IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE MICHAEL FLOYD,
Appellant,
vs.
WILLIAM A. GITTERE, WARDEN, ELY STATE PRISON; AARON D. FORD, ATTORNEY GENERAL; AND THE STATE OF NEVADA,
Respondents.

No. 83436

FILED

NOV 21 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant Zane Floyd was convicted of eleven felony offenses after sexually assaulting a woman and then killing four people and wounding another in a shooting at a grocery store. A jury sentenced Floyd to death for each of the four murders. This court affirmed the convictions and sentences on direct appeal. *Floyd v. State (Floyd I)*, 118 Nev. 156, 42 P.3d 249 (2002), *abrogated by Grey v. State*, 124 Nev. 110, 118, 178 P.3d 154, 160 (2008). Floyd unsuccessfully challenged the convictions and death sentences in two prior postconviction habeas petitions. *Floyd v. State (Floyd III)*, No. 51409, 2010 WL 4675234 (Nev. Nov. 17, 2010) (Order of Affirmance); *Floyd v. State (Floyd II)*, No. 44868 (Nev. Feb. 16, 2006) (Order of Affirmance). Floyd filed a third postconviction habeas petition, which the district court denied as procedurally barred without conducting an evidentiary hearing. This appeal followed.

On appeal, Floyd argues that the district court erred in refusing to transfer the postconviction habeas petition to the department in which

Floyd was tried and convicted and in rejecting claims challenging the Nevada Pardons Board's regulations, the location where the death sentences may be carried out, Floyd's eligibility for the death penalty, and the validity of verdict forms used during the penalty phase of the trial. We conclude that these arguments do not warrant relief and therefore affirm the district court's order.

The district court did not err in denying the motion to transfer

Floyd argues that the district court erred in denying a motion to transfer the postconviction habeas petition to Department 5, where Floyd was tried and convicted. Floyd litigated this issue in an original petition for a writ of mandamus, which this court denied on the merits. *Floyd v. Eighth Jud. Dist. Ct.*, No. 83167, 2022 WL 578450 (Nev. Feb. 24, 2022) (Order Denying Petition). There, we concluded that NRS 176.495 and NRS 176.505(1) refer to the entire judicial district rather than a single department within that district and that NRS 34.730(3)(b) contemplates that a postconviction habeas petition may be assigned to a district court judge who was not the trial judge. *Id.* at *2.

Floyd raises the same arguments that this court rejected in the original proceeding and on rehearing in that matter. *See Floyd v. Eighth Jud. Dist. Ct.*, No. 83167 (Nev. March 25, 2022) (Order Denying Rehearing). Floyd neither cites new authority nor makes a new argument that undermines the reasoning upon which this court previously rejected the arguments. Therefore, we will not revisit this issue. *See Hsu v. Cty. of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 728-29 (2007) (observing that this "court may revisit a prior ruling when (1) subsequent proceedings produce substantially new or different evidence, (2) there has been an intervening

change in controlling law, or (3) the prior decision was clearly erroneous and would result in manifest injustice if enforced." (quotation marks omitted)).

Floyd's challenge to the Nevada Pardons Board's regulations is not cognizable in a postconviction habeas petition

Floyd argues that the Nevada Pardons Board's regulations violate due process because they restrict access to clemency. In particular, Floyd takes issue with two regulations. First is NAC 213.107, which provides that, with some exceptions, "the Board will not consider an application for clemency if other forms of judicial or administrative relief are reasonably available to the applicant." Second, and in the same vein, is NAC 213.120(1), which provides that the Board "will not consider an application for a pardon or the commutation of a punishment submitted by a person sentenced to the death penalty unless the person has exhausted all available judicial appeals." Floyd asserts that these regulations do not clearly define what appeals must be exhausted and are inconsistent with each other (other forms of relief that are "reasonably available" vs. "all available judicial appeals"). We conclude this claim is not properly raised in a postconviction habeas petition.

NRS 34.724(1) provides that a postconviction habeas petition may be used to assert two types of claims: (1) that a conviction was obtained or a sentence was imposed in violation of the Nevada or Federal Constitution or of state law or (2) that the petitioner's time served has not been properly calculated. Floyd's claims about the regulations governing clemency do not relate to how the conviction was obtained, the sentences were imposed, or the computation of the time that Floyd has served. *See Jeremias v. State*, 134 Nev. 46, 59, 412 P.3d 43, 54 (2018) ("Clemency is not required to make a death penalty scheme constitutional."); *see also Nunnery v. State*, 127 Nev. 749, 782-83, 263 P.3d 235, 257 (2011) (rejecting the

argument that Nevada's death penalty scheme is unconstitutional because, as a practical matter, executive clemency does not exist).

Floyd nonetheless argues that claims based on clemency can be asserted in a postconviction habeas petition, pointing to *Niergarth v. State*, 105 Nev. 26, 768 P.2d 882 (1989), and *Miller v. Ignacio*, 112 Nev. 930, 921 P.2d 882 (1996), as examples. We conclude that Floyd's reliance on *Niergarth* and *Miller* is misplaced.

The postconviction habeas petition addressed in *Niergarth* was filed before NRS 34.724 was adopted. *See* 1991 Nev. Stat., ch. 44, § 4, at 75. The case says nothing about that statute or the scope of claims that are cognizable in a postconviction habeas petition under current Nevada law. Regardless, the substance of the claim in *Niergarth* was the computation of the sentence as it related to parole eligibility, not a claim about the clemency process. *See Niergarth*, 105 Nev. at 28, 768 P.2d at 883. The petition at issue in *Niergarth* thus falls within the scope of NRS 34.724 had that been the operative statute at the time.

The habeas petition at issue in *Miller* was an original petition filed in this court that challenged a statute restricting the Pardons Board's authority to commute certain sentences. *See Miller*, 112 Nev. at 932, 921 P.2d at 882-83. As such, NRS 34.724 did not apply. *See* NRS 34.720 (providing that NRS 34.720 through NRS 34.830 "apply only to petitions for writs of habeas corpus" that "[r]equest[ ] relief from a judgment of conviction or sentence in a criminal case" or "[c]hallenge[ ] the computation of time that the petitioner has served pursuant to a judgment of conviction"). Thus, like *Niergarth*, the decision in *Miller* says nothing about NRS 34.724.

Because Floyd's claim about the Pardons Board's regulations falls outside the scope of a postconviction habeas petition under NRS 34.724, we conclude that the district court did not err in rejecting the claim.

Floyd's challenge to the place of execution is not cognizable in a postconviction habeas petition

Floyd argues that NRS 176.355(3) prohibits an execution from occurring anywhere other than *the* Nevada State Prison, which is located in Carson City. This claim is not cognizable in a postconviction habeas petition because it does not challenge the validity of the conviction or sentence or the computation of time served. *See* NRS 34.724(1). Floyd's complaint is about where the death sentence may be carried out, not whether it was imposed in violation of the federal or state constitution or state law. *Cf. McConnell v. State*, 125 Nev. 243, 249, 212 P.3d 307, 311 (2009) (holding that a challenge to the execution protocol does "not implicate the validity of the death sentence and therefore falls outside the scope of a post-conviction petition for a writ of habeas corpus"). This court also rejected the same argument on the merits in denying a writ petition filed by Floyd. *Floyd v. Eighth Jud. Dist. Ct.*, No. 83225, 2022 WL 575630 (Nev. Feb. 24, 2022) (Order Denying Petition). Floyd has offered no reasons to relitigate this issue.

Floyd's challenges to the death sentences are procedurally barred

Floyd also raises two claims related to the death sentences: that he is categorically ineligible for the death penalty and that the verdict forms used during the penalty phase were improper. Those claims are procedurally barred. In particular, Floyd's third petition was untimely given that it was filed 18 years after the remittitur issued on direct appeal. NRS 34.726(1). The petition was successive because Floyd previously litigated two postconviction petitions and constituted an abuse of the writ

because it raised new claims that could have been litigated in prior petitions. NRS 34.810(1)(b)(2); NRS 34.810(3). Accordingly, the petition was subject to dismissal absent a showing of good cause and actual prejudice. NRS 34.726(1); NRS 34.810(1)(b), (4).

Fetal alcohol spectrum disorder

Floyd asserts that fetal alcohol spectrum disorder (FASD) makes him ineligible for the death penalty under the Eighth Amendment to the United States Constitution for two reasons.[1] First, Floyd argues that he is intellectually disabled under NRS 174.098 and therefore ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). Second, Floyd argues alternatively that offenders with FASD are functionally equivalent to an intellectually disabled offender or a juvenile offender, such that the same reasons for prohibiting execution of those offenders applies to offenders with FASD. We conclude that the district court did not err in determining that this claim is procedurally barred.

Floyd did not plead sufficient facts to demonstrate good cause

Floyd asserts that new research showing that FASD is equivalent to intellectual disability provides good cause to raise this claim in an untimely and successive petition. We disagree for two reasons.

First, Floyd does not cite any new legal authority to suggest that any court has treated FASD as functionally equivalent to intellectual disability or youth such that it makes a defendant categorically ineligible

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[1]Although Floyd also refers to the Nevada Constitution's prohibition of "cruel or unusual punishments," Nev. Const. art. 1, § 6, he offers no meaningful analysis of the state provision, what additional protection it might afford, or what different analytical framework should be used to address challenges under the state provision. We therefore do not address it separately from the Eighth Amendment challenge.

for the death penalty. Second, the primary basis for Floyd's argument to expand the categorical exclusions in prior Supreme Court precedent to include FASD—his own FASD diagnosis—has been available since 2006. That diagnosis had even been the basis for an actual-innocence claim in Floyd's second postconviction petition. *Floyd III*, 2010 WL 4675234, at *2. Although the expert declaration supporting the third petition is more thorough than the one drafted in 2006, most of the research on which it relies was available several years before Floyd filed the third petition. And the two sources published within a year before Floyd filed the third petition are merely cumulative of older referenced publications. Therefore, there is insufficient evidence of new scientific developments to support a conclusion that the FASD argument only became available within the year before Floyd filed the at-issue petition. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003) (holding that allegations of good cause may not themselves be procedurally defaulted).

Floyd did not plead sufficient facts to show actual prejudice

To demonstrate actual prejudice, Floyd must satisfy the definition of intellectual disability in NRS 174.098(7) or demonstrate that he suffers from FASD and offenders with FASD should be categorically excluded from the death penalty regardless of whether they are intellectually disabled. Floyd pleaded sufficient facts to show that he suffers from FASD. We conclude, however, that Floyd failed to allege sufficient facts to show he is intellectually disabled or that existing precedent could be properly extended to categorically exclude offenders with FASD from imposition of the death penalty. We address each argument—intellectual disability and new categorical exclusion—in turn.

Intellectual disability

The Supreme Court held in *Atkins* that offenders who are intellectually disabled are categorically excluded from the death penalty under the Eighth Amendment. 536 U.S. at 321. "Intellectually disabled" is defined in NRS 174.098(7) as "significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period." Thus, intellectual disability has three criteria under Nevada law—intellectual-functioning deficits, adaptive deficits, and onset of those deficits during the developmental period. *See Ybarra v. State*, 127 Nev. 47, 56-57, 247 P.3d 269, 275-76 (2011). Because we conclude that Floyd failed to allege sufficient facts to satisfy the first component of the inquiry, we need not address the other components.

The first component—significant subaverage intellectual functioning—is not defined in NRS 174.098. The clinical definition of "subaverage intellectual functioning" is "an IQ score that is approximately 2 standard deviations or more below the mean." Am. Ass'n on Intellectual & Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* 29 (12th ed. 2021) (hereinafter AAIDD-12). Two standard deviations below the mean (100) is approximately 30 points, which equates to a score of approximately 70 points or lower. *Hall v. Florida*, 572 U.S. 701, 711-12 (2014); *Ybarra*, 127 Nev. at 54-55, 247 P.3d at 274. An IQ score, however, "should be read not as a single fixed number but as a range" that accounts for the test's standard error of measurement or SEM. *Hall*, 572 U.S. at 712-13. Thus, an IQ score of 75 on a test with a ±5 SEM reflects a range between 70 and 80. And when the lower end of that range falls two standard deviations below the mean, the person has significant subaverage intellectual functioning. *Moore v.*

Texas, 581 U.S. 1, 13-14 (2017); *see also Ybarra*, 127 Nev. at 54-55, 247 P.3d at 274.

Floyd's IQ scores do not fall within the range for intellectual-functioning deficits. Floyd had IQ scores of 101, 94, 102, and 115. Even accounting for the SEM, the lower ends of the ranges associated with those scores are well above 70.[2] Floyd's IQ scores thus do not require that we move on to consider the adaptive functioning component of the intellectual-disability framework. *Cf. Moore*, 581 U.S. at 14 (explaining that "Moore's IQ score of 74, adjusted for the standard error of measurement, yields a range of 69 to 79" and "[b]ecause the lower end of Moore's score range falls at or below 70, the [court] had to move on to consider Moore's adaptive functioning").

We acknowledge that evidence other than IQ tests may be considered in determining whether a person has intellectual-functioning deficits. *Ybarra*, 127 Nev. at 55, 247 P.3d at 274. Looking to the other evidence offered by Floyd, the allegations still fall short. Generally, historical testing found some deficiency in Floyd's attention, academic achievement, memory and learning, visuospatial construction, motor coordination, executive functioning, communication, daily living skills, and socialization. Nevertheless, many of Floyd's academic and memory test scores hover around average on their respective scales. And although Floyd

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[2]The record does not indicate the SEM for each respective test. But generally, the SEM for "well-standardized IQ tests" is typically between three and five points. Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. Rich. L. Rev. 811, 835 (2007). For purposes of this disposition, we have assumed the higher SEM of ±5 applies to all of the tests.

had been recommended for special education in the first grade and repeated the second grade, records suggest this was due to attention deficit hyperactivity disorder and behavioral issues as opposed to significant subaverage intellectual functioning.

In sum, even considering the evidence of intellectual functioning aside from IQ scores, Floyd did not plead sufficient facts to demonstrate subaverage intellectual functioning as required by NRS 174.098. Floyd thus did not demonstrate ineligibility for capital punishment under NRS 174.098 and *Atkins*.

Categorical exclusion for offenders with FASD

Floyd argues that offenders with FASD should be categorically excluded from the death penalty under the Eighth Amendment regardless of whether they meet the criteria for intellectual disability. In doing so, Floyd asserts that this court should "extend" the Supreme Court decisions holding that the Eighth Amendment prohibits the death penalty for persons who are intellectually disabled (*Atkins*) or who were juveniles when the crime was committed (*Roper v. Simmons*, 543 U.S. 551 (2005)), to include offenders with FASD. We decline to do so.

The relevant inquiry under the Eighth Amendment is two-fold. The first part of the inquiry looks at "objective indicia of consensus" as to whether a particular punishment is disproportionate, "as expressed in particular by the enactments of legislatures that have addressed the question." *Roper*, 543 U.S. at 564. In the second part of the inquiry, the court "determine[s], in the exercise of [its] own independent judgment," whether the particular punishment is disproportionate. *Id.* That inquiry considers "the culpability of the [class of] offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question" and "whether the challenged sentencing practice serves

legitimate penological goals." *Graham v. Florida*, 560 U.S. 48, 67 (2010). Considering both parts of the inquiry under the Eighth Amendment, we conclude that Floyd failed to demonstrate that offenders with FASD must be categorically excluded from the death penalty.

As to the first part of the Eighth Amendment inquiry, Floyd has offered no evidence of a national consensus that the death penalty is a disproportionate punishment for individuals with FASD. Although the twenty-three States[3] that do not have the death penalty are relevant, Floyd has not identified any States *with* the death penalty that have excluded offenders with FASD from the penalty's reach. *Cf. Roper*, 543 U.S. at 564 (observing that "30 States prohibit the juvenile death penalty" which included "12 that had rejected the death penalty altogether, and 18 that maintain it but . . . exclude juveniles from its reach"); *Atkins*, 536 U.S. at 313-16 (same calculations as to exclusion of intellectually disabled). Considering this national landscape, we are not convinced that Floyd has demonstrated objective indicia of a consensus that the death penalty is a disproportionate punishment for offenders with FASD.

As to the second part of the Eighth Amendment inquiry, we acknowledge that Floyd has identified some similarities between offenders with FASD and juveniles or the intellectually disabled when it comes to executive functioning deficits. *See, e.g.*, Kelly Herrmann, Note, *Filling the Cracks: Why Problem-Solving Courts Are Needed to Address Fetal Alcohol Spectrum Disorders in the Criminal Justice System*, 18 Scholar: St. Mary's L. Rev. & Soc. Just. 241, 270 (2016); Jerrod Brown et al., *FASD and the Courts A Reference for Legal Professionals*, 72 Bench & B. Minn. 24, 26 (Nov.

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[3]Death Penalty Information Center, *State by State*, https://deathpenaltyinfo.org/states-landing (last visited Feb. 13, 2024).

2015); *see also* Larry Burd & William Edwards, *Fetal Alcohol Spectrum Disorders Implications for Attorneys and the Courts*, 34 Crim. Just., Fall 2019, 21, 26 (2019) (stating that those with FASD "demonstrate a social incompetence that often manifests as gullibility"). Nevertheless, we are not convinced that those similarities compel the conclusion that offenders with FASD are categorically excluded from the death penalty under the Eighth Amendment.

First, both *Atkins* and *Roper* addressed categories of offenders that are identifiable by objective criteria and share characteristics that make the death penalty excessive when applied to those groups. Floyd has not alleged sufficient facts to show that FASD is as identifiable and quantifiable as intellectual disability or age. Instead, FASD is a collective term for "a group of conditions that can occur in a person who has been exposed to alcohol before birth," including physical impairments, behavioral issues, and learning disabilities. Centers for Disease Control and Prevention (CDC), *About Fetal Alcohol Spectrum Disorders (FASDs)*, https://www.cdc.gov/fasd/about/index.html (last visited June 25, 2024). Floyd's own expert even acknowledged that "FASD tends to be a hidden condition." FASD covers such a vast range of presentations that it is one of the primary causes of intellectual disabilities, while at the same time "most people with FASD will live and die without ever having received a diagnosis of FASD." Burd & Edwards, *supra*, at 24 (quoting A.E. Chudley, *Diagnosis of Fetal Alcohol Spectrum Disorder. Current Practices and Future Considerations*, 96 Biochem. Cell Biology 231 (2018)).

Second, considerations other than executive functioning deficits played an important part in the Supreme Court's decisions in *Roper* and *Atkins*. For example, in *Roper*, the Court observed that juvenile offenders

are more vulnerable to negative influences because they lack the power to extricate themselves from those settings. 543 U.S. at 570. More importantly, juvenile offenders possess a greater potential to reform themselves as "the impetuousness and recklessness that may dominate in younger years can subside." *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)). And in *Atkins*, the Court pointed to intellectual deficits that make offenders who are intellectually disabled less capable of appreciating "the possibility of execution as a penalty." *Atkins*, 536 U.S. at 320. Further, offenders who are intellectually disabled are less able to meaningfully assist their counsel, and they face a greater risk that their demeanor as witnesses may not convey remorse in the eyes of neurotypical jurors. *Id.* at 320-21. Floyd has not alleged that similar factors are at play when it comes to offenders with FASD.

As Floyd did not allege sufficient facts to demonstrate prejudice (i.e., that Floyd is intellectually disabled or that offenders with FASD should be categorically excluded from the death penalty), the district court did not err in denying this claim as procedurally barred.

Penalty phase verdict forms

Floyd argues that the verdict forms provided to the jury during the penalty phase were misleading and therefore the death sentence is invalid. As good cause to excuse the delay in raising this claim and the failure to raise it on direct appeal or in a prior petition, Floyd points to this court's decision in *Petrocelli v. State*, No. 79069, 2021 WL 2073794 (Nev. May 21, 2021) (Order of Reversal and Remand).

Floyd's reliance on *Petrocelli* as good cause is flawed. *Petrocelli* is unpublished and therefore does not establish mandatory precedent. *See* NRAP 36(c)(2) ("An unpublished disposition, while publicly available, does not establish mandatory precedent except in a subsequent stage of a case in

which the unpublished disposition was entered, in a related case, or in any case for purposes of issue or claim preclusion or to establish law of the case."). *Petrocelli* also does not establish a new rule with retroactive application on collateral review; instead, it applied an existing statute, NRS 175.554(4), to conclude that the unused non-death verdict forms, which included language about the conditions necessary to warrant a death sentence, were erroneous. *Petrocelli*, 2021 WL 2073794, at *1. Floyd could have made the same argument on direct appeal or in a timely postconviction habeas petition.

Floyd further failed to demonstrate prejudice. Floyd did not allege that the same problematic verdict forms in *Petrocelli* were used in the penalty phase of Floyd's trial. The death sentence verdict forms included in the record accurately state Nevada law. In particular, they include the weighing determination required for a death sentence but nonetheless acknowledge that the jury could impose a lesser sentence even after making the requisite weighing determination to impose a death sentence. *See Barlow v. State*, 138 Nev. 207, 210, 507 P.3d 1185, 1192 (2022) ("If the jurors unanimously agree that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances, they may impose a death sentence, but they are not obligated to do so." (internal citation omitted)); *Bennett v. State*, 111 Nev. 1099, 1110, 901 P.2d 676, 683 (1995) (observing that even if jurors unanimously find there are no mitigating circumstances sufficient to outweigh the aggravating circumstances, they "still [have] the discretion to return a penalty other than death"). In fact, those forms are virtually identical to part of the verdict form this court recently approved. *See Barlow*, 138 Nev. at 222, 507 P.3d at 1200 ("Section IV: Sentencing Decision (death sentence available)" (emphasis omitted)).

Even assuming that similar unused verdict forms were given in this case, Floyd's mere assertion that this error was not harmless falls short of the burden of pleading sufficient facts to demonstrate prejudice. Floyd failed to allege how the defense was impacted or that the evidence at the penalty hearing was susceptible to the alleged error on the verdict form. Further, Floyd has not included necessary portions of the record or attempted to show prejudice, which was also his burden. *See McClendon v. Collins*, 132 Nev. 327, 333, 372 P.3d 492, 496 (2016) (recognizing appellant's responsibility to include parts of the record necessary for this court's review and that this court presumes the missing portions support the district court's decision).

Having considered Floyd's contentions and concluded that they do not warrant relief, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Cadish

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Stiglich

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Pickering

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Herndon

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Lee

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Parraguirre

_____, J.
Bell

cc: Hon. Michael Villani, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk