 U.S. 510, 520 (2003).

Analysis

Claims 1D(1) and 10, and the Related Part of Claim 17A

In Claim 10, Floyd claims that his constitutional rights were violated by improper closing arguments of the prosecutors in both the guilt and penalty phases of his trial (Claim 10A), that his trial counsel was ineffective for failing to object to the provision of transcripts of the prosecutors' closing arguments to the jurors to review during their deliberations (Claim 10B), and that the State wrongfully failed to preserve blood sample taken from him for drug and alcohol testing (Claim 10B). Second Amended Petition (ECF No. 66), pp. 195-204.[4] In Claim 1D(1), Floyd claims that his

[4] Floyd asserts certain claims for the first time in the portion of his reply concerning Claim 10: regarding comments in the State's opening statement in the guilt phase of the trial (Reply (ECF No. 134), pp. 43, 45); regarding a comment by a prosecutor that the jury should make certain that the next day's newspaper headlines read "death penalty" (Reply, p. 43); regarding a prosecutor's argument that "I trust that you will agree with Mr. Bell and myself that for his crimes he deserves what is in this case a just penalty of death" (Reply, p. 45); regarding a prosecutor's characterization of mitigating evidence as "excuses" (Reply, pp. 43-44); and regarding a prosecutor saying "give me a break" in response to the defense position that Floyd's cooperation with the police was a mitigation circumstance (Reply, pp. 43-44). Floyd did not include these claims in his second amended petition. *See* Second Amended Petition, pp. 195-204. They are improperly raised for the first time in the reply, and the court does not consider them. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir.1994).

trial counsel were ineffective for failing to object to the alleged improper closing arguments made by the prosecutors.[5] *Id*. at 78. In Claim 17A, Floyd claims that his appellate counsel was ineffective for failing to raise on his direct appeal his claims regarding alleged prosecutorial misconduct. Amendment to Second Amended Petition (ECF No. 95), p. 264.

On Floyd's direct appeal, the Nevada Supreme Court addressed the prosecutors' alleged improper arguments, and ruled as follows:

> Floyd asserts that several comments by the prosecution constituted misconduct. A prosecutor's comments should be considered in context, and "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." [Footnote: *United States v. Young*, 470 U.S. 1, 11, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).] Moreover, Floyd failed to object to some of the remarks. [Footnote: *Riley v. State*, 107 Nev. 205, 218, 808 P.2d 551, 559 (1991) (stating that generally this court will not consider whether a prosecutor's remarks were improper unless the defendant objected to them at the time, allowing the district court to rule upon the objection, admonish the prosecutor, and instruct the jury); *c.f.* NRS 178.602 (providing that despite lack of objection, this court may address an error if it was plain and affected a defendant's substantial rights).] Most of the comments require no discussion because they all either were proper or did not amount to prejudicial error.
>
> However, we will discuss one comment which was inappropriate. During closing argument in the guilt phase, the prosecutor told the jury that Floyd "perpetrated the worst massacre in the history of Las Vegas." The jury began its deliberations soon after. Defense counsel then objected to the prosecutor's remark as prejudicial and inflammatory. The district court responded: "I think [the remark] isn't within the evidence. I also don't think it is true. What remedy would you suggest, now that the jury is gone? If you wish, I'll bring them back in and say that that wasn't proper argument." Defense counsel declined that proposal because he thought "an admonition would be moot and would raise more attention than the original comment."
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> The district court was correct that the record contains nothing to support the prosecutor's remark, and it is elementary that "a prosecutor may not make statements unsupported by evidence produced at trial." [Footnote: *Guy v. State*, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992); *see also Leonard v. State*, 114 Nev. 1196, 1212, 969 P.2d 288, 298 (1998); *Collier v. State*, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985).] The remark was therefore improper. [Footnote: The State contends that the comment was "simply an accurate statement of fact known to anyone who has lived

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[5] This portion of Claim 1D, designated Claim 1D(1), is set forth in paragraph 175 of Floyd's second amended habeas petition. In Claim 1D(1), Floyd incorporates all the allegations of prosecutorial misconduct that he makes in Claim 10. However, the portion of Claim 1D(1) based on counsel's failure to object to the prosecution's failure to preserve the blood sample (*see* Second Amended Petition, p. 203 (Claim 10C)) has been dismissed as procedurally defaulted. *See* Order entered August 20, 2012 (ECF No. 114), p. 10.

> in Las Vegas any length of time, and akin to arguing in the Timothy McVeigh case that the Oklahoma bombing was the worst massacre in the history of the State of Oklahoma." This extravagant comparison is neither apt nor persuasive. The multiple murders in this case were an exceptional occurrence, but even a quick look at this court's case law shows that unfortunately they do not stand alone in Las Vegas history. In 1992, four people were shot to death in a Las Vegas apartment in the presence of two young children. *See Evans v. State*, 112 Nev. 1172, 926 P.2d 265 (1996).] We caution prosecutors to refrain from inflammatory rhetoric: "Any inclination to inject personal beliefs into arguments or to inflame the passions of the jury must be avoided. Such comments clearly exceed the boundaries of proper prosecutorial conduct." [Footnote: *Shannon v. State*, 105 Nev. 782, 789, 783 P.2d 942, 946 (1989).] Here, given the overwhelming evidence of Floyd's guilt, we conclude that the error was harmless. [Footnote: *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").]

Floyd, 118 Nev. at 172-74, 42 P.3d at 260-61.

Floyd also made claims in his first state habeas action regarding alleged improper prosecution argument, and, on the appeal in that action, the Nevada Supreme Court ruled as follows:

> Floyd asserts that his trial counsel was ineffective in failing to object to several instances of alleged prosecutorial misconduct. Although misconduct occurred, it was not prejudicial in this case.
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> Floyd's counsel raised prosecutorial misconduct on direct appeal. This court addressed one instance specifically; in regard to the others, we stated: "Floyd asserts that several comments by the prosecution constituted misconduct.... Floyd failed to object to some of the remarks. Most of the comments require no discussion because they all either were proper or did not amount to prejudicial error." [Footnote: *Floyd*, 118 Nev. at 172-73, 42 P.3d at 260 (footnote omitted).] Given this ruling, Floyd's reliance in part on misconduct alleged on direct appeal fails to establish any prejudice.
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> But Floyd newly raises three instances of misconduct that his counsel failed to object to. All occurred during closing argument in the penalty phase as the prosecution rejected the mitigating circumstances proffered by Floyd.
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> > So the defense has made a laundry list of red herrings to make it appear in this case that there is a whole lot of them and, therefore, they should have some weight. They've stacked wishes upon hopes upon dreams that you'll count numbers, that you'll count some things twice, and you'll say "Well, wait a minute. There's a lot of mitigation here."
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> > * * *
> >
> > Now, it really doesn't matter that Mr. Bell [defense counsel] took this entire box of paper clips and threw it on the table. You could have every one of these. How on earth could all of these reasons or excuses, whatever you want to call them, how could all of them put together possibly outweigh the fact

> that more than one person was killed in this case? How could that possibly outweigh a second murder? It can't. None of these combined.
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> * * *
>
> Cooperation with the police as a mitigating circumstance? Give me a break. How does that reduce his moral culpability?
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> * * *
>
> You can throw the whole list away.

We have underlined the rhetoric that is misleading or excessively intemperate and derogatory toward the defense. First, as discussed above, mischaracterizing mitigating evidence as "excuses" could seriously mislead jurors. Second, rhetoric such as "Give me a break" and "red herrings" unfairly imply that the defense is trying something underhanded. This court has repeatedly warned prosecutors not to "disparage legitimate defense tactics" in this manner. [Footnote: *See, e.g.*, *Pickworth v. State*, 95 Nev. 547, 550, 598 P.2d 626, 627 (1979); *Barron v. State*, 105 Nev. 767, 780, 783 P.2d 444, 452 (1989).] We considered it "highly improper" for a prosecutor to tell jurors that a defendant's drug intoxication defense was a "red herring" aimed at gaining a compromise verdict of second-degree murder. [Footnote: *Pickworth*, 95 Nev. at 550, 598 P.2d at 627.] As we have explained, prosecutors have a "duty not to ridicule or belittle the defendant or his case. The appropriate way to comment, by the defense or the State, is simply to state that the prosecution's case or the defendant is not credible and then to show how the evidence supports that conclusion." [Footnote: *Barron*, 105 Nev. at 780, 783 P.2d at 452 (citation omitted).]

A defendant and his counsel have the right to introduce evidence and argue the existence of mitigating circumstances in a capital penalty phase. That is all Floyd and his counsel did here, and on direct appeal this court stated: "This mitigating evidence is not insignificant, but given the aggravating circumstances and the multiple, brutal, unprovoked murders in this case, we do not deem the death sentences excessive." [Footnote: *Floyd*, 118 Nev. at 177, 42 P.3d at 263.] For their part, prosecutors are entitled to argue that the evidence presented by the defendant fails to establish any mitigating circumstances or that any mitigating circumstances lack weight in comparison to the aggravating circumstances. However, they violate their primary duty, which is to see that justice is done, when they suggest to the jury that the defendant's case for a sentence less than death is somehow outrageous or illegitimate. [Footnote: *See Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987).]

We assume that counsel had no sound strategy for not objecting to these remarks. Nevertheless, we conclude that there is no reasonable probability that Floyd would not have received a death sentence if his counsel had objected at trial or raised this issue on appeal.

Order of Affirmance, Petitioner's Exhibit 12, pp. 9-12.

It is clearly established federal law within the meaning of § 2254(d)(1) that a prosecutor's improper remarks violate the Constitution if they so infect the trial with unfairness as to make the resulting conviction a denial of due process. *Parker v. Matthews*, __ U.S. __, 132 S.Ct. 2148, 2153, (2012) (per curiam); *see also Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Comer v. Schriro*, 480 F.3d 960, 988 (9th Cir.2007). The ultimate question is whether the alleged misconduct rendered the petitioner's trial fundamentally unfair. *Darden*, 477 U.S. at 183. In determining whether a prosecutor's argument rendered a trial fundamentally unfair, a court must judge the remarks in the context of the entire proceeding to determine whether the argument influenced the jury's decision. *Boyde v. California*, 494 U.S. 370, 385 (1990); *Darden*, 477 U.S. at 179-82. In considering the effect of improper prosecutorial argument, the court may consider whether the argument manipulated or misstated the evidence; whether it implicated other specific rights of the accused, such as the right to counsel or the right to remain silent; whether the court instructed the jury that its decision is to be based solely upon the evidence; whether the court instructed that counsel's remarks are not evidence; whether the defense objected; whether the comments were "invited" by the defense; and whether there was overwhelming evidence of guilt. *See Darden*, 477 U.S. at 181-82. The standard is general, leaving courts leeway in case-by-case determinations. *Parker*, 132 S.Ct. at 2155 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). In a federal habeas corpus action, to grant habeas relief, the court must conclude that the state court's rejection of the prosecutorial misconduct claim was objectively unreasonable, that is, that it "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Parker*, 132 S.Ct. at 2155 (quoting *Harrington*, 131 S.Ct. at 767-87).

Applying these standards, the court finds that the rulings by the Nevada Supreme Court denying relief on the claims asserted by Floyd in Claims 1D(1) and 10, and the related portion of Claim 17A, were not objectively unreasonable. While some of the prosecutors' comments in the State's closing arguments in the guilt phase of the trial were improper, given the weight of the

evidence against Floyd and the nature of those comments, the court concludes that those comments had no effect on the fairness of Floyd's trial.

Regarding the prosecution's guilt-phase closing arguments, Floyd highlights, as "[p]erhaps the most egregious comment," the following:

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

Exhibit 43, p. 50; *see* Second Amended Petition, p. 198. The Nevada Supreme Court discussed this comment in its opinion on Floyd's direct appeal, and found the comment to be improper, but concluded, reasonably in this court's view, that the error was harmless. *Floyd*, 118 Nev. at 172-74, 42 P.3d at 260-61; *see also id*., 118 Nev. at 177, 42 P.3d at 263 (Maupin, C.J., and Agosti, J., concurring) ("I concur in the result reached by the majority, but write separately to state my view that there was no prosecutorial misconduct at trial in connection with the "massacre" argument.... While the rhetoric was not specifically accurate, the argument was a legitimate comment on the apparent random gunning down of five people, killing four of them."). The comment did not go to any factual dispute in the case. While the comment was improperly inflammatory, this court finds that it had no impact on the outcome of Floyd's trial. The magnitude and brutality of Floyd's shooting rampage was plain from the evidence; the prosecutor's characterization of it added little. Moreover, the trial court properly instructed the jury that the evidence they were to consider consisted of the testimony of witnesses, exhibits, and any facts admitted or agreed to by counsel, and that "[s]tatements, arguments and opinions of counsel are not evidence in the case." Exhibit 44, Instruction No. 6.

Floyd also claims that certain remarks made by the prosecutors in their closing arguments in the guilt phase of the trial were improper expressions of personal opinion and referred to facts not in evidence, Floyd points to the following remarks of the prosecutors in this regard:

(1) "... I don't think there's much question about the facts in this case." (Respondents' Exhibit 43, p. 10);

(2) "There can be no doubt, of course, that she [the sexual assault victim] was in the presence of the defendant." (*Id*. at 12);

(3) "I hope that you will understand her [the sexual assault victim's] reluctance to get involved. I hope that you will understand the system that had her arrested in order to secure her testimony. We felt that the case was sufficiently important that we needed not just her as a victim for the counts charged, but also to have an accurate accounting of that one and a half or two hours that he intentionally omitted." (*Id*. at 13) (objected to, and objection sustained);

(4) "It is difficult to understand, based on everything we've heard, how a man could forget an hour and a half activity with [the sexual assault victim], particularly when it preceded maybe by ten minutes, the homicides. Zane Floyd recalled walking from his house. He recalled putting on his boots. He recalled turning on the music. He recalled walking every step. Those were his words, every step through the store, even the direction he took. Yet for whatever reason, and I'm sure it has something to do with his idea of what a man is and what, how others are to view a man, killing is one thing, but raping or sexually assaulting a woman, that is a cowardly act, and so you don't want to mention that." (*Id*. at 14);

(5) "If you find not guilty as to Mr. Emenegger [the victim of the attempted murder], which seems rather rash, then I presume your logic would follow that you would find not guilty as to everybody else." (*Id*. at 22);

(6) "The fact that no condom was used in this case is probably proof enough. A lady such as her has to use condoms, if they don't want to die an early death of AIDS or some other sexually transmitted disease. She had one, but she had no opportunity to get it out." (*Id*. at 25);

(7) "Devil whiskey made me do it. It wasn't me, it was methamphetamine or cocaine or heroin or PCP. This is what defendants would say for years when they had no real excuse for the conduct that they committed." (*Id*. at 39) (objected to, and objection sustained);

(8) "I think it is easy to look at what he did and what he said and make it absolutely clear that he knew exactly what he was doing when he raped [the sexual assault victim] and he knew exactly what he was doing and the consequences thereof when he shot everybody he could find in the Albertson's store at about 5:15 ...." (*Id*. at 43);

(9) "He told [the sexual assault victim] if he had a smaller gun he could kill her and he told her he had a smaller gun, but he left it in a friend's car. Didn't that turn out to be true? He told the police he had a smaller gun. He left it in Mr. Godman's car. We had the gun salesman who came on and said I sold him a pistol at the same time I sold him a rifle. And what's the materiality? He understood fully well that if he shot her with that shotgun it would make so much noise that people would hear, the police would be called, he would only be able

> to kill one person. But if he had a smaller gun, he could have killed her with the smaller gun and then still maybe gone down to Albertson's and gone on a shooting spree with the shotgun. If he had that pistol, [the sexual assault victim] wouldn't be alive today." (*Id*. at 45); and
>
> (10) "I mean if he was going to kill himself, then there was no accountability.... But then when it came down to it, he didn't have the courage to pull the trigger. And so there has to be some accountability." (*Id*. at 51-52).

See Second Amended Petition, pp. 195-98. Regarding the second, sixth, and ninth remarks quoted above, the court finds them to be appropriate commentary on the evidence, without any expression of improper personal opinion. In the other seven, the prosecutor did speak in the first person, and did perhaps express personal opinion. However, with respect to the first, fourth, fifth, eighth, and tenth remarks quoted above, those remarks concerned inferences or conclusions that could arguably be drawn from the evidence; while it is improper for prosecutors to make arguments in terms of their personal beliefs, those remarks were essentially fair commentary on the evidence. The other two remarks -- the third and seventh quoted above -- were improper expressions of opinion regarding matters not in evidence. Defense counsel objected to those remarks, and the court sustained the objections, undermining their force. And, at any rate, none of the prosecutor's improper expressions of personal opinion were anywhere near egregious enough to render Floyd's trial unfair.

Floyd also claims that, in their closing arguments in the guilt phase of the trial, the prosecutors made remarks that misstated the law; in this regard, Floyd points to the following:

> (1) "I'm going to get into, what I would ask you to do, you can approach deliberations any way you want, but we have so many different crimes. What you might wish to do is take it one crime at a time, and the verdict forms will probably be in that order: Burglary, murder, kidnapping, sexual assault." (Respondents' Exhibit 43, p. 14);
>
> (2) "The burglary, the wording is a little different, but it also has the weapons enhancement. Now what is a burglary. The judge read the instructions. Some people confuse burglary with robbery. We have burglary in this case. Burglary occurs when someone crosses the threshold of your residence, a business, your automobile, puts their hand in your automobile, open window, let's say, with the intention of committing any felony, stealing your purse out of it. If it has more than 250 bucks in it, that's a felony, or with the intention of stealing. Reaching inside your car, if you can believe it, and there's a

> nickel in there and somebody picks that nickel up off the seat of the car, that technically is a felony in the State of Nevada, felony burglary. We're not there, obviously, and I don't want to trivialize the offense of burglary, but I'm simply illustrating to you what the crime is. It doesn't matter, as in this case, that the store is open for business. That doesn't matter. You walk into Save-On Drug and with the intention – and that's the key, what was your intention when you crossed that threshold – with the intention of stealing, you have committed the crime, whether you steal or not. Now, nobody can ever prove that crime, of course against you, but that is the crime of burglary. That's how it is defined in the State of Nevada. We live in Nevada, so we'll follow the law of the State of Nevada. Many people come from other state where it's not quite the same way. If you have sat in juries elsewhere you might be surprised by what the law is in this state." (*Id*. at 16-17);
>
> (3) "Next I would like to discuss with you first degree murder, because that is what we have charged him with. After burglary we have four counts of first degree murder. First degree murder can be committed two ways, so that's why I brought this out and it is really quite simple. Let's just say first degree murder. The first way is premeditated and deliberate murder, premeditated deliberate intentional murder. Premeditated. I think that's right. Deliberate. And the other element is willful. I want to make sure I spell that right. That's the first way, and I would submit to you that we don't even have to talk about the second one, but I'm going to talk about it anyway because it applies to this case because the law in the State of Nevada allows two different theories of first degree murder. And when you read the instructions you will conclude that only lawyers could draft these things because they sound so much alike that there's hardly a distinction." (*Id*. at 17-18); and
>
> (4) "Sexual assault is simply sex with another person against that person's will. That's it. That's it. You don't have to beat them, you don't have to threaten them with a gun, you don't have to hurt them. It is simply sex that is against th will of the victim, or, or where the defendant should know that the victim is incapable of resisting. They are both applicable in this case. You can take your choice. You don't need both, you can take your choice. A 115 pound lady versus a 200 pound man with a shotgun on his home turf, no one can resist that ver successfully." (*Id*. at 24-25) (objected to; trial judge stated: "I'm not sure that I agree with your example ... but the instruction will speak for itself.").

See Second Amended Petition, pp. 196-97. As to none of these remarks has Floyd shown the prosecutor to have clearly misstated the law; where the remarks arguably include inaccurate statements of law, they are at best muddled and ambiguous. The law was properly and clearly set forth in jury instructions, and the jury was instructed to follow the law as stated in those instructions. *See* Exhibit 44, Instructions No. 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 25, 26, and 28. Floyd has

not shown how any arguable misstatement of law in these remarks could have affected his trial such as to render it unfair.

Floyd also contends that the prosecution improperly "attempted to shift the burden of proof" in making the following remarks in the State's closing argument in the guilt phase of his trial:

> Murder of the second degree is a lesser included offense of murder of the first degree. You are allowed to consider murder of the second degree only, only if you have a reasonable doubt as to murder of the first degree. It is not one of these things where you have a choice, you know, you flip a coin and say hey, let's give him murder of the second degree. No, no, only if Mr. Bell [the other prosecutor] and I have not proven to you beyond a reasonable doubt that he committed murder of the first degree. Only then do you even look at murder of the second degree....

Respondents' Exhibit 43, p. 23; *see* Second Amended Petition, p. 197. Floyd does not explain how this argument might have shifted the burden of proof, or how it was improper in any other respect, such as to render his trial unfair. *See* Exhibit 44, Instruction No. 19 ("You may consider the lesser offense of murder of the second degree only if you have a reasonable doubt as to the offense of murder of the first degree.").

Finally, with respect to the prosecutors' closing arguments in the guilt phase of his trial, Floyd claims that, in the following comment, the prosecutor "improperly misstated the law, appealed to the community conscience, and then attempted to shift the burden of proof":

> When we started this case last Monday there was a presumption of innocence and he was clothed with that presumption of innocence at that time. Once Mr. Bell [the other prosecutor] and I present you with sufficient evidence to prove to you his guilt beyond a reasonable doubt, that presumption was removed and you as jurors in our system, the only way to let the judge and the community know that the presumption of innocence is no longer there is to return verdicts of guilty.

Respondents' Exhibit 43, p. 29; *see* Second Amended Petition, pp. 197-98. Floyd argues that the prosecutor's argument was incorrect and improper because "[t]he presumption of innocence persists until the jury deliberates and determines that guilt has been demonstrated beyond a reasonable doubt." *Id*. at 198. The court finds that there was no misstatement of the law in this comment; certainly, there was no misstatement of law that could possibly have rendered Floyd's trial unfair. The prosecutor's point was essentially correct -- only proof of guilt beyond a reasonable doubt could

overcome the presumption of innocence. *See* Exhibit 44, Instruction No. 5 ("The Defendant is presumed innocent unless the contrary is proved."). Moreover, the prosecutor did not minimize the importance of the presumption of innocence; on the contrary, the prosecutor went on from the contested comments to conclude his argument as follows:

> That is how it's done. It is called due process in this country. Whether you are a citizen or not, you are entitled to that due process and that's what we have been through in this courtroom. As one gentleman said, we are not in Turkey, we are not in Iran, we are not wherever.
>
> We are here in America. We have a due process clause that applies to everybody, no matter how heinous the crime. And it is because of that due process clause that we have gone through this week presenting the evidence to you so that when you do return the guilty verdicts, which I fully expect, based on the evidence, you can at least assure the world that we have provided him with the due process that our constitution demands that he be given. Thank you.

Respondents' Exhibit 43, pp. 29-30.

Turning to the penalty phase of the trial, Floyd claims that the prosecutors improperly expressed personal opinion, and misstated the facts in evidence, in the State's closing argument in the penalty phase of his trial, in the following remarks:

(1) "And the third mitigator is that the killing was random and without apparent motive. Nothing scares people more than the potential of random victimization. Let me repeat that. Nothing scares people more than the potential of random victimization." (Respondents' Exhibit 51, p. 45) (objected to, and objection overruled);

(2) "The victims were absolutely innocent. They were doing what we expected people to do. They were going to work, trying to feed their families, when they were brutally and senselessly killed. The defendant had no bone to pick with the victims. He had no bone to pick with Albertson's. It wasn't like he was a fired employee and had some misguided thought that he wanted retribution. It was a thrill kill to kill whoever was available." (*Id*. at 46);

(3) Four, how did the killings occur? These killings are so vicious and done so ugly. Tommy Darnell was shot in the back; no chance. Troy Sargent shot in the heart; no chance. Chuck Leos shot twice; both deadly wounds; no chance. But even worse than that, Zachary Emenegger was hunted down and gunned down. He was begging, "No, no, please," as he was shot, knocked to the ground and shot again. The ruthlessness of this crime is beyond belief. And, of course, the most ruthless of all is poor Luci Tarantino, a grandmother, a lady in her 60s who wouldn't hurt a fly. She's begging for her life and this defendant calmly walks up within two feet of her face and pulls the trigger – full well knowing he had an expertise in guns and he told the police what was going to happen – that her head would just explode." (*Id*. at 52-53);

(4) "The defendant has a hollow soul, ladies and gentlemen. He doesn't care who he hurts, when he hurts, or how he hurts as long as he can satisfy his own basic desires. He plays by his own rules and he doesn't care who suffers or how much. Make no mistake about that. You are in the presence of the most dangerous man you will ever encounter in ... your lifetime." (*Id*. at 55) (objected to, and objection overruled);

(5) "Whereas this defendant has a heart bent on destruction. A hollow soul. And he still has a hollow soul today. When he gave his allocution, when he got up here to say he was sorry, he said the right words, but you could tell none of them came from the heart. He didn't look at the jury. He didn't look at the victims. He didn't even look at his mother. He just kind of looked out. As he did on June the 3rd. Sort of a blank stare, a monotone, ladies and gentlemen. The Zane Floyd that sits here today is the same Zane Floyd that was raping and killing on June 3rd." (*Id*. at 60-61);

(6) "... [T]his coward ... This man who committed these cowardly acts and set out to kill himself whimpered out in front of the store and, as Mr. Bell [the other prosecutor] said, he tried to get away." (*Id*. at 127-28) (objected to, and objection overruled);

(7) "These mitigators pale, pale in comparison to what you could pile up. Remember that table they had up here with all those things piled up on top? Take the average burglar that's in the Nevada State Prison. It would be a pile twice that high. Why? Because you would look into the background and truly see some depravity and some neglect and disadvantage. This is embarrassing." (*Id*. at 129);

(8) "They mentioned a 10 by 15 cell block. Give me a break. He wants to be on the yard, he wants to play ball, he wants to watch television, have three meals a day –" (*Id*. at 137) (objected to, and objection sustained); and

(9) "Many people do not kill even one person or rape a single human being and still receive life without parole. When I speak about ... When I speak about proportionality of sentence, surely a quadruple murderer deserves a greater punishment than those who have murdered only once, than those who have murdered only twice, or three times, or those who have not murdered at all or raped at all." (*Id*. at 137-38)) (objected to, and objection sustained).

See Second Amended Petition, pp. 199-201. This court finds that with respect to first, second, third, fourth, fifth, and sixth comment quoted above, those remarks by the prosecutors were fair commentary on the evidence, and on the alleged aggravating circumstances, without any improper expression of personal opinion. In the other three comments above, the seventh, eighth, and ninth quoted comments, the prosecutor did express what were apparently opinions regarding facts not in evidence. With respect to the eighth and ninth quoted remarks, defense counsel objected and the

court sustained the objections. At any rate, given the strength of the prosecution's case in the penalty phase of the trial, none of the prosecutor's expressions of personal opinion were so egregious as to render Floyd's trial unfair.

Floyd claims that the following argument mischaracterized the defense's argument:

> I also rather expect we'll hear the ridiculous phrase "structured setting." The defense, I have no doubt, is going to come up and concede that he can't ever live in free society given what he did, but he'd be okay in a structured setting; i.e. prison. That's hogwash, ladies and gentlemen. School's a structured setting and he was constantly fighting in school, fighting other students, disruptive.

Respondents' Exhibit 51, p. 58; *see* Second Amended Petition, pp. 199-200. The court finds that this argument was not improper. It was fair argument regarding the evidence, and regarding the weight of proffered mitigation. To the extent that, arguably, the prosecutor should not have used the terms "ridiculous phrase" or "hogwash" to express the State's disagreement with the position of the defense, those remarks were not so egregious as to render Floyd's trial unfair.

Floyd claims that in the following remarks, in the State's closing arguments in the penalty phase of his trial, the prosecutor improperly expressed his personal opinion, "mischaracterized the mitigation evidence," and "misstated the facts":

> Well, let's talk about the mitigating circumstances that might conceivably be argued by the defense that are provided by law.
>
> The defendant has no significant criminal history. Well, you know, the State would concede that's probably a mitigating circumstance. Should it be considered? He has one DUI. I don't think that's significant. I think if I were a juror, I'd put that one on the scale of justice.
>
> The defendant was under extreme mental or emotional disturbance. Now, understand this: It's not clear whether that has to be simultaneously with the brutal killings at Albertson's or a more general proposition. But we do know this: The defendant was not insane; he was not mentally ill; he was above average intelligence; he knew right from wrong; he acted lawfully when he felt like it and unlawfully when he felt like it; he played by his own rules and let others suffer the consequences.
>
> Whether or not you believe that he was under significant emotional distress, it's up to you. Keep in mind when you're looking at that, by his own admission, any problems he had were of his own making. It was he who quit his job; it was he who chose to gamble; it was he who was frustrated with his girlfriend. But it may be that some people will think that should go on the scale.

> And the last specifically provided is the youth of the defendant. Now, the law doesn't define youth either. Some people may think 23 is young. Other people may think that this should be reserved for people that are 16, 17, or 18 who commit first-degree murder. But in any event, if one or more of you think that he's young and maybe ought to get a little credit for that, put that one there too.
>
> Now in addition to these three that are provided by the law, again, I told you that it was open ended. Any other mitigating circumstance. So the defense has made a laundry list of red herrings to make it appear in this case that there's a whole lot of them and, therefore, they should have some weight. They've stacked wishes upon hopes upon dreams that you'll count numbers, that you'll count some things twice, and you'll say, "Well, wait a minute. There's a lot of mitigation here."
>
> Just give you an example. We know that the defendant was not intoxicated to the degree to affect his ability to formulate and carry out a plan of destruction. But there's no question he'd had a couple of drinks. Somebody thinks alcohol is a mitigating factor. Throw that on the scale.
>
> * * *
>
> The State submits this isn't even close, ladies and gentlemen. When you put that over her and you put it on the scales of justice, it's a hundred to nothing. The aggravators far, far, far outweigh all of the mitigators this defendant could [ever] bring forth.
>
> * * *
>
> You can throw the whole list away.

Respondents' Exhibit 51, pp. 47-51, 128; *see* Second Amended Petition, pp. 199-200. On the appeal in Floyd's first state habeas action, the Nevada Supreme Court found the prosecutors' description of mitigating factors proffered by the defendant as "red herrings," and their argument that "you can throw the whole list away," to be "misleading or excessively intemperate and derogatory toward the defense." Order of Affirmance, Petitioner's Exhibit 12, pp. 10-11. The Nevada Supreme Court also found that such arguments unfairly implied "that the defense is trying something underhanded." *Id*. The court pointed out that prosecutors have a "duty not to ridicule or belittle the defendant or his case," and that they "violate their primary duty, which is to see that justice is done, when they suggest to the jury that the defendant's case for a sentence less than death is somehow outrageous or illegitimate." *Id*. at 11-12. The Nevada Supreme Court "assume[d] that counsel had no sound strategy for not objecting to these remarks," but, nevertheless, "conclude[d] that there is no

reasonable probability that Floyd would not have received a death sentence if his counsel had objected at trial or raised this issue on appeal." *Id*. at 12. This court finds reasonable the Nevada Supreme Court's ruling with respect to the prosecutor's use of the phrases "red herrings," and "you can throw the whole list away." Beyond that, regarding the argument quoted above, the court finds that it was fair commentary on the evidence and on the mitigating factors submitted by the defense.

Floyd claims that the prosecutor improperly expressed personal opinion, and "challeng[ed] the jurors to explain their decision not to give death to the victim's families," as follows:

> MR. BELL [prosecutor]: .... If not this case, ladies and gentlemen, what case? If not this case, what case? If the conduct in this case is not sufficiently offenseive or the loss not sufficiently devastating to merit the maximum penalty allowed by law, then come back and tell me, and while you're at it, tell Leanne Leos, Mona Nall –
>
> MR. BROWN [defense counsel]: Objection, your Honor.
>
> THE COURT: Sustained.
>
> MR. BELL: That there is a case that merits the maximum punishment because you've agreed to that when you were selected as jurors. But this is not the case. When you get back to the jury room with eight or ten or eleven of you and are convinced in your heart of hearts this is the case for the death penalty and two or three of you seem to have some difficulty on behalf of the citizens of this community, look at them and say, "If not this case, what case?"

Respondents' Exhibit 51, pp. 40-41; *see* Second Amended Petition, p. 199. This court finds that this argument was improper and that the trial court correctly sustained defense counsel's objection. The court does not, however, find the argument to be so egregious as to infect Floyd's trial with unfairness. The strength of the aggravating factors in this case -- the facts that Floyd murdered four people, and put many more at great risk of death, at random and with no apparent motive -- was made plain by the evidence, and the prosecutors' commentary added little force to that evidence.

Floyd claims that, in the following argument, the prosecutor "improperly attempted to bolster the credibility of government neuropsychologist Mortillaro" and improperly misstated the facts:

> There were no questions of neuropsychologist Louis Mortillaro because he knew what he was talking about and the right tests were applied and they show that he has no brain damage, and now I'm talking about some mitigators they have here about his mental state. There was no brain damage, he has an average I.Q., no hallucinations, no delusions, not mentally ill.

Respondents' Exhibit 51, p. 126; *see* Second Amended Petition, p. 200. The court finds, however, that this argument was fair commentary on the testimony of Dr. Mortillaro. *See* Testimony of Louis Mortillaro, Ph.D., Exhibit 51, pp. 3-8.

Floyd claims that the following arguments of the prosecutor concerning victim impact testimony were improper:

- "What wouldn't Danielle and Gina and Lani and their father Joseph give to see Luci smile just one more time?" (Respondents' Exhibit 51, p. 130); and

- "Thomas Darnell. I don't know how Mona Nall has done it. You know, when you go through the tremendous tragedies together that Mona has suffered and had suffered with her son over the years, so many tragedies, so many hardships, there's a bond that forms. It is just an unbelievable story of survival." (Respondents' Exhibit 51, p. 132).

See Second Amended Petition, p. 201. This commentary on the victim impact testimony was, in this court's view, measured, in light of the force of the victim impact testimony, was not improper, and certainly did not approach a due process violation.

Floyd claims that in the following portion of his closing argument, in the penalty phase of the trial, the prosecutor improperly told the jury that one reason to impose the death penalty was to send a message to others in the community:

> What are the reasons, ladies and gentlemen, for imposing the death penalty? [Penologists] generally come up with two separate reasons for the death penalty: deterrence and punishment.
>
> Deterrence because somehow it sends a message to others in our community, not just that there is a punishment for a certain crime, but that there is justice, that there is a system that metes out punishment in a proportional manner, that we do not.
>
> MR. BROWN [defense counsel]: I think it's the message to the community argument, Judge.
>
> THE COURT: I think he's organizing a period of chronology, and on that basis it's overrruled.
>
> MR. KOOT [prosecutor]: There is a message to everyone out there that if the punishment fits the crime, then we have a system that works. And the public is entitled to have faith and confidence in their system. It has deterrence in the other way too. He won't kill again no matter where he is, no matter what state of depression he suffers.

Respondents' Exhibit 51, p. 136; *see* Second Amended Petition, p. 201. This court finds that this argument was improper. The decision whether to impose the death penalty must involve "an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (emphasis omitted). These comments by the prosecutor cut against that requirement. However, when taken in context, the prosecutor's comments only purported to provide background information about the death penalty, and did not include any overt instruction to the jury to impose the death penalty in this case to send a message to the community. Nor did the comments include any attempt to incite the passions of the jurors. The court finds that these comments were unlikely to mislead the jury, and, at any rate, did not render Floyd's trial unfair.

Finally, with regard to the prosecution's penalty-phase closing arguments, Floyd complains that the prosecutors "improperly attempted to take away the jury's sense of responsibility," in the following comments:

> MR. KOOT [prosecutor]: Lastly, ladies and gentlemen, and it is always the case, that defense counsel attempts to make this more difficult than it already is, more difficult than it has to be.
>
> Mr. Hedger [defense counsel] suggested, as did Mr. Brown [defense counsel], that you can take the, quote, easy road and impose death. That is not the easy road. That is presumptuous on their part. They have, obviously, never sat where you're sitting. It is never, ever easy to return this verdict. Never. And it's not supposed to be.
>
> But you're not killing him. You are part of a shared process.
>
> MR. BROWN [defense counsel]: Objection, Judge.
>
> THE COURT: What is the objection?
>
> MR. BROWN: Trying to spread out the responsibility in individualized considerations of the jurors who can't disburse that.
>
> THE COURT: Overruled.
>
> MR. KOOT: You are asked to render a verdict. The legislature through the people in the state decided that the ultimate punishment would be the death penalty. And even after you render your verdict, there's a process that continues.

MR. BROWN: The responsibility or the jury's duty is to render the verdict.

THE COURT: This is part of their duty.

Are you saying something other than that, Mr. Koot?

MR. KOOT: No, I'm not, your Honor.

Respondents' Exhibit 51, pp. 138-39; *see* Second Amended Petition, p. 201. This court finds that these comments were improper to the extent that they minimized the jurors' sense of responsibility for the death sentence. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985) (improper for prosecution in capital case to suggest that responsibility for determining the appropriateness of the death penalty rests elsewhere, with an appellate court, for example). The offending comments by the prosecutor, however, were somewhat ambiguous. Furthermore, reinforcing the weight of the jury's responsibility, the prosecutor stated: "It is never, ever easy to return this verdict. Never. And it's not supposed to be." Respondents' Exhibit 51, pp. 138-39. The court finds that while these comments were improper, they were not such as to render Floyd's trial unfair.

Taking cumulatively the arguably improper prosecution arguments challenged by Floyd in Claim 10A, the court finds that they did not render Floyd's trial fundamentally unfair, such as to give rise to a violation of his federal constitutional right to due process of law. *See* discussion, *infra*, pp. 59-63. The Nevada Supreme Court's denial of relief with respect to Claim 10A was not objectively unreasonable.

Regarding Claim 10B, given the court's view of the alleged improper prosecution arguments -- finding that some were improper, but not nearly enough to give rise to a due process violation -- the court determines that there was no constitutional violation in the trial court's provision of the transcript of the closing arguments to the jury for use during their deliberations. *See* Second Amended Petition, pp. 202-03. The state supreme court's denial of relief with respect to Claim 10B was not objectively unreasonable.

Regarding Claim 10C, Floyd's claim that the State committed misconduct by failing to preserve his blood sample, the court finds that claim to be wholly unsupported and without merit. Claim 10C is, in its entirety, as follows:

> The state had a responsibility to preserve evidence. The state cannot be allowed to benefit by its failure to preserve evidence, particularly when the state's case is strengthened, and the defendant is unfairly prejudiced.
>
> In this case, the state failed to preserve and process the sample of Mr. Floyd's blood taken for the purpose of drug and alcohol testing. It is the belief of Michael Floyd, Mr. Floyd's father, that the state contaminated the blood sample taken from Mr. Floyd thereby preventing him from utilizing his own expert to conduct testing. *See* Ex. 365 at ¶ 10.

Second Amended Petition, p. 203. The evidence cited in the claim, paragraph 10 of Petitioner's Exhibit 365, which is the declaration of an investigator, states, in its entirety:

> During the trial [Michael Floyd] recalled Zane's defense attorneys stating that the blood sample taken from Zane, for the [purpose] of conducting the alcohol and drug analysis, had been contaminated.

Declaration of Herbert Duzant, Petitioner's Exhibit 365, p. 3, ¶ 10. Floyd did not add any substance to Claim 10C in his reply. *See* Reply, p. 42 n.12. Claim 10C is wholly unsupported and meritless, and the state supreme court's denial of relief with respect to that claim was not objectively unreasonable.

Regarding Claim 1D(1) -- Floyd's claim that his trial counsel was ineffective for failing to object to prosecutorial misconduct alleged in Claim 10 -- the court first notes that defense counsel did in fact object to many of the prosecution's alleged improper arguments identified in Claim 10A. To the extent Floyd contends that his counsel was ineffective for not objecting to other alleged improper prosecution arguments, or other alleged prosecutorial misconduct, the court finds that Floyd was not prejudiced. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984) (A petitioner claiming ineffective assistance of counsel must demonstrate (1) that his attorney's representation "fell below an objective standard of reasonableness," and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). There is

no reasonable probability that the outcome of Floyd's trial would have been different had trial counsel objected to more of the prosecutors' alleged improper arguments, or other prosecutorial misconduct alleged in Claim 10. The Nevada Supreme Court's denial of relief with respect to that claim of ineffective assistance of trial counsel was not objectively unreasonable.

With respect to the related part of Claim 17A -- Floyd's claim that his appellate counsel was ineffective for failing to raise on appeal claims regarding prosecutorial misconduct alleged in Claim 10 -- the court, here too, finds that Floyd was not prejudiced. *See Strickland*, 466 U.S. at 688. Many alleged improper prosecution arguments were in fact contested on Floyd's direct appeal, and some of those not challenged on the direct appeal were challenged, and ruled upon by the Nevada Supreme Court, on the appeal in Floyd's first state habeas action. There is no reasonable probability that the outcome of Floyd's direct appeal would have been different had his appellate counsel raised, on the direct appeal, issues regarding more of the prosecutors' alleged improper arguments, or other prosecutorial misconduct alleged in Claim 10. The Nevada Supreme Court's denial of relief with respect to that claim of ineffective assistance of appellate counsel was not objectively unreasonable.

As the court understands Floyd's motion for evidentiary hearing, he requests an evidentiary hearing, in part, with respect to Claim 1D(1), Claim 10, and the related part of Claim 17A, so that the court may "ascertain whether counsel had a strategic reason for failing to challenge these issues at the trial level and on direct appeal." Reply in Support of Motion for Evidentiary (ECF No. 144), p. 2. The court finds that an evidentiary hearing is not warranted. As is discussed above, the court finds the state supreme court's rulings on these claims to be objectively reasonable, and therefore rules that Floyd does not satisfy the standard imposed by 28 U.S.C. § 2254(d). Moreover, regarding the claims of ineffective assistance of counsel in Claims 10 and 1D(1), and the related part of Claim 17A, the court's rulings are based solely on the second prong of the *Strickland* standard, the prejudice prong. It does not matter to the court's rulings on those claims whether or not counsel had a strategic reason for not further challenging, at trial or on direct appeal, prosecutorial misconduct alleged in Claim 10. In short, Floyd has not shown any need for an evidentiary hearing with respect

to 1D(1) or 10, or the related part of Claim 17A, and the court denies the motion for evidentiary hearing relative to those claims.

The court denies Floyd habeas corpus relief with respect to Claim 1D(1), Claim 10, and the Related Part of Claim 17A, and denies Floyd's motion for an evidentiary hearing with respect to those claims.

Claim 1D(2), and the Related Part of Claim 17A

In Claim 1D(2), Floyd claims that his trial counsel was ineffective for failure to object to the antisympathy jury instruction, and for failure to request a penalty-phase instruction that correctly limited the use of character evidence with respect to the determination that he was eligible for the death penalty. Second Amended Petition, p. 78.[6] In Claim 17A, Floyd claims that his appellate counsel was ineffective for failing to raise these jury instruction issues on his direct appeal. Amendment to Second Amended Petition (ECF No. 95), p. 264.

In the penalty phase of Floyd's trial, the court instructed the jury that "in determining the appropriate penalty to be imposed in this case that it may consider all evidence introduced and instructions given at both the penalty hearing phase of these proceedings and at the trial of this matter." Exhibit 52, Instruction No. 13. And, in the guilt phase of the trial, the court had instructed the jury as follows, with a so-called "antisympathy" instruction:

> A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law."

Exhibit 44, Instruction No. 37. Floyd asserts that "[b]y forbidding the sentencer to take sympathy into account, this language on its face precluded the jury from giving adequate consideration to the

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[6] This portion of Claim 1D, designated Claim 1D(2), is set forth in paragraph 176 of Floyd's second amended habeas petition. In Claim 1D(2), Floyd incorporates all his allegations of improper jury instructions in Claim 6. In it's ruling on the motion to dismiss, the court found that "[t]his claim was presented to the Nevada courts in Floyd's first post-conviction proceeding, but only with respect to counsel's failure to object to the anti-sympathy jury instruction and the malice instruction and to request a penalty phase instruction that correctly defined the use of character evidence," and, therefore, "the claim is not procedurally defaulted as to those particular claims." *See* Order entered August 20, 2012 (ECF No. 114), p. 10. Claim 1D(2), however, does not include a claim regarding trial counsel's failure to object to the malice instruction. *See* Answer, pp. 19-20; Reply, p. 65.

evidence concerning Mr. Floyd's character and background, thus effectively negating the constitutional mandate that all mitigating evidence be considered." Second Amended Petition, p. 177, citing U.S. Const. amends. VIII and XIV. In Claim 1D(2), Floyd claims that his trial counsel was ineffective for failing to object to the antisympathy instruction. *Id*. at 78.

The Nevada Supreme Court considered this claim on the appeal in Floyd's first state habeas action, and ruled as follows:

> The jury ... received a so-called "antisympathy instruction" in the guilt phase, which Floyd contends undermined the jury's obligation to consider all mitigating evidence. We have ... rejected this contention where, as here, the jury was instructed to consider any mitigating circumstances. [Footnote: *See Wesley v. State*, 112 Nev. 503, 519, 916 P.2d 793, 803-04 (1996).] Counsel had no basis to challenge [this instruction] and were not ineffective.

Order of Affirmance, Petitioner's Exhibit 12, pp. 12-13.

In *Saffle v. Parks*, 494 U.S. 484 (1990), the United States Supreme Court held as follows:

> We also reject Parks' contention that the antisympathy instruction runs afoul of [*Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)] because jurors who react sympathetically to mitigating evidence may interpret the instruction as barring them from considering that evidence altogether. This argument misapprehends the distinction between allowing the jury to consider mitigating evidence and guiding their consideration. It is no doubt constitutionally permissible, if not constitutionally required, *see Gregg v. Georgia*, 428 U.S. 153, 189-195, 96 S.Ct. 2909, 2932-2935, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.), for the State to insist that "the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence." [*California v. Brown*, 479 U.S. 538, 545 (1987) (O'CONNOR, J., concurring)]. Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant. It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary. *See Gregg*, *supra*, 428 U.S., at 189-195, 96 S.Ct., at 2932-2935; *Proffitt v. Florida*, 428 U.S. 242, 252-253, 96 S.Ct. 2960, 2966-2967, 49 L.Ed.2d 913 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.); [*Jurek v. Texas*, 428 U.S. 262, 271-72 (1976) (same)]; *Woodson v. North Carolina*, 428 U.S. 280, 303-305, 96 S.Ct. 2978, 2990-2991, 49 L.Ed.2d 944 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325, 333-335, 96 S.Ct. 3001, 3006-3007, 49 L.Ed.2d 974 (1976) (plurality opinion). At the very least, nothing in *Lockett* and *Eddings* prevents the State from attempting to ensure reliability and nonarbitrariness by requiring that the jury consider and give effect to the defendant's mitigating evidence in the form of a "reasoned *moral* response," *Brown*, 479 U.S., at 545, 107 S.Ct., at 841 (emphasis in original), rather than an emotional one. The State must not cut off full and fair

> consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice. *See id*., at 541-543, 107 S.Ct., at 839-840.

Saffle, 494 U.S. at 492-93; *see also Mayfield v. Woodford*, 270 F.3d 915 (9th Cir.2001) (declining to grant certificate of appealability with respect to the same issue), citing *Victor v. Nebraska*, 511 U.S. 1, 13 (1994); *Johnson v. Texas*, 509 U.S. 350, 371-72 (1993); *California v. Brown*, 479 U.S. 538, 542-43 (1987); *Williams v. Calderon*, 52 F.3d 1465, 1481 (9th Cir.1995).

In the penalty phase of Floyd's trial, the jury was given proper instructions concerning the definition and function of mitigating circumstances. *See* Exhibit 52, Instructions No. 6, 7, 8, 9A, 11, and 12.

It is plain, from the Nevada Supreme Court's opinion regarding the antisympathy instruction, and from United States Supreme Court and Ninth Circuit precedent, that any objection by trial counsel to the antisympathy instruction, or any challenge to the antisympathy instruction on Floyd's direct appeal, would have been fruitless. The Nevada Supreme Court's denial of relief on the claim of ineffective assistance of trial counsel -- that trial counsel was ineffective for not objecting to the anti-sympathy instruction -- and on the claim of ineffective assistance of appellate counsel -- that appellate counsel was ineffective for not challenging the anti-sympathy instruction on the direct appeal -- was not contrary to, or an unreasonable application of, *Strickland, Lockett, Eddings*, or any other clearly established federal law, as determined by the Supreme Court of the United States.

Floyd also claims in Claim 1D(2) (incorporating the allegations in Claim 6) that his trial counsel were ineffective for failing to request a jury instruction informing the jury that "it must exclude bad character evidence from the weighing process in which the jury determines death eligibility." *See* Second Amended Petition, pp. 78, 180-81.

The Nevada Supreme Court addressed this claim on the appeal in Floyd's first state habeas action, and ruled as follows:

> Floyd contends that in the penalty phase the jury was not properly instructed that it could not consider character evidence in weighing aggravating circumstances against mitigating circumstances. The jury was not fully instructed on this topic; however, we conclude that Floyd was not prejudiced as a result.

This court has held that jurors cannot consider character (or "other matter") evidence "in determining the existence of aggravating circumstances or in weighing them against mitigating circumstances." [Footnote: *Hollaway v. State*, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000); *see also* NRS 175.552(3) (providing that at a penalty hearing, evidence may be presented on aggravating and mitigating circumstances "and on any other matter which the court deems relevant to sentence").] The jury here was instructed that it could impose a sentence of death only if:

> (1) The jurors find unanimously and beyond a reasonable doubt that at least one aggravating circumstance exists; (2) Each and every juror determines that the mitigating circumstance or circumstances, if any, which he or she has found do not outweigh the aggravating circumstance or circumstances; and (3) The jurors unanimously determine that in their discretion a sentence of death is appropriate.

Citing *Byford v. State* [Footnote: 116 Nev. 215, 239, 994 P.2d 700, 716 (2000).], Floyd argues that the jury should have been further instructed that "[e]vidence of any uncharged crimes, bad acts or character evidence cannot be used or considered in determining the existence of the alleged aggravating circumstance or circumstances."

This court in *Byford* approved of both of these instructions, concluding that they properly informed the jury that it could not consider general character evidence until it had determined whether the defendant was eligible for the death penalty. [Footnote: *Id*.] In an earlier opinion, we expressly directed district courts to give the first instruction in capital penalty hearings. [Footnote: *See Geary v. State*, 114 Nev. 100, 105, 952 P.2d 431, 433 (1998) (*Geary II*).] We did not direct in *Byford*, or elsewhere, that the second one be given. [Footnote: 116 Nev. at 239, 994 P.2d at 716.] However, in 2001, a year after both the *Byford* decision and Floyd's trial, this court provided an instruction on this topic for further use. [Footnote: *See Evans v. State*, 117 Nev. 609, 635-36, 28 P.3d 498, 516-17 (2001).] So, it would have been better if the second instruction or an equivalent had been given, but that does not mean that trial counsel's failure to request the instruction was so deficient or prejudicial that it amounted to ineffective assistance.

Trial counsel may not even have acted deficiently since at that time this court had not yet required such an instruction. Assuming counsel reasonably should have requested the instruction, its omission was not prejudicial. As the State points out, Floyd's opening brief does not even describe any character evidence presented by the State. In his reply brief, Floyd points to only two instances of character evidence, both presented in the guilt phase: the testimony of the sexual-assault victim portraying him "as a bad person with 'sick little fantasies'" and evidence that pornographic videos were found in his room. In the context of this quadruple-murder case, the potential prejudicial impact of this evidence appears negligible.

Further, Floyd has not explained why we should fear that jurors improperly considered this evidence in determining the existence or weight of the aggravating circumstances. Although the written instructions did not expressly tell the jurors not to consider such evidence, the jurors were properly instructed on the elements of the three alleged aggravators. Further during the penalty closing argument, the district court correctly informed the jury on this topic after the prosecutor made the following argument:

> The law does not look at the number of mitigators versus the number of aggravators. It looks at the total weight. So what I'm telling you is take that laundry list [of mitigating circumstances], put them all over there on the scale and then compare that to this defendant terrorizing, terrorizing three dozen people –
>
> Defense counsel objected: "Not an aggravator, Judge. Objection." The district court sustained the objection "as to the form" of the prosecutor's argument and told the jury: "The aggravating circumstances are those that Mr. Bell [the prosecutor] just talked about. If you find the aggravating circumstances outweigh the mitigating circumstances, *then you can go on to consider other things.*" (Emphasis added.) Considering the record as a whole, we conclude that the jurors were sufficiently instructed on this matter, and the presumption is that they followed those instructions. [Footnote: *Collman v. State*, 116 Nev. 687, 722, 7 P.3d 426, 448 (2000).]

Order of Affirmance, Petitioner's Exhibit 12, pp. 12-13.

To the extent that Floyd argues that his trial counsel should have sought the additional instruction under state law, the ruling of the Nevada Supreme Court is authoritative and binding; Nevada law did not require such an instruction when Floyd was tried.

To the extent that Floyd argues that federal law required such an instruction, and that his trial counsel should have requested the instruction based on federal law, Floyd has not pointed to any United States Supreme Court precedent requiring such an instruction. Floyd cites *Tuilaepa v. California*, 512 U.S. 967 (1994); *Arave v. Creech*, 507 U.S. 463 (1993); *Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Zant v. Stephens*, 462 U.S. 862 (1983); *Godfrey v. Georgia*, 446 U.S. 420 (1980); and *Furman v. Georgia*, 408 U.S. 238 (1972). *See* Reply, pp. 60-63. None of those cases, however, requires a jury instruction such as that suggested by Floyd.

Trial counsel was not ineffective for failing to request the jury instruction suggested by Floyd. And, Floyd's appellate counsel was not ineffective for failing to raise, on his direct appeal, any issue regarding the lack of such a jury instruction. The Nevada Supreme Court's denial of relief on these claims of ineffective assistance of trial and appellate counsel was not contrary to, or an unreasonable application of any clearly established federal law, as determined by the Supreme Court of the United States.

In Floyd's motion for evidentiary hearing, he requests an evidentiary hearing, in part, with respect to Claim 1D(2), and the related part of Claim 17A, so that the court may "ascertain whether counsel had a strategic reason for failing to challenge these issues at the trial level and on direct appeal." Reply in Support of Motion for Evidentiary Hearing, p. 2. The court finds that an evidentiary hearing is not warranted. As is discussed above, the court finds the state supreme court's rulings on these claims to be objectively reasonable, and therefore rules that Floyd does not satisfy the standard imposed by 28 U.S.C. § 2254(d). Moreover, the court's rulings on those claims are based on the court's determination that the antisympathy instruction was not improper and the instruction suggested by Floyd regarding bad character evidence was not required. It does not matter to the court's rulings whether or not counsel had a strategic reason for not further challenging the jury instructions, either at trial or on Floyd's direct appeal. Floyd has not shown any need for an evidentiary hearing with respect to Claim 1D(2) and the related part of Claim 17A, and the court, therefore, denies the motion for evidentiary hearing relative to these claims.

The court denies Floyd habeas corpus relief with respect to Claim 1D(2), and the related part of Claim 17A.

Claim 4B(1)

In Claim 4B(1), Floyd claims that "[t]he trial court committed reversible error when it ordered trial counsel to provide the reports and raw data of non-testifying defense mental heath experts." Second Amended Petition, p. 138.

In advance of Floyd's trial, Jakob O. Camp, M.D., Frank Edward Paul, Ph.D., and David L. Schmidt, Ph.D., were appointed as experts for the defense. On February 15, 2000, the defense filed a notice of expert witnesses, pursuant to NRS 174.234(2), which identified Dr. Camp and Dr. Paul as expert witnesses they intended to present at trial. Notice of Expert Witnesses, Respondents' Exhibit 88. On March 17, 2000, the trial court granted the State's motion for reciprocal discovery, and ordered the defense to provide the State with their expert witnesses' reports. *See* Order Granting State's Motion for Independent Psychiatric Examination and Reciprocal Discovery,

Respondents' Exhibit 94. On June 13, 2000, Floyd filed a Supplemental Notice of Expert Witnesses, stating that "Dr. Schmidt will be testifying to neuropsychological test results and opinions regarding such results." Supplemental Notice of Expert Witnesses, Respondents' Exhibit 101. On June 15, 2000, therefore, the trial court ordered the defense to provide Dr. Schmidt's written report to the State. Order, Respondents' Exhibit 102. At a hearing on July 6, 2000, after they had provided Dr. Schmidt's report to the prosecution, the defense changed its mind, and withdrew its notice of expert witnesses, including Dr. Schmidt. *See* Transcript of Proceedings of July 6, 2000, Respondents' Exhibit 109, pp. 4-5. At the penalty phase of the trial, on July 18, 2000, the defense called, as an expert witness, Edward J. Dougherty, Ed.D., to testify regarding Floyd's mental health. Transcript of Jury Trial, July 18, 2000, Respondents' Exhibit 50, pp. 3-146. In rebuttal, the prosecution called, as an expert witness, Louis Mortillaro, Ph.D., who testified in part based upon his review of the results of standardized tests administered to Floyd by Dr. Schmidt. *See* Transcript of Jury Trial, July 19, 2000, Respondents' Exhibit 51, pp. 3-38; *see also* Transcript of Jury Trial, July 18, 2000, Respondents' Exhibit 50, pp. 181-92 (trial court's ruling on the issue).

Against this factual background, as the court understands Claim 4B(1), Floyd contends that his federal constitutional right to due process of law was violated because the trial court ordered Dr. Schmidt's report, along with the reports of Dr. Camp and Dr. Paul, disclosed to the defense, and allowed Dr. Mortillaro to testify for the prosecution based, in part, on the results of standardized tests administered to Floyd by Dr. Schmidt. *See* Second Amended Petition, pp. 138-42; Reply, pp. 47-51. Floyd contends that after the defense made the strategic decision not to call Dr. Schmidt as an expert witness, even though his report had already been provided to the State, Dr. Schmidt's report, and the raw data in it, was no longer available for the State to use at trial. *See* Reply, pp. 48-51. Floyd argues: "The fact that Mr. Floyd un-endorsed his expert *after* complying with the trial court's order to disclose his raw data is irrelevant to the analysis." *Id.* at 51 (emphasis in original).

On Floyd's direct appeal, the Nevada Supreme Court ruled, as follows, on this issue:

> Before trial, Floyd filed a supplemental notice that he might call neuropsychologist David L. Schmidt as an expert witness. Floyd opposed reciprocal

discovery, but the district court ordered him to provide the State with Schmidt's report on his examination of Floyd, which included the results of standardized psychological tests administered to Floyd. The defense later unendorsed Schmidt as a witness, and Schmidt did not testify. During the penalty phase of trial, Floyd called a different psychologist, Edward J. Dougherty, Ed.D., to testify regarding Floyd's mental health. In rebuttal and over Floyd's objection, the State called psychologist Louis Mortillaro, Ph.D., who provided his opinion on Floyd's mental status, relying in part on the results from the standardized tests administered by Schmidt. The district court did not permit the State to use anything from Schmidt's report other than the raw test data. Floyd argues that Mortillaro's testimony violated his constitutional rights, relevant Nevada statutes, and his attorney-client privilege.

NRS 174.234(2) provides that in a gross misdemeanor or felony prosecution, a party who intends to call an expert witness during its case in chief must, before trial, file and serve upon the opposing party a written notice containing:

> (a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of his testimony;
>
> (b) A copy of the curriculum vitae of the expert witness; and
>
> (c) A copy of all reports made by or at the direction of the expert witness.

NRS 174.245(1)(b) similarly provides in part that the defendant must allow the prosecutor to inspect and copy any "[r]esults or reports of physical or mental examinations, scientific tests or scientific experiments that the defendant intends to introduce in evidence during the case in chief of the defendant." Furthermore, resolution of discovery issues is normally within the district court's discretion. [Footnote: *Lisle v. State*, 113 Nev. 679, 695, 941 P.2d 459, 470 (1997).]

Addressing first the claim that Schmidt's report and test results were privileged work-product, we conclude that it has no merit. "'At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.'" [Footnote: *Id*. (quoting *United States v. Nobles*, 422 U.S. 225, 238, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975)).] NRS 174.245(2)(a) apparently codifies this privilege, providing that "[a]n *internal* report, document or memorandum that is prepared by or on behalf of the defendant or his attorney in connection with the investigation or defense of the case" is not subject to discovery. [Footnote: Emphasis added.] Floyd has failed to show that Schmidt's report or the test results were internal documents representing the mental processes of defense counsel in analyzing and preparing Floyd's case. We conclude that they were discoverable as "[r]esults or reports of physical or mental examinations" that Floyd originally intended to introduce in evidence. [Footnote: NRS 174.245(1)(b); *see also* NRS 174.234(2)(c).]

Next Floyd argues that the State's discovery and use of the Schmidt materials was improper because in his view he did not introduce those materials or any psychological evidence during his "case in chief." NRS 174.234(2) and 174.245(1)(b) require discovery from the defendant only where he intends to call an expert witness or to introduce certain evidence during his "case in chief." Floyd introduced psychological evidence only in the penalty phase, not in the guilt phase, and he assumes that in a capital murder trial "case in chief" refers only to the guilt

phase of the trial, not the penalty phase. He offers no authority or rationale for this assumption, and we conclude that it is unfounded.

Black's Law Dictionary defines "case in chief" as "[t]hat part of a trial in which the party with the initial burden of proof presents his evidence after which he rests." [Footnote: *Black's Law Dictionary* 216 (6th ed.1990).] The statutes in question refer to "the case in chief of the defendant" as well as "of the state," even though a criminal defendant normally has no burden of proof. It is clear that the statutes use the term "case in chief" to refer to either party's initial presentation of evidence, in contrast to either's presentation of rebuttal evidence. This meaning is consistent with the context of discovery: before trial a party should know and be able to disclose evidence it expects to present in its case in chief, whereas the need for and nature of rebuttal evidence is uncertain before trial. This meaning is also consistent with the use of the term in this court's case law. [Footnote: *See, e.g., Batson v. State*, 113 Nev. 669, 677, 941 P.2d 478, 483 (1997).]

The State has the burden of proof in both phases of a capital trial: first, in proving that a defendant is guilty of first-degree murder; and second, if such guilt is proven, in proving that aggravating circumstances exist and are not outweighed by any mitigating circumstances. In both phases, the defense has the choice of presenting its own case in response to the State's. Therefore, we conclude that the term "case in chief" in NRS 174.234(2) and 174.245(1)(b) encompasses the initial presentation of evidence by either party in the penalty phase of a capital trial.

Floyd nevertheless maintains that it was improper for the State's expert, who testified in rebuttal, to use the test results obtained by Schmidt after the defense had decided not to call Schmidt as a witness. We conclude that the use of the evidence here was permissible.

A United States Supreme Court case provides some guidance. In *Buchanan v. Kentucky*, the Supreme Court considered "whether the admission of findings from a psychiatric examination of petitioner proffered solely to rebut other psychological evidence presented by petitioner violated his Fifth and Sixth Amendment rights where his counsel had requested the examination and where petitioner attempted to establish at trial a mental-status defense." [Footnote: 483 U.S. 402, 404, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987).] The Court concluded that it did not. [Footnote: *Id*. at 421-25, 107 S.Ct. 2906; *see also State v. Fouquette*, 67 Nev. 505, 538, 221 P.2d 404, 421 (1950).] At his trial, petitioner Buchanan had "attempted to establish the affirmative defense of 'extreme emotional disturbance.'" [Footnote: *Buchanan*, 483 U.S. at 408, 107 S.Ct. 2906.] He introduced evidence from various evaluations of his mental condition done after an earlier burglary arrest. [Footnote: *Id*. at 409 & n. 9, 107 S.Ct. 2906.] In response and over Buchanan's objection, the prosecution introduced evidence from a psychological evaluation of Buchanan done at his and the prosecution's joint request after his arrest for the murder in question; Buchanan had not introduced any evidence from the evaluation. [Footnote: *See id*. at 410-12, 107 S.Ct. 2906.] The Court reasoned that if a defendant "presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested." [Footnote: *Id*. at 422-23, 107 S.Ct. 2906.] The Court noted that Buchanan presented a mental-status defense and introduced psychological evidence, that he did not take the stand, and that the prosecution could respond to this defense only by presenting other psychological evidence. [Footnote: *Id*. at 423, 107 S.Ct. 2906.] The prosecution

> therefore introduced excerpts from the evaluation requested by Buchanan, which set forth the psychiatrist's "general observations about the mental state of petitioner but had not described any statements by petitioner dealing with the crimes for which he was charged." [Footnote: *Id*.] The Court concluded: "The introduction of such a report for this limited rebuttal purpose does not constitute a Fifth Amendment violation." [Footnote: *Id*. at 423-24, 107 S.Ct. 2906.] Also, since defense counsel had requested the psychological evaluation and was on notice that the prosecution would likely use psychological evidence to rebut a mental-status defense, the court concluded that there was no violation of the Sixth Amendment right to counsel. [Footnote: *Id*. at 424-25, 107 S.Ct. 2906.]
>
> We conclude that under the circumstances of this case the State's use of evidence obtained from Floyd by his own expert did not violate Floyd's constitutional rights. We rely on a number of factors in reaching this conclusion. First, similar to *Buchanan*, the evidence was used only in rebuttal after Floyd introduced evidence of his mental status as a mitigating factor. Second, the district court restricted the State's use of evidence contained in the defense expert's report to the standardized psychological test results. Like *Buchanan*, this evidence did not describe any statements by Floyd dealing with his crimes which could incriminate him or aggravate the crimes, nor did it include any conclusions reached by the defense expert. Third, the jury was not informed that the source of the evidence was originally an expert employed by the defense, avoiding the risk of undue prejudice inherent in such information. [Footnote: *Cf. Lange v. Young*, 869 F.2d 1008, 1014 (7th Cir.1989); *United States ex rel. Edney v. Smith*, 425 F.Supp. 1038, 1053 (E.D.N.Y.1976).]

Floyd, 118 Nev. at 167-70, 42 P.3d at 256-59.

To the extent that the Nevada Supreme Court's ruling was a matter of state discovery and evidentiary rules, it is not a subject of this federal habeas corpus petition. *See* 28 U.S.C. § 2254(a) (federal court may entertain an application for a writ of habeas corpus "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States"). The question here is whether the Nevada Supreme Court's ruling that Floyd's federal due process rights were not violated was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. *See* 28 U.S.C. § 2254(d).

An evidentiary ruling violates a defendant's federal constitutional right to due process of law, and is therefore a basis for federal habeas relief, only if it renders the trial "fundamentally unfair." *See Larson v. Palmateer*, 515 F.3d 1057, 1065 (9th Cir.2008); *Windham v. Merkle*, 163 F.3d 1092, 1103 (9th Cir.1998).

The Nevada Supreme Court cited *Buchanan* in determining that Floyd's federal due process rights were not violated. In *Buchanan*, the United States Supreme Court allowed the prosecution to use, at trial, evidence obtained at a pre-trial psychiatric evaluation to rebut the defendant's presentation of contrary psychiatric reports. *Buchanan*, 483 U.S. at 424. The Supreme Court noted that "if a defendant requests [a psychiatric] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested." *Id*. at 422-23. The defense in *Buchanan* had filed a request to initiate an examination for involuntary hospitalization, and then, at trial, relied on the "mental status" defense of extreme emotional disturbance; therefore, the State was allowed to introduce evidence from the involuntary hospitalization examination to rebut other psychiatric evidence. *Id*. at 423-24. The Nevada Supreme Court did not unreasonably look to *Buchanan* for guidance, and did not unreasonably apply that precedent in its ruling in this case. *See Floyd*, 118 Nev. at 169., 42 P.3d at 258.

The prosecution expert witness' testimony based on Dr. Schmidt's raw data did not render Floyd's trial fundamentally unfair. The defense listed Dr. Schmidt as a testifying expert, and, consequently, provided Dr. Schmidt's test results to the prosecution. Then, at trial, after the defense changed its mind and put on another expert to testify regarding Floyd's mental health, the prosecution called Dr. Mortillaro as a rebuttal witness, and Dr. Mortillaro testified regarding his opinions -- not the opinions of Dr. Schmidt -- using the results of the standardized psychological tests administered by Dr. Schmidt. Under these circumstances, which resulted from the defense identifying Dr. Schmidt as a testifying expert and turning over his data and report, and then changing their mind about Dr. Schmidt testifying, Dr. Mortillaro's testimony did not render Floyd's trial fundamentally unfair. *See* discussion, *infra*, pp. 59-63.

Floyd argues that the Nevada Supreme Court unreasonably applied the Supreme Court decision in *United States v. Nobles*, 422 U.S. 225 (1975). *See* Reply, pp. 48-49. In this case, however, unlike in *Nobles*, the defense voluntarily disclosed Dr. Schmidt's data and report to the

prosecution, after giving notice that it intended to call Dr. Schmidt as an expert witness. *Nobles* is inapposite.

Floyd also cites *Ake v. Oklahoma*, 470 U.S. 68 (1985), and *Smith v. McCormick*, 914 F.2d 1153 (9th Cir.1990). In *Ake*, the Supreme Court held that "when an indigent defendant places his mental state at issue, 'the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.'" *Smith v. McCormick*, 914 F.2d at 1157 (quoting *Ake*, 470 U.S. at 83). In *Smith v. McCormick*, the Ninth Circuit Court of Appeals held that the *Ake* rule had been violated because, instead of appointing a defense psychiatrist for the defendant, the trial court appointed a "neutral" psychiatrist, who was to report the results of his examination directly to the court. *See Smith v. McCormick*, 914 F.2d at 1157 ("The right to psychiatric assistance does not mean the right to place the report of a "neutral" psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate -- including to decide, with the psychiatris's assistance, not to present to the court particular claims of mental impairment."). In this case, there was no violation of the rule of *Ake*; Floyd was provided ample psychiatric assistance. And, unlike in *Smith v. McCormick*, Floyd was not unfairly compelled to disclose any of his appointed doctors' data or opinions; Floyd did so of his own accord, after designating them as testifying experts.

Floyd does not show that the Nevada Supreme Court's ruling on his federal constitutional due process claim was contrary to, or an unreasonable application of, *Buchanan*, *Nobles*, or *Ake*, or any other United States Supreme Court precedent. The Court denies Floyd habeas corpus relief with respect to Claim 4B(1).

Claims 4B(5) and 9

In Claim 4B(5), Floyd claims that the trial court "erred by failing to sever the sexual assault claims from the murder claims." Second Amended Petition, p. 145. Similarly, in Claim 9, Floyd claims that his conviction and death sentence are unconstitutional "because of the trial court's failure

to grant a motion to sever counts relating to events at his apartment from those relating to events at the Albertson's." *Id*. at 192.

On Floyd's direct appeal, the Nevada Supreme Court ruled as follows with respect to this claim:

> Before trial, Floyd moved unsuccessfully to sever the counts relating to the events at his apartment from those relating to the events at the supermarket. Floyd contends that two independent episodes were involved and therefore joinder of the charges was improper and prejudiced him. He quotes the Supreme Court of California:
>
> > When a trial court considering a defendant's motion for severance of unrelated counts has determined that the evidence of the joined offenses is not "cross-admissible," it must then assess the relative strength of the evidence as to each group of severable counts and weigh the potential impact of the jury's consideration of "other crimes" evidence. I.e., the court must assess the likelihood that a jury not otherwise convinced beyond a reasonable doubt of the defendant's guilt of one or more of the charged offenses might permit the knowledge of the defendant's other criminal activity to tip the balance and convict him. If the court finds a likelihood that this may occur, severance should be granted.
>
> [Footnote: *People v. Bean*, 46 Cal.3d 919, 251 Cal.Rptr. 467, 760 P.2d 996, 1006 (1988) (citation omitted).] This appears to be a sound statement of law, but it is not applicable here. The California court was considering the joinder of "unrelated counts." We conclude that the counts here were related and that the evidence of each set of crimes was relevant and admissible to prove the other.
>
> NRS 173.115 provides that multiple offenses may be charged in the same information if the offenses charged are based either "on the same act or transaction" or "on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Also, if "evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed." [Footnote: *Mitchell v. State*, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989).] Here, joinder was proper because the acts charged were at the very least "connected together." The crimes at the supermarket began only about fifteen minutes after the crimes at the apartment ended, and Floyd used the same shotgun in committing both sets of crimes. Moreover, his actions and statements in committing the crimes at his apartment were particularly relevant to the question of premeditation and deliberation regarding the murders at the supermarket. Likewise, Floyd's actions and demeanor and possession of the shotgun at the supermarket corroborated the testimony of the sexual assault victim and would have been relevant, at a separate trial, to prove more than just Floyd's character. Thus, the evidence of the two sets of crimes was cross-admissible. [Footnote: *See* NRS 48.045(2); *Middleton v. State*, 114 Nev. 1089, 1108, 968 P.2d 296, 309 (1998).]
>
> Even if joinder is permissible under NRS 173.115, a trial court should sever the offenses if the joinder is "unfairly prejudicial." [Footnote: *Middleton*, 114 Nev.

> at 1107, 968 P.2d at 309.] NRS 174.165(1) provides that if a defendant is prejudiced by joinder of offenses, the district court may order separate trials of counts "or provide whatever other relief justice requires." Floyd quotes the Montana Supreme Court regarding the types of prejudice that can result from joinder of charges:
>
> > The first kind of prejudice results when the jury considers a person facing multiple charges to be a bad man and tends to accumulate evidence against him until it finds him guilty of something. The second type of prejudice manifests itself when proof of guilt on the first count in an information is used to convict the defendant of a second count even though the proof would be inadmissible at a separate trial on the second count. The third kind of prejudice occurs when the defendant wishes to testify on his own behalf on one charge but not on another.
>
> [Footnote: *State v. Campbell*, 189 Mont. 107, 615 P.2d 190, 198 (1980).]
>
> The decision to sever is within the discretion of the district court, and an appellant has the "heavy burden" of showing that the court abused its discretion. [Footnote: *Amen v. State*, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990).] To establish that joinder was prejudicial "requires more than a mere showing that severance might have made acquittal more likely." [Footnote: *United States v. Wilson*, 715 F.2d 1164, 1171 (7th Cir.1983).] We conclude that Floyd has not shown that he was unfairly prejudiced by joinder of charges. The evidence of the burglary, murders, and attempted murder was overwhelming. The evidence of the kidnapping and sexual assaults was substantial and uncontradicted. He has not shown that the jury improperly accumulated evidence against him, that it used the proof of one count improperly to convict him of another count, or that the joinder prevented him from testifying on any charges. Thus the district court did not err in denying Floyd's motion to sever the charges.

Floyd, 118 Nev. at 163-65, 42 P.3d at 254-55.

In challenging the Nevada Supreme Court's ruling, Floyd cites *United States v. Lane*, 474 U.S. 438 (1986). *See* Second Amended Petition, pp. 145, 192-94; Reply, pp. 54-56. However, the Ninth Circuit Court of Appeals has observed that the United States Supreme Court has never held that a state court's denial of a motion to sever can, in itself, violate the federal constitution. *See Runningeagle v. Ryan*, 686 F.3d 758, 776-77 (9th Cir.2012); *Collins v. Runnels*, 603 F.3d 1127, 1131 (9th Cir.2010). Regarding *Lane*, the Supreme Court case cited by Floyd, and *Zafiro v. United States*, 506 U.S. 534 (1993), the court in *Runningeagle* stated:

> ... [W]e have explicitly concluded that *Zafiro* and *Lane* do not "establish a constitutional standard binding on the states and requiring severance in cases where defendants present mutually antagonistic defenses." *Collins v. Runnels*, 603 F.3d 1127, 1131 (9th Cir.2010). In reaching that holding, we found that the statement in *Lane* regarding when misjoinder rises to the level of constitutional violation was dicta and that *Zafiro* is not binding on the state courts because it addresses the Federal

> Rules of Criminal Procedure. *Id*. at 1131-33. Neither decision is "clearly established Federal law" sufficient to support a habeas challenge under § 2254. *Id*.

Runningeagle, 686 F.3d at 776-77. Therefore, in light of *Runningeagle* and *Collins*, Floyd does not show the Nevada Supreme Court's ruling to be contrary to, or an unreasonable application of, any "clearly established Federal law, as determined by the Supreme Court of the United States." *See* 28 U.S.C. § 2254(d).

Moreover, under the circumstances of this case, this court finds that there is no question that the denial of the motion to sever was correct. As the Nevada Supreme Court explained, the charges regarding the events at Floyd's apartment were closely related to the charges regarding the events at the supermarket. There was plainly significant evidentiary overlap between the two sets of charges. The court finds Floyd's claims in this regard to be completely meritless.

The court denies Floyd habeas corpus relief with respect to Claims 4B(5) and 9.

Claim 5

In Claim 5, Floyd claims that his constitutional rights were violated "because of the trial court's failure to grant a change of venue and sequester the jury." Second Amended Petition, p. 149.

The Nevada Supreme Court ruled on this claim as follows on Floyd's direct appeal:

> The district court denied Floyd's motion for a change of venue. He claims that this was error because jurors were biased by the extensive and prominent coverage of his case by the print and broadcast media in Las Vegas. The State does not dispute that the media coverage of the case was massive. It simply points out that Floyd presents no evidence that this coverage resulted in bias on the part of any juror.
>
> NRS 174.455(1) provides that a criminal action "may be removed from the court in which it is pending, on application of the defendant or state, on the ground that a fair and impartial trial cannot be had in the county where the indictment, information or complaint is pending." Whether to change venue is within the sound discretion of the district court and will not be disturbed absent a clear abuse of discretion. [Footnote: *Sonner v. State*, 112 Nev. 1328, 1336, 930 P.2d 707, 712 (1996), *modified on rehearing on other grounds*, 114 Nev. 321, 955 P.2d 673 (1998).] A defendant seeking to change venue must not only present evidence of inflammatory pretrial publicity but must demonstrate actual bias on the part of the jury empaneled. *Id*. Even where pretrial publicity has been pervasive, this court has upheld the denial of motions for change of venue where the jurors assured the district court during voir dire that they would be fair and impartial in their deliberations. [Footnote: *Id*. at 1336, 930 P.2d at 712-13; *see also Ford v. State*, 102 Nev. 126, 129-32, 717 P.2d 27, 29-31 (1986).]

> Floyd does not point to evidence that any empaneled juror was biased and does not even refer to the voir dire of the prospective jurors. Review of the voir dire shows that when asked about pretrial publicity, the jurors who were ultimately empaneled indicated that it would not influence their decision. It appears that every juror also expressed a willingness to consider sentences other than death in the event of a guilty verdict. We conclude that the district court did not err in denying the motion for a change of venue.

Floyd, 118 Nev. at 165, 42 P.3d at 255-56.

Floyd argues that "[t]he Nevada Supreme Court applied the wrong standard by ruling that Mr. Floyd failed to demonstrate that his jurors were biased by the pretrial publicity, without considering whether this was a case where bias should be presumed." Reply, p. 51.

In the Nevada Supreme Court's ruling, there appears to be no analysis of Floyd's federal constitutional claim, whether based on actual or presumed bias. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington*, 131 S.Ct. at 784-85. "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Id*. at 784.

Criminal defendants are entitled to "a fair trial by a panel of impartial, indifferent jurors." *Hayes v. Ayers*, 632 F.3d 500, 507 (9th Cir.2011) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)); *see also Estrada v. Scribner*, 512 F.3d 1227, 1239-40 (9th Cir.2008) (even a single juror's prejudice can violate the defendant's right to an impartial jury). The Constitution does not, however, require that jurors "be totally ignorant of the facts and issues involved." *Mu'Min v. Virginia*, 500 U.S. 415, 430 (1991) (internal quotation marks omitted); *see also Skilling v. United States*, 561 U.S. 358, 380-81 (2010). "The relevant question is not whether the community remembered the case, but whether the jurors ... had such fixed opinions that they could not judge impartially the guilt of the defendant." *Mu'Min*, 500 U.S. at 430 (internal quotation marks omitted).

Jurors' prejudice may be actual or presumed. *Hayes*, 632 F.3d at 508. Prejudice is presumed "'when the record demonstrates that the community where the trial was held was saturated with

prejudicial and inflammatory media publicity about the crime.'" *Id*. (quoting *Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir.1988)). However, a "presumption of prejudice ... attends only the extreme case." *Skilling*, 561 U.S. at 381. Actual prejudice exists "when voir dire reveals that the jury pool harbors 'actual partiality or hostility [against the defendant] that [cannot] be laid aside.'" *Hayes*, 632 F.3d at 508 (quoting *Harris*, 885 F.2d at 1363).

A trial court's decision that a juror is fit to render a verdict is entitled to "special deference." *Mu'Min*, 500 U.S. at 433. The Supreme Court has emphasized that jury selection "is particularly within the province of the trial judge" because "in-the-moment voir dire affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service." *Skilling*, 561 U.S. at 386 (internal quotation marks and citations omitted).

Regarding Floyd's contention that certain jurors harbored an actual bias against him, as a result of their exposure to media coverage of his trial, Floyd did nothing to attempt to substantiate such a claim in the trial court or on his direct appeal. *See* Motion for Change of Venue, Respondents' Exhibit 69; Supplemental Motion for Change of Venue and Reply to State's Opposition, Respondents' Exhibit 77; Supplemental Exhibit to Motion for Change of Venue, Respondents' Exhibit 81; Motion to Sequester Jurors, Respondents' Exhibit 78; Motion for New Trial, Respondents' Exhibit 117, pp. 7-10; Appellant's Opening Brief, Respondents' Exhibit 4, pp. 21-27; Appellant's Reply Brief, Respondents' Exhibit 6, pp. 6-8. Floyd did not specifically mention, in either his argument in the trial court or his argument before the Nevada Supreme Court, any of the three jurors that he now claims to have been biased against him. *See id*. Floyd did not refer either the trial court or the Nevada Supreme Court to those three jurors' juror questionnaires, or to the transcript of their voir dire. *See id*. Even in this court, regarding the alleged bias of the three jurors, in his one-paragraph argument in his second amended petition, Floyd takes only a very limited view of the evidence regarding the three jurors' views. *See* Second Amended Petition, p. 167. Taking into consideration the three jurors' jury questionnaires and their voir dire, this court finds that there is no showing that any of those three jurors had such a fixed opinion that they could

not act as impartial jurors, or that they were unable to put aside whatever they had heard about the case before trial and render an unbiased verdict. *See* Juror Questionnaire, Petitioner's Exhibit 391 (Juror McGee's juror questionnaire); Transcript of Jury Trial, July 11, 2000, Respondents' Exhibit 37, pp. 33-37 (Juror McGee's voir dire); Petitioner's Exhibit 392 (Juror Caven's juror questionnaire); Respondents' Exhibit 37, pp. 49-51 (Juror Caven's voir dire); Petitioner's Exhibit 393 (Juror Luebstorf's juror questionnaire); Respondents' Exhibit 38, pp. 89-98 (Juror Leubstorf's voir dire). The court finds objectively reasonable the Nevada Supreme Court's determination that there was no actual juror bias against Floyd.

Floyd focuses most of his argument regarding Claim 5 on his contention that the media coverage of his case was so extensive that the prejudice of the jury should be presumed. *See* Second Amended Petition, pp. 149-68; Reply, pp. 51-54.

In support of his presumed prejudice argument, Floyd has submitted, as exhibits, copies of some 115 newspaper articles concerning his case. *See* Petitioner's Exhibits 150-263. In their answer, respondents stated that those articles "are not part of any state court record." Answer, p. 27. In his reply, Floyd did not respond to that assertion. *See* Reply, pp. 51-54. In fact, of the 115 newspaper articles submitted by Floyd as exhibits, only three of them were before the state courts: one of the two articles in Petitioner's Exhibit 190, the article in Petitioner's Exhibit 210, and the article in Petitioner's Exhibit 211. *See* Motion for Change of Venue, Respondents' Exhibit 69; Opposition to Motion for Change of Venue, Respondents' Exhibit 75; Supplemental Motion for Change of Venue and Reply to State's Opposition, Respondents' Exhibit 77; Supplemental Exhibit to Motion for Change of Venue, Respondents' Exhibit 81. "[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen*, 131 S.Ct. at 1398. In *Cullen*, the Court reasoned that the "backward-looking language" present in § 2254(d)(1) "requires an examination of the state-court decision at the time it was made," and, therefore, the record under review must be "limited to the record in existence at that same time i.e., the record before the state court." *Id.* Therefore, in ruling on this claim under 28 U.S.C. § 2254(d),

this court does not consider evidence that was not submitted to the state courts; regarding the extent and nature of the media coverage of Floyd's case, the court considers only the exhibits submitted by Floyd in support of his motion for change of venue. *See* Motion for Change of Venue, Respondents' Exhibit 69; Opposition to Motion for Change of Venue, Respondents' Exhibit 75; Supplemental Motion for Change of Venue and Reply to State's Opposition, Respondents' Exhibit 77; Supplemental Exhibit to Motion for Change of Venue, Respondents' Exhibit 81.

In *Skilling*, commenting on its previous holdings in *Rideau v. Louisiana*, 373 U.S. 723 (1963), *Estes v. Texas*, 381 U.S. 532 (1965), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Court stated:

> In each of these cases, we overturned a "conviction obtained in a trial atmosphere that [was] utterly corrupted by press coverage"; our decisions, however, "cannot be made to stand for the proposition that juror exposure to ... news accounts of the crime ... alone presumptively deprives the defendant of due process." *Murphy v. Florida*, 421 U.S. 794, 798-799, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). *See also, e.g., Patton v. Yount*, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). Prominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*.

Skilling, 561 U.S. 380-81 (footnotes omitted) (emphasis in original). Floyd has shown that his case was covered extensively by the Las Vegas news media, but, as the *Skilling* Court instructed, prominence does not necessarily produce prejudice. Floyd has not shown that Las Vegas was saturated with prejudicial and inflammatory media publicity about his crimes, or that the atmosphere of his trial was corrupted by the media coverage. The court finds that the Nevada Supreme Court's ruling, that this was not an extreme case where prejudice from media coverage must be presumed, was objectively reasonable.

Floyd does not show the Nevada Supreme Court's ruling on his claim in Claim 5 of his second amended petition to be contrary to, or an unreasonable application of, any "clearly established Federal law, as determined by the Supreme Court of the United States." *See* 28 U.S.C. § 2254(d). The court denies Floyd habeas corpus relief with respect to Claim 5.

Claim 7

In Claim 7, Floyd claims that "Nevada law fails to properly channel death sentences by limiting the scope of victim-impact testimony." Second Amended Petition, p. 182. Floyd contends that his federal constitutional rights were, as a result, violated in two ways: Floyd contends that his rights were violated on account of his trial counsel's failure to object to comments about the victims made by a prosecutor in the State's opening statement at the guilt phase of his trial, and Floyd contends that his rights were violated by the testimony of Mona Nall at the penalty phase of his trial. *See id*. at 182-88.[7]

Regarding the State's opening statement in the guilt phase of his trial, Floyd contends that his trial counsel should have objected to the following remarks of the prosecutor regarding the people Floyd shot at the grocery store:

> When he got to that east door, first person he saw was a fellow by the name of Thomas Darnell. Thomas Darnell was a 40 year old young man. He had suffered some childhood illnesses that left him mentally impaired. He lived home with his mother and father. He worked as a courtesy clerk. It was his job to pick up the carts and bring them back into the store. And he was pushing the carts in from the parking lot. Zane Floyd ran up from the back, threw off his robe and shot him in the back.
>
> * * *
>
> Zane Floyd moved up aisle 7, and the next person he confronted was a fellow by the name of Chuck Leos. Chuck Leos was 41, just celebrated his first anniversary to his wife, Leanne. He was the frozen food man. He shot him on the right side, in the neck and the face; two shots from that shotgun.
>
> He saw Dennis Troy Sargent. Troy Sargent was the night manager. He was the boss there, a young man with a six year old son. Zane Floyd shot him once straight on in the chest.
>
> * * *
>
> He went into the back room area and found the only person that wasn't hiding that didn't realize what was going on. Her name was Lucy Tarantino. She was in her early Sixties. She was a wife, mother of three, grandmother. She was the salad lady. It was her job to get the salad stuff ready.

[7] In Claim 17A, Floyd asserted that his appellate counsel was ineffective for failing to raise all aspects of this claim on his direct appeal. Amendment to Second Amended Petition (ECF No. 95), p. 264. Floyd has abandoned that claim. *See* Reply, p. 37 n.9.

* * *

> Lucy Tarantino was shot the top of her head, and there is nothing left but her lower jaw. Everything else just exploded and left.

Transcript of Jury Trial, July 11, 2000, Exhibit 38, pp. 145-50; *see also* Second Amended Petition, pp. 182-83.

On the appeal in his first state habeas action, the Nevada Supreme Court ruled as follows:

> Floyd also claims that his counsel were ineffective in failing to challenge two remarks by the prosecutor in the opening statement of the guilt phase. The prosecutor was describing two of the murder victims. He told the jury that "Chuck Leos was 41, just celebrated his first anniversary to his wife, Leanne," and that "Lucy Tarantino ... was in her early sixties. She was a wife, mother of three, grandmother." Floyd argues that this was victim impact evidence which was highly prejudicial and inadmissible in the guilt phase. This argument is unpersuasive. The prosecutor's remarks were not inflammatory, and "facts establishing a victim's identity and general background" are admissible. [Footnote: *Libby v. State*, 109 Nev. 905, 916, 859 P.2d 1050, 1057 (1993), *vacated on other grounds*, 516 U.S. 1037 (1996).] Again Floyd's counsel were not ineffective.

Order of Affirmance, Petitioner's Exhibit 12, pp. 7-8.

To the extent that the Nevada Supreme Court ruled that the prosecutor's remarks were allowable under state law, and that any objection under state law would have been futile, that court's ruling is authoritative and not subject to review in this federal habeas corpus action. Floyd does not point to any federal law holding such general background information about the victims, in the guilt phase of the trial, to be inadmissible. Floyd cites only *Payne v. Tennessee*, 501 U.S. 808 (1991), but the Court in *Payne* did not address the question of the introduction of such basic victim background information in the guilt phase of a capital trial. In short, Floyd makes no showing that the challenged remarks in the State's opening statement were improper and subject to any valid objection. There is no showing that Floyd's trial counsel was ineffective for not objecting to those remarks. *See Strickland*, 466 U.S. at 688. The Nevada Supreme Court's denial of relief on this claim of ineffective assistance of trial counsel was not contrary to, or an unreasonable application of, *Strickland*, or any other clearly established federal law, as determined by the Supreme Court of the United States.

With regard to the testimony of Mona Nall in the penalty phase of his trial, Floyd contends that his trial was rendered unfair, and his federal constitutional right to due process of law was violated, as a result of her testimony, which was as follows:

Q. You're Thomas Darnell's mother?

A. Yes, I am.

* * *

Q. Thomas was a unique individual; is that right?

A. He was extremely unique.

Q. And part of that actually relates from the time he was born?

A. He was born premature, and when he was five weeks old, he contacted meningococcal meningitis. At that time was when only – this is one of the seven different types of meningitis, and it was the killer. People found out you had it during an autopsy because you didn't live more than 24 hours. And he was a premie and only five weeks old.

He was rushed to Children's Hospital in San Diego and they gave me his life expectancy: twenty-five minutes; to twenty-five minutes. They knew he wasn't going to live. I consented to treatment that was strictly experimental and they jetted in a team from UCLA Medical Center to San Diego, and by the grace of God and medical technology Tommy lived, but he was also in a coma for 35 days.

This little body, five-week-old premie, his head looked like it was bigger than the rest of his body, and he was totally bent backwards with the heels touching the back of his head.

Tommy lived, but it followed many years of medical rehabilitation, and at the end, Tommy's little body made a major breakthrough. That's why people when they get meningitis now, they have a treatment. He was one of the first.

When he was six years old, I enrolled him in Ansel Tyne School Hospital in San Diego. Here, again, this very unique place, they dealt mainly with diseases and neurological disorders from accidents, people been in comas. And they take the person, whether it's a child or an adult, and they make him lay and do nothing, and they teach him how to take one finger. What they're doing is taking and building a bridge from the damaged brain cells to the many unused brain cells that we have, so that when that person is finished with all the treatment, the years of treatment, they have a new brain actually.

And they lay and they lift one finger. They can't feed themselves. They have to be fed. They go to a point of learning to roll over, to crawl, to learning to feed, walk forward for balance.

And Tommy being so young, it put him quite behind in school. But he went through this. The only one major outcome he had was that he ran funny. It was kind of funny when he ran. And it was very hard on him, and it took a lot of encouragement, took a lot of fortitude. An exceptional person just to make it through that, and --

Q. The meningitis left some neurological damage?

A. Yeah. Mainly because the coma that he was in. And sometimes people ask me, "Well, is he retarded?" No, Tommy was not retarded. He was the farthest thing from it. He would be a little slow in response, but he was very, very intelligent.

If you were doing some type of math and adding up a column of figures and using a calculator, before you pushed the total button, he'd give you the answer by looking at it.

Q. So he had slow thought processes in other areas though?

A. Yes.

Q. Did that cause him any difficulty as a youth?

A. It did with making associations with other people. It was extremely hard because Tommy was in 16 different schools. He was a military child, and because of his father's background and the area of intelligence that he was in, it forced us to be transferred a tremendous amount of times. So not only did Tommy have a physical point working against him, he also had a social aspect working against him because of being in so many different schools.

Q. When Tommy was 14, there was a traumatic event in his life?

A. Yes. I'd like to back up.

Q. Go ahead.

A. Just a brief comment.

Prior to his 14th year, because of his father being in the military, he also went through the point of when his father was missing in action and also the point that his father was never around to really give him the guidance. So he had a father he looked up to in a picture but who was most of the time not physically there for him.

When Tommy was 14, his father had just gotten out of the Navy, had just taken an early retirement, and his father was killed by a person on alcohol and drugs and a million excuses. But it still -- it took my husband away from me, and it took Tommy's father away from him and from his sisters.

Q. Did Tommy succeed in graduating from high school?

A. Tommy graduated from high school and he also got a year of college. Was extremely difficult for him because of the background. I mean, we went the

regular classes, special education, the modified classes, but he graduated with a regular high school diploma. To get there, he would sit at night, sometimes until midnight studying because there's something he just -- he couldn't quite comprehend, but he had a great determination that he was going to succeed and he would not let anything get him down.

And during this time that he was trying to work to get a diploma for himself, part of his school program, he tutored every day at the elementary school, in math of course, to help kids that were like him at one time, but so that they could do something. He also volunteered three straight years every day at the veteran's hospital in Albuquerque. So he started early on. Through his own pain, he knew how to give back and try to get back with love.

Q. There came a time that -- Tommy lived at home his entire life, did he not, with you?

A. Yes.

Q. After his father was killed, you remarried?

A. Yes, I did.

Q. Tell me about Tommy's relationship with his stepdad.

A. Well, he never referred to him as a stepdad. His relationship with my husband is very -- was very, very close. He always called him Dad from the beginning. They did a lot of things together. They talked. My husband is a musician. At times he got Tommy involved when he was -- got to be a roady with a band, couple bands, in addition to working his regular life.

And he -- everybody loved him. The hurt has gone so deep for every member. The loss of Tommy hurts just as much as if it had been his natural son.

For his niece, Tori lived at home since she was a couple months old. She's 15 now. She's gone from being a straight A student to this year she's -- her grades went down, but she's had a tremendous amount of coping. Tommy was a brother/uncle/father figure. He was always there for her. He tutored her. He never missed not one -- not one school function that she had. He'd always just go around saying, "That's my kid."

Q. Now, there came a time when Tommy was an adult where he lived in Colorado, and there was another traumatizing event in his life; is that right?

A. Seemed like a life of trauma.

Q. Would you share that with us or give us some insight?

A. Tommy was coming home from work at the bus stop and two thugs came up to him at gun and knife point. They took his wallet. Started off as a robbery, I was told, and they saw he had a local address, and they had cars, so they took and -- they were transient people. And they drove to our house arriving at about one o'clock in the morning. I was up and waiting for Tommy. And I saw him get out

of the car, and I saw this one person holding onto Tommy and Tommy was limping. He looked like he was hurt. They came to the door and I let them in naturally --

MR. BROWN [defense counsel]: Your Honor, I apologize. I think this might be getting a little off track.

THE COURT: Sustained.

MR. BELL [prosecutor]: Well, Judge, I think we're going to get to the point where it's going to be relevant because it shows who he is.

THE COURT: I'll permit some leading.

MR. BELL: Thank you.

BY MR. BELL:

Q. Were you and your husband and your daughter and Tommy held hostage for some period of time?

A. We were held hostage for approximately seven hours.

Q. Was your daughter sexually assaulted?

A My daughter, who was 16 at the time, was repeatedly assaulted sexually --

MR. BROWN: Your Honor, I apologize.

THE WITNESS: -- my son was kidnapped.

BY MR. BELL:

Q. Tommy?

A. Yes.

THE COURT: If you have something of relevance to show in terms of the purpose of it, would you get to that point, please.

BY MR. BELL:

Q. Tommy was kidnapped?

A. Yes, he was.

Q. How long was he held by the kidnappers?

A. Over 30 days.

Q. And he was at some point released?

A. He was released in the middle of the Utah desert.

Q. Did that change Tommy, this incident?

A. They tried to cut his ears off.

And he was -- he was -- he was very changed. He was -- he would come in and he'd go around and make sure doors were locked. And it changed all of us. And it was something that we had to learn to live with, and we tried to help each other, but Tommy was just -- he was just -- he was afraid so many, many times.

Q. Let's skip up, then, to you're in Las Vegas and you live close to the Albertson's store?

A. Yes. Three blocks away.

Q. And Tommy got a job there as a courtesy clerk?

A. Yes. He'd been with Albertson's for two years.

Q. At the time of his death?

A. Yes.

Q. And his job was to?

A. He was a courtesy clerk. It was his title, but he did ever so much more than that. He'd do bagging, he'd work in the -- go back and clean the stockroom. Any time anybody needed anything in the store, he'd help them. He'd go over and help in the deli. It was -- it was about his title. He loved it though.

* * *

Q. He'd help people in and out with their groceries?

A. Yeah. There's one little lady that -- she was an invalid. He used to go out and carry her in, put her in the little cart so that she'd be able to be in the little motorized thing and go through because she couldn't walk in.

Q. How did you come to find out about Tommy's death

A. Tori's friend called very early in the morning and said that there had been a robbery and shooting at Albertson's. I was getting ready to go to work and she came and told me.

I turned the TV on. It was all over TV. And I just -- I ran over to Albertson's right away. And for an hour and a half I went around and I was asking everybody, "Have you seen Thomas Darnell?" because everybody knew Tommy. Everybody kept saying, "No. No. I haven't seen him." I looked and I searched for him for an hour and a half. And I was extremely -- I was frantic because of what happened in Colorado. I knew the state of mind that he was -- had to be in, and I had to find him.

After I was there for about an hour and a half, the policeman and a woman from Victim's Assistance came up to me and said, "There's been four fatalities and there's one person that right now is in surgery at UMC and he's very critical, and we believe that to be your son."

They took -- I called my husband on the cell phone with my daughter and she got in touch with everybody else in the family, and I went to UMC. And at UMC I waited what seemed forever. And then the surgeon came down and the nurses came down, and they told me about the full surgery, about all of the injuries, about bone fragments, about the bullet still being stuck in the neck that couldn't be removed. And I'm praying at least just please, God, let him live.

A half an hour later he came out and says, "Does your son have tattoos?" and I said, "He doesn't have one tattoo." "I'm sorry, ma'am, that's not your son." It was Troy.

Q. So then what did you do?

A. It was right after that, probably a half an hour that they came in and they said, "You need to go back to Albertson's." And someone took me back to Albertson's, to the coroner's trailer. And that's not where Tommy was supposed to end at.

He gave to everybody. People in the area there, in the neighborhood. If anybody went to him and asked him for help for anything, he didn't have a lot to give, but he'd give anybody everything he had because he gave it from the heart. He befriended everybody. The little kids that were having trouble with their math in school and had tutored them, the old ladies that he helped all the time. The people that work at the Wienerschnitzel, there's two elderly ladies there. Every day he'd come home from work and he'd stop by and get these big trash cans and go empty them because he said, "They're too heavy for them." And, "Tommy, you don't need to be there." He said, "I know. They need a little help." "That's okay, Mom."

Q. Just briefly, share with us the effect on you and your husband this last year.

A. It was indescribable. There's not a day that goes by that our family doesn't cry. We get up in the morning, I come out my bedroom door. Tommy's bedroom was directly across from mine. I can't go in and change his room again. I know I have to, but I can't. It's like when I do something in there, like I'm taking him away, and I just can't do it. Our jobs, our health, has taken a tremendous toll. Our friends, if you want to console, but how do you console? You pat on the back it's just – you just never stop crying. Nothing will bring Tommy back. We miss him.

Q. Is there anything else you want to share?

A. (No audible response.)

THE COURT: Is there anything else, ma'am?

THE WITNESS: No.

Transcript of Jury Trial, July 17, 2000, Exhibit 47, pp. 82-95; *see* Second Amended Petition, pp. 185-87.

On his direct appeal, Floyd raised a claim regarding Nall's testimony, and the Nevada Supreme Court ruled as follows:

> Floyd also contends that the prosecution committed misconduct by eliciting improper victim impact testimony.
>
> Mona Nall, the mother of murder victim Thomas Darnell, testified during the penalty phase. She related an incident in which her son was assaulted and kidnapped. When she began to tell how the kidnappers came to her own house, the district court initially sustained an objection by defense counsel. After the prosecutor said the testimony would become relevant to show who the victim was, the court said it would permit some more questioning. The witness then testified that she, her husband, their son, and their 16-year-old daughter were held hostage for seven hours and the daughter was sexually assaulted. Defense counsel again objected, and the court asked the prosecutor, "If you have something of relevance to show ..., would you get to that point, please?" The witness then said that her son was held hostage for over 30 days and was finally released in the Utah desert after his abductors tried to cut off his ears.
>
> Victim impact testimony is permitted at a capital penalty proceeding under NRS 175.552(3) and under federal due process standards, but it must be excluded if it renders the proceeding fundamentally unfair. [Footnote: *Leonard v. State*, 114 Nev. 1196, 1214, 969 P.2s 288, 300 (1998).] The United States Supreme Court has stated that victim impact evidence during a capital penalty hearing is relevant to show each victim's "uniqueness as an individual human being." [Footnote: *Payne v. Tennessee*, 501 U.S. 808, 823, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).] Admissibility of testimony during the penalty phase of a capital trial is a question within the district court's discretion, and this court reviews only for abuse of discretion. [Footnote: *Rippo v. State*, 113 Nev. 1239, 1261, 946 P.2d 1017, 1031 (1997).] Here, although the jurors heard the evidence, it is apparent that the district court actually considered it irrelevant.
>
> NRS 175.552(3) provides that "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible." Nevertheless, NRS 48.035(1) remains applicable in a capital penalty proceeding and provides that even relevant evidence "is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." [Footnote: *See McKenna v. State*, 114 Nev. 1044, 1051-52, 968 P.2d 739, 744 (1998) (recognizing that admissible penalty evidence must satisfy NRS 48.035(1)).]
>
> Some evidence of the travails that victim Thomas Darnell endured in his life was certainly relevant, but evidence that his entire family was kidnapped and his sister sexually assaulted was so collateral and inflammatory that it violated NRS 48.035(1) and exceeded the scope of appropriate victim impact testimony. Though the evidence should have been excluded, it was not so unduly prejudicial that it

> rendered the proceeding fundamentally unfair; therefore, reversal of the sentence is not warranted. [Footnote: *See McNelton v. State*, 111 Nev. 900, 906, 900 P.2d 934, 938 (1995) (citing *Payne*, 501 U.S. at 825, 111 S.Ct. 2597).]

Floyd, 118 Nev. at 174-75, 42 P.3d at 261-62.

In *Payne*, the Supreme Court reconsidered its holdings in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), that the Eighth Amendment prohibited a capital sentencing jury from considering "victim impact" evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family. *See Payne*, 501 U.S. at 817. The *Payne* Court pointed out that "the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment." *Id*. at 819. The Court commented as follows on victim impact evidence in capital sentencing proceedings:

> Payne echoes the concern voiced in Booth's case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. *Booth*, *supra*, 482 U.S., at 506, n. 8, 107 S.Ct., at 2534 n. 8. As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind -- for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead each victim's "*uniqueness as an individual human being*," whatever the jury might think the loss to the community resulting from his death might be.

Id. at 823 (emphasis added). According to the *Payne* Court: "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Id*. at 825. The Court continued:

> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Booth*, 482 U.S., at 517, 107 S.Ct. at 2540 (WHITE, J., dissenting) (citation

> omitted). By turning the victim into a "faceless stranger at the penalty phase of a capital trial," *Gathers*, 490 U.S., at 821, 109 S.Ct. at 2216 (O'CONNOR, J., dissenting), *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

Id. The Court concluded:

> We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Id. at 827.

In *Payne*, the Court cautioned, however: "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. *See Darden v. Wainwright*, 477 U.S. 168, 179-183, 106 S.Ct. 2464, 2470-2472, 91 L.Ed.2d 144 (1986)." *Payne*, 501 U.S. at 825. It is upon that statement in *Payne* that Floyd bases his claim. Floyd claims that Nall's testimony was so unduly prejudicial that it rendered his trial fundamentally unfair.

Certainly, Nall's testimony was moving. But the question here is not how powerful the testimony was; the question is whether or not it was "*unduly* prejudicial." *See Payne*, 501 U.S. at 825 (emphasis added). When Floyd went to the grocery store to shoot random people, and shot Darnell in the back, he killed an extraordinary individual. Darnell's story -- one of courage, perseverance, and survival -- reflected his "uniqueness as an individual human being." *See Payne*, 501 U.S. at 823. This court does not read *Payne* to mean that, because of the very moving nature of Darnell's life story, the Due Process Clause should have prevented the prosecution from informing the jury who he was. This was not *undue* prejudice, in this court's view.

Nall's testimony was powerful for exactly the reasons the Court in *Payne* ruled victim impact testimony admissible in capital cases. Her testimony informed the jury who Darnell was; it related his personal characteristics and his "uniqueness as an individual human being." *See Payne*, 501 U.S.

at at 823. Her testimony spoke to the emotional impact of his loss on his family. *See id*. Her testimony showed how Darnell's loss was a "unique loss to society and in particular to his family." *See id*. at 825 (quoting *Booth*, 482 U.S. at 517 (WHITE, J., dissenting) (citation omitted)).

The Nevada Supreme Court ruled that part of Nall's testimony -- her testimony that Darnell's entire family was kidnapped and his sister sexually assaulted -- was improper under state law. *Floyd*, 118 Nev. at 174-75, 42 P.3d at 261-62 (citing NRS 175.552(3), and NRS 48.035(1)). The Nevada Supreme Court ruled that, although that testimony should have been excluded, "it was not so unduly prejudicial that it rendered the proceeding fundamentally unfair." *Id*. In this court's view, the portion of Nall's testimony that was arguably improper, regarding the kidnapping of Darnell's family and the sexual assault of his sister, was of minimal impact, in light of the remaining, admissible portion of Nall's testimony, and in light of the overall strength of the prosecution's case in the penalty phase of the trial. *See* discussion, *infra*, pp. 59-63. This court agrees with the Nevada Supreme Court that Floyd's trial was not rendered fundamentally unfair by the testimony of Mona Nall about Thomas Darnell's life and the impact his murder had on his family.

The Nevada Supreme Court's ruling, denying relief on this claim, was an objectively reasonable application of *Payne*. The court denies Floyd habeas corpus relief with respect to Claim 7.

Claim 13

In Claim 13, Floyd claims that his constitutional rights were violated "by the failure to submit all the elements of capital eligibility to the grand jury or to the court for a probable cause determination." Second Amended Petition, p. 230.

The Nevada Supreme Court ruled on this claim, as follows, on Floyd's direct appeal:

> Floyd argues that before the State can allege aggravating circumstances and seek the death penalty, a grand jury or a justice court must first find probable cause for the circumstances. He cites the Fifth Amendment to the United States Constitution and Article 1, Section 8, of the Nevada Constitution, which require indictment by a grand jury or the filing of an information before a person can be tried for a capital or other "infamous" crime. [Footnote: *See* U.S. Const. amend. V; Nev. Const. art. 1, § 8, cl. 1; *see also Hurtado v. California*, 110 U.S. 516, 538, 4 S.Ct. 111, 28 L.Ed. 232 (1884) (holding it constitutional for states to proceed in criminal

> actions by information following preliminary examination and finding of probable cause, rather than by grand jury indictment).] Floyd's argument has no merit.
>
> The United States Supreme Court has stated: "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment." [Footnote: *Poland v. Arizona*, 476 U.S. 147, 156, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986) (quoting *Bullington v. Missouri*, 451 U.S. 430, 438, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981)).] Therefore, an aggravating circumstance alleged in a capital proceeding does not constitute a separate crime that requires a finding of probable cause under the U.S. or Nevada constitutions.
>
> Floyd also relies on the Supreme Court's holding in *Jones v. United States* that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." [Footnote: 526 U.S. 227, 243 n. 6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999); *see also Apprendi v. New Jersey*, 530 U.S. 466, 478, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).] *Jones* does not support Floyd's proposition either. The Court emphasized that its holding in *Jones* did not apply to aggravating circumstances because "the finding of aggravating facts falling within the traditional scope of capital sentencing [is] a choice between a greater and lesser penalty, not ... a process of raising the ceiling of the sentencing range available." [Footnote: *Jones*, 526 U.S. at 251, 119 S.Ct. 1215; *see also Apprendi*, 530 U.S. at 496, 120 S.Ct. 2348 ("[T]his Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death.").
>
> We conclude that a probable cause finding is not necessary for the State to allege aggravating circumstances and seek a death sentence.

Floyd, 118 Nev. at 166, 42 P.2d at 256.

The Nevada Supreme Court's ruling on this claim was not contrary to, or an unreasonable application of, any clearly established federal law, as determined by the Supreme Court of the United States. There is no clearly established Supreme Court precedent requiring, as a matter of any federal constitutional requirement, that the aggravating factors in a state capital prosecution must be submitted to a grand jury or the court for a probable cause determination before trial. The Supreme Court has stated that indictment by a grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment. *See Branzburg v. Hayes*, 408 U.S. 665, 687-88 n.25 (1972); *see also Apprendi v. New Jersey*, 530 U.S. 466, 477 n.3 ("[The Fourteenth

Amendment] has not ... been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury"....); *Gautt v. Lewis*, 489 F.3d 993, 1003 n.10 (2007) (same). Moreover, Floyd cites no clearly established Supreme Court precedent establishing a requirement from any other federal-law source, beyond the Fifth and Fourteenth Amendments, that aggravating factors in a state capital prosecution must be submitted to a grand jury or the court for a probable cause determination before trial.

The court denies Floyd habeas corpus relief with respect to Claim 13.

Claims 1J and 16

In Claim 1(J), Floyd claims:

> Mr. Floyd's trial attorneys' performance fell below the professional standard expected of an attorney representing a capital defendant. No qualified trial attorney would fail to take all of the steps referenced above before presenting the claim to the jury considering the death penalty.
>
> Had Mr. Floyd's trial, direct-appeal, and state post-conviction attorneys complied with their state and federal constitutional obligation to render effective assistance of counsel, Mr. Floyd would not have been convicted of first-degree murder and would not have received a sentence of death. Mr. Floyd was deprived his state and federal constitutional right to effective assistance of counsel, a fair trial and reliable sentencing proceeding, due process of law and equal protection. Mr. Floyd is entitled to relief in the form of a new trial and a new sentencing proceeding.

Second Amended Petition, p. 82. And, in Claim 16, Floyd claims that his conviction and death sentence are unconstitutional "due to the cumulative errors in the admission of evidence and instructions, gross misconduct by state officials and witnesses, and the systematic deprivation of Mr. Floyd's right to the effective assistance of counsel." *Id*. at 238. The court reads Claims 1J and 16 to assert that, when all the errors in Floyd's trial are considered together, there was constitutional error warranting habeas corpus relief.

The court has, in the discussion above, identified the following errors, or arguable errors, and has considered the effect of these on Floyd's trial, regarding whether or not they rendered his trial fundamentally unfair, in violation of his federal constitutional right to due process of law:

- improper closing arguments made by the prosecutors (Claim 10);
- the testimony of a prosecution expert witness based in part on test results obtained by a defense expert, who was identified by the defense as a testifying expert, but who, after the defense changed its mind, was not called to testify (Claim 4B(1)); and
- Mona Nall's testimony regarding the kidnapping of Thomas Darnell's family and the sexual assault of his sister (Claim 7).

The court considers these errors, or arguable errors, cumulatively, and determines that, taken together, they did not render Floyd's trial fundamentally unfair.

The evidence against Floyd in the guilt phase of his trial was overwhelming. There was no legitimate factual dispute with regard to whether or not Floyd committed the acts that formed the basis for the charges against him. It was proven, beyond any reasonable dispute, that Floyd kidnapped and sexually assaulted the woman from the outcall service. *See* Testimony of Tracie Rose Carter, Respondents' Exhibit 40, pp. 18-134; Testimony of Rena Rubalcaba, Exhibit 38, pp. 160-80; Testimony of Linda Ebbert, Respondents' Exhibit 40, pp. 134-45; Testimony of Maria Thomas, Respondents' Exhibit 40, pp. 145-51. It was undisputed that Floyd entered the Albertson's supermarket with a modified shotgun and shot and killed four people, and shot and attempted to kill a fifth. *See*, *e.g.*, Exhibit 38, p. 153 (defense counsel stating in opening statement: "our client, Mr. Floyd, does not contest the fact that he went into Albertson's on June 3rd, 1999, and shot five people, killing four and wounding the fifth."); *see also id*. at 153-54 (defense counsel stating in opening statement: "As you know, this case really is a penalty case. It's about determining what's the appropriate punishment for Mr. Floyd. But our system of justice and the mechanisms involved with that require us to go through this portion of the trial in order to get to the penalty portion of the trial. That's just the way it is. At penalty phase there will be other witnesses presented, there will be other evidence presented to you that you will be able to consider in the penalty."); *see also* Exhibit 43, p. 36 (defense counsel stating in closing argument: "He went into that store and he shot five people and there's not a contest from us about that.").

In the guilt phase of the trial, the defense attempted to raise a factual issue with respect to Floyd's state of mind -- that is, whether the State proved, beyond a reasonable doubt, that Floyd had the *mens rea* required for first degree murder. But there, too, the evidence against Floyd was overwhelming. The evidence showed plainly that Floyd had the mental capacity to plan the shooting spree and carry it out, and that he did so with malice aforethought and premeditation, and intentionally, willfully, and deliberately. During the course of the kidnapping and sexual assault, Floyd told the sexual assault victim, in some detail, of his plan to shoot and kill random people -- that he had nineteen shotgun shells, and he intended to use those shells to kill the first people he saw, and then himself. *See* Testimony of Tracie Rose Carter, Respondents' Exhibit 40, pp. 18-134. The evidence showed that Floyd took careful, deliberate steps to execute his plan. *See, e.g.*, Testimony of Tracie Rose Carter, Respondents' Exhibit 40, pp. 76-79 (before he walked to the supermarket, Floyd put on a robe, hid his shotgun under the robe, had the sexual assault victim help him tie the robe, and asked her if she could see the shotgun). The defense's contention that Floyd was too intoxicated to form the *mens rea* necessary for first degree murder was belied by the evidence regarding the deliberate steps that Floyd took to carry out the shooting, and also by evidence showing that, when Floyd shot and killed four people and shot and seriously wounded a fifth, his blood alcohol level was no more than approximately 0.14%, a level at which a heavy alcohol drinker like Floyd could function intentionally, willfully, and deliberately. *See* Testimony of Minoru Aoki, Respondents' Exhibit 41, pp. 134-52. In short, in the face of the overwhelming evidence presented by the prosecution, the defense was able to raise no question regarding Floyd's guilt.

The penalty-phase case against Floyd supporting the death penalty was also extremely strong. In its opinion on Floyd's direct appeal, the Nevada Supreme Court aptly summarized the penalty-phase evidence as follows:

The same three aggravating circumstances were found for each murder: it was committed by a person who knowingly created a great risk of death to more than one person by means which would normally be hazardous to the lives of more than one person; it was committed at random and without apparent motive; and Floyd had, in the immediate proceeding, been convicted of more than one murder. The evidence supports the finding of each of these circumstances. The first is established by the fact that Floyd repeatedly fired a shotgun while walking and running through a supermarket where a number of people were present. The second is amply supported by a record that shows that Floyd knew nothing about the people he killed or why he had killed them. For example, immediately after his arrest, Floyd said, "Why did I kill those people? I, I don't know." Finally, Floyd was convicted of four murders in this case, establishing the third circumstance.

* * *

Floyd presented a number of witnesses to testify in mitigation. A family friend and a coworker both testified that they knew him to be a good person and that the person who committed the crimes in this case was not the Zane Floyd they knew. The coworker and Floyd's stepfather testified respectively that when they met Zane in jail immediately after the crimes he was "like a zombie" and "wasn't there." His stepfather also told of Floyd's difficulties and behavioral problems in school and of how well he later did in the Marine Corps. A former Marine who served with Floyd as an instructor in combat training school testified that Floyd was the best instructor, that "in the field, he would be a perfect Marine," but that "on his own" he did not do well.

Floyd's close friend testified that he and Floyd began using marijuana and methamphetamine when they were fifteen or sixteen. The friend testified that Floyd's mother was often intoxicated and that on Floyd's sixteenth birthday his stepfather played drinking games with Floyd and his friends. After Floyd returned from the Marines, his friend reintroduced him to methamphetamine, which they sometimes used without sleeping for several days.

Floyd's mother testified about her own drug and alcohol abuse and the loss of her first child, which caused her to drink even more. When she became pregnant with Floyd, her husband was displeased, they separated, and he filed for divorce just before Floyd's birth. She described Floyd's learning and behavioral problems as a child. She also spoke about how he played baseball and loved animals.

A clinical social worker and psychoanalyst conducted a psychosocial evaluation of Floyd and testified to the following. Floyd's mother had used various illegal controlled substances and abused alcohol. Floyd's stepfather also abused alcohol and was sometimes violent towards Floyd's mother. Floyd had difficulties in school and began drinking when he was fifteen and using methamphetamine when he was sixteen. He enlisted in the Marine Corps at age seventeen. After four years he was honorably discharged on condition that he not reenlist because of his alcohol problems. When he was twenty-two, Floyd attempted to contact his biological father, who refused any contact. Returning home from the military, Floyd lived with his parents. He had no driver's license because of a DUI. He worked for a short time at Costco, but was terminated. He then obtained employment as a security guard, but lost that job in May 1999. That same month his cousin was killed, which affected him and other family members deeply.

> Psychologist Dr. Dougherty testified and gave his opinion that Floyd
>
> suffers from the mental disease of mixed personality disorder with borderline, paranoid, and depressive features. In addition, I confirmed the prior diagnosis of attention deficit hyperactivity disorder ... It's my opinion ... that Mr. Floyd's reasoning was impaired as to rational thought at times, and at times he did not act knowingly and purposely at the time of the alleged incident. His symptoms were exacerbated by a long history of the ingestion of drugs and alcohol.
>
> Floyd spoke in allocution and took responsibility for what he had done and said he could not tell why he did it. He said he was sorry and would regret his actions for the rest of his life.

Floyd, 118 Nev. at 175-77, 42 P.3d at 262-63. The aggravating circumstances were established beyond any real dispute, and they were extremely weighty -- the killing of four people and the endangerment of many more, randomly and without any apparent motive -- and the mitigating evidence did not come close to outweighing those aggravating circumstances.

In light of the strength of both the guilt-phase and penalty-phase cases against Floyd, the effect of the errors, and arguable errors, identified by this court, considered cumulatively, was de minimis. Floyd's trial was not fundamentally unfair. There was no due process violation.

The court, therefore, denies Floyd's second amended petition for writ of habeas corpus.

Certificate of Appealability

This is a final order adverse to Floyd. Therefore, Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts mandates that this court must issue or deny a certificate of appealability. *See* 28 U.S.C. § 2253(c); Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts; Fed. R. App. P. 22(b).

The standard for the issuance of a certificate of appealability requires a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c). The Supreme Court interpreted 28 U.S.C. §2253(c) as follows:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas

> petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir.2000).

The court finds that, applying these standards, a certificate of appealability is warranted with respect to the following issues:

- the claim in Floyd's second amended petition for writ of habeas corpus, in Claim 10A, that the prosecutors made improper closing arguments, and the related claims in Claims 1D(1), 1J, 10B, 16, and 17A, and the request for an evidentiary hearing with respect to those claims;

- the claim in Floyd's second amended petition for writ of habeas corpus regarding the testimony of a prosecution expert witness based in part on test results obtained by a defense expert, who was identified by the defense as a testifying expert, but who, after the defense changed its mind, was not called to testify (Claim 4B(1));

- the claim in Floyd's second amended petition for writ of habeas corpus regarding Mona Nall's victim impact testimony, regarding the kidnapping of Thomas Darnell's family and the sexual assault of his sister (part of Claim 7);

- the court's determination, in ruling on the respondents' motion to dismiss, that the statute of limitations at Nev. Rev. Stat. 34.726 was adequate to support application of the procedural default doctrine; and

- the issue whether Floyd can establish cause and prejudice, under *Martinez v. Ryan*, 134 S.Ct. 296 (2013), to overcome his procedural default of the following claims: Claims 1A, 1B, 1D (in part), and 17 (in part); Claims 1C, 1F, 1G, and 2, as incorporated by reference into Claim 1; and Claim 5, when considered as a new claim under *Dickens v. Ryan*, 740 F.3d 1302, 1319-20 (9th Cir.2014) (en banc) *cert. denied Dickens v. Arizona* 522 U.S. 920 (1997).

The court declines to issue a certificate of appealability with respect to any other issue.

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IT IS THEREFORE ORDERED that petitioner's motion for evidentiary hearing (ECF No. 135) is **DENIED**.

IT IS FURTHER ORDERED that petitioner's second amended petition for writ of habeas corpus (ECF Nos. 66 and 95) is **DENIED**.

IT IS FURTHER ORDERED that petitioner is granted a certificate of appealability with respect to the following issues:

- the claim in Floyd's second amended petition for writ of habeas corpus, in Claim 10A, that the prosecutors made improper closing arguments, and the related claims in Claims 1D(1), 1J, 10B, 16, and 17A, and the request for an evidentiary hearing with respect to those claims;

- the claim in Floyd's second amended petition for writ of habeas corpus regarding the testimony of a prosecution expert witness based in part on test results obtained by a defense expert, who was identified by the defense as a testifying expert, but who, after the defense changed its mind, was not called to testify (Claim 4B(1));

- the claim in Floyd's second amended petition for writ of habeas corpus regarding Mona Nall's victim impact testimony, regarding the kidnapping of Thomas Darnell's family and the sexual assault of his sister (part of Claim 7);

- the court's determination, in ruling on the respondents' motion to dismiss, that the statute of limitations at Nev. Rev. Stat. 34.726 was adequate to support application of the procedural default doctrine; and

- the issue whether Floyd can establish cause and prejudice, under *Martinez v. Ryan*, 134 S.Ct. 296 (2013), to overcome his procedural default of the following claims: Claims 1A, 1B, 1D (in part), and 17 (in part); Claims 1C, 1F, 1G, and 2, as incorporated by reference into Claim 1; and Claim 5, when considered as a new claim under *Dickens v. Ryan*, 740 F.3d 1302, 1319-20 (9th Cir.2014) (en banc) *cert. denied Dickens v. Arizona* 522 U.S. 920 (1997).

With respect to all other issues, petitioner is denied a certificate of appealability.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter an Amended Judgment accordingly.

Dated this 17th day of December, 2014.

UNITED STATES DISTRICT JUDGE

APPENDIX E

Order denying reconsideration, *Floyd v. Baker, et al*, United States District Court of Nevada, Case No. 2:06-cv-00471-PMP-CWH (Dec. 17, 2014)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ZANE FLOYD, Petitioner, vs. RENEE BAKER, *et al.*, Respondents.	2:06-cv-0471-PMP-CWH **ORDER**

Introduction

In this capital habeas corpus action, brought by Zane Floyd, a Nevada prisoner sentenced to death, in an order entered on September 22, 2014 (ECF No. 145), the court denied Floyd's habeas corpus petition; judgment was entered the same day (ECF No. 146).

On October 20, 2014, Floyd filed a motion to alter or amend judgment (ECF No. 147), and on October 21, 2014, Floyd filed a corrected motion to alter or amend judgment (ECF No. 148). Respondents filed an opposition to the corrected motion on November 12, 2014 (ECF No. 155). Floyd filed a reply in support of that motion on December 10, 2014 (ECF No. 161).

The court will deny the original motion, filed on October 20, 2014 (ECF No. 147), as moot, as the court understands it to be superseded by Floyd's corrected motion, filed the following day. The court will grant Floyd's corrected motion (ECF No. 148) in part and deny it in part, as is discussed below.

Standards Applicable to Rule 59(e) Motion

Floyd's corrected motion to alter or amend judgment is made pursuant to Federal Rule of Civil Procedure 59(e).

"A motion for reconsideration under Rule 59(e) should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir.1999) (en banc) (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir.1999)). In *McDowell*, the court quoted Charles Alan Wright, *et al.*, Federal Practice and Procedure, as follows:

> Since specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion. However, reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly. There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct *manifest errors of law or fact upon which the judgment is based*. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice.... Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

McDowell, 197 F.3d at 1255 n.1 (quoting 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (2d ed.1995)) (emphasis in original); *see also Ybarra v. McDaniel*, 656 F.3d 984, 998 (9th Cir.2011).

Claim 10A

In his corrected motion to alter or amend judgment, Floyd requests the court to reconsider its ruling regarding Claim 10A, with regard to certain claims of prosecutorial misconduct.

In Claim 10A, Floyd claims that his constitutional rights were violated by improper closing arguments of the prosecutors in both the guilt and penalty phases of his trial. *See* Second Amended Petition (ECF No. 66), pp. 195-202. In the September 22, 2014, order, in its discussion of Claims 1D(1) and 10, and the related part of Claim 17A, the court considered and denied Claim 10A. *See* Order entered September 22, 2014, pp. 7-27. In a footnote, the court noted that certain claims were

made under the heading of Claim 10 for the first time in Floyd's reply, and the court declined to consider such claims for that reason:

> Floyd asserts certain claims for the first time in the portion of his reply concerning Claim 10: regarding comments in the State's opening statement in the guilt phase of the trial (Reply (ECF No. 134), pp. 43, 45); regarding a comment by a prosecutor that the jury should make certain that the next day's newspaper headlines read "death penalty" (Reply, p. 43); regarding a prosecutor's argument that "I trust that you will agree with Mr. Bell and myself that for his crimes he deserves what is in this case a just penalty of death" (Reply, p. 45); regarding a prosecutor's characterization of mitigating evidence as "excuses" (Reply, pp. 43-44); and regarding a prosecutor saying "give me a break" in response to the defense position that Floyd's cooperation with the police was a mitigation circumstance (Reply, pp. 43-44). Floyd did not include these claims in his second amended petition. *See* Second Amended Petition, pp. 195-204. They are improperly raised for the first time in the reply, and the court does not consider them. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir.1994).

Order entered September 22, 2014, p. 7 n.4.

Floyd contends, in his corrected motion to alter or amend judgment, that the court "committed clear error by excluding from his consideration in Claim 10A a prosecutorial misconduct claim presented in Claim 7A and incorporated into Claim 10A." Corrected Motion to Alter or Amend Judgment (ECF No. 148), p. 3. In this regard, Floyd points to a passage in Claim 10A, in which he incorporates by reference claims from "claim FIVE(A)," but not claims from Claim 7A. *Id.*; *see also* Second Amended Petition for Writ of Habeas Corpus, p. 195. Floyd acknowledges that, in Claim 10A, he "inaccurately cited to and incorporated Claim 5A rather than Claim 7A." Corrected Motion to Alter or Amend Judgment, p. 3 n.1. Given the inaccurate incorporation by reference in Claim 10A, it is not surprising that the court did not consider, as part of its discussion of that claim, claims made in Claim 7A.

At any rate, with respect to the claims made by Floyd in Claim 7A and not considered by the court under the heading of Claim 10A (*see* Order entered September 22, 2014, p. 7 n.4), the court did consider those claims, as follows, in the context of its discussion of Claim 7A:

> In Claim 7, Floyd claims that "Nevada law fails to properly channel death sentences by limiting the scope of victim-impact testimony." Second Amended Petition, p. 182. Floyd contends that his federal constitutional rights were, as a result, violated in two ways: Floyd contends that his rights were violated on account of his

trial counsel's failure to object to comments about the victims made by a prosecutor in the State's opening statement at the guilt phase of his trial, and Floyd contends that his rights were violated by the testimony of Mona Nall at the penalty phase of his trial. *See id*. at 182-88. [Footnote: In Claim 17A, Floyd asserted that his appellate counsel was ineffective for failing to raise all aspects of this claim on his direct appeal. Amendment to Second Amended Petition (ECF No. 95), p. 264. Floyd has abandoned that claim. *See* Reply, p. 37 n.9.]

Regarding the State's opening statement in the guilt phase of his trial, Floyd contends that his trial counsel should have objected to the following remarks of the prosecutor regarding the people Floyd shot at the grocery store:

> When he got to that east door, first person he saw was a fellow by the name of Thomas Darnell. Thomas Darnell was a 40 year old young man. He had suffered some childhood illnesses that left him mentally impaired. He lived home with his mother and father. He worked as a courtesy clerk. It was his job to pick up the carts and bring them back into the store. And he was pushing the carts in from the parking lot. Zane Floyd ran up from the back, threw off his robe and shot him in the back.
>
> * * *
>
> Zane Floyd moved up aisle 7, and the next person he confronted was a fellow by the name of Chuck Leos. Chuck Leos was 41, just celebrated his first anniversary to his wife, Leanne. He was the frozen food man. He shot him on the right side, in the neck and the face; two shots from that shotgun.
>
> He saw Dennis Troy Sargent. Troy Sargent was the night manager. He was the boss there, a young man with a six year old son. Zane Floyd shot him once straight on in the chest.
>
> * * *
>
> He went into the back room area and found the only person that wasn't hiding that didn't realize what was going on. Her name was Lucy Tarantino. She was in her early Sixties. She was a wife, mother of three, grandmother. She was the salad lady. It was her job to get the salad stuff ready.
>
> * * *
>
> Lucy Tarantino was shot the top of her head, and there is nothing left but her lower jaw. Everything else just exploded and left.

Transcript of Jury Trial, July 11, 2000, Exhibit 38, pp. 145-50; *see also* Second Amended Petition, pp. 182-83.

On the appeal in his first state habeas action, the Nevada Supreme Court ruled as follows:

> Floyd also claims that his counsel were ineffective in failing to challenge two remarks by the prosecutor in the opening statement of the guilt phase. The prosecutor was describing two of the murder victims. He told the jury that "Chuck Leos was 41, just celebrated his first anniversary to his wife, Leanne," and that "Lucy Tarantino ... was in her early sixties. She was a wife, mother of three, grandmother." Floyd argues that this was victim impact evidence which was highly prejudicial and inadmissible in the guilt phase. This argument is unpersuasive. The prosecutor's remarks were not inflammatory, and "facts establishing a victim's identity and general background" are admissible. [Footnote: *Libby v. State*, 109 Nev. 905, 916, 859 P.2d 1050, 1057 (1993), *vacated on other grounds*, 516 U.S. 1037 (1996).] Again Floyd's counsel were not ineffective.

Order of Affirmance, Petitioner's Exhibit 12, pp. 7-8.

> To the extent that the Nevada Supreme Court ruled that the prosecutor's remarks were allowable under state law, and that any objection under state law would have been futile, that court's ruling is authoritative and not subject to review in this federal habeas corpus action. Floyd does not point to any federal law holding such general background information about the victims, in the guilt phase of the trial, to be inadmissible. Floyd cites only *Payne v. Tennessee*, 501 U.S. 808 (1991), but the Court in *Payne* did not address the question of the introduction of such basic victim background information in the guilt phase of a capital trial. In short, Floyd makes no showing that the challenged remarks in the State's opening statement were improper and subject to any valid objection. There is no showing that Floyd's trial counsel was ineffective for not objecting to those remarks. *See Strickland*, 466 U.S. at 688. The Nevada Supreme Court's denial of relief on this claim of ineffective assistance of trial counsel was not contrary to, or an unreasonable application of, *Strickland*, or any other clearly established federal law, as determined by the Supreme Court of the United States.

Order entered September 22, 2014, pp. 46-47.

The court has, therefore, examined the arguments of the prosecutors in their opening statement complained of by Floyd in Claim 7A, and finds that those arguments were not a violation of Floyd's due process rights. Whether considered alone or together with the other prosecution arguments complained of by Floyd, those arguments, examined in the context of Floyd's entire trial, did not infect the trial with unfairness.

As for the remainder of the claims that the court declined to consider in its discussion of Claim 10A (*see* Order entered September 22, 2014, p. 7 n.4), Floyd concedes that he first raised those in his reply. *See* Reply in Support of Motion to Alter or Amend Judgment, pp. 3-6. Nevertheless, he urges the court to reconsider its September 22, 2014, order, and consider those

claims. It remains this court's view that Floyd improperly raised those claims for the first time in his reply, and the court, therefore, need not address them, and denies them on that basis. Moreover, and in the alternative, the court has examined those claims of improper prosecution argument -- a comment by a prosecutor that the jury should make certain that the next day's newspaper headlines read "death penalty" (*see* Reply (ECF No. 134), p. 43); a prosecutor's argument that "I trust that you will agree with Mr. Bell and myself that for his crimes he deserves what is in this case a just penalty of death" (*see* Reply, p. 45); a prosecutor's characterization of mitigating evidence as "excuses" (*see* Reply, pp. 43-44); and a prosecutor saying "give me a break" in response to the defense position that Floyd's cooperation with the police was a mitigating circumstance (*see* Reply, pp. 43-44) -- and determines that, considering those comments in light of the entire trial, including the other alleged improper prosecution arguments, they do not approach the standard for a due process violation; those comments did not infect Floyd's trial with unfairness.

Floyd's corrected motion to alter or amend judgment, with regard to the court's ruling on the merits of Claim 10A, is without merit. The court will not alter or amend its judgment with respect to its ruling on the merits of Claim 10A.

Certificate of Appealability - Claims Related to Claim 10A

In the September 22, 2014, order, the court described, as follows, the standard for issuance of a certificate of appealability:

> The standard for the issuance of a certificate of appealability requires a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c). The Supreme Court interpreted 28 U.S.C. §2253(c) as follows:
>
> > Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a

> constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.
>
> *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir.2000).

Order entered September 22, 2014, pp. 63-64. The court went on to grant Floyd a certificate of appealability with respect to the following issues:

- the claim that the prosecutors made improper closing arguments (Claim 10A);
- the claim regarding the testimony of a prosecution expert witness based in part on test results obtained by a defense expert, who was identified by the defense as a testifying expert, but who, after the defense changed its mind, was not called to testify (Claim 4B(1)); and
- the claim regarding Mona Nall's victim impact testimony, regarding the kidnapping of Thomas Darnell's family and the sexual assault of his sister (part of Claim 7).

Id. at 64-65.

Floyd argues, in his corrected motion to alter or amend the judgment, that the court should expand the certificate of appealability to include, along with Claim 10A, claims in Claims 1D(1), 1J, 10B, 16, and 17A that are related to Claim 10A, as well as his request for an evidentiary hearing with respect to those claims. *See* Corrected Motion to Alter or Amend Judgment, pp. 6-9. This argument by Floyd is well-taken. The court finds that, with respect to those claims related to Claim 10A, and with respect to the related motion for evidentiary hearing, Floyd meets the standard for issuance of a certificate of appealability. The court will grant Floyd's corrected motion to alter or amend judgment, and expand the certificate of appealability, in this regard.

Certificate of Appealability - Procedural Issues

Floyd also requests, in his corrected motion to alter or amend the judgment, that the certificate of appealability be expanded to include procedural issues. *See* Corrected Motion to Alter or Amend Judgment, pp. 9-13.

Floyd requests that the court grant a certificate of appealability with regard to the issue whether the statute of limitations at Nev. Rev. Stat. 34.726 was adequate to support application of

the procedural default doctrine. *See id*. at 10-11. In orders entered on August 20, 2012, and February 2, 2013, the court applied the procedural default doctrine, and dismissed certain of Floyd's claims. *See* Order entered August 20, 2012 (ECF No. 114) (order on motion to dismiss); Order entered February 2, 2013 (ECF No. 119) (order on motion for reconsideration). The court ruled the Nev. Rev. Stat. 34.726 statute of limitations to be adequate to support application of the procedural default doctrine. *See* Order entered August 20, 2012, pp. 5-10. Regarding that issue, the court finds that Floyd meets the standard for issuance of a certificate of appealability. The court will grant Floyd's corrected motion to alter or amend judgment, and expand the certificate of appealability in that regard.

Also with respect to the application of the procedural default doctrine, Floyd requests that the court grant a certificate of appealability with regard to whether he can establish cause and prejudice under *Martinez v. Ryan*, 134 S.Ct. 296 (2013), to overcome his procedural default of the following claims: Claims 1A, 1B, 1D (in part), and 17 (in part); Claims 1C, 1F, 1G, and 2, as incorporated by reference into Claim 1; and Claim 5, when considered as a new claim under *Dickens v. Ryan*, 740 F.3d 1302, 1319-20 (9th Cir.2014) (en banc) *cert. denied Dickens v. Arizona* 522 U.S. 920 (1997). *See* Corrected Motion to Alter or Amend Judgment, pp. 9-13; *see also* Reply in Support of Corrected Motion to Alter or Amend Judgment, pp. 10-12, 15-17. Here too, the court finds that Floyd meets the standard for issuance of a certificate of appealability. The court will grant Floyd's corrected motion to alter or amend judgment, and expand the certificate of appealability in this regard as well.

Conclusion

The court will therefore, grant in part and deny in part Floyd's corrected motion to alter or amend judgment. The effect will be to expand the certificate of appealability. To effect that change, the court will separately enter an Amended Order Denying Second Amended Petition for Writ of Habeas Corpus, and will direct that an amended judgment shall be entered accordingly.

IT IS THEREFORE ORDERED that Floyd's Motion to Alter or Amend Judgment Pursuant to Rule 59(e) (ECF No. 147) is **DENIED** as moot, as it was superceded by Floyd's Corrected Motion to Alter or Amend Judgment Pursuant to Rule 59(e) (ECF No. 148).

IT IS FURTHER ORDERED that Floyd's Corrected Motion to Alter or Amend Judgment Pursuant to Rule 59(e) (ECF No. 148) is **GRANTED IN PART AND DENIED IN PART**. The court will, separately, enter an Amended Order Denying Second Amended Petition for Writ of Habeas Corpus, which will include the following four amendments of the order entered September 22, 2014 (ECF No. 145):

(1) The material at p. 64, lines 6-14, is deleted and replaced with the following:

> The court finds that, applying these standards, a certificate of appealability is warranted with respect to the following issues:
>
> - the claim in Floyd's second amended petition for writ of habeas corpus, in Claim 10A, that the prosecutors made improper closing arguments, and the related claims in Claims 1D(1), 1J, 10B, 16, and 17A, and the request for an evidentiary hearing with respect to those claims;
>
> - the claim in Floyd's second amended petition for writ of habeas corpus regarding the testimony of a prosecution expert witness based in part on test results obtained by a defense expert, who was identified by the defense as a testifying expert, but who, after the defense changed its mind, was not called to testify (Claim 4B(1));
>
> - the claim in Floyd's second amended petition for writ of habeas corpus regarding Mona Nall's victim impact testimony, regarding the kidnapping of Thomas Darnell's family and the sexual assault of his sister (part of Claim 7);
>
> - the court's determination, in ruling on the respondents' motion to dismiss, that the statute of limitations at Nev. Rev. Stat. 34.726 was adequate to support application of the procedural default doctrine; and
>
> - the issue whether Floyd can establish cause and prejudice, under *Martinez v. Ryan*, 134 S.Ct. 296 (2013), to overcome his procedural default of the following claims: Claims 1A, 1B, 1D (in part), and 17 (in part); Claims 1C, 1F, 1G, and 2, as incorporated by reference into Claim 1; and Claim 5, when considered as a new claim under *Dickens v. Ryan*, 740 F.3d 1302, 1319-20 (9th Cir.2014) (en banc) *cert. denied Dickens v. Arizona* 522 U.S. 920 (1997).
>
> The court declines to issue a certificate of appealability with respect to any other issue.

(2) The material at p. 64, line 19, through p. 65, line 3, is deleted and replaced with the following:

> **IT IS FURTHER ORDERED** that petitioner is granted a certificate of appealability with respect to the following issues:
>
> - the claim in Floyd's second amended petition for writ of habeas corpus, in Claim 10A, that the prosecutors made improper closing arguments, and the related claims in Claims 1D(1), 1J, 10B, 16, and 17A, and the request for an evidentiary hearing with respect to those claims;
>
> - the claim in Floyd's second amended petition for writ of habeas corpus regarding the testimony of a prosecution expert witness based in part on test results obtained by a defense expert, who was identified by the defense as a testifying expert, but who, after the defense changed its mind, was not called to testify (Claim 4B(1));
>
> - the claim in Floyd's second amended petition for writ of habeas corpus regarding Mona Nall's victim impact testimony, regarding the kidnapping of Thomas Darnell's family and the sexual assault of his sister (part of Claim 7);
>
> - the court's determination, in ruling on the respondents' motion to dismiss, that the statute of limitations at Nev. Rev. Stat. 34.726 was adequate to support application of the procedural default doctrine; and
>
> - the issue whether Floyd can establish cause and prejudice, under *Martinez v. Ryan*, 134 S.Ct. 296 (2013), to overcome his procedural default of the following claims: Claims 1A, 1B, 1D (in part), and 17 (in part); Claims 1C, 1F, 1G, and 2, as incorporated by reference into Claim 1; and Claim 5, when considered as a new claim under *Dickens v. Ryan*, 740 F.3d 1302, 1319-20 (9th Cir.2014) (en banc) *cert. denied Dickens v. Arizona* 522 U.S. 920 (1997).
>
> With respect to all other issues, petitioner is denied a certificate of appealability.
>
> **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter an Amended Judgment accordingly.

(3) The material at p. 27, lines 3-4, is deleted and replaced with the following (this amendment is made by the court *sua sponte* to correct a clerical error):

> The court denies Floyd habeas corpus relief with respect to Claim 1D(1), Claim 10, and the Related Part of Claim 17A, and denies Floyd's motion for an evidentiary hearing with respect to those claims.

(4) At p. 12, line 16, the phrase "did not have had any" is deleted and replaced by the phrase "had no" (this amendment is made by the court *sua sponte* to correct a clerical error).

In all other respects, the Corrected Motion to Alter or Amend Judgment Pursuant to Rule 59(e) is denied.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter an Amended Judgment as directed in the separately-filed Amended Order Denying Second Amended Petition for Writ of Habeas Corpus.

Dated this 17th day of December, 2014.

UNITED STATES DISTRICT JUDGE

APPENDIX F

Order denying in part and granting in part Respondent's Motion to Dismiss, *Floyd v. Baker, et al*, United States District Court of Nevada, Case No. 2:06-cv-00471-PMP-CWH (Aug. 20, 2012)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ZANE FLOYD, Petitioner, vs. RENEE BAKER, *et al.*, Respondents. /	2:06-CV-0471-PMP-CWH **ORDER**

In this habeas corpus case under 28 U.S.C. § 2254, the respondents have filed a motion to dismiss (ECF No. 77) the second amended petition for writ of habeas corpus (ECF Nos. 66/95) filed by Zane Floyd, a Nevada prisoner sentenced to death. As the basis for their motion, respondents contend that several claims in the petition are barred by the doctrine of procedural default. Having considered the parties' arguments and relevant portions of the record, the court concludes as follows.

I *Procedural History*

On September 5, 2000, after a jury trial in the District Court for Clark County, Nevada, Floyd was convicted of four counts of first degree murder with use of a deadly weapon, four counts of sexual assault with use of a deadly weapon, and single counts of burglary while in possession of a firearm, attempted murder with use of a deadly weapon, and first degree kidnaping with use of a deadly weapon. The jury rendered a sentence of death for each count of murder. Floyd appealed.

On March 13, 2002, the Nevada Supreme Court entered an opinion affirming the conviction

and sentences. A petition for rehearing was denied on May 7, 2002, and a remittitur was entered on March 26, 2003.

On June 19, 2003, Floyd filed a petition for post-conviction relief in the state district court that he supplemented on October 6, 2004. On February 25, 2005, the state district court entered its order denying relief. Floyd appealed. On February 16, 2006, the Nevada Supreme Court affirmed the lower court's decision.

On April 16, 2006, this court received Floyd's *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On April 17, 2006, the court granted petitioner's motion for appointment of counsel, and appointed the Federal Public Defender (FPD) as his counsel. On October 23, 2006, Floyd filed an amended petition.

On April 25, 2007, this court entered an order staying proceedings in this court in order to provide Floyd the opportunity to exhaust state court remedies. On June 8, 2007, Floyd filed a second post-conviction petition in state district court. On February 22, 2008, the state district court held an evidentiary hearing on one narrow issue: whether post-conviction counsel in Floyd's prior state proceeding was ineffective in failing to pursue relief based on Floyd's alleged organic brain damage.

April 23, 2009, the state district court entered an order denying relief. Floyd appealed. On November 17, 2010, the Nevada Supreme Court affirmed the lower court's decision, noting that many of the claims in Floyd's petition were barred by the law of the case doctrine and that his remaining claims were barred because his petition was untimely and successive.

On March 16, 2011, petitioner filed a motion to lift the stay and reopen these proceedings. On March 21, 2011, respondents filed their notice of non-opposition to petitioner's motion. On June 13, 2011, Floyd filed a second amended petition, which is the subject of respondents' current motion to dismiss.

II *Procedural Default*

A federal court will not review a claim for habeas corpus relief if the decision of the state court denying the claim rested on a state law ground that is independent of the federal question and

adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). The Court in *Coleman* stated the effect of a procedural default as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986).

A state procedural bar is "independent" if the state court explicitly invokes the procedural rule as a separate basis for its decision. *McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9th Cir. 1995). A state court's decision is not "independent" if the application of a state's default rule depends on a consideration of federal law. *Park v. California*, 202 F.3d 1146, 1152 (9th Cir. 2000). Also, if the state court's decision fails "to specify which claims were barred for which reasons," the Ninth Circuit has held that the ambiguity may serve to defeat the independence of the state procedural bar. *Valerio v. Crawford*, 306 F.3d 742, 775 (9th Cir. 2002); *Koerner v. Grigas*, 328 F.3d 1039, 1050 (9th Cir. 2003).

A state procedural rule is "adequate" if it is "clear, consistently applied, and well-established at the time of the petitioner's purported default." *Calderon v. United States Dist. Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996) (citation and internal quotation marks omitted). In *Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir. 2003), the court of appeals announced a burden-shifting test for analyzing adequacy. Under *Bennett*, the State carries the initial burden of adequately pleading "the existence of an independent and adequate state procedural ground as an affirmative defense." *Id*. at 586. The burden then shifts to the petitioner "to place that defense in issue," which the petitioner may do "by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule." *Id.* Assuming the petitioner has met his burden, "the ultimate burden" of proving the adequacy of the state bar rests with the State, which must demonstrate "that the state procedural rule has been

regularly and consistently applied in habeas actions." *Id.*

III *Discussion*

Respondents argue that claims that were unexhausted when Floyd returned to state court in 2007 are now barred from federal review by the procedural default doctrine. In affirming the lower court's denial of Floyd's second state petition, the Nevada Supreme Court concluded that:

> . . . many of the claims in Floyd's petition had been raised previously and further litigation of those claims was barred by the doctrine of the law of the case. *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). The remaining claims were barred because the petition was untimely and successive. *See* NRS 34.726(1); NRS 34.810(2).

ECF No. 78-7, p. 74.[1] Under Nev. Rev. Stat. § 34.726(1), a petition is untimely if filed later than one year after the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within one year after the Nevada Supreme Court issues its remittitur. Nev. Rev. Stat. § 34.810 addresses successive petitions and requires dismissal of claims that have already been raised and adjudicated on the merits, as well as claims that could have been raised in an earlier proceeding, but were not.

The Nevada Supreme Court analyzed and rejected the good cause arguments raised by Floyd to overcome the procedural default of his claims. *Id.*, p. 74-78. The court also concluded that Floyd's actual innocence claim was without merit. *Id.*

Respondents meet their initial pleading burden under *Bennett* by asserting that the Nevada Supreme Court's application of Nev. Rev. Stat. § 34.726 and § 34.810 to Floyd's second state post-conviction petition constitutes an independent and adequate state procedural ground for denying relief. ECF No. 193, p. 29. In response, Floyd challenges the adequacy of these rules on many fronts.

With respect to Nev. Rev. Stat. § 34.810, Floyd points out that the Ninth Circuit ruled in *Valerio v. Crawford*, 306 F.3d 742, 777-78 (9th Cir. 2002), that the successive petition bar is

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[1] Citations to page numbers for electronically filed documents are based on the ECF pagination.

inadequate to bar federal review. As such, he has carried his burden under *Bennett;* and the burden "shifts back to the government to demonstrate that the law has subsequently become adequate." *King v. LaMarque*, 464 F.3d 963, 967 (9th Cir. 2006).

In an effort to make this showing, the respondents have provided a lengthy list of cases in which the Nevada Supreme Court has purportedly applied the bar. See ECF No. 110-1, p. 31-51. However, only a smattering of the cases listed are capital cases, which, in this instance, are the only cases relevant to the adequacy determination. *See Valerio*, 306 F.3d at 776 (recognizing Nevada Supreme Court's "commendable policy" in capital cases of exercising discretionary *sua sponte* power to overlook the successive petition bar). While the defaults in at least some of those cases occurred before or near the time of Floyd's default, the Nevada Supreme Court did not actually apply Nev. Rev. Stat. § 34.810 to bar the successive petition until several years later. Consequently, the respondents have not carried their burden of demonstrating the bar has become adequate post-*Valerio*.

With respect to Nev. Rev. Stat. § 34.726, however, the Ninth Circuit has rejected the argument that the Nevada Supreme Court of Nevada inconsistently applied the procedural bar for time periods up to 1996. *See Loveland v. Hatcher*, 231 F.3d 640, 642–63 (9th Cir. 2000) (as of 1993); *Moran v. McDaniel*, 80 F.3d 1261, 1269-70 (9th Cir. 1996) (as of 1996). There have been no Ninth Circuit decisions finding the bar inadequate as a general matter. Floyd raises several arguments, however, as to why the bar is inadequate to bar federal review in his case.

First, Floyd argues that the bar is inadequate due to the changes to the procedural landscape brought about by *Crump v. Warden*, 113 Nev. 293, 934 P.2d 247 (1991). In *Crump*, the Nevada Supreme Court held that the mandatory appointment of post-conviction counsel required by Nev. Rev. Stat. § 34.820(1)(a) carries with it the right to have that counsel provide effective assistance. 113 Nev. at 302-05, 934 P.2d at 252-54. Floyd contends that, in his case, the Nevada Supreme Court created a new rule as to the time limit for ineffective assistance of post-conviction claims. He also claims that the Nevada Supreme Court, in order to vindicate a petitioner's right to effective

assistance of post-conviction counsel, will ignore the timeliness and successive petition bars.

As to the purported new rule, Floyd points to the Nevada Supreme Court's determination that his ineffective assistance of post-conviction counsel claims were untimely because they had been raised more than one year after "the remittitur issued from the appeal of the denial of his *first petition*." ECF No. 78-7, p. 74-75 (emphasis added). Be that as it may, the "rule" would only apply to claims of ineffective assistance of post-conviction counsel. As such, it does not otherwise impact the adequacy of Nev. Rev. Stat. § 34.726 as a procedural bar.

With regard to the Nevada Supreme Court's alleged disregard of procedural rules in order to protect a petitioner's rights under *Crump*, Floyd points to only three cases to support his position – *Feazell v. State*, Nev. Sup. Ct. No. 37789, Order Affirming in Part and Vacating in Part (November 14, 2002), ECF No. 68-2, p. 1-11; *Middleton v. Warden*, 120 Nev. 664, 98 P.3d 694 (2004); and *Rippo v. State*, 122 Nev. 1086, 146 P.3d 279 (2006).

Of these cases, only the opinion in *Feazell* references at least one of the procedural bars at issue (i.e., Nev. Rev. Stat. 34.810(1)(b)). ECF No. 68-2, p. 6. Even assuming it serves an example of the inconsistent application of the rule, the case shows, at most, that the Nevada Supreme Court, in some instances, may exercise its discretion to bypass an applicable procedural bar to reach an issue with obvious merit. Likewise, in *Middleton*, the Nevada Supreme Court merely gave the petitioner another opportunity to litigate his post-conviction petition with a new attorney after finding that his existing attorney had "repeatedly violated this court's orders and procedural deadlines"and submitted work product that was "wholly substandard and unacceptable." 120 Nev. at 667-69, 98 P.3d at 696-98. The court's exercise of discretion in these isolated cases does not necessarily render the rule inadequate to support a state decision in other cases. *See Walker v. Martin*, 131 S.Ct. 1120, 1130 (2011) (explaining that a rule is not automatically inadequate "upon a showing of seeming inconsistencies" and that state court must be allowed discretion "to avoid the harsh results that

sometimes attend consistent application of an unyielding rule").[2]

In *Rippo*, the court addressed whether a certain penalty phase jury instruction regarding the consideration of mitigating circumstances was improper. 146 P.3d at 285. Floyd notes that the Nevada Supreme Court raised the issue *sua sponte* long after the time limit imposed by Nev. Rev. Stat. § 34.726 had expired.

Placed in context, however, the state supreme court's consideration of the issue has little, if any, bearing on whether the applicable procedural bars are consistently applied. The state petition for writ of habeas corpus that gave rise to the appeal in *Rippo* was, in fact, filed in a timely manner. *Id*. at 282. The state district court had already denied Rippo's petition when the Nevada Supreme Court announced a new rule in *McConnell v. State*, 102 P.3d 606 (Nev. 2004).[3] The Nevada Supreme Court found good cause for Rippo raising a *McConnell*-based claim on appeal, as opposed to returning to the lower court, because the legal basis for the claim "was not available at the time he pursued his habeas petition in the district court" and because the claim "present[ed] questions of law that [did] not require factual determinations outside the record." *Rippo*, 146 F.3d. at 283 (internal citations omitted).

The suggestion that the Nevada Supreme Court disregarded Nev. Rev. Stat. § 34.726 in raising the jury instruction issue *sua sponte* after the one-year time limit is misleading because the issue was ancillary to the court's adjudication of Rippo's *McConnell* claim. The court addressed the issue, not as a freestanding ground for relief, but because of the issue's potential impact on the court's harmless error analysis. *See id*. at 285, 287-88. Thus, rather than arbitrarily overlook statutory default rules, the Nevada Supreme Court merely considered the impact of the defective the jury instruction in the process of ruling upon a habeas claim (i.e., Rippo's *McConnell* claim) that had

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[2] For the same reason, the court is not persuaded that the Nevada Supreme Court's application of its procedural rules violates the federal equal protection and due process clauses, as Floyd argues in his opposition. See ECF No. 89, p. 33.

[3] In *McConnell*, the Nevada Supreme Court ruled that it is "impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated." *McConnell*, 102 P.3d at 624.

been raised in a manner consistent with Nevada law.

Next, Floyd argues that Nev. Rev. Stat. § 34.726 does not apply in his case because he can meet the statute's "good cause" exception to the rule or, alternatively, the good cause exception is not clear, consistently applied, and well-established. Nev. Rev. Stat. § 34.726 provides that good cause sufficient to excuse the default exists if the petitioner demonstrates that the delay is not his fault. According to Floyd, the Nevada Supreme Court has suggested that a subjective standard is to be applied and that counsel's failure to act is not the petitioner's "fault" in this context. He cites, however, only two cases to support this argument – *Bennett v. State*, 111 Nev. 1099, 901 P.2d 676 (1995) and *Pellegrini v. State*, 117 Nev. 860, 34 P.3d 519 (2001). The footnote in *Pellegrini* that Floyd relies upon is dicta and elsewhere in the decision the court clarified that, to show good cause under § 34.726, a petitioner "must demonstrate that an impediment external to the defense prevented him from raising his claims earlier." 34 P.3d at 526 n. 10, 537. The Nevada Supreme Court has consistently applied that standard for good cause. *See State v. Powell*, 122 Nev. 751, 756, 138 P.3d 453, 456 (2006); *Sullivan v. State*, 120 Nev. 537, 542, 96 P.3d 761, 765 (2004); *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

Floyd also argues that Nev. Rev. Stat. §34.726 cannot bar federal review because it is inconsistently applied according to the Nevada Supreme Court's "unfettered discretion."[4] To support this argument, he recounts the procedural history of a series of cases in which the state supreme court appears to have disregarded the procedural bar when it arguably applied.

In a recent decision, the Supreme Court held that a state procedural rule can adequately bar federal habeas review even if the state court exercises its discretion at times to disregard the rule and decide a habeas claim on its merits. *See Walker*, 131 S.Ct. at 1129-30. In so holding, the Court observed that "[d]iscretion enables a court to home in on case-specific considerations and to avoid

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[4] Floyd also contends that cases showing that the Nevada Supreme Court disregards other procedural bars are relevant in determining whether Nev. Rev. Stat. § 34.726 is an adequate bar. This argument was squarely rejected by the Ninth Circuit in *Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir. 1996).

the harsh results that sometimes attend consistent application of an unyielding rule." *Id*. at 1130.

Floyd contends that *Walker* does not apply here because the California procedural rules at issue in that case are clearly defined in a "trilogy" of state court cases – i.e., *In re Clark*, 855 P.2d 729 (Cal. 1993); *In re Robbins*, 959 P.2d 311 (Cal. 1998); and *In re Gallego*, 141, 959 P.2d 290 (Cal. 1998). However, the Supreme Court focused on that trilogy of cases because California, unlike other states such as Nevada, does not set a determinate time limit for collateral relief applications. *See Walker*, 131 S.Ct. at 1125. Instead, California's timeliness rules are entirely a product of case law. *Id*. at 1124. Accordingly, the Court had to rely on those cases to determine whether the rules were adequate to bar federal relief even though the time limit was indeterminate and, therefore, subject to the state court's discretion. *Id*. at 1128-29.

Because Nev. Rev. Stat. § 34.726, by its own language, contains elements parallel to those contained in the trilogy of California cases, those elements did not need to be established by case law. Suffice it to say that Ninth Circuit, in several cases, has concluded that the Nevada time bar is firmly established and regularly followed by the Nevada courts without relying on state cases to "define" the rule. *See Collier v. Bayer*, 408 F.3d 1279, 1285 (9th Cir. 2005); *High v. Ignacio*, 408 F.3d 585, 590 (9th Cir. 2005); *Loveland*, 231 F.3d at 642–63; *Moran*, 80 F.3d at 1269-70.

In light of *Walker*, the sampling of cases that Floyd relies upon as evidence that the Nevada Supreme Court inconsistently applies Nev. Rev. Stat. §34.726 does not undermine the adequacy of the rule. Even assuming, however, that Floyd has carried his modest burden under *Bennett*, the respondents can show that the procedural rule was "clear, consistently applied, and well-established" at the time of Floyd's default.

The scope of the state's "ultimate burden" depends on the nature and depth of the petitioner's allegations of inadequacy. *Bennett*, 322 F.3d at 584-85 (quoting *Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir. 1999)). The respondents have provided a list of over 900 Nevada Supreme Court opinions (from 2004 forward) in which they claim the court imposed the rule. ECF No. 110-1, p. 1-32. Although the list is composed of mostly non-capital cases, Nevada courts do not appear to

distinguish between capital and noncapital cases in applying Nev. Rev. Stat. § 34.726. *Cf. Bennett v. Mueller*, 322 F.3d 573, 583-84 (9th Cir. 2003) (recognizing that "California's rules governing timeliness in capital cases differ from those governing noncapital cases"); *Valerio*, 306 F.3d at 778 (noting Nevada courts's willingness to consider merits of a claim not raised in an earlier proceeding when death sentence at issue).

Based on the foregoing, this court concludes that Nev. Rev. Stat. § 34.726 was a "clear, consistently applied, and well-established" procedural rule at the time of Floyd's default.

Next, Floyd argues that several claims are not procedurally defaulted because they were exhausted on the merits on direct appeal or in his first post-conviction proceeding. He identifies the following claims as falling in this category: Claims One(D)(1)(in part), One(D)(2) (in part), One(H), Four(B)(1), Four(B)(5), Five, Seven, Nine, Ten, Thirteen (in part) and Seventeen(A)(in part).[5]

In Claim One(D)(1), Floyd claims that he received ineffective assistance of counsel because his trial counsel failed to object to numerous instances of prosecutorial misconduct. Respondents dispute that Floyd presented this claim to the Nevada Supreme Court, but only with respect to Floyd's allegation regarding counsel's failure to object to the prosecution's failure to preserve the blood sample taken from him on the day he was arrested. Respondents point is well taken. Thus, the claim is procedurally defaulted as to that particular allegation.

In Claim One(D)(2), Floyd claims that he received ineffective assistance of counsel because his trial counsel failed to object to improper jury instructions. This claim was presented to the Nevada courts in Floyd's first post-conviction proceeding, but only with respect to counsel's failure to object to the anti-sympathy jury instruction and the malice instruction and to request a penalty phase instruction that correctly defined the use of character evidence. Thus, the claim is not procedurally defaulted as to those particular allegations.

In Claim One(H), Floyd claims that he received ineffective assistance of appellate counsel.

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[5] Seventeen(A) is a supplemental claim filed with leave of the court on January 30, 2012 (ECF No. 95).

This claim has been superceded by Claim Seventeen(A) (ECF No. 95), which is addressed below.

In Claim Four(B)(1), Floyd claims that the trial court committed constitutional error when it ordered trial counsel to provide the prosecution with the reports and raw data of non-testifying defense mental health experts. He presented this claim in his direct appeal to the Nevada Supreme Court ECF No. 28-5, p. 12-18. Thus, the claim is not procedurally defaulted.

In Claim Four(B)(5), Floyd claims that his constitutional rights were violated by the trial court's failure to sever the sexual assault charges from the murder charges. He presented this claim in his direct appeal to the Nevada Supreme Court. ECF No. 28-4, p. 25-30. Thus, the claim is not procedurally defaulted.

In Claim Five, Floyd claims that his conviction and death sentence are in violation of his constitutional rights because of the trial court's failure to grant a change of venue and sequester the jury. He presented this claim in his direct appeal to the Nevada Supreme Court. ECF No. 28-4, p. 30; ECF No. 28-4, p. 2 - 7. Thus, the claim is not procedurally defaulted.

In Claim Seven, Mr. Floyd's claims that his conviction and death sentence are in violation of his constitutional rights because the scope of victim-impact testimony that was allowed at this trial. Respondents concede that, except to the extent it challenges Nevada law, this claim was presented to the Nevada Supreme Court in Floyd's first post-conviction proceeding. ECF No. 77, p. 24-25. The court agrees with Floyd, however, that the challenge based on Nevada law was presented as well. ECF No. 29-7, p. 22-24. Thus, Claim Seven is not procedurally barred.

In Claim Nine, Floyd claims that his conviction and death sentence are in violation of his constitutional rights because of the trial court's failure to grant a motion to sever counts relating to events at his apartment from those relating to events at the Albertson's. Respondents concede that this claim was presented to the Nevada Supreme Court on direct appeal. ECF No. 77, p. 25. Thus, the claim is not procedurally barred.

In Claim Ten, Floyd claims that his conviction and death sentence are in violation of his constitutional rights due to the cumulative effect of various instances of prosecutorial misconduct.

Respondents concede that this claim was presented to the Nevada Supreme Court on direct appeal, except for allegations that challenge the prosecutor's alleged misstatements of law. ECF No. 77, p. 26. Because the additional allegations do not "fundamentally alter the legal claim already considered by the state courts," the claim was exhausted. *See Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). Thus, Claim Ten is not procedurally barred.

In Claim Thirteen, Floyd claims that he was deprived of his constitutional rights because all the elements of capital eligibility were not submitted to the grand jury or to the court for a probable cause determination. Respondents concede that, to the extent that it is based on trail court error, the claim was presented on direct appeal. ECF No. 77, p. 28-9. Respondents contend, however, that the "adequate notice" aspect of the claim was not presented until Floyd's second state post-conviction proceeding. Respondents are incorrect in this regard. See ECF No. 28-5, p. 11. Claim Thirteen is not procedurally barred.

In Claim Seventeen(A), Floyd claims that he received ineffective assistance of appellate counsel. Specifically, he contends that appellate counsel was ineffective in failing to argue the following claims in his federal petition: Claim Four(A-D), Claim Six, Claim Seven, Claim Eleven, Claim Ten, Claim Twelve(B), Claim Fourteen, Claim Fifteen, and Claim Sixteen. Floyd did present ineffective assistance of appellate counsel claims in his first state post-conviction proceeding, but only with respect to counsel's failure to raise the arguments contained in Claims Six, Seven, and Ten of his federal petition. ECF No. 29-7, p. 17-37. As such, the claim is procedurally defaulted to the extent that it is based on counsel's failure to raised the remaining claims.

Floyd contends that Claims Eight, Eleven, Twelve(A), and Seventeen(B), are not procedurally defaulted because they could not have been raised prior to the conclusion of his first state post-conviction proceeding.

For Claim Eight, which is based on allegations that two jurors saw him in his jail jumpsuit and handcuffs, Floyd argues that the legal basis for the claim was not available until the Supreme Court decided *Deck v. Missouri*, 544 U.S. 622 (2005). There is no merit to this argument. While

Deck clarified the issue, the constitutional right of a defendant to appear free of shackles was not novel at the time of Floyd's default. *See*, *e.g.*, *Spain v. Rushen*, 883 F.2d 712, 716 (9th Cir. 1989); *Wilson v. McCarthy*, 770 F.2d 1482, 1484 (9th Cir. 1985)). Indeed, the court notes that Floyd cites, in Claim Eight, to a pre-*Deck* decision – *Gonzalez v. Pliler*, 341 F.3d 897, 900 (9th Cir. 2003). ECF No. 66, p. 189-91. Accordingly, Floyd has not shown cause for his failure to raise the claim in compliance with Nevada's procedural rules. *See Stewart v. LaGrand*, 526 U.S. 115, 119-20 (1999) (holding that petitioner lacked cause for failing to raise claim that execution by lethal gas violated Eighth Amendment because the issue had been widely debated for years and several states were reconsidering use of that method of execution at the time of petitioner's default).

For Claim Eleven, wherein he alleges that Nevada's death sentence by means of lethal injection violates the Eight Amendment, Floyd argues that the State's suppression of execution protocols, the relatively recent publication of scientific evidence regarding pain caused by the lethal injection process, and the absence of a state forum to litigate the claim provide cause sufficient to excuse procedural default of the claim. These arguments are without merit.

As noted above, constitutional challenges to execution by lethal injection are not a recent development. Even though Claim Eleven is partially premised on the allegedly suppressed protocols and recently published information, that does not justify Floyd's failure to bring a lethal injection claim prior to 2007. *See Williams v. Stewart*, 441 F.3d 1030, 1060-61 (9th Cir. 2006) (per curiam) (finding lethal injection claim procedurally defaulted where Arizona prisoner failed to seek evidence after introduction of lethal injection as mode of execution in 1992 but before filing a post-conviction petition in 1994). Likewise, Floyd's argument that constitutional challenges to lethal injection are not cognizable in state court does not excuse him from failing to raise the claim earlier. *See Roberts v. Arave*, 847 F.2d 528, 530 (9th Cir. 1988) ("[T]he apparent futility of presenting claims to state courts does not constitute cause for procedural default.").

For Claim Twelve(A), wherein he claims that the Nevada Supreme Court's review of his sentence is unconstitutional, he claims that the state court does not provide a forum to litigate this

claim. Here again, the apparent futility of presenting a claim to state court does not excuse the failure to raise it. Moreover, Floyd *did* raise the claim in the state district court, but failed to raise it on appeal. ECF No. 29-4, p. 7-8; ECF No. 29-7.

In Claim Seventeen(B), Floyd claims that he was deprived of effective assistance of post-conviction counsel. The Supreme Court has explicitly left open the question of whether there is an exception to the constitutional rule that there is no right to counsel in collateral proceedings in cases where the initial-review collateral proceeding is the petitioner's first opportunity to raise an ineffective assistance of trial counsel claim. *See Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012). However, 28 U.S.C. § 2254(I) precludes Floyd from relying on the ineffectiveness of his post-conviction attorney as a ground for relief arising under section 2254. As such, the claim is dismissed on that basis.

Floyd argues that Claims One(D), Four(B), Five, Six(B), Six(D), Seven, Nine, Twelve, Thirteen, and Fourteen, are not procedurally defaulted because the Nevada Supreme Court implicitly adopted the state district court's ruling that these claims had previously been reached on the merits. Floyd points to the court's statement (in his second state post-conviction proceeding) that many of his claims were barred by the law of the case doctrine. ECF No. 89, p. 73.

Floyd did, in fact, raise several of these claims prior to his second state post-conviction proceedings and, for the reasons stated above, those claims are not procedurally defaulted. As to the remaining claims, however, this court is not convinced that they were fairly presented or considered by the Nevada Supreme Court on direct appeal or in Floyd's first post-conviction proceeding.

As an alternative reason as to why certain claims should not be determined to be procedurally defaulted, Floyd argues that the Claims One(B), One(C), Four(A), Six(A-C, E), Ten, Thirteen, Fourteen, and Fifteen, were exhausted on direct appeal via the Nevada Supreme Court's mandatory review under Nev. Rev. Stat. § 177.055(2), which requires the state supreme court to consider, among other things, "whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor." Nev. Rev. Stat. § 177.055(2)(d).

In order to find any claims exhausted by virtue of the Nevada Supreme Court's review under Nev. Rev. Stat. § 177.055, this court must be satisfied that such review encompassed the specific factual and a federal law grounds advanced by the petitioner in his federal petition. *See Comer v. Schriro*, 463 F.3d 934, 954-56 (9th Cir. 2006) (examining whether petitioner's federal habeas claims were impliedly exhausted under the Arizona Supreme Court's independent review process). In allowing implied exhaustion in *Comer*, the court of appeals noted that, pursuant to Arizona's statutes and case law, the Arizona Supreme Court "examines the entire record, particularly the sentencing hearing, to determine if any procedural errors occurred or other arbitrary factors influenced the sentencing court's decision to impose the death sentence," and that the court "is clearly conscious of its duty to respect the dictates of the Eighth and Fourteenth Amendments and to ensure that the death penalty is not imposed in an arbitrary and capricious fashion." *Id*. at 955. In addition, the court of appeals held that only claims that are "clearly encompassed within Arizona's independent review" and "readily apparent from the record" will be deemed impliedly exhausted. *Id*. at 956.

Here, neither the statute itself nor Nevada case law obligates the Nevada Supreme Court to apply federal law standards in conducting its review under Nev. Rev. Stat. § 177.055. *Sechrest v. Ignacio*, 943 F.Supp. 1245, 1250 (D.Nev. 1996). Moreover, Floyd has not shown that any of the claims at issue are "clearly encompassed" within the scope of Nev. Rev. Stat. § 177.055 and "readily apparent" in the record reviewed by the Nevada Supreme Court. Thus, none of the claims were exhausted on direct appeal by operation of the mandatory review statute.

Based on the foregoing, the court concludes that the following claims are procedurally defaulted: Claims One(A-C, part of D, E-G), Two, Three, Four(except for (B)(1) and (5)), Six, Eight, Eleven, Twelve, Fourteen, Fifteen, and Seventeen(A, in part). As for Claim Sixteen, this court agrees with Floyd that a cumulative error claim does not necessarily need to be exhausted in the sense that this court is obligated to consider the cumulative impact of constitutional errors in the state court proceeding that resulted in his conviction and sentence. *See Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002) (stating that "even if no single error were prejudicial, where there are

several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal.' ") (*quoting United States v. de Cruz*, 82 F.3d 856, 868 (9th Cir. 1996)).

Finally, Floyd argues that he should have the opportunity, after full development of the factual record, to show cause and prejudice to overcome any procedural default. This argument is premised the Supreme Court's recent decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). In *Martinez*, the Court held that, in collateral proceedings that provide the first occasion to raise a claim of ineffective assistance at trial, ineffective assistance of post-conviction counsel in that proceeding may establish cause for a prisoner's procedural default of such a claim. *Martinez*, 132 S. Ct. at 1315.

The Court in *Martinez* stressed that its holding was a "narrow exception" to the rule in *Coleman v. Thompson*, 501 U.S. 722 (1991), that "an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Martinez*, 132 S.Ct. at 1315. It is clear from the opinion that the exception does not extend beyond ineffective assistance of trial claims. *See id.* at 1320. Thus, in this case, *Martinez* would potentially apply to only the procedurally defaulted sub-claims set forth under Claim One of Floyd's petition.

The Ninth Circuit has noted that, "*Martinez* made clear that a reviewing court must determine whether the petitioner's attorney in the first collateral proceeding was ineffective under *Strickland*,[6] whether the petitioner's claim of ineffective assistance of trial counsel is substantial, and whether there is prejudice." *Sexton v. Cozner*, 679 F.3d 1150, 1159 (9th Cir. 2012) (footnote added). Under *Strickland*, a petitioner must show that his counsel's performance was both unreasonably deficient and that the defense was actually prejudiced as a result of counsel's errors. *Strickland*, 466 U.S. at 684.

There is a strong presumption that an attorney performed within the wide range of professional competence, and the attorney's performance will be deemed to have been deficient only if it fell below an objective standard of reasonableness measured under prevailing professional norms. *Id*. at 689, 694. To prove prejudice, the petitioner must demonstrate that there is a

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[6] *Strickland v. Washington*, 466 U.S. 668 (1984)

reasonable probability that, but for counsel's unreasonable errors, the result of the proceeding would have been different. *Id*. at 694. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U .S. at 689. As a result, "[t]he question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 131 S.Ct. 770, 778 (2011) (internal quotations and citation omitted).

The application of the *Strickland* test in this instance means that Floyd is required to show that counsel's representation during the post-conviction proceeding was objectively unreasonable, and that, but for their errors, there is a reasonable probability that Floyd would have received relief on a claim of ineffective assistance of trial counsel in state court. In opposing respondents' motion to dismiss, Floyd argues that he can make such a showing with respect to Claims One(A), (B), and (part of D). ECF No. 104. For the reasons that follow, he has not carried his *Martinez* burden with respect to those claims.

Claim One(A) is premised on allegations that trial counsel failed to adequately develop and present evidence that would have negated Floyd's intent to commit first degree murder and would have bolstered his case for mitigation. In relation to this claim, Floyd contends that his initial post-conviction counsel, David Schieck, was ineffective in failing to develop evidence that Floyd suffered from organic brain damage caused by Fetal Alcohol Spectrum Disorder (FASD) and in failing to delve into Floyd's social history of child abuse and substance abuse.

With respect to the latter, trial counsel presented the testimony of Jorge Abreu. ECF No. 112-5, p. 130-78. In preparation for the hearing, Abreu, a social worker and psychoanalyst, had compiled a detailed social history of Floyd based on interviews with family members and other people who played a significant role in Floyd's life, as well as numerous documents such as school, employment, and military records. In his testimony, he gave a chronology of Floyd's life. That chronology included specific information regarding the substantial role alcohol and substance abuse

played in the life of Floyd and his family from prior to his birth until the day he committed the murders. It also recounted instances of domestic violence either witnessed by or directed at Floyd, Floyd's developmental problems and difficulties in school, his rocky relationship with his often-absent adoptive father, his being rejected by his biological father, his stressful (and ultimately failed) military career, and his inability to hold a job after being discharged from the Marines. To supplement or elaborate upon this information, trial counsel also presented the testimony of a close family friend of the Floyds, Floyd's baseball coach, his co-worker, his best friend while he was growing up, his closest friend in the Marines, his psychiatrist when he was a teenager, and his parents.

Although trial counsel presented extensive testimony about the adverse circumstances pervading Floyd's life, Floyd claims that post-conviction counsel was ineffective for not digging deeper into his social history to uncover evidence of more dramatic instances of abuse committed by Floyd's parents. See ECF No. 104, p. 10-11. This court is not convinced that post-conviction counsel was ineffective in this regard. The additional evidence cited by Floyd would have provided only marginal mitigatory value to the case presented by trial counsel. Moreover, it would have potentially undermined testimony from Floyd's parents that was presumably designed to elicit sympathy from the jury. *See Strickland*, 466 U.S. at 689-90 (the habeas court "must indulge [the] strong presumption" that counsel "made all significant decisions in the exercise of reasonable professional judgment").

As for the evidence regarding organic brain damage caused by FASD, Floyd's trial counsel sought the opinion of numerous mental health experts. At trial counsel's request, psychiatrist Jakob Camp, M.D., evaluated Floyd on the day of his arrest, only hours after he committed the murders. ECF No. 68-10, p. 1-3. Counsel also consulted Frank E. Paul, Ph.D., a clinical psychologist, and David L. Schmidt, a clinical neuropsychologist, each of whom administered several tests on Floyd and prepared a lengthy and comprehensive evaluation. *Id*., p. 16-75. Trial counsel also retained neuropsychologist Thomas F. Kinsora, Ph.D., to evaluate (1) the psychological assessment

conducted by Floyd's treating neuropsychologist, Maria J.P. Cardle, Ph.D., when he was thirteen years old,[7] and (2) the aforementioned assessment by Dr. Schmidt. ECF No. 69, p. 3-15.

At Floyd's penalty hearing, trial counsel presented the testimony of Dr. Norton A. Roitman, M.D., a psychiatrist who, along with Dr. Cardle and a neourologist identified as Dr. Kean, was involved in Floyd's treatment when Floyd was a teenager. ECF No. 113-1, p. 4-35. Lastly, trial counsel also presented the testimony of Edward J. Dougherty, Ed.D, a forensic psychologist retained by the defense to evaluate Floyd.[8] ECF No. 113-2, p. 4-147.

As noted by respondents, none of the foregoing mental health experts diagnosed Floyd as suffering from organic brain damage caused by FASD. Dr. Dougherty testified as to the likelihood that Floyd's developmental problems were caused, at least in part, by the emotional distress his mother endured while pregnant with him, as well as her use of alcohol, drugs, and tobacco during that time. He also discussed the trauma resulting from the circumstances surrounding Floyd's premature birth and other adverse physical and environmental factors that likely impacted his early development.

While Floyd claims that post-conviction counsel was ineffective for not developing FASD evidence, the only evidence he cites to support the allegation that Floyd has organic brain damage from FASD is a 2006 report from a psychologist, Natalie Novick Brown, Ph.D. ECF No. 69-4, p. 55-77. Based on her report, however, it does not appear that she personally evaluated Floyd, but instead, arrived at her conclusions by reviewing documents and photographs.

In light of the foregoing, Floyd has not shown that post-conviction counsel's performance was unreasonable or outside the bounds prevailing professional norms because counsel did not develop FASD evidence to support a claim of ineffective assistance of trial counsel.

In Claim One(B), Floyd alleges that trial counsel were ineffective during the voir dire stage of his trial. He faults trial counsel for agreeing to not voir dire jurors who had reservations about the

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[7] Dr. Cardle's assessment is located at ECF No. 69-5, p. 69-75.

[8] Dr. Dougherty's report is located at ECF No. 69, p. 42-66.

death penalty, agreeing to a prejudicial voir dire format, and failing to individually question each potential juror. He also claims that counsel were ineffective in failing to "life qualify" the jury, excuse certain jurors, and intelligently exercise peremptory challenges. In addition, he contends that trial counsel were ineffective in failing to object to the State's use of peremptory strikes against women.

With regard to the last claim, Floyd alleges little more than the fact that the State used three of its five peremptory challenges against women. As such, he fails to establish even a prima facie case of gender discrimination. *See Johnson v. California*, 545 U.S. 162, 168 (2005) (quoting *Batson v. Kentucky*, 476 U.S. 79 (1986), in holding that a prima facie case of discrimination requires a "showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose").

The remaining allegations relating to counsel's voir dire performance are similarly without merit. The other side of the agreement regarding death scrupled jurors was that the State agreed to excuse several potential jurors who indicated a bias in favor of imposing the death penalty. ECF No. 111-1, p. 5. In addition, the voir dire format utilized by the district court was not an abuse of the court's discretion. *See Summers v. State*, 718 P.2d 676, 679 (Nev. 1986).

As for trial counsel's alleged failure to individually question some of the potential jurors, "life qualify" the jury, excuse certain jurors, and intelligently exercise peremptory challenges, Floyd has not shown that such acts or omission resulted a juror with actual or implied bias. In sum, Floyd cannot show a reasonable probability that the outcome of his trial was impacted by any of the alleged deficiencies in trial counsel's performance that are identified in Claim One(B). *See Fields v. Brown*, 503 F.3d 755, 776 (9th Cir.2007) (en banc) (finding no reasonable probability of a different outcome where petitioner failed to show that juror was actually or impliedly biased). Accordingly, post-conviction counsel was not ineffective in raising these ineffective assistance claims in Floyd's initial post-conviction proceeding.

As noted above, Claim One(D) alleges ineffective assistance based on trial counsel's failure to make certain objections during trial. The aspects of this claim that are procedurally defaulted are

allegations that trial counsel was ineffective in failing to object to (1) the prosecution's failure to preserve the blood sample taken from Floyd on the day he was arrested, and (2) jury instructions regarding premeditation and death penalty eligibility.

With regard to the blood sample, Floyd claims that independent testing by the defense could have been used to undermine testimony from the State's expert as to Floyd's blood alcohol content at the time of the crime and the absence of methamphetamine in his system. Under *California v. Trombetta*, 467 U.S. 479 (1984), the State has a constitutional duty to preserve evidence, but the duty is limited to evidence whose exculpatory value was apparent before its destruction, and is of such nature that the defendant cannot obtain comparable evidence from other reasonably available means. *Trombetta*, 467 U.S. at 489. Destruction of *potentially* exculpatory evidence does not violate the Constitution unless the evidence was destroyed in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

Here, Floyd has shown only that the evidence was, at best, potentially exculpatory. And, because he has made no showing that the State acted in bad faith in allegedly failing to preserve the blood sample, it is unlikely that counsel's failure to raise the issue at trial would have resulted in a more favorable outcome. *See Cunningham v. City of Wenatchee*, 345 F.3d 802, 812 (9th Cir. 2003) (rejecting *Trombetta* claim where value of evidence and showing of bad faith were speculative). Thus, post-conviction counsel was not ineffective by not raising the issue in the initial post-conviction proceeding.

Similarly, neither of the jury instruction issues would have been meritorious either. There is no plausible argument that the jury would not have found the element of premeditation absent the supposedly defective instruction. And, the Nevada Supreme Court has soundly rejected the claim Floyd makes with respect to the death eligibility instruction. *See Nunnery v. State*, 263 P.3d 235, 250-53 (Nev. 2011)

For the foregoing reasons, Floyd has not shown that the procedural default of any of his ineffective assistance of trial counsel claims should be excused pursuant to the holding in *Martinez*.

As for his request to develop the factual record, Floyd contends that doing so would allow him to show that his initial post-conviction counsel was ineffective and would also allow him to demonstrate the extent of the prejudice brought about by trial counsel's ineffectiveness. He does not specify, however, what type of evidence he intends to develop beyond that which already contained in the record herein. Accordingly the court does not see the benefit of additional factual development in relation to Floyd's *Martinez* arguments.

IT IS THEREFORE ORDERED that respondents' motion to dismiss (ECF No. 77) is GRANTED in part and DENIED in part. For the reasons set forth above, the following claims in petitioner's second amended petition (ECF Nos. 66/95) are DISMISSED: Claims One(A-C, part of D, E-G), Two, Three, Four (except for (B)(1) and (5)), Six, Eight, Eleven, Twelve, Fourteen, Fifteen, and Seventeen (A, in part, and B).

IT IS FURTHER ORDERED that respondents shall have **forty-five (45) days** from the date on which this order is entered within which to file their answer to petitioner's remaining claims. In all other respects, the scheduling of this matter is governed by the order entered on March 22, 2011 (ECF No. 61).

IT IS FURTHER ORDERED that respondents' motion to extend time (ECF No. 109) is GRANTED *nunc pro tunc* as of July 5, 2012.

DATED: August 20, 2012.

Phil M. Pro

UNITED STATES DISTRICT JUDGE