No. 23-5039

IN THE

Supreme Court of the United States

THOMAS E. CREECH,

Petitioner,

vs.

TIM RICHARDSON,

Warden.

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

BRIEF OF THE NATIONAL DISABILITY RIGHTS NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Disability Rights Network ("NDRN") is a not-for-profit organization advocating on behalf of people with disabilities for basic rights and ensuring access and accountability within the criminal justice system. NDRN has a strong interest in safeguarding the constitutional rights of all criminal defendants, especially those with physical or mental disabilities, including brain injuries. Specifically, NDRN seeks to ensure that individuals with traumatic brain injuries—often left with life-long damage that affects the way they think and act—are not criminalized or subject to discrimination based on their disabilities.[1][2]

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[1] *Amici* certify that no counsel for any party authored this brief in whole or in part, no party or its counsel made any monetary contribution intended to fund the preparation or submission of this brief, and that no person or entity other than the *amici* or their counsel made such a contribution.

[2] *Amici* certify that counsel for the respondent was provided with 10-day notice as required by the rules of this Court.

SUMMARY OF ARGUMENT

Labeling a defendant a "psychopath"[3] before a sentencer rather than exploring the defendant's medical history of traumatic brain injury can mean the difference between life and death. It certainly may for Petitioner Thomas Eugene Creech.

Capital sentencing determinations require the weighing and balancing by sentencing decision makers of mitigating circumstances that have shaped the accused against aggravating circumstances related to the crime or the defendant's history. Mislabeling Mr. Creech as a psychopath wrongly stereotyped him to the judge. Sentencers see a "psychopath" as evil, emotionless, morally deprived, and remorseless: an aggravating factor. Despite this clear prejudicial effect that has been demonstrated time and time again by researchers and anecdotal data, many misguided defense attorneys—like those that represented Mr. Creech at his sentencing—present evidence of their clients' psychopathy as purported mitigation. This extremely ill-considered strategy can have devastating effects.

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[3] During the course of his sentencings, Mr. Creech was described as having diagnoses of both psychopathy and antisocial personality disorder. *See* Pet. Writ. Cert. at 3, fn. 1. The expert at his resentencing testified that the terms "antisocial personality disorder, psychopath, and psychopathy" were "all the same thing." Appendix H, App. 240. As Mr. Creech did in his petition, *Amici* will utilize the term "psychopathy" to refer to all three disorders.

In the case of Mr. Creech and many other defendants, not only is the nomenclature of psychopathy prejudicial to the outcome of sentencing, but the diagnosis itself is, in fact, medically incorrect. The symptoms of a traumatic brain injury often mirror those of antisocial personality disorders, including psychopathy. But the cause is entirely different. This distinction is key when it comes to capital sentencing: if jurors are presented with evidence by experts that the same behaviors often relied upon to establish a diagnosis of psychopathy (or similar personality disorders) are instead caused by a disability—including a brain injury—they are more likely to see an external factor as a partial cause of the defendant's behavior: a mitigating factor. The difference in presentation of the defendant's medical history to the decision maker thus can be a major consideration in the decision of whether to sentence the defendant to death, or allow the defendant to live. When people with disabilities are provided with effective services, they recover and their lives can and often do improve. Here, the sentencer was denied access to that crucial information.

The Ninth Circuit's decision is inconsistent with the science. The Court of Appeals failed to recognize both the meaningful distinction between psychopathy and traumatic brain damage and the extreme prejudicial effects of Mr. Creech being labeled a psychopath by his own counsel before the jury deciding

whether he would live or die. *Amici* write to highlight the profound effect that such mischaracterizing of the symptoms of a traumatic brain injury as a personality disorder may have on juries, judges and, ultimately, on sentencing.

In his petition for a writ of certiorari, Mr. Creech's counsel set forth the deeply entrenched split among (and within) federal appellate circuits in the United States with respect to the question of whether a defendant's psychopathy diagnosis should be characterized as an aggravating or mitigating factor at sentencing. *See* Pet. Writ. Cert. at 9–12. This Court has the opportunity to give clarity to district and appellate courts across the country and provide critical guidance to counsel as they defend their clients at sentencing and on appeal.

ARGUMENT

I. Sentencing decision makers are more likely to sentence to death defendants they perceive to be psychopaths.

Using the label "psychopath"—even when presented by defense counsel as an explanation for certain behaviors as an allegedly mitigating factor—prejudices judges and jurors against defendants, preventing them from truly and fairly considering mitigation evidence. The individuals deciding whether a defendant lives or dies must be given the opportunity

to consider all positive mitigating evidence, including brain injuries.

Introducing evidence of psychopathy affects the sentencing outcomes for convicted criminals. In general, psychopaths—typically portrayed in the media and popular culture as emotionless and completely lacking remorse—are thought to lack fear of punishment or ownership of their actions. Carla Norton, *Can Psychopaths Be Rehabilitated?*, The Atlantic (Feb. 5, 2014), https://www.theatlantic.com/health/archive/2014/02/can-psychopaths-be-rehabilitated/283300/.

Studies confirm this prejudicial effect, finding that describing a defendant as a "psychopath" increases the likelihood that the defendant will be sentenced to death. John F. Edens, Melissa S. Magyar & Jennifer Cox, *Taking Psychopathy Measures "Out of the Lab" and into the Legal System: Some Practical Concerns*, Handbook on Psychopathy and L. (K.A. Kiehl & W.P. Sinnott-Armstrong eds., 2013); *see also* Pet. Writ Cert. at 21. When mental health experts describe defendants as being psychopathic to mock jurors, those jurors "(a) hav[e] more negative attitudes toward these defendants (e.g., perceiving them as more dangerous and evil) and (b) support[] more punitive legal consequences for them (e.g. greater support for capital punishment)." Shannon E. Kelley et al., *Dangerous, Depraved, and Dead-Worthy: A Meta-Analysis of the Correlates of Perceived Psychopathy in Jury*

Simulation Studies, 75 J. Clin. Psychol. 627, 629 (2019). In fact, one study found that "among mock jurors, defendants diagnosed with psychopathy were overwhelmingly more likely to be sentenced to death than other defendants." Tanneika Minott, *Born This Way: How Neuroimaging Will Impact Jury Deliberations*, 12 Duke L. Tech. Rev. 220, 228 (2014).

Perhaps unsurprisingly, prosecutors often attempt to characterize capital defendants as psychopathic. Their usage of this label suggests that it sways jurors to issue harsher sentences—i.e., has a material impact on jurors' decisions. Mark Costanzo & Julie Peterson, *Attorney Persuasion in the Capital Penalty Phase: A Content Analysis of Closing Arguments*, 50 J. of Soc. Issues 125 (1994). Capital jurors are also "encouraged to view defendants as essentially subhuman or inhuman," John F. Edens, Donna M. Desforges, Krissie Fernandez & Caroline A. Palac, *Effects of Psychopathy and Violence Risk Testimony on Mock Juror Perceptions of Dangerousness in a Capital Murder Trial*, 10 Psychol., Crime, & L. 393, 396 (2004) ("Edens et al., *Effects of Psychopathy and Violence*"), as was the case in *United States v. Barnette*, where the prosecution's expert witness labeled the defendant a psychopath and compared the defendant to a bowl of fake fruit, implying both that a psychopath is akin to an inanimate object (a piece of fruit) and is also capable of tricking people. 211 F.3d 803, 822–23 (4th Cir. 2000).

In a recent study, researchers "synthesize[d] past research using meta-analytic techniques to examine the association between perceptions of a defendant's level of psychopathy and various attitudinal variables (*e.g.*, perceptions of how dangerous or evil a defendant is) and legal outcome criteria (e.g., sentencing recommendations)," and the data pointed to "robust correlations" between defendants labeled as psychopathic and juror perception of those defendants as "evil." Kelley, *supra*, at 630, 638. Post-deliberation interviews also show that attribution to defendants of what are often considered to be psychopathic traits (cocky, emotionless, clever, remorseless, or cold-blooded), heavily influence capital jurors' decision-making. Scott E. Sundby, *Capital Jury and Absolution: The Intersection of Trial Strategy Remorse and the Death Penalty*, 83 Cornell L. Rev. 1557 (1998). Therefore, "[e]quating 'psychopathic' with being evil highlights longstanding concerns that psychopathy—particularly among laypersons—may be a 'moral judgement masquerading as a clinical diagnosis.'" Kelley, *supra*, at 638 (citation omitted). During the sentencing phase, jurors place considerable weight on a defendant's perceived dangerousness. The more jurors perceive a defendant as lacking remorse, dangerous, evil, and beyond rehabilitation, the more likely the jurors will believe that the death penalty is an appropriate punishment. *Id.* at 629–30.

This is hardly shocking. Community surveys show that the most commonly identified archetypal "psychopaths" in the world are notorious villains such as Ted Bundy, Charles Manson, and Jeffrey Dahmer. *Id.* at 629. The reputations of these criminals inextricably link the label of psychopath with the most vile and irredeemable figures of all time. This label is further distorted by the portrayal of psychopaths in pop culture, such as *Hannibal* and *American Psycho*, where psychopaths are characterized as manipulative with deficient emotional characteristics. Bang Thi, *The Psychopath's Double-Edged Sword: How Media Stigma Influences Aggravating and Mitigating Circumstances in Capital Sentencing*, 26 Rev. L. & Soc. Just. 173, 176, 200 (2017). In a study surveying more than 400 individuals called for jury duty, participants responded to questions pertaining to "sources of information that influenced their perceptions of psychopaths." John F. Edens, Shannon Toney Smith, John Clark & Allison Rulseh, *"So What Is a Psychopath?" Venireperson Perceptions, Beliefs, and Attitudes About Psychopathic Personality*, 38 L. Hum. Behav. 490, 495 (2014) ("Edens et al., *So What Is a Psychopath?*"). The most common sources identified were movies and television, "followed by news accounts/documentaries and books/magazine articles." *Id.*

Popular media's effect upon the general perception of psychopaths "contributes to [the] public view that

psychopathy should be viewed more as an aggravating factor than a mitigating one, resulting in a bias during capital sentencing." Thi, *supra,* at 200.

The results across the research are consistent with well-established conclusions around negativity bias, which is the tendency to weigh negative information more heavily than positive information when forming impressions. Edens et al., *Effects of Psychopathy and Violence*, *supra*, at 404. Additionally, simulation studies have shown that "[e]ven when evidence concerning psychopathic traits is not presented during criminal trials… how psychopathic a defendant is perceived to be by jurors predicts how punitive their attitudes will be toward that defendant." Edens et al., *So What Is a Psychopath?*, *supra*, at 490.

In contrast, brain injuries are both a recognized disability and often a mitigating factor in capital punishment cases because mock jurors are less likely to associate the murder with the defendant's core being, as jurors tend to do with psychopathy. William J. Winslade, *Traumatic Brain Injury and Criminal Responsibility*, 10 Med. Ethics (Lahey Clinic Found., Inc.), no. 3, Fall 2003. Researchers found that jurors believe that defendants that have been diagnosed with a brain injury have less "capacity to control their conduct and to choose whether to commit crimes," even if the brain trauma manifests with similar symptoms to the defendants diagnosed as psychopathic. *Id.* Jurors associate traumatic brain injuries with an

explainable, external cause— something beyond the defendant's control.[4] *Id.* Defendants with brain injuries are seen as remorseful and seeking to be rehabilitated. *Id*. In this sense, mock jurors are more likely to blame the *symptoms* of the brain damage or the disability-related behavior rather than the person, which makes a defendant appear less blame-worthy. *See Mann v. Ryan*, 828 F.3d 1143, 1161 (9th Cir. 2016) ("[The petitioner] also notes that [the expert's] damning suggestion that he might be a psychopath failed to account for the possibility of a traumatic brain injury, and that further testing would have revealed that the injury significantly changed [the petitioner's] personality, effectively turning a significant aggravating factor into a significant mitigating factor."). One study found that among mock jurors, the introduction of neuropsychological exams along with neuroimages "confirming brain deficiencies dramatically reduce[d] the likelihood of the defendant being sentenced to death." Minott, *supra*, at 227. This finding is in stark contrast to juror perceptions of a

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[4] This is generally true, as the actions of patients with brain injuries are often not committed of their own volition. *See Caro v. Woodford,* 280 F.3d 1247, 1252 (9th Cir. 2002). There is neurological evidence showing that after a "hard blow to the frontal lobe, which processes emotions and behavior," brain performance is degraded. Ed Lyon, *People With Traumatic Brain Injuries More Likely to Commit Crimes, Prison Legal News* (June 3,2019),https://www.prisonlegalnews.org/news/2019/jun/3/people-traumatic-brain-injuries-more-likely-commit-crimes.

diagnosed psychopath, whom they characterize as calculating and emotionless. Edens et al., *Effects of Psychopathy and Violence*, *supra,* at 396.

II. This Court should acknowledge the clear scientific distinction between psychopathy and brain injury.

The Ninth Circuit rejected Mr. Creech's claim of ineffective assistance of counsel because the court found the newly discovered evidence of his brain damage offered in the federal district court was largely duplicative of the evidence of psychopathy previously presented in the state court. *See Creech v. Richardson*, 59 F.4th 372, 388 (9th Cir. 2023). This decision completely ignores the objectively scientific distinction between personality disorders (like psychopathy) and neurocognitive disorders caused by traumatic brain injury.

As detailed above, the label of "psychopath" will always be considered an aggravating factor at sentencing. So presenting evidence of such a diagnosis could do nothing but harm Mr. Creech's chances at avoiding a death sentence, no matter how it was characterized. However, had Mr. Creech's team properly presented expert testimony that the tendencies contributing to the commission of the crime for which he was being sentenced were caused by a series of brain injuries throughout his childhood and adolescence, the jury would very likely have weighed it

as a mitigating factor. The traumatic brain injury evidence could have made all the difference: it could have saved Mr. Creech's life.

A. Mr. Creech was improperly labeled a psychopath, rather than as a person with a disability as a result of repeated trauma to his brain.

In federal district court, Mr. Creech presented evidence that he experienced numerous head injuries throughout his life. Pet. Writ. Cert. at 7. In his opening brief in the Court of Appeals, Mr. Creech described the horrific events that caused his brain injury, his first head trauma when he was only five years old, followed by many others, including an incident in which Mr. Creech accidentally shot himself in the forehead. *See* Petitioner-Appellant's Opening Brief, (*Thomas Eugene Creech v. Al Ramirez*, No. 10-99015). The negative effects to his frontal lobe were compounded by improperly administered electroshock therapy to which Mr. Creech was subjected at a facility notorious for the horrifying abuse of its patients. *Id.* Doctors testified that those injuries negatively impacted Mr. Creech's "insight, judgment, and capacity to exercise social inhibitions." Pet. Writ. Cert. at 6.

These disability-related behaviors are classic symptoms of neurocognitive decline due to brain injury. Brain injuries are an incredibly common disability among criminal defendants. While only 8.5

percent of the United States' general population has been diagnosed with a traumatic brain injury, approximately 60 percent of the incarcerated population has this disability. Katherine Harmon, *Brain Injury Rate 7 Times Greater Among U.S. Prisoners*, The Scientific American (Feb. 4, 2012), https://www.scientificamerican.com/article/traumatic-brain-injury-prison. And brain injuries can have a profound, sustained effect on a person's behavior. Lyon, *supra.*

Evidence of brain injury is a mitigating factor in capital punishment sentencings because it shows that a defendant does not have full cognitive and physical control of their actions and therefore, is less morally culpable. Winslade, *supra.* However, in state court, an expert for the defense testified that Mr. Creech was a "classic psychopath." See Creech, 59 F.4th at 379. Mr. Creech's trial counsel failed to develop evidence of his brain injuries as a mitigating factor in sentencing. See Pet. Writ. Cert. at 2. Personality disorders such as psychopathy are wholly distinct from neurocognitive symptoms resulting from brain trauma.

There is a material distinction between psychopathy and brain damage that the Ninth Circuit ignored. Psychopathy is properly classified as an aggravating factor for sentencing. As detailed further in Section II, even when presented as a mitigator, jurors consider evidence of psychopathy to be an aggravator. In contrast, neurological conditions such

as brain injuries, post-traumatic stress disorder, ("PTSD"), and other trauma are consistently classified as mitigating factors by legal precedent, as well as by jurors at sentencing. Lee Hiromoto et al., *PTSD and Trauma as Mitigating Factors in Sentencing in Capital Cases*, 50 J. Am. Acad. Psychiatry L. 22 (2022).

"Psychopathy is a disorder marked by deficient emotional responses, lack of empathy, and poor behavior controls, commonly resulting in persistent antisocial deviance and behavior." *See* Nathaniel E. Anderson & Kent A. Kiehl, *Psychopathy: Developmental Perspectives and Their Implications for Treatment*, 32 Restor. Neurol. Neurosci. 103 (2014). Since 1952, the Diagnostic and Statistical Manual of Mental Disorders (the "DSM") has provided the standard classification of mental disorders used by mental health professionals in the United States. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 709 (5th ed. 2022). The DSM classifies antisocial personality disorder (also known as sociopathy or psychopathy) as both a "disruptive, impulse-control, and conduct" and a "personality" disorder. DSM at 537, 733.

The DSM has an *entirely separate* section for neurocognitive disorders, including those brought on by a traumatic brain injury. *Id*. at 667. There are codes specific to both major and mild neurocognitive disorders ("NCDs") accompanied by a "clinically significant behavioral disturbance (e.g., psychotic

symptoms)." *Id.* at 679, 681–82. When the NCD is due to a traumatic brain injury, symptoms can also include increased risks of aggression, hostility, and apathy, common markers of psychopathy. *Id.* at 709–11. In fact, the DSM notes, "[p]sychotic features are common in many NCDs." *Id.* at 684.

The seminal psychiatric diagnostic tool clearly establishes that while brain injuries may bring about symptoms of personality disorders, such as psychopathy, *the root cause is the trauma*. Mislabeling a person with damage to their brain as a psychopath is therefore not only prejudicial (as described in more detail above), it may be medically incorrect.

Researchers have found that harm to the frontal lobe, especially early in development (as experienced by Mr. Creech), can damage the brain's ventromedial prefrontal cortex ("vmPFC"). Bradley C. Taber-Thomas et al., *Arrested Development: Early Prefrontal Lesions Impair The Maturation Of Moral Judgement*, 137 Brain 1254, 1257 (2014). The vmPFC is "critical for the acquisition and maturation of moral competency," the stunting of which is "hallmarked by callous, egocentric, and impulsive antisocial behavior." *Id*. at 1259, 1255.

Despite these clear distinctions between psychopathy and neurocognitive disorders brought on by physical trauma, damage to the brain's frontal lobe is often misattributed to neuropsychiatric personality

disorders, especially in the context of forensic evaluations to assess criminal liability. Mustafa Talip Sener et al., *Criminal Responsibility of the Frontal Lobe Syndrome*, 47 Eurasian J. Med. 218, 218–22 (2015). In a system where 60 percent of those incarcerated suffer from brain injuries, *see* Harmon, *supra*, evidence of brain injuries must be presented to fact finders and those determining a death sentence, especially if that information is relevant to a defendant's state of mind while committing a crime.

Traumatic brain injuries are disabilities, and should be appropriately identified as such, in order to better understand the people who have them. Being mislabeled a psychopath clearly prejudices those with brain injuries at trial, and especially at capital sentencing. It is thus imperative that the Court distinguish between psychopathy and brain damage, as the distinction is scientifically sound, and studies have shown that it has a large effect upon the opinions of juries and judges during sentencing deliberations and on the lives of defendants with disabilities.

CONCLUSION

Mr. Creech is one of many on death row after their counsel presented testimony that they were "psychopaths" in an attempt to explain their behavior. Even if the diagnosis were accurate, the prejudicial effect of the terminology surrounding antisocial personality disorders is well-documented. Such

evidence has no place as part of a defense strategy. In the case of Mr. Creech and others who suffered traumatic brain injuries leading to neurocognitive decline, counsel has not only presented aggravating evidence, but has missed an opportunity for effective mitigation testimony. The Court should take up the case to provide clarity, as proper characterization of such testimony could be the difference between life and death for Mr. Creech and many other Americans.

Respectfully submitted,

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