

No. _____

IN THE
Supreme Court of the United States

DEAN PHILLIP CARTER,

Petitioner,

v.

RON BROOMFIELD,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CUAUHTEMOC ORTEGA
Federal Public Defender
MICHAEL D. WEINSTEIN*
CELESTE BACCHI
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-7526
Facsimile: (213) 894-1102
Michael_Weinstein@fd.org

Attorneys for Petitioner
DEAN PHILLIP CARTER

**Counsel of Record*

CAPITAL CASE

QUESTIONS PRESENTED

These capital habeas cases arise from petitioner-appellant Dean Phillip Carter's 1989 Los Angeles County death judgment and his 1991 San Diego County death judgment. These cases present three questions.

Question 1: Throughout Carter's Los Angeles trial, the trial court became aware of a serious conflict between Carter and his defense counsel. This conflict arose from defense counsel's decision to concede the guilt phase, against Carter's wishes, thereby preventing Carter from exercising his right to testify. The Ninth Circuit Court of Appeals rejected Carter's argument that the trial court had a duty to inquire into this conflict to see if it was detrimentally affecting the attorney-client relationship. Specifically, the court found the underlying state-court decision was reasonable under 28 U.S.C. § 2254(d)(1) because there was no Supreme Court precedent imposing a duty on trial courts to inquire into the nature of an attorney-client conflict of the type at issue here.

The question presented is: May a trial court ignore a conflict between a defendant and his attorney that implicates fundamental rights, or does *Holloway v. Arkansas* establish a duty on trial courts to inquire into that conflict when it is brought to their attention? *See* Sup. Ct. Rule 10(c).

Question 2: During both of Carter's trials, the jury heard that Carter's parents occasionally disciplined him and that, on one occasion, his stepfather chained him to a bed. But the regularity and extent of the abuse Carter suffered was of a different order of magnitude. Had trial counsel conducted a reasonable

investigation, the jury would have learned that Carter was repeatedly beaten by his parents, frequently chained to cabin posts and beds, and kept in a makeshift jail cell. The Ninth Circuit held that, under 28 U.S.C. § 2254(d), the state court reasonably concluded that trial counsel acted effectively in these capital cases even though they presented only a superficial glimpse of Carter’s horrendous childhood. The Ninth Circuit reasoned that presenting additional evidence of abuse could have “backfired” on trial counsel “by leading the jury to infer that the adult [defendant] was beyond rehabilitation.” The Ninth Circuit also held that the state court reasonably concluded that trial counsel acted effectively by not investigating or presenting evidence that their client suffered from Fetal Alcohol Syndrome (FAS) and brain damage, because that evidence could have opened the door to “unfavorable rebuttal testimony.”

The question presented is: Did the Ninth Circuit’s opinion create a conflict with relevant decisions of this Court in concluding that capital defense counsel is effective under *Strickland v. Washington* when they fail to investigate and present powerful mitigation evidence at penalty, because 1) the jury could have *potentially* misconstrued some of that mitigating evidence; and 2) that mitigating evidence could have *potentially* opened the door to some aggravating evidence that paled in comparison to aggravating evidence the jury had already received about the defendant? *See* Sup. Ct. R. 10(c).

Question 3: During post-conviction proceedings, habeas counsel unearthed a wealth of powerful mitigating evidence that trial counsel failed to investigate. In particular, habeas counsel discovered that Carter has brain damage, caused in part by FAS. The Ninth Circuit rejected Carter’s claims of ineffective assistance of counsel because it concluded that evidence of FAS and brain damage would not have made a difference at penalty.

The question presented is: May a court assessing *Strickland* prejudice dismiss the significance of evidence of FAS and brain damage, as the Ninth Circuit did in this case and has done in other cases, or does evidence of brain damage have uniquely mitigating weight, as four other circuits have held? *See* Sup. Ct. R. 10(a).

LIST OF PARTIES

1. Dean Phillip Carter, Petitioner-Appellant
2. Ron Broomfield, Warden, San Quentin State Prison

LIST OF RELATED PROCEEDINGS

1. *Carter v. Chappell*, No. 13-99003 & 13-99007, U.S. Court of Appeals for the Ninth Circuit. Order denying petition for rehearing, entered June 10, 2020.
2. *Carter v. Chappell*, No. 13-99003 & 13-99007, U.S. Court of Appeals for the Ninth Circuit. Opinion entered Dec. 26, 2019.
3. *Carter v. Ylst*, No. 06-01343, U.S. District Court for the Southern District of California. Post-Judgment Order, entered June 4, 2013.
4. *Carter v. Ylst*, No. 06-01343, U.S. District Court for the Southern District of California. Judgment, entered Mar. 19, 2013.
5. *Carter v. Ylst*, No. 06-01343, U.S. District Court for the Southern District of California. Final order denying petition for writ of habeas corpus and issuing certificate of appealability, entered Mar. 19, 2013.
6. *Carter v. Ylst*, No. 06-04532, U.S. District Court for the Central District of California. Judgment, entered Mar. 1, 2013.
7. *Carter v. Ylst*, No. 06-04532, U.S. District Court for the Central District of California. Order denying first amended petition for writ of habeas corpus, entered Mar. 1, 2013.
8. *In re Dean Phillip Carter, On Habeas Corpus*, No. S153780, California Supreme Court. Order Denying Petition for a Writ of Habeas Corpus entered June 17, 2010.
9. *In re Dean Phillip Carter, On Habeas Corpus*, No. S153790, California Supreme Court. Order Denying Petition for a Writ of Habeas Corpus, entered June 17, 2010.
10. *In re Dean Phillip Carter, On Habeas Corpus*, No. S090230, California Supreme Court. Order Denying Petition for a Writ of Habeas Corpus, entered June 28, 2006.
11. *In re Dean Phillip Carter, On Habeas Corpus*, No. S096874, California Supreme Court. Amended Order Denying Petition for a Writ of Habeas Corpus entered Sept. 13, 2006.
12. *People v. Carter*, No. S014021, California Supreme Court. Order denying petition for rehearing, entered Oct. 26, 2005.

13. *People v. Carter*, No. S023000, California Supreme Court. Opinion Affirming Judgment, modified and rehearing denied, entered Oct. 26, 2005.
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PETITION FOR A WRIT OF CERTIORARI

Dean Phillip Carter, a California state inmate, respectfully requests that the Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

ORDERS AND OPINIONS BELOW

On June 10, 2020, the Ninth Circuit Court of Appeals denied Carter's petition for panel rehearing and rehearing en banc. (*See* Petitioner's Appendix (Pet. App.) 1 at 1-2.) The petition for rehearing related to the Ninth Circuit's published decision denying Carter's two capital habeas appeals. (*See* Pet. App. 2 at 3-75.) Those appeals arose from two different district court cases relating to Carter's two separate 28 U.S.C. § 2254 petitions. (Pet. App. 4 at 76-82 & Pet. App. 6 at 84.)

JURISDICTION

The district courts had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13 and this Court's March 19, 2020 order because Carter is filing it within 150 days of the Ninth Circuit's order denying his petition for panel rehearing and rehearing en banc.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

U.S. Const. amend. XIV, Section 1

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state 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.”

28 U.S.C. § 2254(a)

“The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”

28 U.S.C. § 2254(d)

“An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

//

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

STATEMENT OF THE CASE

A. Carter’s trials

In 1989 and 1991, Carter stood trial in Los Angeles County and San Diego County, respectively, for charges stemming from incidents that took place during a three-week period in 1984 in California.

1. Carter’s Los Angeles trial

In his Los Angeles case, the prosecution charged Carter with the rape and murder of Bonnie Guthrie; the murder of Susan Knoll; and the rape and murder of Jillette Mills. The prosecution also charged him with burglarizing the residences of these three women. As part of its guilt-phase case-in-chief, the prosecution introduced, as “other crimes” evidence under California Evidence Code section 1101(b), two other homicides: Tok Kim in Alameda County and Janette Cullins in San Diego County.

During the guilt phase, Carter’s appointed counsel repeatedly told the trial court that he and Carter had a conflict. This conflict arose from defense counsel’s decision to try Carter’s case as a “penalty” case, meaning he was not going to call any witnesses, including Carter, at guilt, and would instead focus his efforts on

Carter’s penalty phase. (Pet. App. 19 at 444, 450, 454.) Carter, however, wanted to put on a “full-blown defense,” which included him testifying. (Pet. App. 19 at 443-46, 448, 458-61.)

At Carter’s request, the court held four *ex parte* hearings in just seven court days. Three of those hearings were held under *People v. Marsden*, 2 Cal. 3d 118 (1970). (Pet. App. 15 at 403-07 & Pet. App. 21 at 486; Pet. App. 16 at 410-14; Pet. App. 17 at 417-21.) In California state courts, the essence of a *Marsden* motion is that the defendant and the attorney have a serious conflict and the defendant wants “to state his reasons for dissatisfaction with his attorney” as a basis for “discharg[ing] his current counsel.” *People v. Lucky*, 45 Cal. 3d 259, 281 (1988). During Carter’s three *Marsden* hearings, the court never asked Carter any questions. As for counsel, the court asked him just four questions. (Pet. App. 15 at 403-07; Pet. App. 16 at 413-14; Pet. App. 17 at 417-21.)

The court held the first *Marsden* hearing the day before the prosecution rested its case. At that hearing, counsel told the court that Carter “emphatically” disagreed with his decision to rest without calling any witnesses, and in response the court asked, “Wasn’t there a Supreme Court case that touched on this issue?” (Pet. App. 15 at 404 & 405.) Counsel noted that there were several state-court cases and briefly described them to the court. (*Id.* at 405.) Several minutes later the court asked, “Anything further?” (*Id.* at 406.) Counsel responded, “Nothing further.” (*Id.*)

The next day the defense rested without calling any witnesses. Afterwards, but before closing arguments, the court held a second *Marsden* hearing. Counsel

specifically requested that hearing because he had failed to mention at the prior hearing that by not presenting any evidence at guilt, he had precluded Carter from testifying. (Pet. App. 16 at 413.) The court's response was, "You just wanted to add that?" (*Id.*)

Later that day, the jury heard closing arguments. Immediately after trial counsel's argument, the court held an *ex parte* hearing, though it did not hold this one under *Marsden*. At this hearing, counsel informed the court that Carter did "not agree" with his closing argument, that Carter thought it was inadequate, and that Carter felt it "compound[ed] the problem of the lack of defense." (*Id.* at 414.) The court asked no questions at this hearing, stating only "the record is clear." (*Id.*)

During deliberations, the court held the third *Marsden* hearing (and the fourth *ex parte* hearing), wherein counsel addressed the applicability of a California Supreme Court case dealing with a defendant's motion to substitute counsel between the guilt and penalty phases of a capital trial. (Pet. App. 17 at 420.) In response, the court asked, "That isn't the case that Judge Albracht had, is it?" (*Id.*) The trial court asked no other questions.

The jury convicted Carter on all counts.

At penalty, the prosecution introduced abstracts of judgments reflecting two burglary convictions, one from 1974 and the other from 1977. The prosecution also introduced evidence that Carter raped J.S. in 1984 (during the three-week period at issue).

//

The defense's mitigation case focused on Carter's adult life and how he was a moderately successful cameraman who struggled with a divorce shortly before the crimes occurred in this case. They presented some evidence of Carter's difficult childhood and what it was like for Carter to grow up in Nome, Alaska, where there were high incidents of depression, suicide, and alcoholism. This evidence included testimony showing that Carter's parents favored his older brother and that, on a single occasion, Carter's stepfather chained Carter to a bed to "keep [Carter] in the house" because he frequently ran away home. (Pet. App. 18 at 433.) Trial counsel presented no mental health evidence. *See People v. Carter*, 36 Cal. 4th 1114, 1136-37 (2005) (describing the defense's penalty-phase presentation).

The jury returned a death verdict after deliberating for multiple days.

2. Carter's San Diego trial

Carter's San Diego trial was held two years after his Los Angeles trial concluded. In his San Diego case, Carter was charged with the murder of Cullins and the rape of B.S. The prosecution introduced as "other crimes" evidence the murders of Knoll, Mills, and Guthrie, and the rape of J.S. The jury convicted Carter on all counts.

At the penalty phase of his San Diego case, the prosecution introduced evidence of Carter's 1974 and 1977 burglary convictions and evidence that Carter was found in possession of a "shank" and a piece of pipe in his jail cell while awaiting trial. (Pet. App. 13 at 248.)

The defense attorneys in Carter's San Diego case had watched Carter's Los Angeles trial two years earlier. Nonetheless, two years after watching that trial, the

San Diego defense attorneys employed essentially the same penalty-phase strategy that failed in Carter’s Los Angeles case. *See People v. Carter*, 36 Cal. 4th 1215, 1236 (2005) (describing the defense’s penalty-phase presentation).

After a day of deliberations, the jury returned a death verdict.

B. Carter’s state-court proceedings

In Carter’s direct appeal arising from his Los Angeles case, he argued that the trial court failed to adequately inquire into the attorney-client conflict he brought to the trial court’s attention during four *ex parte* hearings during the guilt phase of his trial. In a reasoned decision, the California Supreme Court held that it was “satisfied from the record before [it] that . . . the trial court adequately inquired as to the issues raised by the defense.” (Pet. App. 14 at 379.)

In two different state petitions, Carter raised interrelated penalty-phase ineffectiveness claims. During Carter’s post-conviction proceedings, his post-conviction counsel unearthed significant mitigating evidence that defense counsel in both his Los Angeles and San Diego cases failed to uncover and present during Carter’s trials. As detailed in Carter’s state petitions, counsel at both trials were put on notice of Carter’s horrific childhood because they had in their possession reports from the state institutions where Carter spent half of his childhood. One of these reports noted rumors of Carter’s parents “leav[ing] him chained to a bedpost so they could go out socializing.” (Pet. App. 38 at 638.)¹ Another remarked that

¹ The extra-record evidence in support of Carter’s ineffectiveness claims largely consisted of habeas declarations and social history and mental health records. To reduce duplicity, Carter’s appendix includes only the extra-record evidence from his habeas case arising from his Los Angeles trial. Any extra-record

Carter claimed his “step-father kept him chained to a bed for two weeks to prevent runaways.” (Pet. App. 40 at 646.) Probation officers theorized that Carter continued to have run-ins with the law “in order to escape his home situation,” which was described as “obviously very poor.” (Pet. App. 38 at 637-38.) They observed that whenever a normally sociable Carter was asked about his family, he displayed classic signs of child abuse: he became “emotionless” and his answers became “brief and without detail.” (Pet. App. 39 at 644.)

Rather than follow-up on these leads, trial counsel conducted a superficial investigation that was mostly limited to speaking with members of Carter’s immediate family, all of whom downplayed the abuse in Carter’s home. (Pet. App. 30 at 559; Pet. App. 31 at 563.) As a consequence of that truncated investigation, trial counsel in both cases presented the picture of a young man who was “disciplined” frequently as a child and who had found marginal professional success in his mid-twenties, but whose life spun out of control following his divorce. *See Carter*, 36 Cal. 4th at 1136-37 (Los Angeles case); *Carter*, 36 Cal. 4th at 1236 (San Diego case).

As Carter’s habeas investigation revealed, that picture was fundamentally misleading and flawed. As a child, Carter was abused like a sled dog by his stepfather: he was regularly chained to beds, tables, and cabin posts, and forced to eat and drink off the floor. (Pet. App. 32 at 568; Pet. App. 33 at 593; Pet. App 48 at

evidence used in that case mirrors the extra-record evidence used in his habeas case arising from his San Diego trial.

820; Pet. App. 49 at 824-25; Pet. App. 50 at 828; Pet. App. 51 at 830-31; Pet. App. 52 at 834.) When Carter’s step-father was not treating Carter like an animal, he was treating him like a prisoner, locking him away in a makeshift jail cell. (Pet. App. 48 at 819-21; Pet. App. 50 at 828; Pet. App. 54 at 839.)

The juries also never heard any evidence about how Carter suffered from Fetal Alcohol Syndrome (FAS) and had extensive brain damage. Several mental health experts examined Carter in post-conviction proceedings. Neuropsychological testing and brain scans provided “indisputable proof” of significant abnormalities to those “areas of the brain required for judgment, insight, impulse control, and evaluation of reality and appropriate reality based responses,” such as Carter’s frontal lobe. (Pet. App. 42 at 654-55; Pet. App. 44 at 678-80.) During post-conviction proceedings, three separate experts diagnosed Carter with FAS. (*See generally* Pet. App. 45 at 711-53; Pet. App. 46 at 754-89; Pet. App. 47 at 790-817.) A neurological disorder caused by in utero exposure to alcohol, FAS can, and did in this case, cause “diffuse brain damage and severe impairment in cognitive and emotional functioning.” (Pet. App. 33 at 573; Pet. App. 45 at 735; Pet. App. 46 at 774-74.)

The state-court record from Carter’s Los Angeles case showed that the Los Angeles jury never heard about the omitted mental health evidence because, as counsel admitted in a habeas declaration, he failed to adequately investigate Carter’s mental health. (Pet. App. 25 at 530-33.) According to lead counsel from Carter’s Los Angeles case, he was “aware” of Carter’s “documented mental health problems” and “suspected the possibility of organic brain damage,” yet he failed to

have Carter's brain scanned for signs of brain damage, even though a mental health professional he consulted recommended that counsel conduct that exact type of investigation. (Pet. App. 25 at 532-33.) He also "did not prepare or present a psychiatrist, psychologist or other mental health professional, to testify" about Carter's mental health issues. (*Id.* at 531-32.) There was no evidence in the state-court record that trial counsel even considered investigating FAS.

As for the San Diego jury, they did not hear any mental health evidence for two reasons. First, there was no evidence in the state-court record that Carter's San Diego defense team even considered investigating FAS. Second, while Carter's San Diego defense team explored whether Carter had brain damage, they did not perform this part of their investigation until the penalty phase was well underway. One week before Carter's penalty phase began, they had Carter's brain scanned using PET scan technology. (Pet. App. 22 at 495.) That scan revealed large numbers of abnormal brain areas consistent with head injuries or developmental abnormality. (Pet. App. 23 at 501-02.) Towards the end of the defense's penalty-phase case-in-chief, the court held an *in camera* conference to determine if the defense could call a psychiatrist, Dr. Monte Buchsbaum, who specialized in PET scans and brain abnormalities. Trial counsel had contacted the psychiatrist a few days earlier to ask him to interpret Carter's PET scan. During this hearing, the court spoke with Dr. Buchsbaum over the phone because Dr. Buchsbaum was out of the country at a conference. Dr. Buchsbaum stated that he was not given any clinical information about Carter and knew nothing about the crime or Carter's

medical history. (Pet. App. 23 at 500-02.) He was only faxed the PET scan report, which, as noted, revealed a large number of abnormal brain areas. (*Id.* at 501-02.) But because counsel had not provided him with information that was routinely provided to mental health experts, Dr. Buchsbaum considered himself “completely blind” and unable to render an informed opinion about Carter’s brain abnormalities. (*Id.* at 502.) A recess was called during the hearing so that trial counsel could privately consult with Dr. Buchsbaum. (*Id.* at 513.) Afterwards, counsel stated that the defense would not pursue the PET scan evidence for purportedly “tactical reasons.” (*Id.* at 519-20.)

The California Supreme Court summarily denied Carter’s claims in separate orders. (Pet. App. 8-11.)

REASONS FOR GRANTING THE WRIT

A. Standard of review

Carter’s 28 U.S.C. § 2254 habeas petitions are subject to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Because the state court adjudicated the merits of all three claims discussed below, Carter is not entitled to relief unless he can show that the state court’s decision was: “(1) contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). A state-court decision is objectively unreasonable under § 2254(d)(1) if the court’s ruling rested on “an error well

understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *White v. Woodall*, 572 U.S. 415, 421, 426-27 (2014).

B. The Ninth Circuit has decided two important federal questions in a way that conflicts with relevant decisions of this Court.

1. The Ninth Circuit’s decision conflicts with *Holloway v. Arkansas* and its progeny.

According to a uniform body of law developed by this Court over the past half-century, a trial court has a duty to inquire into conflicts that might affect the adequacy of the representation that a defendant is receiving. *Mickens v. Taylor*, 535 U.S. 162, 168 (2002); *see also Holloway v. Arkansas*, 435 U.S. 475, 484 (1978). When this duty is triggered, a trial court must “take adequate steps to ascertain whether” the conflict is serious enough to warrant new counsel. *Holloway*, 435 U.S. at 484. Engaging in this inquiry is thus the only way that a trial court can ensure that a conflict has not violated the defendant’s constitutional rights.

During the guilt phase of Carter’s Los Angeles trial, the trial court repeatedly learned that Carter and his appointed counsel had a conflict arising from his lawyer’s refusal to present any evidence at guilt. Undoubtedly, Carter’s counsel had authority to decide what *third-party* witnesses to call, if any, since that decision fell within the province of “[t]rial management.” *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). But other decisions were “reserved for” Carter to make—“notably, whether to plead guilty, waive the right to a jury trial, testify in [his] own behalf, and forgo an appeal.” *Id.* (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). And Carter wanted to put on a “full-blown defense,” which included him testifying. (Pet. App. 19 at 443-46, 448, 458-61.) Over his objections, Carter’s lawyer decided that

that wasn't going to happen, and he rested without allowing Carter to testify. (*Id.* at 444, 450, 454.)²

The court learned of the conflict between Carter and his counsel during four *ex parte* hearings held over just seven court days. Three of these hearings were held under a California state case, *People v. Marsden*. (Pet. App. 15 at 403-07 & Pet. App. 21 at 486; Pet. App. 16 at 410-14; Pet. App 17 at 417-21.) In California, when defense counsel asks for a “*Marsden* hearing,” it’s counsel’s way of sounding the alarm. The courtroom is closed, the prosecution is asked to leave—only the defendant, his lawyer, the judge, and essential court staff are allowed to remain in the room. This process is supposed to encourage the defendant to speak candidly with the judge. The trial court “must [then] permit the defendant to explain the basis of his contention and to relate specific instances of counsel’s inadequacy.” *People v. Cole*, 33 Cal. 4th 1158, 1190 (2004) (citations omitted). But, here, instead of allowing Carter to explain “the basis of his contention” and “relate specific instances of counsel’s inadequacy,” the trial court asked *counsel* just four questions at these four *ex parte* hearings; and not one of those questions probed the extent of

² The California Supreme Court determined that Carter “acceded” to counsel’s “trial strategy,” including counsel’s decision that Carter not testify. (Pet. App. 2 at 37.) The Ninth Circuit found that determination to be reasonable. (*Id.*) Absent from the Ninth Circuit’s legal analysis (as well as the state court’s) was any mention of the testimony from Carter’s post-verdict proceedings in his Los Angeles case. At those proceedings, Carter and his defense counsel testified that at all times—before and during the trial—Carter wanted to testify and insisted on doing so. (See, e.g., Pet. App. 19 at 445-46, 448, 459-61.) That testimony, as well as the manner, timing, and substance of the numerous *ex parte* hearings, show that the state court unreasonably determined that Carter “acceded” to trial counsel’s strategy. See 28 U.S.C. § 2254(d)(2).

the conflict between counsel and his client. (Pet. App. 15 at 403-07; Pet. App. 16 at 413-14; Pet. App. 17 at 419-21.) Before the Ninth Circuit, Carter argued that this type of negligible inquiry did not satisfy the “adequate steps” requirement of *Holloway*. The Ninth Circuit rejected Carter’s argument and denied his claim, finding that he could not overcome 28 U.S.C. § 2254(d)(1) since, in the Ninth Circuit’s view, there was no “Supreme Court precedent establishing that a trial court’s failure to inquire into the nature of the attorney-client relationship is a per se violation of a defendant’s Sixth Amendment rights.” (Pet. App. 2 at 34.)

The Ninth Circuit was wrong. As this Court explained over four decades ago, when a trial court learns about a potential conflict between a defendant and his attorney, the Constitution demands that the court “take adequate steps to ascertain whether” new counsel is warranted. *Holloway*, 435 U.S. at 484. Since this Court decided *Holloway*, it has never retreated from the general principle that a court must inquire into a conflict between a defendant and his attorney. *See Mickens v. Taylor*, 535 U.S. 162, 168 (2002) (construing *Holloway* “to require inquiry” when “the trial court knows or reasonably should know that a particular conflict exists”) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980)); *see also Wheat v. United States*, 486 U.S. 153, 160 (1988) (“a court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel”); *Wood v. Georgia*, 450 U.S. 261, 272 (1981) (“the *possibility* of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further”).

In its decision, the Ninth Circuit dismissed the relevance of *Holloway*, *Wheat*, and *Wood* because, in that court’s view, “The type of conflict Carter has alleged is . . . one over *defense strategy*. The term ‘conflict’ can refer to different forms of conflict, and care must be taken not to mix them up.” (*Id.* (emphasis added).) The Ninth Circuit distinguished *Holloway*, *Wheat*, and *Wood* from this case because those Supreme Court decisions “all deal with conflicts of interest between other clients the counsel represented.” (*Id.*)

The Ninth Circuit’s decision conflicts with this Court’s decisions in three ways. First, as this Court reaffirmed just a few years ago, the “type of conflict” Carter alleged was not merely “over defense strategy.” In *McCoy*, 138 S. Ct. 1500, this Court reiterated that certain rights are “personal” to a defendant and that if the defendant chooses to exercise any of those rights, then counsel must “honor[] that decision “out of that respect for the individual which is the lifeblood of the law.” *Id.* at 1507 (internal quotation marks omitted). Some of those rights are the same ones implicated in this petition, most notably the right to testify in one’s own defense.

Second, while this Court has never applied *Holloway* and its progeny to a case like this one, “AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.” *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (internal quotation marks and citation omitted). In fact, some “principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.”

Yarborough v. Alvarado, 541 U.S. 652, 666 (2004). The duty to inquire, established in *Holloway*, is such a principle, as exemplified by this Court’s application of it to a wide variety of conflicts. *Holloway* involved a case in which the defendant’s lawyer jointly represented multiple defendants in the same trial. *See* 435 U.S. at 482-84. *Wheat* was a case in which the defendant’s lawyer had represented other co-defendants, charged in the same conspiracy, in separate proceedings. *See* 486 U.S. at 159. *Wood* was a case in which the lawyer had accepted payment of his services from a third party. *See* 450 U.S. at 272. And *Mickens* was a case in which the lawyer had represented the victim in a prior proceeding. *See* 535 U.S. at 164-65. *Mickens*, moreover, expressly rejected the line the Ninth Circuit drew below. In *Mickens*, this Court observed that, as used in the *Holloway* line of cases, the term “actual conflict of interest” has been used to reflect “a conflict *that affected counsel’s performance*—as opposed to a mere theoretical division of loyalties.” *Mickens*, 535 U.S. at 171. In other words, *Holloway* is not limited to the joint representation context.

Not limiting *Holloway* to a narrow set of conflicts of interest makes sense. At their core, *Holloway* and its progeny are concerned with ensuring that criminal proceedings are fair. *See, e.g., Wood*, 450 U.S. at 271 (remarking that the “potential of injustice” in a third-party payment case was “sufficiently serious” to warrant further inquiry). And a trial will undoubtedly be unfair if the defendant’s counsel was ineffective. *Holloway*, 435 U.S. at 489 (stating that an effective lawyer is “basic to a fair trial”). One way that a lawyer can provide ineffective assistance is when, as here, that lawyer interferes with his client’s decision to exercise fundamental rights,

like the right to testify. *See Garza v. Idaho*, 139 S. Ct. 738, 746 (2019) (explaining that a lawyer performs deficiently if he overrides a decision that “is ultimately the defendant’s, not counsel’s, to make”).

Third, the Ninth Circuit’s decision renders virtually meaningless the important protections this Court articulated in *Holloway* and its progeny. Each time this Court has reviewed a case where the trial court failed to ask relevant questions about a conflict brought to its attention, this Court has found the lower court’s inquiry to be inadequate. For instance, in *Holloway*, 435 U.S. at 484 n.7, this Court criticized the trial court for “cut[ting] off any opportunity of defense counsel to do more than make conclusory representations.” Likewise, in *Wood*, 450 U.S. at 273-74, this Court remanded a case to the trial court because the court failed to inquire into a conflict brought to its attention. The results in those cases are unsurprising: A court can only ascertain the extent of a conflict by asking specific and targeted questions about that conflict.

That did not happen here. During the *ex parte* hearings in this case, the court never asked Carter a single question and it asked counsel only four questions, none of which helped the court gain an understanding of the nature and depth of the conflict between Carter and his lawyer. What makes Carter’s case especially appalling is that there were compelling reasons for the trial court to delve deeper into the nature of Carter’s relationship with the appointed counsel. Carter and his attorney had a history of serious disagreements with one another. (*See, e.g.*, Pet. App. 20 at 480-81, 483-84.) And defense counsel even admitted, at the second

Marsden hearing, that he had not accurately stated Carter's concerns at the first *Marsden* hearing. That admission put the court on notice that there could be more to the story than counsel was letting on.

Given the circumstances of this case, the trial court had a duty to inquire into the conflict that was repeatedly brought to its attention. *See Holloway*, 435 U.S. at 484. Any fairminded jurist reviewing this record would find the trial court's inquiry here to be constitutionally inadequate.

* * *

In a claim like this one, a defendant cannot obtain relief unless he can also demonstrate that the conflict at issue "adversely affected" his attorney's performance. *Mickens*, 535 U.S. at 174. This prejudice requirement is the teeth of this claim. It ensures that courts overturn convictions based on a trial court's failure to inquire into conflicts only if the defendant can show that the conflict impacted his Sixth Amendment rights.

The record here contains strong evidence that the conflict between Carter and his lawyer adversely affected his lawyer's representation. In a habeas declaration, defense counsel acknowledged that the conflict between him and Carter led to "animosity and frustration" and a "breakdown" in their relationship that ultimately "irreparably" damaged the attorney-client relationship. (Pet. App. 25 at 529.) Other habeas declarations, submitted by various members of Carter's Los Angeles and San Diego defense teams, show that Carter and his lawyer were barely

communicating with each other during trial. (Pet. App. 27 at 550-51; Pet. App. 28 at 554.)

The lack of communication between Carter and his lawyer might explain why counsel never went “over in detail with [Carter] what his testimony” would be (Pet. App. 19 at 454), which makes it difficult to imagine how counsel could even properly advise Carter about whether he should exercise his right to testify. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) (explaining that to be considered a constitutionally adequate strategic choice, a decision must have been made after counsel had conducted “reasonable investigations or [made] a reasonable decision that makes particular investigations unnecessary”). Counsel also admitted in his habeas declaration that he was “unable to build rapport or develop the confidence of [his] client” (Pet. App. 25 at 529)—both of which are essential to an effective penalty-phase presentation. According to defense counsel, that lack of trust and rapport “contributed to [his] inability [to] present a compelling case in mitigation of petitioner’s punishment.” (*Id.*)³

If this Court has any questions about the extent to which this conflict adversely impacted counsel’s representation, a remand to the lower courts would be appropriate. Carter sought an evidentiary hearing on this claim in both state and federal court. Neither court provided him with one. Thus, to the extent the record is

³ Those failings manifested themselves in countless ways during Carter’s penalty trial, and are discussed at length below.

lacking in any way, it is because he has been denied the process necessary to fully develop his claim.

2. The Ninth Circuit’s decision conflicts with the Court’s *Strickland v. Washington* jurisprudence.

a. The *Strickland* standard

This Court established the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668. An ineffective assistance claim has two components: A petitioner must show that counsel’s performance was deficient, and that the deficiency prejudiced the defense. *Id.* at 687. To establish deficient performance, a petitioner must demonstrate that counsel’s representation “fell below an objective standard of reasonableness.” *Id.* at 688.

b. Carter’s counsel provided ineffective assistance at his San Diego trial by failing to investigate and present evidence of Carter’s nightmarish childhood and evidence that he suffers from FAS and brain damage.

In denying Carter’s claim of ineffective assistance of counsel at the penalty phase of his San Diego trial, the Ninth Circuit focused solely on deficient performance and did not address *Strickland*’s prejudice prong. (Pet. App. 2 at 42–59.) Analyzing this claim under 28 U.S.C. § 2254(d), the Ninth Circuit concluded that counsel conducted a reasonable investigation into Carter’s social history and made a reasonable decision to present a “narrative strategy” of how “Carter over[came] an abusive childhood home to find personal and professional success before a divorce sent him spiraling into a life of violence.” (Pet. App. 2 at 48-49.) For the Ninth Circuit, it was reasonable for counsel to present only a superficial picture

of the abuse Carter suffered because presenting the true extent of Carter’s abusive background could have “backfired” on them “by leading the jury to infer that the adult Carter was beyond rehabilitation.” (Pet. App. 2 at 48.) The Ninth Circuit also found that counsel performed adequately by trying to talk to relevant mitigation witnesses, and they were not at fault for failing to follow-up on leads uncovered in their investigation because certain witnesses, such as Carter’s mother, failed to cooperate with the defense. (Pet. App. 2 at 52–53.) And even though counsel presented no evidence of Carter’s mental health impairments, including FAS and brain damage, the Ninth Circuit found that fairminded jurists could find that decision to be reasonable since, in the Ninth Circuit’s view, presenting that evidence could have opened the door to “unfavorable rebuttal testimony.” (Pet. App. 2 at 54.)

(1) Social history investigation

“It is unquestioned that under prevailing professional norms at the time of [Carter’s] trial, counsel had an ‘obligation to conduct a thorough investigation of the defendant’s background.’” *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam) (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). Counsel in a death-penalty case has “a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 690-91). And while this Court has recognized that reasonable assistance will take a variety of forms, *see Strickland*, 466 U.S. at 688-89, this Court has never held that counsel may forgo a thorough background investigation and wholly fail to present evidence in mitigation where readily available, compelling, and non-cumulative mitigating evidence exists.

Indeed, in a number of cases, this Court has analyzed the adequacy of capital defense counsel's investigation at the penalty phase. *See, e.g., Williams*, 529 U.S. at 396; *Wiggins*, 539 U.S. at 521. The governing principles arising from those cases provide a clear baseline standard for capital defense counsel—a standard that trial counsel failed to meet in this case. And yet the Ninth Circuit still denied relief.

Here, the state-court record showed that counsel performed deficiently in their social history investigation. Counsel were aware from social history records in their possession that Carter had been abused as a child, but they stopped their investigation after discovering a few instances of abuse because they encountered some difficulties with their client and his family. Counsel, however, had a duty to follow up on evidence of child abuse even though Carter and his family may have been uncooperative. *See Porter*, 558 U.S. at 40 (a lawyer's duty to conduct a "thorough investigation" is not obviated by a "fatalistic or uncooperative" client) (citing *Rompilla*, 545 U.S. at 381-82).

Significantly, if counsel had followed up on known leads, they would have uncovered compelling evidence of Carter's nightmarish childhood, even if Carter and his family were not cooperative. Indeed, had trial counsel interviewed Carter's childhood friends, family friends, peers, and neighbors, they would have learned that Carter's parents repeatedly chained him to beds, tables, and cabin posts; that people occasionally saw Carter being forced to eat and drink off the floor; and that many people in the close-knit community of Nome, Alaska, suspected that Carter was kept in makeshift prisons. (Pet App. 32 at 568; Pet. App. 33 at 593; Pet. App. 48

at 819-21; Pet. App. 49 at 824-25; Pet. App. 50 at 828; Pet. App. 51 at 830-31; Pet. App. 52 at 834.) One of Carter’s peers even thought she found Carter’s makeshift prison while visiting Carter’s main home and their summer cabin. (Pet. App. 48 at 819-21.) Counsel failed to interview these witnesses, despite being on notice that Carter’s parents abused him as a child.

In denying Carter’s claim, the Ninth Circuit found that counsel acted reasonably under the circumstances. But the court’s deficient-performance analysis departs from this Court’s jurisprudence in three significant ways. First, the Ninth Circuit laid the blame for counsel’s failure to follow-up on “readily available” and “compelling” mitigating evidence at the feet of Carter and his mother, rather than at the feet of counsel, where it rightly belonged. As noted above, a lawyer’s duty to conduct a “thorough investigation” is not obviated by a “fatalistic or uncooperative” client. *Porter*, 558 U.S. at 40 (citing *Rompilla*, 545 U.S. at 381-82). The same rule should equally apply to other members of the client’s immediate family.

Second, in its discussion of counsel’s purportedly “strategic” choice to not put on additional and profound evidence about the abuse Carter suffered, the Ninth Circuit found:

Had counsel’s strategy been to present the young Carter as a metaphorical feral dog kenneled by his alcoholic parents, the eyewitness testimony of [witnesses not presented at trial] would have been relevant. But that was never counsel’s strategy. Rather than portray him as a feral child—a strategy which may have backfired by leading the jury to infer that the adult Carter was beyond rehabilitation—counsel’s choice of witnesses during the penalty phase suggests that their intended narrative was one of Carter overcoming an abusive childhood home to

find personal and professional success before a divorce sent him spiraling into a life of violence. . . . We cannot pass judgment on counsel's wisdom in choosing this narrative strategy over the one Carter argues they should have pursued.

(Pet. App. 2 at 48-49.)

This analysis turns this Court's jurisprudence on its head. Even if the "intended narrative" were as the Ninth Circuit described (and it was not), the information that counsel readily could have obtained, but didn't, would have *supported* their chosen defense because it added to the redemption story of Carter overcoming the horrors of his abusive childhood home. That said, there was no indication in the state-court record that trial counsel were worried that more evidence of child abuse would have led the jury to infer that Carter "was beyond rehabilitation." (Pet. App. 2 at 48-49.) "When viewed in this light, the 'strategic decision' [the panel invokes] to justify counsel's limited pursuit of mitigating evidence resembles more a post hoc rationalization of counsel's conduct than an accurate description of [his] deliberations." *Wiggins*, 539 U.S. at 526-27 (citations omitted).

The third way the Ninth Circuit's opinion conflicts with the opinions of this Court is in its constricted reading of *Williams v. Taylor*, a pillar of *Strickland* jurisprudence. The Ninth Circuit held that that "[t]he holding of *Williams* is that counsel renders constitutionally ineffective assistance if it fails to investigate and pursue a reasonable defense because it incompetently interpreted the law." (Pet. App. 2 at 51.) Because Carter "ma[de] no argument that his counsel misinterpreted Alaska law in a way that caused them to bypass an investigation of available

records,” the Ninth Circuit held that “*Williams* [did] not provide any relevant point of ‘clearly established Federal law’ . . . on which a fairminded jurist could find disagreement. . . .” (*Id.*)

It is true that the *reason* counsel in *Williams* failed to uncover information about their client’s background was because they misunderstood the law. *Williams*, 529 U.S. at 395. But this Court has never limited *Williams* in that way. To the contrary, in other cases this Court has explained that counsel’s performance can be deficient under *Williams* in a variety of situations, including failing to follow-up on leads known to counsel and making decisions that are not supported by proper investigation. For instance, in *Wiggins*, the petitioner raised a penalty-phase ineffectiveness claim stemming “from counsel’s decision to limit the scope of their investigation into potential mitigating evidence.” 539 U.S. at 521. Trial counsel obtained a presentence investigation report and social services records, which indicated that as a child Wiggins had been left for days without food, was shuttled among foster homes, and that his mother was a chronic alcoholic. *Id.* at 525. Rather than investigating this evidence further, counsel ultimately decided to present a mitigation theory that Wiggins was not directly responsible for the murder. *Id.* at 526.

This Court found trial counsel’s performance was deficient because, as here, they did not follow-up on leads apparent from the limited records they had gathered. As this Court explained, a reasonably competent attorney must pursue relevant leads so that they can make an informed choice about what mitigation

evidence to present at penalty. *Id.* at 519, 523-25. Relatedly, this Court also found trial counsel acted unreasonably in *Wiggins* because, as here, they “chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible.” *Wiggins*, 539 U.S. at 527-28 (citations omitted).

Any fairminded jurist would agree that, as in *Williams* and *Wiggins*, counsel here failed to adhere to reasonable professional standards in their social history investigation.

(2) Mental health investigation

The Ninth Circuit’s finding that counsel also were not deficient for failing to investigate and present mental health evidence—including evidence that Carter suffered from FAS and brain damage—also conflicts with this Court’s decisions. The Ninth Circuit determined that “there is no evidence in the trial record” that would have put counsel on notice that Carter’s mother, Esther, drank while she was pregnant, and that even if counsel had such evidence, it was reasonable for them to avoid an FAS presentation because it would have opened the door to aggravating mental health evidence. (Pet. App. 2 at 56.) The problem with this reasoning is twofold: It eviscerates counsel’s clear responsibility to investigate and present mitigating evidence as set forth in *Strickland* and its progeny; and it seriously misapprehends the devastating impact of an FAS diagnosis and how that diagnosis would have explained some of the possibly aggravating information in Carter’s mental health history.

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As a predicate to these critical errors, the Ninth Circuit’s decision relied on unsupported factual implications from the state record, including its erroneous determination that trial counsel were not on notice of the need to investigate Esther’s alcohol consumption while pregnant. (*Id.*) In actuality, counsel knew that Esther abused alcohol during Carter’s early childhood, which was certainly enough to prompt “a reasonably competent attorney to investigate further.” *Wiggins*, 539 U.S. at 534. Counsel also were aware, through other aspects of their investigation, that alcoholism had pervaded the Native community in Nome for generations. (Pet. App. 2 at 45-46.) There was no reason to think that Carter’s mother, a Native woman, had not suffered from the same societal ills as her peers.

Even setting aside whether counsel should have explored FAS, they certainly should have explored whether Carter had brain damage.⁴ And while they started this investigation, they waited until the eleventh hour to make any real headway with it. Just one week before the penalty phase began, counsel obtained an important brain scan. This scan presented unequivocal proof that Carter had significant brain damage to different parts of his brain. (Pet. App. 23 at 501-02.) But as a result of their dilatory action, counsel could not consult with a relevant expert

⁴ Counsel certainly were on notice that this evidence could be unearthed. There were indications in Carter’s school and juvenile records that he may be brain damaged: he had a history of head traumas (Pet. App. 29 at 557; Pet. App. 37 at 635; Pet. App. 44 at 679; Pet. App. 46 at 761); evidence of developmental delays, problems with attention, a specific math deficit, and emotional outbursts (Pet. App. 34 at 628-33); and psychological reports reflected “high levels of impulsivity” and other possible psychiatric problems. (Pet. App. 78 at 1054; Pet. App. 41 at 647; Pet. App. 46 at 766.)

until the penalty-phase was well underway, which prevented them from presenting the powerful evidence they uncovered.

By ignoring the foregoing material facts, the Ninth Circuit's decision leads inevitably to a position that conflicts with controlling Supreme Court case law, which holds that defense counsel acts deficiently when it has evidence of mental impairments but fails to adequately investigate and present that evidence. *See, e.g., Rompilla*, 545 U.S. at 390-93.

The Ninth Circuit's opinion also fails to recognize the importance of Carter's mental health evidence and how evidence of FAS and brain damage can "influence[] the jury's appraisal of his moral culpability." *Williams*, 529 U.S. at 398. The Ninth Circuit reasoned that a lawyer may act reasonably by not introducing mitigating evidence when that evidence could open the door to aggravating evidence. And certainly that is true when the mitigating evidence is of marginal value and the aggravating evidence is, by comparison, more damaging. But that wasn't the situation here. The evidence that trial counsel failed to adequately investigate and present here—evidence of FAS and brain damage, including to Carter's frontal lobes—could have been a game changer. FAS can cause "diffuse brain damage and severe impairment in cognitive and emotional functioning." (Pet. App. 33 at 573; *see also* Pet. App. 45 at 735; Pet. App. 46 at 774-75.) Because the brain damage caused by prenatal exposure to alcohol affects portions of the brain responsible for planning and impulse control, an FAS diagnosis can lead to a substantially increased risk of criminal behavior. *See id.* As a result, evidence of FAS is fundamentally different

than other types of mental health evidence because it can establish both cause and effect for criminal acts. Evidence of frontal lobe damage is also extremely significant, because the frontal lobe is the part of the brain “involved in evaluation, judgment, and impulse control.” (Pet. App. 44 at 680.)

Time and again this Court has noted the importance of brain damage as a mitigating factor in capital sentencing. For instance, in *Rompilla*, 545 U.S. at 390-92, this Court concluded that the failure of trial counsel to adduce evidence of the defendant’s brain damage was prejudicial under *Strickland*, 466 U.S. 668. *See Rompilla*, 545 U.S. at 392 (observing that Rompilla’s brain damage, caused by FAS, impacted his “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”). In *Sears v. Upton*, 561 U.S. 945, 946, 949 (2010), 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.” *See also Trevino v. Davis*, 138 S. Ct. 1793, 1799-1800 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting from denial of certiorari) (recognizing that evidence of FAS can provide important mitigating evidence in capital cases).⁵

The Ninth Circuit justified counsel’s abandonment of this evidence by claiming that “any argument by counsel that Carter’s actions could be attributable

⁵ For more information on the devastating impact of FAS, Carter asks this Court to take judicial notice of the petitions for writ of certiorari and supporting amici briefs filed in *Floyd v. Gittere*, 19-8921 (cert. denied Nov. 2, 2020), and *Anderson v. Payne*, No. 19-8105 (cert. denied Oct. 5, 2020).

to FAS would have opened the door to the potentially damaging rebuttal evidence contained in the record.” (Pet. App. 2 at 56.) This evidence largely included reports from trial experts diagnosing Carter with antisocial personality disorder. This justification is critically flawed. Any evidence that tended to show antisocial behaviors by Carter was unlikely to do more damage, given that the jury had just convicted Carter of rape and murder. On the other side of the scales, the evidence of FAS and brain damage was both unique—because the jury had not heard any of that evidence at either phase of the trial—and particularly powerful. Because FAS is a brain disorder that increases the likelihood of impulsivity, sociopathy, and criminality, and because frontal lobe damage impacts executive functioning, the jury would have been left with a very different impression of Carter had they been allowed to consider that evidence. Thus, any potential danger that existed if counsel introduced the mental health evidence was far outweighed by the potential benefit of its introduction.

(3) There is a reasonable probability that the jury would have returned a life verdict.

Although the Ninth Circuit did not address the prejudice prong of the *Strickland* analysis, it is worth noting that there is a reasonable probability that the evidence here would have led to a different result.⁶ Any contrary decision is unreasonable.

⁶ Because the Ninth Circuit did not address the prejudice prong, it is appropriate to remand so the circuit court can address the prejudice prong of *Strickland*, as this Court so ordered in *Andrus v. Texas*, 140 S. Ct. 1875, 1887 (2020).

The omitted evidence discussed above would have drastically changed the portrait of Carter at sentencing. During closing arguments, the prosecutor belittled Carter’s penalty-phase presentation, remarking that Carter’s childhood did not appear that difficult: “I have the word ‘discipline’ written up there. There is no evidence of any child abuse. So no evidence that the defendant was abused as a child. . . . There is absolutely no evidence of that in this case. It’s not a mitigating factor.” (Pet. App. 24 at 525.) The prosecutor’s closing argument underscores how the jury could not fairly gauge Carter’s moral culpability at sentencing, because they had heard only a sanitized version of his childhood. This is best exemplified by the single incident of chaining that the jury heard about, and which was portrayed as a necessary punishment to restrain Carter, who was purportedly out-of-control as a child. In reality, the chaining was widespread, chronic, and occurred at all phases of Carter’s childhood. Carter’s childhood was not one of occasional discipline; it was more similar to the nightmarish childhoods this Court has found so compelling other cases. *See, e.g., Williams*, 529 U.S. at 395 (counsel ineffective for not presenting evidence of severe abuse).

Moreover, without information about Carter’s brain damage and FAS, the jury was left to believe that Carter was a person who was generally responsible for his actions, despite his difficult childhood. As with evidence about Carter’s horrific childhood, evidence of Carter’s FAS and mental impairments would have provided the jury with information that they needed to fairly gauge Carter’s moral culpability at sentencing. *Porter*, 558 U.S. at 41.

- c. **Carter's Los Angeles trial attorneys were also ineffective for failing to introduce evidence of Carter's nightmarish childhood, his FAS diagnosis, and evidence that he was brain damaged.**

In its decision denying Carter's related claim of ineffective assistance at penalty arising from Carter's Los Angeles trial, the Ninth Circuit found no deficient performance, applying a 28 U.S.C. § 2254(d) analysis of deficient performance that is largely analogous (and equally problematic) to its discussion of the San Diego penalty phase.

Another issue with the Ninth Circuit's discussion of this claim is that it attributes decisions to trial counsel that are not supported by the record. As noted above, "courts may not indulge in 'post hoc rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions." *Harrington v. Richter*, 562 U.S. 86, 109 (2011). Here, the available evidence of trial counsel's actions can be found in lead counsel's habeas declaration, which described the significant breakdown in his relationship with Carter (and subsequently his mother) and his failure to enlist the assistance of a social historian or mental health professional despite his knowledge of Carter's deeply troubled background and evidence of brain damage. (Pet App. 25 at 527-37.) The panel dismissed this declaration as a lawyer simply "falling on his sword" and concluded that the California Supreme Court could have reasonably concluded that counsel performed effectively. (Pet App. 2 at 65.) But viewing "the reasonableness of counsel's challenged conduct on the facts of the particular case," *Strickland*, 466 U.S. at 690, there was no reasonable explanation for trial counsel to fail to present this evidence,

particularly the evidence about Carter’s impaired mental health. Moreover, a determination that counsel was “falling on his sword” is, at bottom, a credibility finding which suggests that counsel was not being honest about the reasons for this litigation choices. The Ninth Circuit should at least have ordered an evidentiary hearing before making that type of factual finding.

Each of the opinion’s proffered “tactical” explanations for counsel’s deficiencies conflict with this Court’s decisions. *See Porter*, 558 U.S. at 39-40. For example, the Ninth Circuit opined that “the jury would not have responded well to the insinuation that a child abused this badly would inevitably go on to rape, kill, and burglarize multiple women.” (Pet. App. 2 at 68.) Yet time after time, this Court has held that evidence of an abusive childhood is significantly mitigating; thus, the panel’s attempt to make such evidence aggravating underscores how far off course the Ninth Circuit’s decision is from this Court’s decisions. *See, e.g., Wiggins*, 539 U.S. at 527; *Williams*, 529 U.S. at 395; *Rompilla*, 545 U.S. at 382-83; *Sears*, 561 U.S. at 948-51.

Similarly, the panel’s supposition that “evidence of FAS or brain damage would not have been well received because of the evidence that Carter acted so rationally over such a long period of time” betrays a serious misunderstanding of FAS and its effect on those who suffer from it. It also ignores counsel’s declaration, which acknowledges that he failed to retain mental health experts and develop a thorough and cohesive mental health mitigation presentation. (Pet App. 25 at 527–37.) Without taking those crucial steps, counsel could not have engaged in the

necessary investigation and preparation required to support a reasonable tactical decision. *Strickland*, 466 U.S. at 690-91 (“[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”). And such deficient performance during the penalty phase is “all the more alarming” given counsel’s decision (over Carter’s objection) to not put on a guilt-phase defense and instead focus on mitigation. *See Andrus*, 140 S. Ct. at 1883.

Unlike with the ineffectiveness claim arising from Carter’s San Diego trial, the Ninth Circuit did address the prejudice prong relating to this claim. The Ninth Circuit determined there was no reasonable probability the outcome would have been different, yet completely failed to discuss the mental health evidence counsel failed to present. (Pet. App. 2 at 70.) That decision conflicts with this Court’s decisions, which have repeatedly held that evidence of the type at issue here—that is, evidence of horrific child abuse and significant mental health impairments—would have changed the mind of at least one juror in Carter’s penalty phase.

C. The Ninth Circuit’s decision creates a circuit split on the importance of mental health evidence at a capital sentencing.

The Ninth Circuit’s decision on Carter’s ineffectiveness claims also creates a circuit split. Consistent with this Court’s decision in cases like *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*. Here, on the other hand, the Ninth Circuit did not find this evidence to be particularly compelling. That much can be gleaned by how it

diminished the importance of this evidence during its discussion of counsel's performance in Carter's San Diego case and how it did not even mention the importance of Carter's evidence of FAS and brain damage in its prejudice analysis of his Los Angeles case.

The Ninth Circuit's dismissive attitude of the significance of this evidence is similar to the dismissive attitude it took to the same evidence in another capital habeas appeal. *See Floyd v. Filson*, 949 F.3d 1128 (9th Cir. 2020), *cert. denied sub nom. Floyd v. Gittere*, No. 19-8921 (Nov. 2, 2020). It is also similar to the Eighth Circuit's approach to similar evidence. *See 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.

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 the capital defendant here) had FAS and resulting brain damage, but *Anderson's* trial counsel had failed to investigate that disability or present evidence about it at his sentencing hearing (as Carter's counsel failed to do so here in both cases). *Kelly*, 938 F.3d at 964. 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. *Id.* at 958. The panel majority insisted that counsel's failure to offer evidence of FAS and resulting brain damage would not have mattered, because that would have been just "one more" mitigation argument. *Id.*

Judge Kobes correctly pointed out in his dissent 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.” *Id.* at 965. For instance, 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 FAS. The Fourth Circuit concluded that, even under AEDPA’s deferential standard, the failure to investigate FAS 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.” *Id.* at 318.

The Tenth Circuit has held in six cases that evidence of brain damage is of particular importance in determining prejudice under *Strickland*. See *United States v. Fields*, 949 F.3d 1240, 1256 (10th Cir. 2020); *United States v. Barrett*, 797 F.3d 1207, 1230-31 (10th Cir. 2015); *Littlejohn v. Trammell*, 704 F.3d 817, 864 (10th Cir. 2013); *Hooks v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 2012); *Anderson v. Simmons*, 476 F.3d 1131, 1147 (10th Cir. 2007); *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004). The common thread in these cases is a recognition that

[e]vidence of organic brain damage is something that” the Tenth Circuit “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.

Hooks, 689 F.3d at 1205 (citing *Rompilla*, 545 U.S. at 392).

Decisions in the Sixth and Eleventh Circuits also give great weight to evidence of brain damage in a capital sentencing hearing, and thus hold that the failure to adduce such evidence is particularly likely to be prejudicial. *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”); *Glenn v. Tate*, 71 F.3d 1204, 1211 (6th Cir. 1996) (explaining that its “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”); *Jefferson v. GDCP Warden*, 941 F.3d 452, 484 (11th Cir. 2019) (“[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.”); *Ferrell v. Hall*, 640 F.3d 1199, 1234-35 (11th Cir. 2011) (“the mental health expert opinions [on the defendant’s brain damage] 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.”).

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 Carter's case arisen in the Fourth, Sixth, Tenth or Eleventh Circuits, those courts would have given proper weight to the uniquely mitigating factor of his FAS and related brain damage.

CONCLUSION

For the above reasons, this Court should issue a writ of certiorari and review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

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By: /s/ Michael D. Weinstein
MICHAEL D. WEINSTEIN
Deputy Federal Public Defender

Attorneys for Petitioner
DEAN PHILLIP CARTER

*Counsel of Record