THIS IS A CAPITAL CASE

No. ________________________________

In the Supreme Court of the United States

JUSTIN ANDERSON,

Petitioner

v.

DEXTER PAYNE, Director,
Arkansas Division of Correction,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

Trial counsel for the defendant in this capital case learned from four witnesses that the defendant's mother had a drinking problem, including one witness who described her as an "alcoholic." Despite that knowledge, the attorney conducted no investigation into whether the defendant had a Fetal Alcohol Spectrum Disorder and never asked the defendant's parents if the defendant's mother drank during her pregnancy. Habeas counsel's investigation of these matters yielded the mother's admission that she drank during pregnancy and led to a diagnosis of brain damage induced by fetal-alcohol exposure. State postconviction counsel failed to raise the sentencing ineffectiveness claim in state court and 28 U.S.C. § 2254(d) does not apply.

The questions presented are:

1. Under what circumstances does failure to investigate a potential mitigating factor constitute ineffective assistance of counsel?
2. May a court assessing *Strickland* prejudice disregard evidence of brain damage because the capital sentencing jury found unrelated mitigation evidence, as the Eighth Circuit has held, or does such evidence have uniquely mitigating weight, as the Eleventh Circuit and other circuits have held?

PARTIES

The caption contains the names of all parties. Dexter Payne is substituted for Wendy Kelley as Respondent under Supreme Court Rule 35.3.

DIRECTLY RELATED CASES

- *State v. Anderson*, No. 37CR-00-61, Circuit Court of Lafayette County, Arkansas, trial proceedings, judgment entered January 31, 2002.
- *Anderson v. State*, No. CR 02-910, Arkansas Supreme Court, direct appeal from conviction and sentence, judgment entered April 29, 2004.
- *State v. Anderson*, No. 46CR-05-354, Circuit Court of Miller County, Arkansas, resentencing, judgment entered September 8, 2005.
- *Anderson v. State*, No. CR 06-29, Arkansas Supreme Court, direct appeal from resentencing, judgment entered November 2, 2006.
- *Anderson v. State*, No. 46-CR-05-354-2, Circuit Court of Miller County, Arkansas, state postconviction, judgment entered August 20, 2008.
- *Anderson v. State*, No. CR 08-1464, Arkansas Supreme Court, appeal from denial of state postconviction, judgment entered November 17, 2011.
- *Anderson v. Kelley*, No. 5:12-cv-279, United States District Court for the Eastern District of Arkansas, federal habeas, judgment entered March 28, 2017.
- *Anderson v. Kelley*, No. 17-2456, United States Court of Appeals for the Eighth Circuit, appeal from denial of federal habeas, judgment entered September 11, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Justin Anderson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit affirming dismissal of Anderson's habeas petition, which is reported at 938 F.3d 949 (8th Cir. 2019), is set out in Appendix A. The order of the United States District Court for the Eastern District of Arkansas dismissing the habeas petition, which is unofficially reported at 2017 WL 1160583 (Mar. 28, 2017), is set out in Appendix B. The order of the court of appeals denying the petition for rehearing is set out in Appendix C.

JURISDICTION

The Eighth Circuit entered its opinion and judgment on September 11, 2019. App. A. It denied a timely petition for rehearing on October 25, 2019. App. C. On January 14, 2020, Justice Gorsuch extended the time to file this petition until March 23, 2020. *See* No. 19A789. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

INTRODUCTION

Anderson, a capital habeas petitioner, suffers from a Fetal Alcohol Spectrum Disorder ("FASD"), though this was not discovered until years after he was tried and sentenced to death. Anderson's trial counsel knew of four witnesses who reported that the defendant's mother had a drinking problem, including one who described her as an "alcoholic." Despite that knowledge, trial counsel conducted no investigation into whether the defendant has an FASD, did not inform the defense experts about that drinking problem, and never asked the defendant's parents if the defendant's mother drank during her pregnancy.

The Eighth Circuit, reviewing the case under a *de novo* (as opposed to AEDPA) standard of review, summarily concluded that this lack of investigation did not constitute ineffective assistance of counsel simply because "nobody told Anderson's attorneys his mother drank while she was pregnant." App. 10a. That conclusion is inconsistent with the well-established criteria used by other circuits in determining whether the absence of an investigation constitutes ineffective assistance of counsel.

The Eighth Circuit also held that the failure to investigate was not prejudicial because FASD-caused brain damage, even combined with expert testimony showing how that brain damage affected Anderson's conduct, would have been just "one more mitigating circumstance." App. 12a. That assessment is inconsistent with decisions in the Fourth, Tenth, and Eleventh Circuits, which correctly recognize that evidence of brain damage, whether due to FASD or some other cause, is

uniquely weighty mitigating evidence, fundamentally different in kind from most mitigation, including (as here) proof of a troubled childhood.

STATEMENT OF THE CASE

Medical Background

Alcohol use during pregnancy is the most common cause of preventable birth defects. Alcohol freely passes from the mother's bloodstream by way of the placenta into the amniotic fluid and then is absorbed by the fetus. The alcohol kills cells in the fetus, interferes with the migration of cells to organs and systems throughout the fetus, and harms the specialized cells that are essential to transmission within the nervous system.[1] "Of all the negative teratogenic influences on the fetus, alcohol's effect on the brain is considered from [1996] even to this day to be the most harmful thing."[2]

Researchers initially referred to the birth defects caused by alcohol use during pregnancy as fetal alcohol syndrome ("FAS"). As researchers came to better understand the complex harms that such use causes, a number of other diagnoses emerged. Today the constellation of birth defects caused by alcohol use during pregnancy are generally referred to as fetal alcohol spectrum disorders ("FASD"), an umbrella term that encompasses several specific diagnoses.[3]

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[1] App'x I333–I336, J66, J68. Record citations, provided below the margin, are designated "App'x" and refer to the Appellant's Appendix in the Eighth Circuit unless otherwise noted. Citations to the appendix to this petition are designated "App."

[2] App'x I336–I337.

[3] App'x I331–I332.

Among the range of birth defects resulting from alcohol use during pregnancy, the most serious is organic brain damage. The more common harms are decreased brain volume and abnormalities in brain structures.[4]

Brain damage, whether resulting from FASD or some other cause, is most often detected in the forensic context with neuropsychological tests. The appropriate neuropsychological test batteries target the functional domains most sensitive to the effects of prenatal alcohol exposure: intellectual (*e.g.*, significant discrepancies between test scores); memory and learning; attention; processing speed; visuospatial construction; motor skills; auditory processing; and adaptive skills such as academic achievement, communication, social skills, and practical skills. According to diagnostic guidelines published in 2004 by the U.S. Centers for Disease Control, deficits in three or more domains meet the criteria for the central-nervous-system dysfunction in Fetal Alcohol Syndrome—the most severe of the FASD conditions.[5]

The organic brain damage caused by FASD can affect an individual's behavior in a variety of ways that are highly relevant to criminal cases. It frequently impairs executive brain function, which regulates an individual's ability to control impulsive

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[4] Lebel et al., *Imaging the Impact of Prenatal Alcohol Exposure on the Structure of the Developing Human Brain*, 21 Neuropsychology Rev. 102 (2011); Nuñez et al., *Focus on: Structural and Functional Brain Abnormalities in Fetal Alcohol Spectrum Disorders*, 34 Alcohol Research & Health 121 (2011); Moore et al., *Fetal Alcohol Spectrum Disorders: Recent Neuroimaging Findings*, 1 Current Developmental Disorders Reports 161 (2014); Ware et al., *An fMRI Study of Behavioral Response Inhibition in Adolescents with and without Histories of Heavy Prenatal Alcohol Exposure*, 278 Behavioural Brain Research 137 (2015).

[5] Fetal Alcohol Syndrome, Guidelines for Referral and Diagnosis (2004), *available at* https://www.cdc.gov/ncbddd/fasd/documents/FAS_guidelines_accessible.pdf.

behavior. Individuals with FASD are prone to a physical overreaction when startled by unexpected events. Because brain development after birth is delayed by FASD, individuals with FASD may continue to have physically immature brains, and exhibit child-like behavior, well into their twenties.[6]

Since at least the mid-1990s, defense attorneys in capital cases have recognized that FASD is compelling mitigation evidence. For example, in Arkansas, the jurisdiction from which this case arises, as early as 1995 defense attorneys had requested an "examination for possible organic brain damage resulting from [a defendant's] possible involuntary exposure to alcohol while his mother was pregnant with him." *Miller v. State*, 942 S.W.2d 825, 827 (Ark. 1997). The importance of investigating FASD has been the subject of numerous continuing-legal-education programs. In 2003 the American Bar Association Guidelines expressly recommended that the defense team in every capital case include someone qualified to screen for FASD.[7]

State Proceedings

In October 2000, nineteen-year-old Anderson killed Clara Creech with a single gunshot as she was gardening in her yard. This offense came six days after Anderson broke into a truck in which Roger Solvey was sleeping. Anderson shot Solvey, who fortunately survived. The State sought the death penalty for Creech's

[6] Kelly et al., *Effects of Prenatal Alcohol Exposure on Social Behavior in Humans and Other Species*, 22 Neurotoxicology & Teratology 143 (2000).

[7] American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 4.1 cmt. (2003). The defense team in Anderson's case had no such qualified person. App. 22a n.5.

murder, with the attempted capital murder of Solvey, for which Anderson was first convicted, serving as the sole aggravating factor. A jury found Anderson guilty and sentenced him to death. The Arkansas Supreme Court affirmed the conviction but vacated the sentence. *Anderson v. State*, 163 S.W.3d 333 (Ark. 2004).

Resentencing was held in 2005. Before that trial, four different witnesses had informed resentencing counsel that Anderson's mother had a drinking problem. A cousin noted that she was an "alcoholic" who drank "just as much as" Anderson's biological father, a man known to drink excessively.[8] Anderson's half-sister pointed out that Anderson's mother "drank."[9] Other witnesses informed resentencing counsel of the mother's drinking in pre-trial interviews. Anderson's paternal grandmother stated that her son "drank heavily" and that his mother "was drinking too."[10] Anderson's brother said their mother "drank a lot."[11]

Resentencing counsel did nothing with that information—inaction that the attorney later admitted was an oversight. Resentencing counsel did not ask Anderson's mother or father, both of whom were interviewed about other matters, whether his mother drank while pregnant with Anderson.[12] Resentencing counsel retained several expert witnesses but did not ask them to evaluate the possibility of FASD.[13] Nor did resentencing counsel claim to have informed the experts of the

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[8] App'x Z27–Z30, AA6; App. 8a, 20a.

[9] App'x Z26; App. 20a.

[10] App'x. AA1; App. 8a, 20a.

[11] App'x AA3; App. 8a, 20a.

[12] App'x Z30.

[13] App'x Z20.

mother's drinking. Resentencing counsel knew that Anderson had "difficulty communicating" and a history of "impulsive behavior," App. 48a, but never attempted to connect those cognitive and behavioral issues with his mother's known drinking problem.

At resentencing, the defense case for life focused on Anderson's difficult childhood and his young age at the time of the killing. Resentencing counsel asked that each facet of Anderson's challenging past be listed as a separate mitigating factor on the jury verdict form and presented the same subject matter as multiple factors. For example, the jury was asked to find, as three separate mitigators, that Anderson lacked a stable home life, attended five different school districts, and lived in nine different places. App. 23a. As a result, the jury was presented with more than thirty possible mitigating circumstances. App. D.

The prosecutor argued to the jury that this this multiplicity of mitigators really concerned only a single issue: Anderson's upbringing.[14] He also argued that Anderson was old enough to be responsible for his actions.[15] The jury concluded that Anderson's age was not a mitigating factor. App. 63a. The jury agreed that all the

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[14] The prosecutor argued as follows:

> I want you to keep in mind when you're weighing something in a case, it's not necessarily a number of things. As you can see, a bunch of things that are on the mitigation list are in[t]er related to his household. That could probably be in one paragraph instead of twenty sentences. . . [T]hose are all in[t]er related about how his parents were and what they were doing. What I'm saying is, even though they're listed on separate sentences, that may not be a separate circumstance . . . . [T]he number of them is not what's important. It's the weight that's to be given to them in setting the punishment for the murder of Ms. Creech.

App'x S1551. *See also* App'x 1553 ("[I]t's not the number of terms, it's what's involved in it . . . .").

[15] App'x S1556.

childhood-related circumstances did exist, but nonetheless voted to impose the death penalty. App. D.

The Arkansas Supreme Court affirmed. *Anderson v. State*, 242 S.W.3d 229 (Ark. 2006). Anderson's state postconviction counsel did not raise the issue of resentencing counsel's ineffectiveness for failing to investigate FASD.

Federal Habeas Proceedings

Anderson filed a federal habeas petition, invoking the district court's jurisdiction under 28 U.S.C. § 2254. The petition alleged that resentencing counsel was ineffective for failing to investigate FASD as a mitigating factor.[16] Because the state court had not adjudicated this claim, AEDPA deference did not apply.

Anderson's habeas attorneys, their staff, and their experts conducted the investigation that resentencing counsel failed to pursue. They interviewed Anderson's mother about her drinking, and she reported that she "drank daily during the pregnancy. What she drank was malt liquor in 12-ounce cans, a minimum of two to three cans a day, and more on weekends, perhaps four or sometimes more than four on the weekends."[17] Anderson's father reported "daily drinking on the part of the birth mother in quantities sufficient to cause FASD[]. He reported a little bit more consumption than she did."[18] One of Anderson's aunts "reported daily drinking on the part of [Anderson's mother] during the pregnancy."[19]

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[16] App'x A71–A74.

[17] App'x I501.

[18] Appx I502–I503; Pet.'s Ex. 55 at 15 (describing mother drinking during the pregnancy).

[19] App'x I503.

The amount and frequency of the mother's alcohol consumption was at the level most associated with FASD.[20]

Habeas attorneys arranged for a neuropsychologist to perform a battery of neuropsychological tests on Anderson. The tests used were available at the time of resentencing.[21] They are designed to determine if a person has brain damage.[22] Anderson's neuropsychological testing revealed that he was impaired in seven discrete areas of cognitive functioning, where only three are needed for a diagnosis of FASD.[23] Most importantly, he has serious deficits in executive function, which involves the critical matters of judgment and inhibition.[24] The overall pattern of results revealed that Anderson has bilateral damage to his brain with a greater impact in the left hemisphere.[25] The results also indicated that the damage is "developmental," meaning that it occurred during the fetal stage or early in childhood.[26] Based on this and other information, the neuropsychologist suspected that the brain damage was caused by fetal-alcohol exposure.[27]

An MRI identified abnormalities in at least three specific areas of Anderson's brain: the cerebellum, the hippocampus, and the volume of cerebrospinal fluid.[28]

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[20] App'x I351–I353.

[21] App'x I230–I231, I247, I258, I264–65.

[22] App'x I223–I224.

[23] App'x I242–I248, I421.

[24] App'x I249.

[25] App'x I231–I232.

[26] App'x I232–I234.

[27] App'x I262–I263.

[28] App'x I367–I372, I384–I389.

The particular abnormality in the cerebellum, heterotopia, is a rare brain abnormality that is associated with prenatal alcohol exposure.[29] A quantitative electroencephalogram (QEEG), which looks at electrical activity in the brain, was used to measure the level of functional activity in each part of Anderson's brain. The QEEG revealed an abnormally low level of electrical activity in three regions of Anderson's brain.[30]

Based on the MRI and QEEG, the neuropsychological tests, a physical examination, and other information, the psychiatrist diagnosed Anderson as having FASD and concluded that fetal-alcohol exposure was the cause of the brain damage that had been detected. App. 36a.

A psychologist with extensive expertise in FASD provided critical testimony about the effect that FASD, and specifically the resulting brain damage, had on Anderson's behavior. Because of his FASD, Anderson had substantially worse adaptive functioning than his IQ (in the low 80s) would predict.[31] And Anderson had substantial impairment to his executive brain functioning. "[The] executive control in the frontal lobe is central or the core element in controlling urges and strong emotions. You have to have an intact set of executive functions in order to do that."[32] That brain damage, the psychologist testified, rendered Anderson impulsive and prone to "engage[] in risky behaviors without regard to potential harm to

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[29] App'x I369.

[30] App'x I390–I402.

[31] App'x I527.

[32] App'x I522.

himself or others. . . . [T]hose symptoms are due to the underlying brain damage. It's not characterological. . . . [I]n FASD you don't have volitional control over your behavior."[33] In addition, she testified, "[b]rain development in those with FASD is much slower than it is in normally constituted children . . . . [I]ndividuals might lag eight to ten years behind age mates in terms of their brain development."[34] At the age of nineteen the brain of an individual with FASD would be "more like a child's brain than a typical 19-year-old's brain."[35] That combination of factors influenced Anderson's conduct when he committed the crime.[36] "[H]is brain was substantially damaged at the time of the offense and he could not exert top-down control over those bottom-up strong urges."[37]

The district court determined that Anderson's FASD-related ineffectiveness claim was defaulted because postconviction counsel never raised it in state court. Under *Martinez v. Ryan*, 566 U.S. 1 (2012), postconviction counsel's ineffectiveness forgives the default, and the petitioner is entitled to relief, if the trial-ineffectiveness claim has merit. So the district court held a hearing to determine if resentencing counsel's failure to investigate FASD denied Anderson the effective assistance of counsel. Because the state court never adjudicated this claim, the district court reviewed it without applying AEDPA's deferential standard of review.

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[33] App'x I570.

[34] App'x I538.

[35] *Id.*

[36] App'x I540–I542, I594, I602, I611.

[37] App'x I541.

At the hearing, habeas counsel introduced the evidence, described above, establishing that Anderson suffers from FASD and the negative effects of this disability on his functioning. The evidence also showed that authoritative criteria for FASD had been established by 1996 and that this form of mitigation was well-known to the capital-defense bar years before Anderson was resentenced in 2005.[38] Anderson's lead resentencing attorney testified that the failure to investigate FASD was an oversight, not a deliberate tactical choice, stating that the defense team "did not consider the possibility that [Anderson] might have been exposed to alcohol *in utero* or that he suffered from fetal alcohol syndrome. . . . It just isn't something we considered one way or the other." App. 21a. The State offered no rebuttal of this evidence. The district court nevertheless rejected Anderson's claim, finding that counsel's failure to investigate FASD was not unreasonable and that FASD evidence would not have affected the sentencing outcome. App. B.

A divided court of appeals affirmed. The majority held that resentencing counsel's failure to investigate the possibility that Anderson had FASD was not a denial of the effective assistance of counsel because witnesses "made no temporal connection between Anderson's birth and his mother's drinking" and because "nobody told Anderson's attorneys his mother drank while she was pregnant." App. 8a, 10a. The majority commented that "it was not constitutionally deficient for his attorneys not to have *further* investigated FASD." App. 10a (emphasis added). It is undisputed, however, that resentencing counsel never investigated FASD at all.

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[38] App'x I59–I62, I345, I548–I549.

The majority also concluded that the absence of an FASD diagnosis, and of expert testimony about the effect of that disability, was not prejudicial. It reasoned that FASD would have been just "one more mitigating circumstance" on top of the other factors the jury found. App. 12a. The majority pointed out that "the jury heard related evidence on Anderson's brain limitations because [one expert] testified that his frontal lobe was not fully developed given his age at the time of the offense." *Id.* The jury, however, rejected that testimony, concluding that Anderson's age was not mitigating. App. 63a.

Judge Kobes dissented. Regarding ineffectiveness, he recognized that "Anderson's childhood was soaked in alcohol—and his attorneys knew it." App 20a. He found that the family's descriptions of his mother's alcoholism "were so tied to Anderson's infancy that counsel should have investigated further." *Id.* He noted that "there was no [professional] judgment behind counsel's failure to investigate FASD" because resentencing counsel admitted the lack of such an investigation was due to an oversight. App. 21a. The fact that the experts did not advise resentencing counsel to investigate FASD did not excuse the lack of that investigation:

> Anderson's experts did not have access to everything that counsel did and, more importantly, they lacked the most valuable evidence in this case—[the mother's] admission that she drank while pregnant—because counsel failed to uncover it. . . . [E]xperts can only give effective guidance when they have enough information. When counsel fail to ask important questions and turn up crucial facts, that failure cannot be shifted to experts.

App. 22a. Judge Kobes stressed that "by the 1990s the FASD defense was well-recognized by the capital defense bar . . . and Arkansas case law records attempts to use it as early as 1995." *Id.* Thus, "[b]y the time of Anderson's second penalty-phase

trial in 2005, it was common practice for the capital bar to investigate FASD." App. 19a.

Judge Kobes explained that the failure to investigate and discover Anderson's FASD was highly prejudicial. "The court . . . concludes that it is not reasonably probable that 'one more mitigating circumstance' would have made a difference. . . . But evidence of Anderson's FASD is more than 'one more' mitigation argument." App. 23a. He noted that "the court artificially inflates Anderson's mitigation case. Although numerous, the mitigators were duplicative and focused primarily on his traumatic and unstable home life." *Id.* It is "not just the quantity, but the quality of mitigating evidence that can make the difference between life and death." *Id.*

> Compared to Anderson's mitigators, an FASD diagnosis would offer something different and more compelling. . . . That brain damage presents a different and more powerful type of mitigating evidence is a theme throughout capital caselaw. . . . The jury was presented with much mitigating evidence, but nothing with the force of an FASD diagnosis.

App. 23a–24a.

In sum, an FASD diagnosis would have "effectively explain[ed] *why* the defendant had committed the crime." App. 24a. Judge Kobes noted that decisions in the Fourth and Tenth Circuits, in disagreement with the majority opinion, had recognized that evidence of brain damage is a uniquely compelling mitigating factor. App. 23a–24a.

The court of appeals denied a timely petition for rehearing.

Reasons for Granting the Petition

I. The Eighth Circuit's decision conflicts with the standards multiple circuits use to determine whether failure to investigate is ineffective assistance of counsel.

Counsel in a criminal case, and particularly in a capital case, "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). In determining whether a defendant has been denied effective assistance of counsel, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

During the decades since this Court's decision in *Strickland*, the lower courts have identified five factors that are regularly considered in determining whether the lack of an investigation constitutes ineffective assistance of counsel. These are not specific tasks that attorneys must perform, but rather are queries the courts of appeals have repeatedly found valuable in assessing the reasonableness of an investigation. *Strickland* ultimately establishes a "standard of reasonableness" that "spawns few hard-edged rules," *Rompilla v. Beard*, 545 U.S. 374, 381 (2005), so these factors can hardly be exclusive. But these recurring considerations, which stem directly from this Court's holdings, ensure correct and consistent application of the Sixth Amendment right to counsel across the nation in cases involving an attorney's failure to investigate issues relevant to the defense. Correctness and

consistency are of particular importance when the claim determines whether a person may be put to death.

The Eighth Circuit majority held that resentencing counsel had no obligation to investigate FASD because the witnesses they interviewed said only that Anderson's mother had a drinking problem, not that she drank during her pregnancy. This ad hoc rule is inconsistent with the principle that counsel may not "ignore[] pertinent avenues for investigation of which he should have been aware." *Porter v. McCollum*, 558 U.S. 30, 40 (2009). Under prevailing standards, evidence that the client's mother was an alcoholic should have led resentencing counsel to ask about the timeframe rather than ignoring the possibility of FASD. An investigation into FASD was potentially important to the sentencing profile, likely to yield fruit given Anderson's unexplained mental difficulties, accessible through cooperative witnesses, and consistent with resentencing counsel's mitigation theme. In failing to address these issues when analyzing the quality of a capital-sentencing investigation, the Eighth Circuit conflicts with the practice of other courts and upholds a death sentence that would not have survived in other circuits.

A. The factors other circuits use to discern ineffective investigation.

First, the courts of appeals have asked: **How great was the potential importance of the matter not investigated?** An attorney need not seek out the most minute detail or the most obscure witness but she must understand "pertinent avenues for investigation" and look into them. *Id.* at 40. Thus, counsel has been found ineffective where they failed to investigate "constitutionally significant mitigating

evidence," *Blystone v. Horn*, 664 F.3d 397, 420 (3d Cir. 2011); where they failed to talk to witnesses whose testimony "would not have been cumulative," *Harrison v. Quarterman*, 496 F.3d 419, 425 (5th Cir. 2007); and where they failed to locate information that was "highly relevant to the question of moral culpability" and "would have been important to a jury," *Hooks v. Workman*, 689 F.3d 1148, 1206–07 (10th Cir. 2012). On the other hand, additional investigation is not required if the information sought is "expected to be only cumulative, and the search for it distractive from more important duties." *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009).

Second, the courts of appeals have asked: **What was the likelihood that the investigation would lead to relevant information?** Keeping in mind that assessments of counsel's performance must "eliminate the distorting effects of hindsight," *Strickland*, 466 U.S. at 689, counsel may not sit idly by when an investigation would be likely to yield important facts about the case. Thus, the courts of appeals have found counsel ineffective where they ignored "promising leads," *Sowell v. Anderson,* 663 F.3d 783, 793 (6th Cir. 2011); where there were "obvious indicators" that more information was available and there was no reason think that investigation "would have been useless," *Ferrell v. Hall,* 640 F.3d 1199, 1227, 1230 (11th Cir. 2011); and where counsel failed to "follow up on leads that [were] readily identifiable in the evidence." *Littlejohn v. Trammell,* 704 F.3d 817, 862 (10th Cir. 2013). These cases recognize that additional investigation is not required if "it promise[s] less than looking for a needle in a haystack [and] a lawyer truly has reason to doubt there is any needle there." *Rompilla*, 545 U.S. at 389. But

they also acknowledge that counsel must continue to investigate relevant circumstances unless there is reason to believe that "further investigation would have been fruitless." *Wiggins*, 539 U.S. at 525.

Third, the courts of appeals have asked: **How difficult would it have been for the investigation to find relevant material?** This Court has held that capital defense counsel must seek "all reasonably available mitigating evidence." *Id.* at 524. If evidence can be gotten with relative ease, the attorney must get it. Accordingly, the courts of appeals have found counsel ineffective when the attorney interviewing a family member "did not ask her any questions" regarding key issues, *Jacobs v. Horn*, 395 F.3d 92, 103 (3d Cir. 2005); when counsel failed to interview witnesses who "would have been available," *Sowell*, 663 F.3d at 791; when the attorney could have obtained mitigating evidence with "simple persistence" and there were "no obstacles to obtaining witnesses," *Andrews v. Davis*, 944 F.3d 1092, 1101–02, 1111 (9th Cir. 2019) (en banc); when there was no investigation of information "easily within counsel's reach," *Littlejohn*, 704 F.3d at 862–63; when key evidence would have been discovered if counsel had "asked any questions" about it, *Ferrell*, 640 F.3d at 1230; and when relevant documents were "readily discoverable," *Middleton v. Dugger*, 849 F.2d 491, 494 (11th Cir. 1988).

Fourth, the courts of appeals have asked: **Were appropriate expert witnesses retained, provided with needed information, and asked the relevant questions?** In cases where expert testimony is appropriate, it is insufficient to simply hire an expert. "[C]ounsel has an affirmative duty to provide . . . experts with information

needed." *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002). Thus, counsel have been found ineffective where they failed to provide their expert with "any background information whatsoever," *Jacobs*, 395 F.3d at 104; where they "never informed [the expert] of the brain injuries," *Frierson v. Woodford*, 463 F.3d 982, 992 (9th Cir. 2006); and where they unduly limited the questions they asked the experts and withheld key information from them, *Ferrell*, 640 F.3d at 1227.

Fifth, and finally, courts of appeals ask: **Was the failure to investigate due to oversight or neglect, or was it the result of an informed, tactical decision?** "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91. Counsel acts unreasonably if "incomplete investigation was the result of inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 534. Thus, counsel have been found ineffective when they "did not make a conscious choice among available alternative strategies because they overlooked an entire category of compelling mitigating evidence," *Sowell*, 663 F.3d at 790; where the attorneys "opted for capitulation" to the state's theory of the crime rather than investigating it, *Elmore v. Ozmint*, 661 F.3d 783, 862 (4th Cir. 2011); where the "failure to engage in further investigation was the result of neglect—rather than a strategic decision," *Jefferson v. GDCP Warden,* 941 F.3d 452, 479 (11th Cir. 2019); where counsel failed to investigate "for no apparent reason," *Ferrell*, 640 F.3d at 1234; and where counsel's

failure to investigate apparent psychological problems "was not an exercise of informed strategic choice," *Lockett v. Anderson*, 230 F.3d 695, 714 (5th Cir. 2000).

B. The Eighth Circuit's failure to address the factors other circuits use.

Under the factors applied in other circuits, resentencing counsel rendered constitutionally deficient performance by failing to investigate whether Anderson had FASD. The facts that resentencing counsel knew, and the evidence that would have come to light had counsel investigated the possibility of FASD, are largely undisputed.

First, whether Anderson had FASD-based brain damage would clearly have been an important potential element of the resentencing case. As discussed further below, brain damage is always a compelling mitigating factor. And resentencing counsel had reason to believe it would be critical in this case specifically. Resentencing counsel admitted at the habeas hearing that "evidence of FASD would have fit perfectly with the theme of the mitigation defense: 'Childhood Matters.'" App. 24a. The majority below noted that resentencing counsel had retained an expert in "mental functioning and IQ testing," App. 3a, but that expert, while noting that it "won't hurt for defendant to have a neuropsych exam,"[39] concluded that Anderson did not have an IQ sufficient to establish intellectual disability. So evidence identifying some *other* form of cognitive impairment would have been particularly valuable.

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[39] App'x Z55–Z59.

Second, there was good reason at the time of the resentencing to believe that an investigation of FASD would be productive. Four witnesses had already told resentencing counsel that Anderson's mother had a drinking problem. As discussed above, by the time Anderson was resentenced the capital-defense bar was well aware of the ravages of maternal drinking, so such witness statements were a promising lead for mitigation. None of the drinking disclosed by the witnesses was so far removed from Anderson's birth as to make the inference of maternal drinking unlikely. Resentencing counsel should have investigated whether their client's mother, a known alcoholic, continued drinking while pregnant. In addition, resentencing counsel knew that Anderson had serious cognitive problems that their existing experts could not explain,[40] so some as yet unidentified problem had to be the cause.

Third, key information about the possibility of FASD was readily available. Resentencing counsel interviewed Anderson's mother and father, either of whom could have provided information about whether his mother drank while pregnant if counsel had asked a single question on that subject.

Fourth, the defense experts "lacked the most valuable evidence in this case—[Anderson's mother's] admission that she drank while pregnant—because counsel failed to uncover it." App. 22a. Counsel at least could have told their retained

[40] Anderson was held back in school three times and dropped out at age seventeen after he failed the eighth grade for the second time. Pet.'s Ex. 55 at 8, 27–28. His reading comprehension score was in the first percentile. App'x Z38.

experts what was known about the mother's drinking and inquired about the effects of potential maternal drinking.

Fifth, resentencing counsel gave undisputed testimony that the failure to conduct any investigation into the possibility of FASD was an oversight, not a deliberate tactical choice. Counsel admittedly "did not consider the possibility that [Anderson] might have been exposed to alcohol *in utero* or that he suffered from fetal alcohol syndrome. . . . It just isn't something we considered one way or the other." App. 21a. As Judge Kobes correctly observed, "[t]hat is not the sort of 'professional judgment' that *Strickland* permits." *Id.*

In sum, had this case arisen in other circuits, the considerations those circuits regularly use in determining whether an investigation was inadequate would have compelled the conclusion that trial counsel here performed ineffectively by failing to investigate FASD. The circuits that correctly focus on these factors would hold that a reasonable attorney, upon learning from four witnesses that a defendant's mother had a drinking problem, would have asked those witnesses, and any other readily available witness with personal knowledge—including the father and the mother herself—whether the mother drank during her pregnancy. Instead of accounting for the correct considerations—considerations that are a direct product of this Court's holdings—the Eighth Circuit summarily, and without further elaboration, held that four witness statements that Anderson's mother had a drinking problem was not a "red flag" indicating the possibility that she drank during her pregnancy. App 10a.

The Eighth Circuit's determination is not merely incorrect. It compellingly demonstrates how important it is for lower courts to ask similar questions in determining whether a failure to investigate is constitutionally unreasonable. A jurisdiction that fails to apply the relevant factors will affirm death sentences that would be overturned in jurisdictions more sensitive to this Court's guidance. Unless this Court intervenes, a "red flag" requiring further investigation in one circuit will be just an irrelevant detail in another.

II. The Eighth Circuit conflicts with other circuits in not recognizing that brain damage is a uniquely compelling mitigating circumstance.

The State has not disputed that Anderson has been correctly diagnosed as having a Fetal Alcohol Syndrome Disorder. Nor has it questioned the reliability of the standard neuropsychological tests used to conclude that Anderson has brain damage. The State has never challenged the accuracy of the MRI or QEEG tests that revealed physical abnormalities in Anderson's brain or suggested that a malingering defendant could somehow manipulate his brain to create misleading results on those tests. And the State never offered any evidence to contradict the expert testimony that this well-documented brain damage would have materially affected the conduct of which Anderson was convicted.

The Eighth Circuit majority held that denying all this evidence to the resentencing jury was not prejudicial because it amounted to only "one more mitigating circumstance." App. 12a. As Judge Kobes explained, however, the court's dismissal of such evidence is inconsistent with the widespread judicial recognition that "brain damage presents a different and more powerful type of mitigating

evidence [which] is a theme throughout capital caselaw." App. 23a. The Fourth, Tenth, and Eleventh Circuits have held, contrary to the Eighth Circuit here, that evidence of brain damage is a uniquely compelling mitigating factor, the absence of which almost always will be prejudicial.

In *Williams v. Stirling,* 914 F.3d 302 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 105 (2019), the defendant had brain damage resulting from FASD. At his sentencing hearing, counsel introduced evidence of a "challenging childhood, learning disabilities, and other mental health issues," *id.* at 315–16, but he had not investigated, and thus did not raise, FASD-related brain damage as a mitigator. In state postconviction, the defendant's experts described the effect of that brain damage in terms similar to the expert testimony in the instant case.[41] The state court denied the ineffectiveness claim, but the Fourth Circuit concluded that, even under AEDPA's deferential standard, the failure to investigate FASD was unreasonable and the absence of brain-damage evidence was prejudicial:

> [T]he FAS evidence was different from the other evidence of mental illness and behavioral issues because it could have established *cause and effect* for the jury—specifically, a FAS diagnosis could have provided to the jury evidence of a neurological defect that *caused* Williams' criminal behavior. Without this information, the jury could have assumed that Williams was an individual who—despite challenges in his home life, education, and mental health—was generally responsible for his actions, and therefore would have assigned greater moral culpability to him for his criminal behavior.

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[41] "[E]xperts testified that FAS impaired Williams' judgment, as well as his ability to control his impulses and consider the consequences of his actions." 914 F.3d at 318. One expert "concluded that Williams' executive functions—including 'self-regulation' and 'behavior control'—were impaired due to FAS, leading to behavioral difficulties, including impulse control problems and coping skills equivalent to those of a nine year old." *Id.* at 308.

Id. at 318. Evidence that FASD "impaired [the defendant's] judgment" and "his ability to control his impulses and consider the consequences of his actions," the Fourth Circuit held, "could have been persuasive mitigating evidence for a jury" even in light of the other mitigation it heard. *Id.*

In *Littlejohn v. Trammel*, 704 F.3d 817 (10th Cir. 2013), the defendant in postconviction proceedings offered evidence that drug use by his mother during pregnancy had damaged "the microscopic structure and neuro-chemical function of [his] brain." *Id.* at 862. The defense also introduced expert testimony that the defendant had "a behavioral disorder manifested by poor impulse control, psychological immaturity and judgment *that is caused by* neuro-developmental deficits experienced in his peri-natal development." *Id.* at 861. The court noted that this testimony, if credited, "could go far in offering a scientifically supported and *physical* link to Mr. Littlejohn's crime and 'developmental history.'" *Id.* at 863. But the jury was never told of that brain damage. "And without this explanation, the prosecution was able to frame the mitigation defense as a mere collection of the social circumstances of Mr. Littlejohn's upbringing—circumstances that, while unfortunate, do not excuse murder." *Id.* at 864–85. Such an omission would be prejudicial, the Tenth Circuit held, because

> [e]vidence of organic mental deficits ranks among the most powerful types of mitigation evidence available. . . . Evidence that an organic brain disorder was a substantial factor in engendering Mr. Littlejohn's life of deviance probably would have been a significant favorable input for Mr. Littlejohn in the jury's decisionmaking calculus.

Id. at 864.

The defendant in *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012), had suffered brain damage in a truck accident. Injury to his frontal lobes was particularly significant because that part of the brain is the "gas pedal and the brake pedal of behavior." *Id.* at 1205. The court of appeals emphasized that

> [e]vidence of organic brain damage is something that we and other courts, including the Supreme Court, have found to have a powerful mitigating effect. . . . And for good reason—the involuntary physical alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability, altering the causal relationship between impulse and action.

Id. (citing *Rompilla*, 545 U.S. at 392). Absence of this mitigation evidence was prejudicial in a case that included testimony from two family members and a doctor who found it difficult to see how the defendant's crime was premeditated. *Id.* at 1202–03.

In *Ferrell v. Hall,* 640 F.3d 1199, 1216 (11th Cir. 2011), the defendant suffered brain damage after he was hit in the head with a 2x4, twice knocked unconscious while playing ball, and survived a car accident.

> [T]he experts consistently maintained (. . . without any rebuttal) that organic brain damage to Ferrell's frontal lobe has led to impaired insight, impaired judgment, increased impulsiveness and explosiveness, emotional and mental dysfunctions, decreased ability to plan and understand consequences, and inability to process information in stressful situations.

Id. at 1235. Counsel's unreasonable failure to adduce that evidence was not only prejudicial, the Eleventh Circuit held; the state court unreasonably applied *Strickland* in concluding otherwise, because

> the mental health expert opinions would have served to reduce the volitional nature of the crime, as well as Ferrell's ability to plan and act

> rationally, and as a result, undercut the senselessness and cold-blooded nature of the crime as stressed by the prosecutor.

Id. The evidence not only mitigated the crime but also "measurably weaken[ed] the aggravating circumstances found by the jury." *Id.* at 1234–35.

In *Jefferson v. GDCP Warden*, 941 F.3d 452 (11th Cir. 2019), the defendant suffered brain damage when a car ran over his head when he was only two years old. He was "left with a cranial indentation and an abnormally enlarged skull, and suffered frontal lobe and neurological damage." *Id.* at 479.

> The effects of this brain damage likely manifested in an inability to control his impulses and exercise sound judgment and meaningfully set him apart from an unimpaired person. It also makes it harder for Jefferson to deal with difficult or chaotic situations.

Id. at 484. At the original sentencing hearing, the defense had introduced evidence that Jefferson had "a tough childhood" with "very few positive influences in [his] li[fe]." *Id.* at 483–84. But the omission of the brain-damage evidence was prejudicial, the Eleventh Circuit held, because

> [t]here is a powerful difference between someone who grew up poor and without a father and a person who grew up suffering from organic brain damage yielding debilitating mental impairments that worsened into adulthood. There is an even bigger difference between someone who has an "attitude problem" and someone whose frontal lobe was permanently damaged at a young age and who is therefore not capable of controlling his impulses or reactions to external stimuli at critical moments.

Id. at 484.

> [T]he evidence of brain damage that would have been introduced had Jefferson's counsel performed in a constitutionally effective manner would have profoundly changed the character of the penalty phase of the proceedings by fundamentally transforming Jefferson's sentencing profile. This sort of mitigation evidence is precisely the kind that may establish prejudice at the penalty phase. . . . The new mitigation

> evidence . . . not only would have bolstered the mitigation evidence already available but also would have dramatically transformed the sentencing profile presented to the jury. . . . Relatedly, the dramatically different sentencing profile created by the new mitigating evidence substantially weakens the aggravating factors relied on by the jury a sentencing.

Id. at 483–84.

The prosecutor's closing argument in the instant case is a powerful illustration of why the Fourth, Tenth, and Eleventh Circuits are correct in holding that the omission of brain-damage evidence at capital sentencing is highly prejudicial. The prosecutor was able to insist to the jury that Anderson's own expert had concluded that there "wasn't nothing wrong with him."[42] In reality, Anderson was very impaired. Damage to the frontal lobes is particularly significant because that portion of the brain determines an individual's ability to control impulses. But without testimony about that brain damage, or expert testimony regarding its effect on Anderson, the prosecutor was able to tell the jury that Anderson was entirely in control of his actions: "Justin made his own choices, folks, and he's plenty capable of doing it, and . . . he's got the ability to have done better."[43] "He knew what he was doing, and he could have conformed if he had wanted to."[44]

Without being confronted with evidence of FASD, the prosecutor also could argue that most individuals who suffer abuse in childhood do not commit murder: "You can have the wors[t] parents in the world, and they can do everything to you,

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[42] App'x S1581.

[43] App'x S1586.

[44] App'x S1556.

and you can grow up and be a great person. . . ."[45] "Those other family members who had alcoholic daddies and things of that nature, are not out killing."[46] But brain damage, multiple circuits have emphasized, is of a totally different "nature" than an abusive childhood. The prosecutor's argument in the instant case was virtually the same as the argument in *Littlejohn*, which would not have been possible, as the Tenth Circuit correctly noted, had brain-damage evidence been introduced.

> [W]ithout this explanation, the prosecution was able to frame the mitigation defense as a mere collection of the social circumstances of Mr. Littlejohn's upbringing—circumstances that, while unfortunate, do not excuse murder. In this regard, the prosecutor stated, "It is unfortunate that children are raised in [rough] environment[s], but it doesn't make them killers. Choices make people killers."

704 F.3d at 864–85.

The Fourth, Tenth, and Eleventh Circuits are correct in holding that evidence of brain damage is not, in the Eighth Circuit's pointed phrase, just "one more mitigating circumstance." Brain damage is a profoundly different mitigating factor, a factor that goes to the very heart of the legal justification for punishing—and in extreme cases, executing—a defendant. Brain damage shapes an individual's actions in a manner beyond his or her control.

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This Court has held that a proper prejudice inquiry requires a reweighing of aggravation against old and new mitigation, "regardless of how much or how little mitigation evidence was presented during the initial penalty phase." *Sears v.*

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[45] App'x S1583–S1584.

[46] App'x S1557.

Upton, 561 U.S. 945, 956 (2010). It is "not reasonable to discount entirely" the mitigating effect of "brain abnormality and cognitive defects." *Porter*, 558 U.S. at 43. Here, the Eighth Circuit discounted uniquely weighty mitigation in the form of FASD-related brain damage.

Anderson does not ask this Court to hold that FASD or any other form of brain damage should, like intellectual disability, constitute a *per se* constitutional bar to executing a defendant. Nor need this Court decide whether the record in the instant case established that Anderson had FASD, that the FASD had indeed caused brain damage, or that the resulting brain damage had a significant impact on Anderson's commission of the crimes of which he was convicted. Those matters are settled by the record below. Anderson urges only that the Court grant review and hold, as have the Fourth, Tenth, and Eleventh Circuits, that brain damage is particularly important mitigating evidence, the unreasonable omission of which will likely lead to prejudice in the routine case. In Anderson's case, the evidence of FASD carries explanatory value that both mitigates the offense and weakens the sole aggravating factor. In a jurisdiction where only one juror's vote is required for a life sentence—*see* Ark. Code Ann. § 5-4-603(a)-(c)—counsel's failure to investigate prejudiced him.

CONCLUSION

Whether a defendant is put to death should not depend on the happenstance of which court of appeals chances to hear his or her case. Had Anderson's case arisen in another circuit, the court would have recognized the unreasonableness of resentencing counsel's inadequate investigation and would have given proper

weight to the uniquely mitigating factor of Anderson's brain damage. For the above reasons, a writ of certiorari should issue to review the Eighth Circuit's judgment.

MARCH 23, 2020

Respectfully submitted,

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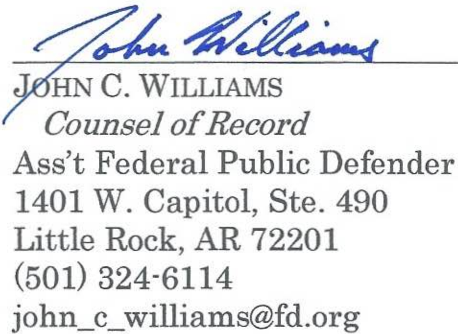

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