THIS IS A CAPITAL CASE

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

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent urges this Court to deny review "[b]ecause the courts below correctly applied this Court's precedent." Br. Opp. 1. That contention misapprehends the ground on which certiorari is granted generally and the questions presented in the petition more specifically. This case is not simply about whether the Eighth Circuit wrongly adjudicated a single ineffective-assistance-of-counsel claim. It is about whether the lower courts are applying discernable, uniform standards to the most common category of claim in capital habeas corpus cases. Here, the Eighth Circuit departed from the precedent of other circuits and in the process reached a palpably erroneous result.

In *Strickland v. Washington*, 466 U.S. 668, 691 (1984), the Court stated a broad rule of reasonableness for attorney performance and prudently cautioned that "all the circumstances" should be considered. Subsequent cases, most notably *Wiggins v. Smith*, 539 U.S. 510 (2003), provided additional guidance on an attorney's effectiveness during a capital-sentencing investigation. In the many years since *Strickland* and *Wiggins*, the lower courts have been uneven in their adherence to this guidance. Without further instruction from this Court, there is an unacceptable risk of repeated ad hoc decisions like the opinion below, devoid of the structured analysis followed in other circuits. A reasonable degree of consistency in the standards applied to such claims is particularly essential in capital cases.

Furthermore, the circuits are divided about whether, as three circuits have held, brain damage is a particularly weighty (although not conclusive) mitigating factor,

the importance of which must be considered in determining prejudice under *Strickland*. That issue has arisen repeatedly in capital habeas cases, including another case with a petition for writ of certiorari currently pending before the Court. *See Floyd v. Filson*, 949 F.3d 1128 (9th Cir. 2020), *cert. pending sub nom. Floyd v. Gittere*, No. 20-8921 (filed July 2, 2020).

The Court should grant certiorari to provide additional guidance on the standards that govern ineffectiveness claims, to reaffirm its holdings that counsel must investigate reasonably available mitigating evidence, and to reinforce that a defendant's brain damage is not just "one more mitigating factor," as the Eighth Circuit held.

I. The Eighth Circuit splits from other circuits in its handling of performance analysis.

The ineffectiveness claim in this case is quite straightforward. Resentencing counsel knew from several sources that Anderson's mother drank heavily and was an alcoholic. The question is whether a reasonable attorney would have investigated the possibility Anderson had FASD. That investigation would have begun simply by asking one of Anderson's parents whether his mother's known drinking continued during her pregnancy.

The Eighth Circuit found that counsel was not ineffective because "nobody told Anderson's attorneys" that his mother drank during her pregnancy (though they never inquired). App. 10a. Respondent endorses this type of reasoning, stressing that "it is . . . undisputed that, in all the interviews Anderson's attorneys conducted

with family members, no one said that Anderson's mother drank while she was pregnant." Br. Opp. 8.

Other circuits do not hold that counsel has no obligation to conduct an investigation unless someone has already told the attorney what the investigation will reveal. As the petition details, other circuits analyze whether omission of a particular investigation is ineffective by addressing a number of very different issues, several of which necessarily assume that counsel did not know what the investigation will reveal. Ordinarily, an ineffectiveness claim will succeed if the matter not investigated was potentially significant, if counsel had reason to believe an investigation could be productive, if the steps needed to conduct that investigation were not unduly burdensome, if relevant experts lacked necessary background information, and if counsel had no strategic reason for failing to act. Pet. 16–20. None of those factors requires a showing that "[some]body told [the] attorneys" what the investigation would reveal.

Other circuits have repeatedly resolved ineffectiveness claims in this principled manner, as is apparent from the cases cited in the petition and from an additional review of cases decided over just the past year. When a court of appeals rejects an ineffectiveness claim, it explains that decision by analyzing these factors; none rejects such a claim on the ground that the result of the investigation was not known in advance.[1] And when a circuit court upholds a claim that counsel's

[1] *Esposito v. Warden*, No. 15-11384, 2020 WL 3428937, at *7 (11th Cir. June 23, 2020) (denying ineffectiveness claim where failure to investigate matter was a "strategic decision"); *Potter v. Green*, No. 19-5407, 2020 WL 3032854, at *5 (6th Cir. June 5, 2020) (denying ineffectiveness claim where counsel had no "indication that the facts [not

investigation was deficient, it does so because the factors guide that result. For example, in *Smith v. Baker,* 960 F.3d 522, 535–36 (9th Cir. 2020), the Ninth Circuit held that the failure to conduct an investigation into mental health was deficient performance because that evidence was likely to be important; because it was likely to yield fruit (counsel suspected mental illness); and because omission of the investigation wasn't "strategic." The court of appeals held that counsel couldn't justify the omission by pleading that he "wasn't confident [he] would get anything [he] could use." *Id.* at 535.[2] These decisions do not indicate that counsel was ineffective because somebody had "told [the] attorneys" in advance what the investigation would show. They were ineffective precisely because they failed to conduct the investigation.

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investigated] would be ascertainable and potentially helpful"); *United States v. Laverdure*, No. 19-35466, 2020 WL 2537313, at *2 (9th Cir. May 19, 2020) (denying ineffectiveness claim where counsel was not "aware of any facts that put him on notice to investigate" the issue in question); *Davis v. Davis*, 807 F. App'x 337, 339 (5th Cir. 2020) (denying ineffectiveness claim based on finding that failure to investigate matter was "the result of reasonable trial strategy"); *Cofer v. Boyd*, No. 19-6060, 2020 WL 1320643, at *3 (6th Cir. Feb. 3, 2020) (denying ineffectiveness claim where choice not to investigate matter was "a legitimate tactical decision"); *Davis v. Schnurr*, 785 F. App'x 519, 527 (10th Cir. 2019) (denying ineffectiveness claim where choice not to investigate matter was a "valid strategic decision"); *Livaditis v. Davis*, 933 F.3d 1036, 1048 (9th Cir. 2019) (denying ineffectiveness claim where matter not investigated "did not differ meaningfully from the evidence [counsel] already had").

[2] *See also Nelson v. Davis*, 952 F.3d 651, 673–75 (5th Cir. 2020) (granting certificate of appealability on ineffectiveness claim because facts known to counsel "should have alerted competent counsel to investigate further," counsel "never interviewed" key witness, counsel did not look at relevant security camera footage which "would have been available," and the omitted evidence was consistent with trial strategy); *Ramirez v. Ryan*, 937 F.3d 1230, 1245 (9th Cir. 2019) (holding that ineffectiveness claim is substantial under *Martinez v. Ryan*, 566 U.S. 1 (2012), because "tantalizing indications in the record suggest[ed] that certain mitigating evidence may be available").

The Ninth Circuit's recent decision in *Andrews v. Davis* illustrates the conflict clearly. There, trial counsel had failed to investigate whether the defendant had been abused when he was in the Alabama prison system, a potentially important mitigating factor. 944 F.3d 1092, 1099 (9th Cir. 2019) (*en banc*). On direct appeal, the California Supreme Court excused that lack of investigation because the defendant had not (on his own initiative) told counsel about his mistreatment: "While counsel were aware petitioner had been incarcerated in the Alabama prison system, he did not inform them of the conditions he endured thereby alerting them to the need for further investigation of possible mitigation." *In re Andrews*, 52 P.3d 656, 668 (Cal. 2002). The Eighth Circuit used the same rationale in this case—counsel were "aware" Anderson's mother was a hard-drinking alcoholic, though witnesses "did not inform them" that she drank during pregnancy. But the Ninth Circuit in *Andrews*, applying the demanding AEDPA standard, concluded that the state-court decision was unreasonable. It was true that "Andrews never told his attorneys about his past—nor specifically about his time at [an Alabama facility]. But nothing suggests that counsel ever *asked* Andrews basic questions designed to elicit their client's life history." *See Andrews*, 944 F.3d at 1111 (emphasis added). The same failure to "ever ask[]" is at the heart of Anderson's ineffectiveness claim.

II. The circuits are split on how brain damage factors into prejudice.

Respondent caricatures Anderson's position by labeling it a "*per se* rule" that evidence of brain damage "automatically establish[es] *Strickland* prejudice." Br. Opp. 18, 19. That is not what Anderson argues at all. Rather, he argues that

evidence of brain damage tends to have a strong mitigating effect, as it offers an explanation for what otherwise may seem to be a senseless offense. The Court has cautioned against a reductive analysis that would dismiss brain damage as just "one more mitigating circumstance," as the Eighth Circuit did here. *See Porter v. McCollum*, 558 U.S. 30, 43 (2009). Other courts follow this admonition, as the petition shows.

Respondent asserts that the Fourth, Tenth, and Eleventh Circuits "merely applied *Strickland*'s prejudice inquiry to the facts of the case before them." Br. Opp. 18. That is not correct. Each of those circuits holds that brain damage is an unusually weighty form of mitigation evidence. The Tenth Circuit held that evidence of brain damage is "among the most powerful types of mitigation evidence available." *Littlejohn v. Trammel*, 704 F.3d 817, 864 (10th Cir. 2013).[3] The Eleventh Circuit recognized that brain damage "is precisely the kind [of mitigation evidence] that may establish prejudice" because it would "profoundly change[] the character of the penalty phase." *Jefferson v. GDCP Warden,* 941 F.3d 452, 483 (11th Cir. 2019). The Fourth Circuit stresses that evidence of FASD and resulting brain damage is

[3] Respondent points out that *Littlejohn* involved a remand and that the Tenth Circuit found no prejudice after that remand. Br. Opp. 18–19. But Respondent neglects to note that this result occurred because the petitioner managed to show only attention deficit disorder and an impulse-control disorder—"commonly diagnosed conditions [that] are too weak to support an argument for prejudice under *Strickland*." *Littlejohn v. Royal*, 875 F.3d 548, 559 (10th Cir. 2017). Anderson's brain damage, by contrast, is severe and uncontested. Respondent also emphasizes that Anderson's case involves "powerful" aggravation. Br. Opp. 19. But so too did *Littlejohn*, in which the jury found that the petitioner had been convicted of a prior violent felony and was likely to be a continuing threat to society. 704 F.3d at 823. The Tenth Circuit nevertheless found that evidence of organic brain damage like that Anderson suffers "would have led at least one juror to support a sentence less than death." *Id.* at 864.

"different from . . . other evidence of mental illness and behavioral issues" because it shows "a neurological disorder that *caused* [a defendant's] criminal behavior." *Williams v. Stirling*, 914 F.3d 302, 318 (4th Cir. 2019).

Respondent devotes much of its brief to a straw man, denying "that other circuits treat evidence of brain damage as automatically establishing *Strickland* prejudice." Br. Opp. 19. But Respondent simply ignores what those circuits *do* hold—that in a capital case, evidence of brain damage is especially likely to be persuasive and its absence is particularly likely to be prejudicial.

Respondent correctly characterizes the Eighth Circuit as applying a very different standard, describing it as holding that evidence of brain damage would have been just "one more mitigating factor." Br. Opp. 17. In the Eighth Circuit it is thus only the number of mitigating factors, and never their weight, that determines prejudice. Respondent argues, and the Eighth Circuit agreed, that when thirty mitigating factors have already been established—whatever their content, and even if they are repetitive of one another—the absence of one more factor (regardless of its significance) could not have mattered very much. Br. Opp. 17–18. In the Eighth Circuit's prejudice assessment, all mitigating factors are of equal weight. Brain damage is no more important than anything else. That obviously is not the standard applied by the Fourth, Tenth, and Eleventh Circuits in assessing prejudice.

III. Respondent's reasons for denying certiorari, like the Eighth Circuit's opinion, are wrong.

Respondent's other arguments, while irrelevant to the circuit split discussed above, provide no reason to deny certiorari and in fact highlight the errors in the Eighth Circuit's opinion.

First, Respondent stresses that counsel acted reasonably because "his experts advised that he did not have any brain damage, whether from FASD or another cause." Br. Opp. 13. But the experts never performed the neuropsychological testing that would have detected brain damage in the first place.[4] And they did not do so because counsel never informed them that Anderson had a major risk factor for brain damage—exposure to alcohol *in utero*. Experts base their recommendations on the information known to them, and counsel have an "affirmative duty to provide . . . experts with information needed." *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002). As Respondent correctly points out, one expert here thought Anderson could have "suffered brain damage from the childhood abuse." Br. Opp. 4. But, as Respondent reminds the Court, counsel could not "tell the experts information they did not know [because they never asked]—that Anderson's mother drank while pregnant." Br. Opp. 16.

Second, Respondent argues that counsel made a "tactical decision" by "declining to pursue neuropsychological testing that all the experts advised would likely be

[4] Respondent says that "Anderson was tested for organic brain disorder prior to his first trial." Br. Opp. 3. That is incorrect. Counsel had Anderson's IQ tested before the first trial and thereby learned that it exceeded the threshold for intellectual disability. But they never ordered neuropsychological testing of the sort needed to discern organic brain damage. *See* App'x Z44–Z51.

fruitless." *Id.* But as Respondent recognizes, one doctor said there was "a chance [Anderson] suffered brain damage," albeit from childhood abuse rather than alcohol exposure, so it is incorrect that all the experts told counsel not to bother testing their client for brain damage. App. 9a. And Respondent offers no basis to think (because there is none) that counsel strategically declined to ask the most important question for any FASD investigation: whether Anderson's alcoholic mother drank while pregnant with him.

Respondent's "strategy" argument is flawed even apart from these problems. When Respondent made these arguments below, the Eighth Circuit did not accept them—and with good reason. For example, the notion that counsel would consciously decide not to investigate the client's brain damage so they could have him testify is entirely implausible. Anderson's brain damage affected his criminal conduct but it did not prevent him from apologizing for his actions. In any case, the record establishes that Anderson's attorney made no such calculation. At the evidentiary hearing, counsel emphasized that she would have presented evidence of FASD had it been available because it fit perfectly with the defense theme of "childhood matters." App. 24a.[5] But counsel admitted that FASD "just isn't something we considered one way or the other," so the evidence was unavailable.

[5] *See also* App'x Z21 (attorney's testimony that "had [counsel] known that Mr. Anderson had fetal alcohol syndrome, [they] would . . . have presented that disorder as mitigating evidence").

App 21a. Failure to investigate the mother's drinking problem was the product of "inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 536.[6]

Finally, Respondent posits that counsel had "no reason to ask" Anderson's mother whether she drank while pregnant. The argument is fatally flawed given the facts here. Counsel knew that Anderson's mother had a drinking problem that existed "during the earliest years of Anderson's life." App. 20a. Alcoholism is a disease that does not easily abate. The value of FASD as mitigation was well known to criminal defense attorneys the time of Anderson's resentencing. And it was well known that brain damage has particularly important explanatory value in cases where no explanation is otherwise apparent. So counsel had *every reason* to ask Anderson's mother whether she was drinking during her pregnancy.

There was one more reason to ask: because the Sixth Amendment requires counsel to seek "all reasonably available mitigating evidence." *Wiggins*, 539 U.S. at 524. FASD evidence would "not have been cumulative" of the abuse case counsel presented at both trials. *Harrison v. Quarterman*, 496 F.3d 419, 425 (5th Cir. 2007). The possibility that Anderson's mother drank while pregnant with him, and that FASD might have resulted, was "readily identifiable in the evidence" of her general

[6] Similarly, the State posits (though the Eighth Circuit did not accept) that counsel omitted neuropsychological testing because they might have had to disclose the absence of helpful results to the prosecutor. The argument makes little sense because the omission guaranteed that the prosecutor would be able to tell the jury that same negative information: that there "wasn't nothing wrong with him." App'x S1581. In any case, counsel could make an informed decision about neuropsychological testing only after a thorough investigation into relevant factors such as whether Anderson's mother drank while pregnant. *See Strickland*, 466 U.S. at 690–91. As already discussed, counsel's failure to ask Anderson's parents even a single question about this topic was unreasonable.

drinking problem. *Littlejohn*, 704 F.3d at 862. And the attorneys could have obtained it with "simple persistence"—indeed, with even less than that—by just asking. *Andrews*, 944 F.3d at 1109.

In the face of this precedent, the Eighth Circuit's conclusion is plainly wrong. If "nobody told" Anderson's attorneys about his mother's drinking habits during pregnancy, then it was all the more important to investigate that issue. Ignorance about the precise timing of the mother's drinking was not an acceptable reason to omit an investigation into FASD altogether. *Cf. Andrus v. Texas*, 140 S. Ct. 1875, 1877 (2020) (finding deficient performance where "counsel performed virtually no investigation of the relevant evidence").

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Concerning prejudice, Respondent resorts to the same argument the Eighth Circuit adopted: that "one additional mitigating factor would not have made a difference." Br. Opp. 20.[7] In emphasizing in this Court that there were thirty mitigating circumstances, Respondent contradicts its own argument at trial, which was that "even though they're listed on separate sentences, that may not be a separate circumstance." App'x S1551; *cf.* App. 23a (Kobes, J., dissenting) ("[T]he court artificially inflates Anderson's mitigation case."). In any event, the argument is wrong as a matter of law. A court abdicates its duty by merely counting mitigating factors rather than weighing their importance to the defendant's moral

[7] Respondent incorrectly asserts that "Anderson's low IQ" was among the mitigating factors the jury found. Br. Opp. 9; *cf.* App. 62a (verdict form). Having failed to gather sufficient evidence that Anderson was intellectually disabled, *see supra* note 4, omission of a promising investigation into FASD was especially unreasonable.

culpability. The Court has "never limited the prejudice inquiry under *Strickland* to cases in which there was 'little or no mitigation evidence' presented." *Andrus*, 140 S. Ct. at 1887 (quoting *Sears v. Upton*, 561 U.S. 945, 954 (2010)). "This is not a case in which the new evidence" of FASD-related brain damage "would barely have altered the sentencing profile." *Porter*, 558 U.S. at 41 (quoting *Strickland*, 466 U.S. at 700).

In closing, the prosecutor powerfully stressed that Anderson "knew what he was doing, and he could have conformed if he had wanted to." App'x S1556. Evidence of FASD, which caused the teenaged Anderson to behave like a child, would have deprived the prosecutor of this argument. *Cf. Littlejohn*, 704 F.3d at 864–65. It would have offered the jury an explanation for why Anderson became violent in October 2000 when he'd never before exhibited such behavior. It would have explained a senseless killing in which, according to Respondent, the defendant was "[a]pparently intending to steal [the victim's] car," yet then did no such thing. Br. Opp. 2. And it would have weakened Anderson's moral culpability for the acts that formed the basis of his capital sentence.

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There is no disagreement about the key facts in this case: (1) Counsel did not know that Anderson's mother drank while pregnant, but (2) they knew she had a drinking problem, (3) they could have investigated the extent and timing of that drinking problem with relative ease, and (4) they lacked any good explanation for why their client turned violent for the first time as nineteen-year-old. If anything, Respondent's brief simply highlights these facts. The gravity of the Eighth Circuit's

error in this case, and the absence of any meaningful factual dispute to impede review, makes this an ideal vehicle in which to resolve the conflict in the lower courts over the standards for assessing ineffectiveness claims.

IV. The Court should consider the petition with *Floyd v. Gittere.*

The Court's docket currently contains another petition for writ of certiorari that asks the following question:

> May a court assessing *Strickland* prejudice dismiss the significance of evidence of brain damage, on the ground that it makes only a "limited additional contribution" compared to other mitigation evidence, as the Ninth Circuit has held, or does evidence of brain damage have uniquely mitigating weight, as four other circuits have held?

Floyd v. Gittere, No. 19-8921, Pet. at i (filed July 2, 2020). Because *Floyd* asks the same question as Anderson's second question presented, the Court should conference the petitions together and grant certiorari to both.

CONCLUSION

The Court should grant the petition for writ of certiorari.

JULY 21, 2020

Respectfully submitted,

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