CAPITAL CASE

No. _____

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

Zane Floyd, Petitioner,

v.

William Gittere, Warden, et. Al., Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

QUESTION PRESENTED

Trial counsel in this capital case knew that the defendant's mother had consumed alcohol while pregnant. Despite recognizing the need to investigate whether the defendant suffered from Fetal Alcohol Spectrum Disorder, and to consult an expert on that disability, trial counsel did neither. Federal habeas counsel subsequently retained such an expert, who concluded that Floyd met the criterion for a diagnosis of FASD and had suffered organic brain damage as a result of his mother's use of alcohol during her pregnancy. The court of appeals rejected the defendant's claim of ineffective assistance of counsel solely on the ground that the asserted ineffectiveness was not prejudicial; the appellate court did not address whether trial counsel was ineffective, or whether this habeas claim was affected by AEDPA.

The question presented is:

> 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?*

*The same question is presented in *Anderson v. Payne*, No. 19-8105.

LIST OF PARTIES

Petitioner Zane Floyd is an inmate at Ely State Prison. Respondent Aaron Ford is the Attorney General of the State of Nevada. Respondent William Gittere is the warden of Ely State Prison.

LIST OF RELATED PROCEEDINGS

DIRECTLY RELATED CASES

State v. Floyd, District Court, Clark County, Nevada, Case No. 99C159897, Judgment of Conviction (September 5, 2000)

Floyd v. State, Supreme Court of the State of Nevada, Case No. 36752, Opinion (42 P.3d 249 (March 13, 2002)) (*per curiam*)

Floyd v. State, Supreme Court of the United States, Case No. 02-7638, Opinion (537 U.S. 1196 (Feb. 24, 2003)

State v. Floyd, District Court, Clark County, Nevada, Case No. 99C159897, Findings of Fact Conclusions of Law and Order denying Petition for Writ of Habeas Corpus (February 4, 2005)

Floyd v. State, Supreme Court of Nevada, Case No. 44868, Order of Affirmance (178 P.3d 754 (Feb. 16, 2006))

State v. Floyd, District Court, Clark County, Nevada, Case No. 99C159897, Findings of Fact Conclusions of Law and Order denying Petition for Writ of Habeas Corpus (April 2, 2008)

Floyd v. State, Supreme Court of the State of Nevada, Case No. 51409, Order of Affirmance (367 P.3d 769 (Nov. 17, 2010))

Floyd v. Baker, United States District Court, Case No 2:06-cv-00471-RFB-CWH, Order (47 F.Supp.3d 1148 (Sep. 22, 2014))

Floyd v. Baker, United States Court of Appeals for the Ninth Circuit, Case No. 14-99012, Opinion (940 F.3d 1082 (Oct. 11, 2019) and amended 949 F.3d 1128 (Feb. 2, 2020)).

Table of Contents

Table of Authorities

Federal Cases **Page(s)**

Federal Statute and Constitutional Amendments

State Cases

Other

PETITION FOR WRIT OF CERTIORARI

Petitioner Zane Floyd respectfully prays that this Court grant a writ of certiorari to review the judgment and amended opinion of the United States Court of Appeals entered on February 3, 2020.

OPINIONS BELOW

The October 11, 2019, opinion of the court of appeals, which is reported at 940 F.3d 1082, is set out at pages 24 to 45 of the Appendix. The February 3, 2020, amended order of the court of appeals denying rehearing and rehearing en banc and amended opinion, which is reported at 949 F.3d 1128, is set out at pages 1 to 23 of the Appendix. The December 17, 2014, Order of the district court, which is unofficially reported at 2014 WL 7240069, is set out at pages 48 to 113 of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on October 11, 2019. A timely petition for rehearing and suggestion for rehearing en banc was denied on February 3, 2020. On March 19, 2020, the Court extended the time for filing future petitions to 150 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Introduction

Floyd, a capital habeas petitioner, suffers from a Fetal Alcohol Spectrum Disorder ("FASD")[1], though this was not discovered until years after he was tried and sentenced to death in state court. Floyd's trial counsel, who knew that Floyd's mother drank during her pregnancy, had expressly recognized prior to trial the need to investigate possible FASD and to consult an expert on FASD. But trial counsel did neither. Because Floyd's counsel did not know that he had FASD, or that FASD usually results in organic brain damage, counsel did not dispute prosecution evidence, and closing argument, that Floyd had no such brain damage.

In this federal habeas proceeding, Floyd contends that the failure of trial counsel to investigate and offer expert testimony regarding FASD constituted ineffective assistance of counsel.

The Ninth Circuit held that the failure to investigate and offer expert testimony regarding FASD was not prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984). It reasoned that proof of FASD-caused brain damage, even combined with expert testimony showing how that brain damage affected Floyd's conduct, would

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[1] The petition sets out the facts alleged in the Second Amended Petition. Because the district court concluded that this claim was defaulted, an issue the court of appeals did not reach, the trial court did not address the factual issues raised by those allegations.

have made only a "limited additional contribution" to Floyd's mitigation defense. App. at 12. That assessment is inconsistent with decisions in the Fourth, Tenth, and Eleventh Circuits, which correctly recognize that evidence of brain damage, whether due to FASD or some other cause, is uniquely weighty mitigating evidence, fundamentally different in kind from other types of mitigation evidence.[2]

Medical Background

Alcohol use during pregnancy is the most common cause of preventable birth defects. Alcohol freely passes from the mother's bloodstream by way of the placenta into the amniotic fluid and then is absorbed by the fetus. The alcohol kills cells in the fetus, interferes with the migration of cells to organs and systems throughout the fetus, and harms the specialized cells that are essential to transmission within the nervous system. Alcohol causes permanent structural and functional damage to the brain and central nervous system.[3]

Researchers initially referred to the birth defects caused by alcohol use during pregnancy as fetal alcohol syndrome ("FAS"). As researchers came to better understand the complex harms that such use causes, a number of other diagnoses emerged. Today the constellation of birth defects caused by alcohol use during

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[2] This same question is presented in *Anderson v. Payne*, No. 19-8105.

[3] 4 Excerpt of Record (EOR) 999. All references to the EOR, SEOR, and Supp.EOR refer to the record before the Ninth Circuit Court of Appeals.

pregnancy are generally referred to as fetal alcohol spectrum disorders ("FASD"), an umbrella term that encompasses several specific diagnoses. Among the range of birth defects resulting from alcohol use during pregnancy, the most serious is organic brain damage. The more common harms are decreased brain volume and abnormalities in brain structures.[4] Brain imaging studies have shown that prenatal alcohol exposure causes significant malformation in the structures within the brain (e.g., corpus collosum, basal ganglia, cerebellum) that are necessary for normal development and functioning.[5] Research has shown that prenatal alcohol exposure causes structural brain damage that affects functioning in the frontal lobe of the brain, particularly the prefrontal cortex, an area that is especially sensitive to the teratogenic effect of ethanol.[6]

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

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

[5] 4EOR 999.

[6] 4EOR 1001.

behavior and to handle stressful situations. Individuals with FASD are prone to a physical overreaction when startled by unexpected events. Because brain development after birth is delayed by FASD, individuals with FASD may continue to have physically immature brains, and exhibit child-like behavior, well into their twenties, sometimes longer.[7]

The diagnosis of FASD typically requires specialized training or experience. The combination of behavioral problems, neuropsychological test results, educational history and (sometimes) childhood appearance that would be recognized by a specialist as demonstrating the existence of FASD would not be understood by every medical professional. Because of the importance of that specialization, the U.S. Department of Health and Human Services, Health Resources and Services Administration, Maternal and Child Health Bureau, funded the creation in 2000 of a directory of physicians and others with significant familiarity with the diagnosis of FASD.[8] Although the directory included medical professionals in most states, including Nevada, the specialists whom it identified were only a limited segment of the nation's physicians, psychologists, and neuropsychologists.

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[7] Kelly *et al.*, *Effects of Prenatal Alcohol Exposure on Social Behavior in Humans and Other Species*, 22 Neurotoxicology & Teratology 143 (2000); 4EOR 1002-03, 1009-10, 1014 (Brown Decl.).

[8] *Resource Directory for the Diagnosis, Prevention and Treatment of FASD*, Barbara A. Morse, Ph.D. and Corinne Barnwell, MSW, Boston University School of Medicine.

Since at least the mid-1990s, defense attorneys in capital cases have recognized that FASD is compelling mitigation evidence.[9] The importance of investigating FASD has been the subject of numerous continuing-legal-education programs. In 2003 the American Bar Association Guidelines expressly recommended that the defense team in every capital case include someone qualified to screen for FASD[10]; that recommendation reflected what was by then common practice (dating back to 1997).

Factual Background

Prior to the early morning hours of June 3, 1999, Zane Floyd had no history of criminal conduct. He did, however, have a history of cognitive problems. A decade earlier, he had been assessed by a psychologist because of a range of behavioral, physical and cognitive difficulties. The psychologist concluded, *inter alia*, that there appeared to be "frontal lobe dysfunction."[11] Floyd subsequently dropped out of high school, was rejected for reenlistment by the Marines, and struggled to keep a job.

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[9] *See Haberstroh v. State of Nevada*, **Error! Main Document Only.**Case No. CV-N-94-009-DWH.

[10] American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases §§ 4.1 cmt., 10.7 cmt. (2003).

[11] 5EOR 1093 (Dr. Cardle report); *see also* 5 Supplemental Excerpt of Record (SEOR) 975-76, 980 (Testimony of Dr. Roitman acknowledging Floyd suffered from brain damage). The Ninth Circuit asserted that both Cardle and Roitman "determined that Floyd did not have any significant cognitive deficits." App. at 8. As shown above, the statement was incorrect.

At the age of twenty-three, he could no longer live independently, and had to move back into his parent's home.

On the night of June 2 and early morning of June 3, 1999, following a series of personal traumas, and a period of heavy drinking, Floyd became briefly suicidal and violent. He called an escort service and asked it to send a woman to his parent's home. Floyd greeted her with a gun and announced that he intended to kill himself and others. He sexually assaulted the woman but permitted her to flee. Floyd then put on camouflage clothing and walked to a nearby all-night grocery store, where he shot five strangers, four of them fatally. When police arrived, Floyd put his gun to his head, and urged the police to shoot him. The police, however, were able to persuade Floyd to surrender.[12] Floyd promptly confessed to the shootings.

Proceedings below

I. State Trial and Direct Appeal

Because Floyd did not dispute his guilt in the supermarket shootings, the central issue from the outset of the state proceedings was whether he would be sentenced to death. Floyd's mother acknowledged "heavy drinking" while she was pregnant with Floyd.[13] During the period between the June 1999 shooting and the July 2000 trial and sentencing hearing, Floyd's trial counsel were repeatedly alerted to the need to

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[12] 1EOR 212-13.

[13] 5EOR 1106, 1163; *see also* 1144, 1150.

investigate whether Floyd had FASD, and whether that disability might be connected to his actions on the night of the shooting, but they failed to do so.

First, on July 23, 1999, a year prior to Floyd's trial, "[trial counsel] identified Fetal Alcohol Syndrome as a potential issue in Floyd's case, and decided to obtain Floyd's birth records [and] his APGAR birth information . . . ."[14] Second, in January 2000, a mitigation specialist retained by trial counsel expressly recommended an investigation into "[p]ossible congenital/pre-natal neurological impairment due to maternal alcohol use."[15] That report was particularly significant because it pointed out that the consumption of alcohol by Floyd's mother could have caused neurological impairment, *i.e.*, brain damage. Third, in early May 2000, a psychologist[16] reported to counsel that Floyd was "[a]lmost positively neurologically damaged from birth"[17], and that this was possibly related to "[h]is mother's previous

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[14] 5EOR 1379.

[15] 5EOR 1150. The consultant was Alfonso Associates.

[16] Dr. Frank Paul.

[17] 4EOR 912.031.

severe poly-drug usage and dependence."[18] Fourth, trial counsel's notes contain an undated reference to "Fetal alcohol," with the name of a specific possible expert.[19]

Despite all this, Floyd's trial counsel did nothing to investigate whether Floyd had FASD. Counsel later candidly acknowledged that "[t]here was no legal strategy for not hiring an expert to investigate this issue, or failure to obtain th[e] [birth] records."[20] Trial counsel retained a series of experts, but never sought an expert with knowledge of FASD, and never asked the experts who were consulted about the possibility that Floyd had that disability.

In mid-May, 2000,[21] only two months before trial, trial counsel retained a neuropsychologist to test Floyd, Dr. David Schmidt.[22] But that expert's resume did not contain any reference to FASD,[23] and trial counsel did not ask that that

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[18] 4EOR 912.032; *see id.* ("indications that Mr. Floyd had suffered some form of neurological injury or deficit that has not been determined. His mother's previous severe poly-drug usage . . . would have a prominent effect on the child's neurological development.").

[19] 5EOR 1115 ("Fetal Alcohol - Dr. Levin" (emphasis in original)).

[20] 5EOR 1379.

[21] *See* 5EOR 1380.

[22] 2SEOR 483-84.

[23] 2 Supplemented EOR (Sup.EOR) 381-83.

disability be assessed.[24] Trial counsel did not provide this neuropsychologist with key documents indicating that Floyd had cognitive problems and that those problems might be related to maternal alcohol use[25]: the 1989 psychologist assessment[26], the January 2000 mitigation specialist assessment, and the early May 2000 psychologist assessment. This neuropsychologist's report, dated June 13, 2000, said nothing about FASD, an issue which the neuropsychologist had not been asked to address. The report contained only an equivocal comment as to whether Floyd had neurological damage.[27]

Floyd's trial counsel recognized that this report was not useful, and—now only a few weeks from trial—retained a second neuropsychologist. This second neuropsychologist, unlike the first, was provided by trial counsel with a copy of the 1989 psychologist report and was asked to assess it. This neuropsychologist concluded that the 1989 report contained "conclusive and overwhelming" evidence of "a neurological problem."[28] There were "signs of neurological dysfunction" and

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[24] 2SEOR 483-84 (Dr. Schmidt was asked to evaluate Floyd for competency to stand trial).

[25] 4EOR 914-20.

[26] 5EOR 1090-95.

[27] 4EOR 924 ("no clear evidence of chronic neuropsychological dysfunction"), 925 ("no clear evidence of chronic neuropsychological impairment.").

[28] 4EOR 930 (Dr. Thomas Kinsora). The Ninth Circuit opinion omits this fact.

"important evidence of . . . neurological 'wiring' anomalies."[29] This neuropsychologist indicated that it was likely further testing would "find additional evidence of neurologic dysfunction."[30] The second neuropsychologist was also highly critical of the report of the first neuropsychologist, which he concluded had omitted several key elements, had improperly used a test intended for stroke victims, and had overlooked the significance of several problems revealed by the tests that were conducted.[31] And he noted that the first neuropsychologist had failed to explore cognitive problems identified in the 1989 report, a failure attributable to the failure of trial counsel to provide that 1989 report to the first neuropsychologist. But because this second neuropsychologist had only been retained on the eve of trial, he was not available to testify (something counsel knew at the inception),[32] and trial counsel did not ask that the trial be delayed until the witness would be available. This second neuropsychologist's background did not include anything about FASD;

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[29] 4EOR 928, 930; *see* 4EOR 929 ("The disparity between [Floyd's] above average skills and his below average skills is particularly important. . . . [W]e interpret the discrepancy and the particular pattern of performance as evidence that there are subtle neurological problems afoot.").

[30] 4EOR 928.

[31] 4EOR 939-39; *see* 4EOR 938 ("several elements to a comprehensive neuropsychological assessment [were] missing or were grossly under assessed").

[32] 5EOR 1381.

he too was never asked to assess whether Floyd might have FASD and did not address that issue.

With both neuropsychologists thus ruled out, trial counsel called as a witness Dr. Frank Dougherty. Dougherty's expertise, however, was learning disabilities[33]; his resume too contained no reference to FASD.[34] Dougherty testified that he was retained to assess Floyd's mental health[35]; he was not asked about whether Floyd might have FASD, and never mentioned the topic. Trial counsel gave Dougherty the report of the first neuropsychologist, but not the report of the second neuropsychologist, or the early May 2000 psychologist's report.[36] Dougherty concluded that the information he had did not warrant further inquiry into whether Floyd had cognitive problems.[37]

The jury convicted Floyd of four homicides, as well as several related offenses. In the subsequent penalty phase, trial counsel did not offer expert testimony that Floyd had FASD, or to explain that FASD usually results in brain damage. There is

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[33] 4EOR 941.

[34] 4EOR 965-75.

[35] 2EOR 355-56.

[36] 4EOR 941, 955-57.

[37] 4EOR 957 ("[T]here was no significant evidence of any type of neurological damage that required further investigation at this point").

no indication from the testimony that was offered, or the questions and closing argument of defense counsel, that either the defense witnesses or trial counsel realized that maternal drinking causes brain damage.

At the sentencing hearing, a clinical social worker, Jorge Abreu, testified about Floyd's background. In one sentence, listing four drugs that Floyd's mother used during pregnancy, Abreu mentioned that alcohol was among them. Abreu did not testify about, and was never asked to discuss, any possible consequences of the use of any of the four drugs.[38] As Abreu explained, he was only to testify about "the factual history of [Floyd's] life, period."[39]

Dougherty mentioned that alcohol was one of several drugs that Floyd's mother used during her pregnancy.[40] He commented without further explanation that

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[38] The court of appeals suggested that Floyd's experts "explicitly argued that his mother's alcohol use while she was pregnant led to his developmental problems in some form and therefore helped explain his actions . . . ." App. at 12. Abreu's testimony contains no such argument.

[39] 5SEOR 1122.

[40] 4SEOR 804:

> And we know with Zane Floyd, that Zane's mother, Valerie, drank alcohol, and she used drugs during her pregnancy. And we did establish that it was during the first trimester. We know that basically she primarily used alcohol, some marijuana. She also had a history of using other drugs, which she denies during this pregnancy. She continue[d] to smoke one and a half packs of Camel cigarettes throughout the pregnancy.

This is the only instance in which Dougherty mentioned the fact that Floyd's mother drank during pregnancy. The court of appeals characterizes Dougherty has having "emphasized" that fact. That is not a fair characterization of this isolated reference. The issue was mentioned again during cross-examination, but only

using alcohol during pregnancy "can have a negative effect on the fetus."[41] But Dougherty never testified about what the "negative effect" might be, and nothing in the record indicates that Dougherty personally had any idea what that effects typically were. Nor did Dougherty express any opinion as to whether the alcohol use by Floyd's mother had actually had any effect at all.[42] When Dougherty was asked to offer an exculpatory explanation for why Floyd, a man with no criminal record, had become violent, he gave only a series of reasons related to events that had occurred shortly before the attack, but never mentioned maternal alcohol use.[43]

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because the state asked Dougherty to recount the mother's assertion that she stopped drinking two weeks after she became pregnant. *Id.* at 835.

[41] 4SEOR 804:

> When a woman is pregnant, she could be exposed to what we call toxicants. That's anything that negatively could affect the development of the fetus. If a woman smokes, . . . you have a very good likelihood of having an underweight birth or maybe having some other problems. We know that if you ingest alcohol, particularly during the first trimester, it can have a negative effect on the development of the fetus. In fact, on many liquor bottles and things now they have those warnings. They didn't have those in the 70's. But we know now from extensive research it could affect you.

See also 3SEOR 734 (closing argument of counsel where he, without explanation, states that Floyd "would suffer from the effects, early effects of his mother's drinking").

[42] The court of appeals suggested that Floyd's experts "explicitly argued that his mother's alcohol use while she was pregnant led to his developmental problems in some form and therefore helped explain his actions . . . ." App. at 12. Neither Dr. Dougherty or Dr. Roitman's testimony contained such argument.

[43] 4SEOR 833-34:

In closing argument, Floyd's trial counsel referred on a single occasion to the fact that Floyd's mother drank.[44] The only effect of that maternal alcohol use mentioned[45] in that closing argument was premature birth, and counsel did not argue that Floyd's premature birth itself had any consequences.[46]

> Q. Let me ask you this, doctor: Why did Zane Floyd, this man with no criminal record, no history of prior violence, commit these acts on June 2nd and June 3rd?
> A. . . . . [T]he best thing I can tell you as a psychologist and understanding human behavior is, the simplest way is that he had somewhat of a psychotic break or total breakdown of his mental functioning, partying during this time that this incident took place. He snapped. He was under extreme emotional distress.
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> He felt that he was under the influence of alcohol. He was basically having to, just moved back to his parents' home, reaffirming his inability to be successful in life. He quits his job. He is rejected by his girlfriend just before the incident. It's the accumulation, the accumulation of all these things.

[44] The court of appeals stated that there were "multiple references" to this in counsel's mitigation argument. App. at 11. That is incorrect; there is only one reference in counsel's argument.

[45] The court of appeals suggested that Floyd's lawyers "explicitly argued that his mother's alcohol use while she was pregnant led to his developmental problems in some form and therefore helped explain his actions . . . ." App. at 12. Counsel's testimony contains no such argument.

[46] 3SEOR 374 ("Zane would suffer from the effects, early effects of his mother's drinking, her ingested alcohol, drugs early on in her pregnancy, as well as the smoking throughout. This led to his premature birth. Zane Floyd was born four pounds, ten ounces, September 20, 1975."). The court of appeals quoted the assertion in the first sentence that Floyd "suffer[ed] from, the effects, early effects of his mother's drinking," but never mentions the second sentence, which identifies only premature birth as an effect. App. at 11.

In the absence of any testimony or argument referring to FASD or identifying any effect of maternal alcohol use except premature birth, the state was able to assert without contradiction, and to great effect, that Floyd was not brain damaged. The state's rebuttal witness repeatedly testified that Floyd was not brain damaged[47]; Floyd's counsel did not pursue that issue on cross-examination, and did not attempt to offer rebuttal evidence. In its closing argument, the state insisted—again without contradiction or objection—that Floyd was not brain damaged.[48]

The jury voted to impose the death penalty for the four killings. On direct appeal, the Nevada Supreme Court affirmed the conviction and sentence. *Floyd v. State*, 42 P.3d 249 (Nev. 2002) (*per curiam*). This Court denied certiorari. *Floyd v. Nevada*, 537 U.S. 1196 (2003).

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[47] 3SEOR 635-36.

> Q. . . . [D]o you have an opinion as to whether or not the defendant on June 3rd, 1999, suffered any neurological deficit; in other words, did he have any brain damage?
> A. No.
> Q. No, he did not?
> A. He did not.

3SEOR 635.

> Q. Was he brain damaged?
> A. No.

3SEOR 655.

[48] 3SEOR 754 ("There were no questions of [the state's] neuropsychologist . . . because he knew what he was talking about and the right tests were applied and they show that he has no brain damage. . . . There was no brain damage . . .").

II. State Post-Conviction Proceedings

Floyd filed a state petition for a writ of habeas corpus. The state trial court denied the petition on the merits, and the Nevada Supreme Court affirmed. *Floyd v. State*, 178 P.3d 754 (Nev. 2006) (table).

Floyd then filed a habeas petition in the U.S. District Court for the District of Nevada. The Federal Public Defender was appointed as counsel and filed an amended petition raising a claim of ineffective assistance of trial counsel for failure to investigate and present expert testimony at the penalty hearing regarding Floyd's FASD. The district court stayed the federal proceeding so Floyd could exhaust that issue in state court.

Floyd filed a second state petition that included several new claims, including the ineffective assistance of trial counsel set out above. The state trial court denied the petition on the merits and as untimely filed. The Nevada Supreme Court affirmed, holding that Floyd's second petition was untimely and successive. *Floyd v. State*, 367 P.3d 769 (Nev. 2010) (unpublished).

III. Federal Habeas Proceedings

In 2011, the federal district court lifted the stay and reopened Floyd's habeas proceeding. As relevant here, the federal habeas petition asserted that Floyd had been denied effective assistance of counsel at his sentencing hearing because trial counsel had failed to investigate whether Floyd had FASD or offer expert testimony about that disability. The petition asserted that such an investigation would have revealed that Floyd indeed had FASD, and that expert testimony would have

explained that FASD usually involves organic damage.[49] Filed with the petition were two reports, one from an FASD expert and one from a neuropsychologist. The petition also asserted that the attorney who represented Floyd in his first state post-conviction proceeding had been ineffective because he failed to investigate and raise a claim that Floyd's trial counsel were ineffective in failing to investigate FASD.

Because the FASD expert[50] retained in connection with the federal habeas proceeding was specifically asked to assess whether Floyd had FASD, she reviewed a substantial number of records that had never been sought by the experts retained prior to the original trial, none of whom had been asked to consider whether Floyd had FASD. Particularly probative among those newly obtained records were childhood photographs of Floyd. A minority of children with FASD have highly distinctive facial features, which are rarely, if ever found among those without FASD. Because those distinctive features usually disappear at puberty, an expert attempting to assess whether an adult has FASD would look for childhood photographs, which in Floyd's case were readily obtained. In Floyd's case, the more

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[49] 3EOR 715-15; 3EOR 724-25.

[50] 4EOR 998.

than fifty photographs obtained by the expert clearly exhibited those distinctive FASD features.[51]

The FASD expert concluded, after reviewing a voluminous amount of records and test results, that "Zane Floyd meets criteria for a specific FASD diagnosis of [a particular type]."[52] "Floyd displayed almost every major neurodevelopmental disorder that has been associated with the primary disabilities seen in individuals with FASD."[53] The FASD expert detailed the ways in which FASD-caused organic brain damage would impair an individual's ability to "control behaviors that stem from emotion-evoked urges."[54] "[W]hen faced with events that trigger negative emotions, individuals with FASD often overreact and behave impulsively . . . ."[55] "[The applicable] FAS[D] . . . diagnosis . . . accounts for *all* of Mr. Floyd's

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[51] 4EOR 1004 ("*Facial Dysmorphology:* . . . Photographs of Zane Floyd when he was an infant and small child display some of the typical facial abnormalities associated with FASD. Characteristic features evidenced in these photos are: small palpebral fissures, ptosis, slight epicanthal folds, elongated upper lip, thin vermillion on upper lip, sunken nasal bridge, short upturned nose, and clown eyebrows.").

[52] 4EOR 1001.

[53] 4EOR 1010.

[54] 4EOR 1001.

[55] 4EOR 1010.

neurodevelopmental and cognitive-behavioral problems and his behavior history, not only during his childhood but also up to the present time."[56]

The neuropsychologist[57] report submitted with Floyd's habeas petition concluded that Floyd was brain damaged. That report specifically examined the patterns of neurological dysfunction that had been identified in 1989 and relied on a more complete battery of neuropsychological tests than had been conducted previously. This report found that Floyd suffered from "significant weakness in the neurological functioning of the right cerebral hemisphere compared to the left."[58] It connected that damage to Floyd's actions on the morning of the killings, concluding that the neurological dysfunction caused Floyd not to be "fully in control of his impulses and actions at the time of the crimes in question."[59]

The federal district court granted the State's motion to dismiss the FASD-ineffectiveness claim, concluding that it was procedurally defaulted, and that Floyd had not shown cause and prejudice for the failure of his attorney at the first state post-conviction proceeding to raise that claim. App. at 143-45. The district court did not decide whether the failure of Floyd's trial counsel to investigate FASD

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[56] 4EOR 1002 (emphasis in original).

[57] 4EOR 1022-75 (Report of Dr. Jonathan Mack, Psy.D., dated 10-13-2006).

[58] 4EOR 1058.

[59] 4EOR 1075.

denied Floyd the effective assistance of counsel, or whether any such denial would have been prejudicial. The district court in a later order denied on the merits certain other unrelated claims but issued a certificate of appealability as to several issues, including whether Floyd could show cause and prejudice for the default of his FASD-ineffective assistance of trial counsel claims.[60]

On appeal, Floyd renewed his contention that the failure of trial counsel to investigate FASD had denied him the effective assistance of counsel, and that that denial was prejudicial under *Strickland*. Both in his briefs and at oral argument, Floyd specifically pointed out that an FASD diagnosis would have established that he was brain damaged. Because at trial there was no expert testimony regarding FASD, Floyd's counsel argued, the jury was "without an explanation that the mother's drinking leads to organic brain damage, which affects the entire life."[61] Brain damage, counsel urged, was far more of an important mitigating factor than, for example, ADD/ADHD, which the state contended Floyd had outgrown by the time he was an adult. Proof of FASD-based brain damage, counsel argued, might well have prompted the jury to return a verdict of life without parole, rather than

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[60] ECF No. 162.

[61] Oral Arg., Jan 31, 2019, available at 2019 WL 1405623.

death.[62] Floyd also asserted that his first state post-conviction counsel had been ineffective in failing to raise this FASD-ineffectiveness claim.

The court of appeals affirmed solely on the ground that the claimed ineffectiveness was not prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984). App. at 12-13. The appellate court did not address whether Floyd's trial counsel had been ineffective in failing to investigate FASD, or whether Floyd's first state post-conviction counsel had been ineffective in failing to raise this FASD-ineffectiveness claim. The court of appeals did not question the expert's conclusion that Floyd suffered from FASD, or that maternal alcohol use had caused organic damage to Floyd's brain. Assuming all that to be true, and even if "the jury heard from an FASD expert," the court held that it was not "reasonably probable" that even a single juror would have been persuaded to vote against the death penalty. App. at 11.

The court of appeals analysis rested largely on its view that the FASD diagnosis and "hear[ing] from an FASD expert" about the nature of FASD (and its resulting brain damage) would have added very little by way of mitigation. First, the court noted that Floyd's trial counsel had advanced a number of other mitigation considerations; since there was already some mitigation evidence, it reasoned that any "additional contribution the FASD mitigating factor" could have added would

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[62] Oral Arg., Jan 31, 2019, available at 2019 WL 1405623.

only have been "limited." App. at 12. Second, the court thought it unlikely that any juror would regard FASD as more serious "than ADD/ADHD[63] and Floyd's other developmental problems." *Id.*[64] Third, the court of appeals noted that the jury had been told that Floyd's mother drank during her pregnancy. *Id.*

Floyd petitioned for rehearing and rehearing en banc. The petition argued, as had the earlier briefing, that FASD caused organic brain damage, a premise which the panel had not questioned. A substantial number of disability rights groups and advocates filed amicus briefs, objecting to the dismissive manner in which the panel had assessed FASD and resulting brain damage, and explaining that the panel's equation of FASD and ADHD was medically unsound.[65] The court of appeals

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[63] The court's insistence that proof of FASD could have added little to trial evidence that Floyd had (at least at an earlier age) ADD was in considerable tension with the Ninth Circuit's earlier holding that proof of ADD has little mitigating value. *Brown v. Ornoski,* 503 F.3d 1006, 1016 (9th Cir. 2007) ("ADD . . . [is a somewhat common disorder[]; although [it] adds quantity to the mitigation case, [it] add[s] little in terms of quality.").

[64] The original panel decision used the phrase "mental illness" rather than "developmental problems." *See* App. at 7, 34.

[65] Amicus briefs were filed on behalf of the National Organization on Fetal Alcohol Syndrome (NOFAS), a group of disability organizations including the Disability Law Center of Alaska and Disability Rights California, the National Association of Public Defense (NAPD) and separate groups of Canadian and British advocates and legal and medical professionals.

denied the petition, but made some minor changes in the language of its original opinion.

REASONS FOR GRANTING THE WRIT

This Court has twice noted the importance of brain damage as a mitigating factor in capital sentencing. In *Rompilla v. Beard*, 545 U.S. 374 (2005), the Court concluded that the failure of trial counsel to adduce evidence of the defendant's brain damage was prejudicial under *Strickland v. Washington,* 466 U.S. 668 (1984). 545 U.S. at 390-92. That evidence was particularly significant because it could demonstrate that the defendant's conduct was less culpable.

> [Rompilla] suffers from organic brain damage [caused by FASD], an extreme mental disturbance significantly impairing several of his cognitive functions. . . . Rompilla's problems . . . were likely caused by fetal alcohol syndrome [and] Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense.

545 U.S. at 392 (quoting *Rompilla v. Beard*, 355 F.3d 233, 279-80 (3d Cir. 2004) (Sloviter, J., dissenting)). In *Sears v. Upton*, 561 U.S. 945 (2010), in applying *Strickland*, this Court noted that although other evidence had not been offered at trial, the "more significant[]" omission was of evidence of the "significant frontal lobe brain damage [the defendant] suffered as a child." 561 U.S. at 949, 956.

Consistent with this Court's decision in *Rompilla* and *Sears*, four courts of appeals have correctly held that the failure of trial counsel to adduce evidence of brain damage at a capital sentencing hearing is particularly likely to be prejudicial under *Strickland*. In this case, on the other hand, the Ninth Circuit dismissed

evidence of brain damage as merely cumulative, and not distinguishable from less serious cognitive issues, specifically ADHD. The Eighth Circuit has taken a similarly dismissive attitude towards brain damage evidence. *Anderson v. Kelly*, 938 F.3d 949 (8th Cir. 2019), *cert. pending sub nom. Anderson v. Payne*, No. 19-8105. This circuit conflict is of substantial importance, because the failure of trial counsel to identify and offer evidence of brain damage is a recurring problem in capital cases, and because (as is set out below) that organic damage occurs from a wide variety of causes.

I. The Ninth Circuit Decision Conflicts With Four Other Circuits In Not Recognizing That Brain Damage Is Uniquely Powerful Mitigating Evidence

This case presents the circuit conflict recently described by Judge Jonathan Kobes in his dissenting opinion in *Anderson v. Kelly*. The capital defendant in *Anderson*, as in the instant case, had FASD and resulting brain damage, but Anderson's trial counsel (as here) had failed to investigate that disability or present evidence about it at his sentencing hearing. The Eighth Circuit concluded that that failure was not prejudicial, because Anderson's trial counsel had adduced a number of other types of mitigating evidence. The panel majority insisted that failure to offer evidence of FASD and resulting brain damage would not have mattered, because that would have been just "one more" mitigation argument. 938 F.3d at 958; *compare* App. at 12 (evidence of FASD and resulting brain damage would have made just a "limited additional . . . mitigating factor as compared with the mitigation evidence presented").

Judge Kobes correctly pointed out in his dissent in *Anderson* that decisions in the Fourth and Tenth Circuits hold, to the contrary, that in assessing whether the failure to offer mitigating evidence is prejudicial, "brain damage presents a different and more powerful type of mitigating evidence." 938 F.3d at 965. In those circuits, evidence of brain damage, whether due to FASD or some other cause, is "more than 'one more' mitigation argument." 938 F.3d at 964. Applying the standard in the Fourth and Tenth Circuits, Judge Kobes reasoned that

> [c]ompared to Anderson's mitigators, an FASD diagnosis would offer something different and more compelling. . . . That brain damage

> presents a different and more powerful type of mitigating evidence is a theme throughout capital caselaw. . . . The jury was presented with much mitigating evidence, but nothing with the force of an FASD diagnosis.

938 F.3d at 965. Decisions in the Sixth and Eleventh Circuits also treat evidence of brain damage as having great weight in a capital sentencing hearing, and thus hold that the failure to adduce such evidence is particularly likely to be prejudicial. Under the standard in those circuits, in determining prejudice under *Strickland*, the absence of evidence of FASD and FASD-based brain damage would have been accorded far greater weight than it was given by the Eighth Circuit in *Anderson*, or by Ninth Circuit in the instant case. The difference in the prejudice standard applied in these circuits can be, literally, a matter of life or death.

In *Williams v. Stirling,* 914 F.3d 302 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 105 (2019), the defendant had brain damage resulting from FASD. At his sentencing hearing, counsel introduced evidence of a "challenging childhood, learning disabilities, and other mental health issues," 914 F.3d at 315–16, but they had not investigated, and thus did not raise, FASD-related brain damage as a mitigator. In post-conviction proceedings, the defendant's experts described the effect of that brain damage in terms similar to the expert testimony in the instant case. *Id.* at 308, 318 (emphasis in original). The Fourth Circuit concluded that, even under AEDPA's deferential standard (which is not applicable in the instant case), the failure to investigate FASD was unreasonable and the absence of brain-damage evidence was prejudicial:

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

Id. at 318. Evidence that FASD "impaired [the defendant's] judgment" and "his ability to control his impulses and consider the consequences of his actions," the Fourth Circuit held, "could have been persuasive mitigating evidence for a jury" even in light of the other mitigation it heard. *Id.*[66]

The Tenth Circuit has held in six cases that evidence of brain damage is of particular importance in determining prejudice under *Strickland*. In *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012), the defendant had suffered brain damage in a truck accident. Injury to his frontal lobe was particularly significant because that part of the brain is the "gas pedal and the brake pedal of behavior." *Id.* at 1205. The court of appeals emphasized that

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[66] The Ninth Circuit in the instant case sought to distinguish the Fourth Circuit decision in *Williams*, arguing that in Floyd's case the mitigating evidence that had been offered at the sentencing hearing was stronger (so additional proof of brain damage would have added less) and the aggravating evidence was stronger (so more would have been needed to overcome it). But the key rationale of the Fourth Circuit's decision was not the relative weight of the other evidence, but the uniquely persuasive weight of proof of brain damage. 914 F.3d at 313-18.

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

Id. (citing *Rompilla v. Beard*, 545 U.S. 374, 392 (2005)).

In *Smith v. Mullin,* 379 F.3d 919, 942 (10th Cir. 2004), the defendant had suffered brain damage from lack of oxygen when he nearly drowned; ineffective trial counsel had failed to refer to that at sentencing. The Tenth Circuit explained that

> the mitigating evidence omitted in Mr. Smith's trial is exactly the sort of evidence that garners the most sympathy from jurors. [A] [d]eath penalty litigation expert . . . testified at the evidentiary hearing that "[j]uries respond to and find mitigating [this type of evidence,] and [they] are more likely to vote for life rather than death sentences in cases where there is ... clear and clearly presented evidence that the defendant has suffered from some form of mental illness . . . ." . . . The available empirical evidence as to juror attitudes supports [the expert's] conclusions.

379 F.3d at 942.

In *United States v. Barrett,* 797 F.3d 1207 (10th Cir. 2015), the defendant had suffered brain damage as a result of "various incidents of head trauma growing up and as a young man." 797 F.3d at 1230. The Tenth Circuit explained that

> evidence of mental impairments "is exactly the sort of evidence that garners the most sympathy from jurors," *Smith v. Mullin,* 379 F.3d 919, 942 (10th Cir.2004), and that this is especially true of evidence of organic brain damage . . . . This evidence goes beyond the generalized mental conditions we have determined to be unhelpful in mitigation. *See Grant v. Trammell,* 727 F.3d 1006, 1020–21 (10th Cir.2013) (generalized personality disorders, borderline personality disorder, bipolar disorder, compulsive personality disorder, and severe emotional distress). It enables counsel to "explain to the jury why [the] defendant may have acted as he did [,] ... connect[ing] the dots

> between, on the one hand, [his] mental problems, life circumstances, and personal history and, on the other, his commission of the crime in question." *Hooks,* 689 F.3d at 1204.

797 F.3d at 1230-31.

In *Anderson v. Simmons,* 476 F.3d 1131 (10th Cir. 2007), the defendant had suffered "repeated head injuries as a child and as an adult, a number of which resulted in periods of unconsciousness. Anderson's brain deficits affect his reasoning, problem solving, and judgment." 476 F.3d at 1144.

> The evidence developed by habeas counsel demonstrates Anderson suffers from brain damage . . . . The most significant damage to Anderson's brain is in the area of the frontal lobe, the area of the brain that affects reasoning, problem solving, and judgment. . . . In *Smith,* this court noted that this type of evidence "is exactly the sort of evidence that garners the most sympathy from jurors." 379 F.3d at 942 (citing both empirical evidence and case law) . . . .

476 F.3d at 1147-48.

In *United States v. Fields,* 949 F.3d 1240, 1256 (10th Cir. 2020), the defendant had suffered "catastrophic loss of brain function," apparently due to a stroke. 949 F.3d at 1252. The Tenth Circuit cited and applied its earlier holdings in *Barrett*, *Smith* and *Hooks* that proof of such a cognitive impairment "is compelling" and the sort of evidence that garners the most sympathy from jurors. 949 F.3d at 1256.

In *Littlejohn v. Trammell*, 704 F.3d 817 (10th Cir. 2013), the defendant in postconviction proceedings offered evidence that drug use by his mother during pregnancy had damaged "the microscopic structure and neuro-chemical function of [his] brain." *Id.* at 862. Post-conviction counsel also introduced expert testimony that the defendant had "a behavioral disorder manifested by poor impulse control,

psychological immaturity and judgment *that is caused by* neuro-developmental deficits experienced in his peri-natal development." *Id.* at 861 (emphasis in original). The court held that this testimony, if credited, "could go far in offering a scientifically supported and physical link to Littlejohn's crime and 'developmental history.'" *Id.* at 863. But the jury had never been told of that brain damage. Such an omission could well be prejudicial, the Tenth Circuit held, because

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

Id. at 864.[67]

In *Glenn v. Tate,* 71 F.3d 1204, 1211 (6th Cir. 1996), the Sixth Circuit noted the prevailing view among the courts of appeals that the failure to offer evidence of brain problems was likely to be prejudicial.

> [The defendant's] sentencing proceeding can hardly be relied upon as having produced a just result when the jurors were given to understand, in the unchallenged report of [a prosecution witness], that the crime was not the product of mental retardation or organic brain disease. . . . Judge Easterbrook, concurring in the affirmance of a grant of habeas relief to a retarded petitioner who had apparently suffered brain damage as a result of blows to the head in his youth, has cited empirical evidence suggesting that while juries tend to distrust claims of insanity, they are more likely to react sympathetically when their

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[67] In *Littlejohn v. Royal*, the Tenth Circuit reiterated that "evidence of organic mental deficits 'ranks among the most powerful types of mitigation evidence available,'" but found in this particular case, there was no prejudice. 875 F.3d 548, 555 (10th Cir. 2017).

> attention is drawn to organic brain problems such as mental retardation. *Brewer v. Aiken,* 935 F.2d 850, 861-62 (7th Cir.1991) (Easterbrook, J., concurring). The failure of [defendant's] counsel to draw the jury's attention to the organic brain problem here, and to the possibility that it helped turn [defendant] into putty in the hands of his admired older brother, was both objectively unreasonable and prejudicial.
>
> Our sister circuits have had no difficulty in finding prejudice in sentencing proceedings where counsel failed to present pertinent evidence of mental history and mental capacity. . . . We would be badly out of step with the other circuits were we to conclude that there was no prejudice in the case at bar.

See Frazier v. Huffman, 343 F.3d 780, 798 (6th Cir. 2003) (noting, in a case in which the defendant had suffered brain damage when he fell from a ladder, "the probability that the jury would find that a murderer who suffers from a functional brain impairment is less morally culpable than one who does not").

The Eleventh Circuit has attached similar importance, in determining prejudice under *Strickland*, to the failure of trial counsel to adduce evidence of brain damage. In *Jefferson v. GDCP Warden*, 941 F.3d 452 (11th Cir. 2019), the defendant had suffered brain damage when a car ran over his head when he was only two years old. He was "left with a cranial indentation and an abnormally enlarged skull, and suffered frontal lobe and neurological damage." *Id.* at 479.

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

Id. at 484. At the original sentencing hearing, the defense had introduced evidence that Jefferson had "a tough childhood" with "very few positive influences in [his]

li[fe]." *Id.* at 483–84. But the omission of the brain-damage evidence was nonetheless prejudicial, the Eleventh Circuit held, because

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

Id. at 484.

> [T]he evidence of brain damage that would have been introduced had Jefferson's counsel performed in a constitutionally effective manner would have profoundly changed the character of the penalty phase of the proceedings by fundamentally transforming Jefferson's sentencing profile. This sort of mitigation evidence is precisely the kind that may establish prejudice at the penalty phase. . . . The new mitigation evidence . . . not only would have bolstered the mitigation evidence already available but also would have dramatically transformed the sentencing profile presented to the jury. . . . Relatedly, the dramatically different sentencing profile created by the new mitigating evidence substantially weakens the aggravating factors relied on by the jury a sentencing.

Id. at 483–84.

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

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

Id. at 1235. Trial counsel's unreasonable failure to adduce that evidence was prejudicial, the Eleventh Circuit held, and the state court unreasonably applied *Strickland* in concluding otherwise, because

> the mental health expert opinions would have served to reduce the volitional nature of the crime, as well as Ferrell's ability to plan and act rationally, and as a result, undercut the senselessness and cold-blooded nature of the crime as stressed by the prosecutor.

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

II. This Case Presents An Excellent Vehicle for Resolving the Question Presented

This case is an excellent vehicle for resolving the question presented. The circumstances of this case illustrate why evidence of brain damage would often be powerful mitigating evidence. Floyd had no history of criminal conduct prior to the morning of June 3, 1999; thus, proof of organic brain damage could have helped to explain and mitigate the culpability of the sudden change in his actions. At the sentencing hearing, the state argued (as prosecutors often do), that if Floyd had endured an abusive childhood, he could still have chosen not to turn violent.[68] But a jury might well reason that an individual with brain damage has significantly less ability than others to control his actions. In this case, the state emphasized, without contradiction, in its rebuttal and closing argument that Floyd did *not* have

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[68] 3EOR 558-59.

brain damage. Evidence to the contrary might well have convinced the jury to reject that prosecution contention.

This appeal is not encumbered by collateral issues. In both the district court and the court of appeals, Floyd expressly asserted that he had FASD, that the FASD had caused organic brain damage, and that his counsel had been ineffective in failing to investigate and present those issues at his sentencing hearing.
The court of appeals upheld Floyd's death sentence solely on the ground that the claimed ineffectiveness would not have been prejudicial. The court did not reach the question whether the conduct of Floyd's trial counsel was ineffective, or whether that ineffectiveness claim would be barred by AEDPA. If this Court were to grant review, it could limit its decision to adopting that standard in the Fourth, Sixth, Tenth and Eleventh Circuits, holding that evidence of brain damage must be given particular weight in assessing prejudice under *Strickland*. The Court would not need go further and determine whether in the instant case the asserted ineffectiveness was prejudicial in light of the other circumstances of the case but could remand the case for further consideration in light of that standard.

While this case presents the same issue as the petition in *Anderson*, that issue arises in a somewhat different context. In *Anderson*, for example, the respondent concedes "that evidence of brain damage may be particularly powerful in some cases," and argues primarily that such evidence would not have been effective in the circumstances of that case. Brief in Opposition, *Anderson v. Payne*, No. 19-8105, 20. Because the differences in the circumstances giving rise to these cases might

prove helpful to the Court in assessing the significance of brain damage as a mitigating factor in capital sentencing, it would be appropriate to grant review in both cases, so that both records are before the Court.

Conclusion

Whether a defendant is put to death should not depend on the happenstance of which court of appeals chances to hear his or her case. Had Floyd's case arisen in the Fourth, Sixth, Tenth or Eleventh Circuits, those courts would have given proper weight to the uniquely mitigating factor of Floyd's brain damage. For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit. The case should be consolidated for oral argument with *Anderson v. Payne,* No. 19-8105.

Respectfully submitted,

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