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DISTRICT COURT
CLARK COUNTY, NEVADA

ZANE MICHAEL FLOYD,
#1619135

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-21-832952-W
99C159897

DEPT NO: XVII

STATE'S RESPONSE TO PETITIONER'S THIRD PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: JULY 2, 2021
TIME OF HEARING: 8:30AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction).

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On June 8, 1999, the State charged ZANE MICHAEL FLOYD (hereinafter "Petitioner") by way of Criminal Complaint with four counts of Murder with Use of a Deadly Weapon, three counts of Attempt Murder with Use of a Deadly Weapon, five counts of Sexual Assault with Use of a Deadly Weapon, one count of Burglary While in Possession of a Firearm, and one count of First Degree Kidnapping with Use of a Deadly Weapon. The State also filed a Notice of Reservation to Seek the Death Penalty. On June 25, 1999, the State filed an Amended Criminal Complaint adding an additional charge of Attempt Murder with Use of a Deadly Weapon.

On June 28, 1999, the State charged Petitioner by way of Information, and two amendments thereafter, as follows: Count 1 – Burglary While in Possession of a Firearm (Felony – NRS 205.060); Count 2 – Murder with Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165); Count 3 – Murder with Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165); Count 4 – Murder with Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165); Count 5 – Murder with Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165); Count 6 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165, 193.330); Count 7 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165, 193.330); Count 8 – First Degree Kidnapping with Use of a Deadly Weapon (Felony – NRS 200.310, 200.320, 193.165); Count 9 – Sexual Assault with Use of a Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165); Count 10 –Sexual Assault with Use of a Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165); Count 11 – Sexual Assault with Use of a Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165); and Count 12 – Sexual Assault with Use of a Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165). On July 6, 1999, the State filed a Notice of Intent to Seek the Death Penalty.

Petitioner's jury trial commenced on July 11, 2000. On July 19, 2000, the jury returned a verdict finding Petitioner guilty on all counts. At the penalty hearing, the State introduced

three aggravating circumstances in support of a death sentence. On July 21, 2000, the same jury returned a verdict of death.

On August 11, 2000, Petitioner filed a Motion for New Trial. The State filed its Opposition on August 17, 2000. On August 21, 2000, the district court denied the Motion for New Trial. The Order was filed on August 24, 2000.

On August 31, 2000, the district court adjudicated Petitioner guilty, and sentenced him to death for Counts 2, 3, 4, and 5. The Judgment of Conviction and the Order of Execution were filed on September 5, 2000.

On September 11, 2000, Petitioner filed a direct appeal with the Nevada Supreme Court. The Nevada Supreme Court affirmed Petitioner's conviction on March 13, 2002. The Court denied Petitioner's subsequent Motion for Rehearing on May 7, 2002. Appellate counsel then filed a Petition for Writ of Certiorari to the United States Supreme Court, which was denied on February 24, 2003. Remittitur issued on March 26, 2003.

On June 19, 2003, Petitioner filed his first Petition for Writ of Habeas Corpus (Post-Conviction). The State filed its Response on July 24, 2003. Petitioner then filed a Supplemental Petition through counsel, David Schieck, Esq., on October 6, 2004. The State filed its Supplemental Opposition on December 7, 2004. On January 18, 2005, the district court denied Petitioner's Petition. The Findings of Fact, Conclusions of Law and Order was filed on February 4, 2005.

Petitioner filed a Notice of Appeal on March 9, 2005, appealing the denial of his post-conviction Petition. On February 16, 2006, the Nevada Supreme Court affirmed the denial of Petitioner's Petition for Writ of Habeas Corpus. Remittitur issued on April 14, 2006.

On April 14, 2006, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court and requested stay and abeyance. Stay and abeyance was granted on April 25, 2007, for exhaustion of state court remedies.

Petitioner then filed his second successive Petition for Writ of Habeas Corpus (Post-Conviction) on June 8, 2007. The State filed its Opposition on August 18, 2007. Petitioner filed his Reply on August 28, 2007. Following argument by both parties on December 13,

2007, the district court ordered an evidentiary hearing. Following the hearing on February 22, 2008, where Petitioner's former counsel, David Schieck, Esq. testified, the district court denied Petitioner's second Petition. The Findings of Fact, Conclusions of Law and Order was filed on April 2, 2008.

On April 7, 2008, Petitioner filed a Notice of Appeal from the denial of his second Petition for Writ of Habeas Corpus (Post-Conviction). On November 17, 2010, the Nevada Supreme Court affirmed the district court's denial of the second Petition. Remittitur issued February 18, 2011. The Nevada Supreme Court also denied Petitioner's request for Rehearing.

On September 22, 2014, the United States District Court denied Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction). Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit on October 22, 2014. On October 11, 2019, the United States Court of Appeals for the Ninth Circuit issued an Order affirming the United States District Court's denial of Petitioner's Petition for Writ of Habeas Corpus.

On November 2, 2020, the United States Supreme Court denied Petitioner's Petition for Writ of Certiorari. On November 5, 2020, Mandate was filed giving the judgment of the United States Court of Appeals for the Ninth Circuit full effect.

On April 14, 2021, the State filed a Motion Seeking an Execution Warrant. The same day, Petitioner filed a Motion to Transfer Case Under EDCR 1.60(H) and Motion to Disqualify the Clark County District Attorney's Office. On April 15, 2021, the State filed a Motion for the Court to Issue Second Supplemental Order of Execution and Second Supplemental Warrant of Execution. On April 21, 2021, Petitioner filed an Opposition to Motion for the Court to Issue Second Supplemental Order of Execution and Second Supplemental Warrant of Execution. Petitioner filed an Amended Opposition on April 26, 2021.

On April 26, 2021, the State filed an Opposition to Petitioner's Motion to Disqualify the Clark County District Attorney's Office and a Response to his Motion to Transfer Case Under EDCR 1.60(H). Petitioner filed both his Replies on April 29, 2021. On May 5, 2021, the State filed its Reply to Petitioner's Opposition to Motion for the Court to Issue Second Supplemental Order of Execution and Second Supplemental Warrant of Execution. On April

10, 2021, the State filed an Addendum to State's Motion for the Court to Issue Second Supplemental Order of Execution and Second Supplemental Warrant of Execution.

On May 11, 2021, Petitioner filed a Motion to Strike, or Alternatively, Motion to Stay the Second Supplemental Order of Execution and Second Supplemental Warrant of Execution. The State filed its Opposition to the Motion to Strike on May 13, 2021. Petitioner filed a Reply on May 20, 2021. On June 4, 2021, this Court denied Petitioner's Motion to Strike.

Following a hearing on May 14, 2021, this Court denied both Petitioner's Motion to Disqualify the Clark County District Attorney's Office and Motion to Transfer Case Under EDCR 1.60(H). This Court entered the Decision and Order Denying Petitioner's Motion to Disqualify the Clark County District Attorney's Office on May 18, 2021.

On April 15, 2021, Petitioner filed his third Petition for Writ of Habeas Corpus (Post-Conviction). Following a hearing on May 6, 2021, in the United States District Court, District of Nevada, Petitioner filed the instant Amended Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Third Petition") on May 11, 2021.

ARGUMENT

I. PETITIONER'S CLAIMS 2, 3, AND 4 ARE NOT COGNIZABLE CLAIMS FOR A HABEAS PETITION

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

Claims 2, 3, and 4 in his Petition are claims that are outside the realm permitted by statute. Petitioner argues in Claim 2 that his due process is being deprived because he has not had an opportunity to seek clemency. In Claim 3 he argues that he cannot be executed at Ely State Prison. Finally in Claim 4 he argues that his execution would constitute cruel and unusual punishment. None of these three claims have anything to do with the validity of his judgment

of conviction or sentence as required by NRS 34.720. Moreover, as to Claim 4, "[A] claim challenging the constitutionality of Nevada's lethal-injection protocol is not cognizable in a postconviction petition for writ of habeas corpus." McConnell v. State, 125 Nev. 243, 212 P.3d 307 (2009) In denying the petition, the McConnell Court held that the petition was challenging the manner in which a death sentence was to be carried out, which is separate from the validity of the judgment of conviction or sentence. Id.

The instant third post-conviction Petition is not the proper vehicle to challenge his ability to seek clemency (Claim 2). It is not the proper vehicle to challenge where his execution will take place (Claim 3). It is not the proper vehicle to challenge the execution protocol (Claim 4). Petitioner's substantive claims of why this Court should not sign the Order of Execution and Warrant should not be raised in a post-conviction Petition and should be raised by challenging the Order itself. A post-conviction habeas is not the proper remedy. Therefore, Claims 2, 3, and 4 should all be dismissed as non-cognizable claims.

II. THIS THIRD PETITION IS TIME-BARRED

Petitioner's instant third Petition for Writ of Habeas Corpus was not filed within one year of the filing of the Remittitur. Thus, this third Petition is time-barred. Pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
>
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late despite evidence presented by the Petitioner that he purchased postage through the prison and mailed the petition within the one-year time limit.

In the instant case, Petitioner filed a direct appeal, and Remittitur issued on March 26, 2003. Petitioner filed the instant third Amended Petition on May 11, 2021—over eighteen years after the Remittitur from his direct appeal. Therefore, the instant third Petition is time-barred. Dickerson, 114 Nev. at 1087, 967 P.2d at 1133–34. Absent a showing of good cause to excuse this delay, the instant Petition must be dismissed.

III. THIS THIRD PETITION SHOULD BE DISMISSED BECAUSE IT IS SUCCESSIVE AND AN ABUSE OF THE WRIT

This third petition is successive because Petitioner failed to raise any of these grounds in a prior petition or direct appeal. NRS 34.810 gives the district court authority to dismiss a petition.

Pursuant to NRS 34.810:

> 1. The court shall dismiss a petition if the court determines that:
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief; or
> (3) Raised in any other proceeding that the petitioner has taken to secure relief from the petitioner's conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner

None of these claims were (1) presented to the trial court; (2) raised on direct appeal or a prior petition; or (3) raised in any other proceeding. The Nevada Supreme Court has held that "[A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier

proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

Furthermore, substantive claims are beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Under NRS 34.810(3), a Petitioner may only escape these procedural bars if they meet the burden of establishing good cause and prejudice. Where a Petitioner does not show good cause for failure to raise claims of error upon direct appeal, the district court is not obliged to consider them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

Here, Petitioner was convicted at trial and proceeded to file a direct appeal, a first postconviction petition for a writ of habeas corpus, a second postconviction for a writ of habeas corpus, a federal petition for a writ of habeas corpus, and now the instant third postconviction petition for writ of habeas corpus. Petitioner has never raised any of these grounds on any prior petitions despite having the ability to do so.

NRS 34.810(2) reads:

> A second or successive petition *must be dismissed* if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(emphasis added).

Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v.

State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that "where a Petitioner previously has sought relief from the judgment, the Petitioner's failure to identify all grounds for relief in the first instance should weigh against consideration of the successive motion.")

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Here, this is Petitioner's third post-conviction Petition. Petitioner did not raise the instant claims on direct appeal, in his first Petition, in his second Petition, or in a federal Petition. Instead, Petitioner raises these claims for the first time now, over eighteen years later. Third Petition, at 20-22. Accordingly, this third Petition is an abuse of the writ, procedurally barred, and therefore, must be dismissed.

IV. APPLICATION OF THE PROCEDURAL BARS IS MANDATORY

The Nevada Supreme Court has held that the district court has a *duty* to consider whether a Petitioner's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the Petitioner's petition was "untimely, successive, and an abuse of the writ" and that the Petitioner failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the district court and ordered the Petitioner's petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074. Therefore, application of the procedural bars is mandatory.

V. THE STATE AFFIRMATIVELY PLEADS LACHES

Certain limitations exist on how long a Petitioner may wait to assert a post-conviction request for relief. Consideration of the equitable doctrine of laches is necessary in determining whether a Petitioner has shown 'manifest injustice' that would permit a modification of a sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated: "Application of the doctrine to an individual case may require consideration of several factors, including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the Petitioner's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev. 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction…" The Nevada Supreme Court has observed, "[P]etitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a

workable system dictates that there must exist a time when a criminal conviction is final." Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the statute requires the State plead laches. NRS 34.800(2).

The State affirmatively pleads laches in this case given that over eighteen years have elapsed between the issuing of Remittitur and the filing of the instant third Petition. In order to overcome the presumption of prejudice to the State, Petitioner has the heavy burden of proving a fundamental miscarriage of justice. See Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). Based on Petitioner's representations and on what he has filed with this Court thus far, Petitioner has failed to meet that burden.

As discussed earlier, the one-year time bar began to run from the date the of the Remittitur on March 26, 2003. The third Petition was filed on May 11, 2021 – *over eighteen years* later. Because more than eighteen years have elapsed between the Remittitur and the filing of the instant third Petition, NRS 34.800 directly applies in this case, and a presumption of prejudice to the State arises. Therefore, pursuant to NRS 34.800, this third Petition should be dismissed under the doctrine of laches.

VI. PETITIONER CANNOT ESTABLISH GOOD CAUSE TO OVERCOME THE MANDATORY PROCEDURAL BARS

A showing of good cause and prejudice may overcome procedural bars. However, Petitioner cannot demonstrate good cause to explain why his Petition is untimely.

"To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim *was not reasonably available at the time of default*." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Rather, to find good cause, there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

A petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506-07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Further, to establish prejudice, the Petitioner must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

In the instant case, Petitioner cannot establish good cause to overcome the mandatory procedural bars because he cannot demonstrate that this claim was not reasonably available at the time of default. Clem, 119 Nev. at 621, 81 P.3d at 525.

A. Claim One

Petitioner asserts that he is raising Claim One now for the first time in the instant third Petition because the claim is based on "new scientific evidence demonstrating the equivalence" of fetal alcohol spectrum disorder (FASD) as an intellectual disability. Third Petition, at 20.

The "new scientific evidence" that Petitioner relies on are two separate Declarations of Dr. Natalie Novick Brown from October 17, 2006, and February 24, 2021. See Petitioner's "Exhibit 1" and "Exhibit 2." The first Declaration, "Exhibit 1" from October 17, 2006, explains that the Las Vegas Federal Public Defender, Capital Habeas Unit, retained Dr. Novick Brown to examine Petitioner's FASD. See "Exhibit 1" at 1. "Exhibit 1" was prepared for the purposes of Petitioner's second Petition, which was previously denied by the district court. Petitioner raised similar claims regarding his FASD in his second Petition, claiming that trial

counsel was ineffective for failing to investigate and present evidence of his FASD at trial. Second Petition, filed June 8, 2007, at 75-99. Similarly, Petitioner raised the issue that he was actually innocent of the offense because he committed it in a "dissociative fugue" based on his FASD. Id. at 109-110.

The second Declaration, "Exhibit 2" from February 24, 2021, was once again prepared by Dr. Novick Brown for the Las Vegas Federal Public Defender, Capital Habeas Unit, to address whether Petitioner's FASD is consistent with the DSM-5, and if it compares to an intellectual disability. See "Exhibit 2" at 2. Dr. Novick Brown's second Declaration and Petitioner's third Petition both revolve around the Diagnostic and Statistical Manual of Mental Disorders 5 (DSM-5) to prove that Petitioner's FASD renders him ineligible for execution. Petitioner constantly refers to this as "new scientific evidence," but fails to address why this claim is only being raised now for the first time eighteen years later. The DSM-5 was last updated in 2013. Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) (May 18, 2013). Petitioner fails to address how this is "new scientific evidence" when this was available for him to raise in 2013—over eight years ago.

Petitioner relies on Dr. Novick Brown's second Declaration to claim that he "meets the current diagnosis under the DSM-5 for the CNS impairment in FASD." Third Petition, at 27. He claims that his "FASD diagnosis under the DSM-5, ND-PAE, is a brain-based, life-long impactful, disorder deserving of the classification 'ID Equivalence.'" Id. at 32. Even if this were true, Petitioner does not and cannot address why he failed to raise this for the last eight years when this evidence was available in the DSM-5 as of 2013. Thus, this is hardly "new scientific evidence" to establish good cause to overcome the mandatory procedural bars.

Moreover, Petitioner claims that because of this DSM-5 "new scientific evidence" from 2013, he is ineligible for execution because of Roper v. Simmons, 543 U.S. 551, 578, 125 S. Ct. 1183, 1200 (2005). Third Petition, at 33-36. Petitioner claims that executing him with the United States Supreme Court precedent of Roper would be cruel and unusual punishment. Id. at 33-38. It is undisputed that Roper held that execution of individuals who were under 18 years of age at the time of their capital crimes is prohibited by the Eighth Amendment. Roper,

at 551, 125 S. Ct. at 1184. And it is undisputed that Petitioner committed these murders at the age of twenty-three. Third Petition, at 36. Petitioner claims that this "rationale of *Roper* extends to individuals age twenty-three because the human brain continues to develop beyond the age of eighteen," without any legal support that this assertion is true. Id. at 34. It is simply false that Petitioner is exempt from execution because he committed these murders at the age of twenty-three. Even if this were the case, once again, Petitioner cannot explain how Roper establishes good cause to overcome the mandatory procedural bars.

Petitioner claims that executing him would constitute cruel and unusual punishment because of his diagnosis under the DSM-5 and his mental age under Roper. Third Petition, at 37-38. However, Petitioner cannot demonstrate to this Court how this is "new scientific evidence" and could not have been raised earlier. At the absolute earliest, Petitioner could have raised these claims from the DSM-5 and Roper in 2013 when the DSM-5 was last updated. But, strategically, Petitioner through the Federal Public Defender's Office once again asks Dr. Novick Brown for a second Declaration in an attempt to delay his execution. The State has routinely raised this issue to this Court for the last two months that Petitioner is repeatedly filing anything he can to delay his execution further. The instant third, procedurally barred Petition is nothing short of a meritless attempt to further delay the execution. Therefore, Petitioner cannot demonstrate good cause to overcome the mandatory procedural bars and explain why he waited to provide this "new scientific evidence" to this Court until immediately after the State filed the Order of Execution. As such, this Petition must be dismissed.

B. Claim Two

Petitioner claims that he is raising Claim Two for the first time in the instant third Petition because the "factual basis for Claim [Two] was not known until the State announced it intended to seek a warrant for Floyd's execution without giving Floyd the opportunity to pursue clemency." Third Petition, at 21. After the jury returned a verdict of death against Petitioner back in 2000, he was obviously aware of the potential to be executed. Petitioner had the potential to seek clemency since 2000—he did not have to wait till the State filed the Warrant of Execution to pursue clemency.

In Nevada, the Pardons Board's constitutional power to grant pardons and commutations of sentences is exclusive. Nev. Const. art. 5, § 14. There is no due process right for a Petitioner to clemency. Niergarth v. State, 105 Nev. 26, 28, 768 P.2d 882, 883 (1989). Moreover, the Nevada Supreme Court has held that parole is not a constitutional right, but a right bestowed by "legislative grace." Goldsworthy v. Hannifin, 86 Nev. 252, 256, 468 P.2d 350, 353 (1970). Thus, Petitioner has no right to clemency or to apply for a Pardon before this Court can issue the Order of Execution or sign the Warrant. By waiting twenty-one years to apply for clemency, Petitioner cannot establish good cause to explain why this claim was untimely and just raised for the first time in his third Petition.

C. Claim Three

Petitioner claims that he can establish good cause to overcome the mandatory time-bar of his third claim because "[t]he State has only just notified Floyd that it intends to effectuate his execution at the Ely State Prison." Third Petition, at 21. Petitioner's third claim is essentially the same claim he raised in his recent Motion to Strike, which this Court has denied.

Petitioner claims that the execution is precluded under NRS 176.355(3), because all executions "must take place at the state prison." Third Petition, at 46-48. Petitioner asserts that the closed Nevada State Prison in Carson City is the only state prison in Nevada where the execution can be held. Petitioner concedes that there are two Nevada "state prisons," including Ely State Prison and High Desert State Prison. Id. at 47. It is unclear why the execution must take place at the decommissioned Nevada State Prison, and not any other state prison in Nevada.

Moreover, the Nevada State Legislature approved $860,000 in 2015 to fund a brand-new execution chamber at Ely State Prison. See www.reviewjournal.com/crime/nevadas-new-86000-execution-chamber-is-finished-but-gathering-dust/. If the legislature's intent were for executions to take place only at the Nevada State Prison in Carson City, the legislature would not have approved almost a million dollars to construct a new execution chamber at Ely State Prison. Petitioner has clearly known of the potential to be executed at Ely State Prison for

almost six years once the legislature approved almost a million dollars to construct the new execution chamber.

Therefore, Petitioner cannot establish good cause to overcome the mandatory procedural bars for this claim. Petitioner claims that the State has only "just notified" him of the intent to execute at Ely State Prison. However, Petitioner has been on notice that the execution will take place at Ely State Prison once the legislature approved almost a million dollars for the new execution chamber. Petitioner has already raised this claim in his Motion to Strike, which was denied by this Court. This is simply another claim he is raising attempting to delay the execution. Thus, Petitioner cannot establish good cause for this claim.

D. Claim Four

Lastly, Petitioner's fourth claim is newly raised in this Petition because it is based on a hearing held in federal court on May 6, 2021. Third Petition, at 22; See Petitioner's "Exhibit 4." Petitioner claims that the testimony from the hearing proves that NDOC is not capable of conducting an execution which complies with state and federal constitutions. Third Petition, at 22. Petitioner's assertion is without merit and cannot establish good cause to overcome the mandatory procedural bars.

NRS 176.355(1) provides that a sentence of death in Nevada "must be inflicted by an injection of a lethal drug." NRS 176.355(2)(b) requires the Director of the Department of Corrections to "[s]elect the drug or combination of drugs to be used for the execution after consulting with the State Health Officer." However as mentioned in State v. McConnell, the Nevada Supreme Court concluded that the method of lethal injection is not appropriate for a petition for a writ of habeas corpus, and it is certainly not appropriate to support any good cause for this delay. 120 Nev. 1043, 1056, 102 P.3d 606, 616 (2004). Moreover, the United States Supreme Court has held that the ultimate authority to determine the lethal injection protocol is left to the Department of Corrections. Hill v. McDonough, 547 U.S. 573, 577, 126 S. Ct. 2096, 2100 (2006). The specific protocol under which Petitioner's execution is to be carried out is within the discretion of the Nevada Department of Corrections. NRS 176.355.

Therefore, the method of lethal injection itself is not unconstitutional and is determined by NDOC.

Petitioner unjustifiably asserts that his execution is unconstitutional because "NDOC is not prepared to conduct his execution in a manner that complies with constitutional requirements." Third Petition, at 50. Petitioner repeatedly asserts that NDOC is not prepared to go forward with an execution—then cites to Director Daniels testimony where he testifies that they are "still in the process of looking at the various drugs to be used." Id. Not once does Director Daniels testify that the execution will be unconstitutional, in fact if anything the Director said if there were an order to execute, he would lawfully perform his duty. Instead, Director Daniels testified that the protocol has not been finalized. "Exhibit 4" at 40. Director Daniels testimony only explains that NDOC is running through protocols and procedures and that there are a lot of moving parts NDOC is processing while finalizing the protocol and execution. Id. at 40-44. Petitioner claims that his execution will be unconstitutional, when it is undisputed the protocol has not been finalized yet. Thus, it is unclear how the Petitioner can claim his execution will be unconstitutional, when the final protocol has not been determined.

In sum, Petitioner's instant third Petition is nothing more than another attempt to further delay his execution. This Petition amounts to a time-barred, successive, meritless post-conviction habeas petition. Moreover, he cannot establish good cause to overcome the procedural bars for all four claims. These claims are meritless and further examples of how Petitioner is making any argument to further delay his execution. Petitioner has exhausted all appellate remedies. Therefore, Petitioner cannot establish good cause to explain why his Petition was untimely, and the instant third Petition must be denied as procedurally barred.

E. Newly raised Claim 5

The State is aware and understands that Petitioner intends to file an amended petition that incorporates a claim based on the recently issued Order in Petrocelli v. State, No. 79069, 2021 WL 2073794 (May 21, 2021). Although the State understands there will be additional briefing, the verdict forms in Petrocelli were entirely different from the ones used in Petitioner's conviction.

The fact that this case was recently decided, however, was not an impediment external to the defense in not raising this claim earlier. The verdict form in this case has not changed since Petitioner's conviction. Thus, there is simply no good cause for this delay.

Furthermore, the issue in Petrocelli was that multiple verdict forms were proffered to the jury which all indicated that the aggravators outweighed the mitigators. Thus three total but separate verdict forms were offered, but all of the forms erroneously carried the language that the aggravating circumstances exist but that the mitigating circumstances do not outweigh the aggravating circumstances regardless of the verdict chosen. These forms were an error of law in that the only verdict in which the aggravating circumstances outweigh the mitigating circumstances is in a verdict imposing the death sentence, not life with or without the possibility of parole.

This situation is entirely different from the Petitioner Floyd's case because first the jury were required to identify the aggravators for each of the four victims. Then the jury appropriately selected the only option possible where the aggravators outweighed the mitigators and imposed a sentence of death. The verdict form used here was not one that would have led to unnecessary confusion as did the multiple verdict forms that were used in Petrocelli.

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CONCLUSION

Petitioner's instant third Petition is nothing more than a meritless argument to further delay his execution. Petitioner cannot establish good cause to overcome the mandatory procedural bars. Therefore, the State respectfully requests that Petitioner's third and procedurally barred Petition for Writ of Habeas Corpus (Post-Conviction) be DENIED.

DATED this 4th day of June, 2021.

Respectfully submitted,

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BY /s/ Alexander Chen
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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and foregoing, was made this 4th day of June 2021, by email to:

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