Appendix

United States Court of Appeals
For the Eighth Circuit

No. 17-2456

Justin Anderson

Plaintiff - Appellant

v.

Wendy Kelley, Director, Arkansas Department of Correction, originally identified as Ray Hobbs

Defendant - Appellee

Appeal from United States District Court
for the Eastern District of Arkansas - Pine Bluff

Submitted: June 12, 2019
Filed: September 11, 2019

Before GRUENDER, STRAS, and KOBES, Circuit Judges.

GRUENDER, Circuit Judge.

Justin Anderson appeals the district court's[1] denial of his petition for habeas corpus. He argues that his counsel was ineffective for failing to investigate and

[1]The Honorable D. P. Marshall Jr., United States District Judge for the Eastern District of Arkansas.

present mental health evidence and for giving the jury an expert report which included information that Anderson was on death row, that a mid-deliberation jury instruction was improper, and that he is categorically exempt from the death penalty. We affirm.

I.

Anderson was nineteen when he broke into a truck occupied by Roger Solvey in October 2000. Anderson shot Solvey, but he survived. Six days later, Anderson shot and killed eighty-seven-year-old Clara Creech while she was gardening in her yard. Anderson admitted to shooting Solvey, and he was convicted of attempted capital murder. A jury then convicted Anderson of capital murder for killing Creech.

Latrece Gray represented Anderson during the penalty phase. She testified that the focus of her defense was "childhood matters." The defense presented eighteen witnesses, including psychiatric expert Dr. Andre Derdeyn, who testified about Anderson's abusive childhood. Dr. Derdeyn diagnosed Anderson with a "major depressive episode" and agreed that Anderson had anti-social personality disorder. The jury was instructed on forty-two mitigating factors and told it could consider any other mitigating circumstance. It found that none of the mitigating factors "probably existed," and it found one aggravating circumstance—that Anderson "previously committed another felony," the attempted murder of Solvey, "an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person." The jury sentenced him to death in 2002. The Arkansas Supreme Court reversed and remanded for resentencing because it determined that the jury "eliminated from its consideration all evidence presented of mitigating circumstances." *Anderson v. State*, 163 S.W.3d 333, 360 (Ark. 2004).

The second penalty phase team included Gray, a mitigation specialist, a paralegal, and several other attorneys. The team also consulted other attorneys at various points. They concluded that their initial strategy had not worked because the jury found no mitigating factors and decided to go "back to the drawing board." As Gray later testified, she and her team "presented the mitigation in a different fashion in the hopes to drive home to the jury that there were mitigating factors." The team prepared a twenty-four-page mitigation table that detailed the potential witnesses to testify on Anderson's behalf, a summary of their expected testimony, and the relevant exhibits to each witness. They presented thirteen witnesses, including Anderson, who had not testified during his first penalty phase.[2] He admitted to and took responsibility for killing Creech. He also testified about a letter he had written to his father while in prison and highlighted his personal accomplishments in prison, such as earning a GED.

The team consulted several experts, including psychologists and psychiatrists. They hired Dr. Rebecca Caperton, who specialized in mental functioning and IQ testing, and Dr. Elizabeth Speck-Kern, who specialized in neuropsychology and learning disabilities. The team otherwise did not request neuropsychological testing, did not have Anderson screened for post traumatic stress disorder ("PTSD"), and did not consult with an expert about the biological limitations of teenage brain development.

In her closing statement, Gray emphasized Anderson's humanity and told the jury that there are "redeeming qualities worth saving in [Anderson]." She said that Anderson was "damaged" but not "unsalvageable." Gray reminded the jury that the law did not require them to "kill" Anderson, and she argued that he had taken full responsibility for what he did and "doesn't deserve to die." After hearing the

[2]One witness also read the transcript of another witness who had testified at Anderson's first penalty phase proceeding.

evidence, the jury found the same aggravating circumstance as that found at Anderson's first sentencing—the attempted murder of Solvey. The jury also found thirty mitigating circumstances. Nevertheless, after weighing the factors, it sentenced Anderson to death.

The Arkansas Supreme Court affirmed the sentence. *Anderson v. State*, 242 S.W.3d 229 (Ark. 2006). Anderson pursued post-conviction relief in Arkansas, and the Arkansas Supreme Court affirmed the denial of Anderson's petition for post-conviction relief. *Anderson v. State*, 385 S.W.3d 783 (Ark. 2011).

Anderson then filed a petition for federal habeas corpus relief in the United States District Court for the Eastern District of Arkansas. *See* 28 U.S.C. § 2254. The district court dismissed Anderson's petition and granted him a certificate of appealability on two of his claims. We later expanded his certificate of appealability to include the two additional claims he now raises on appeal. We consider each in turn.

II.

Anderson claims that his counsel ineffectively failed to present or investigate certain mental health limitations. He argues that his counsel "unreasonably failed to present expert testimony" on the biological limitations of the teenage brain. He also argues that his counsel "unreasonably failed to identify" PTSD despite "ample evidence" of childhood abuse. Finally, he argues that his counsel "ignored obvious signs" of fetal alcohol spectrum disorder ("FASD") and that they should have requested neuropsychological testing, which would have revealed FASD.

During his § 2254 proceedings, Anderson presented an expert witness who testified that Anderson has "developmental" brain damage, which occurs "either perinatally or during development, fetal development, or early in childhood."

Another expert testified that Anderson has partial fetal alcohol syndrome. Anderson also presented an expert witness who diagnosed him with PTSD. Anderson claims that the fact that the jury did not have this information "undermines confidence in the verdict" because "the actions of others changed him physically in a way that's central to his moral culpability."

The district court held a four-day evidentiary hearing on Anderson's mental health claims and dismissed them as procedurally defaulted because he did not present them in state court and because it concluded that the claims were not substantial. We review "the factual findings of the district court for clear error" and "a finding of procedural default de novo." *Oglesby v. Bowersox*, 592 F.3d 922, 924 (8th Cir. 2010). On appeal, the parties agree that Anderson has procedurally defaulted his mental health claims. "If a petitioner has not presented his habeas corpus claim to the state court, the claim is generally defaulted. We will not review a procedurally defaulted habeas claim because the state has been deprived of an opportunity to address the claim in the first instance." *Barrett v. Acevedo*, 169 F.3d 1155, 1161 (8th Cir. 1999) (en banc) (citation omitted).

The Supreme Court announced a narrow exception to this rule in *Martinez v. Ryan*, 566 U.S. 1 (2012). Substantial claims of ineffective assistance of counsel may overcome procedural default when the habeas claim arose in a state whose "procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino v. Thaler*, 569 U.S. 413, 429 (2013). A claim is substantial if it "has some merit." *Martinez*, 566 U.S. at 14. We previously concluded that Arkansas does not afford "meaningful review of a claim of ineffective assistance of trial counsel on direct appeal." *Sasser v. Hobbs*, 735 F.3d 833, 853 (8th Cir. 2013) (internal quotation marks omitted). We assume that Anderson has presented a substantial claim that excuses his procedural default and proceed to the merits.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The defendant must also demonstrate that he was prejudiced. *Id*. at 692. Anderson's counsel's representation did not fall below an objective standard of reasonableness, and even if it did, Anderson has not demonstrated that he was prejudiced.

A.

Under *Strickland*, we first consider whether Anderson's counsel's representation fell below an objective standard of reasonableness. "An attorney's performance is deficient when he makes errors so serious that counsel was not functioning as the counsel guaranteed . . . by the Sixth Amendment." *Holder v. United States*, 721 F.3d 979, 987 (8th Cir. 2013) (internal quotation marks omitted and alteration in original).

Anderson argues that his counsel should have presented more evidence on the biological limitations of the teenage brain. But Anderson's team offered Anderson's "youth . . . at the time of Clara Creech's murder" as a mitigating circumstance. And Dr. Speck-Kern testified to the jury that before the crimes occurred Anderson was acting on "a series of impulses" related to "frontal lobe function." She explained that the frontal lobe is not fully developed until "people are about twenty-five years old. And so, when people are older than that, they can use their brains a lot more effectively than they can when they're teenagers or children." She also told the jury that structure in a young person's life helps them make decisions but that Anderson did not have that structure "in a consistent way." Having presented such evidence, we conclude that counsel's decisions on the teenage brain evidence were "within the range of professionally reasonable judgments." *Bobby v. Van Hook*, 558 U.S. 4, 12 (2009) (per curiam).

Next, Anderson challenges his counsel's failure to investigate adequately PTSD and FASD. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. When assessing whether the investigation was reasonable, we must consider "whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

Anderson's counsel's performance was not deficient for failing to investigate PTSD. Anderson's counsel thoroughly explored and presented evidence of the effects of his childhood abuse on his adult life. Dr. Speck-Kern testified with the goal of "mak[ing] a connection between [Anderson's] childhood abuse and the crime that he committed." She explained to the jury that alcoholism was "a very big problem in [Anderson's] family." She testified that there was "a chronic level of depression in his life," that "things were hopeless for him most of the time," and that Anderson experienced a "real dip" in his depression around the time of the murder. And Maurice Anderson, Anderson's brother, testified at length about the abuse both he and Anderson suffered throughout their childhood.

Anderson argues that his counsel should have pursued a PTSD diagnosis because one psychologist they consulted, Dr. George Woods, sent the team articles about PTSD after Gray wrote him an email asking whether "black males have more difficulty showing emotion than females and other ethnicities." But Dr. Woods did not evaluate Anderson and did not recommend that the team have him tested for PTSD, and Anderson does not allege that any other expert made such a recommendation. "[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up . . . ." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

Anderson's counsel's performance was also not deficient for failing to investigate evidence of FASD. Anderson argues that his counsel "ignored obvious signs of fetal-alcohol exposure." He claims his paternal grandmother told Gray and the team before the first trial that his mother was drinking around the time of his birth. His grandmother said only that she "didn't think [Anderson's mother] was a good pick" for her son because "[t]hey weren't ready for marriage." She explained that her son "drank heavily" and that Anderson's mother "was drinking too." However, she made no temporal connection between Anderson's birth and his mother's drinking. Anderson's brother also told Anderson's attorneys that his mother drank "a lot," and his cousin said that Anderson's mother is an alcoholic, but neither indicated that Anderson's mother drank while she was pregnant with Anderson. As the dissent notes, "no one specifically told counsel that [Anderson's mother's] drinking continued during pregnancy." *Infra*, at 20.

Anderson notes that, despite this evidence, his counsel did not ask his mother whether she drank while she was pregnant with Anderson, a question to which she admitted when asked by Anderson's habeas counsel. He also claims they should have administered neuropsychological testing, which would have revealed damage from fetal-alcohol exposure. Indeed, both Dr. Caperton and Dr. Speck-Kern suggested that neuropsychological testing might have been appropriate. But Dr. Caperton said only that "[i]t [wouldn't] hurt for [Anderson] to have a neuropsych exam." And according to Gray's notes from a later meeting, Dr. Speck-Kern told Gray that she had no reason to believe that Anderson's frontal lobe was damaged and that testing would be only "to rule out" frontal lobe damage.

Gray wrote both Dr. Speck-Kern and Dr. Caperton a letter asking for their opinions on Anderson's I.Q., whether he needed a neuropsychological evaluation, whether he had an anti-social personality disorder or a neuropsychological disorder, and whether they could make any connections between Anderson's "abusive childhood and his adult legal problems." She enclosed a number of materials with

each letter, including Anderson's school records, his I.Q. diagnosis, records showing that Anderson witnessed his mother's boyfriend abuse her, records showing that the boyfriend abused Anderson, testimony and a forensic evaluation from a psychologist, transcript testimony from all of the witnesses who had testified during the penalty phase of Anderson's first trial, and Dr. Derdeyn's report and meeting notes with Anderson.

Despite this information, neither Dr. Speck-Kern nor Dr. Caperton concluded that Anderson was brain damaged. Dr. Caperton said only that "[t]here's a chance [Anderson] suffered brain damage from the childhood abuse." And after reviewing Gray's notes from a meeting with her, Dr. Speck-Kern clarified that Anderson's low IQ "shows some cognitive limitations," but she observed that "[h]e doesn't appear to act as if he is suffering from major brain damage." Though she was given the opportunity, she did not correct Gray's note that "[Dr. Speck-Kern] doesn't think [Anderson] brain-injured, just never parented." Further, Dr. Derdeyn, who was board certified in psychiatry, neurology, child psychiatry, and forensic psychiatry, concluded that "there were no indications of disorders related to anxiety, psychosis or organicity." And Anderson cites no experts who indicated a potential FASD diagnosis to any member of the team.

These facts stand in contrast with the Tenth and Fourth Circuit cases Anderson cites. The Tenth Circuit expressed concerns about counsel's failure to order a neurological evaluation in *Littlejohn v. Trammell*, 704 F.3d 817, 862 (10th Cir. 2013). But in that case, an expert testified that the defendant had "neurological injury [originating] from birth," and the defendant's mother admitted to using drugs during her pregnancy. *Id*. (alteration in original). Likewise, the Fourth Circuit found that counsel was constitutionally deficient for not investigating whether the defendant had FASD where several witnesses testified that the defendant's mother drank while pregnant and where an expert concluded that the defendant "suffered neurological impairments as the result of frontal lobe damage and, consequently, had learning

difficulties." *Williams v. Stirling*, 914 F.3d 302, 306-07, 314-15 (4th Cir. 2019), *petition for cert. filed*, 87 U.S.L.W. 3470 (U.S. May 28, 2019) (No. 18-1495). Here, no expert concluded that Anderson had brain damage, nor did any definitive facts reveal that Anderson's mother drank while she was pregnant. The evidence Anderson's counsel did have did not amount to "red flags pointing up a need to test further." *See Rompilla*, 545 U.S. at 392 (internal quotation marks omitted).

We "indulg[e] a strong presumption that counsel's conduct falls within the wide range of reasonable professional judgment." *Bucklew v. Luebbers*, 436 F.3d 1010, 1016 (8th Cir. 2006). Anderson's attorneys did conduct an investigation that "comprise[d] efforts to discover all reasonably available mitigating evidence." *Wiggins*, 539 U.S. at 524 (emphasis omitted). They diligently consulted several experts, none of which diagnosed Anderson as brain damaged or expressed concerns about FASD despite the fact that Anderson's attorneys sent them testimony from Anderson's first penalty phase, which included testimony about the effects of alcohol on Anderson's childhood.

Though his case may have benefitted had his counsel investigated FASD, we consider "not what is prudent or appropriate, but only what is constitutionally compelled."[3] *Burger v. Kemp*, 483 U.S. 776, 794 (1987). In light of the facts that nobody told Anderson's attorneys his mother drank while she was pregnant and that the experts did not tell them he was brain damaged, it was not constitutionally deficient for his attorneys not to have further investigated FASD. *Cf. Marcrum v.*

[3]The dissent notes, and we emphasize, that the Supreme Court and this court have instructed repeatedly that the ABA Guidelines are "only guides to what reasonableness means, not its definition." *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (internal quotation marks omitted); *Roe v. Flores-Ortega*, 558 U.S. 470, 479 (2000) (explaining that "imposing specific guidelines on counsel is not appropriate" (internal quotation marks omitted)); *Kemp v. Kelley*, 924 F.3d 489, 501 (8th Cir. 2019); *Strong v. Roper*, 737 F.3d 506, 520 (8th Cir. 2013).

Luebbers, 509 F.3d 489, 511 (8th Cir. 2007) ("Where counsel has obtained the assistance of a qualified expert on the issue of the defendant's sanity and nothing has happened that should have alerted counsel to any reason why the expert's advice was inadequate, counsel has no obligation to shop for a better opinion."); *McClain v. Hall*, 552 F.3d 1245, 1253 (11th Cir. 2008) (explaining that the defendant's counsel "reasonably relied" on an expert opinion that the defendant "suffered from 'Antisocial Personality Disorder' but did not suffer from a frontal lobe disorder or from any 'significant emotional disorder'"). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . ." *Strickland*, 466 U.S. at 689. Thus, we conclude that Anderson's counsel's performance was not constitutionally deficient.

B.

Even if counsel were ineffective with regard to the mental health evidence, Anderson has not demonstrated prejudice. Anderson "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Because Anderson challenges his sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id*. at 695. We must consider the "totality of the evidence before the . . . jury." *Id*.

First, Anderson has not shown that it is reasonably probable that the jury would have reached a different conclusion had they been presented with more evidence of the limitations of the teenage brain. Though Gray and her team may not have explained the biological difference between nineteen-year-old brains and older brains as thoroughly as Anderson argues they should have, Dr. Speck-Kern sufficiently presented the issue, as outlined above.

Second, Anderson has not shown that it is reasonably probable that the jury would have reached a different conclusion had it been presented with evidence of a PTSD diagnosis. Based on the evidence presented to it, the jury found thirty mitigating circumstances relating to PTSD, including that Anderson "grew up in . . . abusive, neglectful households, where caretakers showed little or no affection to him," that his mother was diagnosed as mentally retarded and "intellectually incapable of providing adequate care or protection for" Anderson, that he witnessed his mother's boyfriend verbally and physically abuse his mother and brother, that he was physically abused, that he "has a family history of alcoholism," that he "lived in at least nine different places between the ages of five and sixteen," that Anderson's birthdays were not celebrated and that he was not given presents, and that he "never had a stable home life." At least one but not all of the jurors found that "Anderson was under extreme emotional distress" and that he "was acting under unusual pressures or influences" at the time of the crime. We agree with the district court that Anderson's counsel may have "missed the label . . . but they told the story."

Third, Anderson has not shown that it is reasonably probable that the jury would have reached a different conclusion had they been presented with evidence of FASD. Anderson's counsel presented an extensive mitigation case that convinced the jury to find *thirty* mitigating circumstances. And the jury heard related evidence on Anderson's brain limitations because Dr. Speck-Kern testified that his frontal lobe was not fully developed given his age at the time of the offense. Based on the "totality of the evidence before the . . . jury," Anderson has not demonstrated a reasonable probability that the jury "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death" had it been presented with one more mitigating circumstance, evidence of FASD, nor has he shown that the mitigating circumstances would have outweighed the aggravating circumstance had the jury been presented with evidence of PTSD and the teenage brain. *See Strickland*, 466 U.S. at 695.

III.

Anderson next argues that his counsel was ineffective because they presented the jury with a report from Dr. Speck-Kern that said, "Mr. Anderson stated that he has been on Death Row since January 2001." Anderson claims the statement "undermine[d] the . . . jury's sense of responsibility for its verdict" because it alerted the jury that a different jury had already sentenced Anderson to death.

The district court determined that Anderson's claim was procedurally defaulted because he did not present it in state court and because it was not substantial. As with his mental health claims, we review "a finding of procedural default de novo," *Oglesby*, 592 F.3d at 924, and we must consider whether Anderson has presented a "substantial" claim to overcome procedural default, *Martinez*, 566 U.S. at 14. We assume that Anderson's claim is substantial, thereby overcoming his procedural default, and conclude that the claim fails on the merits because he has not demonstrated that he was prejudiced. *See Strickland*, 466 U.S. at 687 (explaining that the defendant must show deficient performance and prejudice).

Under *Strickland*, Anderson must prove prejudice. *Id*. But the Supreme Court has explained that "it is impossible to know" how evidence of a defendant's prior death sentence "might have affected the jury." *Romano v. Oklahoma*, 512 U.S. 1, 13-14 (1994). In *Romano*, the state introduced during the sentencing phase a copy of the judgment and death sentence the defendant received in a prior trial. *Id.* at 3. The defendant argued that the evidence undermined the jury's "sense of responsibility for determining the appropriateness of the death penalty." *Id*. But the Supreme Court explained that to find the sentencing proceeding "fundamentally unfair would . . . be an exercise in speculation, rather than reasoned judgment." *Id*. at 14. It therefore declined to hold the defendant's sentencing proceeding fundamentally unfair. *Id*.

It is similarly unclear whether the statement in Dr. Speck-Kern's report influenced the jury. Indeed, the jury may not have even understood the statement that Anderson "had been on Death Row" to mean that he had been previously sentenced to death. It may have instead assumed he was on death row simply because he was charged with a capital offense. It is also possible that the jury never noticed the statement. Thus, Anderson has not demonstrated prejudice because he has not met his burden of showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see also Sanders v. Trickey*, 875 F.2d 205, 210 (8th Cir. 1989) ("Since appellant offers only speculation that he was prejudiced by the failure of his counsel to interview [a potential witness], he has not made the required showing of prejudice under *Strickland*."); *Kennedy v. Kemna*, 666 F.3d 472, 479 (8th Cir. 2012) (explaining that the defendant's "theory of prejudice [was] rife with speculation").

IV.

Next, Anderson argues that the trial court erroneously instructed the jury to consider an improper aggravating factor. During penalty phase deliberations, the jury asked the trial judge for clarification regarding verdict form 3(b). Form 3(b) asked the jury to determine whether the "aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstances found by any juror to exist." The jury said it needed "clarification for the aggravating circumstances" and asked whether it should consider "the Roger Solvey circumstance, the Clara Creech circumstances, or both of them."

The trial court explained that because the jury had already determined the aggravating circumstance on a prior form, which the trial court reasoned was a threshold issue, the jury "should be allowed to consider all of the . . . properly admitted evidence, or else it shouldn't have been admitted in the first place." Thus,

the trial court told the jury that it "may consider all of the evidence and give it whatever weight that you believe appropriate in answering form three B, and following." Anderson argues that this amounted to an instruction to weigh the "Creech circumstances" as an aggravating factor.

Anderson claims that the "Creech circumstances" do not fit under any of the ten enumerated aggravating factors that Arkansas law permits juries to consider. *See* Ark. Code Ann. § 5-4-604. He therefore concludes that the trial court's instruction was a constitutional error. *See Brown v. Sanders*, 546 U.S. 212, 221 (2006) (explaining that weighing an improper aggravating factor will "give rise to constitutional error[] only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor"). The district court determined that Anderson's claim is procedurally defaulted, and we agree.[4]

We review a "finding of procedural default de novo." *Oglesby*, 597 F.3d at 924. "Before seeking habeas corpus relief under § 2254, a prisoner ordinarily must fairly present his federal claims to the state courts." *Turnage v. Fabian*, 606 F.3d 933, 936 (8th Cir. 2010) (internal quotation marks omitted). "This requirement serves the salutary purpose of giving states the opportunity to pass upon and correct alleged violations of [their] prisoners' federal rights." *Id*. (internal quotation marks omitted and alteration in original).

Anderson did not fairly present his "Creech circumstances" argument in state court. Before the Arkansas Supreme Court, Anderson took issue with the admission of victim impact evidence—testimony from five witnesses, "each of whom gave an extensive history of Mrs. Creech's life and discussed the impact of her death on

[4]The *Martinez* exception applies to ineffective assistance of counsel claims and is inapplicable here. *See Trevino*, 569 U.S. at 422-23.

everyone from themselves, to other family members, to her church family, to society in general." Anderson's relevant argument heading read, "The trial court erred in failing to grant appellant's motions to prohibit victim impact and 'other evidence.' Alternatively, the trial court erred by instructing the jury to consider all evidence presented as aggravating circumstances to be weighed against the mitigators in determining appellant's eligibility for the death penalty."

After a lengthy argument that the trial court should not have allowed the introduction of victim impact evidence, Anderson turned to his alternative argument, claiming only that "[t]he [t]rial [c]ourt erred by instructing the jury to treat [sic] weigh victim impact evidence as an aggravating circumstance against the mitigating circumstances they found to exist" and that "the trial court erred in directing the jury to prematurely weigh the victim impact evidence." His state court briefing urged the Arkansas Supreme Court to overturn a line of cases explicitly dealing with victim impact evidence. He also argued that the "uniqueness and goodness of . . . Creech and the impact her death had on her family" should have been weighed only after weighing aggravators and mitigators. While his heading initially indicated that the trial court should not have instructed the jury to consider "all of the evidence," he later narrowed his focus, arguing only that it should not have been instructed to consider the victim impact evidence.

For the first time, Anderson presents a different argument—that the jury could not consider the "Creech circumstances," which he says involves "the evidence of Clara Creech's killing." But the evidence about Creech's killing is different from the evidence of how that killing affected those close to her. Nevertheless, Anderson argues that his state court briefs "refer, somewhat confusingly, to the 'Clara Creech circumstances' as 'victim impact evidence'" and that he is only reformulating his argument on appeal. But Anderson's briefing to the Arkansas Supreme Court made clear that he used the term "victim impact" in its conventional sense—the testimony of the five witnesses about Creech's life and the impact of her death. His state briefs

did not use the term "victim impact" to refer to "the evidence of Clara Creech's killing." Further, Anderson did not seek a certificate of appealability on whether the jury was erroneously instructed to consider the victim impact evidence as an aggravating factor.

Anderson also argues that his "Creech circumstances" claim is not procedurally defaulted because he referred to a "specific federal constitutional right" violated by considering the victim impact evidence as an aggravating factor—the same constitutional rights he claims are violated by considering the "Creech circumstances" as an invalid aggravating factor. *See Murphy v. King*, 652 F.3d 845, 849 (8th Cir. 2011). But "[p]resenting a claim to the state courts that is merely similar to the federal habeas claim is insufficient to satisfy the fairly presented requirement." *Abdullah v. Groose*, 75 F.3d 408, 412 (8th Cir. 1996); *see also Forest v. Delo*, 52 F.3d 716, 719 (8th Cir. 1995) (explaining that the defendant's claim was procedurally defaulted because he argued before the state court that his attorney coerced his guilty plea, not that the trial judge coerced his guilty plea as he argued in federal court). Thus, because Anderson did not present his "Creech circumstances" argument to the state court, we conclude that Anderson's claim is procedurally defaulted.

But even if we assume that Anderson fairly presented his claim to the state court, his claim nevertheless fails. Considering an aggravating factor in violation of a state statute alone does not amount to a constitutional violation meriting federal habeas relief. *See Barclay v. Florida*, 463 U.S. 939, 956-57 (1983) (plurality opinion) (explaining that the plurality in a prior case "saw no constitutional defect" in a sentence based on both aggravating factors properly considered under state law and an aggravating factor not listed in the state statute); *Moore v. Mitchell*, 708 F.3d 760, 798 (6th Cir. 2013); *Lesko v. Owens*, 881 F.2d 44, 59 (3d Cir. 1989) (noting that the Supreme Court in *Barclay* "held that although the state sentencing statute forbid the jury to consider defendant's prior criminal record, this violation of state law did not violate the federal constitution"); *Shriner v. Wainwright*, 715 F.2d 1452, 1458

(11th Cir. 1983) ("Even if the judge considered a nonstatutory aggravating factor, this error of state law does not rise to the level of a constitutional violation requiring federal habeas corpus relief."); *Barfield v. Harris*, 719 F.2d 58, 61 (4th Cir. 1983). And the Supreme Court has held that a jury may properly "consider the circumstances of the crime in deciding whether to impose the death penalty." *Tuilaepa v. California*, 512 U.S. 967, 976 (1994). Thus, Anderson's claim likewise fails on the merits.

V.

Finally, Anderson argues that his youth at the time of the offense and serious mental illnesses categorically exempt him from the death penalty. He argues that though he procedurally defaulted these claims by failing to present them in state court, he claims they are novel, providing him with "cause" for his default, and he argues that we should remand his case for a hearing on prejudice. *See Engle v. Isaac*, 456 U.S. 107, 129 (1982) ("[W]hen a procedural default bars state litigation of a constitutional claim, a state prisoner may not obtain federal habeas relief absent a showing of cause and actual prejudice."). The district court disagreed, determining that the tools to construct the arguments were available to Anderson when his case was pending in state court. It therefore dismissed his claim as procedurally defaulted. We agree.

In *Reed v. Ross*, 468 U.S. 1, 16 (1984), the Supreme Court held that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." The Court previously "identified three situations in which a new constitutional rule, representing a clear break with the past, might emerge." *Id*. at 17 (internal quotation marks omitted) (citing *United States v. Johnson*, 457 U.S. 537, 549 (1982)). Anderson argues that his claims fall within the second situation, where a Supreme Court decision overturns "a longstanding and

widespread practice to which [the Supreme Court] has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Id*. But Anderson does not identify a Supreme Court decision that fits within *Reed*'s second category.

Further, we have explained that "[i]f the tools were available for a petitioner to construct the legal argument at the time of the state appeals process, then the claim cannot be said to be so novel as to constitute cause for failing to raise it earlier." *Frizzell v. Hopkins*, 87 F.3d 1019, 1021 (8th Cir. 1996) (internal quotation marks omitted). The Supreme Court categorically exempted the execution of offenders under the age of eighteen in *Roper v. Simmons*, 543 U.S. 551, 575 (2005), six months before Anderson's resentencing took place in September 2005. The Supreme Court categorically exempted an insane person from the death penalty in 1986, and it categorically exempted persons with intellectual disabilities in 2002. *See Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). The tools were available to Anderson to make his arguments before the state court. He has thus not shown cause, and his procedural default is not excused.

VI.

For the foregoing reasons, we affirm.

KOBES, Circuit Judge, concurring in part and dissenting in part.

I join the majority's well-reasoned opinion on all but one issue. In my view, counsel's failure to investigate Anderson's fetal alcohol spectrum disorder (FASD) was unreasonable and prejudicial. By the time of Anderson's second penalty-phase trial in 2005, it was common practice for the capital bar to investigate FASD. Anderson's attorneys failed to do so despite significant evidence of his mother's alcohol abuse. This failure likely prejudiced Anderson because evidence of FASD is more powerful than any of the mitigating evidence presented at his resentencing.

I.

FASD is a form of organic brain damage that affects the ability to make decisions, communicate, and control emotions. *See* App. I520–22. We now know that Anderson's mother drank while pregnant and Anderson has FASD as a result. App. I337. The court forgives his defense team's failure to discover this before sentencing because evidence of his mother's drinking "did not amount to red flags pointing up a need to test further." Maj. Op. 10 (citation omitted). I respectfully disagree.

Anderson's childhood was soaked in alcohol—and his attorneys knew it. His defense team heard several of Anderson's relatives describe his mother, Ruby, as a heavy drinker or an alcoholic. His grandmother explained that when she was with Jerry Anderson, Anderson's father, Jerry drank heavily and "Ruby was drinking too." App. AA1. Anderson's older brother reported that when she was with Amos Strickland, "Ruby and Amos drank a lot." App. AA3. His half-sister also told counsel that Ruby drank, App. Z26, and one of his cousins referred to her as a "heavy drinker[]" and "an alcoholic" who "drinks just as much as Jerry did," App. Z27, Z29, AA6.

The court discounts this evidence because the witnesses "made no temporal connection between Anderson's birth and his mother's drinking" and did not explicitly "indicate[] that Anderson's mother drank while she was pregnant with Anderson." Maj. Op. 8. Though it is true that no one specifically told counsel that Ruby's drinking continued during pregnancy, some of the descriptions were so tied to Anderson's infancy that counsel should have investigated further. Anderson's brother, for example, said his mother drank heavily when she was with Amos Strickland, which was during the earliest years of Anderson's life. And although his grandmother's statements to counsel were ambiguous about timing (Anderson's mother appears to have been with Jerry Anderson prior to Anderson's birth but only

married him years later), she reasonably might have been describing the period leading up to Anderson's birth. Ambiguity remains because Anderson's attorneys failed to ask obvious follow-up questions. Then there was the other evidence that should have impressed on his attorneys the prevalence of alcohol in Anderson's childhood. For example, his counsel knew that once, when he talked back while picking up the empty beer cans scattered "any and everywhere," Amos tried to punish him by throwing a full beer bottle that narrowly missed him. App. M213.

Counsel had a duty to conduct an investigation that "comprise[d] efforts to discover all reasonably available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphasis omitted). A thorough investigation is especially important in capital cases. *See Hill v. Lockhart*, 28 F.3d 832, 845 (8th Cir. 1994) ("Given the severity of the potential sentence and the reality that the life of [the defendant] was at stake, we believe that it was the duty of [the defendant's] lawyers to collect as much information as possible . . . for use at the penalty phase of his state court trial."). Failure to fully develop the facts is reasonable only if "professional judgments support the limitations on [the] investigation." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). Here there was no judgment behind counsel's failure to investigate FASD. Anderson's lead mitigation attorney acknowledged the 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. Z119, Z121. That is not the sort of "professional judgment" that *Strickland* permits.

The failure to explore Anderson's prenatal exposure to alcohol is notable given the state of FASD-based mitigation strategies at the time of Anderson's resentencing in 2005. The 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines), which are a "guide[] to determining what is reasonable" in this case, *Strickland*, 466 U. S. at 688, recognized FASD's value as a defense and recommended that all capital

defense teams include at least one person qualified to screen for FASD,[5] ABA Guidelines, *reprinted in* 31 Hofstra L. Rev. 913, 956–57 (2003); *see also*, *id.* at 1022 (mitigation cases depend on "extensive and generally unparalleled investigation into personal and family history" that "begins with the moment of conception") (citations omitted). And although the Supreme Court has cautioned that the ABA Guidelines are "only guides" to what is reasonable, *Strickland*, 466 U.S. at 688, other facts underscore that FASD was established as a mitigation strategy by the time of Anderson's resentencing. For example, his expert testified before the district court that by the 1990s the FASD defense was well-recognized by the capital defense bar, App. I59–60, and Arkansas case law records attempts to use it as early as 1995, *see Miller v. State*, 942 S.W.2d 825, 828 (Ark. 1997). Given all of this, it was unreasonable for counsel not to ask Anderson's mother whether she drank while pregnant.

The majority deflects blame from Anderson's attorneys by shifting focus to the experts his attorneys retained and *their* failure to identify FASD. But Anderson has pleaded ineffective assistance of counsel, not ineffective assistance of experts. The duty to investigate mitigation defenses in capital cases is borne by counsel. *See, e.g.*, *Strickland*, 466 U.S. at 691; *Kayer v. Ryan*, 923 F.3d 692, 713 (9th Cir. 2019); *Harries v. Bell*, 417 F.3d 631, 637 (6th Cir. 2005). Anderson's experts did not have access to everything that counsel did and, more importantly, they lacked the most valuable evidence in this case—Ruby's admission that she drank while pregnant—because counsel failed to uncover it. In capital cases, attorneys often enlist experts to help them decide which defenses to present and what threads to pull at. But experts 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.

[5] Anderson's team did not include a qualified person. App. Z18–19.

II.

I also respectfully disagree with the court that "Anderson has not shown that it is reasonably probable that the jury would have reached a different conclusion" if Anderson's counsel had presented evidence of FASD. Maj. Op. 11. The court notes that the jury found thirty mitigating circumstances and still sentenced Anderson to death. It concludes that it is not reasonably probable that "one more mitigating circumstance" would have made a difference. *Id.* But evidence of Anderson's FASD is more than "one more" mitigation argument.

In my view, the court artificially inflates Anderson's mitigation case. Although numerous, the mitigators were duplicative and focused primarily on his traumatic and unstable home life. *See* App. T2–T14. For example, "Justin Anderson never had a stable home life," "Justin Anderson attended up to five different school districts from Kindergarten to the 8th grade," and "Justin Anderson lived in at least nine different places between the ages of 5 and 16," were three *different* mitigating factors. App. T8–T9.

It's not just the quantity, but the quality of mitigating evidence that can make the difference between life and death. *See Blanton v. Quarterman*, 543 F.3d 230, 236 (5th Cir. 2008). Compared to Anderson's mitigators, an FASD diagnosis would offer something different and more compelling. The ABA Guidelines recognize the significance of an FASD diagnosis, explaining that "the permanent neurological damage caused by fetal alcohol syndrome" could "lessen the defendant's moral culpability for the offense or otherwise support[] a sentence less than death." ABA Guidelines, *supra*, at 1060–61. That brain damage presents a different and more powerful type of mitigating evidence is a theme throughout capital caselaw. *See Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (describing the way that brain damage caused by FASD diminished the defendant's "capacity to appreciate the criminality of his conduct or conform his conduct to the law"); *Littlejohn v. Trammell*, 704 F.3d

817, 864 (10th Cir. 2013) ("Evidence of organic mental deficits ranks among the most powerful types of mitigation evidence available."). The Fourth Circuit recently explained the power of an FASD diagnosis, noting that such evidence "was different from the other evidence [presented to the jury] because it could have established *cause and effect* for the jury," effectively explaining *why* the defendant had committed the crime. *Williams v. Stirling*, 914 F.3d 302, 318 (4th Cir. 2019). "Without [the FASD diagnosis], the jury . . . would have assigned greater moral culpability to [the defendant] for his criminal behavior." *Id.*

So too, here. The jury was presented with much mitigating evidence, but nothing with the force of an FASD diagnosis. As Anderson's lead mitigation attorney admitted, evidence of FASD would have fit perfectly with the theme of the mitigation defense: "Childhood Matters." App. Z20. It would have significantly bolstered that defense, explaining not just that Anderson had a horrible childhood, but that it changed him physically. With the addition of this evidence, there is a reasonable probability that the jury "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Anderson has demonstrated prejudice.

* * *

Anderson has established ineffective assistance of counsel on the narrow issue of his counsel's failure to fully investigate his exposure to alcohol *in utero*. I echo the Fourth Circuit in *Williams*:

> [M]ost of trial counsels' decisions and actions on issues unrelated to [FASD] *did* bear the hallmarks of effective assistance: trial counsel had experience in capital cases; counsel consulted with numerous experts in developing a mitigation case; and counsel spent a significant amount of time developing mitigation arguments. But as *Wiggins* makes abundantly clear, an inadequate

> investigation into potentially mitigating evidence can be, by itself, sufficient to establish deficient performance.

914 F.3d at 313–14 (citations omitted). Because Anderson has shown that failure to investigate FASD likely prejudiced his mitigation case, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

JUSTIN ANDERSON PETITIONER

v. No. 5:12-cv-279-DPM

WENDY KELLEY, Director,
Arkansas Department of Correction RESPONDENT

ORDER

1. Seventeen Octobers ago, Justin Anderson shot and killed Clara Creech. There was a randomness about it. Creech, who was in her eighties, was bent down, working in her front yard in the small town of Lewisville. Anderson didn't know her; he came upon her as he walked down the street. Anderson was nineteen. He had lost his job; he was living with his brother and his brother's girlfriend. In the ten days before, Anderson had burgled a house and stolen two guns, and shot a truck driver who happened to be asleep in the cab of his tractor when Anderson tried to rob it. Anderson was probably trying to steal Creech's car to heal a rift with his brother. Anderson confessed. From the beginning, he hasn't denied shooting Creech. He has maintained, instead, that he did so without premeditation or deliberation, and thus didn't commit capital murder. A Lafayette County jury rejected this defense, convicted Anderson, and chose the death penalty.

The case then began its journey—up, down, and around the state and federal courts. The Arkansas Supreme Court affirmed the conviction but reversed the sentence because of obvious confusion about mitigation reflected in the first jury's sentencing verdict forms. *Anderson v. State (Anderson I)*, 357 Ark. 180, 163 S.W.3d 333 (2004). To address pretrial publicity, venue was changed to Miller County, which adjoins Lafayette County in south Arkansas. At the end of an eight-day trial, the second jury came to several conclusions: there were many mitigating circumstances; there was one aggravating circumstance (Anderson's attempted-murder conviction for shooting the truck driver); and the aggravator outweighed all the mitigators. The second jury therefore also chose the death penalty. (For legal reasons that will become clearer, one hub of the case now is the performance of Anderson's lawyers as they prepared for and handled this resentencing trial.)

The Arkansas Supreme Court affirmed. *Anderson v. State (Anderson II)*, 367 Ark. 536, 242 S.W.3d 229 (2006). The United States Supreme Court denied review. *Anderson v. Arkansas*, 551 U.S. 1133 (2007). Anderson then returned to the Miller County Circuit Court, seeking post-conviction relief. None was granted. The Arkansas Supreme Court later affirmed that none was required.

Anderson v. State (Anderson III), 2011 Ark. 488, 385 S.W.3d 783. Anderson's timely petition for a writ of *habeas corpus* brought the case here.

2. The governing legal framework is settled but complicated. The Court recently summarized that law in *Kemp v. Hobbs*, No. 5:03-cv-55-DPM, *№ 68 at 8–11*. In the next few paragraphs, the Court mostly quotes that summary, revised to refer to Anderson instead of Kemp.

To have preserved a claim for relief, Anderson must have properly exhausted his state remedies by fairly presenting that claim to the Arkansas courts and allowing them to rule on it. *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991); *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). "[A] claim has not been fairly presented to the state courts unless the same factual grounds and legal theories asserted in the prisoner's federal habeas petition have been properly raised in the prisoner's state court proceedings." *Krimmel v. Hopkins*, 56 F.3d 873, 876 (8th Cir. 1995). Anderson can lose a claim to procedural default at any level of state-court review: trial, direct appeal, or state post-conviction proceedings. *Kilmartin v. Kemna*, 253 F.3d 1087, 1088 (8th Cir. 2001).

Once a claim is defaulted, this federal Court can consider it only if Anderson can show either cause for the default and actual prejudice, or that the default will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. "[T]he cause standard requires [Anderson] to show that some objective factor external to the defense impeded counsel's efforts to raise the claim in state court." *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (quotations omitted). Examples of cause include constitutionally ineffective assistance of counsel, an unavailable factual or legal basis for a claim, or interference by state officials that made complying with the exhaustion requirements impracticable. *Murray v. Carrier*, 477 U.S. 478, 488–89 (1986). Anderson must also show "not merely that the errors at . . . trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." 477 U.S. at 494 (quotations omitted and emphasis original).

An equitable exception exists to excuse the procedural default of ineffectiveness-of-trial-counsel claims—if the claim is substantial and post-conviction counsel was ineffective in not raising it. *Martinez v. Ryan*, 566 U.S. 1, 14 (2012); *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013). A substantial

ineffectiveness claim is one that has "some merit." *Martinez*, 566 U.S. at 14. Anderson must show deficient performance and resulting prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). The Court assumes Anderson has made a sufficient showing that post-conviction counsel was ineffective in not raising his ineffectiveness-of-trial-counsel claims.

For his claims that the Arkansas courts decided on the merits, Anderson can obtain federal *habeas* relief only in two limited circumstances. This Court can grant relief only if the state's adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

A decision is contrary to clearly established federal law if the rule the state court applied directly contradicted Supreme Court precedent or if, when faced with "materially indistinguishable" facts, the state court reached a decision opposite the Supreme Court's. *Kinder v. Bowersox*, 272 F.3d 532, 537–38 (8th Cir. 2001). "As for an unreasonable application of the law, we

must remember that unreasonable is not the same as incorrect." 272 F.3d at 538 (quotations omitted). Although a state court's application of federal law might be mistaken in this Court's independent judgment, that does not mean that it is objectively unreasonable. *Ibid.* Finally, the state court's factual findings are presumed correct unless Anderson "can rebut the presumption by clear and convincing evidence." *Rousan v. Roper*, 436 F.3d 951, 956 (8th Cir. 2006).

3. Anderson's petition is a vast fabric. It has twenty-one claims, which embrace seventy-eight subclaims, some of which have subparts. See Appendix A. The claims and supporting points, moreover, are a weave of incorporated contentions. Anderson's comprehensive argument is the product of appointed counsel's zealous, and able, advocacy. (Counsel for respondent Kelley have been equally zealous and able.) As the Court noted in its previous Orders, *№ 31 & 79*, Anderson's new allegations about mental illness, brain damage, childhood trauma, and the neurobiological limitations of young people are the strongest. Because Anderson didn't fully present these issues to the Arkansas courts, this federal court can reach them only if his former lawyers were constitutionally ineffective in their related work.

That's the door created by *Martinez* and *Trevino*. His lawyers' work, and necessarily the merits of these new allegations, were the main subjects of the four-day evidentiary hearing. More about all that in a moment.

The rest of Anderson's claims are important but secondary. Their resolution is clear. The Court has therefore analyzed and decided them in a series of appendices—organized by subject. This is the best way to scrutinize the fabric. Anderson's several arguments for not raising various non-hearing claims in state court aren't persuasive. His procedural defaults aren't excused. See Appendix B. And even looking past his defaults to the merits, these claims fail. Settled precedent stops several of them at the door. For example, the death penalty is constitutional. See Appendix C. Anderson's various attacks on his audio-taped confession, and related ineffectiveness claims, fail: the Arkansas courts adequately addressed the merits there; and his lawyers weren't ineffective. See Appendix D. None of Anderson's points about problems in *voir dire*, some of which are new, make any headway. Potential jurors were questioned adequately; he hasn't demonstrated that any juror was biased. See Appendix E. Anderson's venue-related arguments fail too. See Appendix F. Anderson says that his lawyers fumbled the mental-

capacity evidence in hand, as distinguished from his new claims about their not pushing deeper and wider to get different capacity evidence. These supposedly fumbled claims also fail for various reasons. See Appendix G. His improper-evidence claims don't fare any better. See Appendix H. Anderson also makes a miscellany of claims that he didn't present to the Arkansas courts. They, too, fail on the merits. See Appendix I. Last, Anderson's argument that he is actually innocent of the death penalty is unconvincing. See Appendix J.

4. Now back to the claims on which the Court heard four days of evidence and argument. Anderson's ineffectiveness claims—related to new evidence of an underdeveloped, damaged brain—cannot overcome the overwhelming evidence that he's guilty of capital murder. Whether *Strickland* required his lawyers to do more at resentencing, and whether it would have made a difference, are harder questions. In this Court's judgment, though, Anderson hasn't demonstrated a substantial claim of ineffectiveness. His lawyers' resentencing work wasn't constitutionally inadequate. Where their decisions were imperfect or their efforts fell short, Anderson hasn't demonstrated a reasonable probability of a different result. The

Martinez/Trevino exception therefore doesn't allow the Court to consider the related ineffectiveness claims on the merits.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. The defense presented by Anderson's lawyers at resentencing was powerful and their strategy gained ground, though not victory. The jury unanimously found thirty mitigators, almost all related to Anderson being abused and neglected as a child. On two additional mitigators, at least one juror found that Anderson shot Creech under extreme emotional distress and under unusual pressures or influences. Notwithstanding the mitigating circumstances, the strength of the aggravating circumstance (Anderson's attempted-murder conviction) and the circumstances of Creech's murder support the death sentence. Anderson's lawyers' conduct didn't undermine the adversarial process; the resentencing trial produced a just result.

"Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. The Court must avoid the temptation, from more

than twelve years' distance, to conclude that particular choices were unreasonable. Instead, to be fair all around, the Court must eliminate the distorting effects of hindsight, reconstruct the circumstances, and evaluate counsel's work from their perspective at the time. Did Anderson's defense team make reasonable choices, looking at the case as a whole? Yes.

Their theme was "childhood matters." Evidentiary Hearing, Vol. I (Sealed) 20. The defense team hit that theme in opening statement, carried it through the proof, and closed the case with it. The theme was, and is, compelling.

In opening, defense counsel compared the jury's task to reading a book: "You don't start a book in the middle of the story, you start from the beginning, and I think that's where we should start with Justin." Resentencing Record 2584. His lawyers then presented evidence of Anderson's disruptive and traumatic childhood, and they offered expert testimony describing its effects. They also took the Creech murder head on, describing Anderson's actions as terrible and senseless. They tried to explain, but not excuse, what he'd done. And they asked for mercy: "[M]ercy is something Justin could have shown Ms. Creech and didn't. He chose not to.

All I'm asking is that you don't make the same choice Justin made." Resentencing Record 2590.

Anderson's position now is that his trial lawyers should have uncovered and presented a different explanation for his decision to murder Creech: he was a young man, mentally undeveloped, his brain damaged by fetal-alcohol effects and traumatized by a childhood of abuse and neglect. Anderson offered new experts: Dr. Victoria Reynolds, a clinical psychologist; Dr. Dale Watson, a neuropsychologist; Dr. Richard Adler, a psychiatrist; and Dr. Natalie Novick Brown, a psychologist. They testified that, as a result of *in utero* exposure to alcohol, Anderson has organic brain damage causing a moderate level of brain dysfunction. The effects of fetal alcohol, according to these experts, impair Anderson's executive functioning and behavior control, especially in unfamiliar and stressful situations. Dr. Reynolds added that Anderson suffers from post-traumatic stress disorder caused by a childhood filled with abuse, neglect, and abandonment. Dr. Brown described the interaction among Anderson's undeveloped brain, his exposure to childhood trauma, and the partial fetal-alcohol syndrome diagnosis: at age 19, Anderson had an "immature, doubly-damaged brain" that prevented him from

controlling his behavior when faced with the "unexpected scream from Ms. Creech." Evidentiary Hearing, Vol. IV 783, 864.

Anderson, however, has not demonstrated that his lawyers were so deficient in investigating and presenting mitigation evidence that they were "not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Their duty was "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. Anderson argues they should have developed evidence that he was exposed to alcohol *in utero*, arranged for neuropsychological testing, and had him assessed for PTSD. But his lawyers' decisions were not outside the range of reasonable choices. None of the experts—from the first trial or the resentencing—concluded that Anderson's brain was damaged, or pressed for neuropsychological testing. Anderson's lawyers diligently explored his background and the possibility of any brain dysfunction. They didn't "fail[] to act while potentially powerful mitigating evidence stared them in the face or would have been apparent from documents any reasonable attorney would have obtained." *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009).

Anderson was represented by an organized defense team. At the first trial, Latrece Gray was the lawyer responsible for the penalty phase. At resentencing, she took a larger role. She and attorney Lou Marczuk were the team's core. Lawyers Steve Harper and later Robby Golden assisted. Janice Vaughn, who handled Anderson's first direct appeal, was also involved. There was a mitigation specialist: Carol Holloway. And there were two investigators: James Williams from Little Rock and Peter Briggs in south Arkansas. Pam Welling was the paralegal. The team's membership varied between eight and nine people.

Anderson's resentencing team recognized from the git-go that the approach to mitigation the first time had failed. The jury didn't find one mitigator in *Anderson I*. The lawyers therefore started their resentencing preparations afresh. During the fourteen months between *Anderson I* and the second trial, they worked hard at trying to save Anderson's life. They held regular meetings with written agendas and strategy discussions. The team addressed the various mitigation evidence: forensics, social history, and witnesses. They decided together which experts to use; over several months, they discussed and weighed Anderson's capacity and mental health. Gray

prepared a Revised Mitigation Table with defense witnesses, their anticipated testimony, and supporting exhibits. Petitioner's Exhibit 4. It's twenty-four pages long. This table shows the defense team's industry, as well as its thoroughness.

Testing before the first trial had shown Anderson wasn't intellectually disabled. The defense expert then—Dr. Andre Derdeyn—had found no organic brain disorder. For the second sentencing trial, the defense team decided to get another opinion. And the team wanted to retest Anderson's IQ. The lawyers went with two new experts: Dr. Rebecca Caperton and Dr. Elizabeth Speck-Kern, both psychologists.

Gray wrote each an engagement letter casting a wide net about potential deficits. She asked about a low IQ, a neuropsychological disorder, antisocial personality disorder, and the effect of childhood trauma. Gray enclosed many records: school records; the earlier psychological assessment, which diagnosed Anderson with a 65 IQ; the DHS records of physical and verbal abuse during Anderson's childhood, and his mother's boyfriend's conviction for that abuse; the forensic evaluation and first-trial testimony from the State Hospital psychological examiner; the first-trial mitigation testimony from Dr.

Derdeyn, family members, teachers, and DHS workers; and Dr. Derdeyn's report and notes. Petitioner's Exhibits 11 and 16. The team followed up on these letters with regular telephone conferences and email exchanges with both experts.

Arkansas Rule of Criminal Procedure 18.2, however, was Banquo's ghost at the defense team's regular meetings.

> Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of and permitted to inspect and copy or photograph any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

The lawyers knew about this Rule. Gray told Dr. Speck-Kern that the team would wait until she made her findings before deciding about a report. Why? Because any report, Gray continued, had to be turned over to the prosecutor. Respondent's Exhibit 1, 26555. Gray testified that this Rule was why the team had decided against having psychologist Dr. James Moneypenny (who tested Anderson's IQ before the first trial) prepare a written report.

Before the first trial, the prosecutor had moved for the disclosure of any expert statements or reports, "including results of . . . mental examinations and of scientific tests . . .[.]" Trial Record 6. Although the Circuit Court never

filed an Order on that motion, at a hearing about a week before the first trial, the Court ordered the defense to immediately prepare a summary of any testifying expert's opinions and make the expert available to the prosecution for an interview. Trial Record 1510, 1526-29. The next day, relying on Rule 18.2, the Court ordered production of all records beneath any testifying expert's opinion, including notes and tests. Trial Record 1552-78. Before the resentencing trial, all the lawyers agreed that the Court's prior Orders and rulings stood unless modified; the Circuit Court so held. Resentencing Record 1174-76. Anderson's defense team thus knew that any neuropsychological test results were vulnerable to discovery.

The team also faced uncertainty. Would new tests help or hurt the defense? Anderson's lawyers faced the risk recognized in *Forrest v. Steele*, 764 F.3d 848 (8th Cir. 2014). Because the prosecutor "might have acquired any unfavorable results, . . . the consequences of negative results were potentially severe." 764 F.3d at 856. Any testing offered by the two new experts had to be weighed against the possibility that the uncertain results could be used against Anderson.

Dr. Caperton's specialty was mental functioning and IQ testing. She determined that the scoring on Anderson's most recent IQ test—91—was correct. She told the defense team that she didn't think Anderson would score low enough for the results to be helpful. Having reached the end of that path, the team stopped consulting with Dr. Caperton.

Dr. Speck-Kern specialized in neuropsychology. Anderson's team contacted her because she regularly evaluated people with suspected brain injuries, cognitive issues, and language disorders. The team wanted to know if Anderson had any of these problems. Early on, Dr. Speck-Kern told the team that Anderson needed neuropsychological testing. She suggested giving him the Wisconsin card-sorting test for executive functioning. But—after spending almost two hours with him—she revised her recommendation. Dr. Speck-Kern acknowledged that Anderson's IQ revealed some cognitive limitations, but she found his "problems seem to mostly be emotional . . .[.]" She said Anderson "doesn't appear to act as if he is suffering from major brain damage." Petitioner's Exhibit 19. According to Gray's notes, Dr. Speck-Kern told her that Anderson "just seems average" and "nothing indicates frontal lobe damage." Dr. Speck-Kern had softened her view. She now told Gray

that neuropsychological testing would be only to "rule out" any brain damage. Petitioner's Exhibit 20. And other indicators cut against the need for testing. As Dr. Speck-Kern would highlight in her testimony, Anderson, while in prison, had passed the GED, started reading novels and history, done some writing, and taken an anger management class.

The defense team worked to understand, evaluate, and act on Dr. Speck-Kern's conclusions. The exchange between Dr. Speck-Kern and Gray about the psychologist's meeting with Anderson shows the deep collaboration between the lawyers and this expert—and the shade of Rule 18.2. After meeting with Anderson, Dr. Speck-Kern called Gray to discuss her observations and findings. Gray made notes during their talk. Then she typed them up and emailed them to the defense team and Dr. Speck-Kern. Gray testified that she asked Dr. Speck-Kern to correct any misunderstandings. The expert did so. Correcting Gray's note that no tests were warranted, for example, Dr. Speck-Kern wrote: "I have tests for cognitive and emotional concerns, but that could introduce a lot more than you wish to have presented. Usually you [defense lawyers] do not want emotional tests, so I'm going by that too." Petitioner's Exhibit 19. But the

psychologist left Gray's summation of her expert opinion unaltered: "S.K. doesn't think Justin brain injured, just never parented." Petitioner's Exhibit 19.

As the testing issue came to a head, Anderson's lawyers were also weighing whether he should testify at resentencing. Their on-going prep work with him would have reasonably informed their decision about neuropsychological tests. And the strength of his eventual testimony dovetails with Dr. Speck-Kern's opinion.

Anderson didn't testify at his first trial. He wanted to do so at resentencing. He did, articulately and thoughtfully. His introspective letter to his father, Jerry, was introduced into evidence. Anderson told the jury that, while in prison, he had earned his GED and completed an anger resolution seminar. He expressed regret that he hadn't tried harder in school. The defense presented Anderson's school records, which showed he'd changed schools at least six times in twelve years. He failed the fourth grade; he repeated the eighth grade at least twice; and he didn't finish the ninth grade. Anderson explained that he sometimes did poorly to spite his father. Other times, he said, he felt like he wasn't smart enough. Anderson took

responsibility for killing Creech. He was remorseful. He apologized to the Creech family for "all the pain" that he'd caused them. Resentencing Record 3750. He kept his composure under vigorous cross-examination. As one of his lawyers pointed out in closing, Anderson didn't respond in kind or lose his temper when the prosecutor yelled out some of his questions.

Adolescent Brain. More scientific testimony about Anderson's undeveloped nineteen-year-old brain wasn't necessary. The Circuit Court instructed the resentencing jurors to use their common sense. Resentencing Record 3965. That suffices—we've all been nineteen, been around 19-year-olds, and have experience with family or friends that age. Young people make poor, impulsive choices without weighing potential consequences adequately. And Anderson's lawyers presented a bit of evidence on this point. Dr. Speck-Kern testified that the frontal lobe—the brain's executive center—is the last brain area to develop; she said that development continues until age twenty-five. Once this brain area is fully matured, according to Dr. Speck-Kern, we are able to "think through things" and "evaluate our behaviors in a different way." Resentencing Record 3864–65. The resentencing jury was simply not convinced that Anderson's age qualified as

a mitigating circumstance. Anderson's lawyers' work here was adequate; and more testimony on this point wouldn't have made a difference.

Trauma Disorder. Anderson's lawyers missed the label—post-traumatic stress disorder—but they told the story. They worked hard at presenting a full picture of Anderson's abusive and traumatic childhood. They used expert testimony, moreover, to describe its long-term effects on him.

Anderson and his brother, Maurice, testified that they were first abused by their mother's boyfriend, Amos Strickland. Anderson was then only four or five years old. They both said their mother—who is intellectually disabled—didn't protect them. Anderson's lawyers called to the stand daycare workers and DHS employees who were involved with Anderson's removal from his home—after he twice showed up at daycare with a swollen face. A Texarkana police officer testified that, as a result of the abuse, Strickland pleaded guilty to injuring a child. Anderson described his seven months with a foster family as the best time of his life. He was nurtured for the first time. Though he got to take the bicycle that his foster family had given him when he went to live with his father, Jerry, the nurturing ended.

Anderson and Maurice testified about Jerry's escalating abuse and daily drinking. They described living in a motel room, going hungry, stealing food, and being beaten on their bare skin with belts and extension cords wrapped in duct tape. Family members echoed the brothers' testimony about Jerry's neglect and drunkenness, though they claimed not to have known the extent of the abuse.

Dr. Speck-Kern explained this trauma's effect. She testified that Anderson's unstable and traumatic childhood affected his ability to cope. She described his feelings of isolation and his difficulty forming attachments. She told the jury that Anderson was afraid of "everything." Resentencing Record 3869. She said he had been withdrawn and chronically depressed for much of his life. She said that he approached problems with a "series of impulses." Resentencing Record 3864.

All this testimony was effective. The jury was convinced by the childhood-trauma evidence and unanimously found the many related mitigators. His lawyers' efforts related to Anderson's childhood trauma and its effects weren't constitutionally ineffective. And Anderson hasn't

demonstrated that adding the medical diagnosis—PTSD—would have affected the outcome, especially in light of the jury's mitigation findings.

Neuropsychological Deficits. Much of this Court's recent evidentiary hearing was about whether Anderson's lawyers should have pursued neuropsychological testing and a partial fetal alcohol syndrome diagnosis. Anderson argued that his lawyers latched onto his IQ to the exclusion of any other brain dysfunction. There were hints, particularly when viewed in hindsight, that testing was needed: Anderson's low IQ and poor academic performance, his substance abuse, his difficulty communicating, his impulsive behavior, his family history of intellectual disability, his disruptive and traumatic childhood, and the accounts of Ruby's drinking. And Dr. Speck-Kern initially suggested the Wisconsin card-sorting test, an easily administered protocol. But after reviewing Anderson's records and meeting with him twice, Dr. Speck-Kern didn't think he was brain-damaged. She down-graded her recommendation; testing would just be to rule out any brain injury. These circumstances brought home the prospect of creating evidence helpful to the prosecution. Based partly on Dr. Speck-Kern's final

conclusions, Anderson's defense team, it is clear to this Court, made the tactical choice not to have Anderson tested.

The lawyers reasonably relied on the informed judgment of Dr. Speck-Kern—a qualified expert with a sufficient basis for her opinion under Arkansas Rule of Evidence 702. It's true that the lawyers were driving; whether Anderson should be tested was their call. But when an informed, qualified expert makes a judgment, it is within the range of constitutionally permissible choices for the lawyer to accept the expert's opinion. The hindsight view is that there was no good reason not to have Anderson tested. An easy rule-out test seems like the most prudent step. But recall that Rule 18.2 was in the room, too. And his lawyers' choice was supported by Anderson's planned testimony. There's an obvious disconnect between Anderson, the brain-damaged young man, and the put-together person that he revealed on the stand at the resentencing trial. Evidence of Anderson's actual functioning in the years after the crime—his GED, his well-written letter to his father, his articulate testimony, and his remorse—pulls in the opposite direction of the recent neuropsychological test results.

In his closing argument to this Court, Anderson made a strong argument from *Antwine v. Delo*, 54 F.3d 1357 (8th Cir. 1995) on the more-testing point. There, the Court of Appeals concluded that the trial lawyer's decision not to seek a second mental examination was constitutionally unreasonable—"more like inadequate trial preparation than a strategic choice." 54 F.3d at 1367. The lawyer was aware of substantial evidence that the defendant's abnormal behavior on the day he killed two people was not due to PCP intoxication. That other evidence was at war with the court-appointed psychiatrist's conclusion that Antwine didn't suffer from any mental disease or defect. That psychiatrist's evaluation had consisted of interviewing Antwine for twenty minutes and reviewing the police background sheet. 54 F.3d at 1365. The circumstances here are different. Anderson's lawyers consulted with more than one expert. Dr. Speck-Kern's evaluation was thorough; she reviewed numerous records, met with Anderson, and communicated regularly with the defense team. When needed, she corrected their understanding of her work. And she revised her opinion about testing only after a long meeting with Anderson. The lawyers knew about her careful consideration and made the tactical choice—with Rule

18.2 in the background—to rely on her revised opinion. Both in terms of the available evidence, and the quality of the expert's work, this case is unlike *Antwine*.

Perhaps Anderson's lawyers should have uncovered the evidence that Ruby drank while she was pregnant, which would have led to a partial fetal alcohol syndrome diagnosis. They could have introduced Anderson's new brain images and recent poor neuropsychological test scores to show that his brain was damaged by the effects of fetal alcohol. But the defense team would have either been up against the person Anderson revealed at trial or lost the benefits of his testimony. And they would have had to get past the chilling facts of the senseless and unprovoked Creech murder. The jury agreed that childhood matters; it found thirty mitigators. But the jurors also unanimously agreed that Anderson didn't deserve their mercy. There's no reasonable probability that this new evidence would have changed any of their minds. At some point, all the science offered at the recent evidentiary hearing moves beyond explanation to excuse—one bridge too far.

Anderson's ineffectiveness claims—about mental illness, brain damage, childhood trauma, and young people's neurobiological limitations—are not

substantial. *Martinez/Trevino* doesn't excuse the procedural default. These parts of Claims II and III therefore fail.

* * *

Anderson's petition for *habeas corpus* relief, *№ 1*, will be dismissed with prejudice. Reasonable judges could disagree about this Court's conclusions on three issues. 28 U.S.C. § 2253(c)(2); *Tennard v. Dretke*, 542 U.S. 274, 282 (2004). The Court therefore grants Anderson a certificate of appealability on those issues:

- Was Anderson's lawyers' work constitutionally defective in not investigating the neurobiological limitations of young people, or in not presenting more evidence about this point in mitigation?
- Was Anderson's lawyers' work constitutionally defective in not investigating post-traumatic stress disorder, or in not presenting a medical diagnosis in mitigation?
- Was Anderson's lawyers' work constitutionally defective in not further investigating his neuropsychological deficits or fetal-alcohol exposure, or in not presenting facts about these points in mitigation?

So Ordered.

D.P. Marshall Jr.

D.P. Marshall Jr.
United States District Judge

28 March 2017

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2456

Justin Anderson

Appellant

v.

Wendy Kelley, Director, Arkansas Department of Correction, originally identified as Ray Hobbs

Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:12-cv-00279-DPM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 25, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

FORM I
AGGRAVATING CIRCUMSTANCE

We, the Jury, after careful deliberation, have unanimously determined that the State has proved beyond a reasonable doubt the following aggravating circumstance:

( ) Justin Anderson previously committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person.

FOREPERSON

INSTRUCTION NUMBER __
FORM 2
MITIGATING CIRCUMSTANCES

For each of the following mitigating circumstances, you should place a checkmark in the appropriate space to indicate the number of jurors who find that the mitigating circumstance probably exists.

Justin Anderson grew up in abusive, neglectful households where caretakers showed little or no affection to him.

Check one of the following:

✓ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Justin Anderson's mother, Ruby Eason Anderson, was diagnosed as being mentally retarded.

Check one of the following:

✓ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Ruby Eason Anderson was determined to be intellectually incapable of providing adequate care or protection for Justin Anderson.

Check one of the following:

____ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Justin Anderson witnessed verbal and physical abuse of his mother, Ruby Eason Anderson, and his brother Maurice Anderson, by her live-in boyfriend, Amos Strickland.

Check one of the following:

____ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Amos Strickland treated his own biological children more favorably than Justin Anderson.

Check one of the following:

____ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Amos Strickland physically abused Justin Anderson.

Check one of the following:

- ✓ All members of the jury find that this circumstance probably exists.
- ___ At least one, but not all members of the jury find that this circumstance probably exists.
- ___ No member of the jury finds that this circumstance probably exists.

Amos Strickland was convicted of Felony Injury to a Child for abusing Justin Anderson.

Check one of the following:

- ✓ All members of the jury find that this circumstance probably exists.
- ___ At least one, but not all members of the jury find that this circumstance probably exists.
- ___ No member of the jury finds that this circumstance probably exists.

Ruby Eason Anderson would lie to authorities to protect Amos Strickland when questioned about Justin's abuse.

Check one of the following:

- ✓ All members of the jury find that this circumstance probably exists.
- ___ At least one, but not all members of the jury find that this circumstance probably exists.
- ___ No member of the jury finds that this circumstance probably exists.

At the age of 5, the Texas Department of Human Services removed Justin Anderson from his home, and placed him in foster care due to his mother's inability to protect him.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Justin Anderson was separated from his older brother, Maurice Anderson, when Justin was placed in foster care.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Foster care was the happiest time in Justin Anderson's life.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Ruby Anderson was determined to be an unfit parent, and the 202nd Judicial District Court of Bowie County Texas terminated her parental rights.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

The first knowledge Justin Anderson had of his father, Jerry Anderson, was when Justin was 5 years old.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Justin Anderson has a family history of alcoholism.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Jerry Anderson was an alcoholic, a poor provider and was unable to keep a steady job.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Jerry Anderson would leave Justin and Maurice Anderson alone for long periods of time when they were children.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Jerry Anderson did not always provide adequate food or clothing for Justin and Maurice Anderson.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Justin Anderson never had a stable home life.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Justin Anderson witnessed his father, Jerry, physically abuse Justin's mother, Ruby Eason Anderson.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Justin Anderson attended up to five different school districts from Kindergarten to the 8th grade.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Justin Anderson lived in at least nine different places between the ages of 5 and 16.

Check one of the following:

- ✓ All members of the jury find that this circumstance probably exists.
- ___ At least one, but not all members of the jury find that this circumstance probably exists.
- ___ No member of the jury finds that this circumstance probably exists.

Justin Anderson attended school until the 8th grade.

Check one of the following:

- ✓ All members of the jury find that this circumstance probably exists.
- ___ At least one, but not all members of the jury find that this circumstance probably exists.
- ___ No member of the jury finds that this circumstance probably exists.

Justin Anderson has been diagnosed as having an IQ of 65 that is considered Mildly Mentally Retarded.

Check one of the following:

- ___ All members of the jury find that this circumstance probably exists.
- ___ At least one, but not all members of the jury find that this circumstance probably exists.
- ✓ No member of the jury finds that this circumstance probably exists.

Justin Anderson was a youth, age 19, at the time of Clara Creech's murder.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

\ No member of the jury finds that this circumstance probably exists.

Justin Anderson confessed to shooting Clara Creech and Roger Solvey.

Check one of the following:

\ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Justin Anderson remained in Lewisville and never attempted to flee after the crimes were committed.

Check one of the following:

\ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Justin Anderson cooperated with authorities including taking them to where the murder weapon was located.

Check one of the following:

- ↘ All members of the jury find that this circumstance probably exists.
- ___ At least one, but not all members of the jury find that this circumstance probably exists.
- ___ No member of the jury finds that this circumstance probably exists.

At the time of the crime, Justin Anderson was under extreme emotional distress.

Check one of the following:

- ___ All members of the jury find that this circumstance probably exists.
- ↘ At least one, but not all members of the jury find that this circumstance probably exists.
- ___ No member of the jury finds that this circumstance probably exists.

Justin Anderson has obtained his GED since imprisonment.

Check one of the following:

- ↘ All members of the jury find that this circumstance probably exists.
- ___ At least one, but not all members of the jury find that this circumstance probably exists.
- ___ No member of the jury finds that this circumstance probably exists.

Justin Anderson's birthdays were not celebrated and presents were never given.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Justin Anderson is a follower and older brother, Maurice Anderson, easily influences him.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Clara Creech's murder was committed while Justin Anderson was acting under unusual pressures or influences.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Justin Anderson has completed an Anger Resolution Seminar since imprisonment.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Justin Anderson has been baptized since imprisonment.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Justin Anderson is remorseful for his actions.

Check one of the following:

___ All members of the jury find that this circumstance probably exists.

___ At least one, but not all members of the jury find that this circumstance probably exists.

___ No member of the jury finds that this circumstance probably exists.

Other mitigating circumstances. Specify below in writing any other mitigating circumstances that all members of the jury find probably exists. If no member of the jury finds that other mitigating circumstances probably exist, leave the space below blank.

_____

_____

_____

Other mitigating circumstances. Specify below in writing any other mitigating circumstances that at least one but not all members of the jury find probably exists. If no member of the jury finds that other mitigating circumstances probably exist, leave the space below blank.

_____

_____

_____

FOREPERSON

INSTRUCTION NUMBER ___
FORM 3
CONCLUSIONS

The Jury, having reached its final conclusions, will so indicate by having its Foreperson place a check mark in the appropriate space ( ) in accordance with the Jury's findings. In order to check any space, your conclusions must be unanimous. The Foreperson of the Jury will then sign at the end of this form.

WE THE JURY CONCLUDE:

(a) (✓) The State proved beyond a reasonable doubt one or more aggravating circumstances.

(If you do not unanimously agree to check paragraph (a), then skip (b) and (c) and sentence Justin Anderson to life imprisonment without parole on Form 4.)

(b) (✓) The aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstances found by any juror to exist.

(If you do not unanimously agree to check paragraph (b), then skip (c) and sentence Justin Anderson to life imprisonment without parole on Form 4.)

(c) (✓) The aggravating circumstances when weighed against any mitigating circumstances justify beyond a reasonable doubt a sentence of death.

(If you do not unanimously agree to check paragraph (c), then sentence Justin Anderson to life imprisonment without parole on Form 4.)

If you have checked paragraphs (a), (b), and (c), then sentence Justin Anderson to death on Form 4.

Otherwise, sentence Justin Anderson to life imprisonment without parole on Form 4.

FOREPERSON

INSTRUCTION NUMBER ___
FORM 4
VERDICT

We, the Jury, after careful deliberation, have determined that Justin Anderson shall be sentenced to:

A. ( ) LIFE IMPRISONMENT WITHOUT PAROLE.

B. (X) DEATH.

(If you return a verdict of death, each juror must sign this verdict.)

FOREPERSON