No. 19-8105

In the Supreme Court of the United States

JUSTIN ANDERSON,
Petitioner,

v.

DEXTER PAYNE, Director,
Arkansas Division of Correction,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the court of appeals correctly applied *Strickland v. Washington*, 466 U.S. 668 (1984) to determine that Petitioner, who does not dispute that he murdered one person less than a week after attempting to murder another, received effective assistance of counsel.

(2) Whether the court of appeals correctly concluded that Petitioner failed to demonstrate that an additional mitigating circumstance (on top of the thirty that the jury found) would have outweighed the aggravating circumstance of Anderson's previous act of attempted murder.

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INTRODUCTION

Justin Anderson shot 87-year old Clara Creech in the back. Creech's murder was both horrific and senseless. Sadly, it also was not Anderson's first senseless act. The week before he had attempted to kill truck driver Roger Solvey, and Anderson only failed because Solvey miraculously survived being shot.

Anderson never denied committing those crimes. And an Arkansas jury determined that the aggravating circumstance of committing attempted capital murder just before he murdered Creech warranted a death sentence.

In his federal habeas corpus petition, Anderson claimed for the first time that his counsel were ineffective for not investigating whether he was exposed to alcohol in the womb and that, had this fact been discovered, the jury would have decided against the death penalty. But the district court, after a careful review of the record, determined that Anderson's counsel investigated his mitigation case thoroughly. Nobody told counsel Anderson's mother drank while pregnant, and the defense experts all concluded that Anderson was not brain damaged. And in any case, one more mitigating circumstance would not have made a difference against the backdrop of the thirty the jury had already found, mostly relating to Anderson's abusive childhood. Nor could it possibly have outweighed Anderson's senseless crimes.

Because the courts below correctly applied this Court's precedent, just as every court of appeals would, this Court should deny Anderson's petition for a writ of certiorari.

STATEMENT

1. Justin Anderson went on a crime spree in October 2000 that ended in a senseless murder. Anderson first broke into a home and stole two handguns. Pet. App. 26a. Four days later he attempted to rob a tractor-trailer and ended up shooting Roger Solvey, the driver who had been asleep in the cab, with one of the stolen pistols. *Id.* Solvey fortunately survived, but Anderson was not immediately apprehended.

Six days later, 87-year old Clara Creech was bent down gardening in her front yard in the small town of Lewisville, Arkansas. *Id.* "Anderson didn't know her; he came upon her as he walked down the street." *Id.* Apparently intending to steal Creech's car, Anderson shot Creech from behind with a .38 caliber pistol, killing her.

Anderson confessed to killing Creech. *See Anderson v. State*, 163 S.W.3d 333, 336 (Ark. 2004) ("*Anderson I*") (Anderson told police he "shot the old lady in the back"). He admitted to shooting Solvey, too. Pet. App. 2a. Anderson was tried for the latter and convicted of attempted capital murder, ultimately being sentenced to fifty years' imprisonment. *See Anderson v. State*, No. CR-02-582, 2003 WL 549121, at *1 (Ark. Ct. App. 2003). He was charged with capital murder for killing Creech, with the attempted murder of Solvey as the aggravator supporting a sentence of death.

2. Anderson's first trial ended in a guilty verdict and death sentence. *Anderson I*, 163 S.W.3d at 339. Anderson's conviction was affirmed, but his sentence was reversed because of juror confusion about how to properly complete the sentencing form. *Id*. at 357-60. The case was sent back to the trial court for resentencing.

3. At resentencing Anderson was represented by "an organized defense team" that included five attorneys, a mitigation specialist, two investigators, and a paralegal.

Pet. App. 38a. Given the failure of the mitigation approach taken at the first trial—the jury did not find a single mitigating circumstance existed despite being instructed on forty two—the resentencing team started over and spent the next fourteen months rebuilding Anderson's mitigation case from the ground up. *Id.* Their investigation was comprehensive, and their preparations included forensics, social history, Anderson's capacity, and his mental health. *Id.* A testament to the team's "industry, as well as its thoroughness," the mitigation table alone was twenty-four pages long. Pet. App. 39a.

They settled on the theme "childhood matters." *Id.* Anderson's mitigation case centered on his "disruptive and traumatic childhood." *Id.* Anderson's counsel had a lot of material to work with; the defense they presented was "powerful." Pet. App. 34a. Though Anderson now claims his resentencing counsel should have prepared a different defense—one centered on a fetal alcohol spectrum disorder ("FASD") diagnosis reached by his habeas experts—his counsel had good reasons for taking the approach they did. Chief among them was the advice given to Anderson's counsel by his retained experts.

Anderson was tested for organic brain disorder prior to his first trial. Pet. App. 39a. Dr. Andre Derdeyn evaluated Anderson and found no such disorder. *Id.* For the second trial, the defense team wanted a second opinion and "consulted several experts, including psychologists and psychiatrists." Pet. App. 3a. Anderson's counsel

eventually selected two psychologists: Dr. Rebecca Caperton, who specialized in mental functioning and IQ testing, and Dr. Elizabeth Speck-Kern, who specialized in neuropsychology and learning disabilities. *Id.*

Anderson's counsel asked the experts about several potential deficits, including "low IQ, a neuropsychological disorder, antisocial personality disorder, and the effect of childhood trauma." Pet. App. 39a. His counsel provided the experts with myriad records, including Anderson's school records; previous psychological assessments; social-services documents reflecting Anderson's abusive childhood; the testimony from Anderson's first trial; and Dr. Derdeyn's report and notes. Pet. App. 39a-40a. Anderson's counsel specifically inquired whether Anderson "needed 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." Pet. App. 8a. (internal quotations omitted).

Dr. Caperton determined that Anderson's most recent IQ score of 91 was correct, rather than a previous score of 65. Pet. App. 42a. "She told the defense team that she didn't think Anderson would score low enough for the results to be helpful." *Id.* Dr. Caperton did not conclude that Anderson had any brain damage, although she did not specifically rule it out. *See* Pet. App. 9a (opining that there was a "chance Anderson suffered brain damage from the childhood abuse") (quotations and alterations omitted).

Dr. Speck-Kern, a neuropsychologist, was specifically consulted regarding suspected brain injuries, cognitive issues, or language disorders. Pet. App. 42a. Before she had evaluated him, Dr. Speck-Kern believed Anderson needed neuropsychological testing and gave her recommendations. *Id.* But she revised her recommendation after actually evaluating Anderson in person, determining that his "problems seem[ed] to mostly be emotional" and that he didn't "appear to act as if he [was] suffering from major brain damage." *Id.* (internal quotations omitted). Dr. Speck-Kern advised that Anderson seemed "average" and that there was nothing to indicate frontal lobe damage. *Id.* Based on her evaluation of Anderson, Dr. Speck-Kern determined that neuropsychological testing was not, in fact, necessary, and would serve only to rule out any brain damage. Pet. App. 43a. Her summation: she didn't "think Anderson [was] brain injured," he was "just never parented." Pet. App. 44a.

Anderson's counsel had good reason to avoid any unnecessary psychological testing. Arkansas Rule of Criminal Procedure 18.2 would have required Anderson to turn over any expert reports to the prosecutor, along with "all records beneath any testifying expert's opinion, including notes and tests." Pet. App. 41a. Thus, any "testing offered by the two new experts had to be weighed against the possibility that the uncertain results could be used against Anderson." *Id.* Dr. Speck-Kern specifically cautioned that any cognitive or emotional tests she might employ "could introduce a lot more than" Anderson's counsel "wish[ed] to have presented." Pet. App. 43a.

An additional concern was how any testing would affect whether Anderson would testify at his resentencing and the strength of any testimony. Anderson chose not to

testify at his first trial. Pet App. 44a. Given the resentencing team's decision to change their strategy after Anderson's first death sentence, it is unsurprising that Anderson chose to testify at his resentencing. According to the district court, Anderson testified "articulately and thoughtfully." *Id.* He testified about recently earning his GED and completing an anger resolution seminar. *Id.* He discussed his poor performance in school because he frequently moved and had a strained home life. *Id.* He apologized to the Creech family, taking responsibility for killing Creech and expressing remorse. Pet. App. 44a-45a. He kept his composure, never losing his temper even under vigorous cross-examination. Pet. App. 45a. The district court recognized the "obvious disconnect between Anderson, the brain-damaged young man, and the put-together person that he revealed on the stand at the resentencing trial." Pet. App. 49a. Presenting the "put-together" Anderson on the stand was a tactical choice made by Anderson's counsel, one that could have been undermined by unhelpful neurological testing.

Anderson's mitigation case, though unsuccessful, was compelling. In keeping with the theme of "childhood matters," Anderson's resentencing was replete with evidence of his childhood trauma and abuse. Testimony from Anderson's family members detailed his traumatic upbringing, including physical abuse at the hands of his mother's boyfriend that began when he was four or five years old. Pet. App. 46a. When Anderson went to live with his father, the abuse continued. Pet. App. 47a. Testimony by Dr. Speck-Kern explained the ongoing effects of this childhood trauma,

such as Anderson's "feeling of isolation and his difficulty forming attachments," as well as chronic depression and impulsiveness. *Id.*

The district court found this testimony to be "effective." *Id.* In stark contrast to Anderson's first trial, where the jury found no mitigating circumstances existed, this time the jury found thirty, many of them related to Anderson's childhood trauma. Pet. App. 4a; Pet. App. 47a. The jury found one aggravating circumstance, Anderson's attempted murder of Roger Solvey. Pet. App. 27a. That aggravator outweighed all the mitigators, and the jury therefore sentenced Anderson to death. *Id.*

5. The Arkansas Supreme Court affirmed Anderson's sentence. *Anderson v. State*, 242 S.W.3d 229 (Ark. 2006) ("*Anderson II*"), *cert. denied sub. nom. Anderson v. Arkansas*, 551 U.S. 1133 (2007). Anderson then unsuccessfully sought post-conviction review in state court, and the Arkansas Supreme Court affirmed denial of relief. *Anderson v. State*, 385 S.W.3d 783 (Ark. 2011).

6. Anderson then filed a petition for federal habeas corpus relief, bringing "twenty-one claims, which embrace[d] seventy-eight subclaims, some of which ha[d] subparts." Pet. App. 31a. The district court dismissed Anderson's petition in its entirety, granting a certificate of appealability on three ineffective-assistance-of-counsel claims regarding resentencing counsel's alleged failure to investigate and/or present evidence regarding: (1) the neurobiological limitations of young people; (2) post-traumatic stress disorder; and (3) neuropsychological deficits or fetal alcohol exposure. Pet. App. 52a. These claims were all procedurally defaulted because Anderson never presented them in state court. *See Coleman v. Thompson*, 501 U.S. 722, 731-32

(1991). Thus, Anderson needed to show both that his claims were substantial and his post-conviction counsel had been ineffective in failing to raise them. *Martinez v. Ryan*, 566 U.S. 1, 14 (2012); *Trevino v. Thaler*, 569 U.S. 413 , 429 (2013).

As relevant here, the district court rejected Anderson's argument that his resentencing counsel were ineffective in failing to investigate evidence of FASD. No one disputed that Anderson's mother (and father) drank heavily. Judge Kobes went so far as to comment that "Anderson's childhood was soaked in alcohol—and his attorneys knew it." Pet. App. 20a. True, and so did the jury. It unanimously found Anderson's family history of alcohol to be a mitigating circumstance. Pet. App. 59a. But it is also undisputed that, in all of the interviews Anderson's attorneys conducted with family members, no one said that Anderson's mother drank while she was pregnant. Pet. App. 8a.

Perhaps neuropsychological testing would have uncovered evidence of FASD. Perhaps not. In any case, the district court concluded that Anderson's resentencing counsel's decision not to opt for testing was "not outside the range of reasonable choice," given the advice they received from the defense experts. Pet. App. 37a. In fact, the experts were all in accord—there was little to no reason to think Anderson had suffered any brain damage. Pet. App. 48a-49a; *see also* Pet. App. 9a. Given the likelihood that neurological testing would prove fruitless, along with prospect of the results of any testing being turned over the prosecution, perhaps undermining other aspects of Anderson's mitigation case, the decision to forgo testing was reasonable.

As to prejudice, the district court concluded that one more mitigating factor would not have convinced the jury not to sentence Anderson to death. To start, evidence of brain damage would run up against the put-together, thoughtful, and remorseful picture that Anderson portrayed while testifying. Pet. App. 51a. Further, the jury found thirty mitigating factors, including Anderson's troubled childhood, his parent's drinking and abusive behavior, and Anderson's low IQ. *Id.* The district court concluded the scientific evidence regarding FASD that Anderson offered at his habeas evidentiary hearing "[a]t some point . . . moves beyond explanation to excuse—one bridge too far." *Id.*

7. The Eighth Circuit affirmed the district court's dismissal of Anderson's petition. Pet. App. 19a. It denied his petition for rehearing en banc. Pet. App. 53a. Anderson timely filed his petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

Asked by Anderson to review the investigation performed by his trial counsel, the Eighth Circuit properly "judge[d] the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland v. Washington*, 466 U.S. 668, 690 (1984); Pet. App. 12a. The Eighth Circuit assumed for the sake of argument that Anderson had presented "a substantial claim" of ineffective assistance of trial counsel, *Martinez v. Ryan*, 566 U.S. 1, 17 (2012), and proceeded to the merits of Anderson's ineffective-assistance-of-counsel claims. It affirmed the dismissal of Anderson's habeas petition, concluding that his resentencing counsel was not ineffective for failing to investigate a potential FASD diagnosis. And it agreed with the district court that Anderson had failed to show any prejudice resulting from the lack of one more mitigating circumstance on top of the thirty the jury had already found. No other court of appeals would have reached a contrary conclusion, and this Court should likewise deny his petition for a writ of certiorari.

I. As any other court of appeals would have, the Eighth Circuit correctly determined that trial counsel's performance was not deficient.

A. The court of appeals correctly applied this Court's decisions regarding ineffective assistance of trial.

As the courts below acknowledged, Anderson's trial counsel faced an unenviable task: defending a man who, in a span of less than two weeks, burgled a home to steal two handguns, attempted to murder a sleeping truck driver, and then murdered an 87-year-old woman by shooting her from behind. *See Anderson I*, 163 S.W.3d at 338 (Anderson telling police he "shot the old lady in the back"). To try and mitigate the undisputed facts of Anderson's heinous crimes, Anderson's robust team of lawyers,

investigators, and mitigation specialists strategically focused on developing a mitigation case based on Anderson's troubled childhood. Having failed to sway the jury during Anderson's first trial, Anderson's counsel spent over a year preparing a fresh defense. Pet. App. 38a.

Anderson's mental functioning had been investigated before his first trial; his expert concluded that "there were no indications of disorders related to" organic brain damage. Pet. App. 9a (internal quotations omitted). Still, resentencing counsel consulted new expert witnesses, hoping a second opinion would provide them with new avenues to pursue. Pet. App. 3a. They asked the experts about additional IQ testing for Anderson, "whether he needed a neuropsychological evaluation, whether he had an anti-social personality disorder or a neuropsychological disorder," and how to connect Anderson's "abusive childhood" to the crimes he committed as an adult. Pet. App. 8a (internal quotations omitted). Counsel's investigation cast a broad net, looking for anything that could help them avoid the same result of Anderson's first trial.

Working diligently with these new experts, Anderson's counsel built a strong mitigation case centered on his abusive childhood. But there was simply nothing to go on as far as potential brain damage, the experts concluded. Pet. App. 9a. Even Dr. Speck-Kern, the neuropsychologist hired by Anderson's counsel—a specialist experienced in diagnosing "suspected brain injuries, cognitive issues, and language disorders"—found nothing to go on. Pet. App. 42a. These experts had been provided with reams of records detailing Anderson's childhood, including all the materials from the first trial. Pet. App. 9a. The fact that Anderson's mother was a neglectful alcoholic

was not lost on the experts. Indeed, Dr. Speck-Kern concluded that Anderson wasn't "brain-injured," his problems stemmed from the fact that he was "just never parented." *Id.*

Because "no expert concluded that Anderson had brain damage, nor did any definitive facts reveal that Anderson's mother drank while she was pregnant," it was not unreasonable for counsel not to investigate an FASD diagnosis. Pet. App. 10a. "The evidence Anderson's counsel did have did not amount to 'red flags pointing up a need to test further.'" *Id.* (quoting *Rompilla v. Beard*, 545 U.S. 374, 392 (2005)). Anderson's counsel focused on the defense they had evidence for, which was his abusive childhood. They reasonably investigated Anderson's mental functioning based on the evidence they had, which all that *Strickland* requires. *See* 466 U.S. at 687-91.

B. There is no circuit split.

1. Anderson attempts to manufacture a circuit split, claiming that other courts of appeals employ various "factors" to assess the reasonableness of counsel's investigation of mitigating circumstances. Pet. 15-19. But these supposed "factors" are nothing of the sort, and the circuit-court decisions Anderson cites do not claim otherwise. Instead, those cases—along with the case below—follow *Strickland*'s requirement that "[i]n 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." 466 U.S. at 691. "Assess[ing] . . . all the circumstances" will certainly involve a thorough inquiry into the investigation undertaken by counsel, which is what the courts below did. And that inquiry may include some or even all of the "recurring considerations" Anderson mentions. Pet. 15.

Yet the nature of *Strickland*'s reasonableness standard "spawns few hard-edged rules." *Rompilla*, 545 U.S. at 381. Even Anderson recognizes this, conceding that the five "factors" he advocates "can hardly be exclusive." Pet. 15. Thus, it is difficult to tell exactly what sort of test Anderson wants this Court to adopt. What is certain is that no circuit applies anything like Anderson's "five-factor-plus" approach to ineffective-assistance-of-counsel claims, nor has this Court. Which makes perfect sense; considerations relevant in one case may not be relevant in another.

Anderson's case illustrates this. Anderson incorrectly asserts that the Eighth Circuit created an "ad hoc rule" that, where counsel is simply unaware that a defendant's mother drank during pregnancy, they have no obligation to investigate FASD. *See* Pet. 16. But that is not what the Eighth Circuit held. Rather, "[i]n 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." Pet. App. 10a (emphasis added). In a case like Anderson's, where counsel did not know about his mother's drinking during pregnancy, and his experts advised that he did not have any brain damage, whether from FASD or another cause, counsel had every reason to believe that "further investigation would have been fruitless." *Wiggins v. Smith*, 539 U.S. 510, 525 (2003); *see* Pet. 17 (discussing second "factor" of the likelihood of investigation leading to relevant information). Thus, the character of the information any investigation would have uncovered, Pet. 16-17 (first "factor"), and how difficult

the investigation would have been if undertaken, Pet. 18 (third "factor"), are of little to no importance.

The two circuit-court cases dealing with fetal alcohol and drug exposure upon which Anderson relies do not reach a contrary conclusion. In *Littlejohn v. Trammel*, the Tenth Circuit held that defense counsel was ineffective where an expert testified that the defendant had a "neurological injury originating from birth" *and* the defendant's mother admitted to using drugs during her pregnancy. 704 F.3d 817, 862 (10th Cir. 2013) (alterations omitted). Likewise, in *Williams v. Stirling*, counsel was ineffective for not investigating FASD where several witnesses testified that the mother drank while pregnant *and* an expert concluded that the defendant "suffered neurological impairments as the result of frontal lobe damage." 914 F.3d 302, 306-07 (4th Cir. 2019). Anderson's counsel were on notice of neither potential brain damage nor his mother's alcohol consumption during pregnancy; the Fourth and Tenth Circuits found ineffectiveness only where both were true.

2. Even had the Eighth Circuit applied *Strickland* in the formulaic manner Anderson advocates for, the result would have been the same.

Anderson's first "factor," the potential strength of the mitigation evidence not uncovered by counsel, does not help him here. Pet. 20. As noted below, Anderson essentially argues this Court should elevate FASD evidence above other types of mitigation evidence. That ignores the context-dependent framework of *Strickland*. In fact, the district court below did not find the potential FASD diagnosis compelling at all in light of the nature of Anderson's crime and the fact that the jury already found

thirty mitigating circumstances, including the related circumstances of Anderson's underdeveloped adolescent brain. Pet. App. 51a. Indeed, in the context of a defense that rested in part on Anderson's thoughtful and remorseful testimony—a change from his first trial where the jury found no mitigating circumstances existed—the district court noted that such evidence could "move[] beyond explanation to excuse." *Id.*

The same is true of Anderson's argument that evidence of "another cognitive impairment would have been particularly valuable" since Anderson's IQ was too high to establish intellectual disability. Pet. 20. Moreover, that argument ignores the fact that the jury was offered the mitigator of Anderson "being diagnosed as having an IQ of 65 that is considered Mildly Mentally Retarded" and unanimously rejected it. Simply put, in the context of a jury not inclined to excuse Anderson's murder of an elderly woman due to arguments about his mental capacity, evidence of FASD would not have been significant.

As to Anderson's proposed second "factor," Anderson does not argue that the Eighth Circuit failed to analyze it. Pet. 21. Indeed, apart from advocating for a *per se* rule requiring counsel to investigate for FASD whenever a defendant's mother is an alcoholic, Anderson simply rehashes the same points rejected by the Courts below. *But see Strickland*, 466 U.S. at 690 (insisting against "rigid requirements for acceptable assistance). The same for the third "factor." It matters not that Anderson's mother might have disclosed her drinking during pregnancy to resentencing counsel had they asked about it, because they had no reason to ask.

Regarding the fourth "factor," Anderson does not argue that his attorneys failed to retain competent experts to assess his mental condition. Instead, he claims that his attorneys were ineffective for failing to tell the experts information they did not know—that Anderson's mother drank while pregnant. He further complains that counsel "could have told their retained experts what was known about the mother's drinking," Pet. 21-22, but the record shows that they *did*. As the Eighth Circuit noted, none of the defense experts "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." Pet. App. 10a.

Finally, on the fifth "factor," Anderson misstates the nature of the tactical choice his resentencing counsel made. He claims that the failure to investigate FASD was an oversight, not a deliberate choice. Pet. App. 22. But the pertinent tactical decision was declining to pursue neuropsychological testing that all the experts advised would likely be fruitless. Indeed, as the district court explained, because potentially unfavorable results would have to be turned over to the prosecution, declining further testing was a reasonable strategic choice. Pet. App. 41-43.

* * *

In sum, the Eighth Circuit correctly held that Anderson's resentencing counsel were not ineffective, and no circuit would have decided his case differently. Anderson's counsel conducted a thorough, diligent investigation, putting on a powerful mitigation case centered on the evidence that was available to them. They relied on their

retained experts in declining to pursue further neurological testing and instead focused on Anderson's abusive childhood and portrayed him as someone who felt remorse for the crime he committed. Their strategy may have failed, but it was not constitutionally deficient. Anderson's petition should be denied.

II. The Eighth Circuit also correctly concluded that Anderson did not suffer any prejudice.

A. Anderson was not prejudiced by the absence of evidence concerning FASD.

The courts below correctly held that Anderson's resentencing counsel made the best of the evidence available to them and put on a compelling mitigation case. Pet. App. 35a. "Anderson's counsel presented an extensive mitigation case that convinced the jury to find *thirty* mitigating circumstances." Pet. App. 12a. Those include the abuse he endured as a child, the fact that his mother was mentally retarded and incapable of caring for him, and his family's alcoholism. *Id.* Though evidence of FASD was not presented, 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." *Id.* Still, the jury "unanimously agreed that Anderson didn't deserve their mercy." Pet. App. 51a. The courts below correctly concluded that one more mitigating factor would not have changed their minds.

It could also have hurt Anderson's case. Indeed, the district court noted that Anderson could have "lost the benefits of his testimony." *Id.* Anderson had not testified at his first trial, and the jury found no mitigating circumstances existed despite the plethora of evidence presented. Pet. App. 3a. With Anderson's thoughtful and

remorseful testimony, against the backdrop of a mitigation case geared toward explaining while not excusing Anderson's crimes, the jury found thirty mitigating circumstances. Pet. App. 12a. But evidence of FASD could have "move[d] beyond explanation to excuse" and contradicted "the person Anderson revealed at trial." Pet. App. 51a. Finally, and most importantly, the jury "would have had to get past the chilling facts of the senseless and unprovoked Creech murder" to find any mitigating circumstances outweighed the aggravating circumstances. *Id.* Anderson has not shown a reasonable probability that they would have.

B. Other circuits have not adopted a *per se* rule—in contravention of *Strickland*—finding prejudice whenever habeas counsel uncovers evidence of brain damage.

Anderson claims that three circuits have created a rule that "evidence of brain damage is a uniquely compelling mitigating factor, the absence of which almost always will be prejudicial." Pet. 24. Such a rule would, of course, contravene this Court's insistence against "rigid requirements for acceptable assistance." *Strickland*, 466 U.S. at 690. It would also disobey the instruction that courts "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. Of course, these courts of appeals have not actually done so. Like the courts below, they merely applied *Strickland*'s prejudice inquiry to the facts of the case before them. This Court's review is therefore not warranted.

To illustrate, Anderson cites *Littlejohn v. Trammel*, where the Tenth Circuit noted that "[e]vidence of organic mental deficits ranks among the most powerful types of mitigation evidence available." 704 F.3d 817, 864 (10th Cir. 2013). The court remanded the case for more fact finding on the issue, and when the case again reached

the court of appeals, it affirmed the district court's conclusion that the defendant had not suffered prejudice. In so holding, it explained that its prior decision in *Littlejohn* "does not mean that *all* evidence of organic brain damage has the same potency in the *Strickland* prejudice analysis and will ineluctably result in a determination of prejudice. *Littlejohn v. Royal*, 875 F.3d 548, 559 (10th Cir. 2017); *see also id.* at 559 n.4 ("*Strickland* prejudice does not necessarily follow from the failure to investigate and present evidence of organic brain damage."). That court also went on to note that "in some instances, . . . organic-brain-damage evidence would have been just as likely—if not more likely—to have had an aggravating effect rather than a mitigating effect on a sentencing jury. *Id.* at 560; *accord Burris v. Parke*, 130 F.3d 782, 784-85 (7th Cir. 1997) ("noting that a jury "may not be impressed with the idea that to know the cause of viciousness is to excuse it; they may conclude instead that when violent behavior appears to be outside the defendant's power of control, capital punishment is appropriate to incapacitate"). Given the powerful aggravating circumstance here, there is little doubt the Tenth Circuit would have reached the same conclusion that the Eighth Circuit did.

Anderson also points to *Williams v. Stirling* in support of his contention that other circuits treat evidence of brain damage as automatically establishing *Strickland* prejudice. But even that court concluded that "counsel would not have been required to present evidence of FAS[D] . . . if it was an unsound strategy to present this information to the jury because, for example, it could indicate future dangerous-

ness." 914 F.3d 302, 216 (4th Cir. 2019). In the same vein, Anderson's counsel declined further neurological testing to avoid potentially unfavorable results and to preserve the testimony Anderson was to give. Pet. App. 51a.

Nor has the Eleventh Circuit elevated evidence of brain damage above all else in contravention of *Strickland*. In *Ferrell v. Hall*, the Eleventh Circuit concluded that evidence of the defendant's mental state was important because it "measurably weakens the aggravating circumstances found by the jury," which was that the murder "was outrageously and wantonly vile, horrible or inhuman in that it involved torture and depravity of mind." 640 F.3d 1199, 1235 (11th Cir. 2011). The same was true in *Jefferson v. GDCP Warden*, where that court relied on its opinion in *Ferrell*, applying it to "[n]early identical aggravating factors to those found" in that case. 941 F.3d 452, 485 (11th Cir. 2019). Contrast those to Anderson's case, where his previous attempted murder the week before served as the aggravating circumstance. Evidence of FASD would not have had any bearing on his dangerousness and propensity to violate crime. Anderson is correct that evidence of brain damage may be particularly powerful in some cases, but the courts below were correct in concluding that his was not one of them. The Eleventh Circuit would have agreed.

* * *

Anderson was not prejudiced for lack of the jury hearing evidence of FASD. Other circuits have not created a *per se* rule to the contrary, and neither should this Court. The Eighth Circuit correctly concluded that one additional mitigating factor would not have made a difference in the face of the heinous nature of Anderson's

murder of Ms. Creech less than a week after he tried to kill Solvey. Anderson's counsel performed admirably with the task they were given, and they cannot be faulted merely because the jury believed that Anderson's crime warranted the death penalty. Anderson's petition should be denied.

CONCLUSION

This Court should deny the petition for certiorari.

Respectfully submitted,

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