No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Keith D. Nelson, Petitioner,

vs.

United States of America, Respondent.

CAPITAL CASE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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****CAPITAL CASE****

QUESTIONS PRESENTED

1. Does it violate the *Strickland* prejudice standard to conclude that never before presented evidence of brain damage, severe mental illness, and childhood sexual abuse, would not have created a reasonable probability of a life sentence?

2. Under the plain language of the statute governing Certificates of Appealability, should the vote of one judge control whether or not a Certificate of Appealability is granted?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption. The petitioner is not a corporation.

RELATED PROCEEDINGS

Minute Entry: Guilty Plea, *United States v. Nelson*, No. 99-CR-00303-FJG (W.D. Mo. Oct. 25, 2001), Doc. 339

Minute Entry: Death Verdict, *United States v. Nelson*, No. 99-CR-00303-FJG (W.D. Mo. Nov. 28, 2001), Doc. 418

Minute Entry: Sentencing, *United States v. Nelson*, No. 99-CR-00303-FJG (W.D. Mo. Mar. 11, 2002), Doc. 441

Judgment, *United States v. Nelson*, No. 99-CR-00303 (W.D. Mo. Mar. 12, 2002), Doc. 442
Opinion: District Court Judgment Affirmed, *United States v. Nelson*, No. 02-1757 (8th Cir. Oct. 22, 2003), Entry 1699326

Judgment, *United States v. Nelson*, No. 02-1757 (8th Cir. Oct. 22, 2003), Entry 1699327

Order: Petition for Rehearing and for Rehearing En Banc Denied, *United States v. Nelson*, No. 02-1757 (8th Cir. Dec. 24, 2003), Entry 1719594

Order: Petition for a Writ of Certiorari Denied, *Nelson v. United States*, No. 03-10620 (U.S. Nov. 8, 2004)

Order: Petition for Rehearing Denied, *Nelson v. United States*, No. 03-10620 (U.S. Jan. 10, 2005)

Order and Judgment: Motion to Vacate Conviction and Sentence Denied, *Nelson v. United States*, No. 04-CV-08005-FJG (W.D. Mo. Nov. 21, 2006), Doc. 61

Order: Motion for Relief Pursuant to Fed. R. Civ. P. 59 Denied, *Nelson v. United States*, No. 04-CV-08005-FJG (W.D. Mo. Apr. 13, 2007), Doc. 75

Opinion: Case Remanded for Evidentiary Hearing, *Nelson v. United States*, No. 07-

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Judgment, *Nelson v. United States*, No. 04-CV-08005-FJG (W.D. Mo. July 27, 2015), Doc. 275

Judgment: Application for Certificate of Appealability and Appeal Denied, *Nelson v. United States*, No. 15-3160 (8th Cir. Sept. 15, 2016), Entry 4448453

Order: Petition for Rehearing Granted, *Nelson v. United States*, No. 15-3160 (8th Cir. July 19, 2017), Entry 4559060

Opinion: District Court Judgment Affirmed, *Nelson v. United States*, No. 15-3160 (8th Cir. Nov. 28, 2018), Entry 4730179

Judgment, *Nelson v. United States*, No. 15-3160 (8th Cir. Nov. 28, 2018), Entry 4730193

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Keith D. Nelson respectfully petitions this Court for a writ of certiorari to review the opinion of the Eighth Circuit Court of Appeals.

OPINIONS BELOW

The panel opinion of the Eighth Circuit Court of Appeals appears at Appendix A to the petition. *United States v. Nelson*, 909 F.3d 964 (8th Cir. 2018). The order granting rehearing and addressing the Motion for a Certificate of Appealability ("COA") is Appendix B to the petition. *Nelson v. United States*, 15-3160 (8th Cir. July 19, 2017), Entry 4559060. The opinion of the district court denying relief after a hearing is Appendix C to the petition. *Nelson v. United States*, 97 F. Supp. 3d 1131 (W.D. Mo. 2015).

STATEMENT OF JURISDICTION

The Eighth Circuit Court of Appeals issued its opinion on November 28, 2018. An order denying the petition for rehearing/rehearing *en banc* was entered on March 11, 2019. An extension of time to file the petition for a writ of certiorari was granted to August 8, 2019. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Sixth Amendment, U.S. Const. amend. VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

> cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment, U.S. Const. amend. VIII, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 2253 provides, in pertinent part:

> (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
>
> (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.

STATEMENT OF THE CASE

I. INTRODUCTION

This case was remanded for a 28 U.S.C. § 2255 hearing on claims that capital counsel was ineffective in the investigation and presentation of mitigating evidence, and in failing to object to the improper and inflammatory closing arguments of the prosecutor. *Nelson v. United States*, 297 F. App'x 563 (8th Cir. 2008). The hearing established that Nelson's jury never learned about critical mitigating facts, including Nelson's significant brain damage and repeated childhood sexual assaults. Despite its lengthy recitation of this evidence, the Eighth Circuit Court of Appeals gave it

short shrift in its *Strickland* prejudice analysis, directly contradicting the large body of Supreme Court precedent which compels a finding of prejudice for this uniquely persuasive mitigating evidence. *See* attached Appendix A (panel opinion).[1] In addition, although one Eighth Circuit judge would have granted a COA on issues regarding counsels' failure to object to the improper argument of the prosecutor, two other panel members did not vote to grant the COA and no appeal was heard on that issue. Because there is a split among the Circuits in regard to COA practice in this circumstance, Supreme Court review is required.

II. THE INEFFECTIVENESS OF CAPITAL SENTENCING COUNSEL

The evidence of Nelson's mental impairments was robust. In addition to organic brain damage, he suffers from psychosis and his upbringing is marked by a "relentless barrage of trauma" and "onslaught of horrifying life experiences" that impacted every aspect of his emotional, cognitive, and biological development. App. 17a. Even the lone prosecution expert who disagreed whether these factors played a role in the offense conceded that Nelson's impairments were not just genuine, but severe: his own testing demonstrated that Nelson's frontal lobe dysfunction places him near the bottom 1% of the population. App. 11a-12a, 25a; AOB 392; P#88. Nelson's impairments were corroborated by neuroimaging, a documented history of head injuries, and an extensive family history of mental illness. This was not,

[1]Citations to the record are as follows: trial transcript ("TT"); § 2255 hearing ("HT"); defense § 2255 exhibits ("P#"); Opening Brief Appendix ("AOB").

therefore, a "battle of the experts." Both the prosecution and defense experts reached the same conclusion. Indeed, the Government's expert neuropsychologist, Dr. Martell, described this as case of "convergent validity," by which he meant that every aspect of the examination—neuropsychological testing, neuro-imaging, medical records, past history, and clinical interviews—led to the same conclusion, i.e., that Petitioner suffers from severe neuro-cognitive deficits. HT 673-74. The jury heard none of it.

Nor was this a case of attorneys ignorant of their responsibilities in this area. Trial counsel testified that he knew the investigation of a capital defendant's mental health was a necessary aspect of providing effective assistance of counsel. And, finally, this was not a case of a trial court refusing to fund an investigation. The district court approved funds for a neuropsychologist, that person was hired, plans were made to conduct an evaluation, but, it simply never got done. HT 219-20, 200.

Nelson's history of childhood sexual abuse was also proven. When he was seven or eight he was raped by an older man and sexually molested by his mother's boyfriend. App. 19a. As an adolescent, he was repeatedly physically and sexually assaulted while in the care of juvenile authorities, requesting to be placed in isolation to protect himself and attempting suicide multiple times. App. 18a-19a. This evidence was not contested.

Despite counsel's failure to present such evidence, the Eighth Circuit concluded there could be no prejudice because Nelson's jury heard *some other*

mitigating evidence at trial. App. 26a-27a. However, the jury that sentenced Keith Nelson to death never knew that he has organic brain damage, is mentally ill, and has suffered unspeakable trauma, including childhood rape. Instead, all the jury learned was that Nelson was raised by a neglectful single mother in an impoverished environment, and therefore had limited opportunities in life. This was hardly a satisfying insight into Nelson's life and background. Nor was it an accurate one.

The jury was given no indication that there was anything wrong with Nelson in terms of his mental or physical health. In fact, it was told the opposite: despite some initial birth complications, counsel informed the jury that Nelson had "recovered just fine," and a psychologist who had reviewed Nelson's records testified that except for a probable diagnosis of Attention Deficit/Hyperactivity Disorder, Nelson knew right from wrong and was capable of making rational choices. TT 38, 995, 1041. The truth, however, was far different.

As the evidence adduced at the § 2255 hearing established, the contemporaneous birth records indicated that he had bleeding in his brain. HT 519. During his emergency transport to Children's Mercy Hospital immediately after his birth, Nelson stopped breathing several times, and he suffered such a severe deprivation of oxygen that his infant body and limbs turned blue because of the lack of oxygen in his blood. HT 522-23. Far from "recovering just fine," the tremendous amount of stress placed on his infant brain by the bleeding and lack of oxygen had lasting effects on the organic structures of Nelson's brain—in particular the frontal

lobes, which are key to regulating behavior and impulse control. HT 434-35, 520, 583. The jury, however, never learned this crucial information, and trial counsel's statement undoubtedly left it with the false impression that Nelson was not a person who suffered from any brain damage or mental health problems.

The evidence presented at the § 2255 hearing was not just "a larger quantity of mitigation," but rather encompassed entirely new categories of mitigation never presented at trial that would have painted a dramatically different picture of Nelson and offered insight into his conduct and moral culpability that was otherwise missing from the trial presentation. App. 52a ("Nelson's habeas counsel has not uncovered any 'powerful' new evidence. Rather, habeas counsel has simply discovered a larger quantity of mitigation evidence."). The new evidence included:

- Unrebutted evidence that Nelson was raped as a child on multiple occasions, including when he was incarcerated in juvenile detention facilities. AOB 75, 80; HT 544.

- Expert neuropsychological evidence that he has organic brain damage so severe that even the Government's expert testified that Nelson is in the bottom 1% of the population in terms of his executive functioning. App. 11a-12a, 25a; AOB 392; P#88.

- Expert psychological evidence that Nelson is mentally ill and suffers from cognitive disorder, post-traumatic stress disorder, and psychosis. AOB 226-50; HT 440, 443-45.

- Expert psychological evidence that as a result of chronic exposure to trauma, Nelson suffered both psychological and neurological deficits that damaged his psychological, emotional and sexual development, and impaired the parts of his brain involved in inhibiting impulses and regulating behavior. HT 535, 538-39, 545-47.

Any claim that this evidence was previously presented to the jury is incorrect and belied by the record. Indeed, the district court essentially acknowledged that the § 2255 evidence was new in holding that trial counsel was deficient for failing to present any evidence to the jury about Nelson's mental impairments. App. 62a-63a. Trial counsel affirmatively *misled* the jury into believing that Nelson did not suffer from brain damage, and that his criminal conduct was the result of "choices" that he made, rather than the actions of a man suffering from psychosis and severe damage in the parts of his brain responsible for regulating his impulses and behavior.

In closing arguments trial counsel stated that Nelson "chose to kill Pamela Butler." TT 1135. Counsel's decision to make the case about Nelson's "choices" was something the Government immediately seized upon and exploited in closing arguments. *See* TT 1155-56 ("This case is about choices."). The Government argued to the jury that Nelson's "choice" revealed that he was a "rotten human being" who was "evil at his core." TT 1158, 1161.

Had trial counsel presented the jury with the readily available evidence of Nelson's brain damage and mental illness, it would have been able to marshal powerful and compelling expert evidence that Nelson suffered from profound mental impairments over which he had no control, and that these impairments directly affected his ability to engage in rational decision-making and regulate his conduct. Nelson was not a person who "chose" to do evil; he was someone with significant mental deficits that directly impaired his cognition and behavior. There is a

reasonable probability that at least one juror might have found this evidence sufficiently reduced his moral culpability such that it warranted a life sentence, rather than death.

III. THE CERTIFICATE OF APPEALABILITY

In addition to counsel's ineffectiveness in regard to mitigation, trial and appellate counsel were also ineffective in failing to object to several instances of improper closing argument by the prosecutor. App. 90a-91a, 100a-101a, 113a-115a. At the hearing, appellate counsel agreed that the Government's closing argument was improper in several different respects, that the instances were not isolated, included improper "send a message" arguments, calling the defendant evil, equating the return of a life sentence with weakness, and misleading the jury into believing they did not have responsibility for sentencing the defendant to death. HT 118-22, 123-25. Appellate counsel agreed that these were significant and obvious issues that should have been raised on appeal. HT 126.

The prosecutor who gave the rebuttal closing in this case also gave the rebuttal closing in *United States v. Johnson*, 713 F. Supp. 2d 595 (E.D. La. 2010). *See* Minute Entry, *United States v. Johnson*, No. 04-17 (E.D. La. May 27, 2009), ECF No. 1238; HT 126 (identifying the prosecutor). In that case, the capital defendant was granted a new penalty phase based upon improper arguments made in the rebuttal closing, arguments that closely mirror the ones given in Nelson's case. *See Johnson*, 713 F. Supp. 2d at 626, 630-38. In granting a new trial, the trial judge noted the particularly

persuasive power of this prosecutor. *Id.* at 638 (noting that the jurors were "riveted in their seats by his oration, utterly attentive and motionless").

Although a hearing was ordered on these claims by the Eighth Circuit Court of Appeals, when Nelson returned to the Eighth Circuit after the hearing, only one panel member was willing to grant Nelson a COA on this issue.[2] App. 32a n.1. Under the plain language of the COA statute, Judge Wollman's dissent on this issue should have lead to full briefing and the expansion of the COA.

Under 28 U.S.C. § 2253(c)(1), appeals in habeas corpus actions may not be taken "[u]nless *a* circuit justice or judge issues a certificate of appealability." (emphasis added). Under the statute then, the vote of one judge means that a COA should be granted. The standard for a COA is "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which is demonstrated where "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations omitted). The opinion of Judge Wollman illustrates that there was reasonable debate on this issue.

Members of this Court have noted that a disagreement among judges as to the

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[2]The panel originally denied a COA on all issues. App. 86a. However, in the wake of this Court's decision in *Buck v. Davis*, 137 S. Ct. 759 (2017), the petition for panel rehearing was granted and the three judge panel granted a COA on three issues involving the ineffectiveness of capital sentencing counsel. App. 32a.

debatability of a claim "alone might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution" of the claim. *Jordan v. Fisher*, 135 S. Ct. 2647, 2651 (2015) (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting from the denial of certiorari) (emphasis in original).

This petition raises an important question that involves a Circuit split on the proper COA standard: whether a COA on a claim may properly be denied as not debatable over the dissent of a federal appellate judge. In the Second, Fifth, Eighth, and Eleventh Circuit Courts of Appeals, a COA would be denied. In the Third, Fourth, Sixth, Seventh, and Ninth Circuit Courts of Appeals, a COA would be granted. Certiorari should be granted in order to provide uniformity on this question.

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit's Decision Conflicts With This Court's Precedent On The Proper Assessment Of Mitigating Evidence In Capital Cases.

The Eighth Circuit's opinion conflicts with multiple decisions by this Court on the proper way to assess prejudice resulting from the deficient performance of capital counsel. *See Sears v. Upton*, 561 U.S. 945 (2010) (per curiam); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000). Nelson's significant mitigating evidence–including evidence of severe brain damage and childhood sexual abuse–created a reasonable probability that at least one juror would have struck a different balance.

The Eighth Circuit concluded there could be no prejudice because Nelson's jury heard some other mitigating evidence at trial. App. 26a-27a. This Court has rejected such reasoning as a fundamental misapplication of *Strickland*: "We have never limited the prejudice inquiry . . . to cases in which there was only 'little or no mitigation evidence' presented." *Sears*, 561 U.S. at 954 (citation omitted). Contrary to the panel's reliance on *Porter* and *Wiggins*, *see* App. 26a, those decisions do not hold that prejudice can only be demonstrated in cases where the trial presentation was thin; they simply recognize that prejudice is especially evident in such cases.

None of the trial evidence cited by the Eighth Circuit bore any resemblance to the § 2255 mitigation; the jury never learned that Nelson was the victim of sexual assault throughout his childhood or that he suffered from a variety of mental health impairments. This Court has long recognized that brain damage and mental health evidence are uniquely compelling in capital cases, and not fungible with other types of mitigation. *See Sears*, 561 U.S. at 950, 956 (remanding for new prejudice inquiry where new mitigation included substantial cognitive impairments); *Porter*, 558 U.S. at 36, 42-43 (finding prejudice where new mitigation included brain damage that could manifest in impulsive violent behavior); *Rompilla*, 545 U.S. at 391 (finding prejudice where new mitigation included cognitive deficiencies and signs of schizophrenia); *Wiggins*, 539 U.S. at 535-37 (finding prejudice where new mitigation included diminished mental capacity); *Williams*, 529 U.S. at 370, 396 (finding prejudice where new mitigation included repeated head injuries and indication that

mental impairments were organic).[3]

This Court also recognizes that childhood sexual abuse is uniquely persuasive mitigation that can influence a capital jury's decision, and it is especially powerful in this case given the nature of the crime. *See Wiggins*, 539 U.S. at 534-35 (finding prejudice where counsel failed to present evidence that Petitioner was sexually molested and raped in foster care); *Sears*, 561 U.S. at 948 (remanding for new prejudice determination where new mitigation included childhood sexual abuse); *Porter*, 558 U.S. at 43 (it was unreasonable for the state court to discount evidence of Petitioner's abusive childhood, especially when it could help explain his behavior in relationship to the victim); AOB 204 (explaining how childhood sexual abuse can inappropriately shape a child's sexual development, including making the victim more likely to later perpetrate sex crimes).

Although acknowledging that Nelson's § 2255 evidence was credible and well-established, the Eighth Circuit failed to allow for the possibility that the jury might credit that evidence. Although the Government's expert questioned whether Nelson's impairments affected his conduct, this Court has held that entirely discounting

[3]As in *Porter*, Nelson's brain damage would have been particularly mitigating because the damage directly impacted Nelson's ability to control his behavior at the time of the crime. *See Porter*, 558 U.S. at 36 (neuropsychologist testified brain damage substantially impaired Porter's ability to confirm his conduct to the law); App. 11a (neuropsychologist testified Nelson's behavior during offense "was consistent with frontal lobe dysfunction and showed abnormal disinhibition and impulsivity instead of planning").

mental health evidence on that basis does not comport with *Strickland*. *Porter*, 558 U.S. at 43 ("While the State's experts identified perceived problems with the tests [showing brain damage and cognitive defects] and the conclusions [the defense expert] drew from them, it was not reasonable to discount entirely the effect that [the defense expert's] testimony might have had on the jury.").

The Eighth Circuit also failed to analyze how this mitigation would have altered the jury's assessment of the Government's case. For example, one of the Government's most effective penalty-phase arguments was that Nelson's mitigation should be disregarded because two of his testifying brothers, including Nelson's twin, grew up in the same environment yet went on to lead productive lives; thus, Nelson's background was not truly mitigating, he was just a "rotten human being" who was "evil at his core." TT 1124, 1155-56, 1158, 1161. *See also* App. 12a-13a. The § 2255 evidence, however, would have been powerful rebuttal. It demonstrated that Nelson's life trajectory was different from his brothers' since birth: He "suffered a brain bleed, stopped breathing, and suffered from severe oxygen deprivation." App. 9a. The situation was so grave he was baptized en route to the hospital for fear he might not survive. HT 517; P#38 at 13-14. The resulting brain damage had "lasting effects on his frontal lobe—the part of the brain key to regulating behavior and impulse control." App. 9a. The Government's comparison of Nelson's life trajectory to his brothers' was inaccurate and unfair; but for counsel's omissions, there is a reasonable probability that at least one juror would have rejected the Government's invitation to

discount Nelson's mitigation evidence on that basis and simply regard him as evil and undeserving of mercy.

Despite finding that trial counsel was deficient for failing to investigate and present mitigating evidence of Nelson's brain damage, cognitive impairments, and mental illness, the district court denied the claim because "[n]o amount of mental health evidence or testimony relating to brain damage and difficult upbringing," could overcome the facts of the crime. App. 76a. The court did not merely weigh the mitigating evidence proffered at the § 2255 hearing against the aggravating evidence and conclude the former was insufficient to outweigh the latter; rather, it held that no amount of mitigation could ever be sufficient. Stated differently, the court held that the nature of the crime necessarily precluded a finding of *Strickland* prejudice and that a sentence of death was inevitable under any conceivable circumstance. The Eighth Circuit opinion echoes this reasoning, giving short shrift to the import of the new compelling mitigation, instead focusing on the "totality of aggravating evidence." App. 19a-24a.

This mode of legal analysis—what the Fifth Circuit has derisively referred to as the "brutality trumps" approach to assessing *Strickland* prejudice—has been rejected by numerous courts. *See Walbey v. Quarterman*, 309 F. App'x 795, 804 (5th Cir. 2009) ("[Prosecution's] argument—that [defendant] suffered no prejudice because the brutality of his crime eclipses any mitigating evidence—is a non-starter."); *Foust v. Houk*, 655 F.3d 524, 545-46 (6th Cir. 2011) (while the aggravating

circumstances were "overwhelming" and the "crime was heinous" and "gruesome," "[p]owerful aggravating circumstances . . . do not preclude a finding of prejudice"); *Smith v. Mullin*, 379 F.3d 919, 944 (10th Cir. 2004) (finding prejudice even though "case in favor of the death penalty was strong" and crime, which involved stabbing death of defendant's wife and two stepsons and asphyxiation of two stepdaughter, was "horrendous"). There is broad acknowledgment across the circuit courts that evidence of mental impairments is particularly compelling in the context of a *Strickland* prejudice analysis; courts have thus repeatedly rejected arguments that a defendant is not prejudiced by the complete omission of such evidence. As the Sixth Circuit noted:

> Our sister circuits have had no difficulty in finding prejudice in sentencing proceedings where counsel failed to present pertinent evidence of mental history and mental capacity. In addition to *Brewer v. Aiken*, [935 F.2d 850 (7th Cir. 1991)] see, e.g., *Stephens v. Kemp*, [846 F.2d 642, 652-55 (11th Cir. 1988)] ("the resulting prejudice is clear"); *Blanco v. Singletary*, [943 F.2d 1477, 1505 (11th Cir. 1991)] (prejudice requirement "clearly met" by counsel's failure to present evidence of epileptic seizures and organic brain damage); *Loyd v. Whitley*, [977 F.2d 149, 159-60 (5th Cir. 1992)] (failure to present mitigating evidence of substantial mental defects "undermines our confidence in the outcome"). We would be badly out of step with the other circuits were we to conclude that there was no prejudice in the case at bar.

Glenn v. Tate, 71 F.3d 1204, 1211 (6th Cir. 1995).

Empirical evidence also refutes the prejudice analysis of the Eighth Circuit. While the facts of the crime here are certainly shocking and evoke sympathy for the

victim, there are numerous examples of federal capital juries returning life sentences in cases at least as aggravated as the instant case:

- *United States v. Naeem Williams*, D. Haw. No. 06-CR-00079-KSC: Defendant was convicted of beating to death his 5-year old daughter. Trial evidence established that defendant routinely assaulted and tortured the 5-year old for many months leading up to her death, frequently beating her with his fists and his belt, often after she soiled herself.

- *United States v. Larry Lujan*, D. N.M. No. 05-CR-00924-RB: Defendant was convicted of the 2005 kidnapping murder of a 16 year old potential federal witness in a drug prosecution. The boy was beaten, forced to perform oral sex, and nearly decapitated with a meat cleaver. His body was found 3 weeks later. Defendant was also linked by DNA to a 1993 murder of another couple.

- *United States v. Steven Northington*, E.D. Pa. No. 2:07-CR-00550-RBS: Defendant was convicted of a 2004 arson fire that killed six people, including four children–ages 1, 10, 12 and 15. The fire was set to retaliate against a federal informant.

- *United States v. Coleman Johnson*, W.D. Va. No. 00-CR-00026-NKM: Defendant was convicted of using a pipe bomb to kill his ex-girlfriend, who was eight months pregnant, to avoid having to pay child support. DNA testing performed after the murder confirmed that defendant was the father of the child that the victim was carrying.

- *United States v. Steven Green*, W.D. Ky. No. 06-CR-00019-TBR: Defendant was convicted of the 2006 murders of a family of four, including two children, and the rape and murder of their daughter.

- *United States v. Oscar Grande* and *Israel Cisneros*, E.D. Va. No. 04-CR-00283-GBL: Defendants, who were members of the MS-13 street gang, were convicted of the stabbing murder of a pregnant teenager in 2003. The victim was 17 years old and was targeted because she was a former member of the gang and had become a federal informant. Shortly after she left the witness protection program, defendants repeatedly stabbed her.

- *United States v. Chevie Kehoe*, E.D. Ark. No. 97-CR-00243-KGB: Defendant was convicted of the murder of a family of three–an Arkansas gun dealer, his wife, and their 8-year old daughter–in furtherance of a white supremacist

racketeering enterprise. Along with her parents, defendant disposed of the 8-year old girl's body by dumping her in a swamp.

- *United States v. Alexis Candelario-Santana*, D. P.R. No. 09-CR-00427-FAB: Defendant, who already had 13 prior murder convictions, was convicted of 20 murders, including the October 17, 2009 "Tombola Massacre," where eight people were killed and twenty wounded in a shooting at a bar, including an unborn child.

- *United States v. Thomas Pitera*, E.D. N.Y. No. 90-CR-00424-RJD: Defendant was a contract killer for the Mafia who was convicted of six murders. Several of the murders involved torturing the victims, dismembering their bodies and burying them in a deserted marsh on Staten Island.

- *United States v. Mohamed Rashed Daoud Al-'Owhali*, S.D. N.Y. No. 98-CR-01023-KTD: Defendant, an accomplice of Osama Bin Laden, was convicted of organizing two bombings of American embassies in Africa. The 1998 bombings in Kenya and Tanzania collectively killed 224 people, including 12 Americans, and injured more than 5,000 people.

- *United States v. Tommy Edelin*, D. D.C. No. 98-CR-00264-RCL: Defendant was convicted of four murders that he ordered as the so-called "drug kingpin" of DC-area gang known as the "1-5 Mob." Two of those murders involved ordering the killing of a 14-year old boy and a 19-year old.

- *United States v. Kenneth A. Tatum*, E.D. Tex No. 99-CR-00005-TH: Defendant, a member of the "Crips" gang, was convicted of murdering three people, one of whom was a 63-year old retired minister that defendant kidnapped and murdered.

- *United States v. Samuel Stephen Ealy*, W.D. Va. No. 00-CR-00104-JPJ: Defendant was convicted of the 1989 murder of a family of three–a husband, wife, and son. The husband and wife were found shot to death outside their home; their son was found shot to death in a closet inside the home.

- *United States v. Tyrone Williams*, S.D. Tex. No. 03-CR-00221: Defendant was convicted for his participation in an alien smuggling operation that led to 19 people's deaths by dehydration, overheating and suffocation in the back of a truck trailer driven by defendant.

- *United States v. Zacarias Moussaoui*, E.D. Va. No. 01-CR-00455-LMB:

Defendant was convicted of being a co-conspirator in the September 11, 2001, terrorist attack on the World Trade Center and Pentagon, which killed over 3,000 people and resulted in four airline crashes in New York, Pennsylvania, and Washington, D.C.

- *United States v. John Mayhew*, S.D. Ohio No. 03-CR-00165-ALM: Defendant was convicted of murdering his ex-wife, her boyfriend, and defendant's own 18-year old daughter, with whom defendant had an incestuous relationship.

- *United States v. Michael Natson*, M.D. Ga. No. 05-CR-00021-CDL-GMF: Defendant was convicted of the 2003 murder of a pregnant 23-year old Georgia Southern University student. Defendant was a U.S. Air Force military police officer, and the victim's skeletal remains were found by hunters on a remote part of Fort Benning, Georgia.

- *United States v. Jessie Con-ui*, M.D. Pa. No. 13-CR-00123-ARC: Defendant, serving a life term for another murder, killed a federal correctional officer at the United States Penitentiary at Canaan, inflicting stomps and kicks to the head and over 200 stab wounds in an attack lasting nine minutes and captured on video-tape.

- *United States v. Ulysses Jones*, W.D. Mo. No. 10-CR-03090-DGK: Defendant on trial for murder of federal inmate at FMCP/Springfield and contemporaneous near fatal stabbing of a second inmate. This was defendant's second murder while in federal custody and his fourth overall, including the murder in Washington, D.C. of a Secret Service agent.

Each of the above federal capital cases was tried to a jury, and despite the horrific and brutal facts surrounding these murders—some of which involved, as in this case, the murder of a child—the juries did not return death sentences. These verdicts specifically rebut the premise of the district court's *Strickland* prejudice analysis, i.e., that cases involving the murder of a child are "too overwhelming" to be mitigated, and therefore "no amount" of mitigating evidence can avoid a death sentence.

The many deficits and traumas that occurred in Nelson's life do not excuse this crime. However, they do help explain his inability to function normally. These cognitive impairments, including disinhibition and impulsivity, are not of his own choosing; he was born with these deficits. The unpresented mitigation about his impairments, as well as the sexual abuse and trauma that shaped his development, would have humanized him and provided context for his otherwise seemingly inexplicable actions. *See Sears*, 561 U.S. at 950-51 (evidence that Sears' diminished judgment due to cognitive deficiencies resulted in criminal behavior "may not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts"). To hold that Nelson's severe brain damage and repeated childhood sexual assaults would not have mattered to a single juror flies in the face of a well-established body of Supreme Court precedent.

II. The Plain Language Of The COA Statute Requires A COA To Be Granted Based Upon The Vote Of A Single Judge.

The statute governing COAs clearly states that the vote of a single judge controls whether a COA is granted, stating that no appeal will be take "[u]nless *a* circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1) (emphasis added). Precedent of this Court also seems to indicate that the vote of a single judge, even if it is at odds with the votes of other judges, establishes the debatability of the claim, the standard for a COA. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (noting that the COA standard involved "showing that reasonable

jurists could debate" whether the claims were adequate enough to proceed further); *Buck v. Davis*, 137 S. Ct. 759, 774 (2017) ("The statute sets forth a "two-step process; an initial determination whether a claim is reasonably debatable, and then—if it is—an appeal in the normal course."). Meeting the COA standard only requires a "preliminary showing" that the claim is debatable. *Id.* The vote of one judge should satisfy this initial inquiry, allowing the claim to be fully briefed on appeal.

Recently, this Court reiterated in *Buck v. Davis* that the COA determination is a "threshold" inquiry and "is not coextensive with a merits analysis." 137 S. Ct. at 773. Courts undertaking a COA inquiry should "ask only if the District Court's decision was debatable." *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 348) (internal quotation marks omitted). The bar is a low one: "[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." *Id.* (alteration in original) (quoting *Miller-El*, 537 U.S. at 338) (internal quotation marks omitted). The COA inquiry "would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail." *Miller-El*, 537 U.S. at 337.

Three members of this Court have indicated that the mere fact of disagreement among judges, standing alone, may indicate that the COA standard has been met. *Jordan*, 135 S. Ct. at 2651 (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting from the denial of certiorari). While the Third, Fourth, Sixth, Seventh, and

Ninth Circuits follow COA practices consistent with this (and would grant the COA), the Second, Fifth, Eighth, and Eleventh do not (and would not grant the COA).

Judge Wollman's dissent indicates that reasonable jurists could debate the correctness of the district court's ruling. Judge Wollman is necessarily a "jurist of reason" and is "*a* circuit justice or judge" who can issue a COA. 28 U.S.C. § 2253(c)(1) (emphasis added); *accord* Fed. R. App. P. 22(b)(1) (in a habeas corpus proceeding, "the applicant cannot take an appeal unless *a* circuit justice or *a* circuit or district judge issues a certificate of appealability under 18 U.S.C. § 2253(c)." (emphasis added)). However, lower courts are split on the impact of a dissent on the outcome of a COA application. In some circuits, a lack of unanimity on whether a COA should issue automatically results in the issuance of a COA. In others, the COA is denied.

A majority of the federal courts of appeals permit a single circuit judge to issue a COA, even though the application is presented to a panel. In the Third Circuit, COA applications are referred to a panel of three judges, and "if any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253, the certificate will issue." 3d Cir. L.A.R. 22.3; *see also Harper v. Vaughn*, 272 F. Supp. 2d 527, 529 n.4 (E.D. Pa. 2003). In the Fourth Circuit, COAs "shall be referred to a panel of three judges. If any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253(c), the certificate will issue." 4th Cir. R. 22(a)(3). In the Ninth Circuit, an application for COA is "presented to 2 judges rather than the full panel if only 2 are participating. Any judge participating may

vote to grant relief and so order." 9th Cir. General Order 6.3(g)(1).

In the Sixth and Seventh Circuits, precedent indicates that the vote of one judge will result in the grant of a COA. *See Shields v. United States*, 698 F. App'x 807, 813 (6th Cir. 2017) (granting COA on a § 2255 claim where the member was a dissenting panel member on direct appeal); Order at 2, *Shields v. United States*, No. 15-5609 (6th Cir. Nov. 4, 2015), ECF No. 8-2 (stating that "[b]ased on the dissenting opinion in the direct appeal, it appears that reasonable jurists could debate" the substantive claim, and granting COA); *Thomas v. United States*, 328 F.3d 305, 307-09 (7th Cir. 2003) (summarizing Seventh Circuit procedure whereby COA application is assigned to two-judge panel and then, if both vote to deny COA, the applicant may seek reconsideration by a three-judge panel, in which case COA will issue if one judge concludes the standard is met).

The Second, Fifth, Eighth, and Eleventh Circuits allow a COA to be denied over a single judge's dissent. In the Second Circuit, "[t]he clerk initially refers a request for a certificate of appealability to a single judge of the panel assigned to a death penalty case, who has authority to issue the certificate. If the single judge denies the certificate, the clerk refers the application to the full panel for disposition by majority vote." 2d Cir. Internal Op. Proc. 47.1(c). Precedent in the Fifth, Eighth, and Eleventh Circuits do reflect that these courts regularly deny COA by a vote of two-to-one. *See*, *e.g.*, Order, *Cromartie v. GDCP Warden*, No. 17-12627 (11th Cir. Mar. 26, 2018) (denying COA by vote of two-to-one); *Vang v. Hammer*, 673 F. App'x 596,

598 (8th Cir. 2016) (same); *Jordan v. Epps*, 756 F.3d 395, 413 (5th Cir. 2014) (same).

In this case, the Eighth Circuit denied Nelson the opportunity to raise his ineffectiveness claims regarding prosecutorial misconduct on appeal over the dissent of Judge Wollman. In so doing, the court of appeals failed to acknowledge the impact of Judge Wollman's dissent in assessing whether reasonable jurists could debate the correctness of the district court's ruling. If, as this Court has held, the touchstone of the COA inquiry is whether reasonable jurists might differ, then it is clear that a COA should have issued in this case.

The split among the circuits on whether a COA may be denied over the dissent of a panel judge leads to arbitrary results. Were Nelson litigating his claim in the Third, Fourth, Sixth, Seventh, or Ninth Circuits, a COA would automatically have issued. This Court should grant certiorari to resolve the circuit split and provide much-needed guidance to the lower courts on the import of dissenting opinions in the COA analysis.

CONCLUSION

On the first question, the Court should grant certiorari and reverse the Eighth Circuit Court of Appeal's findings on *Strickland* prejudice. On the second question, the Court should grant review and hold that under the plain language of the COA statute, the vote of one judge means that the COA should be granted, and full appellate briefing allowed. Nelson should then be remanded to the Eighth Circuit Court of Appeals for full appellate briefing on his claims regarding counsel's

ineffectiveness in regard to the closing argument of the prosecutor.

Respectfully submitted: August 8, 2019.

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