

No. 23-6888

In the

SUPREME COURT OF THE UNITED STATES

DARRELL WAYNE FREDERICK,

Petitioner,

-vs-

CHRISTE QUICK, Warden,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

CAPITAL CASE
REQUEST FOR EXECUTION DATE PENDING

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CAPITAL CASE QUESTIONS PRESENTED

In March of 2011, Darrell Wayne Frederick killed his own mother by brutally beating her to death in her own home. An Oklahoma jury convicted Frederick of first-degree murder, among other crimes, and sentenced him to death.

In his original application for post-conviction relief, Frederick alleged he was denied his right to the effective assistance of counsel in multiple ways, including that his appellate counsel failed to raise a claim that his trial counsel was ineffective for failing to investigate and present evidence of his alleged brain damage during the penalty stage of his trial. Following an evidentiary hearing, the Oklahoma Court of Criminal Appeals held Frederick was not denied the effective assistance of counsel.

The Western District of Oklahoma denied Frederick's habeas petition, including the ineffective assistance of counsel claim at issue, and the United States Court of Appeals for the Tenth Circuit affirmed. Unhappy with the circuit court's faithful application of the Antiterrorism and Effective Death Penalty Act ("AEDPA") to his claim, Frederick now contends the Tenth Circuit did not consider the totality of the mitigation evidence in arriving at its conclusion that he suffered no prejudice.

The questions presented are:

- 1. Whether this Court should address an alleged legal error in the Tenth Circuit's decision that does not exist and is, instead, merely an attempt at fact-bound error correction.**
- 2. Whether this Court should review a decision of the Tenth Circuit concerning a claim of ineffective assistance of counsel that is entirely in keeping with all other circuit courts with respect to the evidentiary value a finding of antisocial personality disorder may have in the penalty stage of a capital case.**

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INTRODUCTION

In March of 2011, Darrell Wayne Frederick was living with his mute, deaf mother, Connie Frederick, in Oklahoma City. Ms. Frederick had recently taken Frederick in following his release from prison a few years earlier. Frederick repaid that generosity by bludgeoning his mother to death following an altercation he had with her in which he refused to allow her access to the food and drink in the home's kitchen. A jury convicted Frederick of first-degree murder (Count 1), in violation of 21 OKLA. STAT. § 701.7(A) (2001), among other crimes,¹ and sentenced him to death² in the District Court of Oklahoma County, State of Oklahoma, Case No. CF-2011-1946. The Oklahoma Court of Criminal Appeals ("OCCA") upheld Frederick's convictions and sentences on direct appeal in a published opinion issued on May 25, 2017. *See* Pet. Appx. 137a-185a. The OCCA denied rehearing a little over a month later. *See* Order Denying Rehearing and Directing Issuance of Mandate, *Frederick v. State*, No. D-2015-15 (Okla. Crim. App. July 7, 2017). This Court denied Frederick a petition for writ of certiorari the following year. *See Frederick v. Oklahoma*, 583 U.S. 1127 (2018).

¹ Frederick was also convicted of assault and battery with a dangerous weapon, after former conviction of two or more felonies (Count 2), in violation of 21 OKLA. STAT. § 645 (2001), and domestic abuse assault and battery (Count 3), in violation of 21 OKLA. STAT. § 644(C) (2001). *See* Pet. Appx. at 149a.

² The jury found the existence of three aggravating circumstances: (1) Frederick was previously convicted of a felony involving the use or threat of violence to the person; (2) the murder was especially heinous, atrocious, or cruel; and (3) the existence of a probability that Frederick would commit criminal acts of violence that would constitute a continuing threat to society. *See* Pet. Appx. at 149a.

In his original application for post-conviction relief, filed in the OCCA, Frederick argued that he was subjected to ineffective assistance from his appellate counsel for failing to allege that his trial counsel failed to investigate, develop, and present to the jury evidence of his alleged brain damage during the penalty stage of his trial. *See* Pet. Appx. at 90a-136a. Frederick sought an evidentiary hearing in conjunction with his claim to develop the underlying basis for it. *See id.* The OCCA granted that request and a hearing was held on four separate days in Oklahoma County District Court. *See id.* During the hearing, Frederick presented the testimony of two mental health expert witnesses. *See id.* But, as will be shown, the evidence Frederick presented through his experts was mixed, at best, when it came to its value in his mitigation case, especially considering that it would have opened the door to the State's presentation of Frederick's antisocial personality disorder diagnosis in rebuttal. As such, the OCCA denied Frederick the post-conviction relief he sought. *See* Pet. Appx. at 90a-136a.

Taking his claim to federal court, Frederick raised the same claim of ineffective assistance of counsel based upon the failure to present the evidence of his alleged brain damage in mitigation. *See* Pet. Appx. at 78a-81a. The district court denied relief. *See id.*

At the Tenth Circuit, Frederick pressed the issue again. *See* Pet. Appx. at 30a-42a. A majority of the Tenth Circuit panel hearing the case denied relief, finding the OCCA's post-conviction decision was not contrary to, or an unreasonable application

of, clearly established federal law. *See id.* The circuit court denied Frederick's motion for panel rehearing and en banc consideration.

Frederick has petitioned this Court for a writ of certiorari on two issues, that his case presents a similar one to *Thornell v. Jones*, Supreme Court Case No. 22-982, because the court below failed to consider the totality of the mitigating evidence in its review of the prejudice prong established in *Strickland v. Washington*, 466 U.S. 668 (1984), and that the Tenth Circuit's ruling categorically foreclosed any capital defendant with a diagnosis of antisocial personality disorder from ever receiving a life verdict. Pet. at i. Neither of Frederick's questions warrants review. As to the former, the Tenth Circuit *did* consider the totality of the mitigation evidence in its assessment of the OCCA's decision; analyzing Frederick's claim closely, it becomes clear he is seeking review in the hope that this Court will attach greater weight to the credibility of his experts than that granted them in the OCCA. But Frederick cannot alter their testimony, which clearly indicated that Frederick's alleged brain damage offered little in the way of explanation as to why he brutally murdered his mother. And Frederick never explains in his Petition exactly why his claims warrant the review given *Jones*; apart from their underlying issues stemming from claims of ineffective assistance of counsel in capital cases, the two cases bear little resemblance to one another.

As to the latter question, Frederick contends a circuit split reveals the Tenth Circuit's misdiagnosis of the value of his alleged brain damage evidence. But a review of Frederick's cited cases reveals no such split exists. Instead, the circuit courts are

in harmony when it comes to the issue of antisocial personality disorder in the context of a capital case.

This Court should, therefore, deny the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

STATEMENT OF THE CASE

A. Frederick murders his mother and assaults his niece.

On March 26, 2011, sometime between 5:30 and 6:00 pm, Da'Jon Diggs arrived at the home of her grandmother, Connie Frederick. (Tr. 807-19). At the time, Ms. Diggs was in college but split her time living between her dorm room and her grandmother's house. (Tr. 811-14). Even when staying at her dorm, Ms. Diggs would frequently stop by the house to check on her grandmother,³ who was eighty-five years old and had been deaf and mute her entire life. (Tr. 810-20, 1133). Ms. Diggs, like much of her family, was able to communicate with Ms. Frederick through sign language. (Tr. 810). Also living at the home at that time was Darrell Frederick, the son of Ms. Frederick.⁴ (Tr. 814, 909-910). Frederick had begun living with Ms. Frederick in 2009 upon his release from jail. (Tr. 912-16).

Entering the house, Ms. Diggs heard Frederick and Ms. Frederick "fussing"⁵ in the kitchen. (Tr. 820-21). Ms. Diggs approached the kitchen but paused before

³ Ms. Diggs had already stopped by the house once earlier in the day. (Tr. 816-18).

⁴ Frederick was also Ms. Diggs' uncle. (Tr. 814).

⁵ Ms. Diggs explained that, while Ms. Frederick was mute as far as her speech was concerned, she could still make some sounds. (Tr. 820). Ms. Diggs further explained that Ms. Frederick

entering so that she might determine what was going on. (Tr. 821). Ms. Diggs saw Frederick aggressively snatch food away from Ms. Frederick's hands. (Tr. 821-24). Frederick then called Ms. Frederick a "bitch," told her to get out of the kitchen, and shoved her against the kitchen counter. (Tr. 823-24). Ms. Diggs intervened and escorted Ms. Frederick to her bedroom, where they sat on Ms. Frederick's bed and talked for a bit. (Tr. 826).

When Frederick had gone back to his own bedroom, Ms. Diggs made her way to the kitchen to get Ms. Frederick something to drink. (Tr. 826). Frederick, however, came back out and told Ms. Diggs not to take anything back to Ms. Frederick in her bedroom. (Tr. 826-27). Despite this warning from Frederick, Ms. Diggs snuck some food back to Ms. Frederick. (Tr. 827). Ms. Frederick wanted some juice though. (Tr. 827). Ms. Diggs tried going back into the kitchen again, but Frederick was lurking about. (Tr. 828). Ms. Diggs walked to a nearby store and purchased some orange juice for Ms. Frederick. (Tr. 828).

While out of the house, Ms. Diggs called both her mother, Judith Frederick-Jones, and her uncle, Tobias Frederick,⁶ out of frustration to discuss what had just happened. (Tr. 807, 828-29, 1491). Ms. Diggs shared with Tobias Frederick her concern that Frederick was going to seriously hurt either her or Ms. Frederick. (Tr. 829).

would "yell" in sign language by using coarse or exaggerated movements with her hands. (Tr. 820-21).

⁶ Tobias Frederick is the son of Ms. Frederick and the brother of Frederick. (Tr. 909-10).

As Ms. Diggs returned back inside the house, she heard the house phone ringing and Frederick answer. (Tr. 830). Listening in, Ms. Diggs was able to make out that it was Tobias Frederick who had called. (Tr. 830, 923). Tobias Frederick testified that he told Frederick in his phone conversation with him that he had to leave the house and find another place to live. (Tr. 923). According to Tobias Frederick, Frederick shot back, “Man, I ain’t got time for this,” and hung up. (Tr. 923). At the house, Ms. Diggs could hear Frederick yelling into the phone. (Tr. 830-32).

Knowing that Frederick was irate, Ms. Diggs made her way back to Ms. Frederick’s room and gave her the juice. (Tr. 831). Ms. Diggs told Ms. Frederick to stay in her room no matter what happened. (Tr. 831). Ms. Diggs then shut the door to the bedroom. (Tr. 832).

Ms. Diggs intended on getting her cell phone, which was in a different room, and calling the police. (Tr. 832-33). But as she left Ms. Frederick’s room, Frederick charged at her, yelling, “Oh, you have a problem with me too? I’ll take you too, bitch.” (Tr. 833). Ms. Diggs attempted to defend herself against Frederick, with the struggle spilling from room to room within the house. (Tr. 834). At one point, Ms. Diggs was able to push Frederick back off of her, causing him to stumble and allowing Ms. Diggs to get out the front door. (Tr. 834-35). Frederick chased after her. (Tr. 834-35).

Kids were playing in the front yard of the neighboring house as this happened. (Tr. 835, 896-98). Seeing what was occurring, the kids yelled out to Ms. Diggs that Frederick had picked up a rock or brick and had it in his hand. (Tr. 835, 903).

Frederick chased Ms. Diggs around the yard with the rock or brick in his hand. (Tr. 835, 898).

Ms. Diggs was eventually able to escape into the next yard and call police from a borrowed phone. (Tr. 835-37; State's Ex. 1). Frederick, who had chased Ms. Diggs outside wearing only his pajama bottoms, yelled at the on-looking children and went back inside the house. (Tr. 836-37, 845-46, 898-900).

Frederick came back outside again a few minutes later but was fully dressed now. (Tr. 836-37, 899-900). By this time police were arriving. (Tr. 837). Frederick then went back toward the house, the rattle of a chain link fence was heard, and Frederick was not seen or heard from anymore that day. (Tr. 837-38, 900-02, 971-72, 1031-33).

Ms. Diggs followed the arriving police officers into the house. (Tr. 837-38, 950). They found Ms. Frederick lying face-down on the floor in the bedroom where Ms. Diggs had left her. (Tr. 838, 950). Lifting her up, they could see that Ms. Frederick had severe bruising and swelling on both sides of her head. (Tr. 839, 928, 951, 959, 997, 1005; State's Ex. 25). Through signing, Ms. Diggs asked Ms. Frederick who had done this. (Tr. 840). Ms. Frederick responded that Frederick was to blame.⁷ (Tr. 840).

Ms. Frederick was taken by ambulance to Mercy Hospital at her request. (Tr. 843, 993). On the way to the hospital Ms. Frederick again indicated that Frederick was the one who had assaulted her. (Tr. 991-92). At the hospital, Dr. Michael Hahn, Ms. Frederick's neurosurgeon, immediately operated on Ms. Frederick to reduce

⁷ The sign Ms. Frederick used for Frederick was a "D" held up near her temple. (Tr. 840). Ms. Diggs testified Ms. Frederick was unable to move her hand all the way up to her temple, but she moved it up to her head. (Tr. 840).

pressure upon her brain caused by a significant subdural hematoma⁸ that had developed under the left side of her skull. (Tr. 1005-10). Although Ms. Frederick survived the surgery,⁹ she died approximately one month later from her traumatic, blunt-force head injuries. (Tr. 1010, 1134, 1138).

Police located Frederick the night after Ms. Frederick's beating occurred. (Tr. 971-72, 1031-33). Upon being approached by police, Frederick denied being Darrell Frederick and gave a false name before admitting his identity. (Tr. 1033-34). Frederick's right hand was significantly swollen and his right ring finger was cut and still bleeding. (Tr. 974-76, 1076-80; State's Exs. 27, 29, 56-59). Several pieces of Frederick's clothing had blood on them. (Tr. 974-75, 1042-47, 1097-1112; State's Exs. 28, 30-41). Authorities located blood stains in Frederick's bedroom at Ms. Frederick's house as well. (Tr. 1064-71; State's Exs. 46-54).

B. Frederick's jury trial.

In November 2014, an Oklahoma County jury found Frederick guilty of first-degree murder, assault and battery with a dangerous weapon after former conviction of a felony, and domestic abuse – assault and battery. *See* Pet. Appx. at 149a. The jury found the existence of three aggravating circumstances, set forth by the State: (1) Frederick had a prior violent felony, (2) the murder was especially heinous, atrocious, or cruel, and (3) there existed the probability that Frederick posed a

⁸ Ms. Frederick's subdural hematoma was 1.8 cm in size. (Tr. 1008). A subdural hematoma is a blood clot existing between the brain and the dura matter, which covers the brain and separates the brain from the skull. (Tr. 1005-06). Dr. Hahn considered anything larger than 1 cm significant in size. (Tr. 1006).

⁹ Ms. Frederick never regained consciousness following the surgery. (Tr. 1011).

continuing threat to society. *See id.* Frederick was sentenced to death for his murder conviction, imprisonment for twenty-five years for the assault and battery with a dangerous weapon conviction, and one-year for the domestic abuse conviction. *See id.*

C. State direct appeal and post-conviction proceedings.

On direct appeal, the OCCA affirmed Frederick's convictions and sentences in a published opinion issued May 25, 2017. Pet. Appx. at 137a-185a. Frederick notes that his appellate attorney was "an employee of the same public defender's office as trial counsel" and did not raise the ineffective assistance of counsel claim that is the subject of his certiorari petition. Pet. at 5. If Frederick is attempting to suggest that appellate counsel had a conflict of interest that prevented her from raising ineffective assistance of trial counsel claims, he is incorrect. Appellate counsel raised multiple grounds of ineffective assistance of trial counsel and requested an evidentiary hearing. *See* Pet. Appx. at 176a-83a.

While his direct appeal case was pending, Frederick sought post-conviction relief in the OCCA as well. *See* Pet. Appx. at 90a-136a. Among the claims he raised there, Frederick contended that his appellate counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel for neglecting to develop and present a more robust mitigation case based upon Frederick's mental health. *See* Pet. Appx. at 123a-33a. The OCCA remanded Frederick's post-conviction case to the state district court for an evidentiary hearing on the matter. *See* Pet. Appx. at 92a-93a.

At that hearing, Frederick presented the testimony of two attorneys who represented him over the course of his state-court proceedings, Cathy Hammarsten,

who represented Frederick early on but did not ultimately try the case, and James Rowan, who represented Frederick at his trial, as well two doctors, Dr. Curtis Grundy, a clinical and forensic psychologist, and Dr. Antoinette McGarrahan, a neuropsychologist, on the matter of his brain. *See* Pet. Appx. at 123a-25a.

Both testified that they administered testing on Frederick and provided their conclusions based upon that testing to the state district court. *See* Pet. Appx. at 33a-34a, 78a, 123a-25a. Dr. Grundy determined that Frederick met the criteria for a diagnosis of paranoid personality disorder as well as antisocial personality disorder. *See id.* Dr. McGarrahan similarly noted that she found Frederick had paranoid personality and antisocial personality disorders but opined that Frederick had brain damage that guided the behavior leading to those diagnoses. *See id.* According to Dr. McGarrahan, frontal lobe damage could ostensibly pose problems for an individual in the areas of complex decision-making, standard interactions with other people, or being capable of discerning the “gray area” in a given situation. *See id.* However, Dr. McGarrahan at the same time confirmed that each of those possible impairments could be the result of one’s antisocial personality disorder. *See id.* Upon being specifically asked by the State whether she could draw any connection between Frederick’s alleged brain damage and his actions in his crimes, Dr. McGarrahan frankly acknowledged that she could not. *See id.* (“I cannot make that direct link.”). Dr. McGarrahan further noted that while frontal lobe injuries typically impact one’s ability to control their aggression or violence, Frederick—who was fifty-five when he murdered his mother—was at a point in his life where that was no longer an

attributing factor given his age. *See id.* (“You typically don’t see unprovoked aggression even with frontal lobe damage in individuals who are in their fifth and sixth decade of life.”).

From this evidence, the OCCA concluded that Frederick’s appellate counsel was not ineffective for failing to assert a claim based on trial counsel’s failure to investigate and present to the jury the evidence of Frederick’s alleged brain damage. Pet. Appx. at 90a-136a. The OCCA’s decision was based upon both prongs of the analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). As to the deficient performance prong, the OCCA concluded trial counsel made a strategic choice to not pursue further investigation on the matter given that Frederick did not cooperate with efforts to have him evaluated by medical professionals. Pet. Appx. at 127a-29a. The OCCA explained it would have been a bizarre decision to pursue a defense based upon brain damage evidence when Frederick had not consented to any form of personal interview or evaluation by a medical expert. *Id.* As to the prejudice prong, the OCCA concluded the presentation of the brain damage evidence, while mitigating to some, might have been further aggravating to others. Pet. Appx. at 129a-33a. The court explained its introduction would have “given the State ample ground to underscore and highlight” Frederick’s antisocial personality disorder, which “tends to present an aggravating ... circumstance in the sentencing context.”¹⁰ Pet. Appx. at 129a. The OCCA highlighted Dr. McGarrahan’s testimony from the hearing, noting

¹⁰ Frederick’s ineffective assistance of appellate counsel claim that his trial counsel failed to investigate and present evidence of his brain damage was strictly a sentencing-stage allegation of error.

her comment that Frederick’s brain damage “would not impair his day-to-day activities” and “that she could not draw any connection between any brain damage and his criminal conduct.” *Id.* Given its finding that trial counsel was not ineffective based upon its review of the evidence derived from the evidentiary hearing, the OCCA denied Frederick’s claim of ineffective assistance of appellate counsel for failing to raise the issue of his alleged brain damage. Pet. Appx. at 132a-33a.

D. Federal habeas proceedings.

On December 16, 2019, Frederick filed a petition for habeas corpus relief in the Western District of Oklahoma. *See* Pet. Appx. 65a. Frederick advanced, among other claims, a claim that the OCCA unreasonably denied his claim of ineffective assistance of appellate counsel for failing to argue ineffective assistance of trial counsel for failing to investigate and present mitigating evidence concerning Frederick’s mental health. *See* Pet. Appx. at 78a-81a. On July 29, 2020, the district court denied relief and denied Frederick a Certificate of Appealability (“COA”) on all claims in the petition. *See* Pet. Appx. at 87a.

Frederick sought a COA in the United States Court of Appeals for the Tenth Circuit and was granted his request as to his claims of ineffective assistance of appellate counsel¹¹ and his claim of cumulative error.

¹¹ The COA granted by the Tenth Circuit in Frederick’s case encompassed those ineffective assistance of appellate counsel claims raised in the OCCA, which included claims concerning the failure to raise ineffective assistance of trial counsel for failing to present evidence in the guilt-stage concerning Ms. Frederick’s cause of death, failing to cross-examine the medical examiner on alternative sources for Ms. Frederick’s injuries, failing to object to certain statements by the prosecutor about the testimony of the medical examiner, and failing to present testimony from Frederick’s family about his troubled childhood during the penalty-phase. *See* Pet. Appx. 9a-10a.

The Tenth Circuit affirmed the federal district court's denial of habeas relief. Pet. Appx. at 46a. More specifically, in relation to the issues here, the circuit court concluded the OCCA reasonably found Frederick had failed to demonstrate prejudice as to his ineffective assistance of appellate counsel claim, as Frederick had fallen short in demonstrating that "all fairminded jurists could disagree with the OCCA's conclusion that he was not prejudiced at the penalty phase by trial counsel's failure to present brain damage evidence." Pet. Appx. at 35a. Critical to that conclusion was the majority's concerns regarding the lack of a sufficient connection between Frederick's alleged brain damage and the murder of his mother and the fact that the presentation of such evidence would have opened the door to the introduction of Frederick's antisocial personality disorder diagnosis. Pet. Appx. at 35a-36a.

Much like the OCCA, the majority noted that while Dr. McGarrahan "explained that aggression and minimally provoked violence is often seen in individuals with frontal lobe damage, she testified that 'was not currently the case with Mr. Frederick's brain damage' and that he could inhibit his aggression." Pet. Appx. at 35a (alterations accepted). Moreover, the majority noted that Frederick's advanced age of fifty-five at the time of the murder meant his unprovoked aggression was atypical of those affected by frontal lobe damage, who typically became more docile with age; as Dr. McGarrahan stated, Frederick should have been exhibiting more difficulty in his thinking as opposed to his behavior. Pet. Appx. at 35a. Finally, the majority noted Dr. McGarrahan's inability to provide a "direct link" between Frederick's brain damage and the murder; at best, Dr. McGarrahan could only offer

that his frontal lobe damage was “a contributing factor” to his actions. Pet. Appx. at 35a. In sum, the majority explained “Dr. McGarrahan’s testimony did not explain how Mr. Frederick’s brain damage ‘played a substantial role’ in causing him to commit the murder.” Pet. Appx. at 36a (citing *Littlejohn v. Royal*, 875 F.3d 548, 564 (10th Cir. 2017)). As such, a fairminded jurist could conclude the omission of Frederick’s alleged brain damage evidence did not result in any prejudice to his case. Pet. Appx. at 36a.¹²

The majority’s analysis of the value of Frederick’s alleged brain damage evidence did not end just with an assessment of its potential mitigating value, which—as shown—was minimal, at best. In keeping with circuit precedent as well as the precedent from this Court, the majority further highlighted the negative consequences the presentation of the very same evidence could have had upon Frederick’s case. Pet. Appx. at 36a. *See Cullen v. Pinholster*, 563 U.S. 170, 201 (2011) (finding no prejudice in part because the omitted mitigating evidence would have opened the door to rebuttal by the State). Introducing the jury to Frederick’s alleged frontal lobe damage would have allowed the State to introduce evidence of his “antisocial personality [disorder] diagnosis, which ‘tends to present an aggravating’

¹² In a footnote, the majority further questioned the potential mitigating effect of Frederick’s alleged brain damage evidence by noting that he failed to establish in the state court that his alleged brain damage was treatable. Pet. Appx. at 36a n.23. Circuit court precedent has repeatedly indicated that the failure to make such a showing tends to further diminish its value before a jury. *See* Pet. Appx. at 36a n.23 (citing *Littlejohn*, 875 F.3d at 565 (“[T]he mitigating effect of ... brain damage would likely have been diminished by the lack of reliable treatment options....”); *Grant v. Royal*, 886 F.3d 923, 925 (10th Cir. 2018) (“[T]he potency of ... organic-brain damage evidence would have been significantly weakened” because the expert “never indicated that the negative manifestations of [the petitioner’s] organic brain damage ... were treatable.”)).

circumstance during the penalty phase.” Pet. Appx. at 36a (citing *Littlejohn*, 875 F.3d at 564; *Harris v. Sharp*, 941 F.3d 962, 998 (10th Cir. 2019)). Such strong evidence is routinely relied upon by the prosecution in rebuttal, the majority noted, and would have “undercut the potential mitigating effect of the brain damage diagnosis.” Pet. Appx. at 36a. And that is attributed to the disorder’s tendency to demonstrate a defendant’s potential for future, continued dangerousness, even if they are incarcerated. Pet. Appx. at 36a n.24. In concluding its discussion, the majority expressly noted, as shown from its evaluation in the preceding section discussing the lack of any substantial connection between Frederick’s alleged brain damage and his crime, that its decision, as a whole, “d[id] not rest alone on the double-edged nature of the brain-damage evidence.” Pet. Appx. at 36a n.24.

Lastly, the majority distinguished the five primary cases out of this Court and the Tenth Circuit that Frederick relied upon to make his prejudice argument. Pet. Appx. at 37a-38a (citing *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009); *United States v. Barrett*, 985 F.3d 1203 (10th Cir. 2021); *Anderson v. Sirmons*, 476 F.3d 1131 (10th Cir. 2007); *Smith v. Mullin*, 379 F.3d 919 (10th Cir. 2014)).¹³ The majority noted the outcomes in each of these cases could be distinguished because they, generally speaking, involved: (1) stronger evidence of brain damage than that presented here; (2) a connection between the brain damage and the crime of conviction; (3) more mitigating evidence than that presented here; and/or (4) weaker aggravating evidence than what the State presented at trial here.

¹³ Frederick has mostly abandoned his attempt to rely upon these cases in his Petition, citing only to *Rompilla*. See Pet. at 13.

Pet. Appx. at 38a. Additionally, the majority pointed out that all but one of the cases was decided on *de novo* review, whereas Frederick’s case was subject to the constraints of AEDPA, under which “even a strong case for relief” may be insufficient. Pet. Appx. at 38a (citing *Harrington v. Richter*, 562 U.S. 86, 102 (2011)).

In conclusion, and in keeping with the limitations placed upon the court’s review by the AEDPA, the majority found that “[g]iven the strength of the State’s aggravation case and the limited mitigating value of the brain damage evidence, the OCCA reasonably concluded that Mr. Frederick was not prejudiced by trial counsel’s failure to introduce that evidence during the penalty phase. Pet. Appx. at 39a.

Frederick sought reconsideration in the Tenth Circuit, filing a petition for rehearing and request for *en banc* consideration. See Pet. Appx. at 186a. The Tenth Circuit denied the petition and request on October 2, 2023. Pet. Appx. at 186a-187a.

On February 29, 2024, Frederick’s petition for writ of certiorari was placed on this Court’s docket. On March 11, 2024, Quick requested an extension to file a response until May 3, 2024. This Court granted that request the following day.

REASONS FOR DENYING THE PETITION

Although not exhaustive, Rule 10 of this Court’s rules provides that “[a] petition for writ of certiorari will be granted only for compelling reasons” and includes examples of grounds for granting a petition for writ of certiorari. These include a conflict among the United States courts of appeal, a conflict between a United States court of appeals and a state court of last resort, a conflict between state courts of last resort, an opinion by a state court or United States court of appeals that decides an

important federal question in a way that conflicts with relevant decisions of this Court, and an opinion by a state court or United States court of appeals that decides an important federal question that should be settled by this Court. SUP. CT. R. 10. Frederick fails to demonstrate any of these exists in his case.

Frederick's first question presented imputes an analytical failure to the circuit court's resolution of his ineffective assistance claim that simply is not present in the opinion. Moreover, he attempts to draw a comparison between his case and a case granted review by and recently argued before this Court, but never clarifies exactly what the two bear in common.

His second question suffers from deficiencies all its own, posing a question before this Court that was never raised below, fabricating an answer to the question contrary to his cause and ascribing it to the circuit court, all while arguing the question brings to light a circuit court split that does not exist.

This Court should deny certiorari review.

I.

THE TENTH CIRCUIT IDENTIFIED AND APPLIED THE APPROPRIATE LAW TO FREDERICK'S INEFFECTIVE ASSISTANCE CLAIM.

- A. *Frederick's framing of the Tenth Circuit decision is inaccurate; his claim of a failure to apply the appropriate law is actually an attempt to seek fact-bound error correction.*

Frederick contends that his case warrants this Court's review because the Tenth Circuit did not consider the totality of the available mitigating evidence and

then reweigh it against the aggravating evidence in its review of the OCCA's prejudice determination. But the majority below did exactly that.

The court noted several times that it must consider all the mitigation evidence developed by Frederick as it addressed the reasonableness of the OCCA's decision. *See* Pet. Appx. at 35a n.22 (explaining that it would not require a nexus between the alleged brain damage and the crime before taking its value into consideration); 38a n. 25 (citing *Wiggins v. Smith*, 539 U.S. 510, 538 (2003)) (stating that "courts evaluate the prejudicial effect of failing to present certain mitigating evidence by assessing whether 'the available mitigating evidence, *taken as a whole*, might have influenced the jury's appraisal of the defendant's moral culpability.'" (alterations accepted and emphasis added)). The court acknowledged the potential value of brain damage evidence. Pet. Appx. at 31a, 35a. But stated that such evidence *sometimes* will also be aggravating. Pet. Appx. at 31a. The very length of the Tenth Circuit's discussion of the issue belies any claim that it categorically refused to consider Petitioner's mitigating evidence.

Specifically, the majority opinion squarely analyzed all of the mitigation evidence and its potential value both on its own and in relation to the State's case in aggravation. Pet. Appx. at 30a-42a. The majority did so by first presenting the relevant legal background on the issue, before thoroughly restating the evidence presented at trial and derived from Drs. Grundy and McGarrahan during the evidentiary hearing, before turning to its analysis of the issue under § 2254(d)(1) and

(d)(2).¹⁴ Pet. Appx. at 32a-34a. Within its evaluation of the OCCA’s decision under § 2254(d)(1), the majority noted the lack of a connection between the alleged brain damage and Frederick’s crime, pointed out that the cited evidence of brain damage carried the potential to do more harm than good in his case, and finally distinguished those cases Frederick relied upon to show why none warranted habeas relief. Pet. Appx. at 35a-39a. The majority concluded, with regard to the analysis under § 2254(d)(1), which is all that Frederick attacks in his Petition, that “[g]iven the strength of the State’s aggravation case and the limited mitigating value of the brain damage evidence, the OCCA reasonably concluded that Mr. Frederick was not prejudiced by trial counsel’s failure to introduce that evidence during the penalty phase.” Pet. Appx. at 39a.

The majority clearly understood that it was tasked with evaluating the value of the post-conviction evidence of Frederick’s alleged brain damage, in light of all the evidence presented in the penalty stage of his trial, as it assessed the reasonableness of the OCCA’s decision. And like the OCCA, the majority did not “exclude the evidence from the balancing equation, *see* Pet. at 12; instead, it found the alleged brain damage here of limited value given its weak connection to the crime as attested by Dr. McGarrahan. *See* Pet. at 34a-36a. The majority identified several portions of Dr.

¹⁴ While Frederick does at one point indicate that the circuit court “misread critical parts of the record to characterize mitigating evidence as aggravating,” he never clearly contends that he is carrying his claim under § 2254(d)(2) forward and presenting it to this Court now. Moreover, in the body of his Petition wherein he presents the reasons for why this Court should grant review, Frederick only ever cites to the majority’s analysis under § 2254(d)(1) (apart from those instances where he cites to the dissent). *See* Pet. at 12, 17 (citing *Frederick v. Quick*, 79 F.4th 1090, 1125 (10th Cir. 2023)); *see* Pet. Appx. at 36a. As such, the specific issues addressed by the circuit court under § 2254(d)(2) are abandoned.

McGarrahan’s testimony where she simply could not make strong correlations between Frederick’s alleged brain damage and his crime. Pet. at 35a.¹⁵

Seen in this way, Frederick’s Petition merely takes issue with the fact that the majority—again, much like the OCCA—did not give greater weight to other portions of Dr. McGarrahan’s testimony. To be sure, the majority noted those portions too, observing that Dr. McGarrahan did say Frederick’s alleged frontal lobe damage “was a ‘contributing factor’ to his behavior and that his behavior was ‘partially explainable’ by brain damage.” Pet. Appx. at 35a. But those few mixed comments by Dr. McGarrahan were not enough to establish that no fairminded jurist could agree with the decision of the OCCA on the matter. *See* Pet. Appx. at 36a (citing *Wilson v. Trammell*, 706 F.3d 1286, 1309-10 (10th Cir. 2013); *Hooks v. Workman*, 689 F.3d 1148, 1204 (10th Cir. 2012)).

Essentially, Frederick takes issue with the *weight* assigned to the evidence by the OCCA and found reasonable by the Tenth Circuit majority. There can simply be no question that the Tenth Circuit considered all of Frederick’s proffered mitigation evidence. As has been shown above, and will be further addressed below, there was no confusion on the law by the majority requiring correction or creating a split of circuit authority. Frederick simply wants this Court to review his case in the hope that it will grant more weight to those few comments by Dr. McGarrahan that could be seen as helpful to his case and disregard the many which support the OCCA and

¹⁵ The majority identified those portions of Dr. McGarrahan’s testimony where she said Frederick “could inhibit his aggression,” that she would expect Frederick to be more docile given his advanced age, and that she could not provide a “direct link” between his crime and his alleged brain damage. Pet. Appx. at 35a.

the majority's decision. *See* SUP. CT. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

The state court's factual findings are presumed correct, and Frederick has the burden of rebutting them by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). He did not attempt to carry that burden below and does not do so now.¹⁶ *See* Pet. Appx. at 10a ("Mr. Frederick does not challenge the state court's determination of the facts."). As such, this Court should reject Frederick's request to scrutinize the Tenth Circuit's decision when it is nothing more than an attempt to have the facts of his case and the credibility of his expert reassessed.

B. *Frederick's case bears little similarity to Thornell v. Jones.*

In his first question presented, Frederick contends that his case is worthy of this Court's full consideration because it is similar to that of *Thornell v. Jones*, Supreme Court Case No. 22-982. Pet. at i. Then again in his conclusion, Frederick mentions the case again, requesting that his petition be held until a decision is rendered in *Jones*. Pet. at 18. In between, Frederick never spells out exactly how his case is similar to that in *Jones* or why holding the petition until such a decision is rendered would clarify the Tenth Circuit's decision below; the issues in *Jones* are never discussed within the body of his Petition. *See* Pet. at i-18.¹⁷

¹⁶ Frederick did challenge the OCCA's decision in the Tenth Circuit as being contrary to 28 U.S.C. § 2254(d)(2). *See* Pet. Appx. at 39a-42a. He does not make any such claim in his Petition now.

Frederick's neglect is likely due to the fact that the similarities between his case and *Jones* extend only to the general basis of the claim in question: ineffective assistance of counsel that turns on prejudice. The true issue, as presented by the petitioner in that case, was whether the United States Court of Appeals for the Ninth Circuit violated Supreme Court precedent by employing a flawed methodology for assessing prejudice under *Strickland* when the circuit court disregarded the district court's factual and credibility findings and excluded evidence in aggravation and the state's rebuttal when it reversed the district court and granted habeas relief. *See* Petition for Writ of Certiorari (filed April 6, 2023), *Thornell v. Jones*, No. 22-982. Thus, the case is more a question concerning the appropriate amount of deference a circuit court is to afford the findings made following an evidentiary hearing in the federal district court. *See id.* Needless to say, none of that is at issue here. There was no evidentiary hearing held in the federal district court; deference in the context of this case is only to be given to the decision of the OCCA. And despite Frederick's failure to reference 28 U.S.C. § 2254(d) at any point in his brief, he does not appear to call into question the appropriateness of AEDPA deference to the state court decision here. *See* Pet. at 1-18. As such, Frederick's unwarranted claim of similarities

¹⁷ Frederick's Petition cites to the *Jones* case in the body of his brief only one time to state, generally, once more that "[t]he 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)." Pet. at 10. But the petitioner's Petition for Writ of Certiorari and the respondent's Brief in Opposition each only provide a single question presented. *See* Petition for Writ of Certiorari (April 6, 2023) and Brief in Opposition (filed August 23, 2023), *Thornell v. Jones*, No. 22-982. Still, if Frederick is to rely on the case as support for why this Court should grant review in his case, he should take the time to spell out the reasons why or his petition lacks persuasiveness.

between his case and one in which this Court already granted review should be rejected.

II.

THE CLAIM THAT FORMS THE BASIS OF FREDERICK'S SECOND QUESTION PRESENTED WAS NOT PRESENTED OR PASSED UPON BELOW.

A. *Frederick failed to raise the issue contained within his second question presented in the state or federal courts below.*

Frederick's second question argues that this Court should take up the issue of whether or not a diagnosis of antisocial personality disorder categorically forecloses the imposition of a life sentence upon a capital defendant. Pet. at i. But Frederick never raised that broad question before the OCCA, the federal district court, or the Tenth Circuit. See Pet. Appx. at 1a-185a. He certainly had ample opportunity to do so seeing as the federal district court cited similar caselaw for the same purpose—considering the possibility that a jury may view antisocial personality disorder as aggravating, but not holding a petitioner with such a diagnosis can never establish prejudice. Compare Pet. Appx. at 36a (majority of the Tenth Circuit citing to *Littlejohn v. Royal*, 875 F.3d 548, 564, for the premise that evidence of an antisocial personality disorder diagnosis *may* have an aggravating effect) with Pet. Appx. at 80a (federal district court citing to *Littlejohn*, 875 F.3d at 564, for the very same reason).

It comes as no surprise that this Court considers itself “a court of review, not of first review....” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). It is for that reason that this Court generally holds that issues raised for the first time on appeal will not be reviewed because such practice is “an unacceptable exercise of discretion.”

Singleton v. Wulff, 428 U.S. 106, 120 (1976); see *Johnson v. United States*, 520 U.S. 461, 465 (1997) (“This Rule is simply the embodiment of the ‘familiar’ principle that a right ‘may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.’” (quoting *United States v. Olano*, 507 U.S. 725, 713 (1993))); *Dep’t of Revenue v. Kurth Ranch*, 511 U.S. 767, 772 n.9 (1994) (“The issue was not raised below, so we do not address it.”).

More specific to the context here, this Court has rejected on multiple occasions the invitation to decide issues raised for the first time in a petition for writ of certiorari. See, e.g., *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805-06 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); see also *Cromwell v. Randall*, 10 Pet. 368 (1836) (where Justice Story’s survey of cases concluded that the Judiciary Act of 1789, 20 § 25, 1 Stat. 85, granted this Court with no jurisdiction unless a federal question was raised and decided in the state court below; “If both of these do not appear on the record, the appellate jurisdiction fails.”). This Court should not consider Petitioner’s new arguments.

B. *The Tenth Circuit did not hold an antisocial personality disorder diagnosis would categorically foreclose a life sentence.*

As shown above, the Tenth Circuit analyzed the reasonableness of the OCCA’s post-conviction opinion which held that Frederick failed to establish ineffective assistance of appellate counsel for failing to argue trial counsel was ineffective for

neglecting to investigate and present evidence of his alleged brain damage in the penalty stage of trial as mitigation. *See* Pet. Appx. 30a-39a.

Frederick contends the majority “effectively held that an [antisocial personality] disorder diagnosis is *always* aggravating, even when the evidence demonstrates a defendant’s impulsive behavior is more likely attributable to brain damage.” Pet. at 17 (emphasis in original) (citing and quoting Pet. Appx. at 36a (“Evidence of ASPD as a causal explanation of Mr. Frederick’s behaviors would undercut the potential mitigating effect of the brain damage diagnosis.” (alterations adopted)))); *see also* Pet. Appx. at 36a. Frederick then goes on to claim that “[u]nder the Majority’s approach, not a single juror could have voted for life in the face of a potential [antisocial personality disorder] diagnosis.” Pet. at 17. Not once within its opinion did the majority make the sweeping declaration that a diagnosis of antisocial personality disorder would foreclose a life sentence. *See* Pet. Appx. at 30a-39a.

Read as a whole, the majority’s opinion does not dictate anything approaching what Frederick claims. For starters, the language Frederick quotes from the opinion, *see* Pet. Appx. at 36a (“Evidence of antisocial personality disorder as a causal explanation of *Mr. Frederick’s behaviors* would undercut the potential mitigating effect of the brain damage diagnosis.” (emphasis added)), speaks only in terms of the diagnosis as it exists in *this* case. There is no far-reaching holding issued by the majority by which a reader could reasonably conclude that an antisocial personality disorder diagnosis must always be viewed as aggravating, much less so aggravating that a petitioner could never establish prejudice. Instead, the majority was relying

upon past circuit precedent to grapple with the OCCA's determination that there existed a distinct reality that the introduction of Frederick's specific alleged brain damage diagnosis would have opened the door to antisocial personality disorder, which "**tends** to present an *aggravating*" circumstance during the penalty phase. *See* Pet. Appx. at 36a (emphasis in original, bold added) (quoting *Littlejohn v. Royal*, 875 F.3d 548, 564 (10th Cir. 2017), and citing *Harris v. Sharp*, 941 F.3d 962, 998 (10th Cir. 2019) (finding the OCCA reasonably concluded that the development of mitigation evidence in the form of the petitioner's mental illness "would have opened the door to evidence of psychopathy with antisocial personality disorder" which courts have characterized as "the prosecution's 'strongest possible evidence in rebuttal'" (alterations accepted)). Frederick's second question presented is based on a misreading of the court's opinion.

C. *There is no circuit split on the issue.*

Taking Frederick's second question presented and the body of his petition together, he claims the circuit courts are split on the issue of whether "an [antisocial personality disorder] diagnosis categorically forecloses a life verdict." Pet. at i, 15-18. But given the discussion in the preceding section, there is no need to even contemplate this question; seeing as the majority made no such sweeping declaration, there can be no circuit precedent with which the panel's opinion conflicts.

Setting that critical shortcoming aside, there is no circuit split as Frederick contends.

Frederick claims the Sixth, Ninth, and Eleventh Circuits “have held that [antisocial personality disorder] is not necessarily aggravating.” Pet. at 16. But he oddly claims that other circuits, including the Fifth, Eighth, *Ninth*, and *Eleventh*, “take an opposing view and recognize [antisocial personality disorder] to be aggravating.” Pet. at 16-17. The internally contradictory nature of the alleged circuit split from his petition alone should give this Court pause; a review of his cases eliminates any remaining doubt.

The Sixth Circuit in *Esparza v. Sheldon*, 765 F.3d 615, 622-24 (6th Cir. 2014), found itself reviewing an inverse claim to that raised by Frederick here; the habeas petitioner in *Esparza* contended that his counsel was ineffective for presenting evidence derived from a psychological evaluation that revealed a diagnosis of antisocial personality disorder. In making that claim, the petitioner “argue[d] that an antisocial personality disorder diagnosis is categorically prejudicial.” *Id.* at 623. The Sixth Circuit held such evidence was not so black-and-white. *Id.* “Although Esparza correctly observes that the diagnosis can harm as much as it helps,” the court noted, “its double-edged nature cuts against the categorical rule he espouses.” *Id.*

Similar to the claim in *Esparza*, the Eleventh Circuit in *Morton v. Sec’y, Fla. Dept. of Corrs.*, 684 F.3d 1157, 1167-68 (11th Cir. 2012), encountered a habeas claim wherein the petitioner alleged that his counsel rendered ineffective assistance by introducing evidence that he suffered from an antisocial personality disorder. The circuit court explained that while evidence of antisocial personality disorder is “not good mitigation,” 684 F.3d at 1168 (internal quotations omitted) (quoting *Reed v.*

Sec’y, Fla. Dept. of Corrs., 593 F.3d 1217, 1246 (11th Cir. 2010)), it had never ruled that a capital defense attorney rendered ineffective assistance as a matter of law simply because they introduced evidence of an antisocial personality disorder for mitigation purposes. *Id.* at 1168. Instead, the issue was more nuanced, and “a diagnosis of antisocial personality disorder has negative characteristics or presents a double-edged sword renders it uniquely a matter of trial strategy that a defense lawyer may, or may not, decide to present as mitigating evidence.” *Id.*

These cases say nothing different than the cases that Frederick claims form the other side of the supposed circuit split. As he notes in his brief, the Fifth, Eighth, Ninth, and Eleventh Circuit have all acknowledged that evidence of a diagnosis of antisocial personality disorder may cut both ways in a capital case. *See Atwood v. Ryan*, 870 F.3d 1033, 1063 (9th Cir. 2017) (rejecting the habeas petitioner’s claim of ineffective assistance because counsel “could have reasonably concluded that adopting a mental health defense would open the door to the rebuttal testimony that [the petitioner] has pedophilic disorder and antisocial personality disorder [which] may be highly damaging”); *Reed v. Sec’y, Fla. Dep’t of Corr.*, 593 F.3d 1217, 1246 (11th Cir. 2010) (quoting *Wong v. Belmontes*, 558 U.S. 15, 26 (2009) (noting that the introduction of certain mitigation evidence in a habeas petitioner’s case, which included a diagnosis of an antisocial personality disorder, would have allowed “the worst kind of bad evidence [to] come in with the good”); *Foster v. Johnson*, 293 F.3d 766, 781 (5th Cir. 2002) (rejecting the habeas petitioner’s claim of ineffective assistance because the state court’s determination that evidence which included a

diagnosis of antisocial personality disorder was “double-edged” in nature was not unreasonable); *Guinan v. Armontrout*, 909 F.2d 1224, 1230 (8th Cir. 1990) (rejecting the habeas petitioner’s claim of ineffective assistance of counsel claim, which argued that his counsel should have introduced evidence of his mental state in mitigation, in part because such evidence included an antisocial personality disorder and “might very well have reinforced the state’s position that [he] was a dangerous individual”).

Each of these circuit courts recognized, just like the majority did here, that evidence of an antisocial personality disorder diagnosis cuts both ways. *See* Pet. Appx. at 36a. There is no circuit split. And this Court should reject the invitation to review a decision of the Tenth Circuit that is entirely consistent with all other circuits.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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