
IN THE SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,
Petitioner,

v.

TIM RICHARDSON, WARDEN, IDAHO MAXIMUM SECURITY INSTITUTION,
Respondent.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth
Circuit No. 10-99015**

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

During Petitioner Thomas Creech’s most recent sentencing, he was referred to as a “psychopath.” That is not uncommon in capital sentencings, and defense lawyers must decide how to respond to the label. The Courts of Appeals are divided on whether that label is always aggravating—such that a defense lawyer who does not prevent or at least respond to it may have been ineffective for Sixth-Amendment purposes. The Fifth, Eighth, and Tenth Circuits have treated psychopathy as categorically aggravating, as have the Ninth and Eleventh Circuits in some cases. On the other hand, the Ninth Circuit (in Mr. Creech’s case) and the Eleventh Circuit have held that the label may in some situations be mitigating and, so, not a basis for an ineffective-assistance-of-counsel claim.

Mr. Creech has been on death row for forty-one years. His tenure there was greatly prolonged by the need for him to be resentenced after he obtained habeas relief and by fluctuations in this Court’s precedent that occasioned two appeals below and a remand for extensive litigation. Mr. Creech’s time on death row has been typified by the kind of “[y]ears on end of near-total isolation” that multiple Justices have identified as a constitutional problem calling for this Court’s review, *Ruiz v. Texas*, 137 S. Ct. 1246, 1247 (2017) (Breyer, J., dissenting) (quoting *Davis v. Ayala*, 135 S. Ct. 2187 (2015) (Kennedy, J., concurring)), with twenty-three hours a day by himself in a tiny cell facing the execution chamber and very few opportunities for meaningful human contact.

The questions presented are these:

1. Whether, for purposes of measuring ineffective-assistance-of-counsel claims arising from capital sentencings, evidence of or reference to psychopathy should be treated as potentially mitigating or as categorically aggravating?
2. Whether the Eighth Amendment is implicated by a prisoner’s excessively long residence on a highly restrictive death row.

PARTIES TO THE PROCEEDINGS BELOW

Aside from the parties listed in the caption, several prior wardens at the Idaho Maximum Security Institution were at one time respondents below, to-wit: Dave Paskett, John Hardison, Al Ramirez, Keith Yordy, and Tyrell Davis.

RELATED PROCEEDINGS

Ada County District Court

Case No. 10252

State v. Creech

Findings imposing death penalty, Jan. 25, 1982

Judgment of conviction, Mar. 17, 1983

Order denying motion to withdraw guilty plea, June 24, 1983

Idaho Supreme Court

Case Nos. 14480/15000

State v. Creech, 670 P.2d 463 (Idaho 1983)

Opinion issued denying relief, May 23, 1983

Petition for rehearing denied, Sept. 21, 1983

Idaho Supreme Court

Case No. 15114

State v. Creech

Order dismissing appeal, Jan. 24, 1984

United States Supreme Court

Case No. 83-5818

Creech v. State, 465 U.S. 1051 (1984)

Petition for certiorari denied, Feb. 27, 1984

Idaho Supreme Court

Case No. 15475

State v. Creech

Denial of motion to withdraw guilty plea affirmed, June 20, 1985

Petition for rehearing denied, Dec. 31, 1985

United States District Court, District of Idaho

Case No. 86-1042

Creech v. State

Habeas petition denied, June 18, 1986

United States Court of Appeals, Ninth Circuit
Case No. 86-3983
Creech v. State, 947 F.2d 873 (9th Cir. 1991) (en banc)
Affirmed in part, reversed in part, remanded, Oct. 16, 1991

United States Supreme Court
Case No. 91-1160
State v. Creech, 507 U.S. 463 (1993)
Reversed and remanded, March 30, 1993

Ada County District Court
Case No. 10252
State v. Creech
Judgment of Conviction, Apr. 17, 1995

Ada County District Court
Case No. SPOT-95-00154-D
Creech v. State
Post-conviction petition denied, Dec. 12, 1996

Idaho Supreme Court
Case Nos. 22006/23482
State v. Creech, 966 P.2d 1 (Idaho 1998)
Opinion issued denying relief, Aug. 19, 1998
Petition for rehearing denied, Oct. 23, 1998

United States Supreme Court
Case No. 98-8278
Creech v. State
Petition for certiorari denied, June 4, 1999

Ada County District Court
Case No. SPOT0000403D
Creech v. State
Post-conviction petition denied, Jan. 25, 2001

Idaho Supreme Court
Case No. 27309
Creech v. State, 51 P.3d 387 (Idaho 2002)
Opinion issued dismissing appeal, June 6, 2002
Petition for rehearing denied, Aug. 1, 2002

Ada County District Court
Creech v. State
Case No. SPOT0200712D
Post-conviction petition denied, Apr. 25, 2003

Idaho Supreme Court
Case Nos. 29681/29682
State v. Creech
Appeal dismissed, Dec. 23, 2005

United States District Court, District of Idaho
Case No. CV 99-0224-S-BLW
Creech v. Hardison
Judgment of dismissal, March 31, 2010
Order denying relief on remand, Jan. 29, 2016

Ada County District Court
Case No. CV PC 2008-6064
Creech v. State
Order dismissing petition for post-conviction relief, Mar. 30, 2011

United States Court of Appeals, Ninth Circuit
Case No. 10-99015
Creech v. State
Order vacating and remanding, June 20, 2012
Opinion denying relief July 20, 2022
Order denying petition for rehearing and amending opinion, Feb. 6, 2023

Ada County District Court
Case No. CV01-22-9424
Creech v. State
Judgment dismissing petition for post-conviction relief, Dec. 1, 2022

Idaho Supreme Court
Case No. 50336
Creech v. State
Appeal pending

NOTE ABOUT CITATIONS TO THE RECORDS BELOW

“9th Cir. Dkt.” citations refer to docket entries below in *Creech v. Hardison*, 9th Circuit Case No. 10-99015. References to page numbers of documents in the Excerpts of Record from that case are the “ER” page numbers located at the bottom of the page, and all other pin cites are to the blue CM/ECF page numbers at the top of the document. “Dist. Ct. Dkt.” citations refer to docket entries in *Creech v. Richardson*, U.S. Dist. Idaho Case No. 1:99-cv-00224-BLW.

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Petitioner Thomas E. Creech respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

A copy of the opinion below is attached as Appendix A, App. 1–45, and is available at *Creech v. Richardson*, 59 F.4th 372 (9th Cir. 2023).

JURISDICTIONAL STATEMENT

On February 6, 2023, the Ninth Circuit denied Mr. Creech’s petition for rehearing and issued an amended opinion disposing of the appeal. *See id.* The petition is timely filed, as Justice Kagan extended the deadline to July 6, 2023.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part that every criminal defendant “shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI.

The appeal also implicates the Eighth Amendment to the United States Constitution, which states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.

STATEMENT OF THE CASE

On May 13, 1981, Mr. Creech killed fellow inmate David Jensen in a fight. 9th Cir. Dkt. 21-5 at 966. Mr. Creech pleaded guilty to first-degree murder for the death on August 28, 1981. *Id.* at 906. On January 11, 1982, the initial sentencing

took place. 9th Cir. Dkt. 21-4 at 690. Mr. Creech's counsel called only three witnesses, one of whom was Dr. John Stoner. Appendix I, App. 283.

Dr. Stoner testified that Mr. Creech has antisocial personality disorder (ASPD), which he described as "the criminal personality." *Id.* at 292. Elsewhere, Dr. Stoner mentioned that he was not qualified to evaluate individuals for brain damage and therefore had referred Mr. Creech to Dr. Steve Thurber for such an assessment. *Id.* at 309. Dr. Thurber did not himself testify at the sentencing. The prosecutor asked Dr. Stoner to confirm that Dr. Thurber was "of the opinion that this defendant does not have organic brain damage." *Id.* at 320. Dr. Stoner did not quarrel with the prosecutor's summation. Rather, he stated: "My understanding, was that there was no organic brain syndrome which is related to this crime." *Id.*

On January 25, 1982, Mr. Creech was sentenced to death by the trial court. 9th Cir. Dkt. 12-1 at 190–91. In its findings on the death penalty, the trial court classified as a factor in mitigation that "the defendant did not instigate the fight with the victim, but the victim, without provocation, attacked him." *Id.* at 193. As a consequence, Mr. Creech was in the eyes of the sentencing judge "initially justified in protecting himself." *Id.* The death sentence was eventually upheld on appeal by the Idaho Supreme Court on a 3-2 vote. *See State v. Creech (Creech I)*, 670 P.2d 463 (Idaho 1983), attached as Appendix G, App. 188–235.

On January 24, 1984, the case was remanded for post-conviction proceedings. 9th Cir. Dkt. 12-1 at 180. Mr. Creech's counsel filed a petition for post-conviction relief on May 9, 1995. 9th Cir. Dkt. 21-2 at 268–71. The petition did not raise any

claims of ineffective assistance of counsel. *Id.* Relief was denied by the Idaho state courts. *See State v. Creech (Creech II)*, 710 P.2d 502 (Idaho 1985).

Mr. Creech pursued federal habeas relief, which ultimately led the Ninth Circuit to vacate his death sentence on several grounds. *See Creech v. Arave (Creech III)*, 947 F.2d 873 (9th Cir. 1991). This Court reversed in part, but left the grant of relief in place. *See State v. Creech (Creech IV)*, 507 U.S. 463 (1993). Prior to the resentencing, Mr. Creech’s counsel did not have him tested for brain damage. At the March 1995 resentencing, the defense called only four witnesses and introduced only three exhibits. One of the defense witnesses was Steven Brown, a psychologist. Appendix H, App. 237. Dr. Brown testified that Mr. Creech was a “classic psychopath,” a category of people who “break the law continually” and who are “often callused with regards to other people.” *Id.* at 240.¹ He further opined that Mr. Creech’s “psychopathic tendencies” were “greater than 96 percent of the inmate population,” including with respect to “lack of remorse.” *Id.* at 281.

Dr. Brown briefly discussed brain damage during his testimony. In so doing, he noted that Dr. Stoner had administered a “Bender” test prior to the original

¹ Dr. Brown testified that the terms “antisocial personality disorder, psychopath, and psychopathy” were “all the same thing.” Appendix H, App. 240. The expert who testified at the original sentencing, Dr. Stoner, preferred the term “anti-social personality disorder.” Appendix I, App. 321. For purposes of this petition, the terms are substantively the same and equally detrimental to defendants, as is the term “sociopath.” *See Correll v. Ryan*, 539 F.3d 938, 963 (9th Cir. 2008) (O’Scannlain, J., dissenting) (using the three terms interchangeably and explaining why they are all highly damaging to capital defendants). In the interest of consistency, Mr. Creech will stick to “psychopathy” when employing his own language but will use the words chosen by other sources when quoting them.

sentencing. *Id.* at 238. According to Dr. Brown, Mr. Creech struggled with some aspects of the Bender test, and “occasionally people with brain damage” did as well. *Id.* By 1995, however, the test was “seen as not a very good indicator of brain damage.” *Id.* After receiving the evidence, the trial court imposed another death sentence on April 17, 1995. 9th Cir. Dkt. 12-1 at 162.

A new post-conviction petition was filed in 1996, which totaled only eight pages. 9th Cir. Dkt. 21-2 at 255–63. An evidentiary hearing was held in state court on the petition in October 1996. Mr. Creech’s attorneys introduced a single exhibit, called only two lay witnesses who knew their client prior to the crime, and had no expert testify. 9th Cir. Dkt. 115-3 at 506–07. The trial judge denied relief and the Idaho Supreme Court affirmed. *See State v. Creech (Creech V)*, 966 P.2d 1 (Idaho 1998), attached as Appendix F, App. 169–87.

In 1999, Mr. Creech sought federal habeas relief in district court. 9th Cir. Dkt. 12-2 at 353–57. The second amended habeas petition is the operative one, and it was filed on March 24, 2005. *Id.* at 353–445. Claim 4 challenged Mr. Creech’s resentencing counsel for their failure to present brain damage in mitigation. *Id.* at 376. In Mr. Creech’s forty-fifth claim, he alleged that the length of his confinement under a death sentence was cruel and unusual under the Eighth Amendment, with reference to *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting the denial of certiorari). *Id.* at 440–42.

While the federal habeas litigation was ongoing, Mr. Creech filed a successive state post-conviction petition, asserting the *Lackey* claim. 9th Cir. Dkt. 21-2 at 122–

51. Eventually, the Idaho courts denied relief. *See Creech v. State (Creech VI)*, 51 P.3d 387 (Idaho 2002), attached as Appendix E, App. 164–68. The Idaho Supreme Court found the *Lackey* claim procedurally barred on the ground that it should have been raised in the first petition. *See* Appendix E, App. 155–56. On March 29, 2006, the federal district court dismissed the *Lackey* claim as procedurally defaulted without any specific explanation as to why. Appendix D, App. 161–62.

In March 2010, the federal district court dismissed the habeas petition. 9th Cir. Dkt. 12-1 at 6–81. While Mr. Creech’s case was at the Ninth Circuit, this Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012). *Martinez* clarified that the errors of post-conviction attorneys can serve as cause to overcome defaults on trial-ineffectiveness claims. *See* 566 U.S. 1. The Ninth Circuit remanded the case to the district judge for him to apply *Martinez* in the first instance. 9th Cir. Dkt. 75.

On remand, Mr. Creech argued that trial and post-conviction counsel were ineffective in their handling of resentencing issues, including by failing to assert brain damage as mitigation. 9th Cir. Dkt. 115-3 at 437–60; Dist. Ct. Dkt. 318. In support, Mr. Creech proffered substantial evidence of brain damage. Most significantly, Mr. Creech submitted a declaration by Dr. Craig Beaver, a neuropsychologist. 9th Cir. Dkt. 127-1 at 846–65. Dr. Beaver was the first mental-health professional to administer on Mr. Creech “a comprehensive neuropsychological examination.” *Id.* at 862. In light of his examination, Dr. Beaver opined that Mr. Creech suffered from a traumatic brain injury when he was five years old and fell down a flight of stairs. *Id.* at 849–50, 862. He landed on

concrete and was diagnosed with a cerebral concussion, but was then “taken from the hospital by his family without medical permission.” *Id.* at 850. As a result of this accident and a number of others, as well as electroshock therapy at an asylum as an adolescent, Mr. Creech’s brain was damaged, most likely “a frontal-lobe-type deficit.” *Id.* at 864. Dr. Beaver explained how Mr. Creech’s brain damage compromised his “decision making, weighing of risk, and emotional regulation.” *Id.* at 863. In Dr. Beaver’s view, those impairments were germane to Mr. Creech’s offense, because they would contextualize Mr. Creech’s “response to the assault by David Jensen” by supplying “an understanding as to why Mr. Creech did not stop his attack of Mr. Jensen once Mr. Jensen was incapacitated.” *Id.* at 864.

Dr. Beaver’s assessment was confirmed by reports from Dr. Jonathan Pincus, a neurologist, and Dr. Michael Gelbort, a neuropsychologist. After running Mr. Creech through a series of tests, Dr. Pincus concluded that Mr. Creech suffered from “bilateral brain damage,” which diminished “his capacity to plan well,” and undermined his “insight, judgment, and capacity to exercise social inhibitions.” 9th Cir. Dkt. 12-2 at 262. For his part, Dr. Gelbort offered his own expert opinion that Mr. Creech’s deficits were reflective of brain dysfunction that “limit[ed] [his] ability to think/behave in a logically reasonable and adaptive fashion.” *Id.* at 258.

In January 2016, the district court denied relief without holding an evidentiary hearing, Appendix C, App. 77–128, and in March 2017 it denied a subsequent motion for reconsideration, Appendix B, App. 46–76. As relevant here, the district court considered whether the ineffectiveness claim had been

“fundamentally alter[ed]” under Ninth Circuit precedent by the new evidence of brain damage such that it had “a significantly different and stronger evidentiary posture than it had in state court,” which would render the claim unexhausted and defaulted and therefore subject to a *Martinez* excuse. Appendix C, App. 107–08 (citing *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc)). The district court determined that no such fundamental alteration had occurred. *Id.* at 123–24. It reasoned that the new brain-damage evidence did “very little to alter the evidentiary posture of the” claim. *Id.* at 123.

Mr. Creech re-opened the appeal and the Ninth Circuit affirmed in a published opinion. *See Creech*, 59 F.4th 372. The Ninth Circuit reviewed the new evidence on brain damage introduced in federal habeas proceedings and concluded that it did not sufficiently improve the ineffectiveness claim so as to render the claims defaulted, meaning that *Martinez* did not apply to the facts. *See id.* at 388. In so finding, the Ninth Circuit reasoned that “[t]he new evidence introduced on federal habeas review in support of Creech’s argument that he suffers from brain damage and an organic brain disorder was largely duplicative of evidence that had been introduced during his 1982 sentencing and his 1995 resentencing.” *Id.* The Ninth Circuit acknowledged that Dr. Brown testified at the resentencing that Mr. “Creech was a psychopath.” *Id.* “Under our case law,” the Ninth Circuit recognized, “that testimony, standing alone, could have been aggravating rather than mitigating evidence.” *Id.* However, the Ninth Circuit maintained that Dr. Brown’s testimony “was, on the whole, mitigating,” in part because he also advised the

sentencing court “that there was probably a biological contribution to Creech’s mental state and behavior.” *Id.* at 389.²

On Mr. Creech’s *Lackey* claim, the Ninth Circuit denied a certificate of appealability because “neither the Supreme Court nor the Ninth Circuit has ever held that the duration of a death row inmate’s confinement prior to execution amounts to cruel and unusual punishment.” *Id.* at 394.

REASONS FOR GRANTING THE WRIT

I. The psychopathy issue warrants review.

More than twenty years ago, Judge Posner described antisocial personality disorder in a capital case as “fancy language for being a murderer.” *Lear v. Cowan*, 220 F.3d 825, 829 (7th Cir. 2000). That is exactly right, and it is why “no competent capital defense attorney would ever pursue a diagnosis of ASPD or label his client a psychopath in mitigation of punishment.” Kathleen Wayland & Sean D. O’Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 Hofstra L. Rev. 519, 530 (2013). Nevertheless, the Ninth Circuit below characterized psychopathy as *mitigating*. Its decision to do so was consistent with caselaw from the Sixth and Eleventh Circuits, but at odds with better-reasoned precedent from the Ninth Circuit itself as well as the Fifth, Eighth, and Tenth Circuits. Mr. Creech’s appeal cleanly presents that well-entrenched division in the circuit courts.

² In this petition, unless otherwise noted, all internal quotation marks and citations are omitted and all emphasis is added.

A. There is disagreement between and within the circuit courts on whether psychopathy is categorically aggravating or not.

There is a longstanding and irreconcilable conflict among circuit court opinions on whether a defendant's psychopathy ought to be automatically understood as aggravating, or whether it can under certain circumstances be mitigating.

On one side of the ledger are decisions by the Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits that have deemed psychopathy aggravating in capital cases without qualification. *See United States v. Fields*, 949 F.3d 1240, 1257 (10th Cir. 2019) (explaining that it “would have been critical to the defense” at a capital trial to discredit a government expert who found that the defendant “suffered from an untreatable personality disorder with anti-social and psychopathic narcissistic and dependent traits and features”); *Atwood v. Ryan*, 870 F.3d 1033, 1063 (9th Cir. 2017) (absolving counsel of ineffectiveness, as their choice not to pursue mental-health evidence kept the door from being opened to “evidence of antisocial personality disorder” because it “may be highly damaging”); *Reed v. Sec’y, Fla. Dept. of Corrs.*, 593 F.3d 1217, 1246 (11th Cir. 2010) (calling a “diagnosis of antisocial personality disorder” “not good mitigation” because it “is not mitigating but damaging”); *Foster v. Johnson*, 293 F.3d 766, 781 (5th Cir. 2002) (rejecting an ineffectiveness claim where trial counsel chose to avoid “further psychiatric investigation” as “fruitless and potentially harmful” when existing records included a diagnosis of “Conduct Disorder and Personality Disorder with Antisocial and Narcissistic Features”); *Guinan v. Armontrout*, 909 F.2d 1224, 1230 (8th Cir. 1990)

(“Evidence of an antisocial personality disorder might well have reinforced the state’s position that [the defendant] was a dangerous individual,” and it was “highly doubtful” that such material “would be considered mitigating by a jury”).

On the other side of the ledger are opinions from the Sixth, Ninth, and Eleventh Circuits that have regarded psychopathy as mitigating while dealing with the exact same category of claims (ineffective assistance) in the exact same context (capital habeas cases). *See Esparza v. Sheldon*, 765 F.3d 615, 624 (6th Cir. 2014) (positing that “there often will be cases where [ASPD’s] mitigation value exceeds its harmful effects,” as in the appeal at bar, where the condition “helps diminish [the defendant’s] moral responsibility for his actions”); *Morton v. Sec’y, Fla. Dept. of Corrs.*, 684 F.3d 1157, 1168 (11th Cir. 2012) (upholding a state court’s decision that “reasonably ruled that antisocial personality disorder is a valid mitigating circumstance for trial courts to consider and weigh”); *Lambright v. Schriro*, 490 F.3d 1103, 1125 (9th Cir. 2007) (classifying defense counsel’s performance as deficient in part because he failed to recognize ASPD as “a mitigating factor”).

It is a particularly striking sign of the confusion in this area of law that two circuits—the Ninth and the Eleventh—have decisions on both sides of the line. And the Eleventh Circuit’s jurisprudence is especially valuable for illustrating the inconsistency and its problematic consequences. The Eleventh Circuit has regularly discarded ineffectiveness claims on the reasoning that counsel justifiably avoided a presentation that would have painted the defendant as having ASPD and thereby harmed the case for life. *See Evans v. Sec’y, Dept. of Corrs.*, 703 F.3d 1316, 1332

(11th Cir. 2013) (taking that approach because ASPD “is a trait most jurors tend to look unfavorably upon, that is not mitigating but damaging”); *Cummings v. Sec’y for Dept. of Corrs.*, 588 F.3d 1331, 1368 (11th Cir. 2009) (discerning no prejudice on an ineffectiveness claim because the highlighted evidence “left” the petitioner “mainly with a diagnosis of antisocial personality disorder, which is not mitigating but damaging”); *see also Reed*, 593 F.3d at 1246 (same). At the same time, when confronted with defense counsel who in fact did suggest to the jury that their client was antisocial, the Eleventh Circuit has rebuffed the claim on the diametrically opposite rationale: that “antisocial personality disorder is a valid mitigating circumstance for trial courts to consider and weigh.” *Morton*, 684 F.3d at 1168.

It is difficult to see how the same condition in the same area of law in the same circuit (involving the same state of Florida) can both be “not mitigating but damaging,” *Evans*, 703 F.3d at 1332, and simultaneously “a valid mitigating circumstance,” *Morton*, 684 F.3d at 1168. In the Eleventh Circuit, it appears that ASPD is either mitigating or aggravating depending solely on which view permits the court to deny relief to the inmate. That malleability underscores the uncertainty in the law, and thus the need for clarity from this Court. The Ninth Circuit has also grappled with the difficulty of the question, observing that “there is a substantial tension between the implications of [ASPD] being seen as a ‘can’t help’ characteristic,” which would make it mitigating, and “what are the frequent accompaniments of this condition,” which are all aggravating. *Harris v. Pulley*, 885 F.2d 1354, 1383 (9th Cir. 1988).

It is a confusion that has infected the state courts as well. State courts of last resort in Indiana, Pennsylvania, Tennessee, and Washington have all classified psychopathy as at least sometimes mitigating. *See Commonwealth v. Robinson*, 82 A.3d 998, 1018 (Pa. 2013); *Ward v. State*, 969 N.E.2d 46, 64 (Ind. 2012); *State v. Cauthern*, 967 S.W.2d 726, 740 (Tenn. 1998); *State v. Benn*, 845 P.2d 289, 315–16 (Wash. 1993) (en banc); *Clisby v. State*, 456 So. 2d 99, 101–02 (Ala. Crim. App. 1983). Contrastingly, the high courts of Illinois and South Dakota have issued opinions in which psychopathy surfaces as an invariably aggravating factor. *See State v. Manning*, 985 N.W.2d 743, 759 (S.D. 2023); *People v. Thomas*, 687 N.E.2d 892, 905 (Ill. 1997). Other state courts have searched vainly for a happy medium and in the process only underscored the lack of clarity in this area. The North Carolina Supreme Court, for instance, declared that it was improper for a trial judge to find a sociopathic personality to be aggravating because it qualified as a psychological disorder, and yet still thought it acceptable for the judge to find the symptoms of the same condition, such as “antisocial . . . behavior,” to be aggravating. *State v. Todd*, 326 S.E.2d 249, 256 (N.C. 1985). That puzzling result sums up the inconsistency on the subject in the lower courts.

There is no need for the issue to percolate further. The citations above are scattered from 1983 to 2023, reflecting a comprehensive incubation period. Furthermore, the citations encompass the six circuits that produce an overwhelming majority of the capital habeas cases in the federal appellate system: the Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh. Of the twenty states in the

country with more than ten people each on their death rows, seventeen of them are in one of the listed circuits. *See* Death Penalty Information Center, The Death Penalty in 2022: Year End Report, available at <https://dpic-cdn.org/production/documents/reports/year-end/Year-End-Report-2022.pdf>. None of the remaining three states in the twenty—North Carolina, South Carolina, and Pennsylvania—have had an execution in the last ten years. *See* Death Penalty Information Center, Execution Database, available at <https://deathpenaltyinfo.org/database/executions>. Simply put, the question has been exhaustively addressed over many years in all of the federal jurisdictions where it most matters: those in which inmates live or die based on the answer.

Finally, the question is an important one of nationwide significance. Ineffective assistance of counsel is “the most common ground for relief sought in habeas petitions.” Joel Mallord, *Putting Plea Bargaining on the Record*, 162 U. Pa. L. Rev. 683, 687 (2014). It is accordingly essential to bring uniformity to the circuit courts’ handling of ineffectiveness claims in the numerous habeas cases on their dockets. And it is even more essential when it comes to “the death penalty, which is unique in its severity and irrevocability.” *Kennedy v. Louisiana*, 554 U.S. 407, 428 (2008). It is unacceptable that an inmate in Tennessee whose attorney presented him to the jury as a psychopath will be executed while a prisoner in neighboring Arkansas whose lawyer did the same will obtain Sixth Amendment relief, merely because one crime took place in the Sixth Circuit and the other the Eighth.

There is scant guidance from this Court to assist lower judges. Some authorities believe that this Court endorsed the conception of psychopathy as mitigating in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). See *Morton v. State*, 789 So.2d 324, 329–30 (Fla. 2001). However, the majority opinion in *Eddings* refers to ASPD in a single sentence, in which the Court merely recites the facts. See 455 U.S. at 107 (“A state psychologist stated that Eddings had a sociopathic or antisocial personality disorder and that approximately 30% of youths suffering from such a disorder grew out of it as they aged.”). There is no commentary on ASPD, let alone a finding that it is mitigating. The holding of *Eddings* was to find it unconstitutional for the trial judge to refuse to consider the inmate’s “family history,” *id.* at 113, which has nothing to do with ASPD. Youth is the only mitigating theme discussed in the opinion, *id.* at 115–16—again, not ASPD. In a word, *Eddings* does not speak to the question presented.

Insofar as *Eddings* is relevant, it would only mean that this Court’s cases are in tension with one another, which would be an even stronger reason for certiorari review. In *Darden v. Wainwright*, 477 U.S. 168, 186 (1986), the Court rejected an ineffectiveness claim because trial counsel reasonably kept the door closed to evidence that the defendant had a “sociopathic type personality.” Judge O’Scannlain has fairly read *Darden* as standing for the holding that “counsel’s decision not to present mitigating character or mental-state evidence was sound trial strategy because it would have opened the door to damaging rebuttal evidence, including a psychiatric opinion that the defendant had a sociopathic personality.”

Correll, 539 F.3d at 963 (O’Scannlain, J., dissenting). In Judge O’Scannlain’s view, *Darden* supports the proposition that ASPD is, “[i]n its best possible light, . . . a basket of cobras.” *Id.* at 963. Of note, Judge O’Scannlain also cited six different published decisions from the Ninth Circuit that likewise painted ASPD as aggravating rather than mitigating. *See id.*

There is either no direction from the Court on the ASPD issue, or a conflicting pair of decisions that is giving rise to confusion and dissension in the circuits. Either way, the conflict in the circuit courts has been fully aired and urgently demands resolution here.

B. Mr. Creech’s case is an optimal vehicle for resolving the issue.

The present appeal frames the circuit split in a straightforward fashion and gives the Court a solid foundation for resolving the key constitutional question.

In the opinion below, the Ninth Circuit declined to grant relief on Mr. Creech’s brain-damage claim because the relevant mitigating evidence was supposedly “duplicative of evidence that had been introduced during his 1982 sentencing and his 1995 resentencing.” *Creech*, 59 F.4th at 388. To justify that outcome, the Ninth Circuit considered the testimony that Dr. Brown delivered for the defense at Mr. Creech’s resentencing. There, Dr. Brown testified—in the Ninth Circuit’s words—“that Creech was a prototypical or classic psychopath.” *Id.* at 389. Nonetheless, the Ninth Circuit classified Dr. Brown’s contribution as “on the whole, mitigating.” *Id.* The very next line of the opinion is that Dr. Brown “testified that there probably was a biological predisposition for Creech’s psychopathy.” *Id.* In

other words, the Ninth Circuit plainly understood psychopathy to be mitigating in Mr. Creech's case.

That understanding is what places the opinion below in the camp of circuits believing that there are “cases where [ASPD's] mitigation value exceeds its harmful effects,” *Esparza*, 765 F.3d at 624, as opposed to the circuits in which ASPD is in an absolute sense “not good mitigation” because it “is not mitigating but damaging,” *Reed*, 593 F.3d at 1246. Since the opinion below definitively chose a side in the debate, the case is the ideal platform to settle the disagreement.

The case is also a good vehicle in the sense that the mitigation presentation put on in state court for Mr. Creech was unusually weak. That is to say, it would be a more complicated situation for certiorari purposes if state-court counsel had offered a legitimate mitigation case and psychopathy was simply one insignificant element of it. For then, it would be more difficult to reach the psychopathy question, since the evidentiary posture of the ineffectiveness claim as a whole would not have been fundamentally altered. But that problem is not present, because state-court counsel's presentation was anemic by any measure.

To begin with resentencing counsel, they called only four witnesses at the hearing—including Mr. Creech himself—and introduced only three exhibits. 9th Cir. Dkt. 12-3 at 511. The three lay witnesses gave shallow, incomplete accounts of Mr. Creech's background. In their brief direct examination of Mr. Creech, resentencing counsel focused entirely on his disciplinary history in prison. 9th Cir. Dkt. 21-2 at 288–90. There was no discussion of Creech's background or why he

might have turned out the way he had. The next witness, Mr. Creech's brother-in-law Michael Plageman, spoke only to how Mr. Creech was a nice man and a talented artist. *Id.* at 290–91(a). During her stint on the stand, Mr. Creech's sister, Virginia Plageman, was taken through a superficial, poorly guided overview of only one or two areas of mitigation, completely unverified by any records or other testimony. 9th Cir. Dkt. 12-3 at 513–18. Resentencing counsel did not call a single other family member, despite describing Mr. Creech's mother earlier as a “necessary and material” witness.” *Id.* at 572.

Though the bar was low, post-conviction counsel managed to perform even worse. Those attorneys were able to muster only eight pages for their post-conviction petition and a single exhibit for the evidentiary hearing. 9th Cir. Dkt. 21-2 at 255; 9th Cir. Dkt. 115-3 at 507. They did not gather a host of important and rudimentary records. 9th Cir. Dkt. 21-2 at 223–25. And at the evidentiary hearing, their two lay witnesses gave brief, unfocused testimony and were profoundly lacking in credibility. *Id.* at 154–64. One of them, Mr. Creech's ex-wife Emma Asbrock, testified that she had “been exposed to top-secret information while building jet airplane engines at General Electric.” *Id.* at 157. The other, Mr. Creech's daughter Shelley Creech, testified that she was on disability because of schizophrenia and borderline personality disorder, agreed with the prosecutor's statement that drugs were for her “a pretty serious problem . . . for a lot of years,” and volunteered that she had not “been in bed for four days.” *Id.* at 160, 162, 163.

In summary, these are attorneys who fell miles short of “their obligation to conduct a thorough investigation of the defendant’s background.” *Wiggins v. Smith*, 539 U.S. 510, 522 (2003). It is thus unsurprising that they were found ineffective by a federal district court in another case where they similarly allowed their client to be painted as antisocial rather than suffering from brain damage. *See generally Row v. Miller*, No. 1:98-cv-240, 2021 WL 4553117 (D. Idaho Sept. 30, 2021).

Because state-court counsel at both the resentencing and the initial post-conviction proceeding did so little in the way of mitigation, the damaging effect of the psychopathy label is especially stark. Put differently, the mitigation offered was so sparse that the injury counsel did to their own client through psychopathy was as intense as it could have been, placing the question presented at the heart of the case. In the same vein, the Ninth Circuit found that the ineffectiveness claim had not been fundamentally altered after comparing the *mitigating* evidence introduced in state court (at least as the panel understood it) with the *mitigating* evidence introduced in federal court. *See Creech*, 59 F.4th at 389. The Ninth Circuit did not rest its determination on an assessment of the *aggravating* evidence brought forth by the prosecution. Had it done so, we would now have a more complicated equation implicating a whole other set of facts. But because the Ninth Circuit kept the inquiry narrow, it is narrow here as well: was the mitigation presentation in federal habeas sufficiently stronger than in state court so as to fundamentally alter the ineffectiveness claim? That inquiry turns directly on the question presented regarding psychopathy and whether it is aggravating or mitigating.

Another factor strengthening the appeal as a suitable vehicle is the simplicity of the standard of review. The question the Ninth Circuit was grappling with was whether the “previously exhausted claim” of ineffective assistance of counsel at sentencing had been “supplemented on federal habeas with sufficient new supporting evidence” such that “the claim could be transformed into a new, unexhausted, and procedurally defaulted claim.” *Id.* at 388. That question was by definition never taken up by the state courts, since the evidence was not presented in Mr. Creech’s initial post-conviction petition and consequently was not subject to a merits analysis under Idaho’s post-conviction regime. It follows that there are no impediments in the case concerning comity. *See, e.g., Cullen v. Pinholster*, 563 U.S. 170, 202 (2011) (reiterating that federal habeas review of state court decisions does not turn solely on the merits of the constitutional issue but rather on the high bar of unreasonableness). Instead, the Ninth Circuit conducted its own de novo consideration of whether the psychopathy theme was mitigating or not. So, too, can this Court, rendering the case an ideal vehicle. *Compare Peede v. Jones*, 138 S. Ct. 2360, 2361 (2018) (Sotomayor, J., respecting the denial of certiorari) (agreeing with the denial of certiorari because the comity restrictions in federal habeas precluded the Court’s ability to fully review the case, even though the lower court’s approach was “deeply concerning”).

C. The Court should rein in the deviating circuit panels.

Apart from the ever-present importance of resolving circuit splits for its own sake, there are significant additional reasons for the Court’s involvement here.

To begin, it is particularly imperative for the Court to reconcile the split described above because inmates like Mr. Creech who get unlucky panel draws are being wrongly sent to their deaths. The courts that have found psychopathy to be mitigating are simply mistaken. It is a profoundly aggravating label. At the risk of stating the obvious, it is inequitable for defendants to lose their lives as a result of a widespread misunderstanding in the circuits.

What is more, there is a compelling basis for the Court to intercede in the name of science. The question of whether a certain type of evidence is mitigating or aggravating is an empirical one. That is to say, evidence is aggravating if juries see it as such and it is mitigating if juries see it as such. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality op.) (interpreting the Eighth Amendment to require that “the sentencer in all capital cases” be allowed to give “independent mitigating weight to aspects of the defendant’s character and record and to circumstances of the offense proffered in mitigation”).

Although the courts above on the wrong side of the split have ignored it, there is a large and consistent body of evidence proving that juries regard psychopathy as aggravating. *See, e.g.,* Shannon E. Kelley et al., *Dangerous, depraved, and dead-worthy: A meta-analysis of the correlates of perceived psychopathy in jury simulation studies*, 75(4) J. Clin. Psychol. 627, 629 (2019) (reporting on how jurors react to being told that defendants are psychopaths with “more negative attitudes toward these defendants” and by wanting “more punitive legal consequences for them (e.g., greater support for capital punishment”); John F.

Edens et al., *No sympathy for the devil: Attributing psychopathic traits to capital murderers also predicts support for executing them*, 4(2) *Personality Disorders: Theory, Research, & Treatment* 175, 175 (2013) (proving that capital jurors who regard a defendant as a psychopath are far more likely to sentence him to death); John F. Edens et al., *Bold, smart, dangerous and evil: perceived correlates of core psychopathic traits among jury panel members*, 7(2) *Personality & Mental Health* 143, 143, 150 (2013) (showing that laypeople associate psychopathy with evil, violence, and danger). Against this uniform corpus, the opposing view has no scientific support. The courts that have portrayed psychopathy as mitigating have done so based on their own assumptions—not on any scientific literature.

Recently, this Court has taken pains to ensure that scientific realities are acknowledged in the caselaw regarding mitigating and aggravating evidence at capital sentencings. It has done so in the context of intellectual disability, a condition that categorically exempts defendants from the death penalty. *See Atkins v. Virginia*, 536 U.S. 304, 316 (2002). With respect to intellectual disability, the Court has reaffirmed that its precedent does not “license disregard of current medical standards.” *Moore v. Texas*, 581 U.S. 1, 13 (2017). It is no more justifiable for the courts to ground their decisions about psychopathy in erroneous lay perceptions about how the descriptor resonates with juries. Just as there is a scientific truth about who is intellectually disabled, there is a scientific truth about how juries process psychopathy. They process it as aggravating, and the precedent should reflect as much. As indicated by the caselaw surveyed above, the circuits

need the same reminder that this Court has vigilantly provided in its intellectual-disability cases. *See generally Moore v. Texas*, 139 S. Ct. 666 (2019) (per curiam); *Hall v. Florida*, 572 U.S. 701 (2014).

There is also a need for the Court to reiterate to the circuits the significance of the criminal defense community's views in this area. Since the split at issue arises in the context of ineffective assistance of counsel, it is appropriate for the Court to consider the “[p]revailing norms of practice” among criminal defense attorneys. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

Those norms unequivocally direct defense attorneys to avoid communicating to juries that their clients are psychopaths. *See, e.g.*, Sean D. O’Brien & Kathleen Wayland, *Implicit Bias and Capital Decision-Making: Using Narrative to Counter Prejudicial Psychiatric Labels*, 43 Hofstra L. Rev. 751, 756 (2015) (encouraging defense attorneys to “always contest the admissibility” of psychopathy evidence because of “the distorting effect of dehumanizing labels”); John H. Blume & David P. Voisin, *Avoiding or Challenging a Diagnosis of Antisocial Personality Disorder*, *Champion*, Apr. 2000, at 69 (referring to the use of ASPD at capital sentencing hearings as “the kiss of death”); Russell Stetler, *Capital Cases*, *Champion*, Apr. 1999, at 55 (advising defense attorneys to “look behind the misleading and harmful labels which have been applied to the client,” such as ASPD); *see generally* Craig Haney, *The Social Context of Capital Murder: Social Histories as the Logic of Mitigation*, 35 Santa Clara L. Rev. 547 (1995) (similar).

It is understandable why some circuit panels have strayed from the well-founded conclusions of the scientific and criminal defense communities and depicted psychopathy as mitigating. They detect in psychopathy a commonality with other psychological conditions that clearly are mitigating and that also, like psychopathy, connect the defendant's mental condition to his commission of the offense. The Sixth Circuit exemplified this approach when it wrote that it was reasonable of defense counsel to use ASPD as part of strategy to reduce "blameworthiness for a brutal crime by leveraging an uncontested psychiatric diagnosis to explain how [defendant] developed and why." *See Carter v. Bogan*, 900 F.3d 754, 778 (6th Cir. 2018). And the Ninth Circuit below followed a similar path. *See Creech*, 59 F.4th at 389 (deeming psychopathy mitigating because it provided "evidence of mental dysfunction caused by factors beyond a defendant's control").

But what these decisions do not appreciate—and what the better-reasoned ones cited above do—is that the very *definition* of psychopathy is fundamentally and ineluctably aggravating. One need look no further than the descriptions given in connection with capital trials themselves. In a Supreme Court case, a Georgia psychologist testified that a psychopath is "just as determined to do evil as a preacher is determined to do [good]." *Burger v. Kemp*, 483 U.S. 776, 791 n.9 (1987). A psychiatric report prepared for a Mississippi capital trial explained that ASPD is "a category describing people in conflict with the mores of society who are selfish, callous, irresponsible, impulsive, and unable to feel guilt or to learn from experience and punishment." *Jordan v. Epps*, 756 F.3d 395, 399 (5th Cir. 2014). Tennessee

mental-health professionals called by the State at a capital sentencing described persons with ASPD as having “no conscience,” being “self centered,” being “notoriously dishonest and untruthful,” and having “very little regard for the feelings of others and . . . willing to use any means to get what they want, no matter who it hurts.” *Hodges v. Colson*, 727 F.3d 517, 524 (6th Cir. 2013). These highly unflattering accounts are fully in keeping with the one outlined at Mr. Creech’s trial, where Dr. Brown testified that such individuals “break the law continually” and are “often callused with regards to other people.” Appendix H, App. 240.

It does not take much imagination to grasp why juries are put off by defendants whose “condition” is essentially a laundry list of tremendously negative qualities. And the aggravating impact of psychopathy is deepened further by the fact that it “does *not* infer a severe mental disease” because “[i]t’s really personality characteristics that meet certain criteria.” *Guinan*, 909 F.2d at 1229. Stated differently, to be a psychopath is simply to be a bad person, full stop. The nomenclature of psychopathy is, as one prosecutor testified, “most appealing to” the government, since the “words alone are a wonderful argument for a jury,” considering that the “definition” is that of someone who “does not feel remorse,” which is “hard to spin . . . as positive or sympathetic.” *Kimbrough v. Sec’y, Fla. Dep’t of Corrs.*, 565 F.3d 796, 801 (11th Cir. 2009). It is no coincidence that in numerous cases cited here, and many others, prosecutors have been the ones seizing on psychopathy as their message to convey to the jury at penalty-phase proceedings.

Contrary to the Ninth Circuit's supposition below, psychopathy is not transformed from aggravation to mitigation just because there is a "biological contribution" to the phenomenon. *Creech*, 59 F.4th at 389. For one thing, every mental condition has *some* kind of a "biological contribution." The brain is a physical organ, and it is obviously at the core of any such condition in one way or another. More to the point, when a jury is told that a defendant is a bad person (as psychopathy essentially tells them) then it hardly alters the equation for them to hear that there is a biological aspect to him being a bad person.

In that regard, *United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000), is an instructive case, both for revealing the error in the opinion below and for underscoring the circuit split. In *Barnette*, a government expert testified at a capital sentencing that the defendant was a psychopath, i.e., an individual who was "very callous, manipulative, [and] calculating," and who "will often exploit other people." *Id.* at 822. The expert further opined that the personality type was in part a function of how individuals "biologically" respond to stimuli. *Id.* Because the defense was not permitted to rebut the testimony with their own expert, the Fourth Circuit vacated the death sentence. In so doing, the court observed that the government expert's testimony was "as damning as it could be." *Id.* at 825. The testimony was not made less damning by the "biological" element of psychopathy, as the Ninth Circuit believed it was here. Instead, the *Barnette* court properly recognized that it was aggravating to be termed at a capital sentencing a

“psychopath who felt no remorse or guilt,” *id.*, and the same is true in the case at bar and in the many others arrayed here on the erroneous side of the split.

There is another feature of the decision below that points to either a gap in this Court’s precedents or a need for clarification in the law. The Ninth Circuit treated psychopathy and brain damage as virtually interchangeable, in that both relate to a “mental dysfunction caused by factors beyond a defendant’s control.” *Creech*, 59 F.4th at 389. Brain damage, though, is a very different creature from psychopathy. For brain damage is a broad disability that affects an individual in all sorts of ways. Some of those ways potentially help to explain the commission of a murder, by showing—for example—that a defendant’s judgment was impaired, or he was prone to act impulsively, or he had less ability to appreciate the wrongfulness of his action. *See, e.g., Ferrell v. Hall*, 640 F.3d 1199, 1235 (11th Cir. 2011) (granting relief on an ineffectiveness claim because counsel failed to provide to the jury evidence of brain damage and other conditions that would have “reduce[d] the volitional nature of the crime, as well as [the defendant’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”). Other effects of brain damage might be mitigating in the more diffuse sense of generating sympathy for a defendant simply because he faces challenges in his life through no fault of his own. *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (outlawing under the Eighth Amendment “[a] process that accords no significance to relevant facets of the character and record of the individual offense” because it “excludes from

consideration . . . the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind”).

None of that can be said about psychopathy. Psychopathy is not a general disability that can be used to illuminate certain bad behavior in a sympathetic fashion—it is nothing more than a word for a person who commits the bad behavior. That is why courts routinely refer to “antisocial conduct” or “antisocial behavior” as a shorthand for *criminal* conduct and *criminal* behavior. See, e.g., *Gregg v. Georgia*, 428 U.S. 227, 238 (1976) (Marshall, J., dissenting) (exploring whether the death penalty discourages “antisocial conduct”); *California v. Byers*, 402 U.S. 424, 453 (1971) (Harlan, J., concurring) (discussing the “deterrence of antisocial behavior through criminal sanctions”). No one would ever think to use a phrase like “brain-damaged conduct” or “brain-damaged behavior” in the same way—that is, as synonymous with criminal activity.

The particular facts of Mr. Creech’s case serve as a neat embodiment of the problems with conflating brain damage and psychopathy. According to the testimony from Dr. Brown, resentencing counsel’s expert, Mr. Creech was a “classic psychopath,” that is, a member of a group of people who “break the law continually,” who are “often callused with regards to other people,” and who have a “lack of remorse.” 9th Cir. Dkt. 12-3 at 523, 531. By contrast, the brain-damage evidence adduced in federal court established how Mr. Creech’s neurological disability undermined his “decision making, weighing of risk, and emotional regulation,” as well as “his capacity to plan well,” his “insight, judgment, and capacity to exercise

social inhibitions,” and his “ability to think/behave in a logically reasonable and adaptive fashion.” 9th Cir. Dkt. 127-1 at 863; 9th Cir. Dkt. 12-2 at 258, 262.

All of those problems related to brain damage directly diminish the aggravation present in a case where the sentencer initially found that the victim “instigate[d] the fight with the victim” and “the victim, without provocation, attacked him.” 9th Cir. Dkt. 12-1 at 193. For all of them help to clarify why Mr. Creech’s reaction was so disproportionate and violent. 9th Cir. Dkt. 127-1 at 864. That is textbook mitigation. *See Boyde v. California*, 494 U.S. 370, 382 (1990) (stating that mitigating evidence “is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to . . . emotional and mental problems, may be less culpable than defendants who have no such excuse” (emphasis removed)). On the other hand, psychopathy served no purpose at Mr. Creech’s resentencing aside from stressing that the defendant was “callused” and had a “lack of remorse,” 9th Cir. Dkt. 12-3 at 523, 531, which is textbook *aggravation*. *See, e.g., Burr v. Pollard*, 546 F.3d 828, 832 (7th Cir. 2008) (“[A] lack of remorse” is “properly considered at sentencing because it speaks to traditional penological interests such as rehabilitation (an indifferent criminal isn’t ready to reform) and deterrence (a remorseful criminal is less likely to return to his old ways)”).

In the same regard, it is important to clarify what was said at Mr. Creech’s resentencing about brain damage. Below, the Ninth Circuit intimated that a brain-damage presentation was made in mitigation at the resentencing. *See Creech*, 59

F.4th at 389 (including “organic brain disorder” in a list of themes supposedly introduced at the resentencing). That is quite misleading, as the defense essentially *repudiated* the presence of brain damage in state court.

At the resentencing, the only comment on brain damage made by the relevant defense expert (Dr. Brown) was that a *different* expert (Dr. Stoner) had administered a test more than ten years earlier in connection with the original sentencing and that “occasionally people with brain damage” had similar results as Mr. Creech but that the test was now “seen as not a very good indicator of brain damage.” Appendix H, App. 238. As for Dr. Stoner’s testimony at the original sentencing in 1982, his bottom-line opinion was that Mr. Creech should be evaluated by *someone else*, who would be a “qualified” examiner for brain damage. Appendix I, App. 309. That “qualified” examiner (Dr. Thurber) who was brought in by Dr. Stoner never testified at resentencing—his findings were only referenced by Dr. Stoner. The prosecutor asked Dr. Stoner whether it was true “that Dr. Thurber is of the opinion that this defendant *does not have organic brain syndrome?*” *Id.* at 320. “My understanding,” Dr. Stoner responded without disagreement, “was that there was no organic brain syndrome which is related to this crime.” *Id.*

In overview, the “presentation” on the subject at the resentencing consisted of an expert who expressly *discounted* any finding of brain damage at the original sentencing, and the original sentencing itself centered on an expert who expressly *denied* the presence of any relevant brain damage. The idea that this approach qualifies as a presentation on brain damage in any meaningful fashion is fanciful.

Resentencing counsel effectively jettisoned any brain-damage defense and chose to throw their lot in with an expert who testified that Mr. Creech was a “classic psychopath.” Appendix H, App. 240. The case is accordingly a perfect vehicle for exploring the crucial distinction between psychopathy and brain damage.

In other cases, the Ninth Circuit has gotten the distinction right. *See Caro v. Woodford*, 280 F.3d 1247, 1257 (9th Cir. 2002) (finding trial counsel ineffective where they failed to present brain damage evidence and instead elicited testimony that “tended, rather, to paint [the defendant] as a violent psychopath”); *Wallace v. Stewart*, 184 F.3d 1112, 1115–18 (9th Cir. 1999) (similar). But the fact that the panel below missed the distinction, along with the other panels cited earlier, shows that the law is not yet sufficiently well-defined on the question.

This Court has repeatedly addressed brain damage as a mitigating factor in ineffectiveness cases dealing with capital sentencings. *See Sears v. Upton*, 561 U.S. 945, 945, 949 (2010) (per curiam); *Porter v. McCollum*, 558 U.S. 30, 36, 41, 43 (2009); *Rompilla v. Beard*, 545 U.S. 374, 392 (2005). In all of those cases, defense attorneys were found ineffective in part for their failure to present evidence of brain damage. None of those cases refer to psychopathy. It would be odd if the rule is that defense attorneys are ineffective for neglecting to offer evidence of brain damage *except* when they also characterize their own client to the sentencer as being a psychopath. If psychopathy and brain damage are distinct, as all of the evidence and many circuit decisions indicate they are, then it is incumbent upon the Court to say so. And if they are fungible, as the panel below felt they were and as

the Eleventh Circuit has proclaimed, that too calls for elucidation. In either event, there is a pressing need for this Court to address psychopathy head on and clarify its status at capital sentencings, just as it did for brain damage in earlier cases.

II. The *Lackey* issue warrants review.

Multiple Justices have repeatedly and over many years expressed concern about the dehumanizing effects of lengthy periods in solitary confinement on death row, and the arbitrariness of who lives and who dies when the process takes so long. *See, e.g., Ruiz v. Texas*, 137 S. Ct. 1246, 1247 (2017) (Breyer, J., dissenting); *Davis v. Ayala*, 576 U.S. 257, 286–90 (2015) (Kennedy, J., concurring); *Lackey*, 514 U.S. at 1045 (Stevens, J., respecting the denial of certiorari). It is time to take the matter up, and Mr. Creech’s case is a fitting occasion to do so.

On the merits of the claim, there is a strong originalist argument for the notion that present-day delays in executions are unusual by the standards “in England at the time our Constitution was written,” when executions occurred days after sentencing. *Elledge v. Florida*, 119 S. Ct. 366, 366 (1998) (Breyer, J., dissenting); *see* Brent E. Newton, *The Slow Wheels of Furman’s Machinery of Death*, 13 J. App. Prac. & Process 41, 55–57 & nn.64–70 (2012) (establishing that the framers and the members of the founding generation “considered even delays of several months [of confinement under a death sentence] to be cruel and unusual—which reflected the prevailing view in England and the colonies at the time of America’s independence” and summarizing the views of George Washington, Thomas Jefferson, James Wilson, and John Marshall). Other Justices have

disagreed and criticized the theory. *See Knight v. Florida*, 120 S. Ct. 459, 459 (1999) (Thomas, J., concurring) (contending that there is no “support in the American constitutional tradition or in this Court’s precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed”).

As the citations above illustrate, this is a debate that has persisted at the Court for many years. During that time, delays on death row have gotten even longer. *See Glossip v. Gross*, 576 U.S. 863, 925 (2015) (Breyer, J., dissenting) (commenting on how “[t]he length of the average delay has increased dramatically over the years,” going from two years in 1960 to eleven years in 2004 to eighteen years in 2015). As a consequence, *Lackey* claims continue to regularly accrue at the Court. *See, e.g., Smith v. Ryan*, No. 16-8071, Pet. for Certiorari, filed Feb. 21, 2017. It is therefore an appropriate juncture for the full Court to step in.

Mr. Creech’s case is a good opportunity for it to do so. To begin, there are no legitimate procedural obstacles to stand in the Court’s way. Although the federal district court deemed the claim defaulted, it did so without explanation. 9th Cir. Dkt. 12-1 at 127. The Idaho Supreme Court regarded the claim as defaulted on the basis that it should have been raised in the first post-conviction petition. *See* Appendix E, App. 164–68. But the only precedent cited by the Idaho Supreme Court on the point was *McKinney v. State*, 992 P.2d 144, 150–52 (Idaho 1999), which *did* take up the merits of a *Lackey* claim that was advanced for the first time in a successive petition. Consequently, the Idaho Supreme Court plainly did not

invoke a rule that is “strictly or regularly followed,” *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988), and its decision was not adequate to preclude federal review.

Nor did the Ninth Circuit say otherwise. Although the panel mentioned the district court’s default finding, it did not endorse the same conclusion. *See Creech*, 59 F.4th at 394. Instead, the Ninth Circuit rejected the claim because “neither the Supreme Court nor the Ninth Circuit has ever held that the duration of a death row inmate’s confinement prior to execution amounts to cruel and unusual punishment.” *Id.* Thus, the only analysis relied upon by the Ninth Circuit goes straight to the heart of the constitutional theory, and it is squarely presented here. Furthermore, because no procedural default is in play, the issue is reviewed de novo, *see Cone v. Bell*, 556 U.S. 449, 472 (2009), thereby dispensing with another potential wrinkle that would otherwise have complicated certiorari review, *see, e.g., Dunn v. Madison*, 138 S. Ct. 9, 12 (2017) (Ginsburg, J., concurring) (remarking that the issue presented deserved a “full airing” but that given AEDPA’s restrictions it was not a well-suited vehicle for such an airing in its current posture).

In addition, Mr. Creech’s *Lackey* claim is an exemplary one for certiorari review because of the length and nature of his tenure on death row. For starters, Mr. Creech’s forty-one-year residence on death row has been longer than that of any of the inmates whose *Lackey* claims are cited above. Notably, it is more than double the twenty-year period described by Justice Breyer in *Knight* as “astonishingly long.” 120 S. Ct. at 461 (Breyer, J., dissenting). Given its exceptional duration, Mr. Creech’s death-row history crystallizes the *Lackey* claim.

The reasons for the delay in Mr. Creech’s case further crystalize the claim. Mr. Creech was resentenced to death twelve years after his original punishment was imposed because his federal constitutional rights were violated at the initial proceeding and no court corrected the error until the Ninth Circuit intervened after extensive litigation. *See Creech*, 947 F.2d at 881–85. The case then effectively restarted and again progressed all the way to an oral argument at the Ninth Circuit before this Court issued *Martinez*, which “represent[ed] a remarkable sea change in decades-old precedent-law which lower courts and litigants understood as settled.” *Haynes v. Thaler*, 489 F. App’x 770, 776 (5th Cir. 2012) (Dennis, J., dissenting), *vacated on unrelated grounds*, 569 U.S. 1015 (2013); *accord* Appendix C, App. 91 (“*Martinez v. Ryan* worked a remarkable change in the law governing procedurally defaulted [ineffectiveness] claims.”). *Martinez* compelled a remand, substantial additional proceedings in the district court, replacement briefs on appeal, a new oral argument, and a lengthy opinion from the Ninth Circuit—all of which took about eleven years to accomplish. Mr. Creech’s case therefore demonstrates how delays in executions are frequently attributable not to the prisoner’s dilatoriness but to errors and fluctuations in the judicial system and the courts’ appropriate desire to afford especially searching scrutiny to death sentences. *See Gregg*, 428 U.S. at 187 (“When a defendant’s life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed.”). It is that dynamic that makes *Lackey* claims compelling and consequently deserving of certiorari review. *Cf. Foster v. Florida*, 123 S. Ct. 470, 472 (2002) (Breyer, J., dissenting) (voting for review of a *Lackey*

claim where the duration of “confinement has resulted partly from the State’s repeated procedural errors”).

The structural delays in Idaho’s capital post-conviction scheme also make it an attractive candidate for the Court to finally take *Lackey* on in this appeal. After a death sentence is imposed in Idaho, the direct appeal is stayed while the initial post-conviction action is litigated to completion at the trial court. *See* Idaho Code § 19-2719(3), (6). The post-conviction proceeding and the direct appeal are then heard at the same time by the Idaho Supreme Court. *See id.* Very few states have anything like Idaho’s regime. *See* Joan M. Fisher, *Expedited Review of Capital Post-Conviction Claims: Idaho’s Flawed Process*, 2 J. App. Prac. & Process 85, 116–19 (2000). One byproduct of Idaho’s framework is that ineffective assistance of appellate counsel cannot be litigated in the initial post-conviction case, since the post-conviction case and the direct appeal move forward in tandem. Instead, appellate ineffectiveness must be asserted in a separate action, commenced shortly after the consolidated appeal is decided. *See* Idaho Code § 19-2719(3). As a consequence, it automatically takes several more years in Idaho for a death-row inmate’s constitutional claims to be resolved in state court than nearly anywhere else. *See, e.g., Hall v. State*, --- P.3d ----, 2023 WL 4111371 (Idaho 2023) (denying appellate-ineffectiveness claims five years after the direct appeal concluded). And because the federal statute of limitations is tolled in the meantime, *see* 28 U.S.C. 2244(d)(2), everything else is delayed as well.

Moreover, Idaho has a uniquely unforgiving avenue for successive post-conviction litigation in capital cases. A death-row inmate has only “forty-two days after the petitioner knew or reasonably could have known of [the] claim” to commence the action. *Pizzuto v. State*, 202 P.3d 642, 649 (Idaho 2008). That deadline “is the shortest in the nation.” *Hoffman v. Arave*, 236 F.3d 523, 532 (9th Cir. 2001). And it is enforced rigidly. *See, e.g., Fields v. State*, 298 P.3d 241, 243–45 (Idaho 2013) (finding a petition untimely on the basis that the prisoner should have known earlier that the lead detective deliberately destroyed a trial exhibit that constituted key forensic evidence). Inevitably, Idaho’s system generates piecemeal post-conviction cases, as counsel discover critical evidence and attempt to present it in accordance with draconian timelines, which in turn routinely leads to federal habeas stays. *See, e.g.*, Dist. Ct. Dkts. 38, 114.

These defects in Idaho’s regime have greatly extended the lifespans of capital cases there. *See Row v. Miller*, No. 1:98-cv-240, 2023 WL 274409, at *29 (D. Idaho Mar. 31, 2023) (meditating on “Idaho’s shortsighted and sometimes inadequate system of expedited justice for death penalty cases”). Idaho’s eight death-row inmates have been there for 209 years total, or an average of twenty-six years each. *See* Idaho Department of Correction, Death Row, available at <https://www.idoc.idaho.gov/content/prisons/death-row>. Most of those inmates are still far from execution dates given how much life remains in their cases. Idaho is therefore well beyond the eighteen-year death-row delay that gave Justice Breyer pause in *Glossip*. *See* 576 U.S. at 924 (Breyer, J., dissenting). The policy choices

leading to these substantial delays were not made by Mr. Creech. And although the Idaho authorities believed they were somehow “eliminating unnecessary delay” in the system, *State v. Beam*, 766 P.2d 678, 682 (Idaho 1988), their confusion over how the process works is—again—not attributable to Mr. Creech.

The conditions on Idaho’s death row reinforce the strength of the *Lackey* claim here. For many years, Mr. Creech was subjected to the unforgiving terms of the traditional model: twenty-three hours a day locked by himself in a twelve-foot-by-seven-foot cell (facing the death house) with very few visits permitted with family and loved ones other than those occurring between a glass divider and nearly every meal eaten alone. See Brandon Vines, *Decency Comes Full Circle: The Constitutional Demand to End Permanent Solitary Confinement on Death Row*, 55 Colum. J. L. & Soc. Probs. 591, 641 (2022). During most of that time, Mr. Creech’s only time “outside” was at most an hour a day in a cage by himself. Mr. Creech thus typifies the “[y]ears on end of near-total isolation” that multiple Justices have identified as the cause of “a terrible psychiatric price.” *Ruiz*, 137 S. Ct. at 1247 (Breyer, J., dissenting) (citing *Ayala*, 576 U.S. at 289 (Kennedy, J., concurring)).

The stress engendered by Mr. Creech’s isolation has been exacerbated by Idaho’s decision to obtain nine gratuitous death warrants for him over the course of sixteen years, each of which scheduled an execution even though one could obviously not be carried out as a result of ongoing collateral litigation. Some of the warrants compelled Mr. Creech and his loved ones to make arrangements for the disposition of his corpse, and one execution date came within forty-eight hours of

being carried out. More recently, Idaho's new Attorney General has trumpeted how he secured a death warrant for another prisoner for the nakedly political purpose of advancing firing-squad legislation, even while admitting at the same time that the State was unprepared to execute the inmate. *See* Media Advisory: Attorney General Raul Labrador Obtains New Death Warrant, Feb. 24, 2023, available at <https://www.ag.idaho.gov/newsroom/media-advisory-attorney-general-raul-labrador-obtains-new-death-warrant/>. “The prospect of pending execution exacts a frightful toll,” *see Foster*, 123 S. Ct. at 471–72 (Breyer, J., dissenting), and the State's cavalier exploitation of the process only sharpens the constitutional violation.

Idaho is also a posterchild for the constitutional concerns associated with the randomness generated by interminable delays in executions. *See In re Medley*, 134 U.S. 160, 172 (1890) (reflecting on how, “when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it”). Fifty death sentences have been handed down in Idaho in the modern era. *See* The DPIC Death Penalty Census, available at <https://deathpenaltyinfo.org/facts-and-research/death-penalty-census>. During the same period of time there have been only three executions in Idaho. *See* Death Penalty Information Center Execution Database, available at <https://deathpenaltyinfo.org/database/executions>. As recently as 2000, there were twenty-one people on death row in Idaho. *See* NAACP, Death Row USA, Summer 2000, available at <https://www.naacpldf.org/wp->

[content/uploads/DRUSA_Summer_2000.pdf](https://www.naacpldf.org/wp-content/uploads/DRUSA_Summer_2000.pdf). Of those twenty-one, only five remain on death row today. See NAACP, Death Row USA, Winter 2022, available at <https://www.naacpldf.org/wp-content/uploads/DRUSAWinter2022.pdf>. A substantial majority of the others were not executed but rather obtained relief or died of natural causes in prison. In *Glossip*, Justice Breyer showed how the deterrent and retributive value of the death penalty diminished significantly when only 20% of a particular pool of inmates who received the punishment were actually executed. See *Glossip*, 576 U.S. at 931–32 (Breyer, J., dissenting). Over the last twenty-three years in Idaho, the number is a much lower 6%.

It is highly implausible that an individual would be deterred from committing a murder by the thought that he might be in the tiny group of people who face a death sentence and then, if he was, he had a 6% chance of being executed forty years after the crime. See Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. Legal Stud. 283, 314–15 (2004) (concluding that “the national trend of longer death row waits is lessening the deterrent effect of capital punishment”). To be executed in such a system “is the equivalent of being struck by lightning,” *Glossip*, 576 U.S. at 923 (Breyer, J., dissenting), and thus unconstitutionally capricious.

There is a voluminous body of literature detailing the immense psychological cost exacted through solitary confinement of the sort endured by Mr. Creech for most of the last four decades. See *Williams v. Sec’y, Pa. Dep’t of Corrs.*, 848 F.3d 549, 563, 576 (3d Cir. 2017) (finding “a due process right to avoid continued

placement in solitary confinement on death row” and observing that “[n]umerous studies on the impact of solitary confinement show that these conditions are extremely hazardous to well-being”); *see also* Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. Pa. Const. L. 115, 118 (2008) (concluding that every study on solitary confinement found negative psychological effects after sixty days); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J. L. & Policy 325, 331 (2006) (“[E]ven a few days of solitary confinement will predictably shift the [brain’s] electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium.”).

In sum, if a *Lackey* claim is viable anywhere and for anyone, it is viable in Idaho and for Mr. Creech. There remains a “need for this Court . . . to consider in an appropriate case the underlying constitutional question” implicated by *Lackey* claims, *Smith v. Ryan*, 137 S. Ct. 1283, 1284 (2017) (Breyer, J., respecting the denial of certiorari), and Mr. Creech’s is just such a case.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted this 30th day of June 2023.



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