CAPITAL CASE

No. 19-8921

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

Zane Floyd, Petitioner,

v.

William Gittere, Warden, *et.* al., Respondents

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

REPLY BRIEF FOR PETITIONER

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I. There Is A Clear Circuit Conflict Regarding The Significance Of Brain Damage In The Assessment Of Prejudice Under *Strickland v. Washington*

Decisions in the Fourth, Sixth, Tenth and Eleventh Circuits all hold that, in resolving a claim under *Strickland v. Washington*, 466 U.S. 668 (1984), the failure of trial counsel to offer evidence of a defendant's brain damage is particularly likely to be prejudicial. Respondents systematically ignore the legal standard set out and applied in the decisions in those circuits, and instead argue only that the circumstances in those cases were different from the facts of the instant case. Br. Opp. 11-14. But it is the legal standard in those circuits (and its conflict with the Ninth Circuit standard) that matters. The decision of the court of appeals in the instant case is "badly out of step with the other circuits." *Glenn v. Tate*, 71 F.3d 1204, 1211 (6th Cir. 1996).

In *Williams v. Stirling,* 914 F.3d 302 (4th Cir. 2019), the Fourth Circuit recognized that proof of (FASD-caused) brain damage is "different from the other evidence of mental illness and behavioral issues because it could have established cause and effect for the jury," and thus is particularly likely to be "persuasive mitigating evidence for a jury. " 914 F.3d at 318 (emphasis omitted). The Tenth Circuit holds that "[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," *Hooks v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 2012), and is "exactly the sort of evidence that garners the most sympathy from jurors." *Smith v. Mullin,* 379 F.3d 919, 942 (10th Cir. 2004). In *Glenn v. Tate,* the Sixth Circuit pointed to "empirical evidence suggesting that while juries tend to distrust claims of

insanity, they are more likely to react sympathetically when their attention is drawn to organic brain problems . . ." 71 F.3d at 1211. "Our sister circuits have had no difficulty in finding prejudice in sentencing proceedings where counsel failed to present pertinent evidence of . . . mental capacity. . . ." *Id.* In *Jefferson v. GDCP Warden*, 941 F.3d 452 (11th Cir. 2019), the Eleventh Circuit held that "[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 . . . ." 941 F.3d at 484. "[E]vidence of brain damage . . . is precisely the kind that may establish prejudice at the penalty phase . . . ." 941 F.3d at 483-84. The brief in opposition never mentions or discusses any of this language in these decisions of other circuits.

Respondents object that "[t]he other circuits have not established a rule compelling courts to blindly give evidence of brain damage a specific amount of weight." Br. Opp. 11. This hypothesized rigid rule which respondents attack is a straw man. What the petition does assert, and what respondents do not directly deny, is that those other circuits (unlike the Ninth Circuit) hold that evidence of brain damage is fundamentally different from and potentially more compelling than other types of mitigation evidence, and that it may be particularly effective in rebutting prosecution evidence. Legal standards attaching especial significance to certain circumstances are a familiar and important part of the law, even though those circumstances are not accorded "a specific amount of weight." *E.g.*, *Connick v. Myers*, 461 U.S. 138, 151-52 (1983) (need for close working relationships particularly important in assessing disruptive effect of speech); *Graham v. Connor*,

490 U.S. 386, 396 (1989) (need for split-second decisions particularly important in assessing reasonableness of use of force).

The majority view is consistent with this Court's death penalty jurisprudence. While defendants are permitted to offer evidence of *any* potentially mitigating circumstance, mitigating evidence is uniquely significant if it demonstrates that the crime for which the defendant is being sentenced is at least in part "attributable to" cognitive or other problems that affected the defendant's "ability to act deliberately." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *see Tennard v. Dretke*, 542 U.S. 274, 288 (2001). "Underlying *Lockett* [*v. Ohio,* 438 U.S. 586 (1978)] and *Eddings* [*v. Oklahoma,* 455 U.S. 104 (1982)] is the principle that punishment should be directly related to the personal culpability of the criminal defendant." *Penry*, 492 U.S. at 319. "[Courts] can envision few things more certainly beyond one's control than the drinking habits of a parent prior to one's birth." *Dillbeck v. State*, 643 So. 2d 1027, 1029 (Fla. 1994). The majority rule properly requires courts, in determining whether the failure to offer evidence of brain damage was prejudicial, to specifically assess whether a sentencing juror might have concluded that the defendant was less culpable because his actions arose in part from that medical condition, an assessment that would consider both the nature of the offense and any expert testimony about the behavioral consequences of the brain damage at issue.

The manner in which the Ninth Circuit treated proof of brain damage in this case is precisely opposite to the way that evidence is evaluated in other circuits.

Contrary to the standard in the Fourth, Sixth, Tenth and Eleventh Circuits, the Ninth Circuit insists that evidence of brain damage is *not* different in kind from other mitigating evidence. "The Ninth Circuit . . . determined that Floyd failed to establish actual prejudice because . . . his 'new evidence' is different in degree, not in kind, from the mitigating evidence that Floyd's trial counsel developed and presented at trial . . . ." Br. Opp. 1-2; *see* App. 012 (FASD-based brain damage only "differs somewhat in degree, but not type, from that presented in mitigation"). The court of appeals insisted that it was unlikely that even a single juror would "have considered a formal FASD diagnosis more severe and debilitating than ADD/ADHD and Floyd's other developmental problems." App. 012. The decision below is devoid of any consideration of the expert testimony regarding the impact of brain damage on Floyd's actions the night of the crime. The panel seems to have assumed, wrongly as an amicus point out[1], that the behavioral consequences (whatever they might be) of brain damage and of ADHD (and other unidentified "developmental problems"), are the same "in kind." But the medical opinions of Article III judges, however sincere, are no substitute for the real thing. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

The court of appeals' equation of FASD with ADHD is particularly significant because the Ninth Circuit regards proof of ADHD as *less* likely to be effective than much mitigating evidence. "AD[H]D . . . [is] a somewhat common disorder[]; although [it] add[s] quantity to the mitigation case, [it] add[s] little in terms of

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[1] Brief of National Organization on Fetal Alcohol Syndrome as Amicus Curiae, 9-11.

quality." *Brown v. Ornoski*, 503 F.3d 1006, 1016 (9th Cir. 2007). That view of ADHD as a mitigating factor is widely shared.[2] The Tenth Circuit as well regards ADHD as having only limited effect as mitigation evidence.

> Attention deficit disorder is a commonly diagnosed condition . . . [There is evidence that] attention deficit disorder has "a very, very low correlation with criminal activity" . . . . In this regard, a number of cases from our court and our sister circuits have specifically concluded that evidence of attention deficit disorder does not favor a finding of prejudice. [E.g.,] *Wackerly v. Workman*, 580 F.3d 1171 (10th Cir. 2009) . . . [;] *Brown v. Ornoski*, 503 F.3d 1006, 1016 (9th Cir. 2007) . . . ; *Campbell v. Polk*, 447 F.3d 270, 284 (4th Cir. 2006). . . . . In other words, these cases emphasize that a diagnosis of attention deficit disorder at least frequently offers little, if any, *quality* mitigating evidence . . . .

Littlejohn v. Royal, 875 F.3d 548, 560-61 (10th Cir. 2017) (emphasis added). In *Wackerly*, the Tenth Circuit pointed out that proof of ADHD had little mitigating force because it "d[id] not give context to the murder, provide an explanation for [the defendant's] behavior, or suggest [the defendant] bears any less moral culpability for his actions. . . . . [I]t does little to counteract the strength of the State's case or render questionable the . . . aggravating factors found by the jury . . . ." 580 F.3d at 1182 (10th Cir. 2009) (opinion by Gorsuch, J.).

The Ninth Circuit's equation of FASD with ADHD stands in stark contrast with the manner in which other circuits assess the comparative significance of those conditions as mitigating factors. The Tenth Circuit, which regards ADHD as having only limited mitigating weight, has repeatedly held that proof of brain damage is uniquely important. Pet. 29-32. The Fourth Circuit in *Williams v. Stirling*, 914

[2] ADHD would be an important mitigation consideration in a case where there was evidence linking some ADHD-related behavior to the underlying offense.

F.3d 302 (4th Cir. 2019), held that the failure to offer evidence of FASD (and thus brain damage) was prejudicial, despite the fact that in that case (as here) proof of ADHD *was* offered at the original sentencing hearing. 914 F.3d at 308. More generally, the Tenth Circuit has observed that proof of brain damage is particularly important because it "goes beyond the generalized mental conditions we have determined to be unhelpful in mitigation [such as] generalized personality disorders, borderline personality disorder, bipolar disorder, compulsive personality disorder, and severe emotional distress." *United States v. Barrett,* 797 F.3d 1207 (10th Cir. 2015).

Ignoring the difference between the standard applied by the court of appeals in the instant case and the standard applied by the Eleventh Circuit in *Jefferson v. GDCP Warden*, 941 F.3d 452, 485 (11th Cir. 2019), respondents argue that

> 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*. . . . In contrast, the Ninth Circuit here determined that the new mitigating evidence does not have the same effect.

Br. Opp. 13. But the "evidence the jury never heard" in *Jefferson* is the same as the "new evidence" never heard by the jury in the instant case: proof of brain damage. The difference in the outcome of these cases derived from the different standards applied by the courts of appeals. The Eleventh Circuit recognizes—as the Ninth Circuit does not—that proof of brain damage "profoundly change[s] the character of the penalty phase of the proceedings by fundamentally transforming [the defendant]'s sentencing profile." 941 F.3d at 483-84.

II. This Case Presents An Excellent Vehicle For Resolving The Question Presented

(1) This case presents an excellent vehicle for resolving the question presented. The record contains the results of a full battery of post-conviction neuropsychological tests demonstrating that Floyd is brain damaged, as well as an expert report tying that damage to FASD and to Floyd's conduct. In the courts below, federal postconviction counsel expressly argued that Floyd was prejudiced by the failure of trial counsel to introduce at the original sentencing hearing evidence of FASD and brain damage. Respondents do not deny that Floyd adequately raised and preserved this issue below.

This is precisely the type of case in which proof of brain damage would be regarded as prejudicial under the standards applied in other circuits. In this case, as in the Sixth Circuit decision in *Glenn v. Tate,* the failure of trial counsel to offer proof of brain damage permitted the prosecution to point to unrebutted testimony by a prosecution witness that the defendant did not have brain damage. *Compare Glenn*, 71 F.3d at 1211 *with* Pet. 17, nn. 47, 48. In this case, as in the Tenth Circuit decision in *Littlejohn*, the failure of trial counsel to offer proof of brain damage permitted the prosecution to argue to the sentencing jury that the defendant, despite a difficult childhood, could have chosen to avoid criminal conduct. *Compare Littlejohn v. Trammell*, 704 F.3d 817, 864-65 (10th Cir. 2013) *with* 3 EOR 558-59. Here, as in decisions in the Fourth, Sixth and Tenth Circuits, proof that brain damage played a role in the defendant's actions would have substantially reduced

his moral culpability. *See Hooks*, 689 F.3d at 1205; *Williams*, 914 F.3d at 318; *Frazier v. Huffman,* 343 F.3d 780, 789 (6th Cir. 2003).

(2) Respondents suggests that, even if the court below incorrectly evaluated the mitigating force of proof of brain damage in this case, that evidence (properly assessed) could still be outweighed by the gravity of the crime. Br. Opp. 2, 10. But the question presented in this Court is whether the court of appeals applied the wrong standard in assessing the weight of that mitigating factor. Whether that mitigating evidence (properly assessed) might have affected the outcome of the sentencing hearing is an issue the court of appeals did not decide, and which this Court could remand to the lower courts after clarifying the standard for assessing the significance of brain damage as a mitigating circumstance. This Court routinely grants review to resolve a dispute about the governing legal standard, despite the fact that the respondent contends it might ultimately prevail even under the standard advocated by the petitioner.

Respondents object that Floyd would not ultimately prevail on remand because his ineffectiveness claim was procedurally defaulted in state court. Br. Opp. 2, 14. The court of appeals did not address Floyd's contention that under *Martinez v. Ryan*, 566 U.S. 1 (2012), there was cause to excuse the procedural default of that ineffectiveness claim. App. 010-011. The possibility that a respondent may ultimately prevail based on an issue not reached by the court of appeals does not weigh against consideration by this Court of the legal issue that the appellate court did decide. Similarly, respondents note that the court of appeals

did not decide whether Floyd's trial counsel were ineffective (Br. Opp. 14), and argue that the state is likely to prevail on that issue on remand. Br. Opp. 14.[3] But, again, the only basis on which the Ninth Circuit *did* decide the case concerns the standard for determining prejudice under *Strickland*, and the petition unquestionably presents a suitable vehicle for resolving that question.

Respondents argue that these issues "stand[] in the way of this Court's ability to grant Floyd's claim." Br. Opp. 14. But the petition does not ask this Court to "grant Floyd's claim" for habeas relief. Petitioner argues only that this Court should adopt the standard in the Fourth, Sixth, Tenth and Eleventh Circuits, and then remand the case for further proceedings consistent with its opinion.

(3) At the original trial there were scattered references to the fact that Floyd's mother drank. Because the court of appeals' comments about that were confusing, the petition sets out the complete text of each of those short passages. Pet. 13-16. Respondents do not question the accuracy of those quotations or contend that there were any other such references.

Nonetheless, the brief in opposition asserts that both Floyd's experts and Floyd's trial counsel specifically contended at the sentencing hearing that the use of alcohol by Floyd's mother explained the crimes for which he was being sentenced. "Floyd's lawyers and experts explicitly argued that his mother's alcohol use while

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[3] The account of trial counsel's actions set out at pp. 3-4 and 14-15 of the brief in opposition omits a number of the failures of trial counsel detailed in the petition. *See* Pet. 8-13.

she was pregnant led to his developmental problem in some form and therefore helped explain his actions . . . ." Br. Opp. 12 (quoting App. 012). This assertion is not supported by any citation to any portion of the transcript of the sentencing hearing.

The events so described in the brief in opposition did not occur. The first of the two defense experts, Jorge Abreu, testified only that Floyd's mother drank during her pregnancy. Abreu made no statements at all about what led to Floyd's developmental problems or about what might explain his actions. Pet. 13. The second defense expert, Dr. Dougherty, made only a single comment about alcohol use, noting merely that in general a mother's alcohol use during pregnancy "*can* have a negative effect on the development of the fetus."[4] Dougherty made no statement that use of alcohol by Floyd's mother *did* affect the development of the fetus or that it caused Floyd developmental problems after he was born, and never argued, explicitly or otherwise, that prenatal alcohol exposure helped to explain Floyd's actions. Pet. 14-15. Floyd's counsel did not argue that Floyd's mother's alcohol use helped explain his actions. The specific consequence of that alcohol use suggested by counsel was that it "led to [Floyd's] premature birth."[5] Pet. 16; *see* Pet. 15 n. 41. In the passage quoted above from the brief in opposition, the "actions" which respondents assert Floyd's counsel attributed to prenatal alcohol exposure were the crimes that occurred in 1999, not Floyd's premature birth in 1975.

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[4] 4 SEOR 804 (emphasis added).

[5] 3 SEOR 374.

Neither this Court's decision to grant or deny the instant petition, nor whether Mr. Floyd ultimately is executed or serves a life sentence without the possibility of parole, should turn on a misunderstanding of the record.

Conclusion

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.

Dated this 5th day of October, 2020.

Respectfully submitted,

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