No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LAURA SHAUGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case raises a pressing issue of national importance: In applying for a certificate of appealability (COA) to appeal from the denial of a motion under 28 U.S.C. § 2255, whether rulings by the district court denying relief are debatable by jurists of reason if rulings by other courts in similar situations arguably support the movant-appellant's claims. Specifically, did the United States Court of Appeals for the Third Circuit improperly deny Ms. Shauger a COA after she had demonstrated that the facts of her case, when applied to rulings of this Court, several Circuit Courts of Appeals, and the Supreme Court of Idaho, as well as to the ABA Standards for Criminal Justice (3d ed. 1993), arguably supported her ineffective assistance claims?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Shauger and respondent United States).

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LAURA SHAUGER respectfully petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Third Circuit filed on July 3, 2018, denying her application for a certificate of appealability permitting her to appeal the denial by the United States District Court for the Eastern District of Pennsylvania of her motion under 28 U.S.C. § 2255.

ORDERS AND OPINIONS BELOW

The order of the United States Court of Appeals for the Third Circuit (Chagares, Greenaway, and Fuentes, JJ.) denying the petitioner's application for a certificate of appealability was filed July 3, 2018. That order, which is not published, is reprinted as Appendix A to this petition. On August 15, 2018, the Court of Appeals denied the petitioner's petition for rehearing. That order, which is not published, is reprinted as Appendix C to this petition.

On November 30, 2017, the United States District Court for the Eastern District of Pennsylvania (Goldberg, J.), filed a memorandum opinion denying the petitioner's motion under 28 U.S.C. § 2255 to vacate her sentence and resentence her. That memorandum opinion, which is not published, is reprinted as Appendix B to this petition.

JURISDICTION

The order of the United States Court of Appeals for the Third Circuit denying the petitioner's application for a certificate of appealability was entered on July 3, 2018. Appx. A; Fed.R.App.P. 36. By order filed August 15, 2018, the court of appeals denied petitioner's timely petition for rehearing. Appx. C. This petition is filed within 90 days after that date. Rules 13.1, 13.3. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF CONSTITUTIONAL PROVISION, FEDERAL STATUTE AND RULE OF PROCEDURE INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense.

28 U.S.C. § 2253. Appeal:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> * * *
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Fed.R.App.P. 22(b) Certificate of Appealability:

> (1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.
>
> (2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.
>
> (3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

STATEMENT OF THE CASE

A. Introduction

After the United States District Court for the Eastern District of Pennsylvania denied Laura Shauger's motion under 28 U.S.C. § 2255 to vacate sentence, she applied to the Third Circuit for a certificate of appealability (COA). The Third Circuit denied her request for a COA with respect to her claim that sentencing counsel provided ineffective assistance when he failed to have her evaluated for trauma and PTSD, because "jurists of reason would not debate that Shauger's attorney acted reasonably by relying on the testimony of Dr. Russell and by failing to investigate further, given the facts known to him at the time." Appx. A, pp. 1-2. The court's ruling failed to address the petitioner's argument that *Saranchak v. Secretary, Pennsylvania Department of Corrections*, 802 F.3d 579, 594-95 (3d Cir.

2015), supported her request for a COA since in that case the court found sentencing counsel's representation to be deficient under similar circumstances.

The Third Circuit also denied a COA with respect to the petitioner's ineffective assistance claim based on statements her sentencing counsel made against her interest as well as by her sentencing attorney's failure to make obvious arguments in mitigation in support of a downward variance. Without any explanation, the Third Circuit held that "[j]urists of reason would not debate that Shauger's attorney acted reasonably in the evidence that he presented at sentencing, nor would they debate that Shauger was not prejudiced by her attorney's conduct." Appx. A, p. 1. The Third Circuit did not address the petitioner's argument that this issue was at least debatable since it was supported by cases from other jurisdictions. Under these circumstances, the Second, Fifth, Ninth, Tenth, and Eleventh Circuits would have granted a COA. *See, e.g., Hoffler v. Bezio* 726 F.3d 144, 154 n.9 (2d Cir. 2013)(granting COA with respect to issue supported by a non-frivolous argument and denying COA with respect to issue foreclosed by precedent); *Sanchez v. Davis,* 888 F.3d 746, 751 (5th Cir. 2018) (granting COA despite deference to counsel's performance after appellant makes rational argument supporting claim); *Lopez v. Schriro,* 491 F.3d 1029, 1041-43 (9th Cir. 2007) (granting COA where appellant's claim is supported by a rational argument, even though court ultimately rules against appellant); *Bullock v. Carver,* 297 F.3d 1036, 1043-58 (10th Cir. 2002) (granting COA where appellant made rational arguments based on caselaw, even though court ultimately rejects those arguments); *Dean-Mitchell v. Reese,* 837 F.3d

1107, 1112-14 (11th Cir. 2016) (granting COA where appellant provided rationale to dispute district court's ruling based on interpretation of controlling regulation).

The Third Circuit's denial of a COA is at odds with the practice of the Second, Fifth, Ninth, Tenth, and Eleventh Circuits, which grant COAs whenever, as in this case, the petitioner's claim is supported by a non-frivolous argument. This Court should grant certiorari to provide guidance to the Courts of Appeals with respect to what constitutes a debatable issue. The Court should then grant a COA and remand to the Third Circuit to hear the petitioner's appeal.

B. Procedural History and Facts Material to Consideration of Question Presented

On September 13, 2012, Laura Shauger was charged in eight counts of a sixteen-count indictment filed in the United States District Court for the Eastern District of Pennsylvania with employing a child to produce images of the child engaging in sexually explicit conduct in violation of 18 U.S.C. § 2251(a). Each count carried with it a mandatory minimum of 15 years and a maximum sentence of 30 years' imprisonment.

The indictment charged that Ms. Shauger took photographs of her then seven-year-old daughter engaging in sexually explicit conduct and emailed them to her co-defendant/boyfriend, Patrick Mergen. Unbeknownst to Ms. Shauger, and without her permission, Mr. Mergen emailed the photographs to a friend of his in Australia. The photographs showed masturbation and "lascivious exhibition of the

genitals or pubic area," 18 U.S.C. § 2556(2)(A), but not sexual intercourse, bestiality, or sadistic or masochistic abuse, which are also included within the definition of "sexually explicit conduct." *Id.*

After she initially pled not guilty, Ms. Shauger's court-appointed attorney attempted, unsuccessfully, to negotiate a plea to charges that did not carry a mandatory minimum sentence. As part of that effort, her attorney solicited letters from Ms. Shauger's family and friends and sent them to the prosecutor. Seven of those letters claimed Ms. Shauger had been physically or psychologically abused, either by her husband, her co-defendant, or by both. App. B. p. 7. The letter writers believed this abuse explained and mitigated Ms. Shauger's criminal conduct. *Id.*

On May 20, 2013, Ms. Shauger pled guilty to one count pursuant to a written plea agreement.

Prior to sentencing, Ms. Shauger's attorney arranged for her to be evaluated by William Russell, Ph.D., a psychologist whose practice focused primarily on matters involving sexual offenses and the assessment and treatment of sexual offenders. Appx. B, p. 2. Dr. Russell found that Ms. Shauger suffered from dependent personality disorder, which he believed made her willing to abandon her natural instincts to protect her young daughter in order to obtain love and attention from her co-defendant/boyfriend. Dr. Russell did not address whether Ms. Shauger suffered from trauma as a result of abuse, and if so, whether that trauma in any

way explained or mitigated her criminal conduct. Ms. Shauger's sentencing attorney did not ask Dr. Russell or any other expert to evaluate her for trauma.

At the August 21, 2013, sentencing hearing, the petitioner's attorney urged the court to grant a downward variance from the otherwise applicable 292-300-month guideline range and to sentence Ms. Shauger to the 15-year (180-month) mandatory minimum sentence. The government recommended a sentence of between 20 and 24 years (240-288 months), which itself represented a downward variance.

To demonstrate Ms. Shauger's potential for rehabilitation, her attorney submitted support letters from family and friends, some of which appeared to shift blame away from Ms. Shauger, or to minimize the seriousness of the offense. The witnesses offered by defense counsel at sentencing testified along similar lines. One letter likened Ms. Shauger to "the honest person who has a starving baby and no money who steals formula from a store." Doc. 92, p. 60 (Sent. Tr.). Some of the letters suggested that Ms. Shauger did not understand the seriousness of her offense. Witnesses who testified in support of Ms. Shauger at sentencing made similarly unhelpful statements. The district court made it clear that this likely resulted in a longer sentence, when the judge stated that he took these damaging letters "into consideration in fashioning the sentence." *Id.* p. 61.

As part of his sentencing allocution, the petitioner's attorney told the court that a respected former judge had told him that Ms. Shauger should receive a

longer sentence and that even he (her attorney) was conflicted about arguing for a variance.

The district court sentenced Ms. Shauger to 300 months' (25 years) imprisonment, five years less than the 30-year statutory maximum provided by 18 U.S.C. § 2251(e). Prior to imposing sentence, the court explained that it was imposing a harsh sentence because "the nature and circumstances of the offense":

> are heinous beyond heinous. I've considered the need for the sentence imposed to reflect the seriousness of the crime. You never like to say, in all my years as a state and federal prosecutor and state and federal judge, I haven't seen anything this disturbing, but I think this is that day. The seriousness of this offense, *it couldn't be any more serious*, so I've considered that.

Doc. 92, p. 63 (Sent. Tr.) (emphasis added).

The petitioner filed a timely notice of appeal. The Third Circuit dismissed that appeal on July 1, 2014.

On June 30, 2015, the petitioner filed a motion under 28 U.S.C. § 2255 to vacate her sentence. The motion claimed that she had been "deprived of her Sixth Amendment right to the effective assistance of counsel at sentencing." The motion claimed that sentencing counsel's representation was deficient in several respects. The motion argued that counsel provided ineffective assistance when he failed adequately to investigate the mitigation potential of claims that Ms. Shauger had been abused by her husband and boyfriend. In support of this claim, the petitioner submitted under seal an evaluation report prepared by Marti Loring, Ph.D., an expert in trauma and abuse in adult women. The motion also argued that counsel

provided ineffective assistance of counsel at sentencing when he failed to make obvious arguments in mitigation. Finally, the motion argued that counsel provided ineffective assistance at sentencing when he made arguments that were against the interests of his client.

On January 12, 2017, the district court held an evidentiary hearing. At that hearing, Dr. Loring presented expert testimony that Ms. Shauger suffered from Battered Person Syndrome and PTSD, and that these conditions were mitigating and helped explain why she committed her offense.

On December 1, 2017, the district court filed a memorandum opinion, Appx. B, along with an order denying relief. The district court also denied a certificate of appealability for the same reasons it denied relief. App. B, p. 21. The petitioner filed a timely notice of appeal on January 29, 2018.

On February 23, 2018, the petitioner filed a motion requesting a COA from the Third Circuit. The petitioner first requested a COA to review the district court's rejection of her claim that she received ineffective assistance of counsel when her sentencing attorney failed to have her evaluated for trauma and abuse. The district court "conclude[d] that sentencing counsel was objectively reasonable in his investigation," Appx. B, p. 9, because he "selected an expert who specialized in the sentencing topic at issue—the evaluation and rehabilitation of sex offenders." *Id.* The court found "it was not objectively unreasonable for sentencing counsel to cease his investigation into Petitioner's mental health once Dr. Russell evaluated and

diagnosed her because counsel had obtained a diagnosis from a qualified expert that attempted to provide an explanation for Petitioner's actions." *Id.* 13.[1]

In her motion for a COA, the petitioner argued that the issues were at least debatable because under the facts of the case, her positions were arguably supported by at least one opinion of this Court, a precedential opinion of the Third Circuit, and opinions by other Courts of Appeals, the Idaho Supreme Court and the ABA Standards for Criminal Justice (3d ed. 1993), Standard 4-1.2(b) (The Function of Defense Counsel),

On July 3, 2018, the Third Circuit denied the petitioner's motion for a COA. The court's order reads in full:

> Shauger's application for a certificate of appealability is denied. Jurists of reason would not debate the District Court's conclusion that Shauger did not show that her Sixth Amendment right to the effective assistance of counsel was violated. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). Jurists of reason would not debate that Shauger's attorney acted reasonably in the evidence that he presented at sentencing, nor would they debate that Shauger was not prejudiced by her attorney's conduct. In particular, jurists of reason would not debate that Shauger's attorney acted reasonably by relying on the testimony of Dr. Russell and by failing to investigate further, given the facts known to him at the time. Shauger's motion for appointment of counsel is denied as moot.

Appx. A, pp. 1-2.

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[1] Because the district court found that the petitioner had not met her burden with respect to *Strickland's* performance prong, it did not directly address prejudice. The court nevertheless implied that it would likely have imposed a lower sentence had it heard testimony at sentencing similar to the testimony Dr. Loring provided during the § 2255 hearing. Appx. B, p. 3.

On August 3, 2018, the petitioner filed a timely petitioner for rehearing by the panel and en banc. To further support her claim that it is at least debatable that sentencing counsel should have had Ms. Shauger evaluated for trauma and abuse, the petitioner cited *United States v. Nwoye*, 824 F.3d 1129 1132-33 (D.C. Cir. 2016) (Kavanaugh, J.) (citing Janet Parrish, Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases, in DEPARTMENT OF JUSTICE ET AL., THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS (1996)), in which then-Judge Kavanaugh noted the importance of engaging experts to investigate allegations of trauma and abuse is well known. The petitioner noted that the section of the Department of Justice Report cited by then-Judge Kavanaugh makes it clear that expert testimony concerning trauma and abuse can provide important mitigating evidence at sentencing. DOJ Report, Part I, pp. 1, 2, 4, 20, and 22.[2]

[2] The rehearing petition also notes that prior to *United States v. Booker*, 543 U.S. 220 (2005), many courts held that expert testimony concerning the impact of trauma and abuse can support downward departures from the then otherwise mandatory sentencing guideline range. See, e.g., *United States v. Johnson*, 956 F.2d 894, 902-03 (9th Cir. 1992) (remanding for resentencing to allow district court to consider impact of Battered Woman's Syndrome as a basis for downward departure); *United States v. Whitehall*, 956 F.2d 857, 863-64 (8th Cir. 1992) (same); *United States v. Brant*, 112 F.3d 510, 1997 WL 225486, p. *4-*5 (4th Cir. 1997) (per curiam) (unpublished disposition) (same); *United States v. Willis*, 38 F.3d 170, 176 (5th Cir. 1994) (at sentencing, district court properly considered evidence that defendant was a battered woman); *United States v. Gaviria*, 804 F.Supp. 476 (E.D.N.Y. 1992) (Weinstein, J.) (granting downward departure based on impact of Battered Woman's Syndrome). *Cf. United States v. Cheape*, 889 F.2d 477, 480-81 (3d Cir. 1989) (recognizing that coercion and duress that does not amount to a defense at trial can support a downward departure at sentencing).

On August 15, 2018, the Third Circuit denied the petition for rehearing. Appx. C.

C. Statement of Lower Court Jurisdiction Under Rule 14.1(i).

The United States District Court for the Eastern District of Pennsylvania had subject-matter jurisdiction of the underlying criminal case under 18 U.S.C. § 3231, in that the indictment alleged an offense against the United States committed in that district. The jurisdiction of the court below was invoked under 28 U.S.C. § 1291 and 28 U.S.C. §§ 2253(a) and (c).

REASONS FOR GRANTING THE WRIT

The Third Circuit's boilerplate denial of the petitioner's motion for a certificate of appealability highlights a problem of national significance concerning how the Third Circuit and other Courts of Appeals address motions by prisoners for certificates of appealability that are required for them to appeal from the denial of habeas petitions and motions to vacate sentence under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c). This Court has held that a COA must issue whenever "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The question at this stage is not whether the appellant has a substantial chance of prevailing on appeal, but only whether the district court's decision is debatable. As this court has held, a "claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). In *Buck v. Davis,*

580 U.S.—, 137 S.Ct. 759, 773-75 (2017), the Court made it clear that an appellant need only make this threshold showing to be entitled to a COA. The Court held that:

> when a reviewing court … inverts the statutory order of operations and "first decid[es] the merits of an appeal, ... then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner at the COA stage. *Miller-El,* 537 U.S., at 336–337. *Miller-El* flatly prohibits such a departure from the procedure prescribed by § 2253. *Ibid.*

137 S.Ct. at 774. The question the Court has not yet addressed is what an appellant must show to demonstrate that an issue is debatable among jurists of reason. In the absence of direction from this Court, the circuits have taken two approaches to the issue. The Second, Fifth, Ninth, Tenth, and Eleventh Circuits have published precedential opinions that have issued COAs whenever an issue is supported by caselaw and a non-frivolous rational argument tied to the facts of the case.[3] The First Circuit has published one non-precedential case in which it denied a COA because the petitioner had made no colorable claim—suggesting that colorable claims are entitled to COAs. *Furtado v. Maloney,*125 Fed.Appx. 318, 320 (1st Cir. 2005) (per curiam). The Third, Sixth, Seventh, Eighth, and District of Columbia Circuits have no published precedential or non-precedential opinions that establish criteria for judging whether an issue meets this Court's standards for granting a COA. Although the Fourth Circuit has issued two published opinions in which it has granted a COA, neither of these opinions establish criteria that could be applied

[3] *See* cases listed *ante* at pages 4-5.

generally. See *Reid v. Angelone,* 369 F.3d 363 (4th Cir. 2004), and *Rowsey v. Lee,* 327 F.3d 335 (4th Cir. 2003).

The result of the varying approaches taken by the Circuits has resulted in what amounts to a virtual split. Litigants in the Second, Fifth, Ninth, Tenth, and Eleventh Circuits know that they can obtain a COA if they can make a non-frivolous argument in support of an issue. In the Third, and other Circuits, whether a litigant can obtain a COA is dependent on whether a judge, or a panel of judges, can agree, for whatever unexplained reason, that jurists of reason could differ with respect to the issue before them. Without criteria to judge whether a particular issue is "debatable" among jurists of reason, the end result is that COA decisions in the Third, Sixth, Seventh, Eighth, and District of Columbia Circuits can be completely dependent on the subjective views and biases of the judges considering the motion for a COA. For example, in *Blount v. United States,* 860 F.3d 732 (D.C. Cir. 2017), the panel declined to grant a COA even in the face of a dissent by one of its members. Rather than focus on the debatability of the issue before it, the panel conducted what amounted to the merits review prohibited by *Buck.* Although Judge Williams, the dissenting judge, recognized that he had the authority to issue a COA on his own, he did not. Judge Williams explained:

> Readers may wonder why I did not simply grant the certificate myself and thus provide my colleagues with jurisdiction to reach the merits decision that they do. A circuit judge acting alone is authorized to grant a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. Pro. 22(b)(1)-(2). But as far as I can tell, no judge has ever taken that step in this court, certainly not after panel oral argument. I have chosen not to do so

> partly out of comity but more out of futility; a move to the more difficult appeal stage would—so far as appears—not yield a difference in my colleagues' conclusion.

860 F.3d at 747. In the petitioner's case, there is no way of knowing what criteria the Third Circuit used to conclude that the issues she raised were not even debatable. What is known is that if the petitioner's case were out of the Second, Fifth, Ninth, Tenth, or Eleventh Circuits, she likely would have received a COA. This Court should grant certiorari to provide clarity concerning the criteria courts must use to determine whether an issue is debatable. After granting certiorari, the Court should grant a COA and remand to the Third Circuit to consider the petitioner's appeal.

I. Certiorari Should Be Granted Because Reasonable Jurists Could Debate Whether the Rulings of the District Court Were Correct.

This Court has made it clear that when a court considers a motion for a COA, the question is not whether the petitioner has a substantial chance of prevailing on appeal, but only whether the district court's decision is debatable. In *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003), the Court held that a "claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." In *Buck v. Davis,* 580 U.S.—, 137 S.Ct. 759, 773-75 (2017), the Court made it clear that an appellant need only make this threshold showing to be entitled to a COA. Since the district court's decision is at least debatable, the Third Circuit should have issued a COA.

A. The district court found that sentencing counsel's failure to have Laura Shauger evaluated for trauma and abuse did not fall below an objective standard of reasonableness. Reasonable jurists could differ.

The petitioner's motion under 28 U.S.C. § 2255 contends that sentencing counsel's failure to have Laura Shauger evaluated for trauma and abuse amounted to ineffective assistance of counsel because it fell below an objective standard of reasonableness and prejudiced her. *Strickland v. Washington,* 466 U.S. 668, 688 and 694 (1984) (establishing criteria for proving an ineffective assistance of counsel claim). In denying the petitioner's § 2255 motion, the district court "conclude[d] that sentencing counsel was objectively reasonable in his investigation," Appx. B, p. 9, because he "selected an expert who specialized in the sentencing topic at issue—the evaluation and rehabilitation of sex offenders." *Id.* The court found "it was not objectively unreasonable for sentencing counsel to cease his investigation into Petitioner's mental health once Dr. Russell evaluated and diagnosed her because counsel had obtained a diagnosis from a qualified expert that attempted to provide an explanation for Petitioner's actions." *Id.* 13. Reasonable jurists could have reached a different conclusion.[4]

The Petitioner argued that letters from family and friends should have alerted her attorney to the need to have her evaluated to determine whether trauma and abuse might support a downward variance. Those letters claimed that

[4] Because the court found that the petitioner had not met her burden with respect to *Strickland*'s performance prong, it did not directly address prejudice. The court nevertheless implied that it would likely have imposed a lower sentence had it heard testimony at sentencing similar to the testimony Dr. Loring provided during the § 2255 hearing. Appx. B, p. 3.

Laura Shauger had been abused by both her husband and co-defendant and that that abuse had something to do with her commission of the offense. Under similar circumstances, this Court, as well as the Third Circuit, have found sentencing counsel ineffective.

In *Wiggins v. Smith,* 539 U.S. 510 (2003), the Court held that

> [i]n assessing the reasonableness of an attorney's investigation …, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.

Id. at 527. While the district court acknowledged this principle, Appx. B, p. 9, it noted that this Court also held that "when a reviewing court analyzes the reasonableness of counsel's investigation or decision, it must 'apply[] a heavy measure of deference to counsel's judgments.'" Appx. B, p. 9 (quoting *Wiggins*). The court then "appl[ied] this heavy measure of deference [to] conclude that sentencing counsel was objectively reasonable in his investigation." *Id.* The court reached this conclusion because petitioner's attorney "reviewed the letters submitted by petitioner's family and friends," *id.,* and then had Ms. Shauger evaluated by an expert in "the evaluation and rehabilitation of sex offenders" who "carefully evaluated Petitioner, prepared a report with his conclusions, and presented those conclusions at sentencing." *Id.* A reasonable jurist could have come to a different conclusion.

While *Wiggins,* held that courts should give counsel a "heavy measure of deference" in evaluating ineffective assistance claims, the Court nevertheless found counsel in that case ineffective for failing to investigate. In that case, counsel should have conducted a further investigation because they knew something of the

abuse the defendant has suffered as a child. 539 U.S. at 525. The Court found counsel's failure to investigate information they had concerning the defendant's abusive childhood fell below an objective standard of reasonableness. The Court noted that the heavy deference *Strickland* requires is due only to the extent that a reasonable investigation was done. *Id.* at 521. The Court then found that defense counsel's failure to develop the abuse issue fell below an objective standard of reasonableness. *Id.* at 534. A reasonable jurist could have come to the same conclusion in this case. The petitioner's attorney had evidence that Ms. Shauger had been abused, but failed to develop the issue. A reasonable jurist could have found that since her attorney did not conduct a reasonable investigation, his decision was entitled to no deference, and that his failure to investigate fell below an objective standard of reasonableness.

In *Saranchak v. Secretary, Pennsylvania Department of Corrections,* 802 F.3d 579, 594-95 (3d Cir. 2015), trial counsel did not pursue a mental health argument against the death penalty based on a strategic decision he had made to rely on the testimony of a neutral court-appointed expert. The Pennsylvania Supreme Court concluded that this strategic decision was reasonable because the defendant's family had not told defense counsel about the defendant's "military delusions." *Id.* 593-94. In evaluating counsel's representation, the Third Circuit "appl[ied] a 'doubly deferential standard,' both as to whether counsel's conduct was reasonable as well as to the Pennsylvania Supreme Court's treatment of the issue." *Id.* 593. Even applying this highly deferential standard, the Third Circuit rejected the ruling

of the Pennsylvania Supreme Court and found the attorney's failure to seek an additional evaluation deficient. *Id.* 596. The Third Circuit rejected the Pennsylvania Supreme Court's ruling because the record demonstrated that defense counsel *was* aware of his client's "military delusions," even though he did not learn about them from the client's family. *Id.* 594. The Third Circuit held that because the neutral expert appointed by the court did not address this behavior, counsel was obligated to investigate further. *Id.* 594-96. In reaching this conclusion, the Third Circuit noted that the deference owed defense counsel's strategic decisions is not without limit since "'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" *Id.* 395 (quoting from *Strickland*).

A reasonable jurist could have used similar reasoning to find that petitioner's attorney's representation fell below an objective standard of reasonableness when he failed to have Ms. Shauger evaluated for trauma and abuse. Although Dr. Russell addressed and gave an explanation for Ms. Shauger's neediness and manipulability, he did not test her for trauma, did not address the allegations that she had been abused, and did not discuss how abuse may have played a role in her commission of the offense. A reasonable jurist could have found that just as the failure of the neutral expert in *Saranchak* to address the defendant's unusual behavior should have prompted counsel in that case to have his client evaluated further, Dr. Russell's failure to address allegations of abuse should have prompted Ms. Shauger's attorney to have her evaluated for trauma and abuse.

The district court rejected the defendant's *Saranchak* argument, because unlike defense counsel in *Saranchak,* the petitioner's attorney did not rely on a neutral court-appointed expert, but instead had her evaluated by a psychologist who looked at her history, background, and general mental health. Appx. B, pp. 9-10.

It is at least *debatable* whether the district court's application of *Saranchak* was correct. *Saranchak* was primarily concerned with counsel's failure to obtain an additional evaluation after he became aware that the neutral court-appointed expert had failed to address the defendant's "military delusions." *Id.* 594. *Saranchak* turned on the fact that counsel was aware of his client's delusions, but did not seek an evaluation to address them when the court-appointed expert did not. The fact that the initial evaluation was conducted by a court-appoint, rather than defense, expert, was not part of the court's reasoning.

The petitioner's position is also supported by *Marcrum v. Luebbers*, 509 F.3d 489 (8th Cir. 2007), in which the Eighth Circuit held that:

> Where counsel has obtained the assistance of a qualified expert on the issue of the defendant's sanity *and nothing has happened that should have alerted counsel to any reason why the expert's advice was inadequate*, counsel has no obligation to shop for a better opinion.

Id. 511 (emphasis added). In that case, the Eighth Circuit found no deficit performance because "the record is not so crystal clear that [defense counsel] was on notice that his expert was missing something." *Id.* The district court in this case found that *Marcrum* did not support the petitioner's claim since "counsel here selected a qualified expert *based on the information presented to him*, had that

expert evaluate Petitioner, and presented that expert on her behalf at the sentencing." Appx. B, p. 11 (emphasis added). A reasonable jurist could have come to a different conclusion. A reasonable jurist could have concluded that letters from family and friends that reported Ms. Shauger had been abused, "should have alerted" the petitioner's attorney to a "reason why [Dr. Russell's] advice was inadequate"—to wit, the fact that it did not address the abuse allegation. A reasonable jurist could therefore have concluded that the petitioner's attorney's failure to have Ms. Shauger evaluated for abuse and trauma fell below an objective standard of reasonableness.

In this case, the petitioner's attorney knew that Ms. Shauger's family and friends believed she had been abused and traumatized by her husband and co-defendant. He also knew that Dr. Russell's report did not address this abuse. Under similar circumstances, the Court in *Wiggins,* and the Third Circuit in *Saranchak* had found deficient representation for failing to investigate further. This is also arguably the type of situation that, according to the Eighth Circuit, "should have alerted counsel [that] the expert's advice was inadequate." 509 F.3d at 511.

There is therefore a non-frivolous argument based on caselaw and the facts of this case that the district court erred when it held that sentencing counsel's failure to investigate did not fall below an objective standard of reasonableness. Under the rule adopted by the Second, Fifth, Ninth, Tenth, and Eleventh Circuits, this would have been sufficient to justify a COA. After granting certiorari, this Court should

adopt criteria for judging COA applications, grant a COA in this case, and remand to the Third Circuit for full briefing on the merits.

B. The district court found that sentencing counsel's failure to make obvious arguments in mitigation did not prejudice the petitioner. Reasonable jurists could differ.

The petitioner's § 2255 motion contended that sentencing counsel was also ineffective for failing to support his argument for a downward variance with two obvious mitigating facts: (1) Ms. Shauger committed her offense in one of the less harmful ways provided by the statute under which she was convicted, and (2) she voluntarily ceased all criminal conduct almost two years before she was arrested. The district court found that the petitioner was not prejudiced by these failures, but did not address *Strickland*'s performance prong.

The district court began its analysis by looking at the reason it gave at sentencing for denying a variance:

> "[T]his case boils down to a situation where a mother exploited rather than protected. ... I can't ignore the overwhelming despicable violation of trust that occurred here where a mother facilitated a situation which allowed a child predator to ruin the life of a seven-year-old."

Appx. B, p. 17 (quoting from the sentencing transcript). Because the arguments the petitioner claims her attorney should have made would not have altered this basic fact, the district court concluded there is no reasonable probability that these arguments would have made a difference at sentencing. *Id.* A reasonable jurist could come to a different conclusion.

Prior to imposing sentence, the district court described Ms. Shauger's offense in the following way:

> I've considered the nature and circumstances of the offense, which I will not belabor any further. They are heinous beyond heinous. I've considered the need for the sentence imposed to reflect the seriousness of the crime. You never like to say, in all my years as a state and federal prosecutor and state and federal judge, I haven't seen anything this disturbing, but I think this is that day. The seriousness of this offense, *it couldn't be any more serious*, so I've considered that.

Doc. 92, p. 63 (Sent. Tr.) (emphasis added). In fact, as the petitioner discussed in her § 2255 motion, while Ms. Shauger's offense was indeed serious and heinous, when viewed in the context of the range of heinous offenses that 18 U.S.C. § 2251(a) covers, it is among the least harmful ways she could have committed the crime. Ms. Shauger betrayed her daughter, but her offense did not involve the even more extreme abuse, such as sexual intercourse, bestiality, and sadistic or masochistic abuse that are also within the definition of "sexually explicit conduct." 18 U.S.C. § 2556(2)(A). The fact that Ms. Shauger came to her senses nearly two years before her arrest, and began to protect her daughter from any further abuse, also makes the offense less serious than it could have been. Because the district court based its sentence, at least in part, on a belief that turned out to be erroneous, it is at least debatable whether a reasonable jurist would have imposed a lower sentence had the petitioner's attorney brought these facts to the sentencing court's attention.

In *Estrada v. State,* 143 Idaho 558, 149 P.3d 833 (2007), for example, the Supreme Court of Idaho reversed the lower court's denial of post-conviction relief after holding that the petitioner had met the *Strickland* test for ineffective assistance of counsel. The question in that case was whether the petitioner had been prejudiced by his attorney's failure to advise him of his right to assert the privilege against self-incrimination during a court-ordered psychosexual evaluation. The

Supreme Court of Idaho found that the petitioner had met *Strickland*'s prejudice prong based on the comments the sentencing court made with respect to that evaluation:

> The sentencing judge's specific, repeated references to the psychosexual evaluation suggest that it did play an important role in the sentencing. While we do not pass judgment in any way on whether the sentence actually imposed on Estrada was unreasonable or excessive, nevertheless, Estrada has met his burden of showing that the evaluation played a role in his sentence. Therefore, Estrada has demonstrated prejudice as a result of his attorney's failure to advise him of his Fifth Amendment rights.

143 Idaho at 565; 143 P.3d at 840.

Since the relative heinousness of the offense was something the district court considered in fashioning the sentence, applying the reasoning of the Idaho Supreme Court, there is at least a reasonable probability that the result of the sentencing would have been difference had prior counsel made the arguments suggested by the petitioner. For this reason, it is at least debatable that a reasonable jurist would have imposed a lower sentence under the circumstances.

There is therefore a non-frivolous argument based on caselaw and the facts of this case that the district court erred when it held that the petitioner was not prejudiced by her sentencing attorney's failure to make obvious arguments in mitigation. Under the practice of the Second, Fifth, Ninth, Tenth, and Eleventh Circuits, this would have been sufficient to justify a COA. After granting certiorari, this Court should adopt criteria for judging COA applications, grant a COA in this case, and remand to the Third Circuit for full briefing on the merits.

C. Sentencing counsel introduced evidence and made statements during his allocution that were against the petitioner's interests. The district court found that submitting such evidence did not fall below an objective standard of reasonableness and making such statements did not prejudice the petitioner. Reasonable jurists could differ.

The petitioner's § 2255 motion argued that she received ineffective assistance of counsel at sentencing when her attorney introduced evidence and made arguments that were against her interests. Her attorney submitted letters from family and friends, some of whom also testified at sentencing. He did this:

> to show that Petitioner had a deep support network that would assist her rehabilitation. Additionally, counsel sought to humanize his client so that I could understand what he meant when he said that this was a case where "a good person ... did a bad thing, and I don't mean one bad thing, I mean a series of events .... By all accounts, she's a good person." (N.T. 08/21/2013 at 45.)

Appx. B, p. 20 (ellipses original). While it was perfectly reasonable for sentencing counsel to submit letters and present testimony for these purposes, many of the letters and much of the testimony undercut one of counsel's goals—to show that Ms. Shauger accepted responsibility for her offense. They also downplayed the seriousness of Ms. Shauger's actions, characterized conduct that occurred over a ten-month period as a mere aberration, and blamed others for what Ms. Shauger did. One letter likened Ms. Shauger to "the honest person who has a starving baby and no money who steals formula from a store." Some of the letters suggested that Ms. Shauger did not understand the seriousness of her offense. Witnesses who testified in support of Ms. Shauger at sentencing made similarly unhelpful statements. The district court made it clear that this unhelpful evidence likely resulted in a longer

sentence. Doc. 92, p. 61 (Sent. Tr.) (court took these damaging letters "into consideration in fashioning the sentence").

The district court did not deny the harmful nature of these letters and testimony. Instead, it compared the representation provided by the petitioner's sentencing counsel with the representation provided by defense counsel in *United States v. Herrera-Zuniga,* 571 F.3d 568 (6th Cir. 2009). Since the petitioner's attorney's representation looked good in comparison, Appx. B, pp. 19-20, the court concluded "[i]n light of the 'heavy measure of deference' that [it must] give to strategic decisions of counsel," *id.*, p. 20, counsel's submission of such evidence "was not objectively unreasonable." *Id.* It is at least debatable whether counsel's submitting letters and testimony that were obviously harmful to the petitioner's interests "was not objectively unreasonable."[5]

According to the ABA Standards for Criminal Justice (3d ed. 1993), Standard 4-1.2(b) (The Function of Defense Counsel), the "basic duty" of defense counsel is to "serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation." According to the commentary section, this means that defense counsel must not be "half-hearted in the application of his or her energies to a case." Because this is the "basic duty" of a criminal defense attorney, it is at least debatable whether anything less must necessarily fall below an objective standard of reasonableness. It is therefore at least debatable whether

[5] The court did not address whether the petitioner was prejudiced by this harmful evidence.

defense counsel in this case should have, at minimum, vetted the letters and testimony to make sure they did not harm the petitioner's position with respect to sentencing. It is therefore at least debatable whether those submissions fell below an objective standard of reasonableness.

The petitioner also argued that she received ineffective assistance of counsel when, as part of his sentencing colloquy, defense counsel told the court that: (1) prior to sentencing he had consulted with a "particular[ly] good lawyer [and] former judge," who had told him that "if [he were] sentencing her, [he would] give more [time] to the mother," and (2) "as a father of seven children, I don't know what (indiscernible) to impose." *See* Appx. B, p. 18. Both of these statements suggested that the petitioner should receive a sentence that was higher than the one counsel was requesting. The court found that these statements did not prejudice the petitioner because "[t]here is not a reasonable probability that any court would have given petitioner a different sentence had those comments not been made by counsel." Appx. B, p. 21.[6] Reasonable jurists could differ.

Although prior counsel did not argue for a longer sentence, as did counsel in *Herrera-Zuniga,* he did something akin to it. While he argued for the shortest possible sentence, he undermined that argument by telling the court he not only had doubts about it, but that a respected former judge had told him that the petitioner should receive a higher sentence. A reasonable jurist could have concluded

[6] The court did not address whether these statements satisfied *Strickland*'s performance prong.

that there is a reasonable probability that after hearing such statements, a sentencing court would discount defense counsel's argument for a variance and impose a sentence that was higher than it might otherwise impose. This is especially true in a case such as this one where *both* the probation office and the prosecution had recommended a downward variance. In effect, the petitioner's attorney was the only one to suggest that a variance would *not* be appropriate. The probation office recommended that the petitioner be sentenced to the 15-year mandatory minimum sentence. The government asked for a sentence of between 20 and 24 years (240-288 months), which was below the 292-360-month guideline range. Doc. 92, p. 58 (Sent. Tr.).[7]

There is therefore a non-frivolous argument based on caselaw and the facts of this case that the district court's erred when it rejected the petitioner's ineffective assistance claim based on her attorney's submitting harmful evidence at sentencing. Under the rule adopted by the Second, Fifth, Ninth, Tenth, and Eleventh Circuits, this would have been sufficient to justify a COA. After granting certiorari, this Court should adopt criteria for judging COA applications, grant a COA in this case, and remand to the Third Circuit for full briefing on the merits.

[7] The district court's opinion erroneously states that the prosecution oppose a variance. Appx. B, p. 16.

CONCLUSION

For all of the foregoing reasons, reasonable jurists could, at minimum, differ with the rulings of the district court denying Laura Shauger's motion to vacate sentence under 28 U.S.C. § 2255, which means a COA must issue. The case should then be remanded to the Third Circuit for full briefing. This Court's review is warranted not only to resolve a circuit split, but also to establish the criteria a court must use to determine whether an issue is one on which reasonable jurists could differ.

Respectfully submitted,

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