Capital Case

Case No. ________________________

In the Supreme Court of the United States

DARRELL WAYNE FREDERICK,
Petitioner,
v.
CHRISTE QUICK, WARDEN,
Oklahoma State Penitentiary,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Dated this 29th day of February, 2024

QUESTIONS PRESENTED (CAPITAL CASE)

The jury that sentenced Mr. Frederick to death did not hear from a single live defense witness during the penalty phase of his capital trial. Despite ample evidence indicating Mr. Frederick suffers from brain damage, defense counsel failed to investigate and present such evidence that could have humanized Mr. Frederick and explained the neurological underpinnings of his behavior. Yet the Tenth Circuit, in a split opinion, held that counsel's performance did not prejudice Mr. Frederick. The Majority Opinion reasoned that had defense counsel presented evidence of Mr. Frederick's brain damage during the penalty stage, it would have opened the door to introduction of Mr. Frederick's antisocial personality diagnosis (ASPD)—a diagnosis the court viewed as nothing other than aggravating. Rather than evaluate the totality of all the available mitigation evidence in reweighing it against the evidence in aggravation, the Majority concluded there can be no prejudice where the unpresented evidence could include potentially aggravating evidence. Following this outcome, the following questions warrant this Court's review:

1. This case presents a similar question to *Thornell v. Jones*, Supreme Court Case No. 22-982 (*cert.* granted, Dec. 13, 2023): Whether the Tenth Circuit contravened *Strickland v. Washington*, 466 U.S. 668 (1984) by not considering the totality of the mitigating evidence in its prejudice review?

2. Whether the possibility of an ASPD diagnosis categorically forecloses a life verdict?

STATEMENT OF RELATED PROCEEDINGS

Frederick v. Quick, No. 20-6131 (United States Court of Appeals for the Tenth Circuit) (order denying petition for rehearing and rehearing en banc filed on October 2, 2023).

Frederick v. Quick, 79 F.4th 1090 (10th Cir. 2023) (opinion affirming judgment of district court).

Frederick v. Sharp, No. CIV-19-37-SLP (W.D. Okla. July 29, 2020) (memorandum opinion denying habeas relief).

Frederick v. State, Case No. PCD-2015-47 (Okla. Crim. App. Dec. 20, 2018) (opinion denying application for post-conviction relief).

Frederick v. State, Case No. PCD-2015-47 (Okla. Crim. App. Aug. 1, 2017) (order granting motion for evidentiary hearing and remanding to the District Court of Oklahoma County).

Frederick v. Oklahoma, 583 U.S. 1127 (2018) (denying petition for writ of certiorari to the Oklahoma Court of Criminal Appeals).

Frederick v. State, 400 P.3d 786, *as amended* (Okla. Crim. App. June 23, 2017) (opinion affirming convictions and sentence on direct appeal).

State v. Frederick, Case No. CF-2011-1946 (Okla. Cnty. Dist. Court Jan. 5, 2015) (judgment and sentencing).

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PETITION FOR A WRIT OF CERTIORARI

Darrell Frederick, a condemned inmate at Oklahoma State Penitentiary, respectfully petitions this Court for a writ of certiorari.

OPINIONS BELOW

The August 14, 2023 opinion of the Tenth Circuit Court of Appeals is reported in *Frederick v. Quick*, 79 F.4th 1090 (10th Cir. 2023) (*See* Appendix A). The federal district court's denial of the Petition for Writ of Habeas Corpus is found at *Frederick v. Sharp*, Case No. CIV-19-37-SLP, 2020 WL 4352749 (W.D. Okla. July 29, 2020) (unpublished) (*See* Appendix B). The Oklahoma Court of Criminal Appeals (OCCA) opinion denying Mr. Frederick's Application for Post-Conviction Relief can be found at *Frederick v. State*, No. PCD-2015-47 (Okla. Crim. App. Dec. 20, 2018) (unpublished) (*See* Appendix C). The OCCA's opinion denying Mr. Frederick's direct appeal is reported in *Frederick v. State*, 400 P.3d 786 (Okla. Crim. App. 2017) (*See* Appendix D). The Tenth Circuit's Order denying Petition for Rehearing, dated October 2, 2023, is found at Appendix E.

JURISDICTION

The Majority affirmed the district court's judgment denying habeas relief on August 14, 2023. Rehearing and rehearing en banc were denied on October 2, 2023. On December 26, 2023, Justice Gorsuch extended the time to file this petition until February 29, 2024. This Court has jurisdiction to review the Tenth Circuit's opinion and order denying relief under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

STATEMENT OF THE CASE

A. Factual Background

Mr. Frederick and his mother, 85-year-old Connie Frederick (Ms. Frederick), enjoyed a loving relationship. He provided care to Ms. Frederick, who was deaf and mute. He took care of daily tasks, including cooking, shopping, cleaning, and helping her bathe.

On March 26, 2011, Da'Jon Diggs (Diggs) went to the home of her grandmother, Ms. Frederick. Diggs alleged that she witnessed Mr. Frederick (her uncle) and Ms. Frederick "fussing" over food in the kitchen. Diggs testified that Mr. Frederick pushed Ms. Frederick against a counter. Ms. Frederick pushed back, and, according to Diggs, Mr. Frederick then shoved Ms. Frederick. Diggs intervened and took Ms. Frederick to her bedroom. Diggs then returned to the kitchen where she and Mr. Frederick argued. Diggs testified that she next went to the store to buy juice for Ms. Frederick.

When Diggs returned, she went to Ms. Frederick's room and told her to stay there. Diggs claimed that as soon as she closed the bedroom door and turned around, Mr. Frederick charged her. The two began fighting, and Diggs ran outside. Neighbors saw Mr. Frederick pick up a rock or "something" and chase Diggs. Diggs ran to a next-door neighbor's house and called 911. Diggs testified that Mr. Frederick went back in the house and soon came out again. He then went back inside.

The police arrived within a minute and entered the house. They, along with Diggs, found Ms. Frederick on the floor of her bedroom, face down. Diggs lifted and rolled Ms. Frederick over and saw her face was swollen and bruised. Mr. Frederick was not in the house. Diggs testified a police officer asked her to ask her grandmother whether she was in pain and "Who did it?" Diggs testified her grandmother raised her hand upwards and made a "D" sign. According to Diggs, the sign her grandmother used for Darrell was "D."

Soon after, an ambulance arrived and placed Ms. Frederick on a stretcher. Paramedic Adam Simmons testified that he asked Diggs to elicit information from Ms. Frederick about what happened. He testified that Ms. Frederick, through Diggs, said her son hit her with an unknown object an unknown number of times. Ms. Frederick remained in the hospital until her death on April 30, 2011. According to the State's medical examiner, her cause of death was "traumatic head injury, blunt force."

B. Trial and State Direct Appeal

Mr. Frederick faced charges in the Oklahoma County District Court, including first-degree malice murder (Count One), attempted assault and battery with a dangerous weapon after former convictions of two or more felonies (Count Two), and domestic abuse assault and battery (Count Three).

According to trial counsel, his guilt-stage strategy was to convince the jury that Ms. Frederick had fallen rather than being beaten. Trial counsel elicited information on cross-examination from State's witnesses about Ms. Frederick's history of poor health and history of falling. But trial counsel did not call a single defense witness; did not consult with a single medical expert; and did not even attempt to interview the State's medical examiner before trial. Mr. Frederick was convicted of all counts.

During Mr. Frederick's sentencing phase, trial counsel presented virtually no mitigation. After the State presented 14 witnesses supporting its alleged aggravators, the entire mitigation evidence spanned a mere 18 pages. It consisted of a short portion of a 1982 post-conviction hearing transcript containing the testimony of Mr. Frederick's deceased father, read aloud by an investigator. Such testimony included that in 1972, at 15 or 16 years old, Mr. Frederick was "very immature in many things." Mr. Frederick was in "an accident in the truck, ran into a post. . . and hit his head on the windshield, busted the windshield out of the truck and . . . was a changed child from that very moment." Trial counsel did not present a single live witness and rested its penalty-phase case after Mr. Frederick's father's testimony was read into the record.

After the defense rested, the parties, outside the presence of the jury, discussed the proposed mitigating circumstances offered by the defense. Specifically, defense counsel proposed six mitigating circumstances. As the prosecutors recognized, two of the six proposed mitigating circumstances put the issue of Mr. Frederick's brain damage "front and center." One proposed mitigating circumstance was that "Darrell

Frederick suffered a severe concussion in his early teen years which resulted in damage to the brain," and the other stated "Darrell Frederick suffered [an injury] in his early teen years [that] caused [him] the [sic] lose the ability to control his impulses."

The State expressed concern that trial counsel had proposed two mitigators regarding brain damage but hadn't presented a shred of evidence in support. The State rightfully complained there had "been absolutely no evidence" of either of these mitigating circumstances. The court agreed, ruling, "There's got to be some evidence put in somewhere as to these mitigating circumstances. You can't just say something with no evidence." Trial counsel agreed to "modify my mitigator[s] to the mitigation to conform to the evidence."

Because of his failure to investigate and present evidence of brain damage, trial counsel, during sentencing closing arguments, urged the jurors to rely on their "common sense" and deduce that Mr. Frederick suffers from brain damage. He argued to the jury that "I think there is an explanation [for Mr. Frederick's impulsive behavior] but we're not scientists enough to know precisely what that explanation is." The jury sentenced Mr. Frederick to death.

Mr. Frederick appealed to the Oklahoma Court of Criminal Appeals (OCCA). Direct appeal counsel, who was an employee of the same public defender's office as trial counsel, did not raise a claim as to trial counsel's ineffectiveness with respect to trial counsel's failure to present evidence of Mr. Frederick's brain damage. OCCA affirmed the judgments and sentences.

C. State Post-Conviction Proceedings

Subsequently, Mr. Frederick sought post-conviction relief, contending ineffective assistance of counsel by his appellate counsel and cumulative error. OCCA granted an evidentiary hearing. Post-conviction proceedings unveiled critical evidence of Frederick's organic brain damage, particularly affecting his frontal lobes—a condition associated with aggressive behaviors.[1]

On post-conviction, counsel retained Dr. Curtis Grundy, a clinical and forensic psychologist. Although Dr. Grundy diagnosed Mr. Frederick with ASPD, he concluded Mr. Frederick had "indicators of possible traumatic brain injury" and referred him for neuropsychological testing. Accordingly, post-conviction counsel retained Dr. Antoinette McGarrahan, a neuropsychologist, to administer neuropsychological testing.

At the evidentiary hearing, Dr. McGarrahan testified that "Mr. Frederick does have significant indicators of brain damage. We would call it generally global reduction, meaning an overall reduction in his intellect. In addition, there's primary impairment of his frontal lobes or executive functioning…" She further testified that the frontal lobe "controls certain aspects of behavior," including "aggression, violence, acting out, impulsivity." Regarding Dr. Grundy's finding of ASPD, Dr. McGarrahan testified that ASPD and brain damage are "not mutually exclusive." According to Dr. McGarrahan, "many of the behaviors – the impulsivity,

[1]In addition to evidence of Mr. Frederick's brain damage, post-conviction counsel unveiled myriad mitigating evidence including evidence of Mr. Frederick's abusive and dysfunctional childhood and evidence of Mr. Frederick's positive attributes.

the irresponsibility, the aggression – that define[] [ASPD] are also behaviors that you see in people with frontal lobe damage." She explained, "[ASPD] are merely the behaviors that somebody engages in. The brain damage is what we're seeing with Mr. Frederick that I believe is guiding those behaviors of [ASPD] that lead to that diagnosis." Dr. McGarrahan concluded that Mr. Frederick's brain injury was likely the result of his automobile accident and blows to the head he suffered while he served on the prison boxing team earlier in his life.

Ultimately, OCCA denied Mr. Frederick's post-conviction relief. With respect to *Strickland*'s performance prong, the court found that trial counsel's "decision not to present any mental health evidence was a strategic choice made after reasonable investigation." *Frederick v. State*, Case No. PCD-2015-47 at 40 (Okla. Crim. App. Dec. 20, 2018). Regarding *Strickland*'s prejudice prong, the court found that Dr. McGarrahan's testimony "could have opened the floodgates" to Dr. Grundy's ASPD diagnosis. *Id.* at 40-41. The court concluded:

> [T]here is no reasonable probability that the omitted mental health evidence would have altered the outcome of the sentencing stage of trial. In reaching this conclusion, we have considered both the totality of the evidence that was before the sentencing jury and evidence that the prosecution likely would have presented in response to the omitted evidence.

Id. Despite holding Mr. Frederick suffered no prejudice, OCCA stated "[i]nformation from the mental health experts in this case could reasonably be viewed as mitigating to one person and aggravating to another." *Id.* at 41.

D. Federal Habeas

On December 16, 2019, Mr. Frederick filed the 28 U.S.C. § 2254 petition underlying this petition. Mr. Frederick asserted that counsel failed to adequately investigate, develop, and present critical evidence that would have rebutted the State's first-stage evidence and argument that Ms. Frederick's death was a homicide. Mr. Frederick also asserted that in the sentencing stage, counsel failed to reasonably investigate, develop, and present compelling mitigating evidence, including Frederick's family and social histories and evidence of brain damage. The district court denied relief and did not issue a Certificate of Appealability (COA). On February 4, 2021, the Tenth Circuit granted a COA specifically addressing Mr. Frederick's claims about ineffective assistance of counsel and cumulative errors.

In a fractured opinion, the Tenth Circuit issued its decision on August 14, 2023. Regarding the claim that counsel was ineffective for failing to present evidence of Mr. Frederick's brain damage during the penalty phase, the Majority focused only on *Strickland*'s prejudice prong. The Majority did not discuss *Strickland*'s performance prong. Judge Rossman recognized that the "district court all but concluded [trial counsel's] performance during the penalty phase was constitutionally deficient." *Frederick v. Quick*, 79 F.4th 1090, 1142 (10th Cir. 2023) (Rossman, J., dissenting). She concluded that "[g]iven the absence of any investigation combined with [trial counsel's] decision to present a [penalty] defense that depended on such an investigation, counsel's performance was constitutionally deficient." *Id.* at 1144. The Majority endorsed OCCA's conclusion that Mr. Frederick was not prejudiced at the penalty phase by trial counsel's failure to investigate and present brain damage evidence. According to the Majority, OCCA's "no-prejudice determination was not unreasonable" for three reasons: "[B]ecause the proffered evidence (a) failed to adequately link brain damage to the murder and (b) would have opened the door to evidence harmful to the defense. Also, (c) Mr. Frederick's reliance on certain cases is misplaced." *Id*. at 1124.

Recognizing the flawed analysis of the Majority, Judge Rossman dissented. *Frederick*, 79 F.4th at 1135-53 (Rossman, J., dissenting). Noting the Majority treated the "most powerful form of mitigating evidence as essentially aggravating so as to foreclose a showing of prejudice," *id.* at 1145 n.12, Judge Rossman concluded OCCA's no-prejudice determination was contrary to and involved an unreasonable application of clearly established federal law and was based on an unreasonable determination of the facts in light of the evidence presented, *id*. at 1148, 1150-52. Judge Rossman recognized that trial counsel made brain damage the "central theme" of his penalty phase defense. *Id.* at 1136. But "without conducting any investigation into the matter," the jury was left with nothing but trial counsel's "guess": "I think there is an explanation [for Mr. Frederick's behavior] but we're not scientists enough to know precisely what that explanation is." *Id.*

REASONS FOR GRANTING THE PETITION

This Court has repeatedly and consistently stressed the importance of considering the entirety of evidence, including factors with both mitigating and aggravating implications. *See Strickland v. Washington*, 466 U.S. 668, 695 (1984).

Since *Strickland*, this Court has applied this rule in federal habeas cases and granted relief. *See Williams v. Taylor*, 529 U.S. 362, 397-98 (2000), *Wiggins v. Smith*, 539 U.S. 510, 534-38 (2003), and *Rompilla v. Beard*, 545 U.S. 374, 390-93 (2005). Nonetheless, the Majority upheld the decision of the lower courts because it discounted Mr. Frederick's brain damage mitigation to irrelevance; the Majority viewed the brain damage evidence as aggravating, and it misread critical parts of the record to characterize mitigating evidence as aggravating. The lower courts' approach, endorsed by the Majority, unreasonably applied and contradicted *Strickland*'s mandate to "consider the totality of the evidence" when assessing prejudice. *Strickland*, 466 U.S. at 695.

Mr. Frederick seeks the reaffirmation of constitutional principles guiding the assessment of prejudice in the *Strickland* context. To that end, this petition addresses whether unpresented mitigation evidence that could include hypothetically aggravating facts automatically negates prejudice. The questions presented in this case are closely related to one of the questions in *Thornell v. Jones*, Supreme Court Case No. 22-982, *cert. granted* (Dec. 13, 2023).

I. THE MAJORITY CONTRAVENED DECADES OF THIS COURT'S PRECEDENT.

The Sixth Amendment guarantees "the right to the effective assistance of counsel." *Strickland*, 466 U.S. at 686. *Strickland* requires a defendant who claims ineffective assistance to show that "counsel's representation fell below an objective standard of reasonableness," and that any deficiency was "prejudicial to the defense." *Id*. at 688, 692. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id*. at 686.

A court assessing prejudice based on the failure to investigate and present mitigating evidence must consider the precise nature of the mitigating evidence and assess its value in the context of the whole record. *See, e.g.*, *Wiggins*, 539 U.S. at 534, *Williams*, 529 U.S. at 397-98, and *Rompilla*, 545 U.S. at 390-93. Both *Williams* and *Rompilla* underscore the imperative to consider all the presented evidence, without discounting mitigating factors based on a perceived dual impact. Prejudice is established if there is a reasonable probability that "at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. When evaluating ineffective assistance of counsel claims about trial counsel's failure to present evidence, courts should consider "all the evidence—the good and the bad—when evaluating prejudice." *Wong v. Belmontes*, 558 U.S. 15, 26 (2009).

Mr. Frederick's jury weighed virtually no mitigation against fourteen aggravation witnesses who detailed Mr. Frederick's history of impulsive behavior. The brain damage evidence that Mr. Frederick's attorney failed to present could have "allow[ed] the jury to understand why Mr. Frederick was paranoid, aggressive, impulsive, short-tempered, and struggled to regulate his emotions in everyday social interactions." *Frederick*, 79 F.4th at 1148 (Rossman, J., dissenting). OCCA, which discounted the value of the brain damage mitigating evidence to the jury and used a double-edge analysis to discount the brain damage mitigation, reached a no-prejudice determination. Yet OCCA's opinion underscores why it is so important not to forgo weighing mitigation evidence just because it has an aggravating edge. OCCA stated: "Information from the mental health experts in this case could reasonably be viewed as mitigating to one person and aggravating to another." Opinion Denying Application for Post-Conviction Relief at 4, *Frederick v. State*, Case No. PCD-2015-47, (Okla. Crim. App. Dec. 20, 2018) (unpublished). This is precisely why courts must do the work, conduct the mandatory reweighing, add the mitigating edge to the mitigation and the aggravating edge to the aggravation, and not just exclude the evidence from the balancing equation. To be sure, jurors are not a monolith, they do not all treat evidence the same, and all it takes is one to find mitigating resonance rather than an aggravating edge in a piece of presented mitigation evidence.

Similarly, the Majority neglected this Court's directive to evaluate ineffective assistance of counsel claims by reweighing all evidence, both mitigating and aggravating. The Majority held that the omission of Mr. Frederick's brain damage evidence was not prejudicial based, in part, on the evidence opening "the door to introduction of Mr. Frederick's antisocial personality diagnosis, 'which tends to present an *aggravating*' circumstance during the penalty phase." *Frederick*, 79 F.4th at 1125 (quoting *Littlejohn v. Royal*, 875 F.3d 548, 564 (10th Cir. 2017)[2]). In so holding, the Majority departed from constitutional norms.

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[2]But the *Littlejohn* Court said that "[t]he *circumstances here* fall far short of constituting the paradigmatic halfhearted mitigation case, as well illustrated in *Smith* and *Anderson*." *Id.* at 563 (emphasis added). It evaluated the totality of the evidence presented at trial and in post-conviction. *See id.* Here, unlike in *Littlejohn*, the Tenth Circuit failed to account for what already had been presented at trial, which was virtually no mitigation and the same aggravation, and failed to recognize that Mr. Frederick's case is, at *most*, the "paradigmatic halfhearted mitigation case."

The Majority failed to consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in post-conviction—and reweigh it against the evidence in aggravation. *See Sears v. Upton*, 561 U.S. 945, 956 (2010) (per curiam) ("A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered [mitigation] evidence…, along with the mitigation evidence introduced during [Mr. Frederick's] penalty phase trial, to assess whether there is a reasonable probability that [the petitioner] would have received a different sentence after a constitutionally sufficient mitigation investigation"). That Mr. Frederick suffered from organic brain damage "'might well have influenced the jury's appraisal' of [Mr. Frederick's] moral culpability,'" *Wiggins*, 539 U.S. at 538, and could have served as "a basis for a sentence less than death," *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The "risk that any antisocial personality disorder evidence in this case would be received by the jury as more aggravating than mitigating is markedly reduced by Dr. McGarrahan's explanatory testimony about its organic origins." *Frederick*, 79 F.4th at 1148 n.12 (Rossman, J., dissenting).

It is "possible that [some jurors] could have heard" all the mitigating evidence about [Mr. Frederick's] organic brain damage "and still have decided on the death penalty." *Rompilla*, 545 U.S. at 393. But "that is not the test." *Id.* The mitigating evidence need not outweigh the aggravating evidence to prove prejudice. *Williams*, 529 U.S. at 398 ("Mitigating evidence unrelated to dangerousness may alter the jury's selection of [a] penalty, even if it does not undermine or rebut the prosecution's death-eligibility case.").

A holistic examination ensures a fair and constitutionally sound assessment of the balance between aggravating and mitigating factors in capital cases. Instead, by focusing its analysis on the so-called double-edged nature of Mr. Frederick's brain damage mitigation, the Majority's prejudice analysis failed to view the mitigating evidence against the aggravating evidence. The Majority's assertion that mitigating evidence relating to Mr. Frederick's organic brain damage should be discounted due to its purported double-edged nature contradicts the clear directives set forth by this Court. Justice Sotomayor has taken on the issue of double-edged evidence, and spoke of viewing the prejudice inquiry "holistically," and not "cancel[ing]" out mitigating aspects of evidence due to aggravating aspects. *See Trevino v. Davis*, 138 S. Ct. 1793, 1797-98 (2018) (Sotomayor, J., dissenting) (denial of petition for writ of certiorari).

The Majority's inclination to discount brain damage evidence based on its purported double-edged nature directly conflicts with this Court's guidance in *Williams* and *Rompilla*, and it risks introducing an arbitrary criterion into the evaluation of mitigating factors. For example, in *Williams*, new evidence presented in post-conviction proceedings revealed the petitioner was "borderline mentally retarded," and experienced childhood abuse. *Williams*, 529 U.S. at 395-96. This Court acknowledged that "not all of the additional evidence was favorable to [the petitioner]," such as his extensive criminal record as a juvenile. *Id.* at 396. Still, the Court considered all the evidence presented at trial and in post-conviction and evaluated how the new evidence would have affected the jury's decision. *Id.* at 397-98. Despite the additional potentially aggravating evidence, the Court granted relief, holding that the state court's prejudice determination was unreasonable because it failed to reweigh the totality of the mitigating evidence against the totality of the aggravating evidence. *Id.*

Likewise, in *Rompilla*, a post-conviction investigation revealed the petitioner suffered from organic brain damage, "an extreme mental disturbance significantly impairing several of his cognitive functions." *Rompilla*, 545 U.S. at 392. But the investigation also revealed the petitioner "early came to [the] attention of juvenile authorities, quit school at 16, [and] started a series of incarcerations…often of assaultive nature and commonly related to over-indulgence in alcoholic beverages." *Id.* at 390-391. Despite being doubled-edged, this Court concluded the petitioner was prejudiced by his counsel's failure to investigate and introduce the undiscovered evidence because it, "taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability." *Id.* at 393.

The Majority and the lower courts flouted this Court's longstanding precedent. To ensure that courts continue to assess prejudice properly by considering the precise nature of the mitigating evidence and assessing its value in the context of the whole record, this Court should grant Mr. Frederick's petition for certiorari.

II. AN INTER-CIRCUIT CONFLICT REGARDING ASPD WARRANTS THIS COURT'S INTERVENTION.

Contrary to the Majority's perspective, Dr. McGarrahan's testimony would have blunted Mr. Frederick's prior diagnosis of ASPD. She recognized that ASPD is "merely the behavior[]" not the etiology of Mr. Frederick's impulsive behavior. Further, "many of the behaviors – the impulsivity, the irresponsibility, the aggression

– that define[] [ASPD] are also behaviors that you see in people with frontal lobe damage." According to Dr. McGarrahan, "the etiology [of Mr. Frederick's behavior] is at least in part due to brain damage." By treating ASPD as the source of Mr. Frederick's behavior rather than a description of the behavior itself, the Majority highlights one of several different ways in which circuit courts have addressed ASPD.

Various circuits and other jurisdictions have held that ASPD is not necessarily aggravating. For example, the Sixth Circuit held that ASPD is not categorically prejudicial. *See, e.g., Esparza v. Sheldon*, 765 F.3d 615, 623 (6th Cir. 2014) (finding that ASPD is *not* categorically prejudicial and noting Ohio state law recognizes ASPD as a statutory mitigating factor). The Eleventh Circuit upheld a Florida Supreme Court decision "which reasonably ruled that [ASPD] is a valid mitigating circumstance for trial courts to consider and weigh." *Morton v. Sec'y, Fla. Dept. of Corrs.*, 684 F.3d 1157, 1168 (11th Cir. 2012). In *Lambright v. Schriro*, 490 F.3d 1103, 1122, 1125 (9th Cir. 2007), the Ninth Circuit held that a diagnosis of personality disorder not otherwise specified with antisocial, borderline, and inadequate features, "if properly developed and explained to the sentencer, would have had a mitigating effect under Arizona law." *See also Stankewitz v. Wong*, 698 F.3d 1163, 1173-74 (9th Cir. 2012); *Andrews v. Davis*, 944 F.3d 1092, 1121, 1135 (9th Cir. 2019) (en banc) (recognizing that evidence of a defendant's ASPD is not dispositive of the prejudice analysis).

Decisions by the Fifth, Eighth, Ninth, and Eleventh Circuits take an opposing view and recognize ASPD tends to be aggravating. *See 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 [ASPD]" because it "may be highly damaging"); *Reed v. Sec'y, Fla. Dept. of Corrs.,* 593 F.3d 1217, 1246 (11th Cir. 2010) (characterizing ASPD as "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) (finding "[e]vidence of [ASPD] 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"). The Majority here, however, surpassed these circuits in its condemnation of ASPD; the Majority effectively held that an ASPD diagnosis is *always* aggravating, even when the evidence demonstrates a defendant's impulsive behavior is more likely attributable to brain damage. *See Frederick,* 79 F.4th at 1125 (finding "[e]vidence of [ASPD] as a causal explanation of Mr. Frederick's behaviors would undercut the potential mitigating effect of the brain damage diagnosis").

Under the Majority's approach, not a single juror could have voted for life in the face of a potential ASPD diagnosis. Such a hypothesis ignores the evidence presented in this case and conflicts with decisions in various jurisdictions finding that

ASPD is at least potentially mitigating. This Court should resolve the conflict among the various circuits to ensure fairness in capital sentencing.

CONCLUSION

For the foregoing reasons, Mr. Frederick respectfully requests this Court grant his petition for writ of certiorari or alternatively hold his petition until after this Court decides *Thornell v. Jones*, Supreme Court Case No. 22-982, *cert. granted* (Dec. 12, 2023).

Respectfully submitted,

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Dated this 29th day of February, 2024