

No. 19-8921

In The
Supreme Court of the United States

—◆—
ZANE FLOYD,

Petitioner,

v.

WILLIAM GITTERE, WARDEN, ET AL.,

Respondents.

—◆—
**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

—◆—
**BRIEF OF NATIONAL ORGANIZATION ON FETAL
ALCOHOL SYNDROME AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

—◆—
THOMAS C. SAND
Counsel of Record
MILLER NASH GRAHAM & DUNN LLP
3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 224-5858
tom.sand@millernash.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the National Organization on Fetal Alcohol Syndrome (“NOFAS”) is a 501(c)(3) nonprofit public health advocacy organization.¹ NOFAS is committed to preventing prenatal exposure to alcohol, drugs, and other substances known to harm fetal development. NOFAS works to raise awareness and support women before and during their pregnancy. NOFAS also works to support individuals, families, and communities living with Fetal Alcohol Syndrome (“FAS”), Fetal Alcohol Spectrum Disorders (“FASD”), and other preventable intellectual and developmental disabilities. NOFAS represents children and adults seeking medical, mental health, education, rehabilitative and other therapeutic services for the effects of prenatal alcohol exposure. FASD is the leading preventable cause of developmental disabilities and birth defects, and a leading known cause of learning disabilities, with nearly 100,000 newborns in the United States every year exposed to heavy or binge drinking during prenatal development.

Approximately 60 percent of individuals with FASD have a history of legal trouble and 50 percent have been confined in a jail, prison, treatment facility,

¹ Pursuant to Rule 37.2, counsel of record for all parties received notice of NOFAS’s intent to file this brief at least ten days before the due date, and all parties to the appeal have consented to the filing of this brief. Pursuant to Rule 37.6, NOFAS affirms that no counsel for a party authored this brief in whole or in part and that no person other than NOFAS or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

or psychiatric hospital. Natalie Novick Brown et al., *Prenatal Alcohol Exposure: An Assessment Strategy for the Legal Context*, 42–43 *Int'l J.L. & Psychiatry* 144, 144 (2015). Accordingly, NOFAS agrees with the American Bar Association that it is necessary that law enforcement officials, courts, jurors, and corrections officers be educated about FASD. FASD should be appropriately considered during all stages of an individual's encounter with the criminal justice system, including sentencing, confinement, mitigation, diversion, and exclusion from the death penalty. Am. Bar Ass'n, FASD Resolution and Report (Aug. 7, 2012), https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/fasd-resolution/.

Petitioner Zane Floyd (“Mr. Floyd”) demonstrates many of the characteristics of an individual with FASD. Although Mr. Floyd’s case is an extreme example of the maladaptive behavior associated with FASD, his experience is representative of that of many people affected by FASD who encounter the criminal justice system. People with FASD are often misdiagnosed, misunderstood, and unable to receive services. Their condition, while often severe, goes unrecognized as a mitigating factor.

Mr. Floyd’s case has profound implications for the standards of decency with which our society and criminal justice system treat people with brain-based disorders and ensuring that individuals affected by FASD are treated equally under the law in the United States, regardless of where they happen to live. This case is also particularly important for understanding the

neurobehavioral and neurocognitive disorders associated with FASD, vulnerabilities of affected individuals, opportunities for intervention and eligibility for services and treatment, and the ultimate consequences of the high cost to live with FASD in our society.

NOFAS files this brief pursuant to Rule 37 of the Rules of the Supreme Court of the United States. All parties to the appeal have consented to the filing of this brief and written consent has been provided to counsel for NOFAS by counsel for each party.



SUMMARY OF ARGUMENT

Petitioner Zane Floyd (“Mr. Floyd”) exhibits many of the characteristics of a person affected by a Fetal Alcohol Spectrum Disorder (“FASD”). Nevertheless, Mr. Floyd was sentenced to death by a Nevada jury without that jury ever seeing or hearing evidence that he suffered from FASD. Counsel representing Mr. Floyd during his trial failed to investigate or present any evidence of an FASD diagnosis or that Mr. Floyd suffered from associated organic brain damage.

FASD is a group of conditions characterized by significant and persistent neurological, cognitive, and behavioral deficits resulting from brain damage caused by prenatal alcohol exposure. Individuals affected by FASD frequently struggle to function independently in society due to behavioral deficits that, unlike those associated with certain other disabilities and conditions, typically do not improve with age.

During criminal proceedings, evidence of a defendant's FASD may serve as a significant mitigating factor against imposing the death penalty. Evidence of an FASD diagnosis and testimony by an expert may demonstrate that the defendant was unable to control his or her behavior or conform to societal norms, explain that brain damage associated with FASD contributed to the defendant's criminal behavior, and clarify that potentially "aggravating" circumstances may be the result of the defendant's FASD.

Mr. Floyd petitioned the United States District Court for the District of Nevada for habeas corpus relief due to errors occurring during his trial. A significant basis for Mr. Floyd's petition was a claim of ineffective assistance of counsel, based on trial counsel's failure to investigate and introduce FASD-related evidence. The District Court denied Mr. Floyd's petition and a panel of the United States Court of Appeals for the Ninth Circuit affirmed that denial. *Floyd v. Filson*, 949 F.3d 1128 (9th Cir. 2020).

The Ninth Circuit panel evaluated Mr. Floyd's claim of ineffective assistance of counsel and determined that "there [was] no reasonable probability that, had the jury heard from an FASD expert, it would have concluded that mitigating factors outweighed aggravating factors such that Mr. Floyd did not deserve a death sentence." *Floyd*, 949 F.3d at 1138–39 (applying *Strickland v. Washington*, 466 U.S. 668, 688, 694–95 (1984)). In making that determination, the Ninth Circuit panel dismissed the significant weight that evidence of a defendant's FASD and/or brain damage

carries during sentencing and conflated FASD with other conditions and disabilities.

This Court and courts in at least four other circuits of the United States Courts of Appeals, however, have recognized the significant mitigating value of evidence of a defendant's FASD or brain damage at the sentencing stage of a criminal proceeding. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 392–93 (2005) (holding that evidence discovered by post-conviction counsel, including that defendant “suffer[ed] from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions . . . likely caused by fetal alcohol syndrome” was “sufficient to undermine confidence in the outcome” of sentencing proceedings that resulted in the death penalty).

If the Ninth Circuit's misapplication of *Strickland* and the resulting circuit split is allowed to persist, Mr. Floyd will never have the opportunity to present to a court or jury evidence that could lessen his culpability and weigh against a sentence of death. Furthermore, individuals affected by FASD or other brain damage will face unequal treatment under the law simply on account of which judicial circuit they happen to live in.

This Court should grant Mr. Floyd's Petition for Writ of Certiorari to ensure that Mr. Floyd has the opportunity to present crucial mitigating evidence demonstrating the magnitude of his trial counsel's error and resolve a circuit split to protect the constitutional rights of individuals affected by FASD.



ARGUMENT

I. **FASD and associated brain damage cause significant developmental, cognitive, and behavioral deficits**

Fetal Alcohol Syndrome (“FAS”) and the collection of related disorders known as Fetal Alcohol Spectrum Disorders (“FASD”)s are characterized in substantial part by permanent brain damage that causes significant and lasting developmental, cognitive, and behavioral deficits. Those deficits frequently include difficulty with working memory, problem solving, planning, response inhibition, impulse control, concept formation, and adaptive functioning skills. Individuals with FASD frequently have trouble leading an independent life, keeping social relationships, and integrating effectively into society in an appropriate manner. FASD is also strongly associated with decreased IQ, reduced motor skills, and impaired attention.

Since it was first recognized in 1973, FAS has been associated with three main diagnostic features: 1) pre- and/or postnatal growth deficiency, 2) a characteristic pattern of facial anomalies, and 3) central nervous system dysfunction, including structural brain damage. Edward P. Riley et al., *Fetal Alcohol Spectrum Disorders: An Overview*, 21 *Neuropsychol. Rev.* 73, 73–74 (2011). Over time, additional research into the effects of prenatal alcohol exposure has led to an understanding that FAS is only one of many potential outcomes of prenatal exposure to alcohol—the entire group of conditions is now known as FASD. *Id.* at 74.

Prenatal alcohol exposure affects every stage of an individual's brain development and disrupts subsequent cognitive, motor, and behavioral functions. *Id.* at 77. Neuroimaging studies have found that prenatal alcohol exposure leads to a decrease in brain volume/size, reductions in gray matter, and disorganization of the central nervous system, as well as other brain abnormalities. Sarah N. Mattson et al., *Fetal Alcohol Spectrum Disorders: A Review of the Neurobehavioral Deficits Associated with Prenatal Alcohol Exposure*, 43 *Alcoholism* 1046, 1050 (2019); S. Christopher Nuñez et al., *Focus On: Structural and Functional Brain Abnormalities in Fetal Alcohol Spectrum Disorders*, 34 *Update on Brain Pathology* 121, 122–27 (2011). That permanent brain damage correlates with significant neurological, cognitive, and behavioral deficits. Mattson et al., *supra*, at 1050–51. In particular, individuals with FASD typically have deficits in general intelligence, executive function (higher-order cognitive processes like working memory, problem solving, planning, and response inhibition), impulse control, concept formation, and adaptive functioning (skills necessary for everyday life, including leading an independent life, keeping social relationships, and integrating effectively into society). *Id.* at 1051–55. FASD is also strongly associated with decreased IQ, reduced motor skills, impaired attention, lower scores on verbal fluency measures, and reduced language skills. *Id.*

People born prenatally exposed to alcohol are born with a “developmental disability.” See Larry Burd and William Edwards, *Fetal Alcohol Spectrum Disorders*,

Implications for Attorneys and the Courts, Crim. Just., Fall 2019, at 21, 26–27; see also Larry Burd & Svetlana Popova, *Fetal Alcohol Spectrum Disorders: Fixing the Aim to Aim for the Fix*, Int’l J. Envtl. Rsch. and Pub. Health (2019), 16, 3978, 1–6. Experts on FASD have recognized that it is the equivalent of an intellectual disability and proposed a framework for treating it as such. Stephen Greenspan et al., *FASD and the Concept of ‘Intellectual Disability Equivalence’*, in *Fetal Alcohol Spectrum Disorders in Adults: Ethical and Legal Perspectives* 241, 241 (Monty Nelson & Marguerite Trussler eds., 2016). In recent years, some states, including Minnesota and Alaska, have even codified FASD as a developmental disability in certain contexts. See, e.g., Minn. Stat. § 252.27; Alaska Stat. § 47.20.290.

The various cognitive and behavioral deficits associated with FASD also lead to simultaneous diagnoses of other neurological, mental, and behavioral conditions in individuals with FASD at much higher rates than in members of the general public. See, e.g., Svetlana Popova et al., *Comorbidity of Fetal Alcohol Spectrum Disorder: A Systematic Review and Meta-analysis*, 387 *Lancet* 978 (2016) (identifying and estimating the prevalence of comorbid conditions in individuals with FAS). For example, studies have shown that whereas 6.7 percent of the general population in the United States is affected by Attention-Deficit/Hyperactivity Disorder (‘ADHD’), more than 51 percent of individuals with FAS are diagnosed with disturbances of activity and attention. *Id.* at 984 tbl. 2.

Other conditions with much higher prevalence rates in individuals with FAS than in the general population include visual impairment, hearing loss, lifetime alcohol and drug dependence, language impairments, intellectual disabilities, and conduct disorders. *Id.*

Despite high rates of comorbidity, however, FASD is not equivalent to and should not be confused with other conditions that may appear to overlap with FASD. ADHD, for example, is “a persistent pattern of behavior including hyperactivity and impulsivity, and/or inattention,” behaviors which may also be seen in individuals with FASD. See Elizabeth Peadon & Elizabeth J. Elliott, *Distinguishing Between Attention-Deficit Hyperactivity and Fetal Alcohol Spectrum Disorders in Children: Clinical Guidelines*, 6 *Neuropsychiatric Disease & Treatment* 509, 509 (2010). Despite that similarity, however, FASD and ADHD are completely distinct conditions that must be accounted for separately by a court or jury during sentencing.

FASD results from a very specific and permanent cause: prenatal alcohol exposure that interferes with human development during gestation, causing permanent brain damage and resulting in structural and functional brain abnormalities and an array of effects on cognition and behavior. Mattson et al., *supra*, at 1050. ADHD, on the other hand, may be caused by a strong genetic component and a variety of possible environmental contributors (including exposure to toxins, prematurity, adverse childhood experiences, illness, and head trauma). *Id.*

Individuals with FASD are often unable to improve their adaptive functioning skills over time and frequently cannot live independently in society as adults. *See, e.g.,* Larry Burd & Jacob Kerbeshian, *Commentary: Fetal Alcohol Spectrum Disorders*, 2 *Int'l J. Alcohol & Drug Rsch.* 3, 4–5 (2013). The neurobehavioral and neurocognitive deficits of people with FASD become worse and more complex over time. *See* Cassondra Kambeitz et al., *Association of adverse childhood experiences and neurodevelopmental disorders in people with fetal alcohol spectrum disorders (FASD) and non-FASD controls*, 19 *BMC Pediatrics* 498 (2019).

Studies have shown that children with FASD show no improvement in adaptive functioning skills—the ability to meet appropriate expectations of personal independence and social responsibility, including the ability to perform everyday tasks and adapt to changes in environment—as they age, whereas children with Attention-Deficit Disorder (‘ADD’) and/or ADHD continue developing as they age. *See, e.g.,* Nicole Crocker et al., *Comparison of Adaptive Behavior in Children with Heavy Prenatal Alcohol Exposure or Attention-Deficit/Hyperactivity Disorder*, 33 *Alcoholism* 2015, 2021 (2009). An individual with FASD may therefore never be able to adequately manage stressors and handle environmental changes to the extent necessary to live independently in society. Individuals with ADHD, however, are often able to improve their behavioral deficits as they age and live independently in society. *Id.* at 2021 (concluding that individuals with

ADHD have a “development delay in adaptive ability” and are able to improve over time).

This case provides an opportunity to examine and explicitly recognize the special risk that individuals with FASD face—an opportunity this Court could seize by granting Mr. Floyd’s Petition for Writ of Certiorari.

II. The likelihood of a different result if the jury had heard evidence of Mr. Floyd’s FASD is sufficient to undermine confidence in the outcome of the sentencing stage of Mr. Floyd’s trial

Evidence and expert testimony detailing Mr. Floyd’s neurodevelopmental deficits and showing that they resulted specifically from FASD would have provided important proof of a mitigating circumstance. If evidence of Mr. Floyd’s FASD had been presented, it might well have changed the jury’s balancing of mitigating versus aggravating factors and influenced the jury’s appraisal of Mr. Floyd’s culpability in deciding whether Mr. Floyd deserves the death penalty. Because Mr. Floyd has never been allowed an evidentiary hearing to present that evidence, however, the jurors who sentenced him to death, the district court that denied his habeas petition, and the Ninth Circuit panel that denied his appeal in this case have never had before them complete and accurate information sufficient to understand FASD and properly weigh it as a mitigating circumstance that may make Mr. Floyd less deserving of the death penalty. Accordingly, the fact that the

jury that sentenced Mr. Floyd to death never heard such evidence undermines confidence in the outcome of the sentencing stage of his trial.

The Ninth Circuit found it was sufficient for the jury to have heard that Mr. Floyd's mother drank while pregnant with Mr. Floyd and that he suffered from conditions including ADD/ADHD, along with an insinuation that his mother's drinking may have led to those conditions.² But this type of evidence is far from sufficient to permit a court, let alone a juror, to understand the true nature, effect, and severity of FASD. An expert on FASD is necessary to explain the prevalence, scope of consequences, and phenotype of an individual who is affected by prenatal alcohol exposure. Many medical practitioners, public health professionals, policymakers, and systems of care frequently do not even fully understand FASD, and regularly fail to identify or diagnose FASD. *See* Larry Burd & William Edwards, *Fetal Alcohol Spectrum Disorders: Implications for Attorneys and the Courts*, Crim. Just., Fall 2019, at 21, 23–24. As of 2007, 42 percent of psychologists underestimated the prevalence of FASD, over 70 percent lacked training in FASD, and 82 percent were unprepared to manage people with FASD. *Id.* As of 2006, only 62 percent of pediatricians felt prepared to identify FASD and only 50 percent felt prepared to diagnose it. *Id.*

² It appears unclear whether and to what extent such evidence actually was presented. *Compare Floyd*, 949 F.3d at 1139–40, *with* Petition for Writ of Certiorari at 14–17 (No. 19-8921) (Jul. 2, 2020).

Overall, less than 1 percent of people affected by FASD in the United States are diagnosed. *Id.*

Testimony from an expert on FASD explaining the neurobiological implications of an FASD diagnosis would provide evidence of a fundamentally different type than evidence merely of prenatal alcohol exposure and diagnosis of other conditions that are often comorbid with FASD. *See Williams v. Stirling*, 914 F.3d 302, 316 (4th Cir. 2019) (holding that investigation by counsel into evidence of defendant’s FAS would have been “substantively different from the defense team’s investigation into other mental illnesses and behavioral issues because FAS could have established both cause and effect for [defendant’s] criminal acts” and “could have provided to the jury evidence of an overarching neurological defect that caused [defendant’s] criminal behavior”).

For example, Dr. Natalie Novick Brown, a nationally recognized expert on FASD, concluded in 2006 after reviewing testimony, and numerous records, reports, evaluations, photographs, and raw data regarding Mr. Floyd, that he met criteria for an FASD diagnosis. Decl. of Natalie Novick Brown, Ph.D., Pet’r’s Excerpt of R., at EOR0998–1019, 1001 (hereinafter “Novick Brown Decl.”). Specifically, Dr. Novick Brown opined that Mr. Floyd was affected by FAS Type 3, a condition characterized in part by “a pattern of behavioral and/or cognitive abnormalities inconsistent with developmental level and unexplained by genetic background or environmental conditions.” *Id.* at EOR1002. Those abnormalities include, among other things,

“poor impulse control, problems in social perception, . . . poor capacity for abstraction, . . . and problems in memory, attention, or judgment.” *Id.*

Testimony from experts like Dr. Novick Brown is critical for a jury to consider when weighing whether a defendant deserves the death penalty because factors portrayed as aggravating circumstances may actually be explained as behavioral manifestations of FASD. A lack of expert testimony or other evidence explaining the link between FASD and those behavioral manifestations prevents a jury from considering a significant mitigating circumstance that may outweigh aggravating circumstances.

For example, FASD may explain an individual’s lack of self-control and/or inability to recognize when his conduct subjects others to harm, interpret social cues, or conform to social norms. Individuals with FASD may commit serious crimes, including major sexual boundary violations, because they are unable to distinguish between appropriate and inappropriate environmental cues and integrate them into their own behavior. *See, e.g.,* Mattson et al., *supra*, at 1050–51; *see also* Novick Brown Decl. at EOR1006.

In Mr. Floyd’s case, Dr. Novick Brown noted, for example, that Mr. Floyd exhibited extreme impulsivity, showing “flashes of severe anger” that he “had difficulty controlling even in [a] highly structured testing environment.” Novick Brown Decl. at EOR1006–07. Those behaviors, she noted, were relevant to Mr. Floyd’s “uncontrolled aggression during his crimes” and

were consistent with neurodevelopmental disorders observed in Mr. Floyd. *Id.* Those neurodevelopmental disorders were “consistent with the type of primary disabilities typically seen in individuals diagnosed with FASD.” *Id.* at EOR1004. In Dr. Novick Brown’s judgment, Mr. Floyd also displayed significant deficits in social skills, impulse control, and judgment—all consistent with FASD-induced neurodevelopmental disabilities. *Id.* at EOR1009.

The criminal justice system by its nature frequently portrays such factors as aggravating circumstances that make a defendant more deserving of a harsh punishment, including the death penalty. The Ninth Circuit panel noted, for example, that “the especially shocking nature of Floyd’s crime, during which he killed multiple unarmed people at close range, without provocation, and in their workplace,” made it “unlikely” that evidence regarding Mr. Floyd’s FASD would have convinced a single juror to change the outcome of Mr. Floyd’s sentencing. *Floyd*, 949 F.3d at 1140. An expert on FASD, however, can lay out for a jury or court how the very facts that appear “especially shocking” and unexplainable are in all likelihood related to the permanent brain damage caused by prenatal alcohol exposure.

Dr. Novick Brown explained in 2006 that, “when faced with events that trigger negative emotions, individuals with FASD,” like Mr. Floyd, “often overreact and behave impulsively without the moderating (i.e., socializing) steps involved in healthy executive functioning.” Novick Brown Decl. at EOR1010. Dr. Novick

Brown then noted that Mr. Floyd's crimes "occurred shortly after he drank an excessive amount of alcohol, used methamphetamine, and experienced several stressful events: job problems, the death of his cousin, the 'loss' of his best friend to homosexuality, the loss of his girlfriend, his unsuccessful return home to live with his parents, the loss of his entire paycheck to gambling, and \$10,000 debts that he was behind in paying." *Id.* at EOR1011.

Furthermore, an individual living without a proper diagnosis of FASD may be deprived of adequate services and effective treatment to prevent the negative manifestations of neurobehavioral deficits resulting from FASD. *See id.* at EOR1010. An expert in FASD could explain to a court or jury that an individual with FASD may experience "adverse life outcomes because his primary disabilities were not accurately diagnosed and treated." *Id.* Indeed, in Mr. Floyd's case, "it is highly likely that his secondary disabilities," including substance abuse, inappropriate sexual behavior, dependent living, criminal behavior, and unrestrained brutal aggression, "would have been more manageable and less extreme, if they had developed at all," if Mr. Floyd had received appropriate treatment for his FASD-induced primary disabilities during childhood. *Id.*

Because of the lack of understanding of the nuances of FASD among other medical practitioners and experts, testimony from an expert in FASD regarding Mr. Floyd's diagnosis and FASD in general would have been powerfully persuasive evidence for the jury to

consider before deciding that Mr. Floyd deserved the death penalty. Mr. Floyd, however, has never had an opportunity to present that evidence. Given the chance to do so, the likelihood of a different outcome at the sentencing stage of Mr. Floyd’s trial is sufficient to undermine confidence in the outcome the jury actually reached.

III. The Ninth Circuit panel’s decision ignored the significant weight of evidence of a defendant’s FASD at the sentencing stage of a criminal proceeding, incorrectly applied *Strickland v. Washington*, and disagreed with courts in other circuits

Although the Ninth Circuit panel that denied Mr. Floyd’s appeal applied the correct precedent—*Strickland*—for evaluating a claim of ineffective assistance of counsel, it reached a conclusion that was not only incorrect, but conflicted with past decisions by this Court and other circuits.

In *Rompilla v. Beard*, this Court held that evidence regarding a defendant’s FAS, among other similar and related evidence, was significant enough to “undermine confidence in the outcome” of the sentencing stage of a defendant’s trial for murder. 545 U.S. 374, 393 (2005). In that case, the defendant was found guilty on one count of murder and other related charges. *Id.* at 378. During the sentencing stage of his trial, prosecutors presented evidence to support the existence of three aggravating circumstances. *Id.* The

jury found all three aggravators had been established and, despite also finding the existence of two mitigating factors, sentenced the defendant to death. *Id.* Post-conviction, counsel for the defendant discovered evidence that was not investigated or presented by trial counsel, including evidence that the defendant “suffer[ed] from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions . . . likely caused by fetal alcohol syndrome.” *Id.* at 392. In holding that the failure by trial counsel to investigate and present such evidence constituted ineffective assistance of counsel under the Sixth Amendment, this Court interpreted *Strickland*, writing:

[A]lthough we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered “mitigating evidence, taken as a whole, ‘might well have influenced the jury’s appraisal’ of [Rompilla’s] culpability,” *Wiggins v. Smith*, 539 U.S., at 538, 123 S.Ct. 2527 (quoting *Williams v. Taylor*, 529 U.S., at 398, 120 S.Ct. 1495), and the likelihood of a different result if the evidence had gone in is “sufficient to undermine confidence in the outcome” actually reached at sentencing, *Strickland*, 466 U.S., at 694, 104 S.Ct. 2052.

Id. at 393. Accordingly, this Court acknowledged in *Rompilla* the significant weight that evidence of FAS, FASD, and organic brain damage may carry with jurors deciding whether to sentence a defendant to

death. Such evidence is sufficiently important as a mitigating factor that defense counsel's failure to investigate and present it during the sentencing stage constitutes ineffective assistance of counsel and violates a defendant's Sixth Amendment rights. *See id.*

The Fourth Circuit, in *Williams*, similarly held that evidence of a defendant's FAS was crucial evidence for a jury to consider and would have been "substantively different from the defense team's investigation into other mental illnesses and behavioral issues because FAS could have established both cause and effect for [defendant's] criminal acts" and "could have provided to the jury evidence of an overarching neurological defect that caused [defendant's] criminal behavior." 914 F.3d at 316. The Tenth, Sixth, and Eleventh Circuits have also held or noted the uniquely persuasive nature of evidence of a defendant's FAS, FASD, or brain damage during sentencing and that a failure to investigate and present such evidence is highly prejudicial to defendants and may constitute ineffective assistance of counsel. *See, e.g., Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012); *Glenn v. Tate*, 71 F.3d 1204, 1211 (6th Cir. 1996); *Jefferson v. GDCP Warden*, 941 F.3d 452 (11th Cir. 2019).

The Ninth Circuit panel in Mr. Floyd's case, however, incorrectly applied *Strickland* to reach a conclusion that conflicts with *Rompilla* and decisions in the Fourth, Sixth, Tenth, and Eleventh Circuits. The Ninth Circuit panel examined whether Mr. Floyd's counsel's performance "fell below an objective standard of reasonableness" and, "if so, [whether] there [was] a

reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Floyd*, 949 F.3d at 1138–39 (citing *Strickland*, 466 U.S. at 688, 694). In determining the risk of prejudice that resulted from any failure by Mr. Floyd’s trial counsel, the panel “consider[ed] whether it [was] reasonably probable that the jury otherwise ‘would have concluded that the balance of aggravating and mitigating circumstances did not warrant death’ in light of ‘the totality of the evidence’ against” Mr. Floyd. *Id.* (quoting *Strickland*, 466 U.S. at 695).

In contrast to this Court’s decision in *Rompilla*, and the holdings of the Fourth, Sixth, Tenth, and Eleventh Circuits, however, the Ninth Circuit ultimately decided that “there [was] no reasonable probability that, had the jury heard from an FASD expert, it would have concluded that mitigating factors outweighed aggravating factors such that Mr. Floyd did not deserve a death sentence.” *Id.* at 1091.

In reaching that conclusion, the panel relied on its own beliefs about FASD that were not founded in the record and are contrary to the science. For example, in its opinion, the panel appeared to equate FASD with ADD and ADHD, suggesting that a juror would not consider “a formal FASD diagnosis more severe and debilitating than ADD/ADHD and Floyd’s other mental illnesses.” *Id.* at 1092. The panel further concluded that testimony by an expert in FASD would have added nothing of consequence to the jury’s understanding of mitigating and aggravating circumstances, because “the defense had suggested” that Mr. Floyd’s

ADD/ADHD and other mental illnesses “included effects on his mental state of his mother’s drinking and drug use during pregnancy, but without using FASD terminology.” *Id.* Finally, the panel determined, without support, that evidence detailing and explaining Mr. Floyd’s FASD would have differed only “somewhat in degree, but not type” from “the evidence that would have supported the FASD diagnosis as well as the implication that the evidence explained Floyd’s behavior.” *Id.* at 1093.³

Mr. Floyd, however, has never had an opportunity to present evidence of his FASD diagnosis or expert testimony regarding FASD more generally. Without any such evidence in the record, the panel could not properly evaluate the strength or nature of the evidence that Mr. Floyd might have presented. Without

³ The Ninth Circuit panel initially denied Mr. Floyd’s appeal in October 2019. *Floyd v. Filson*, 940 F.3d 1082 (9th Cir. 2019), *amended and superseded on denial of reh’g en banc* by *Floyd v. Filson*, 949 F.3d 1128 (9th Cir. 2020). Mr. Floyd filed petitions for panel rehearing and rehearing en banc and NOFAS filed a brief as *amicus curiae* supporting Mr. Floyd’s petition. Appellant’s Pet. for Panel Reh’g and Pet. for Reh’g En Banc, No. 14-99012, ECF No. 105 (9th Cir. Dec. 24, 2019); Br. of *Amicus Curiae* National Organization on Fetal Alcohol Syndrome in Supp. of Pet’r, No. 14-99012, ECF No. 109 (9th Cir. Jan. 3, 2020). The Ninth Circuit denied Mr. Floyd’s petition and amended its original opinion by making only superficial and cursory changes that did not actually remove or undo the panel’s original errors. *See, e.g.*, 949 F.3d at 1134 (replacing three references to Mr. Floyd’s “mental illnesses” with references to his “developmental problems”). The amended opinion includes the same disregard of science and comparison to ADD/ADHD, with only a very slight change in terminology used. *Id.*

an evidentiary hearing, Mr. Floyd has not had an opportunity to demonstrate to any court the type, degree, and persuasiveness of FASD evidence that is available.

By instead relying on assumptions that are not supported by the record, and which Mr. Floyd has not had an opportunity to contest or refute, the panel side-stepped decades of scientific and medical research showing the severe deficits caused by FASD in comparison to other conditions. As detailed in Sections I and II, *supra*, FASD is a unique collection of conditions resulting from organic brain damage caused by prenatal exposure to alcohol. FASD has severe effects on an individual's cognitive and behavioral skills and abilities that differ in type, severity, and duration from those associated with conditions like ADD/ADHD and which are not adequately explained or understood by oblique references to a mother's drinking. *Id.* Testimony by an expert familiar with that research and with Mr. Floyd could have explained to jurors that Mr. Floyd may have been unable to regulate his behavior due to FASD-induced permanent brain damage in a way that could not be attributed to or confused with the effects of other conditions or mental illnesses.

By equating FASD to ADD/ADHD and concluding that evidence and testimony regarding FASD would not have differed in type from evidence already in the record, the Ninth Circuit panel contradicted or ignored not only the 50 years of scientific and medical evidence, but also this Court's decision in *Rompilla*, 545 U.S. at 392–93, and the decisions of at least four other circuits of the United States Courts of Appeals. The

Ninth Circuit panel's decision is particularly problematic because of its apparent conflation of FASD with other conditions, setting precedent for other courts, government agencies, and aid organizations to disregard the unique risks and severe effects of FASD.

IV. Only this Court can protect Mr. Floyd's constitutional rights, resolve the existing circuit split, and ensure that individuals with FASD or similar brain damage receive equal treatment under the law

Mr. Floyd and other individuals affected by FASD who happen to reside within the Ninth Circuit now depend on this Court to grant Mr. Floyd's Petition for Writ of Certiorari and decide whether failure by a criminal defendant's trial counsel to investigate and present evidence of the defendant's FASD and/or brain damage at the sentencing stage of criminal proceedings constitutes ineffective assistance of counsel.

This case is an excellent vehicle for the Court to decide that question and resolve the split between the Ninth Circuit and the Fourth, Sixth, Tenth, and Eleventh Circuits in the application of *Strickland*. By granting Mr. Floyd's Petition for Writ of Certiorari, this Court could seize the opportunity to decide conclusively whether a jury must see and hear evidence of a criminal defendant's FASD or brain damage before sentencing him or her to death or, at the very least, whether a defendant like Mr. Floyd must be given the opportunity to present such evidence to a court before

the mitigating value of that evidence can be so readily dismissed.

Finally, this Court also has the opportunity to standardize treatment of criminal defendants affected by FASD across the United States and ensure that they are treated equally under the law, regardless of the judicial circuit within which they happen to live. As it currently stands, an individual with FASD may be convicted of a crime and sentenced to death in the Ninth Circuit without a court or jury ever seeing or hearing any evidence of that individual's FASD, brain damage, and resulting cognitive and behavioral deficits. If the same individual, however, is tried in the Fourth, Sixth, Tenth, or Eleventh Circuits, his or her FASD would be afforded the significant weight and mitigating value it deserves in determining whether the death penalty is appropriate. By granting Mr. Floyd's Petition for Writ of Certiorari and deciding his case, this Court can eliminate that disparity.



CONCLUSION

For the foregoing reasons, NOFAS respectfully urges the Court to grant Mr. Floyd's Petition for Writ of Certiorari.

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Respectfully submitted,

THOMAS C. SAND

Counsel of Record

MILLER NASH GRAHAM & DUNN LLP

3400 U.S. Bancorp Tower

111 S.W. Fifth Avenue

Portland, Oregon 97204

(503) 224-5858

tom.sand@millernash.com

Counsel for Amicus Curiae