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**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:

1 Early in the morning on June 3, 1999, Floyd telephoned an “outcall” service  
2 and asked that a young woman be dispatched to his apartment. As a result, a  
3 twenty-year-old woman came to Floyd’s apartment around 3:30 a.m. As soon as she  
4 arrived, Floyd threatened her with a shotgun and forced her to engage in vaginal  
5 intercourse, anal intercourse, digital penetration, and fellatio. At one point he ejected  
6 a live shell from the gun, showed it to the woman, and said that her name was on it.  
7 Eventually Floyd put on Marine Corps camouflage clothing and said that he was  
8 going to go out and kill the first people that he saw. He told the woman that he had  
9 left his smaller gun in a friend’s vehicle or he could have shot her. Eventually he told  
10 her she had 60 seconds to run or be killed. The woman ran from the apartment, and  
11 around 5:00 a.m. Floyd took his shotgun and began to walk to an Albertson’s  
12 supermarket which was about fifteen minutes by foot from his apartment.

13 Floyd arrived at the supermarket at about 5:15 a.m. The store’s security  
14 videotape showed that immediately after entering the store, he shot Thomas Michael  
15 Darnell in the back, killing him. After that, he shot and killed two more people,  
16 Carlos Chuck Leos and Dennis Troy Sargeant. Floyd then encountered Zachary T.  
17 Emenegger, who attempted to flee. Floyd chased him and shot him twice. Floyd  
18 then leaned over him and said, “Yeah, you’re dead,” but Emenegger survived. Floyd  
19 then went to the rear of the store where he shot Lucille Alice Tarantino in the head  
20 and killed her.

21 As Floyd walked out the front of the store, Las Vegas Metropolitan Police  
22 Department (LVMPD) officers were waiting for him. He went back in the store for a  
23 few seconds and then came out again, pointing the shotgun at his own head. After a  
24 police officer spoke with him for several minutes, Floyd put the gun down, was taken  
25 into custody, and admitted to officers that he had shot the people in the store.

26 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.

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

1 are in the record at Petitioner’s Exhibit 6, and Respondents’ Exhibit 7).<sup>1</sup> Floyd pursued a direct  
2 appeal to the Nevada Supreme Court, and that court affirmed Floyd’s conviction and sentence on  
3 March 13, 2002. *Id.*

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

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

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

22 On June 8, 2007, Floyd filed a second state habeas petition in state district court. Petitioner’s  
23 Exhibit 396; Respondents’ Exhibit 20. On February 22, 2008, the state district court held an  
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25 <sup>1</sup> The exhibits referred to in this order as “Petitioner’s Exhibits” were filed by Floyd and are  
26 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.

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

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

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

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

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

19 On August 20, 2012 (ECF No. 114), the court granted in part, and denied in part,  
20 respondents’ motion to dismiss. The court order dismissed Claims 1A, 1B, 1C, 1D (in part), 1E, 1F,  
21 1G, 2, 3, 4 (in part), 6, 8, 11, 12, 14, 15, and 17 (in part). *See* Order entered August 20, 2012 (ECF  
22 No. 114). In all other respects, the court denied the motion to dismiss. Floyd filed a motion for  
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26 <sup>2</sup> 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.”

1 reconsideration of the August 20, 2012 order (ECF No. 116), and the court denied that motion on  
2 February 22, 2013 (ECF No. 119).<sup>3</sup>

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

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

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

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

15 An application for a writ of habeas corpus on behalf of a person in custody  
16 pursuant to the judgment of a State court shall not be granted with respect to any  
17 claim that was adjudicated on the merits in State court proceedings unless the  
18 adjudication of the claim --

19 (1) resulted in a decision that was contrary to, or involved an unreasonable  
20 application of, clearly established Federal law, as determined by the Supreme Court  
21 of the United States; or

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22 <sup>3</sup> In their briefing of the merits of Floyd's remaining claims, Floyd and the respondents argue  
23 that the court should reconsider certain aspects of the August 20, 2012 order. *See, e.g.*, Answer (ECF  
24 No. 127), pp. 47-48; Reply (ECF No. 134), pp. 2-5; Response to Reply (ECF No. 138), pp. 23-25. Floyd  
25 also seeks reconsideration of the August 20, 2012 order in his motion for evidentiary hearing. *See*  
26 *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.

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

3 28 U.S.C. § 2254(d).

4 A state court decision is contrary to clearly established Supreme Court precedent, within the  
5 meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing law set  
6 forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that are materially  
7 indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result  
8 different from [the Supreme Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)  
9 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685,  
10 694 (2002)).

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

18 The Supreme Court has further instructed that “[a] state court’s determination that a claim  
19 lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the  
20 correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 786  
21 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has stated  
22 “that even a strong case for relief does not mean the state court’s contrary conclusion was  
23 unreasonable.” *Id.* (citing *Lockyer*, 538 U.S. at 75); *see also Cullen v. Pinholster*, \_\_ U.S. \_\_, 131  
24 S.Ct. 1388, 1398 (2011) (describing the AEDPA standard as “a difficult to meet and highly  
25 deferential standard for evaluating state-court rulings, which demands that state-court decisions be  
26 given the benefit of the doubt” (internal quotation marks and citations omitted)).

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

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

10 The analysis under section 2254(d) looks to the law that was clearly established by United  
11 States Supreme Court precedent at the time of the state court’s decision. *Wiggins v. Smith*, 539 U.S.  
12 510, 520 (2003).

### 13 Analysis

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

15 In Claim 10, Floyd claims that his constitutional rights were violated by improper closing  
16 arguments of the prosecutors in both the guilt and penalty phases of his trial (Claim 10A), that his  
17 trial counsel was ineffective for failing to object to the provision of transcripts of the prosecutors’  
18 closing arguments to the jurors to review during their deliberations (Claim 10B), and that the State  
19 wrongfully failed to preserve blood sample taken from him for drug and alcohol testing (Claim  
20 10B). Second Amended Petition (ECF No. 66), pp. 195-204.<sup>4</sup> In Claim 1D(1), Floyd claims that his

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22 <sup>4</sup> Floyd asserts certain claims for the first time in the portion of his reply concerning Claim 10:  
23 regarding comments in the State’s opening statement in the guilt phase of the trial (Reply (ECF No.  
24 134), pp. 43, 45); regarding a comment by a prosecutor that the jury should make certain that the next  
25 day’s newspaper headlines read “death penalty” (Reply, p. 43); regarding a prosecutor’s argument that  
26 “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).

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

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

7 Floyd asserts that several comments by the prosecution constituted  
8 misconduct. A prosecutor's comments should be considered in context, and "a  
9 criminal conviction is not to be lightly overturned on the basis of a prosecutor's  
10 comments standing alone." [Footnote: *United States v. Young*, 470 U.S. 1, 11, 105  
11 S.Ct. 1038, 84 L.Ed.2d 1 (1985).] Moreover, Floyd failed to object to some of the  
12 remarks. [Footnote: *Riley v. State*, 107 Nev. 205, 218, 808 P.2d 551, 559 (1991)  
13 (stating that generally this court will not consider whether a prosecutor's remarks  
14 were improper unless the defendant objected to them at the time, allowing the district  
15 court to rule upon the objection, admonish the prosecutor, and instruct the jury); *c.f.*  
16 NRS 178.602 (providing that despite lack of objection, this court may address an  
17 error if it was plain and affected a defendant's substantial rights).] Most of the  
18 comments require no discussion because they all either were proper or did not  
19 amount to prejudicial error.

20 However, we will discuss one comment which was inappropriate. During  
21 closing argument in the guilt phase, the prosecutor told the jury that Floyd  
22 "perpetrated the worst massacre in the history of Las Vegas." The jury began its  
23 deliberations soon after. Defense counsel then objected to the prosecutor's remark as  
24 prejudicial and inflammatory. The district court responded: "I think [the remark]  
25 isn't within the evidence. I also don't think it is true. What remedy would you  
26 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."

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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<sup>5</sup> 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.



1 in Las Vegas any length of time, and akin to arguing in the Timothy McVeigh case  
2 that the Oklahoma bombing was the worst massacre in the history of the State of  
3 Oklahoma.” This extravagant comparison is neither apt nor persuasive. The multiple  
4 murders in this case were an exceptional occurrence, but even a quick look at this  
5 court’s case law shows that unfortunately they do not stand alone in Las Vegas  
6 history. In 1992, four people were shot to death in a Las Vegas apartment in the  
7 presence of two young children. *See Evans v. State*, 112 Nev. 1172, 926 P.2d 265  
8 (1996).] We caution prosecutors to refrain from inflammatory rhetoric: “Any  
9 inclination to inject personal beliefs into arguments or to inflame the passions of the  
10 jury must be avoided. Such comments clearly exceed the boundaries of proper  
11 prosecutorial conduct.” [Footnote: *Shannon v. State*, 105 Nev. 782, 789, 783 P.2d  
12 942, 946 (1989).] Here, given the overwhelming evidence of Floyd’s guilt, we  
13 conclude that the error was harmless. [Footnote: *See NRS 178.598* (“Any error,  
14 defect, irregularity or variance which does not affect substantial rights shall be  
15 disregarded.”).]

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

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

19 Floyd asserts that his trial counsel was ineffective in failing to object to  
20 several instances of alleged prosecutorial misconduct. Although misconduct  
21 occurred, it was not prejudicial in this case.

22 Floyd’s counsel raised prosecutorial misconduct on direct appeal. This court  
23 addressed one instance specifically; in regard to the others, we stated: “Floyd asserts  
24 that several comments by the prosecution constituted misconduct.... Floyd failed to  
25 object to some of the remarks. Most of the comments require no discussion because  
26 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.

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.

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.”

\* \* \*

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

1           that more than one person was killed in this case? How could that possibly  
2 outweigh a second murder? It can't. None of these combined.

3                                   \*   \*   \*

4           Cooperation with the police as a mitigating circumstance? Give me a  
5 break. How does that reduce his moral culpability?

6                                   \*   \*   \*

7                           You can throw the whole list away.

8           We have underlined the rhetoric that is misleading or excessively intemperate  
9 and derogatory toward the defense. First, as discussed above, mischaracterizing  
10 mitigating evidence as “excuses” could seriously mislead jurors. Second, rhetoric  
11 such as “Give me a break” and “red herrings” unfairly imply that the defense is trying  
12 something underhanded. This court has repeatedly warned prosecutors not to  
13 “disparage legitimate defense tactics” in this manner. [Footnote: *See, e.g., Pickworth*  
14 *v. State*, 95 Nev. 547, 550, 598 P.2d 626, 627 (1979); *Barron v. State*, 105 Nev. 767,  
15 780, 783 P.2d 444, 452 (1989).] We considered it “highly improper” for a prosecutor  
16 to tell jurors that a defendant’s drug intoxication defense was a “red herring” aimed at  
17 gaining a compromise verdict of second-degree murder. [Footnote: *Pickworth*, 95  
18 Nev. at 550, 598 P.2d at 627.] As we have explained, prosecutors have a “duty not to  
19 ridicule or belittle the defendant or his case. The appropriate way to comment, by the  
20 defense or the State, is simply to state that the prosecution’s case or the defendant is  
21 not credible and then to show how the evidence supports that conclusion.” [Footnote:  
22 *Barron*, 105 Nev. at 780, 783 P.2d at 452 (citation omitted).]

23           A defendant and his counsel have the right to introduce evidence and argue  
24 the existence of mitigating circumstances in a capital penalty phase. That is all Floyd  
25 and his counsel did here, and on direct appeal this court stated: “This mitigating  
26 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.

1           It is clearly established federal law within the meaning of § 2254(d)(1) that a prosecutor’s  
2 improper remarks violate the Constitution if they so infect the trial with unfairness as to make the  
3 resulting conviction a denial of due process. *Parker v. Matthews*, \_\_ U.S. \_\_, 132 S.Ct. 2148, 2153,  
4 (2012) (per curiam); *see also Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Comer v. Schriro*,  
5 480 F.3d 960, 988 (9th Cir.2007). The ultimate question is whether the alleged misconduct rendered  
6 the petitioner’s trial fundamentally unfair. *Darden*, 477 U.S. at 183. In determining whether a  
7 prosecutor’s argument rendered a trial fundamentally unfair, a court must judge the remarks in the  
8 context of the entire proceeding to determine whether the argument influenced the jury’s decision.  
9 *Boyd v. California*, 494 U.S. 370, 385 (1990); *Darden*, 477 U.S. at 179-82. In considering the  
10 effect of improper prosecutorial argument, the court may consider whether the argument  
11 manipulated or misstated the evidence; whether it implicated other specific rights of the accused,  
12 such as the right to counsel or the right to remain silent; whether the court instructed the jury that its  
13 decision is to be based solely upon the evidence; whether the court instructed that counsel’s remarks  
14 are not evidence; whether the defense objected; whether the comments were “invited” by the  
15 defense; and whether there was overwhelming evidence of guilt. *See Darden*, 477 U.S. at 181-82.  
16 The standard is general, leaving courts leeway in case-by-case determinations. *Parker*, 132 S.Ct. at  
17 2155 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). In a federal habeas corpus  
18 action, to grant habeas relief, the court must conclude that the state court’s rejection of the  
19 prosecutorial misconduct claim was objectively unreasonable, that is, that it “was so lacking in  
20 justification that there was an error well understood and comprehended in existing law beyond any  
21 possibility for fairminded disagreement.” *Parker*, 132 S.Ct. at 2155 (quoting *Harrington*, 131 S.Ct.  
22 at 767-87).

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

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

3       Regarding the prosecution’s guilt-phase closing arguments, Floyd highlights, as “[p]erhaps  
4 the most egregious comment,” the following:

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

8 Exhibit 43, p. 50; *see* Second Amended Petition, p. 198. The Nevada Supreme Court discussed this  
9 comment in its opinion on Floyd’s direct appeal, and found the comment to be improper, but  
10 concluded, reasonably in this court’s view, that the error was harmless. *Floyd*, 118 Nev. at 172-74,  
11 42 P.3d at 260-61; *see also id.*, 118 Nev. at 177, 42 P.3d at 263 (Maupin, C.J., and Agosti, J.,  
12 concurring) (“I concur in the result reached by the majority, but write separately to state my view  
13 that there was no prosecutorial misconduct at trial in connection with the “massacre” argument....  
14 While the rhetoric was not specifically accurate, the argument was a legitimate comment on the  
15 apparent random gunning down of five people, killing four of them.”). The comment did not go to  
16 any factual dispute in the case. While the comment was improperly inflammatory, this court finds  
17 that it did not have had any impact on the outcome of Floyd’s trial. The magnitude and brutality of  
18 Floyd’s shooting rampage was plain from the evidence; the prosecutor’s characterization of it added  
19 little. Moreover, the trial court properly instructed the jury that the evidence they were to consider  
20 consisted of the testimony of witnesses, exhibits, and any facts admitted or agreed to by counsel, and  
21 that “[s]tatements, arguments and opinions of counsel are not evidence in the case.” Exhibit 44,  
22 Instruction No. 6.

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

- 26             (1)     “... I don’t think there’s much question about the facts in this case.”  
                  (Respondents’ Exhibit 43, p. 10);

- 1 (2) “There can be no doubt, of course, that she [the sexual assault victim]  
2 was in the presence of the defendant.” (*Id.* at 12);
- 3 (3) “I hope that you will understand her [the sexual assault victim’s]  
4 reluctance to get involved. I hope that you will understand the system  
5 that had her arrested in order to secure her testimony. We felt that the  
6 case was sufficiently important that we needed not just her as a victim  
7 for the counts charged, but also to have an accurate accounting of that  
8 one and a half or two hours that he intentionally omitted.” (*Id.* at 13)  
9 (objected to, and objection sustained);
- 10 (4) “It is difficult to understand, based on everything we’ve heard, how a  
11 man could forget an hour and a half activity with [the sexual assault  
12 victim], particularly when it preceded maybe by ten minutes, the  
13 homicides. Zane Floyd recalled walking from his house. He recalled  
14 putting on his boots. He recalled turning on the music. He recalled  
15 walking every step. Those were his words, every step through the  
16 store, even the direction he took. Yet for whatever reason, and I’m  
17 sure it has something to do with his idea of what a man is and what,  
18 how others are to view a man, killing is one thing, but raping or  
19 sexually assaulting a woman, that is a cowardly act, and so you don’t  
20 want to mention that.” (*Id.* at 14);
- 21 (5) “If you find not guilty as to Mr. Emenegger [the victim of the  
22 attempted murder], which seems rather rash, then I presume your logic  
23 would follow that you would find not guilty as to everybody else.”  
24 (*Id.* at 22);
- 25 (6) “The fact that no condom was used in this case is probably proof  
26 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

1 to kill one person. But if he had a smaller gun, he could have killed  
2 her with the smaller gun and then still maybe gone down to  
3 Albertson's and gone on a shooting spree with the shotgun. If he had  
4 that pistol, [the sexual assault victim] wouldn't be alive today." (*Id.* at  
5 45); and

- 6 (10) "I mean if he was going to kill himself, then there was no  
7 accountability.... But then when it came down to it, he didn't have the  
8 courage to pull the trigger. And so there has to be some  
9 accountability." (*Id.* at 51-52).

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

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

- 23 (1) "I'm going to get into, what I would ask you to do, you can approach  
24 deliberations any way you want, but we have so many different crimes. What  
25 you might wish to do is take it one crime at a time, and the verdict forms will  
26 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

1 nickel in there and somebody picks that nickel up off the seat of the car, that  
2 technically is a felony in the State of Nevada, felony burglary. We're not  
3 there, obviously, and I don't want to trivialize the offense of burglary, but I'm  
4 simply illustrating to you what the crime is. It doesn't matter, as in this case,  
5 that the store is open for business. That doesn't matter. You walk into Save-  
6 On Drug and with the intention – and that's the key, what was your intention  
7 when you crossed that threshold – with the intention of stealing, you have  
8 committed the crime, whether you steal or not. Now, nobody can ever prove  
9 that crime, of course against you, but that is the crime of burglary. That's  
10 how it is defined in the State of Nevada. We live in Nevada, so we'll follow  
11 the law of the State of Nevada. Many people come from other state where it's  
12 not quite the same way. If you have sat in juries elsewhere you might be  
13 surprised by what the law is in this state.” (*Id.* at 16-17);

8 (3) “Next I would like to discuss with you first degree murder, because that is  
9 what we have charged him with. After burglary we have four counts of first  
10 degree murder. First degree murder can be committed two ways, so that's  
11 why I brought this out and it is really quite simple. Let's just say first degree  
12 murder. The first way is premeditated and deliberate murder, premeditated  
13 deliberate intentional murder. Premeditated. I think that's right. Deliberate.  
14 And the other element is willful. I want to make sure I spell that right. That's  
15 the first way, and I would submit to you that we don't even have to talk about  
16 the second one, but I'm going to talk about it anyway because it applies to this  
17 case because the law in the State of Nevada allows two different theories of  
18 first degree murder. And when you read the instructions you will conclude  
19 that only lawyers could draft these things because they sound so much alike  
20 that there's hardly a distinction.” (*Id.* at 17-18); and

15 (4) “Sexual assault is simply sex with another person against that person's will.  
16 That's it. That's it. You don't have to beat them, you don't have to threaten  
17 them with a gun, you don't have to hurt them. It is simply sex that is against  
18 th will of the victim, or, or where the defendant should know that the victim is  
19 incapable of resisting. They are both applicable in this case. You can take  
20 your choice. You don't need both, you can take your choice. A 115 pound  
21 lady versus a 200 pound man with a shotgun on his home turf, no one can  
22 resist that ver successfully.” (*Id.* at 24-25) (objected to; trial judge stated:  
23 “I'm not sure that I agree with your example ... but the instruction will speak  
24 for itself.”).

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

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

3 Floyd also contends that the prosecution improperly “attempted to shift the burden of proof”  
4 in making the following remarks in the State’s closing argument in the guilt phase of his trial:

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

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

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

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

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



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

5           That is how it’s done. It is called due process in this country. Whether you  
6 are a citizen or not, you are entitled to that due process and that’s what we have been  
7 through in this courtroom. As one gentleman said, we are not in Turkey, we are not  
8 in Iran, we are not wherever.

9           We are here in America. We have a due process clause that applies to  
10 everybody, no matter how heinous the crime. And it is because of that due process  
11 clause that we have gone through this week presenting the evidence to you so that  
12 when you do return the guilty verdicts, which I fully expect, based on the evidence,  
13 you can at least assure the world that we have provided him with the due process that  
14 our constitution demands that he be given. Thank you.

15 Respondents’ Exhibit 43, pp. 29-30.

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

19           (1)    “‘And the third mitigator is that the killing was random and without apparent  
20 motive. Nothing scares people more than the potential of random  
21 victimization. Let me repeat that. Nothing scares people more than the  
22 potential of random victimization.’” (Respondents’ Exhibit 51, p. 45)  
23 (objected to, and objection overruled);

24           (2)    “‘The victims were absolutely innocent. They were doing what we expected  
25 people to do. They were going to work, trying to feed their families, when  
26 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);

- 1 (4) “The defendant has a hollow soul, ladies and gentlemen. He doesn’t care who  
2 he hurts, when he hurts, or how he hurts as long as he can satisfy his own  
3 basic desires. He plays by his own rules and he doesn’t care who suffers or  
4 how much. Make no mistake about that. You are in the presence of the most  
5 dangerous man you will ever encounter in ... your lifetime.” (*Id.* at 55)  
6 (objected to, and objection overruled);
- 7 (5) “Whereas this defendant has a heart bent on destruction. A hollow soul. And  
8 he still has a hollow soul today. When he gave his allocution, when he got up  
9 here to say he was sorry, he said the right words, but you could tell none of  
10 them came from the heart. He didn’t look at the jury. He didn’t look at the  
11 victims. He didn’t even look at his mother. He just kind of looked out. As he  
12 did on June the 3rd. Sort of a blank stare, a monotone, ladies and gentlemen.  
13 The Zane Floyd that sits here today is the same Zane Floyd that was raping  
14 and killing on June 3rd.” (*Id.* at 60-61);
- 15 (6) “... [T]his coward ... This man who committed these cowardly acts and set out  
16 to kill himself whimpered out in front of the store and, as Mr. Bell [the other  
17 prosecutor] said, he tried to get away.” (*Id.* at 127-28) (objected to, and  
18 objection overruled);
- 19 (7) “These mitigators pale, pale in comparison to what you could pile up.  
20 Remember that table they had up here with all those things piled up on top?  
21 Take the average burglar that’s in the Nevada State Prison. It would be a pile  
22 twice that high. Why? Because you would look into the background and truly  
23 see some depravity and some neglect and disadvantage. This is  
24 embarrassing.” (*Id.* at 129);
- 25 (8) “They mentioned a 10 by 15 cell block. Give me a break. He wants to be on  
26 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).

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

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

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

5 I also rather expect we'll hear the ridiculous phrase "structured setting." The  
6 defense, I have no doubt, is going to come up and concede that he can't ever live in  
7 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.

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

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

16 Well, let's talk about the mitigating circumstances that might conceivably be  
17 argued by the defense that are provided by law.

18 The defendant has no significant criminal history. Well, you know, the State  
19 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.

20 The defendant was under extreme mental or emotional disturbance. Now,  
21 understand this: It's not clear whether that has to be simultaneously with the brutal  
22 killings at Albertson's or a more general proposition. But we do know this: The  
23 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.

24 Whether or not you believe that he was under significant emotional distress,  
25 it's up to you. Keep in mind when you're looking at that, by his own admission, any  
26 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.



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

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

8 MR. BELL [prosecutor]: .... If not this case, ladies and gentlemen, what case?  
9 If not this case, what case? If the conduct in this case is not sufficiently offensive or  
10 the loss not sufficiently devastating to merit the maximum penalty allowed by law,  
11 then come back and tell me, and while you’re at it, tell Leanne Leos, Mona Nall –

12 MR. BROWN [defense counsel]: Objection, your Honor.

13 THE COURT: Sustained.

14 MR. BELL: That there is a case that merits the maximum punishment  
15 because you’ve agreed to that when you were selected as jurors. But this is not the  
16 case. When you get back to the jury room with eight or ten or eleven of you and are  
17 convinced in your heart of hearts this is the case for the death penalty and two or  
18 three of you seem to have some difficulty on behalf of the citizens of this community,  
19 look at them and say, “If not this case, what case?”

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

26 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.

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

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

- 6 - "What wouldn't Danielle and Gina and Lani and their father Joseph give to  
7 see Luci smile just one more time?" (Respondents' Exhibit 51, p. 130); and
- 8 - "Thomas Darnell. I don't know how Mona Nall has done it. You know,  
9 when you go through the tremendous tragedies together that Mona has  
10 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).

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

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

17 What are the reasons, ladies and gentlemen, for imposing the death penalty?  
18 [Penologists] generally come up with two separate reasons for the death penalty:  
deterrence and punishment.

19 Deterrence because somehow it sends a message to others in our community,  
20 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.

21 MR. BROWN [defense counsel]: I think it's the message to the community  
22 argument, Judge.

23 THE COURT: I think he's organizing a period of chronology, and on that  
basis it's overruled.

24 MR. KOOT [prosecutor]: There is a message to everyone out there that if the  
25 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  
26 way too. He won't kill again no matter where he is, no matter what state of  
depression he suffers.

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

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

14 MR. KOOT [prosecutor]: Lastly, ladies and gentlemen, and it is always the  
15 case, that defense counsel attempts to make this more difficult than it already is, more  
difficult than it has to be.

16 Mr. Hedger [defense counsel] suggested, as did Mr. Brown [defense counsel],  
17 that you can take the, quote, easy road and impose death. That is not the easy road.  
18 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.

19 But you're not killing him. You are part of a shared process.

20 MR. BROWN [defense counsel]: Objection, Judge.

21 THE COURT: What is the objection?

22 MR. BROWN: Trying to spread out the responsibility in individualized  
23 considerations of the jurors who can't disburse that.

24 THE COURT: Overruled.

25 MR. KOOT: You are asked to render a verdict. The legislature through the  
26 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.

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

2 THE COURT: This is part of their duty.

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

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

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

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

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

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26



1           Regarding Claim 10C, Floyd’s claim that the State committed misconduct by failing to  
2 preserve his blood sample, the court finds that claim to be wholly unsupported and without merit.

3 Claim 10C is, in its entirety, as follows:

4           The state had a responsibility to preserve evidence. The state cannot be  
5 allowed to benefit by its failure to preserve evidence, particularly when the state’s  
6 case is strengthened, and the defendant is unfairly prejudiced.

7           In this case, the state failed to preserve and process the sample of Mr. Floyd’s  
8 blood taken for the purpose of drug and alcohol testing. It is the belief of Michael  
9 Floyd, Mr. Floyd’s father, that the state contaminated the blood sample taken from  
10 Mr. Floyd thereby preventing him from utilizing his own expert to conduct testing.  
11 *See Ex. 365 at ¶ 10.*

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

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

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

21           Regarding Claim 1D(1) -- Floyd’s claim that his trial counsel was ineffective for failing to  
22 object to prosecutorial misconduct alleged in Claim 10 -- the court first notes that defense counsel  
23 did in fact object to many of the prosecution’s alleged improper arguments identified in Claim 10A.  
24 To the extent Floyd contends that his counsel was ineffective for not objecting to other alleged  
25 improper prosecution arguments, or other alleged prosecutorial misconduct, the court finds that  
26 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

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

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

15         As the court understands Floyd’s motion for evidentiary hearing, he requests an evidentiary  
16 hearing, in part, with respect to Claim 1D(1), Claim 10, and the related part of Claim 17A, so that  
17 the court may “ascertain whether counsel had a strategic reason for failing to challenge these issues  
18 at the trial level and on direct appeal.” Reply in Support of Motion for Evidentiary (ECF No. 144),  
19 p. 2. The court finds that an evidentiary hearing is not warranted. As is discussed above, the court  
20 finds the state supreme court’s rulings on these claims to be objectively reasonable, and therefore  
21 rules that Floyd does not satisfy the standard imposed by 28 U.S.C. § 2254(d). Moreover, regarding  
22 the claims of ineffective assistance of counsel in Claims 10 and 1D(1), and the related part of Claim  
23 17A, the court’s rulings are based solely on the second prong of the *Strickland* standard, the  
24 prejudice prong. It does not matter to the court’s rulings on those claims whether or not counsel had  
25 a strategic reason for not further challenging, at trial or on direct appeal, prosecutorial misconduct  
26 alleged in Claim 10. In short, Floyd has not shown any need for an evidentiary hearing with respect

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

3 The court denies Floyd habeas corpus relief with respect to Claim 1D(1), Claim 10, and the  
4 Related Part of Claim 17A, and denies Floyd’s motion for  
5 Claim 1D(2), and the Related Part of Claim 17A

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

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

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

19 Exhibit 44, Instruction No. 37. Floyd asserts that “[b]y forbidding the sentencer to take sympathy  
20 into account, this language on its face precluded the jury from giving adequate consideration to the  
21 evidence concerning Mr. Floyd’s character and background, thus effectively negating the

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23 <sup>6</sup> This portion of Claim 1D, designated Claim 1D(2), is set forth in paragraph 176 of Floyd’s  
24 second amended habeas petition. In Claim 1D(2), Floyd incorporates all his allegations of improper jury  
25 instructions in Claim 6. In it’s ruling on the motion to dismiss, the court found that “[t]his claim was  
26 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.

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

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

6 The jury ... received a so-called “antisympathy instruction” in the guilt phase, which  
7 Floyd contends undermined the jury’s obligation to consider all mitigating evidence.  
8 We have ... rejected this contention where, as here, the jury was instructed to consider  
9 any mitigating circumstances. [Footnote: *See Wesley v. State*, 112 Nev. 503, 519,  
10 916 P.2d 793, 803-04 (1996).] Counsel had no basis to challenge [this instruction]  
11 and were not ineffective.

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

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

14 We also reject Parks’ contention that the antisympathy instruction runs afoul  
15 of [*Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104  
16 (1982)] because jurors who react sympathetically to mitigating evidence may  
17 interpret the instruction as barring them from considering that evidence altogether.  
18 This argument misapprehends the distinction between allowing the jury to consider  
19 mitigating evidence and guiding their consideration. It is no doubt constitutionally  
20 permissible, if not constitutionally required, *see Gregg v. Georgia*, 428 U.S. 153,  
21 189-195, 96 S.Ct. 2909, 2932-2935, 49 L.Ed.2d 859 (1976) (opinion of Stewart,  
22 Powell, and STEVENS, JJ.), for the State to insist that “the individualized assessment  
23 of the appropriateness of the death penalty [be] a moral inquiry into the culpability of  
24 the defendant, and not an emotional response to the mitigating evidence.”  
25 [*California v. Brown*, 479 U.S. 538, 545 (1987) (O’CONNOR, J., concurring)].  
26 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

1 the sentencing decision according to its own whims or caprice. *See id.*, at 541-543,  
2 107 S.Ct., at 839-840.

3 *Saffle*, 494 U.S. at 492-93; *see also Mayfield v. Woodford*, 270 F.3d 915 (9th Cir.2001) (declining to  
4 grant certificate of appealability with respect to the same issue), citing *Victor v. Nebraska*, 511 U.S.  
5 1, 13 (1994); *Johnson v. Texas*, 509 U.S. 350, 371-72 (1993); *California v. Brown*, 479 U.S. 538,  
6 542-43 (1987); *Williams v. Calderon*, 52 F.3d 1465, 1481 (9th Cir.1995).

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

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

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

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

25 Floyd contends that in the penalty phase the jury was not properly instructed  
26 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.

1 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:

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6 (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.

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9 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.”

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12 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.

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23 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.

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26 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:

1                   The law does not look at the number of mitigators versus the number  
2 of aggravators. It looks at the total weight. So what I'm telling you is take  
3 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 –

4                   Defense counsel objected: “Not an aggravator, Judge. Objection.” The district court  
5 sustained the objection “as to the form” of the prosecutor’s argument and told the  
6 jury: “The aggravating circumstances are those that Mr. Bell [the prosecutor] just  
7 talked about. If you find the aggravating circumstances outweigh the mitigating  
8 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).]

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

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

13                  To the extent that Floyd argues that federal law required such an instruction, and that his trial  
14 counsel should have requested the instruction based on federal law, Floyd has not pointed to any  
15 United States Supreme Court precedent requiring such an instruction. Floyd cites *Tuilaepa v.*  
16 *California*, 512 U.S. 967 (1994); *Arave v. Creech*, 507 U.S. 463 (1993); *Lowenfield v. Phelps*, 484  
17 U.S. 231 (1988); *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Zant v. Stephens*, 462 U.S. 862  
18 (1983); *Godfrey v. Georgia*, 446 U.S. 420 (1980); and *Furman v. Georgia*, 408 U.S. 238 (1972).  
19 *See Reply*, pp. 60-63. None of those cases, however, requires a jury instruction such as that  
20 suggested by Floyd.

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

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

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

16 Claim 4B(1)

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

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



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

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

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

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

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

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

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

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

25 Addressing first the claim that Schmidt's report and test results were  
26 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

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

3 *Black's Law Dictionary* defines "case in chief" as "[t]hat part of a trial in  
4 which the party with the initial burden of proof presents his evidence after which he  
5 rests." [Footnote: *Black's Law Dictionary* 216 (6th ed.1990).] The statutes in  
6 question refer to "the case in chief of the defendant" as well as "of the state," even  
7 though a criminal defendant normally has no burden of proof. It is clear that the  
8 statutes use the term "case in chief" to refer to either party's initial presentation of  
9 evidence, in contrast to either's presentation of rebuttal evidence. This meaning is  
10 consistent with the context of discovery: before trial a party should know and be able  
11 to disclose evidence it expects to present in its case in chief, whereas the need for and  
12 nature of rebuttal evidence is uncertain before trial. This meaning is also consistent  
13 with the use of the term in this court's case law. [Footnote: *See, e.g., Batson v. State*,  
14 113 Nev. 669, 677, 941 P.2d 478, 483 (1997).]

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

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

26 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

1 therefore introduced excerpts from the evaluation requested by Buchanan, which set  
2 forth the psychiatrist's "general observations about the mental state of petitioner but  
3 had not described any statements by petitioner dealing with the crimes for which he  
4 was charged." [Footnote: *Id.*] The Court concluded: "The introduction of such a  
5 report for this limited rebuttal purpose does not constitute a Fifth Amendment  
6 violation." [Footnote: *Id.* at 423-24, 107 S.Ct. 2906.] Also, since defense counsel  
7 had requested the psychological evaluation and was on notice that the prosecution  
8 would likely use psychological evidence to rebut a mental-status defense, the court  
9 concluded that there was no violation of the Sixth Amendment right to counsel.  
10 [Footnote: *Id.* at 424-25, 107 S.Ct. 2906.]

11 We conclude that under the circumstances of this case the State's use of  
12 evidence obtained from Floyd by his own expert did not violate Floyd's  
13 constitutional rights. We rely on a number of factors in reaching this conclusion.  
14 First, similar to *Buchanan*, the evidence was used only in rebuttal after Floyd  
15 introduced evidence of his mental status as a mitigating factor. Second, the district  
16 court restricted the State's use of evidence contained in the defense expert's report to  
17 the standardized psychological test results. Like *Buchanan*, this evidence did not  
18 describe any statements by Floyd dealing with his crimes which could incriminate  
19 him or aggravate the crimes, nor did it include any conclusions reached by the  
20 defense expert. Third, the jury was not informed that the source of the evidence was  
21 originally an expert employed by the defense, avoiding the risk of undue prejudice  
22 inherent in such information. [Footnote: *Cf. Lange v. Young*, 869 F.2d 1008, 1014  
23 (7th Cir.1989); *United States ex rel. Edney v. Smith*, 425 F.Supp. 1038, 1053  
24 (E.D.N.Y.1976).]

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

26 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).

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

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

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

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

3         Floyd also cites *Ake v. Oklahoma*, 470 U.S. 68 (1985), and *Smith v. McCormick*, 914 F.2d  
4 1153 (9th Cir.1990). In *Ake*, the Supreme Court held that “when an indigent defendant places his  
5 mental state at issue, ‘the State must, at a minimum, assure the defendant access to a competent  
6 psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and  
7 presentation of the defense.’” *Smith v. McCormick*, 914 F.2d at 1157 (quoting *Ake*, 470 U.S. at 83).  
8 In *Smith v. McCormick*, the Ninth Circuit Court of Appeals held that the *Ake* rule had been violated  
9 because, instead of appointing a defense psychiatrist for the defendant, the trial court appointed a  
10 “neutral” psychiatrist, who was to report the results of his examination directly to the court. *See*  
11 *Smith v. McCormick*, 914 F.2d at 1157 (“The right to psychiatric assistance does not mean the right  
12 to place the report of a “neutral” psychiatrist before the court; rather it means the right to use the  
13 services of a psychiatrist in whatever capacity defense counsel deems appropriate -- including to  
14 decide, with the psychiatrist’s assistance, not to present to the court particular claims of mental  
15 impairment.”). In this case, there was no violation of the rule of *Ake*; Floyd was provided ample  
16 psychiatric assistance. And, unlike in *Smith v. McCormick*, Floyd was not unfairly compelled to  
17 disclose any of his appointed doctors’ data or opinions; Floyd did so of his own accord, after  
18 designating them as testifying experts.

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

23         Claims 4B(5) and 9

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

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

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

5 Before trial, Floyd moved unsuccessfully to sever the counts relating to the  
6 events at his apartment from those relating to the events at the supermarket. Floyd  
7 contends that two independent episodes were involved and therefore joinder of the  
8 charges was improper and prejudiced him. He quotes the Supreme Court of  
9 California:

10 When a trial court considering a defendant's motion for severance of  
11 unrelated counts has determined that the evidence of the joined offenses is not  
12 "cross-admissible," it must then assess the relative strength of the evidence as  
13 to each group of severable counts and weigh the potential impact of the jury's  
14 consideration of "other crimes" evidence. I.e., the court must assess the  
15 likelihood that a jury not otherwise convinced beyond a reasonable doubt of  
16 the defendant's guilt of one or more of the charged offenses might permit the  
17 knowledge of the defendant's other criminal activity to tip the balance and  
18 convict him. If the court finds a likelihood that this may occur, severance  
19 should be granted.

20 [Footnote: *People v. Bean*, 46 Cal.3d 919, 251 Cal.Rptr. 467, 760 P.2d 996, 1006  
21 (1988) (citation omitted).] This appears to be a sound statement of law, but it is not  
22 applicable here. The California court was considering the joinder of "unrelated  
23 counts." We conclude that the counts here were related and that the evidence of each  
24 set of crimes was relevant and admissible to prove the other.

25 NRS 173.115 provides that multiple offenses may be charged in the same  
26 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.

1 at 1107, 968 P.2d at 309.] NRS 174.165(1) provides that if a defendant is prejudiced  
2 by joinder of offenses, the district court may order separate trials of counts “or  
3 provide whatever other relief justice requires.” Floyd quotes the Montana Supreme  
4 Court regarding the types of prejudice that can result from joinder of charges:

5 The first kind of prejudice results when the jury considers a person facing  
6 multiple charges to be a bad man and tends to accumulate evidence against  
7 him until it finds him guilty of something. The second type of prejudice  
8 manifests itself when proof of guilt on the first count in an information is used  
9 to convict the defendant of a second count even though the proof would be  
10 inadmissible at a separate trial on the second count. The third kind of  
11 prejudice occurs when the defendant wishes to testify on his own behalf on  
12 one charge but not on another.

13 [Footnote: *State v. Campbell*, 189 Mont. 107, 615 P.2d 190, 198 (1980).]

14 The decision to sever is within the discretion of the district court, and an  
15 appellant has the “heavy burden” of showing that the court abused its discretion.  
16 [Footnote: *Amen v. State*, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990).] To  
17 establish that joinder was prejudicial “requires more than a mere showing that  
18 severance might have made acquittal more likely.” [Footnote: *United States v.*  
19 *Wilson*, 715 F.2d 1164, 1171 (7th Cir.1983).] We conclude that Floyd has not shown  
20 that he was unfairly prejudiced by joinder of charges. The evidence of the burglary,  
21 murders, and attempted murder was overwhelming. The evidence of the kidnapping  
22 and sexual assaults was substantial and uncontradicted. He has not shown that the  
23 jury improperly accumulated evidence against him, that it used the proof of one count  
24 improperly to convict him of another count, or that the joinder prevented him from  
25 testifying on any charges. Thus the district court did not err in denying Floyd’s  
26 motion to sever the charges.

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

27 In challenging the Nevada Supreme Court’s ruling, Floyd cites *United States v. Lane*, 474  
28 U.S. 438 (1986). See Second Amended Petition, pp. 145, 192-94; Reply, pp. 54-56. However, the  
29 Ninth Circuit Court of Appeals has observed that the United States Supreme Court has never held  
30 that a state court’s denial of a motion to sever can, in itself, violate the federal constitution. See  
31 *Runnigeagle v. Ryan*, 686 F.3d 758, 776-77 (9th Cir.2012); *Collins v. Runnels*, 603 F.3d 1127,  
32 1131 (9th Cir.2010). Regarding *Lane*, the Supreme Court case cited by Floyd, and *Zafiro v. United*  
33 *States*, 506 U.S. 534 (1993), the court in *Runnigeagle* stated:

34 ... [W]e have explicitly concluded that *Zafiro* and *Lane* do not “establish a  
35 constitutional standard binding on the states and requiring severance in cases where  
36 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



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

3 *Runnigeagle*, 686 F.3d at 776-77. Therefore, in light of *Runnigeagle* and *Collins*, Floyd does not  
4 show the Nevada Supreme Court’s ruling to be contrary to, or an unreasonable application of, any  
5 “clearly established Federal law, as determined by the Supreme Court of the United States.” *See*  
6 28 U.S.C. § 2254(d).

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

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

13 Claim 5

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

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

17 The district court denied Floyd’s motion for a change of venue. He claims  
18 that this was error because jurors were biased by the extensive and prominent  
19 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.

20 NRS 174.455(1) provides that a criminal action “may be removed from the  
21 court in which it is pending, on application of the defendant or state, on the ground  
22 that a fair and impartial trial cannot be had in the county where the indictment,  
23 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  
24 inflammatory pretrial publicity but must demonstrate actual bias on the part of the  
25 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  
26 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).]

1           Floyd does not point to evidence that any empaneled juror was biased and  
2 does not even refer to the voir dire of the prospective jurors. Review of the voir dire  
3 shows that when asked about pretrial publicity, the jurors who were ultimately  
4 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.

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

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

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

16           Criminal defendants are entitled to “a fair trial by a panel of impartial, indifferent jurors.”  
17 *Hayes v. Ayers*, 632 F.3d 500, 507 (9th Cir.2011) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722  
18 (1961)); *see also Estrada v. Scribner*, 512 F.3d 1227, 1239-40 (9th Cir.2008) (even a single juror’s  
19 prejudice can violate the defendant’s right to an impartial jury). The Constitution does not,  
20 however, require that jurors “be totally ignorant of the facts and issues involved.” *Mu’Min v.*  
21 *Virginia*, 500 U.S. 415, 430 (1991) (internal quotation marks omitted); *see also Skilling v. United*  
22 *States*, 561 U.S. 358, 380-81 (2010). “The relevant question is not whether the community  
23 remembered the case, but whether the jurors ... had such fixed opinions that they could not judge  
24 impartially the guilt of the defendant.” *Mu’Min*, 500 U.S. at 430 (internal quotation marks omitted).

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

1 prejudicial and inflammatory media publicity about the crime.” *Id.* (quoting *Harris v. Pulley*, 885  
2 F.2d 1354, 1361 (9th Cir.1988)). However, a “presumption of prejudice ... attends only the extreme  
3 case.” *Skilling*, 561 U.S. at 381. Actual prejudice exists “when voir dire reveals that the jury pool  
4 harbors ‘actual partiality or hostility [against the defendant] that [cannot] be laid aside.” *Hayes*,  
5 632 F.3d at 508 (quoting *Harris*, 885 F.2d at 1363).

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

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

1 not act as impartial jurors, or that they were unable to put aside whatever they had heard about the  
2 case before trial and render an unbiased verdict. *See* Juror Questionnaire, Petitioner’s Exhibit 391  
3 (Juror McGee’s juror questionnaire); Transcript of Jury Trial, July 11, 2000, Respondents’ Exhibit  
4 37, pp. 33-37 (Juror McGee’s voir dire); Petitioner’s Exhibit 392 (Juror Caven’s juror  
5 questionnaire); Respondents’ Exhibit 37, pp. 49-51 (Juror Caven’s voir dire); Petitioner’s Exhibit  
6 393 (Juror Luebstorff’s juror questionnaire); Respondents’ Exhibit 38, pp. 89-98 (Juror Leubstorff’s  
7 voir dire). The court finds objectively reasonable the Nevada Supreme Court’s determination that  
8 there was no actual juror bias against Floyd.

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

12         In support of his presumed prejudice argument, Floyd has submitted, as exhibits, copies of  
13 some 115 newspaper articles concerning his case. *See* Petitioner’s Exhibits 150-263. In their  
14 answer, respondents stated that those articles “are not part of any state court record.” Answer, p. 27.  
15 In his reply, Floyd did not respond to that assertion. *See* Reply, pp. 51-54. In fact, of the 115  
16 newspaper articles submitted by Floyd as exhibits, only three of them were before the state courts:  
17 one of the two articles in Petitioner’s Exhibit 190, the article in Petitioner’s Exhibit 210, and the  
18 article in Petitioner’s Exhibit 211. *See* Motion for Change of Venue, Respondents’ Exhibit 69;  
19 Opposition to Motion for Change of Venue, Respondents’ Exhibit 75; Supplemental Motion for  
20 Change of Venue and Reply to State’s Opposition, Respondents’ Exhibit 77; Supplemental Exhibit  
21 to Motion for Change of Venue, Respondents’ Exhibit 81. “[R]eview under § 2254(d)(1) is limited  
22 to the record that was before the state court that adjudicated the claim on the merits.” *Cullen*, 131  
23 S.Ct. at 1398. In *Cullen*, the Court reasoned that the “backward-looking language” present in  
24 § 2254(d)(1) “requires an examination of the state-court decision at the time it was made,” and,  
25 therefore, the record under review must be “limited to the record in existence at that same time i.e.,  
26 the record before the state court.” *Id.* Therefore, in ruling on this claim under 28 U.S.C. § 2254(d),

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

7 In *Skilling*, commenting on its previous holdings in *Rideau v. Louisiana*, 373 U.S. 723  
8 (1963), *Estes v. Texas*, 381 U.S. 532 (1965), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the  
9 Court stated:

10 In each of these cases, we overturned a “conviction obtained in a trial atmosphere that  
11 [was] utterly corrupted by press coverage”; our decisions, however, “cannot be made  
12 to stand for the proposition that juror exposure to ... news accounts of the crime ...  
13 alone presumptively deprives the defendant of due process.” *Murphy v. Florida*, 421  
14 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*.

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

22 Floyd does not show the Nevada Supreme Court’s ruling on his claim in Claim 5 of his  
23 second amended petition to be contrary to, or an unreasonable application of, any “clearly  
24 established Federal law, as determined by the Supreme Court of the United States.” *See* 28 U.S.C.  
25 § 2254(d). The court denies Floyd habeas corpus relief with respect to Claim 5.  
26



1 \* \* \*

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

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

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

7 Floyd also claims that his counsel were ineffective in failing to challenge two  
8 remarks by the prosecutor in the opening statement of the guilt phase. The prosecutor  
9 was describing two of the murder victims. He told the jury that “Chuck Leos was 41,  
10 just celebrated his first anniversary to his wife, Leanne,” and that “Lucy Tarantino ...  
11 was in her early sixties. She was a wife, mother of three, grandmother.” Floyd  
12 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.

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

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

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

4 Q. You're Thomas Darnell's mother?

5 A. Yes, I am.

6 \* \* \*

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

8 A. He was extremely unique.

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

10 A. He was born premature, and when he was five weeks old, he contacted  
11 meningococcal meningitis. At that time was when only – this is one of the seven  
12 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.

13 He was rushed to Children's Hospital in San Diego and they gave me his life  
14 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  
15 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.

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

18 Tommy lived, but it followed many years of medical rehabilitation, and at the  
19 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.

20 When he was six years old, I enrolled him in Ansel Tyne School Hospital in  
21 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  
22 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  
23 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.

24 And they lay and they lift one finger. They can't feed themselves. They have  
25 to be fed. They go to a point of learning to roll over, to crawl, to learning to feed,  
walk forward for balance.  
26



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

6                   Q.     The meningitis left some neurological damage?

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

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

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

15                   A.     Yes.

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

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

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

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

25                   Q.     Go ahead.

26                   A.     Just a brief comment.

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

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

35                   Q.     Did Tommy succeed in graduating from high school?

36                   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

1 regular classes, special education, the modified classes, but he graduated with a  
2 regular high school diploma. To get there, he would sit at night, sometimes until  
3 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.

4 And during this time that he was trying to work to get a diploma for himself,  
5 part of his school program, he tutored every day at the elementary school, in math of  
6 course, to help kids that were like him at one time, but so that they could do  
7 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.

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

9 A. Yes.

10 Q. After his father was killed, you remarried?

11 A. Yes, I did.

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

13 A. Well, he never referred to him as a stepdad. His relationship with my  
14 husband is very -- was very, very close. He always called him Dad from the  
15 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.

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

18 For his niece, Tori lived at home since she was a couple months old. She's 15  
19 now. She's gone from being a straight A student to this year she's -- her grades went  
20 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."

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

23 A. Seemed like a life of trauma.

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

25 A. Tommy was coming home from work at the bus stop and two thugs  
26 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

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

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

5 THE COURT: Sustained.

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

8 THE COURT: I'll permit some leading.

9 MR. BELL: Thank you.

10 BY MR. BELL:

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

13 A. We were held hostage for approximately seven hours.

14 Q. Was your daughter sexually assaulted?

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

17 MR. BROWN: Your Honor, I apologize.

18 THE WITNESS: -- my son was kidnapped.

19 BY MR. BELL:

20 Q. Tommy?

21 A. Yes.

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

24 BY MR. BELL:

25 Q. Tommy was kidnapped?

26 A. Yes, he was.

Q. How long was he held by the kidnapers?

A. Over 30 days.

Q. And he was at some point released?

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

2 Q. Did that change Tommy, this incident?

3 A. They tried to cut his ears off.

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

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

10 A. Yes. Three blocks away.

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

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

13 Q. At the time of his death?

14 A. Yes.

15 Q. And his job was to?

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

20 \* \* \*

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

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

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

26 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.

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

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

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

14 Q. So then what did you do?

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

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

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

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

37 Q. Is there anything else you want to share?

38 A. (No audible response.)

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

40 THE WITNESS: No.

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

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

5 Floyd also contends that the prosecution committed misconduct by eliciting  
6 improper victim impact testimony.

7 Mona Nall, the mother of murder victim Thomas Darnell, testified during the  
8 penalty phase. She related an incident in which her son was assaulted and kidnapped.  
9 When she began to tell how the kidnappers came to her own house, the district court  
10 initially sustained an objection by defense counsel. After the prosecutor said the  
11 testimony would become relevant to show who the victim was, the court said it would  
12 permit some more questioning. The witness then testified that she, her husband, their  
13 son, and their 16-year-old daughter were held hostage for seven hours and the  
14 daughter was sexually assaulted. Defense counsel again objected, and the court  
15 asked the prosecutor, "If you have something of relevance to show ..., would you get  
16 to that point, please?" The witness then said that her son was held hostage for over  
17 30 days and was finally released in the Utah desert after his abductors tried to cut off  
18 his ears.

19 Victim impact testimony is permitted at a capital penalty proceeding under  
20 NRS 175.552(3) and under federal due process standards, but it must be excluded if it  
21 renders the proceeding fundamentally unfair. [Footnote: *Leonard v. State*, 114 Nev.  
22 1196, 1214, 969 P.2s 288, 300 (1998).] The United States Supreme Court has stated  
23 that victim impact evidence during a capital penalty hearing is relevant to show each  
24 victim's "uniqueness as an individual human being." [Footnote: *Payne v. Tennessee*,  
25 501 U.S. 808, 823, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).] Admissibility of  
26 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

1 rendered the proceeding fundamentally unfair; therefore, reversal of the sentence is  
2 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).]

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

4 In *Payne*, the Supreme Court reconsidered its holdings in *Booth v. Maryland*, 482 U.S. 496  
5 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), that the Eighth Amendment prohibited  
6 a capital sentencing jury from considering “victim impact” evidence relating to the personal  
7 characteristics of the victim and the emotional impact of the crimes on the victim’s family. *See*  
8 *Payne*, 501 U.S. at 817. The *Payne* Court pointed out that “the assessment of harm caused by the  
9 defendant as a result of the crime charged has understandably been an important concern of the  
10 criminal law, both in determining the elements of the offense and in determining the appropriate  
11 punishment.” *Id.* at 819. The Court commented as follows on victim impact evidence in capital  
12 sentencing proceedings:

13 Payne echoes the concern voiced in *Booth*’s case that the admission of victim  
14 impact evidence permits a jury to find that defendants whose victims were assets to  
15 their community are more deserving of punishment than those whose victims are  
16 perceived to be less worthy. *Booth, supra*, 482 U.S., at 506, n. 8, 107 S.Ct., at 2534  
17 n. 8. As a general matter, however, victim impact evidence is not offered to  
18 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.

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

22 The Court continued:

23 We are now of the view that a State may properly conclude that for the jury to  
24 assess meaningfully the defendant’s moral culpability and blameworthiness, it should  
25 have before it at the sentencing phase evidence of the specific harm caused by the  
26 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

1 omitted). By turning the victim into a “faceless stranger at the penalty phase of a  
2 capital trial,” *Gathers*, 490 U.S., at 821, 109 S.Ct. at 2216 (O’CONNOR, J.,  
3 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.

4 *Id.* The Court concluded:

5 We thus hold that if the State chooses to permit the admission of victim  
6 impact evidence and prosecutorial argument on that subject, the Eighth Amendment  
7 erects no per se bar. A State may legitimately conclude that evidence about the  
8 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.

9 *Id.* at 827.

10 In *Payne*, the Court cautioned, however: “In the event that evidence is introduced that is so  
11 unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the  
12 Fourteenth Amendment provides a mechanism for relief. *See Darden v. Wainwright*, 477 U.S. 168,  
13 179-183, 106 S.Ct. 2464, 2470-2472, 91 L.Ed.2d 144 (1986).” *Payne*, 501 U.S. at 825. It is upon  
14 that statement in *Payne* that Floyd bases his claim. Floyd claims that Nall’s testimony was so  
15 unduly prejudicial that it rendered his trial fundamentally unfair.

16 Certainly, Nall’s testimony was moving. But the question here is not how powerful the  
17 testimony was; the question is whether or not it was “unduly prejudicial.” *See Payne*, 501 U.S. at  
18 825 (emphasis added). When Floyd went to the grocery store to shoot random people, and shot  
19 Darnell in the back, he killed an extraordinary individual. Darnell’s story -- one of courage,  
20 perseverance, and survival -- reflected his “uniqueness as an individual human being.” *See Payne*,  
21 501 U.S. at 823. This court does not read *Payne* to mean that, because of the very moving nature of  
22 Darnell’s life story, the Due Process Clause should have prevented the prosecution from informing  
23 the jury who he was. This was not *undue* prejudice, in this court’s view.

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



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

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

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

### 18 Claim 13

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

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

23 Floyd argues that before the State can allege aggravating circumstances and  
24 seek the death penalty, a grand jury or a justice court must first find probable cause  
25 for the circumstances. He cites the Fifth Amendment to the United States  
26 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

1 actions by information following preliminary examination and finding of probable  
2 cause, rather than by grand jury indictment).] Floyd’s argument has no merit.

3 The United States Supreme Court has stated: “Aggravating circumstances are  
4 not separate penalties or offenses, but are ‘standards to guide the making of [the]  
5 choice’ between the alternative verdicts of death and life imprisonment.” [Footnote:  
6 *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  
7 does not constitute a separate crime that requires a finding of probable cause under  
8 the U.S. or Nevada constitutions.

9 Floyd also relies on the Supreme Court’s holding in *Jones v. United States*  
10 that “under the Due Process Clause of the Fifth Amendment and the notice and jury  
11 trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that  
12 increases the maximum penalty for a crime must be charged in an indictment,  
13 submitted to a jury, and proven beyond a reasonable doubt.” [Footnote: 526 U.S.  
14 227, 243 n. 6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999); see also *Apprendi v. New*  
15 *Jersey*, 530 U.S. 466, 478, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).] *Jones* does  
16 not support Floyd’s proposition either. The Court emphasized that its holding in  
17 *Jones* did not apply to aggravating circumstances because “the finding of aggravating  
18 facts falling within the traditional scope of capital sentencing [is] a choice between a  
19 greater and lesser penalty, not ... a process of raising the ceiling of the sentencing  
20 range available.” [Footnote: *Jones*, 526 U.S. at 251, 119 S.Ct. 1215; see also  
21 *Apprendi*, 530 U.S. at 496, 120 S.Ct. 2348 (“[T]his Court has previously considered  
22 and rejected the argument that the principles guiding our decision today render  
23 invalid state capital sentencing schemes requiring judges, after a jury verdict holding  
24 a defendant guilty of a capital crime, to find specific aggravating factors before  
25 imposing a sentence of death.”)].

26 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

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

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

8 Claims 1J and 16

9 In Claim 1(J), Floyd claims:

10 Mr. Floyd’s trial attorneys’ performance fell below the professional standard  
11 expected of an attorney representing a capital defendant. No qualified trial attorney  
12 would fail to take all of the steps referenced above before presenting the claim to the  
13 jury considering the death penalty.

14 Had Mr. Floyd’s trial, direct-appeal, and state post-conviction attorneys  
15 complied with their state and federal constitutional obligation to render effective  
16 assistance of counsel, Mr. Floyd would not have been convicted of first-degree  
17 murder and would not have received a sentence of death. Mr. Floyd was deprived his  
18 state and federal constitutional right to effective assistance of counsel, a fair trial and  
19 reliable sentencing proceeding, due process of law and equal protection. Mr. Floyd is  
20 entitled to relief in the form of a new trial and a new sentencing proceeding.

21 Second Amended Petition, p. 82. And, in Claim 16, Floyd claims that his conviction and death  
22 sentence are unconstitutional “due to the cumulative errors in the admission of evidence and  
23 instructions, gross misconduct by state officials and witnesses, and the systematic deprivation of  
24 Mr. Floyd’s right to the effective assistance of counsel.” *Id.* at 238. The court reads Claims 1J and  
25 16 to assert that, when all the errors in Floyd’s trial are considered together, there was constitutional  
26 error warranting habeas corpus relief.

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

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

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

10 The evidence against Floyd in the guilt phase of his trial was overwhelming. There was no  
11 legitimate factual dispute with regard to whether or not Floyd committed the acts that formed the  
12 basis for the charges against him. It was proven, beyond any reasonable dispute, that Floyd  
13 kidnapped and sexually assaulted the woman from the outcall service. *See* Testimony of Tracie  
14 Rose Carter, Respondents' Exhibit 40, pp. 18-134; Testimony of Rena Rubalcaba, Exhibit 38,  
15 pp. 160-80; Testimony of Linda Ebbert, Respondents' Exhibit 40, pp. 134-45; Testimony of Maria  
16 Thomas, Respondents' Exhibit 40, pp. 145-51. It was undisputed that Floyd entered the Albertson's  
17 supermarket with a modified shotgun and shot and killed four people, and shot and attempted to kill  
18 a fifth. *See, e.g.*, Exhibit 38, p. 153 (defense counsel stating in opening statement: "our client,  
19 Mr. Floyd, does not contest the fact that he went into Albertson's on June 3rd, 1999, and shot five  
20 people, killing four and wounding the fifth."); *see also id.* at 153-54 (defense counsel stating in  
21 opening statement: "As you know, this case really is a penalty case. It's about determining what's  
22 the appropriate punishment for Mr. Floyd. But our system of justice and the mechanisms involved  
23 with that require us to go through this portion of the trial in order to get to the penalty portion of the  
24 trial. That's just the way it is. At penalty phase there will be other witnesses presented, there will  
25 be other evidence presented to you that you will be able to consider in the penalty."); *see also*  
26 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.").

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

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

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1           Psychologist Dr. Dougherty testified and gave his opinion that Floyd  
2           suffers from the mental disease of mixed personality disorder with  
3           borderline, paranoid, and depressive features. In addition, I confirmed  
4           the prior diagnosis of attention deficit hyperactivity disorder ... It's my  
5           opinion ... that Mr. Floyd's reasoning was impaired as to rational  
6           thought at times, and at times he did not act knowingly and purposely  
7           at the time of the alleged incident. His symptoms were exacerbated by  
8           a long history of the ingestion of drugs and alcohol.

9           Floyd spoke in allocution and took responsibility for what he had done and  
10          said he could not tell why he did it. He said he was sorry and would regret his  
11          actions for the rest of his life.

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

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

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

#### 20          Certificate of Appealability

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

25          The standard for the issuance of a certificate of appealability requires a "substantial showing  
26          of the denial of a constitutional right." 28 U.S.C. §2253(c). The Supreme Court interpreted  
27          28 U.S.C. §2253(c) as follows:

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

1 petition on procedural grounds without reaching the prisoner's underlying  
2 constitutional claim, a COA should issue when the prisoner shows, at least, that  
3 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.

4 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79  
5 (9th Cir.2000).

6 The court finds that, applying these standards, a certificate of appealability is warranted with  
7 respect to the following of Floyd's claims in his second amended habeas petition:

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

14 The court declines to issue a certificate of appealability with respect to Floyd's other claims.

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

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

19 **IT IS FURTHER ORDERED** that petitioner is granted a certificate of appealability with  
20 respect to the following claims in his second amended petition for writ of habeas corpus:

- 21 - the claim that the prosecutors made improper closing arguments  
22 (Claim 10A);
- 23 - the claim regarding the testimony of a prosecution expert witness  
24 based in part on test results obtained by a defense expert, who was  
25 identified by the defense as a testifying expert, but who, after the  
26 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).



1 With respect to all other claims in petitioner's second amended habeas petition, petitioner is denied a  
2 certificate of appealability.

3 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment accordingly.

4 Dated this 22nd day of September, 2014.  
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7 UNITED STATES DISTRICT JUDGE

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