**No. 19-8921**

IN THE

# Supreme Court of the United States

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ZANE FLOYD,

*Petitioner*,

v.

WILLIAM GITTERE, WARDEN, *et al.*,

*Respondents.*

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

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## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

(Capital Case)

Whether the Ninth Circuit erred in its application of the fact-bond, case-specific standard for establishing ineffective assistance of counsel under *Strickland v. Washington*, 446 U.S. 668 (1984), in rejecting Petitioner Zane Floyd's claim that trial counsel was ineffective for failing to investigate and present evidence of Fetal Alcohol Spectrum Disorder.

## PARTIES

Zane Floyd, is the Petitioner and an inmate at Ely State Prison. Respondent William Gittere is the warden of Ely State Prison. Aaron D. Ford, the Attorney General of the State of Nevada, is a Respondent not named in the caption, and he joins this brief in full.

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## INTRODUCTION

Despite being presented with a plethora of mitigating evidence, which included evidence that Petitioner Zane Floyd (hereinafter "Floyd") suffered from cognitive defects that could be linked to prenatal exposure to alcohol, a Nevada jury sentenced Floyd to death because he entered a grocery store with a shotgun and shot five people, killing four of them. Floyd now seeks review of the Ninth Circuit's determination that trial counsel's purported failure to investigate and discover mitigating evidence that Floyd has brain damage resulting from some form of Fetal Alcohol Spectrum Disorder (hereinafter "FASD") did not result in actual prejudice to Floyd. Floyd suggests that the Ninth Circuit's decision conflicts with decisions of this Court and numerous circuit court decisions because it does not state that evidence of brain damage is entitled to significant weight.

In reality, there is no conflict. The Ninth Circuit said nothing of what weight evidence of brain damage, by itself, is entitled to when conducting a prejudice analysis under *Strickland v. Washington*, 466 U.S. 668 (1984). What the Ninth Circuit did do, is exactly what this Court's cases require of a court applying the prejudice prong of *Strickland*. Mitigation evidence that constitutionally ineffective counsel failed to present at trial is not viewed in a vacuum. Rather, a court is to take all the available mitigating evidence—the evidence presented at trial and the evidence identified in post-conviction proceedings—and reweigh it in its totality against the prosecution's aggravating evidence to make an assessment of whether there is a reasonable probability of a different outcome. The Ninth Circuit did just

that when it determined that Floyd failed to establish actual prejudice because (1) his "new evidence" is different in degree, not in kind, from the mitigating evidence that Floyd's trial counsel developed and presented at trial, and (2) the State presented overwhelming evidence of multiple aggravating circumstances arising from Floyd dressing in "a Marine Corps camouflage uniform" and walking 15 minutes to a grocery store where he murdered four people after he sexually assaulted a female escort at gunpoint.

Floyd fails to show that this case meets the criteria for review under Sup. Ct. R. 10. Instead, he seeks mere error correction with respect to the Ninth Circuit's application of the correct legal standard for evaluating his claim of ineffective assistance of counsel because he simply disagrees with the Ninth Circuit about whether his proffered evidence of brain damage is largely cumulative of evidence already presented to the jury. Additionally, two other hurdles that Floyd will have to overcome in order to ultimately prevail make this case ill-suited for this Court's review: (1) Floyd procedurally defaulted this claim in state court, and (2) he also fails to establish deficient performance under *Strickland*.

## STATEMENT OF THE CASE

In June 1999, Floyd made an early morning call to an escort service in Las Vegas, Nevada, seeking the company of a female escort. App. 008. Floyd threatened the escort with a shotgun upon her arrival and forced her to engage in various sexual acts. App. 008. Later, Floyd changed clothing, putting on a "Marine Corps camouflage uniform," and he informed the escort of his intent "to kill the first

nineteen people he saw that morning." App. 008. He also noted that he would have already killed the escort if he had a smaller gun on him, but he told her that he would give her one minute to run. App. 008. And she successfully escaped. App. 008.

Thereafter, Floyd made an approximately fifteen-minute walk to a nearby supermarket. App. 008. Arriving around 5:15 AM, he walked into the store and opened fire on store employees. App. 008. He killed four store employees and wounded a fifth. App. 008. Upon exiting the store, Floyd was confronted by law enforcement, and he surrendered. App. 008.

Floyds appointed attorneys immediately turned their attention to addressing Floyd's mental health, having a forensic psychiatrist, Dr. Jakob Camp, meet with Floyd for three hours the day of his arrest. App. 008. "Dr. Camp concluded that Floyd did not suffer from a mental illness that would impar his ability to stand trial," and made various recommendations regarding possible impact of Floyd's military service and obtaining adolescent health records regarding prior treatment for attention deficit/hyperactivity disorder. App. 008. As a result, counsel obtained records of two doctors that diagnosed Floyd with ADD but "had also determined that Floyd did not have any significant cognitive deficits" when he was an adolescent. App. 008.

As the time for trial came near, trial counsel retained a neuropsychologist by the name of Dr. David L. Schmidt to "conduct a full examination of Floyd." App. 008-09. After completing the full evaluation, "Dr. Schmidt concluded that Floyd suffered from ADHD and polysubstance abuse, but that he showed '[n]o clear evidence of

chronic neuropsychological dysfunction," and he further "diagnosed Floyd with a personality disorder" that included antisocial features. App. 008.

Counsel recognized that Dr. Schmidt's conclusions would not be helpful, so he turned to another neuropsychologist, Dr. Kinsora. Although Dr. Kinsora was critical of Dr. Schmidt's evaluation of Floyd, all that Dr. Kinsora could say was that it was not clear whether further testing "would reveal ongoing deficits or not," and that it would not have surprised him "to find some continued neurological problems." App. 009. As a result, trial counsel removed Dr. Schmidt from its list of intended witnesses, but the trial court nevertheless had ordered disclosure of Dr. Schmidt's report and testing data. App. 009.

In preparation for trial, counsel also retained a psychologist named Dr. Frank E. Paul, who was a retired Naval officer, to address "Floyd's background and life history." App. 009. In addition to discovering that Floyd's mother had heavily used drugs and alcohol earlier in her life, including during a prior pregnancy, Floyd's mother told Dr. Paul she stopped drinking and using drugs when she was pregnant with Floyd, but continued smoking tobacco. App. 009. Dr. Paul also learned of a (1) prior incident where Floyd was accused of anally penetrating a three-year-old boy when Floyd was eight years old, (2) Floyd's habits of substance abuse as a teen, (3) Floyd's military service record. App. 009. Nevertheless, the defense elected not to call Dr. Paul at trial.

The state alleged three aggravating factors as a basis to seek the death penalty against Floyd: (1) that he murdered more than one person, (2) that the murder was

at random and without apparent motive, and (3) that he created a risk of danger to more than one person. App. 009. As a result, during the penalty phase of the trial the defense put on numerous expert witnesses in an attempt to build its case for mitigation on punishment.

Of particular relevance, trial counsel called two expert witnesses. "Dr. Edward Dougherty, a psychologist specializing in learning disabilities and education; and Jorge Abreu, a consultant with an organization specializing in mitigation defense." App 009.

Dr. Dougherty "diagnosed Floyd with ADHD and a mixed personality disorder with borderline paranoid and depressive features." App. 009. He also testified about "the 'prenatal stage' of Floyd's development, and commented that his mother 'drank alcohol and she used drugs during her pregnancy,' including 'during the first trimester.'" App. 009. Abreu testified about "Floyd's life, drawing on many of the same facts that Dr. Paul's report mentioned," including "Floyd's mother's heavy drinking, including during her pregnancies." App. 009.

In rebuttal, the State called Dr. Louis Mortillaro, "a psychologist with a clinical neuropsychology certificate." Based on a brief evaluation of Floyd and relying on Dr. Schmidt's testing, "reached conclusions similar to Dr. Schmidt. App. 009.

The jury deliberated for three days. App. 009. Finding all three aggravators proven and that none of the mitigating evidence Floyd offered outweighed that evidence, the jury returned death sentences on each Floyd's convictions for murder. App. 009.

After an unsuccessful round of state post-conviction review, Floyd filed a federal habeas petition. App. 009-10. After appointment of the federal public defender, Floyd filed an amended opinion that included various unexhausted claims of ineffective assistance of counsel. App. 010.

Floyd returned to state court to exhaust his new claims, and the state courts dismissed the petition as untimely and successive. App. 010. Floyd then returned to federal court. Among the claims the state court dismissed as procedurally defaulted is the claim that is the subject of the petition—a claim that trial counsel was ineffective for not investigating and presenting mitigating evidence about Floyd suffering from FASD. App. 011. The district court dismissed this claim as procedurally defaulted. App. 010. However, the Ninth Circuit bypassed the procedural default and declined to address the deficient performance prong of ineffective assistance of counsel, instead electing to deny Floyd's claim based on the absence of prejudice. App. 011.

Floyd sought rehearing, but the Ninth Circuit denied Floyd's petition. Floyd now challenges the Ninth Circuit's prejudice determination, arguing it creates conflicts with decisions of this Court and four circuit courts because it fails to give adequate weight to Floyd's proffered evidence that he has brain damage derived from his FASD.

## REASONS FOR DENYING THE PETITION

### I. The Petition Merely Seeks Error Correction Because It Fails to Identify an Actual Conflict with Decisions of This Court or Other Circuit Courts.

This Court has repeatedly restated the test for applying the prejudice standard of *Strickland* to a claim that counsel failed to investigate and present mitigating evidence in the penalty phase of a capital murder trial. *See*, *e.g.*, *Sears v. Upton*, 801 U.S. 945, 954-56 (2010). It is a "fact-specific" standard that requires the trial court to take all the available mitigating evidence—what was presented at trial and what was presented after the fact—and reweigh it against the prosecution's aggravating evidence. *Id*. The Ninth Circuit engaged in that analysis here. App 011-13. Floyds attempt to otherwise create a conflict with decisions of this Court and decisions of other circuits is misplaced. Floyd fails to show that this case meets the criteria for review under Sup. Ct. R. 10.

#### A. The Petition Fails to Establish a Conflict with Decisions of This Court.

Floyd relies upon this Court's decision in *Sears*, in an attempt to suggest that the Ninth Circuit's decision conflicts with decisions of this Court applying *Strickland*. Pet. 25. However, *Sears* only proves that Floyd merely seeks error correction in this case. There, this Court concluded that the state court "failed to apply the correct prejudice inquiry" because, "[a]lthough the [state] court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case." *Sears*, 561 U.S. at 946, 952.

The state court's analysis went awry, according to this Court, because the state court failed to conduct the prejudice inquiry at all. Because Sears had presented some mitigation evidence at trial, the state court declined "speculate as to what the effect" evidence uncovered during Sears' state post-conviction proceeding that trial counsel should have discovered would have had on the outcome of Sears' sentencing proceeding. *Id*. at 954-56. The state court's refusal to reweigh the available mitigating and aggravating evidence caused this Court to conclude that the state court applied an incorrect *legal* standard. *Id*. That trial counsel had presented some mitigating evidence did not preclude the conclusion that counsel's otherwise deficient investigation resulted in prejudice. Rather, this Court's precedents applying *Strickland* required the state court to consider "the totality of the available mitigation evidence—both that adduced at trial and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation." *Sears*, 561 U.S. at 956 (quoting *Porter v. McCollum*, 558 U.S. 30, 32 (2009)) (internal quotation marks omitted and brackets in original). Furthermore, the decision in *Sears* resulted in a remand to allow the state court to conduct the proper "reweighing analysis in the first instance." *Id*. at 956. A remand for reweighing would have been unnecessary if *Sears* required giving evidence of brain damage the dispositive weight, as Floyd suggests.

Here, unlike in *Sears*, the Ninth Circuit conducted the "the type of probing and fact-specific analysis" that is required by *Strickland*. The Ninth Circuit essentially assumed Floyd would be able to prove up his theory of brain damage and coupled that

with the mitigation evidence Floyd presented at trial before reweighing that evidence against the aggravating evidence the state presented at trial. App. 011-13. Thus, a close evaluation *Sears* actually demonstrates that Floyd does not identify a conflict on any point of law between *Sears* and the Ninth Circuit's decision in this case; he just disagrees with how the Ninth Circuit applied the correct legal rule to his case.

Floyd also asserts that the Ninth Circuit's decision in this case conflicts with *Rompilla v. Beard*, 545 U.S. 374 (2005). Pet. 25. Again, no such conflict exists. In large part, *Rompilla* is a case that focused on application of the deficient performance prong, not the prejudice prong, of *Strickland*. 545 U.S. at 380-83. This Court identified a very narrow issue—that counsel failed to review an available file for a prior conviction containing information the prosecutor repeatedly noted it would rely upon to establish the prior conviction as an aggravating circumstance—to establish that trial counsel's performance was objectively unreasonable. *Id*. at 383 (concluding that "the lawyers deficient in failing to examine the court file on Rompilla's prior conviction"). And this Court further concluded that counsel's deficient performance resulted in actual prejudice because that file included information from Rompilla's prison files that "pictured Rompilla's childhood and mental health very differently from anything defense counsel had seen or heard." *Id*. at 390. In particular, the file included information that "destroyed the benign conception of Rompilla's upbringing and mental capacity defense counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts"

that trial counsel retained "to look into Rompilla's mental state as of the time of the offense and his competency to stand trial." *Id*. at 382, 391.

Here, the purported deficient performance is that trial counsel did not present evidence that Floyd purportedly has brain damage resulting from his mother consuming alcohol while she was pregnant with Floyd. Notwithstanding the fact that Floyd's claim of deficient performance lacks merit for reasons addressed below, *see infra* Part III, the issue of prejudice in this case is significantly distinguishable from *Rompilla*. But as the Ninth Circuit noted, trial counsel presented the jury with evidence that Floyd suffered from cognitive deficits, that Floyd was exposed to alcohol *in utero*, and that there was a possible causal connection between the alcohol exposure and Floyd's cognitive deficits. App. 12.

This is not a case like *Rompilla*, where counsel failed to discover "a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." 545 U.S. at 393. Floyd's attorney presented a well-developed mitigation case after consulting with a mitigation expert and numerous mental health experts that sought to connect Floyd's behavior to his cognitive deficits. App. 8-9, 11-13. The jury conclude that the mitigating evidence did not overcome the State's overwhelming evidence on aggravation, and the Ninth Circuit determined that adding the new evidence to the mitigation side of the scale does not create a reasonable probability of a different outcome. App. 11-13.

The Ninth Circuit engaged in the analysis required by this Court's relevant jurisprudence applying *Strickland* to a claim like Floyd's. Floyd fails to identify a conflict with any of this Court's decisions.

### B. The Petition Fails to Establish a Conflict with Decisions of Other Circuit Courts

Floyd also asserts that the Ninth Circuit's decision conflicts with multiple decisions of other circuits. Pet. 28-35. Floyd's arguments miss the mark. The other circuits have not established a rule compelling courts to blindly give evidence of brain damage a specific amount of weight without consideration of how that evidence aligns with what trial counsel did present to the jury and how it compares to the prosecutor's evidence in aggravation.

The progression of the Tenth Circuit's decisions in *Littlejohn v. Trammell*, 704 F.3d 817 (10th Cir. 2013), and *Littlejohn v. Royal*, 875 F.3d 548 (10th Cir. 2017), illustrates the relevant point. Initially, the Tenth Circuit remanded for to the district court for an evidentiary hearing on Littlejohn's claim that trial counsel failed to investigate and present evidence of organic brain damage, but the Court later affirmed the district court's denial of Littlejohn's petition. In particular, despite previously concluding that Litttlejohn's "claim '*may* have merit," the court rejected Littlejohn's argument on prejudice while noting that Tenth Circuit case law on this issue "does not mean that *all* evidence of organic brain damage has the same potency in the *Strickland* prejudice analysis" and that evidence of brain damage may be "just as likely—if not more likely—to have had an aggravating effect than a mitigating effect on a sentencing jury." *Littlejohn*, 875 F.3d at 554, 559-60.

None of the other circuit decisions Floyd cites is to the contrary. In *Williams v. Stirling*, 914 F.3d 302, 315 (4th Cir. 2019), the court engaged in a comparison of the type of mitigating evidence presented at trial with what the evidence of brain damage would have established, suggesting that the evidence of brain damage would do more to explain "both *cause* and *effect* for Williams' criminal acts whereas the other mitigation evidence went more to effects on behavior." But the Ninth Circuit appropriately distinguished *Williams*, noting that the nature of the mitigating evidence that trial counsel developed in that case was different because "Floyd's lawyers and 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. 012. Additionally, the Fourth Circuit concluded that counsel's deficiency resulted in actual prejudice also rested with the fact that the State only presented "minimal" evidence on a single aggravating factor, with the jury indicated it was deadlocked on the issue of sentencing at one point. *Williams*, 914 F.3d at 308, 318-19. In contrast, as the Ninth Circuit noted in Floyd's case, the State's evidence for aggravation in this case is overwhelming—Floyd raped a woman at gunpoint and then, as he told her he would, he walked 15 minutes to a nearby grocery store and murdered four people. App. 012-13.

The Sixth and Eleventh circuit cases Floyd cites do not establish the rule Floyd seeks either. In both of the Sixth Circuit cases, trial counsel's development and presentation of mitigating evidence—if they presented any mitigating evidence at all—paled in comparison to the effort Floyd's attorneys made to develop a complete

social history that would explain Floyd's conduct. *Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2005); *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1996). As a result, both of those cases provide no guidance for case like Floyd's, where trial counsel did develop and present other mitigating evidence on mental impairment and its relationship to the defendant's criminal behavior.

And in both of the Eleventh Circuit cases Floyd cites, the State relied upon Ga. Code Ann. § 17-10-30(b)(7), an aggravator: that the murder "was outrageously or wantonly vile, horrible, or inhuman." *Jefferson v. GDCP Warden*, 941 F.3d 452, 485 (11th Cir. 2019); *Ferrell v. Hall*, 640 F.3d 1199, 1210 (11th Cir. 2011). And the Eleventh Circuit determined that the petitioner presented evidence the jury never heard that sufficiently mitigated the petitioner's moral culpability with respect to the aggravating nature of the offense to establish prejudice under *Strickland*. *Jefferson*, 941 F.3d at 485; *Ferrell*, 640 F.3d at 1235. In contrast, the Ninth Circuit here determined that the new mitigating evidence does not have the same effect. App. 12-13. That is simply a matter of two different courts applying the "probing and fact-specific analysis" that this Court has directed courts to apply in assessing prejudice under *Strickland*. *Sears*, 561 U.S. at 955.

The Ninth Circuit's decision in this case does not conflict the circuit court decisions Floyd cites in his petition.

* * *

The Ninth Circuit applied the rule this Court requires courts to apply in addressing whether the failure to investigate and present mitigating evidence

resulted in actual prejudice. Floyd just disagrees with the conclusion the Ninth Circuit reached in applying that rule. He seeks error correction that does not warrant review by this Court. This Court should deny the petition.

## II. Review of Floyd's Claim is Barred by Adequate and Independent State Grounds for Denial of Relief.

A federal court will not entertain a claim for relief in a habeas action that a state court decided on adequate and independent state law grounds unless the petitioner can establish cause and prejudice or a fundamental miscarriage of justice to overcome the default. *Coleman v. Thompson*, 501 U.S. 722 (1991). As the Ninth Circuit recognized, the Nevada Supreme Court rejected Floyd's underlying claim as untimely under Nev. Rev. Stat. 34.726. App. 010. While the Ninth Circuit exercised its discretion to bypass the procedural default and *deny* Floyd's claims on the merits, the procedural bar still stands in the way of this Court's ability to grant Floyd's claim. App. 010-11.

## III. Floyd's Claim Otherwise Fails on the Merits Because He has not Shown Deficient Performance.

Finally, although the Ninth Circuit also declined to address the issue of deficient performance, Floyd nevertheless fails to show that counsel performed deficiently in this case. App. 010-11. Floyd's entire theory for relief is built around the idea that counsel purportedly failed to retain an expert that could have identified FASD. But this theory fails when considering counsel's actions in this case. *Strickland*, 446 U.S. at 687-689 (recognizing the significant deference owed to trial counsel's decision-making).

In addition to retaining numerous other mental health professionals that evaluated Floyd and "a consultant with an organization specializing in mitigation defense," trial counsel retained a neuropsychologist by the name of Dr. David L. Schmidt to "conduct a full examination of Floyd." App. 008-09. After a complete evaluation of Floyd, "Dr. Schmidt concluded that Floyd suffered from ADHD and polysubstance abuse, but that he showed '[n]o clear evidence of chronic neuropsychological dysfunction," and he further "diagnosed Floyd with a personality disorder" that included antisocial features. App. 008.

Counsel recognized that Dr. Schmidt's conclusions would not be helpful, so he turned to another neuropsychologist, Dr. Kinsora. Although Dr. Kinsora was critical of Dr. Schmidt's evaluation of Floyd, all that Dr. Kinsora could say was that it was not clear whether further testing "would reveal ongoing deficits or not. . . ." App. 009. At that point, it was objectively reasonable for trial counsel to proceed on the defense they had been able to develop through extensive evaluations they had conducted on Floyd going all the way back to the day of his arrest, when he was evaluated by Dr. Camp. This is not a case where counsel failed to adequately investigate mitigating evidence. Counsel did investigate the issues, but they were unable to develop evidence showing that he had brain damage. Accordingly, Floyd also fails to show deficient performance.

* * *

## CONCLUSION

The Petition should be denied.

Respectfully submitted,

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