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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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No. _____

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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United States Court of Appeals
For the Eighth Circuit

No. 15-3160

Keith D. Nelson

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: April 11, 2018
Filed: November 28, 2018

Before SMITH, Chief Judge, WOLLMAN and COLLOTON, Circuit Judges.

SMITH, Chief Judge.

Keith D. Nelson pleaded guilty to interstate kidnapping resulting in the death of ten-year-old Pamela Butler. At the penalty phase of the trial, the jury sentenced him to death after consideration of aggravating and mitigating factors. After this court affirmed his death sentence, *see United States v. Nelson (Nelson I)*, 347 F.3d 701 (8th Cir. 2003), *cert. denied*, 543 U.S. 978 (2004), Nelson moved for habeas relief under

28 U.S.C. § 2255 to set aside his conviction and sentence of death. The district court denied the motion without a hearing. We subsequently remanded for an evidentiary hearing on six issues. *See Nelson v. United States (Nelson II)*, 297 F. App'x 563 (8th Cir. 2008) (per curiam). Following the evidentiary hearing, the district court denied Nelson's claims. For purposes of our appellate review, we ordered the parties to brief the three claims for which the district court denied relief. In addition, we granted Nelson's motion to modify the certificate of appealability and expanded it to include Nelson's claim that his trial counsel was ineffective for advising him to plead guilty.

Having thoroughly reviewed the record, we affirm the district court's denial of § 2255 relief to Nelson.

I. *Background*[1]

A. *Underlying Facts*

On September 29, 1999, Nelson approached James Robinson in the parking lot of a temporary work service in Kansas City, Kansas, and asked Robinson if he wanted a job hauling cement out of a basement. Robinson responded that he did. The two left the lot in a white Ford F–150 pickup truck driven by Nelson. Nelson and Robinson had never met before. While at the job site, Nelson told Robinson that he would like to kidnap a woman and take her away from the city to torture, rape, electrocute, kill, and bury her. Nelson said that he wanted to do this because he was definitely going back to prison for other charges. He felt he ought to go back for something big. The statements bothered Robinson, but he dismissed them as Nelson simply joking crudely. He decided not to contact the police.

Just three days later, Michanne Mattson was attacked outside of her apartment building. Mattson was driving home from a friend's house in the early morning when

[1]The following facts are taken substantially from *Nelson I,* 347 F.3d at 704–06, without further attribution.

she passed a white pickup truck parked alongside the road. After she passed the truck, it followed her for some distance into the parking lot of her apartment complex. She exited her vehicle and noticed that a man had exited the white truck. As she approached the door to her apartment building, the same man, whom she later identified as Nelson, confronted her on the sidewalk in a well lit area in front of her building. After a brief exchange, Mattson turned to go into the building, and Nelson rushed up behind her, grabbed her, and placed an eight-inch knife to her throat. He forced a handcuff onto Mattson's left wrist and dragged her through the parking lot toward his vehicle, exclaiming that she had better shut up and that he was going to kill her. Mattson continued to struggle, eventually escaping Nelson's grasp and calling for help. Nelson ran back to his truck and drove away.

On October 12, 1999, Nelson told an acquaintance that he had spotted a young girl in the Kansas City, Kansas area that he wanted to kidnap, rape, torture, and kill, and that now was the time to do it. Shortly thereafter, several individuals spotted Nelson in the area of 11th and Scott Streets in a white pickup truck. At that time, ten-year-old Pamela Butler ("Pamela") was rollerblading in the street near her home in the same area. Nelson parked his vehicle at the side of the street and lay in wait. As Pamela skated near the slightly ajar door of the truck, Nelson quickly jumped out of the truck, grabbed her around the waist, and threw her into the truck. Pamela's sister, Penny Butler ("Penny"), saw Nelson grab her sister and her sister's struggle with Nelson in the cab of the truck. Several other witnesses also saw the kidnapping. One person even gave chase in his own vehicle. Nelson eluded him, but the witness was able to write down the license plate number of the truck—Missouri plate number 177-CE2. Several other eyewitnesses verified the truck's license plate number.

Later that evening, the custodian of the Grain Valley Christian Church in Kansas City, Missouri, and his wife saw a suspicious white truck with Missouri license plate number 177-CE2 parked in the church lot. The custodian's wife wrote down the plate number and noticed an afghan in the front seat of the truck. They

contacted the police after seeing the kidnapping story on the ten o'clock news and informed them of the location of the truck. When the police arrived at the church, the truck was gone.

The truck was found abandoned the next day in Kansas City, Missouri. A police dog that had been provided with some of Pamela's clothing was dispatched to Nelson's mother's house and alerted to an afghan found inside the residence. That same day a large manhunt for Nelson commenced. On October 14, a civilian employee of a police department spotted Nelson hiding under a bridge. After he was spotted, Nelson went into the river and attempted to get away. When he made it back to shore, he was surrounded by railroad workers who detained him until the authorities arrived. After the authorities arrived, an onlooker shouted, "Where is the little girl?"[2] Nelson turned to an officer and stated, "I know where she's at, but I'm not saying right now." His capture was broadcast live on television. The next day the police found Butler's body in a wooded area behind the Grain Valley Christian Church. That discovery was broadcast on local television, and the United States Attorney held a live press conference from the discovery site. Subsequent investigation revealed that Pamela had been raped and then strangled to death with wire. The DNA in seminal fluid obtained from Pamela's underpants matched Nelson's DNA.

On October 21, 1999, a federal grand jury charged Nelson with (1) the kidnapping and unlawful interstate transportation of Pamela for the purpose of sexual abuse which resulted in the death of the victim in violation of 18 U.S.C. § 1201(a)(1) and (g) and 18 U.S.C. § 3559(d) (1994); and (2) traveling across state lines with the intent to engage in a sex act with a female under the age of twelve which resulted in

[2]Our prior opinion records the onlooker as shouting, "[W]here is the little girl?" *Nelson I*, 347 F.3d at 705. The jury trial transcripts reflects that the onlooker yelled out, "What about the girl?" Tr. of Jury Trial, Vol. IV, at 268, *United States v. Nelson*, No. 4:99-cr-00303-FJG (W.D. Mo. Nov. 19, 2001), ECF No. 462.

the death of the victim in violation of 18 U.S.C. §§ 2241(c), 2245, and 3559(d). On October 25, 2001, Nelson pleaded guilty to count one of the indictment, and the district court, upon the government's request and in accord with the plea agreement, dismissed count two of the indictment. Several days later, Nelson attempted suicide by ingesting a large amount of prescription medicine. He was treated at a local hospital, and the case then proceeded to the penalty phase of the trial in November 2001. The jury hearing the penalty phase returned a verdict that death should be imposed.

At sentencing, the district court offered Nelson the opportunity to address the court. Nelson, showing no remorse for what he had done, blistered the district court and the victim's family with a profanity laden tirade. The jury returned a verdict of death against Nelson, and the district court imposed the death sentence in accordance with the jury's verdict. The district court subsequently denied Nelson's motion for a new trial.

B. *Procedural History*

Nelson appealed to this court, and we affirmed the district court's judgment. *Nelson I*, 347 F.3d at 704. Thereafter, the Supreme Court denied Nelson's petition for certiorari. *Nelson v. United States*, 543 U.S. 978 (2004).

Nelson then moved to vacate, set aside, or correct his sentence in the district court. *See* 28 U.S.C. § 2255. The district court determined that no evidentiary hearing was necessary and that it could resolve Nelson's claims from the trial record. The district court dismissed Nelson's § 2255 motion and a companion motion to disqualify the district judge, and it subsequently denied Nelson's motion to alter or amend the judgment. *See* Fed. R. Civ. P. 59. Nelson filed a notice of appeal and sought a certificate of appealability from the district court. He sought certification on each of his 60 separate claims of ineffective assistance of trial and appellate counsel in his § 2255 motion, the denial of his recusal motion, and the separate denial of his

motion for additional funding of expert and investigative services. The district court denied the certificate. Nelson then filed a motion for a certificate of appealability with this court.

We granted a certificate of appealability on six claims in Nelson's § 2255 motion:

> A. Allegations of Trial Counsel's Constitutional Ineffectiveness:
>
> > (2) & (3) Failure to conduct adequate mitigation investigation including failure to move for a continuance to complete one.
> >
> > (4) Failure to conduct adequate investigation of defendant's mental health.
> >
> > (5) Advising or instructing defendant to decline to submit to a mental health examination by a government examiner.
> >
> > (15) Failure to make objections:
> >
> > > (e) to allegedly inflammatory and improper comments in the Government's closing argument and rebuttal.
>
> B. Allegations of Appellate Counsel's Constitutional Ineffectiveness:
>
> > (1) Failure to conduct adequate review of the trial record and the law.
> >
> > (2)(c) Failure to raise on appeal the Government's allegedly improper comments in closing arguments.

Nelson II, 297 F. App'x at 565–66 (italics omitted).

We remanded the case to the district court, directing it to hold an evidentiary hearing on these issues and to make findings of fact and conclusions of law. We denied a certificate of appealability on the remaining claims.

On remand, the district court held an evidentiary hearing to address the six issues. It denied habeas relief and denied Nelson a certificate of appealability. *See Nelson v. United States (Nelson III)*, 97 F. Supp. 3d 1131 (W.D. Mo. 2015). Nelson then moved this court for issuance of a certificate of appealability, which we denied.

Nelson petitioned for rehearing by the panel or en banc, and the case was held in abeyance until the Supreme Court issued its decision in *Buck v. Davis*, 137 S. Ct. 759 (2017). Thereafter, Nelson filed a petition for rehearing, and the government filed its response. We granted Nelson's petition for panel rehearing. We subsequently granted Nelson's motion to modify the certificate of appealability and expanded it to include the claim that Nelson's trial counsel was ineffective for advising him to plead guilty.

II. *Discussion*

When reviewing a district court's denial of a § 2255 motion, we apply de novo review "to the district court's legal conclusions, and mixed questions of law and fact, but we review underlying factual findings for clear error." *Ortiz v. United States*, 664 F.3d 1151, 1164 (8th Cir. 2011) (citing *United States v. Hernandez*, 436 F.3d 851, 855 (8th Cir. 2006); *United States v. Duke*, 50 F.3d 571, 576 (8th Cir. 1995)).

On appeal, Nelson asserts that his trial counsel rendered constitutionally ineffective assistance of counsel by: (1) failing to conduct an adequate mitigation investigation, including failing to move for a continuance to complete one; (2) failing to conduct an adequate investigation of Nelson's mental health; (3) advising or instructing Nelson to decline to submit to a mental health examination by a government examiner; and (4) advising Nelson to plead guilty.

Nelson's claim that his trial counsel was "so defective as to require reversal of [his] . . . death sentence has two components." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "First, [Nelson] must show that [his] counsel's performance was deficient." *Id.* To satisfy this requirement, Nelson must show that his "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [Nelson] by the Sixth Amendment." *Id.*

"Second, [Nelson] must show that the deficient performance prejudiced the defense. This requires showing that [his] counsel's errors were so serious as to deprive [Nelson] of a fair trial, a trial whose result is reliable." *Id.* To prove prejudice, Nelson "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Because Nelson challenges his death sentence, the relevant "question is whether there is a reasonable probability that, absent the errors, the factfinder . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. "To assess that probability, we consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam) (alteration in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000)). This "standard applies—and will necessarily require a court to 'speculate' as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase." *Sears v. Upton*, 561 U.S. 945, 956 (2010) (per curiam). Such standard "is the proper prejudice standard for evaluating a claim of ineffective representation in the context of a penalty phase mitigation investigation." *Id.*

If Nelson cannot "make[] both showings [of deficient performance and prejudice], it cannot be said that [his] . . . death sentence resulted from a breakdown

in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687. But "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Id.* at 697.

A. *Prejudice Resulting From Inadequate Mitigation and Mental Health Investigation and Lack of Mental Health Examination*

For purposes of this opinion, we will begin by examining *Strickland*'s prejudice prong, "evaluat[ing] the totality of the available mitigation evidence . . . in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 397–98 (citation omitted). Nelson argues that had the jury heard the mitigation evidence presented at the evidentiary hearing, a reasonable probability exists that at least one juror would have struck a different balance.

1. *Totality of Mitigation Evidence*

a. *Brain Damage*

During the evidentiary hearing, Nelson called several expert witnesses to testify regarding his brain damage. Records adduced at the evidentiary hearing show Nelson was rushed to a special children's hospital after his birth because he had suffered a brain bleed, stopped breathing, and suffered from severe oxygen deprivation, leading to lasting effects on his frontal lobe—the part of the brain key to regulating behavior and impulse control. Dr. Carolyn Crawford, a neonatologist, analyzed Nelson's birth records. She testified that Nelson's mother received almost no prenatal care prior to Nelson's birth. In addition, she testified that Nelson was born prematurely and suffered several complications after his birth, resulting in his hospitalization. Dr. Crawford summarized the myriad problems, which were documented in Nelson's birth records, including his compromised neurological development. But she testified that information and studies on areas of brain injury and brain damage were not available in 2001—she could testify in terms of risk

factors, but she could not have offered this same testimony (i.e., the lingering effects of prenatal and neonatal insults) based upon her review of the records back in 2001.

Dr. Ruben Gur, Ph.D., a neuropsychologist with a speciality in brain imaging and behavior, conducted a neuroimaging study of Nelson's brain. He testified at the evidentiary hearing that MRI and PET neuroimaging confirmed that several areas of Nelson's brain suffered significant damage, including the frontal lobes, the amygdala, the hippocampus, and the basal ganglia. According to Dr. Gur, when these areas of the brain are damaged, an individual is not able to effectively engage in rational planning, maintain impulse control (especially sexual impulses), and inhibit risky or aberrant thoughts and behaviors. Dr. Gur opined that the structural damage that the MRI detected in the frontal regions of Nelson's brain "would indicate diminished executive functions such as abstraction and mental flexibility, planning, moral judgment, and emotional regulation, moderating limbic arousal and impulse control." Appellant's App. at 146. Likewise, Dr. Gur opined that the abnormal activity detected in the amygdala, frontal lobes, and cortex would diminish impulse control. He also noted that "abnormalities in basal ganglia could further impair rational performance under stress because they supply the neurotransmitter dopamine, which is necessary for intact frontal lobe functioning. The resulting behavior of someone with such brain damage would be disorganized, erratic and failing to adjust to situational demands." *Id.* Despite these abnormalities, Dr. Gur recognized that "such individuals do respond well to structured environments, where the complexity of the surrounding and need for decision-making is reduced." *Id.* at 146–47.

Also at the evidentiary hearing, Dr. Michael Gelbort, Ph.D., testified concerning his neuropsychological evaluation of Nelson. In his report, Dr. Gelbort noted that Nelson's testing results indicated "frontal lobe disturbance/dysfunction" which "has an effect on his everyday thinking and reasoning capacities" and manifests as "impaired reasoning and learning/memory abilities." *Id.* at 180. Dr. Gelbort explained that damage in these areas of the brain affects an individual's

ability to exercise judgment and control one's impulses. According to Dr. Gelbort, "[T]he way behavior unfolds is that you can have impulsive behavior that takes time and develops slowly where there's plenty of time to say, no, I shouldn't do this, but it's still an impulsive behavior even though it happens over time slowly." Tr. of Evidentiary Hr'g, Vol. II, at 413, *Nelson v. United States*, No. 4:04-cv-08005-FJG (W.D. Mo. Apr. 15, 2014), ECF No. 261. Dr. Gelbort opined that Nelson's behavior during the offense was consistent with frontal lobe dysfunction and showed abnormal disinhibition and impulsivity instead of planning.

Dr. Xavier Amador, Ph.D., a clinical and forensic psychologist, testified during the evidentiary hearing that, in his opinion, Nelson suffered from frontal lobe dysfunction and that Nelson's mental health was also impaired by a cognitive disorder (not otherwise specified), post-traumatic stress disorder, psychotic disorder (not otherwise specified), and a personality disorder that would impair his functioning. Dr. Amador also found that Nelson showed signs of paranoid thinking. Dr. Amador testified that he reviewed an affidavit prepared by Dr. Natalie Novik Brown, Ph.D., a fetal alcohol spectrum specialist, who opined that Nelson "may or may not be fetal alcohol [affected] but certainly had signs of neurological impairment that may be related to fetal alcohol syndrome." *Id.* at 431. He opined that Nelson was severely mentally ill and in a dissociative state at the time of the offense, meaning he was unable to appreciate the nature and quality or wrongfulness of his acts or conform his conduct to the requirements of the law. He concluded that Nelson committed the offense under the influence of severe mental disturbances that affected his perceptions, judgment, impulses, and ability to conform his conduct to the requirements of the law.

Dr. Dan Martell, a forensic neuropsychologist, who studies the brain and behavior, and particularly the effects of brain damage on human behavior, testified as a government witness at the evidentiary hearing. He evaluated Nelson on

September 9–10, 2010, for nine-and-a-half hours.[3] He identified Nelson as having "brain damage, brain dysfunction, [and] neurological impairments." Tr. of Evidentiary Hr'g, Vol. IV, at 657, *Nelson v. United States*, No. 4:04-cv-08005-FJG (W.D. Mo. Apr. 17, 2014), ECF No. 263. Dr. Martell acknowledged that this finding—and the identical findings of the other experts—are "evidence of mitigation." *Id.* at 658.

b. *Nelson's History and Characteristics*

At trial, several individuals testified about Nelson's characteristics and upbringing. Nancy Nelson ("Nancy"), Nelson's mother, testified that Nelson was diagnosed with dyslexia and was a poor student, frequently had fights and behavioral problems in school, and had a bed-wetting problem well into his teen years. Nancy also testified that two of her children were schizophrenic. She admitted that she was an alcoholic and that because she had to work long hours to support her children, she was frequently away from home, requiring the boys to care for themselves. This resulted in the boys often getting into trouble at school and in the community.

Mary Smith, Nancy's sister and Nelson's aunt, testified about Nelson's disadvantaged and difficult childhood. So too did Georganna Romero, Nancy's sister and Nelson's aunt, who described the poor living conditions of Nancy's home in Texas and further described how the house smelled of urine. Irene Wood testified that she helped Nancy and her five boys get a home, clothing and personal items when they moved to Texas. She recounted the poor conditions of Nelson's upbringing in Texas.

Two of Nelson's brothers testified about Nelson's childhood. Steven Nelson ("Steven"), Nelson's youngest brother, testified that he is employed as an engineer

[3]Dr. Martell previously attempted to evaluate Nelson in the fall of 2001 at the government's request, but Nelson refused to be evaluated.

and has a successful career. After high school, Steven attended DeVry Institute in Kansas City, where he had a 3.9 grade point average. He recounted his disadvantaged childhood in Texas and how his mother Nancy neglected him and his brothers. He corroborated testimony of Nelson's bed-wetting problem, how his mother was never home and was either working or drinking, and how he and his brothers had to take care of themselves most of the time.

Kenneth Nelson ("Kenneth"), Nelson's twin brother who suffered no trauma at birth, testified he is a satellite communications maintenance operator and installer in the U.S. Army. He characterized his career as successful. He graduated from school with a 3.69 grade point average. He testified about his family's disadvantaged and impoverished childhood, telling the jury that his mother seriously neglected him and his brothers. He stated that his mother was never around and was always at the bar working or drinking alcohol. He also described an abusive boyfriend of his mother. According to Kenneth, he and Nelson would frequently burglarize and steal from homes when they lived in Texas. But Kenneth straightened his life out when he moved back to Missouri and lived with his aunt and uncle, where he became involved in high school football, worked at a grocery store as a stocker, and did well in school.

Gene Thompson was the Nelson family's landlord when they lived in Texas. He testified that they lived in Section 8 housing and described the poor, unkempt conditions of their home. Thompson stated that when the Nelson family left the rental property, it was in extremely poor condition.

Michael Griffith, a former neighbor of the Nelson family in Texas, testified that Nancy was never home and the boys were frequently left alone to fend for themselves. Griffith stated that he did little things to try to aid the Nelson family, such as plumbing repairs at no charge. He testified that the home was always messy and unclean. He also testified that Nelson's brothers made fun of him because of his bed-wetting problem.

Rhonda Monroe ("Rhonda"), a former babysitter for the Nelson children in Texas, testified that when Nancy would go to work, she would bring the children to Rhonda's home. Rhonda testified Nelson had a bed-wetting problem and that Rhonda's husband would punish Nelson by spanking him with a belt. Rhonda's husband was an alcoholic and was very abusive towards Nelson and his brothers; they were very scared of him. When Rhonda's husband was home, the Nelson boys were required to stay in one room of Rhonda's home. If they left the room, Rhonda's husband would spank the boys with a belt. Rhonda's daughter, Jennifer Monroe ("Jennifer"), testified that the Nelson boys were always required to stay in one room when her mother was babysitting them. According to Jennifer, her stepfather, Billy Reese, was always spanking them with a belt. She testified that the Nelson boys were extremely afraid of her stepfather.

Ellen Crutsinger, a former teacher to several of the Nelson boys in Texas, testified that Nelson was in a special education class and struggled while in school. She recalled Nelson helping a crippled girl in a wheelchair while in elementary school. Nelson would push the girl around the school grounds in her wheelchair, and the two developed a friendship. Crutsinger testified that Nancy never attended the "meet the teacher" nights at the school.

Homer Dear, Nelson's former school principal and a former Texas State Representative, testified that he knew the Nelson family during the time they lived in Texas and that he was the boys' principal at the elementary school. Dear believed the boys were physically and mentally abused. He described the Nelson family as a very poor family and also described how he had tried to help them. He testified about the boys' poor hygiene and how he would require the boys to take showers and would give them clothing at the school. According to Dear, he bought clothes for the boys at a store on at least one occasion. He also visited the Nelson home and described the house as unclean.

David Cunningham, Nelson's employer, described Nelson as a pleasant employee and a good worker. He characterized Nelson as reliable and conscientious when working for his basement waterproofing business.

At trial, Nelson called expert defense witness Dr. Mark Cunningham to testify on his behalf. Dr. Cunningham is a clinical and forensic psychologist who frequently testifies as a mitigation and sentencing expert in capital cases in the United States. He testified about the effect of childhood abuse and neglect on Nelson's character and development. Dr. Cunningham explained how the squalid conditions and abusive and violent nature of Nelson's childhood affected the formation of Nelson's character. According to Dr. Cunningham, Nelson would become less violent as he aged.

c. *Nelson's Father and Family Background*

At trial, Nancy testified in detail about Kenneth Morse, Nelson's violent and abusive father. She told the jury that Morse frequently beat her and was abusive to her boys, too. She recounted for the jury in detail how Morse, on one occasion, tied her up and shocked her with an electrical cord. In addition, Morse would lock her in closets in their home. On another occasion, Nancy testified that when she was pregnant with her son Paul, Morse threw her to the ground and beat and stomped on her so severely that she had to have her spleen removed. Nancy moved with her children, including Nelson, to California and Texas to flee Kenneth. Smith testified that Morse regularly beat Nancy and that he would also lock her up in their home. Smith helped Nancy escape Morse when they moved to California and Texas. Romero testified that Morse beat and tortured Nancy. She recounted how Morse tried to electrocute Nancy.

During trial, Morse flatly denied almost every allegation made about his frequent and severe beatings of Nelson and his mother Nancy. But medical records adduced at the evidentiary hearing confirmed that Nancy did undergo a splenectomy in October 1975 while she was pregnant with Paul.

Evidence at the evidentiary hearing also disclosed Morse's background. Morse was one of 14 siblings born into severe poverty. His "siblings described him as . . . 'unbalanced[,'] 'always strange[,'] and always in trouble as a child." Appellant's App. at 61. He suffered from "'fits,' during which he would pull his hair, and bang his head on the walls, the floor or rocks. He would bite and pinch himself until he bled." *Id.* He "ate aspirin like it was candy" and ate chicken feces. *Id.* at 62. At age ten, he attacked his seven-year-old brother with an ax and cut off his toe. He was cruel toward animals and became increasingly violent with age. At age 17, he raped a 13-year-old girl. A year later, he attempted to rape a seven-year-old girl. Numerous family members acknowledged that Morse displayed symptoms of schizophrenia, including acting delusional and paranoid. In addition to Morse, other family members on Morse's side of the family also exhibited signs of mental illness, including episodes of delusions, depression, schizophrenia, psychosis, and paranoia. On one occasion, Morse's brother Fred was found in the woods with a gun, claiming to have seen and heard their dead brother Charlie, and was taken into custody and hospitalized. Morse's brother, Milas, and his sisters, Beth and Evelyn, suffer from depression and other mental health problems. Morse also has at least one nephew and three nieces that have been diagnosed with mental illnesses. Milas also received an 18-year sentence for raping his four-year-old great-granddaughter. Morse's nephew, Milas Jr., is alleged to have raped all three of his own children. Morse's nephew, Chester, raped his 13-year-old daughter.

Jill Miller, MSSW, testified at the evidentiary hearing. She stated that she prepared Nelson's social history and discovered a multigenerational history of mental illness, a history of alcoholism, substance abuse on both sides of the family, domestic abuse on both sides of the family, as well as inappropriate sexual behavior and criminal sexual misconduct. She also discovered that there was severe poverty on the Morse side of the family. Miller testified that she was able to gather additional medical records on Nancy, which showed the abuse that Nancy suffered and the medical records for one of Nelson's brothers, who suffered from schizophrenia.

Dr. Leslie Lebowitz, Ph.D., a clinical psychologist with particular expertise in the effects of complex trauma on psychological development and behavior, testified at the evidentiary hearing regarding the sustained abuse and neglect inflicted on Nelson and how it impacted him. She testified that Nelson's family tree was "riddled with major psychopathology, substance abuse, and patterns of interpersonal violence and neglect." Tr. of Evidentiary Hr'g, Vol. III, at 530, *Nelson v. United States*, No. 4:04-cv-08005-FJG (W.D. Mo. Apr. 16, 2014), ECF No. 262. She stated that Nelson was born to a mother who was battered and unprepared to parent him; she also testified that his mother severely neglected him, failed to protect him from abuse, and later beat and emotionally abused him. Dr. Lebowitz testified that Nelson "experienced the most severe kind of trauma, which is chronic, severe developmental trauma." *Id.* at 535. According to Dr. Lebowitz, as a result of the "onslaught of horrifying life experiences" inflicted upon Nelson, *id.* at 539, "every single developing system in his self, his emotional system, his cognitive system, his biological system, his capacity to attach, all of those fundamental systems [were] under continuous and relentless assault from the violence," *id.* at 538. She explained:

> The problem with Mr. Nelson's life is that it was a continuous, relentless barrage of trauma and neglect, and the ubiquity of what happened, the variety of what happened, the utter lack of rescue or protection and the amount of time, the slough of development over which these experiences happened create a kind of toxic load that is qualitatively unlike other things.

Id. at 546–47. Dr. Lebowitz opined this trauma occurred "during the period of life in which his brain [was] under the most rapid period of development in which [he was] growing more neuro connections than [he was] losing." *Id.* at 538. As a result, she testified, Nelson suffered damage to the parts of the brain and his psychological development that are involved in inhibiting impulses and regulating behavior.

d. *Incarceration History and History of Physical and Sexual Abuse*

During trial, the jury heard testimony regarding Nelson's time at the Community Corrections of America (CCA) federal holding facility in Leavenworth, Kansas. Melvin Lister, a CCA guard, testified that he worked in the segregation area of CCA when Nelson was housed there. Lister testified that inmates frequently threatened and harassed Nelson. Lieutenant Bruce Roberts, another CCA employee, testified that inmates frequently verbally harassed Nelson. During the 25 months that Nelson was housed at CCA, he never tried to escape. Roberts never considered Nelson a threat.

CCA officials, as a part of a routine practice in which all phone conversations of inmates are recorded, recorded a conversation between Nelson and his girlfriend, Kerri Dillon. At trial, the defense played that conversation for the jury. In the conversation, Dillon and Nelson discussed, among other things, Dillon's recent pregnancy by Nelson. Nelson appears to express remorse for Butler's murder, telling Dillon of his intent to tell law enforcement authorities of his involvement in the crime. Nelson states, "I'm just gonna do the right thing for once in my life." Tr. of Jury Trial, Vol. VIII, at 861, *United States v. Nelson*, No. 4:99-cr-00303-FJG (W.D. Mo. Nov. 26, 2001), ECF No. 466 (quoting Def.'s Ex. 113 at 16).

The evidentiary hearing disclosed that Nelson was physically and sexually assaulted while incarcerated as a youth and engaged in self-harm, including multiple suicide attempts. The evidence showed that Nelson was sent to the Texas Youth Commission (TYC) at age 14. While there, Nelson witnessed other residents being sexually assaulted and was physically assaulted several times. His medical records document bruising and swelling on his face and around his left eye and injuries to his nose, upper chest, and the back of his head. He requested that staff put him in isolation and separate him from the other residents. Staff frequently had to place Nelson in restraints while in isolation to prevent him from injuring himself because of his attempts to slash his wrists using a Coke can, the teeth from a comb, and his

own fingernails. Upon his release from TYC after four months, Nelson's facial injuries were still visible. After leaving TYC, Nelson moved between his mother's home and other juvenile institutions. His mother also sent him to his father's home in Kansas City, where Morse would frequently abuse drugs and cuss at and beat Nelson's elderly grandmother. One day, Nelson went to the train yards and attempted to kill himself by jumping in front of a moving train, but a railroad detective intervened. After Nelson returned to his mother in Texas, Nelson was once again in and out of juvenile detention, including Booneville. Medical records from this facility show that Nelson sustained injuries to his head and face; he was also sexually assaulted.

Evidence adduced at the evidentiary hearing also showed that Nelson was sexually victimized while in his mother's care. When Nelson was seven or eight years old, one of his mother's boyfriends molested him. And, while Nelson was living in an apartment complex in California, an older man anally penetrated him and forced him to perform oral sex.

2. *Totality of Aggravating Evidence*

a. *Offense of Conviction*

At trial, the government presented 30 witnesses over a two-day period. We have already recounted the egregious facts revealed through these witnesses' testimony in the background section of this opinion. *See supra* Part I. We recount some of this testimony in more detail here to clarify its use as aggravating evidence.

James Shannon Robinson testified that on September 29, 1999, he and Nelson spent the day working together on a job site where Nelson revealed to Robinson that he wanted to kidnap a female and then take her to a remote location where he could torture, rape, electrocute, and then kill and bury her. Nelson bragged he was going back to the penitentiary anyway, and he "wanted to go for something big." Tr. of Jury

Trial, Vol. III, at 96, *United States v. Nelson*, No. 4:99-cr-00303-FJG (W.D. Mo. Nov. 19, 2001), ECF No. 461.

On October 2, 1999—ten days before Pamela was kidnapped—Nelson, in the middle of the night, held a knife to the throat of Michanne Mattson, a medical student, and attempted to drag her kicking and struggling from her apartment parking lot to his white Ford pickup. Mattson testified that Nelson "told [her] not to say anything or he would cut [her] throat. And he said that several times, that he would kill [her] if [she] said anything." *Id.* at 112. Nelson handcuffed Mattson's left wrist. According to Mattson, he then pushed her toward the parking lot with the knife to her throat. Nelson told Mattson "he was going to kill [her] if [she] said anything, to keep quiet, you f***ing b***h, I'll kill you if you say anything." *Id.* at 113–14. Mattson stated that Nelson called her "a f'ing b***h" "[t]wo or three times." *Id.* at 114. Mattson eventually pushed away from Nelson and pulled the knife down from her throat and yelled for help, but Nelson's gloved hands were over her mouth. Mattson dropped to her knees, and Nelson started dragging Mattson by the handcuffs out to the parking lot while cursing at her. "He kept calling [her] a f***ing b***h and [saying] that he was going to kill [her]." *Id.* at 115. Mattson then dropped limply to the pavement, rolled away from him, and continued yelling. Nelson ripped Mattson's purse off her shoulder and ran to his truck, but he kept looking back at her saying, "If you look at me, b***h, I'll kill you. Don't look at me. Better run, b***h, I'll kill you." *Id.* at 116. Mattson testified Nelson said that about five times.

Around 4:00 p.m., on Tuesday, October 12, 1999—the day that Pamela was kidnapped—Nelson told an acquaintance "that he knows where a 14-year-old girl is, that right now is the time to get her, take her, kill her, rape her." Tr. of Jury Trial, Vol. IV, at 149. Nelson was "hyper" and "anxious." *Id.* A little over an hour later in Kansas City, Kansas, ten-year-old Pamela left her home on her roller skates to go one-and-a-half blocks to the local gas station to buy some cookies and soda. Her 11-year-old sister Penny was playing on the front porch and saw her sister leave.

Penny testified that before Pamela returned home, a white Ford pickup had parked along the street with the driver's door left ajar. Penny saw Pamela skating toward home, the same way she had skated toward the convenience store. Pamela skated toward the pickup truck; when she approached the truck, Penny testified hat Nelson "came up from out the truck and grabbed her and threw her in the truck and slammed the door and drove by." *Id.* at 176. Penny began screaming. Hearing her screams, her teenage sister Casey Eaton came out of the house and looked to where Penny was pointing and saw a white pickup truck pulling away. As Nelson drove past the screaming girls, he "flipped [them] off." *Id.* at 177. The girls' screaming and the tires' squealing attracted the attention of Paul Wilt who was sitting in his truck visiting a friend nearby. Wilt gave chase, but eventually lost sight of the truck. He was able to get its license tag number—177-CE2.

Between 6:30 and 7:30 p.m. that same evening, Carl and Shirley Condra drove to their church, Grain Valley Christian Church in Grain Valley, Missouri. The Condras saw a white Ford pickup truck with the license plate number 177-CE2 parked behind the church. The truck was unlocked and empty. The Condras did not recognize the truck as belonging to any member of the congregation and believed its presence to be suspicious. They tried to find a police officer, but found none and went home. Later that night, after seeing the 10:00 p.m. news of Pamela's abduction which included a description of the truck, they immediately called the police.

Sometime around 8:00 p.m. or thereafter that evening, Nelson drove to his mother Nancy's house in Kansas City, Missouri. Nelson and his mother then drove to the Oasis Bar, which was a block and a half away from Pamela's home. Nancy drank, while Nelson played a video game. After they left the bar, they stopped at the gas station where Pamela had bought her cookies and soda. Nelson purchased a soda and cigarettes. Nelson and Nancy were at his girlfriend's house when the news broadcast Pamela's abduction. Nelson showed no anxiety, remorse, grief, or other reaction. Nelson and Nancy then returned to Nancy's house.

At 11:00 p.m., Patti Griffith, Nancy's next-door neighbor, saw Nelson on the passenger side of the white pickup truck wiping the dashboard and underneath areas while periodically glancing up and down the street. Later that night, a noise awakened Griffith. She looked out the window and noticed that the pickup truck was gone, and Nelson was pacing around in his yard.

Around 2:00 a.m. on the morning of Wednesday, October 13, 1999, Nelson called for a cab. The dispatcher who took the call recalled Nelson being "real cool" and "cool as a cucumber"; Nelson even told the dispatcher a joke. *Id.* at 227.

Around 9:00 a.m. that morning, a white Ford pickup truck with the license number 177-CE2 was found abandoned ten blocks from Nelson's residence. The truck appeared to have been recently cleaned; it was left unlocked with the keys lying on the floorboard. The manhunt for Nelson and the search for Pamela continued throughout Wednesday.

On Thursday, October 14, 1999, Laurie Torrez, a civilian employee of the Kansas City, Kansas Police Department, spotted Nelson under the 18th Street Bridge and called the police. Nelson had injured his leg while attempting to lower himself from the bridge. He was unable to escape and submitted to capture. Before a helicopter arrived to extract him from the area, a large crowd of watchers assembled. A member of the crowd yelled out, "What about the girl?" *Id.* at 268. Nelson looked at the arresting officer and said, "I know where she's at, but I'm not saying right now." *Id.* at 269. Later than day, a complaint was filed against Nelson for the kidnapping of Pamela. Pamela remained missing.

On Friday, October 15, 1999, law enforcement personnel who were searching the woods and fields east of the church first discovered Pamela's white sports bra. They then discovered her underpants. Her nude, lifeless body was found buried under a pile of brush. A wire ligature was wrapped around her throat.

Autopsy results revealed numerous scrapes and abrasions and blunt force trauma to Pamela's mouth and head. Her hymen had been torn near the time of death. Redness and irritation present in her genital area was consistent with sexual assault. The cause of death was strangulation.

Pamela's underpants were submitted to the Federal Bureau of Investigation (FBI) for DNA analysis. The FBI's DNA analysis revealed the presence of semen in the crotch area of Pamela's underpants. When compared to Nelson's blood sample, test results conclusively showed that he was the source of the DNA in the semen stain.

Inmates housed with Nelson also testified about discussions they had with Nelson. Inmate Edward Frazier testified that he and Nelson

> got into a conversation about . . . building a cell and [Nelson] said the cells would . . . have nothing in it besides cotton. He said that he would watch his victim like seven days a week and then at some point he would kidnap them, put them in that room. I asked him what did the room consist of. He said there would be cotton on the floor. They wouldn't have a bed. They wouldn't have a shower. The only thing they would have is a commode and they would get their toilet paper from the outside of it.

Tr. of Jury Trial, Vol. VI, at 503, *United States v. Nelson*, No. 4:99-cr-00303-FJG (W.D. Mo. Nov. 20, 2001), ECF No. 464.

According to Frazier, Nelson told him he was going to abduct "[m]ostly" women, *id.*, and that he planned on binding them down and "[d]o what he wanted to do with them," *id.* at 504. This included having sex with them. He told Frazier that "he knew how to get belts and how to tie a person down to where he could actually put them in different positions where he could have sex with them, and he described

it in detail." *Id.* He also told Frazier that after he was "done with them," he would "[k]ill them." *Id.* While he did not tell Frazier precisely how he would kill his victims, he did tell Frazier "that once he did kill them, that he would [dispose of the bodies] the old-fashioned way," which was "the river bed." *Id.*

Inmate Steven Bailey testified that his cell was next door to Nelson's cell. About 2:00 or 3:00 a.m. in March of 2000, Bailey heard a voice coming from Nelson's cell, which he recognized as Nelson's. He "heard high-pitched[,] low-volume type screams that sounded like a little girl" and "cries for mommy." Tr. of Jury Trial, Vol. V, at 361, *United States v. Nelson*, No. 4:99-cr-00303-FJG (W.D. Mo. Nov. 20, 2001), ECF No. 463. These sounds were repeated a couple of times during a five-to-ten minute period. In May of 2000, Bailey was awake reading around 3 or 4 a.m. in the morning when he heard sounds coming from Nelson's cell. He "heard a series of short high-pitched screams that were again low in volume. Heard cries for mommy. Help me. Don't hurt me. Don't kill me." *Id.* at 362. He recognized the voice as Nelson's. The next day, the same sounds occurred, lasting ten to fifteen minutes. This time, Bailey confronted Nelson, saying, "How could you do that to that little girl[?]" *Id.* at 363. Nelson replied, "You wouldn't believe it." *Id.*

b. *Victim Impact and Nelson's Address to the Court*

In addition to the evidence of guilt, the jury also heard evidence about the uniqueness of Pamela and the impact her death had on the lives of her family members.

When offered the opportunity to address the court, Nelson, showing no remorse for what he had done, blistered the district court and the victim's family with a profanity laden tirade.

c. *Escape Attempts and Prior Criminal History*

While in custody on this offense at CCA, Nelson talked about escaping, unraveled a section of the prison fencing, and fashioned two workable handcuff keys. Nelson threatened to mace his state probation officer. And, while at CCA, in an unprovoked assault, he beat a correctional officer and threatened to kill yet another correctional officer.

The jury also learned of Nelson's three prior Missouri state convictions for stealing and a conviction for attempted escape from custody.

d. *Dr. Martell's Testimony at the Evidentiary Hearing*

Dr. Martell, the government's expert witness, testified at the evidentiary hearing that "despite [Nelson's] level of brain impairment that's apparent on the testing and examination," looking at Nelson's behavior in the course of committing the crime, Dr. Martell found no impulsivity. Tr. of Evidentiary Hr'g, Vol. IV, at 649. Dr. Martell stated that Nelson tried to carry out his fantasy on another victim, and when that did not work, he selected another more youthful, more easily controlled victim. According to Dr. Martell, Nelson laid in wait, hid himself, brought electrical cords to bind the victim, kidnapped her, and took off at a high rate of speed in a manner that people would not be able to see him or identify him. He also took the victim to a secluded area and bound her up so she could not get away. Dr. Martell opined that Nelson's actions showed planning as opposed to impulsive acting out. For those reasons, Dr. Martell did not believe that Nelson's brain damage played a significant role in him committing this crime. Dr. Martell also testified that he did not believe that Nelson met the standards with regard to not understanding the wrongfulness of his behavior. He specifically noted that Nelson attempted to avoid being seen and attempted to get rid of incriminating evidence. Dr. Martell testified, "If you didn't know it was wrong, there's no reason to get rid of the truck, to wipe it down for evidence, to try and remove fibers from the crime scene that could identify him." *Id.* at 650. Dr. Martell testified that he had reviewed the reports of Dr. Daniel

Foster,[4] Dr. Gelbort, Dr. Brown, Dr. Amador, Dr. Crawford, Dr. Lebowitz, Dr. Gur, Dr. Miller, and Dr. Roger Jones.[5] Dr. Martell testified that none of these reports changed his opinions regarding Nelson.

3. *Reweighing of the Evidence*

We have now reweighed the totality of the available mitigation evidence—both that offered at trial and that offered at the evidentiary hearing—against the evidence in aggravation to determine whether a reasonable probability exists that Nelson would have received a different sentence. *See Porter*, 558 U.S. at 41. We conclude that the result would have been the same. This is not a case in which the "[t]he judge and jury at [Nelson's] original sentencing heard almost nothing that would humanize [Nelson] or allow them to accurately gauge his moral culpability." *See id.* (explaining that the judge and jury "learned about [the petitioner's] turbulent relationship with [his girlfriend], his crimes, and almost nothing else"). Nor is this a case where the "jury heard only one significant mitigating factor" before imposing the death penalty. *See Wiggins v. Smith*, 539 U.S. 510, 537 (2003) ("Wiggins' sentencing jury heard only one significant mitigating factor—that Wiggins had no prior convictions. Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." (citation omitted)). Instead, during the penalty phase, the jury heard substantial mitigating evidence that (1) Nelson was a poor student who suffered from dyslexia; (2) Nelson frequently fought and had behavioral problems in school; (3) Nelson had a bed-wetting problem well into his teen years, which he was teased for; (4) his mother was an alcoholic; (5) Nelson's mother was frequently away from

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[4]Dr. Foster is the forensic psychologist that the defense hired to evaluate Nelson's mental health. The district court ultimately disallowed Dr. Foster's testimony during the penalty phase. *See Nelson III*, 97 F. Supp. 3d at 1151.

[5]Dr. Martell reviewed a dermatological report prepared by Dr. Jones dated January 10, 2012, in which Dr. Jones examined Nelson and found his skin normal.

the home, resulting in the boys caring for themselves and getting into trouble; (6) Nelson and his siblings lived in poor conditions in a home that smelled of urine; (7) two of Nelson's siblings have schizophrenia; (8) Nelson's babysitter's husband was an alcoholic and abusive toward Nelson, particularly because of his bed-wetting problem; (9) Nelson showed kindness to a crippled girl in a wheelchair while in elementary school; (10) Nelson was physically and mentally abused as a child; (11) Nelson had poor hygiene as a child; (12) Nelson was a pleasant, reliable, and good worker; (13) the squalid conditions and abusive environment that Nelson lived in affected the formation of Nelson's character; (14) Nelson's father was violent and abusive to his mother and to Nelson, including using electric shock to abuse his mother on one occasion; (15) inmates frequently threatened and harassed Nelson at CCA; and (16) Nelson expressed he wanted to do the right thing in a recorded phone call at the CCA.

Having reweighed the evidence, including the additional mitigating evidence presented in the post-convicting proceeding, we conclude that there is no reasonable probability of a different outcome.

Accordingly, we affirm the district court's denial of Nelson's ineffective assistance claims for (1) failing to conduct an adequate mitigation investigation, including failing to move for a continuance to complete one; (2) failing to conduct an adequate investigation of Nelson's mental health; and (3) advising or instructing Nelson to decline to submit to a mental health examination by a government examiner because we conclude that no prejudice resulted.

B. *Guilty Plea*

After we granted Nelson's petition for panel rehearing, we subsequently granted Nelson's motion to modify the certificate of appealability and expanded it to include the claim that Nelson's trial counsel was ineffective for advising him to plead guilty.

Prior to trial, Nelson's counsel advised him that there was no viable defense to the charges against him and counseled him to enter a guilty plea, proceed to trial only on the sentencing phase of his capital trial, and argue that his plea established an acceptance of responsibility for purposes of punishment. Nelson argues that the advice on which this plea was based was erroneous because he did have a defense to the capital charges—he could have presented an affirmative defense of insanity under 18 U.S.C. § 17. According to Nelson, he could have presented evidence that he was suffering from a severe mental disease or defect at the time of the offense. Nelson argues that counsel's advice to plead guilty was not an informed strategic decision; instead, it was made in a vacuum without the benefit of an investigation into his mental health. Had he been properly advised of the availability of the defense, Nelson argues he would have not entered a plea but would have availed himself of the applicable defense and gone to trial.

In response, the government argues that we should dismiss Nelson's claim of ineffective assistance based on counsel advising him to plead guilty where he had an insanity defense because this issue was not one of the issues on which we remanded for an evidentiary hearing, nor does it relate back to issues raised in Nelson's original timely-filed § 2255 motion. The government asserts that because this new claim does not relate back to Nelson's original, timely-filed § 2255 motion, it is not properly raised in the certificate of appealability from the district court's § 2255 order that denied relief on other grounds. Therefore, the government argues, the issue constitutes a second or successive § 2255 motion that cannot be considered until this court grants permission in accordance with the requirements under 28 U.S.C. § 2255(h).

"The relation back of an amendment is governed by Rule 15(c) and presents a question of law which this Court reviews de novo." *Robinson v. Clipse*, 602 F.3d 605, 607 (4th Cir. 2010). "An amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out

of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading . . . ." Fed. R. Civ. P. 15(c)(1)(B).

> To arise out of the same conduct, transaction, or occurrence, the claims must be tied to a common core of operative facts. An amended motion may raise new legal theories only if the new claims relate back to the original motion by arising out of the same set of facts as the original claims. The facts alleged must be specific enough to put the opposing party on notice of the factual basis for the claim. Thus, it is not enough that both an original motion and an amended motion allege ineffective assistance of counsel during a trial. The allegations of ineffective assistance must be of the same time and type as those in the original motion, such that they arise from the same core set of operative facts.

Dodd v. United States, 614 F.3d 512, 515 (8th Cir. 2010) (cleaned up).

In Nelson's original, timely-filed § 2255 motion, the only claim that he made with regard to defense counsel's alleged ineffectiveness as to his guilty plea is as follows:

> (18) Defense counsel advised and convinced Movant to plead guilty to count one of the indictment in exchange for the Government dismissing count two of the indictment and letting the defense argue that Movant had accepted responsibility for his actions, a contention that was unanimously rejected by the jury[.] To reach this agreement, Movant was required to waive any post-conviction challenge as to the guilty plea. This is an unenforceable condition and trial counsel were placed in a conflicted position when they advised Movant to accept the conditions of the offer while ostensibly avoiding post-conviction review of the reasonableness of that advice as it pertained to Movant's decision to enter a guilty plea.

Mot. Brought Pursuant to 28 U.S.C. § 2255 to Vacate the Conviction & Sentence Imposed at 11–12, *Nelson v. United States*, No. 4:04-cv-08005-FJG (W.D. Mo. Nov. 6, 2005), ECF No. 25.

We conclude that Nelson's claim that his trial counsel was ineffective for advising him to plead guilty is not of the same "time and type" as the ineffective-assistance claims in his original petition. In his original § 2255 motion, the issue was whether the plea agreement waiver of post-conviction relief placed trial counsel in a position of conflict because such relief might entail allegations and proof of their ineffectiveness. Nelson did not specifically raise whether defense counsel provided ineffective assistance of counsel in advising him to plead guilty on the basis that he did not have a defense to the capital charges. The district court denied Nelson's original § 2255 motion on all issues without an evidentiary hearing. On appeal, we granted a certificate of appealability on six issues and remanded for an evidentiary hearing to address those issues. *See Nelson II*, 297 F. App'x at 567. Nelson acknowledges that our "remand did not encompass [his] claim that trial counsel was ineffective for advising him to plead guilty." Appellant's Br. at 125. We, therefore, hold that Nelson's claim does not relate back to his original § 2255 motion.

III. *Conclusion*

Accordingly, we affirm the district court's denial of § 2255 relief to Nelson.

United States Court of Appeals
For the Eighth Circuit

No. 15-3160

Keith D. Nelson

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: May 26, 2017
Filed: July 19, 2017

Before SMITH, Chief Judge, WOLLMAN, and COLLOTON, Circuit Judges.

ORDER

Keith Nelson's petition for panel rehearing filed December 15, 2016, has been considered by the panel and is granted. The petition for rehearing en banc is dismissed as moot.

Nelson's petition argues that the panel's order of September 15, 2016, applied an incorrect legal standard in evaluating his application for a certificate of appealability. We reject this contention. The order's language, which is standard text used by this court in denying an application for certificate of appealability, merely states that the court "has carefully reviewed the original file of the district court." Nelson attached to his application more than 900 pages of exhibits from the original file of the district court; he presumably wanted the court to review these materials carefully. Nothing in the court's order is inconsistent with the proper legal inquiry—i.e., "whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (internal quotation omitted).

On further review of the application, however, the panel concludes that it should be granted in part. The application is granted as to the first and second issues raised in the application involving four of Nelson's claims in the district court:

> Claims A(2) & (3)—alleged ineffective assistance of trial counsel in failing to conduct adequate mitigation investigation, including failure to move for a continuance to complete one;
>
> Claim A(4)—alleged ineffective assistance of trial counsel in failing to conduct an adequate investigation of defendant's mental health;
>
> Claim A(5)—alleged ineffective assistance of trial counsel in advising or instructing defendant to decline to submit to a mental health examination by a government examiner.

The application is otherwise denied.[1]

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[1]Chief Judge Smith would deny the application in its entirety. Judge Wollman would also grant the application as to the third issue raised in the application

The clerk is directed to establish a briefing schedule and to set the case for oral argument before this panel during the week of January 8–12, 2018, in St. Louis. Any motions for enlargement of the word limits on briefs must be filed at least two weeks before the applicable due date and should be referred to the panel.

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involving Claims A(15)(e) and B(2)(c) in the district court.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KEITH D. NELSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 04-8005-CV-W-FJG
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

I. BACKGROUND

On October 14, 1999, Keith Nelson was charged with interstate kidnapping resulting in death and interstate travel with intent to engage in a sexual act with a child under the age of twelve. On October 25, 2001, Nelson entered a plea of guilty to count one and proceeded to the penalty phase of the trial. On November 13, 2001, a jury was selected and trial began the following day. On November 28, 2001, the jury recommended imposition of the death penalty. On December 18, 2001, Nelson filed a Motion for a New Trial. On February 28, 2002, this Court denied Nelson's Motion for New Trial. On March 11, 2002, the Court imposed a sentence of death. Nelson filed a Notice of Appeal to the Eighth Circuit. On October 22, 2003, the Court of Appeals affirmed the conviction and sentence. The United States Supreme Court denied Nelson's petition for certiorari review on November 8, 2004. On November 10, 2004, Nelson filed a motion seeking appointment of counsel to represent him in connection with his post-conviction challenges. Counsel was appointed on December 14, 2004 and Nelson filed a § 2255 motion to set aside his conviction and sentence of death on

November 6, 2005. On August 21, 2006, Nelson filed a motion to disqualify this Court from further participation in the case. On November 21, 2006, this Court determined that no evidentiary hearing was necessary and denied Nelson's motion to disqualify and recuse and also denied Nelson's § 2255 motion to vacate, set aside or correct his sentence. Nelson then appealed the denial to the Eighth Circuit Court of Appeals.

On October 30, 2008, the Eighth Circuit Court of Appeals granted Nelson's motion for a certificate of appealability on six claims of ineffective assistance of trial and appellate counsel and remanded the case to this Court with directions to hold an evidentiary hearing on these claims and to make findings of fact and conclusions of law concerning them. The six claims which the Eighth Circuit remanded were[1]:

A. Allegations of Trial Counsel's Constitutional Ineffectiveness:
(2) & (3) Failure to conduct adequate mitigation investigation including failure to move for a continuance to complete one.
(4) Failure to conduct adequate investigation of defendant's mental health.
(5) Advising or instructing defendant to decline to submit to a mental health examination by a government examiner.
(15) Failure to make objections:
(e) to allegedly inflammatory and improper comments in the Government's closing argument and rebuttal.

B. Allegations of Appellate Counsel's Constitutional Ineffectiveness:
(1) Failure to conduct adequate review of the trial record and the law.
(2)(c) Failure to raise on appeal the Government's allegedly improper comments in closing arguments.

[1] The numbering of these claims reflects the original numbering of claims in the initial §2255 motion.

The Court held an evidentiary hearing on these claims on April 14-17, 2014. The Court now makes the following Findings of Fact and Conclusions of Law.

II. STANDARD

Our analysis of the ineffectiveness claims is governed by Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to succeed on an ineffectiveness claim, Nelson must show "both deficient performance by counsel and prejudice." Id. at 687-88. In Johnson v. U.S., 860 F.Supp.2d 663 (N.D.Iowa 2012), the Court stated:

> To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." [Strickland], 466 U.S. at 688, 104 S.Ct. 2052. . . . The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id., at 687, 104 S.Ct. 2052. Harrington v. Richter, ___ ,U.S.___, ___, 131 S.Ct. 770, 787, 178 L.Ed.2d 624 (2011); Premo v. Moore, —— U.S. ——, 131 S.Ct. 733, 739, 178 L.Ed.2d 649 (2011) (quoting Richter). Also, the court " 'must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." ' " King, 595 F.3d at 852–53 (quoting Ruff v. Armontrout, 77 F.3d 265, 268 (8th Cir.1996), in turn quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052). There are two substantial impediments to making the required showing of deficient performance. First, " '[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.' " United States v. Rice, 449 F.3d 887, 897 (8th Cir.2006) (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052). Second, "[t]here is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " Id. (quoting Strickland, 466 U.S. at 689, 104 S.Ct. 2052); Davis v. Norris, 423 F.3d 868, 877 (8th Cir.2005) ("To satisfy this prong [the movant] must overcome the strong presumption that his counsel's conduct fell within the wide range of reasonable professional assistance.")

Id. at 741. In United States v. Orr, 636 F.3d 944, 952 (8th Cir. 2011), the Court stated,

"strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after a less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." However, as noted in Armstrong v. Kemna, 534 F.3d 857, 864-65 (8th Cir.2008), "[o]n the other hand, strategic choices resulting from lack of diligence in preparation and investigation [are] not protected by the presumption in favor of counsel."

III. DISCUSSION

A. Failure to Conduct Adequate Mitigation Investigation Including Failure to Move for a Continuance to Complete One – Claims A(2) & (3)

1. Mitigation Investigation

Susan Hunt and Bill Shull discussed the need for a mitigation investigation to investigate statutory and non-statutory mitigating factors. They also discussed gathering records. Ron Ninemire, at the direction of Larry Pace, lead the mitigation investigation. (Evid. Tr. 26)[2]. The defense team filed a motion on July 20, 2000, in order to receive additional time to prepare the mitigation case and the mental health issues. (Evid. Tr. 31-32). The trial was continued until April 23, 2001. (Evid. Hg. Ex. P26, Evid. Tr. 36). Hunt traveled to Texas and California to conduct mitigation investigation. In California, Hunt attempted to obtain records demonstrating that Nancy Nelson had lived in a battered women's shelter. Ninemire gathered records, and interviewed several people in White Settlement, Texas. (Evid. Tr. 91.) Ninemire chronicled the team's various investigative efforts and after being removed from the case because of a

[2] The Evidentiary Transcripts can be found in Case No. 04-8005 (Docs. 260-263).

conflict, created a detailed letter dated September 12, 2000, which documented a to-do list of what had been done and what needed still to be done. (Evid. Tr. 88.) That letter was passed along to Bill Shull and Hunt as Nelson's remaining counsel. (Evid. Tr. 88-89.). In her testimony at the evidentiary hearing, Susan Hunt said that in his letter, Mr. Ninemire's investigation found that Nelson and his brothers were physically and/or sexually abused during their formative years by their mother and men she brought into the home, that Nelson had been hospitalized immediately after his birth, and that some of his brothers suffered from schizophrenia. Furthermore, Mr. Ninemire suggested that further investigation should include a psychiatric examination of Nelson. (Evid. Tr. 113.) During his testimony, Shull stated that he was familiar with the circumstances of Nelson's birth – being the second born of twins and possibly being a fetal/alcohol baby, as well as Nelson's sudden personality change in the ninth grade, and extended bed wetting. (Evid. Tr. 153.) Shull had knowledge that fetal alcohol syndrome could lead to neurological damage or impairments. (Evid. Tr. 154.). After Ninemire was removed from the case, defense counsel obtained the services of two different investigators, Dan Grothaus and Tim Murphy. (Evid. Tr. 49; Evid. Hrg. Exh. P38 at 79.) Grothaus was a former investigative journalist and documented his progress. (Evid. Hrg. Exh. 10.) By letter dated October 25, 2000, Grothaus kept the defense team informed about his investigation. (Evid. Tr. 89-90.). As the investigation progressed, the defense team secured funding from the court to retain Tena Francis, a seasoned death penalty mitigation investigator. However, despite the fact that it was her usual practice to see her clients as often as possible, she only saw Nelson twice, on consecutive days in February 2001. No one else from her office ever visited with Nelson either. (Evid. Tr.

477). It was Ms. Francis' intention to turn the mitigation investigation over to her associate, Deborah Haddad. (Evid. Tr. 480). However, a dispute arose between Ms. Haddad and defense counsel and she did not continue working on the case. (Evid. Tr. 481-482). After this no one from Ms. Francis' office was working on the case and Ms. Francis could not step back in due to her involvement with other cases. (Evid. Tr. p. 482, Ex. P9A).

In May 2001, Ms. Francis provided a first draft of a chronology and a social history to defense counsel. This draft was not updated or supplemented prior to the start of the penalty phase. (Ex. P9 at 34-57). In an affidavit dated June 30, 2001, Ms. Francis stated that as of May 18, 2001, she and her associates had spent a total of 267 hours on Nelson's case. (Evid. Tr. 495-96). Lisa Murphy, who also worked with Ms. Francis conducted some interviews and facilitated some interviews in White Settlement, Texas in late August or early September 2001. (Evid. Tr. 491). On September 19, 2001, in a sealed motion to this Court, defense counsel and Tena Francis indicated that "extensive mitigation work on the case" had been completed. Correspondingly, in the billing hours of Tena Francis, Patrick Berrigan, and Susan Hunt, it is clear that this statement is true. Ms. Francis admitted that from July 1, 2001 going forward, her firm billed a total of 162 hours on Nelson's case. She stated that this was in addition to the 267 hours already billed. (Evid. Tr. 507). Thus, the total amount of hours billed by Ms. Francis' firm was 429 hours for Nelson's mitigation case. (Plaintiff's Exhibits, P36, 36A). Francis obtained additional records of Nelson's birth, abusive upbringing, lack of educational achievement, and other mitigation issues. She provided the defense team with a binder of this information before trial, and this information was presented to the jury for their

consideration of whether a life or death sentence should be imposed.

2. Mitigation Evidence Presented to the Jury During the Penalty Phase

The first witness called to testify during the mitigation phase of the trial was Nancy Nelson, defendant's mother. Ms. Nelson testified in detail regarding Nelson's violent and abusive father, Kenneth Morse. She told the jury that Morse frequently beat her and was also abusive to her boys. She described for the jury in disturbing detail how on one occasion Morse tied her up and shocked her with an electrical cord. Morse would also lock her in closets in their home. Ms. Nelson moved herself and the children, including Keith, to California and Texas to get away from Morse. She also testified that Keith was diagnosed with dyslexia and was a poor student, he frequently had fights and behavior problems in school, and he had a bed-wetting problem well into his teen years. The jury also heard Ms. Nelson admit that she was an alcoholic and that two of her children were schizophrenic. Ms. Nelson told the jury that because she had to work long hours to support her children she was frequently away from the home, which required the boys to take care of themselves. As a result, the boys often got into trouble at school and in the community. (Trial Tr. 598-694.)[3]

Mary Smith, Nelson's aunt (Nancy Nelson's sister), testified that she and Nancy's stepfather were both abusive alcoholics. She told the jury that Kenneth Morse, Nelson's father, regularly beat Nancy and that he would also lock her up in the home. Ms. Smith helped Nancy and the kids get away from Morse when they moved to California and Texas. Ms. Smith also testified about Nelson's disadvantaged and difficult childhood. (Trial Tr. 712-24.)

[3] The Penalty Phase Transcripts can be found in Case No. 99-303, Docs. 459-469).

Georganna Romero, another aunt (also Nancy Nelson's sister), testified that Morse beat and tortured Nancy and related how on one occasion Morse tried to electrocute Nancy. Ms. Romero described the poor living conditions of Nancy Nelson's home in Texas and further described how the house smelled of urine. (Trial Tr. 725-38.).

Irene Wood testified that she helped Nancy Nelson and her five boys get a home, clothing, and personal items when they moved to Texas. She conveyed the poor conditions of Nelson's childhood in Texas. Ms. Wood also insisted that Nancy Nelson use the last name of Smith so that Morse could not locate her in Texas. (Trial Tr. 740-49.)

Melvin Lister, a guard at the Community Corrections of America (CCA) federal holding facility in Leavenworth, Kansas, testified that he worked in the segregation area of CCA when Nelson was housed in that facility. Lister told the jury that Nelson was frequently threatened and harassed by other inmates at the facility. (Trial Tr. 749-57.) Lieutenant Bruce Roberts, another CCA employee, also testified that Nelson was frequently verbally harassed by other inmates. During the 25 months that Nelson had been housed at CCA, he had never tried to escape. Roberts did not consider Nelson to be a threat while he was housed at CCA. (Trial Tr. 767-84.)

Kenneth Nelson, Nelson's twin brother, testified he was a satellite ommunications maintenance operator and installer in the U.S. Army, and described his career in the U.S. Army as a successful career. He graduated from high school with a 3.69 grade point average. Kenneth told the jury about his family's disadvantaged and impoverished childhood, and described an abusive boyfriend of his mother, Nancy Nelson. He and

Keith would frequently burglarize and steal from homes when they lived in Texas. Kenneth also told the jury that his mother seriously neglected him and his brothers. He said that his mother was never around and that she was always at the bar working or drinking alcohol. Kenneth straightened his life out when he moved back to Missouri and lived with his aunt and uncle, where he became involved in high school football, worked at a grocery store as a stocker, and subsequently did well in school. (Trial Tr. 798-839.)

David Cunningham, Nelson's employer, testified he owned a basement waterproofing business. Cunningham described Nelson as a pleasant employee and a good worker. He felt that Nelson was reliable and conscientious when working for his business. (Trial Tr. 849-55.)

The defense also played a recorded conversation to the jury between Nelson and his girlfriend, Kerri Dillon. The phone conversation was recorded when Nelson called his mother who then patched Ms. Dillon into a third-party phone call. The conversation was recorded by CCA officials as a part of a routine practice in which all phone conversations of inmates are recorded. In the conversation, among other things, Ms. Dillon and Nelson discussed her recent pregnancy by Nelson. In the conversation, Nelson also appears to express remorse for his involvement in the murder of ten-year-old Pamela Butler. He tells Ms. Dillon of his intent to tell law enforcement authorities of his involvement in the crime. Nelson states in the conversation as follows: "I'm just gonna do the right thing for once in my life." (Trial Tr. 861.)

Steven Nelson, Keith Nelson's youngest brother, testified that he was employed as an engineer and was successful in his career. Following high school, Steven attended DeVry Institute in Kansas City and had a 3.9 grade point average. He

described his disadvantaged childhood in Texas and further described how his mother Nancy neglected him and his brothers. Steven also described Keith's bed-wetting problem, told the jury his mother was never home and was either working or drinking, and that he and his brothers had to take care of themselves most of the time. (Trial Tr. 863-87.)

Gene Thompson was the landlord for the Nelson family when they lived in Texas. He testified that the Nelson family lived in Section 8 housing, and described the poor, unkempt conditions of the Nelson home. Thompson told the jury that when the Nelson family left the rental property it was in extremely poor condition. (Trial Tr. 895-903.)

Rhonda Monroe, a former babysitter in Texas, testified she was the babysitter for the Nelson children when Nancy Nelson was at work. Nancy Nelson would bring the children to Ms. Monroe's home and leave them when she went to work. Ms. Monroe testified Keith Nelson had a bed-wetting problem, and that her husband would punish Keith by spanking him with a belt. Her husband was an alcoholic, and was very abusive towards Keith and his brothers and that they were scared of her husband. When her husband was home the Nelson boys would be required to stay in one room in her home. If they left the room her husband would spank the boys with a belt. (Trial Tr. 904-16.)

Jennifer Monroe, Rhonda Monroe's daughter, testified that the Nelson boys were always required to stay in one room when her mother was babysitting them. Her stepfather, Billy Reese, was always spanking the boys with a belt. She said that the Nelson boys were extremely afraid of her stepdad. (Trial Tr. 919-27.)

Ellen Crutsinger, a former teacher of several of the Nelson boys in Texas, testified that Keith was in a special education class and that he struggled while in school. She

further described Keith helping a crippled girl in a wheelchair while in elementary school. Keith would push the girl around the school grounds in her wheelchair and that they developed a friendship. Ms. Crutsinger further testified that Nancy Nelson never attended the "meet the teacher" nights at the school. (Trial Tr. 928-36.)

Michael Griffith, a former neighbor of the Nelsons in Texas, testified that Nancy Nelson was never at home and the boys were frequently left alone to fend for themselves. Mr. Griffith did little things to try to help the Nelson family such as doing plumbing repairs at no charge. He testified that the Nelson house was always messy and unclean. He also told the jury that Nelson's brothers would make fun of him because of his bed-wetting problem. (Trial Tr. 940-51.)

Homer Dear, Nelson's former school principal and also a former Texas State Representative, testified that he knew the Nelson family when they were living in Texas and he was their principal at an elementary school. Mr. Dear believed the Nelson boys were physically and mentally abused. He described the Nelson family as a very poor family and further described how he had tried to help them. He described the poor hygiene of the Nelson boys and told the jury how he would require the boys to take showers and would give them clothing at the school. Mr. Dear bought clothes for the boys at a store on at least one occasion. He also visited the Nelson home and described the house as unclean. (Trial Tr. 951-59.)

Finally, Nelson called expert defense witness Dr. Mark Cunningham to testify on his behalf. Dr. Cunningham is a clinical and forensic psychologist who frequently testifies as a mitigation and sentencing expert in capital cases around the United States. He testified concerning the effect of childhood abuse and neglect on Nelson's character

and development. In his lengthy testimony, Dr. Cunningham explained to the jury how the squalid conditions and abusive and violent nature of Keith Nelson's childhood affected the formation of Nelson's character. Dr. Cunningham also told the jury that Nelson would be less violent as he aged. (Trial Tr. 964-1025.).

3. Mitigation Evidence Which Should Have Been Presented to the Jury

Jill Miller, MSSW, testified at the evidentiary hearing. She stated that she prepared a social history of Mr. Nelson and discovered a multigenerational history of mental illness, a history of alcoholism, substance abuse on both sides of the family, domestic abuse on both sides of the family, inappropriate sexual behavior and criminal sexual misconduct. She also discovered that there was severe poverty on the Morse side of the family. Ms. Miller testified that she was able to gather additional medical records on Nancy Nelson, evidencing the abuse she suffered as well as medical records for one of Nelson's brothers, showing that he suffered from schizophrenia. (Ev.Tr. 359-361). Ms. Miller also testified that even though the trial team had gathered school records for Nelson, they were never introduced during the penalty phase. (Evid. Tr. 364-365). She also testified that there were additional school records that have been gathered since the penalty hearing, and were available at the time, but were not gathered by Tena Francis or her staff (Evid. Tr. 368). Ms. Miller stated that Tena Francis investigators did not gather any records at all related to the Morse side of the family. (Evid. Tr. P. 372).

On cross-examination, Ms. Miller admitted that she had been actively working on gathering records in this case for over five years. Ms. Miller also admitted that when she prepared her psychosocial history report, she relied on the earlier work that Ms.

Francis and her associates had done, including interviews with 13 or 14 witnesses. She also looked at interview notes prepared by Deborah Haddad, memos written by Dan Grothaus, Ron Ninemire, interview notes of Ron Ninemire and memos of interviews by Lisa Murphy. (Evid. Tr. 381).

Nelson also argues that the mitigation investigation should have included testimony from a psychologist, such as Dr. Lebowitz, to testify regarding the severity of Nelson's history of childhood maltreatment and the effects that this might have had on him. Dr. Lebowitz testified that Nelson's family tree was "absolutely riddled with major psychopathology, substance abuse, and patterns of interpersonal violence and neglect." (Evid. Tr. P. 530). Dr. Lebowitz stated that Nelson was born to a mother who was battered and was unprepared to parent him. She testified that he was severely neglected by his mother, she did not protect him from abuse and later on he was also beaten and emotionally abused by her. (Evid. Tr. P. 532). Dr. Lebowitz testified to the extraordinary violence and neglect that Nelson was exposed to by both his parents and other individuals who cared for him when he was younger and what sort of impact this had on him. (Evid. Tr. 538 – 542). Nelson argues that if the nature and quality of the maltreatment he suffered at the hands of the adults charged with his care, had been properly investigated and presented, it would have weighed heavily on the life side of the balance and there is a reasonable probability that at least one juror, presented with this additional information, might have struck a different balance.

4. Failure to Move For a Continuance

In the summer of 2001, Berrigan had health issues that necessitated heart bypass surgery which took place on August 8, 2001. Berrigan and Hunt had a meeting at CCA

with Nelson about Berrigan's surgery. Nelson wanted the trial continued so that Berrigan could have time to recover, but Berrigan decided that he was not going to ask for a continuance. (Evid. Tr. 66-67.) Hunt testified about Berrigan's decision to not file a continuance motion with Nelson, stating that Berrigan assured her that he could get everything done, and Hunt and Nelson accepted Berrigan's decision. (Evid. Tr. 110.) Whether she ultimately agreed with the decision to proceed to trial or not, Hunt never informed this Court that she was concerned about Berrigan's health, nor did she express any concerns about whether or not the defense team was ready to go to trial and, correspondingly, never filed for a continuance on her own. In regards to his surgery, Berrigan said, it "depends on how you look at it." It [the trial] was set for a couple of months after his surgery, and as he "look[s] back on it now, of course, I know I wasn't ready. . . . I wasn't ready, but I guess I didn't particularly assess whether I was ready or not after having bypass surgery." Berrigan testified that he thought "we were going to trial in October, period" – there was "never a promise . . . it will be continued eight months, nine months, a year." (Evid. Tr. 231-32.) Berrigan testified that he just lost a bunch of time, but he is not sure even if he had asked for a continuance he would have used his health as a reason. No motion for a continuance was ever filed. (Evid. Tr. 234.). After his surgery, Berrigan testified that he was able to devote a significant amount of time in terms of getting up to speed for Nelson's case. (Evid. Tr. 263.) Nelson never made the magistrate or district judge aware of his concerns that his case was not going to be ready for trial.

5. Analysis

"Evidence of a difficult family history and of emotional disturbance is typically

introduced by defendants in mitigation." Eddings v. Oklahoma, 455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). "Before deciding what mitigating evidence, if any, should be presented to the jury during a capital penalty phase, counsel has a duty to conduct a thorough investigation into a defendant's background." Honken v. U.S., 42 F.Supp.3d 937,1089 (N.D.Iowa 2013)(citing Porter v. McCollum,, 558 U.S. 30, 39, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009)). In Honken, the Court noted:

> As a general matter, there is a strong presumption that counsel made all significant decisions while exercising reasonable professional judgment. See Strickland, 466 U.S. at 689, 104 S.Ct. 2052. The deference owed to strategic judgments is defined in terms of the adequacy of the investigation supporting such judgments. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690-91, 104 S.Ct. 2052. . . .The principle concern in deciding whether counsel exercised reasonable professional judgment as to a defendant's mitigation case is whether the investigation was reasonable. See Wiggins [v. Smith], 539 U.S. 510, 522-23,123 S.Ct. 2527,[156 L.Ed.2d 471 (2003)](citing Strickland, 466 U.S.at 691, 104 S.Ct. 2052). . . .The performance of counsel is "measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" Id. (citations omitted)(quoting Strickland, 466 U.S. at 688-89, 104 S.Ct. 2052).

Id. at 1089-90.

In the instant case, Nelson argues that while Tena Francis' organization billed for a substantial number of hours for the work performed, there was no evidence of any continuing effort to gather documents, locate additional witnesses, or update the first draft of the chronology and the social history. It was only toward the end of the summer of 2001, that Lisa Murphy, who had no social work training, assisted in locating witnesses and arranging interviews for counsel. Nelson argues that the testimony of Jill

Miller, outlines how incomplete the mitigation investigation was when the case went to trial, including the complete failure to investigate the paternal side of Nelson's family. Nelson also argues that the "superficial mitigation presentation in this case presents a clear example of the state of affairs described in Wiggins where 'counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources.' Id. at 524. Nelson argues that there is a reasonable probability that one or more jurors if presented with a full and accurate picture of Nelson's life and impairments, would have struck a different balance.

The Court disagrees. This is not a case like Wiggins where counsel completely abandoned the investigation into Nelson's background. In Wiggins, after being convicted of first degree murder, robbery and two counts of theft, Wiggins elected to be sentenced by a jury. Counsel filed a motion for bifurcation of the sentencing proceedings, first intending to prove that Wiggins did not act as a principal in the first degree. If necessary, counsel then intended to present a mitigation case. However, the Court denied the motion and the sentencing proceedings commenced immediately. In the opening statement, counsel told the jurors that they would hear that the defendant had experienced a difficult life and it had not been easy for him. During the proceedings however, counsel introduced no evidence of the defendant's life history. Before closing arguments, counsel made a proffer to the Court to preserve the bifurcation issue and detailed the mitigation case which would have been presented had the court granted the bifurcation motion. The jury sentenced the defendant to death. In his habeas petition, Wiggins alleged that his counsel was ineffective for limiting the scope of the mitigation investigation. The Court noted that counsel's investigation drew from three sources: a

psychologist's report which concluded that Wiggins had an IQ of 79, had difficulty coping with demanding situations and exhibited features of a personality disorder. Counsel also had available a PSI which had a one page account of Wiggins' personal history which described his "misery as a youth" and quoted his description of his background as "disgusting" and noting that he spent much of his life in foster care. Counsel also "tracked down" records kept by the Department of Social Services which documented his various placements. The Supreme Court in Wiggins stated that while counsel's investigation did not meet Strickland's performance standards, "we emphasize that Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case." Id. at 533. The Court found that counsel's investigation did not reflect reasonable professional judgment and was not consistent with professional standards at the time nor reasonable in light of the evidence that counsel uncovered in the social service records. Id. at 534. The Court found that the mitigating evidence that counsel failed to uncover was powerful. For example, the Court noted that "Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. The time Wiggins spent homeless, along with this diminished mental capacities, further augment his mitigation case." Id. at 534-35. The Court concluded that there is a reasonable probability that if the jury had heard this evidence, they would have returned a different sentence. Id. at 536.

The Court finds the Wiggins case distinguishable. Nelson's counsel conducted a thorough mitigation investigation and presented a comprehensive mitigation case to the jury. A mitigation specialist was hired and a social history report produced. As acknowledged earlier, the mitigation investigation did not proceed without interruptions. Ms. Francis testified that she only visited with Nelson twice, and she normally likes to see and talk with the client as much as possible. She also testified that once Ms. Haddad stopped working on the case, she should have notified the attorneys that her firm needed to be removed from the case and another person hired. However, she admitted that she "dropped the ball." (Evid. Tr. 495). However, despite "dropping the ball," Ms. Francis testified that she and the individuals working for her spent over 400 hours working on Nelson's case. (Evid. Tr. 507-08). This is not a case where only scant mitigation evidence was presented. Rather, the mitigation case was presented over a period of two days and Nelson's attorneys called seventeen witnesses to testify on his behalf. The witnesses included his mother, aunts, siblings, a former teacher, principal, family friends, a landlord, prison guards, an employer, former babysitter and her daughter and an expert forensic psychologist. Nelson also introduced a recorded conversation with his girlfriend, who is the mother of Nelson's child. The witnesses recounted the abuse suffered by Nelson, his siblings and his mother at the hands of his father, Kenneth Morse. The jury also heard testimony regarding Keith Nelson's chaotic home life including the family's frequent moves. Testimony was also given by the former babysitter who testified to the abuse Keith suffered at the hands of her husband. Nelson's former teacher also testified that Keith Nelson was in special education classes at school and that school was difficult for him. Dr. Mark Cunningham, a clinical

and forensic psychologist also testified concerning the effect of childhood abuse and neglect on Nelson's character and development. Thus, unlike Wiggins, where "no evidence of Wiggins' life history" was presented, in the instant case, the Court finds that although the mitigation case was not perfect, it was more than adequate. Unlike Wiggins, Nelson's habeas counsel has not uncovered any "powerful" new evidence. Rather, habeas counsel has simply discovered a larger quantity of mitigation evidence. It is always possible to discover additional records or new witnesses, the more time that is available. However, with over 400 hours devoted to the case, the Court finds that the mitigation evidence which was discovered and the mitigation case which was initially presented to the jury was sufficient. The Court is unsure why Berrigan did not request a continuance due to his surgery. As noted above, it is possible that more witnesses or evidence could have been uncovered if the case had been continued. However, Nelson has not shown that Berrigan's failure to request a continuance affected the mitigation case which his counsel presented. Thus, the Court finds that Nelson's counsel was not deficient in either the mitigation investigation or presentation of the mitigation case. Accordingly, the Court hereby **DENIES** relief on Claim A(2) - Failure to conduct an adequate mitigation investigation and Claim A(3) – Failure to move for a continuance to complete one.

B. Failure to Conduct Adequate Investigation of Nelson's Mental Health and Advising or instructing Nelson to Decline to Submit to a Mental Health Examination by a Government Examiner – Claims A (4) & (5)

1. Mental Health Investigation

As early as the spring of 2000, the defense team was aware that mental health would play an important role in the case. Larry Pace testified that mental health is

always an important consideration in a death penalty case. (Evid. Tr. 608). In support of a motion to continue the trial, defense counsel informed this Court that two of Nelson's brothers had been diagnosed with schizophrenia and that further mental health evaluations needed to be completed. (Evid. Tr. 33.) In a note from her files regarding a defense team meeting on November 17, 2000, Ms. Francis chronicled the team's discussion of obtaining a neuropsychologist. (Evid. Tr. 40-41.) As a result, Dr. Dennis Cowan, who was local and highly recommended, was hired. (Evid. Tr. 42.) By December 12, 2000, Dr. Mark Cunningham was hired to review the records that had been collected and to serve as a "teaching witness" on Nelson's traumatic background for the jury. (Evid. Tr. 43-44.) After Berrigan became involved with the case he began handling the bulk of the mitigation responsibilities, including the mental health issues. Berrigan believed that a neuropsychological examination needed to be done and was aware that Dr. Cowan had been approved by this Court. Dr. Cowan was poised to conduct an examination and evaluation of Nelson. (Evid. Tr. 196.) Berrigan's CJA worksheet (Evid. Hrg. Exh. P17A) indicates that he called Dr. Cowan the day before the evaluation was scheduled to occur and canceled it. (Evid. Tr. 198.) Berrigan testified that he canceled Dr. Cowan's evaluation because he had had prior experience with Dr. Cowan and thought that he could obtain someone with more of a national reputation. (Evid. Tr. 199.) Additionally, Berrigan had just been appointed to the case and did not feel the need to use an expert chosen by another attorney. Berrigan admitted that he wanted to wait and do the mental evaluation later in the case, once he knew more about the case and at a time when he had a better handle on the discoverability of what he uncovered. (Evid. Tr. 199-200.). However, Berrigan never commissioned a

neuropsychological evaluation and testified that "we dropped the ball. It should have happened. Other things came up to the forefront, and I never got back to it. There's no excuse, really no excuse at all." (Evid. Tr. 200). Berrigan admitted that in another § 2255 case he handled, he also testified that he had dropped the ball on certain aspects of the client's representation. Berrigan agreed that the death penalty in that case was set aside and the penalty phase was going to be retried. He admitted that he has a philosophical opposition to the death penalty and that when a court sets aside a death sentence, it gives his client another bite at the apple. (Evid. Tr. 259-260). No assessment of Nelson for brain damage, dysfunction or other cognitive impairment was ever conducted. (Evid. Tr. 196).

2. Advising Nelson To Decline Examination by Government Mental Health Expert Witnesses

The record clearly establishes that after Berrigan was appointed to the case, he filed a number of motions on how, when, and if the Government would be allowed to conduct a mental health evaluation of Nelson. Once this Court ordered the evaluation, Berrigan systematically objected to the manner in which the evaluation would be conducted and attempted to have the court intervene on what subjects, if any, the Government could question Nelson about. The litigation in this area began in May 2001 and continued until after Nelson pled guilty. Berrigan testified that he had past bad experiences in death penalty cases with mental health evidence and indicated that ". . . the problem with neuropsych testing is certainly if you don't talk about the defendant's history, that's going to be the subject of cross-examination by the government prosecutors. If you had a neurologist, that really isn't part of their job. I mean, somebody

who's just doing, for example, objective medical testing, such as brain imaging, doesn't really have occasion to have any discussion with the client about their history or the events of the alleged crime." (Evid. Tr. 219.) Tena Francis testified and her records confirm that Berrigan was skeptical about a neuropsychological examination and wanted more objective testing, or something along the lines of a neurological evaluation. Finally, Berrigan explained that the discoverability of mental health evidence was not well-settled under federal law at the time of Nelson's trial (2001). While on the witness stand, this Court asked Berrigan to explain his concern with the Government's examination of Nelson's mental health. Berrigan explained that in 2000 in state court, the law was that if the defense put on mental health evidence, the Government would have the opportunity to examine the defendant. In Berrigan's experience, if the Government put on its psychologist in the penalty phase, it "was devastating testimony" and he lost his case. (Evid. Tr. 227.) Consequently, Berrigan wanted to delay any examination, so as to not give the Government additional, damaging evidence. Berrigan was aware that the Government had sent Dr. Dan Martell and Dr. Park Dietz to see Nelson at CCA and that Nelson refused to see Dr. Martell (and would have refused to see Dr. Dietz). (Evid. Tr. 234.). Berrigan testified that he was familiar with Dr. Martell (neuropsychologist) and Dr. Dietz (psychologist) and that both doctors had a national reputation. Berrigan's main concern about these two experts was that they would be biased against his client and would therefore be "pro-government." Berrigan believed they would testify in a way that would effectively refute Nelson's defense and he did not want them to be the last witnesses the jury heard from before beginning deliberations. Berrigan indicated that those fears, in part, were the reason why he engaged in a

protracted litigation to prevent the Government from being able to conduct its own mental health evaluation. (Evid. Tr. 264.). In the end, the Court allowed Nelson to present the testimony of Dr. Cunningham. Dr. Cunningham was able to provide some expert mental health testimony about Nelson, but he did so from a review of the records, rather than an interview with Nelson. Consequently, Berrigan was able to prevent the negative mental health testimony of the Government experts he feared, but he was only able to introduce some limited mental health evidence that discussed Nelson's horrible childhood environment. Berrigan further explained that the advice to not submit to an interview ". . . was the strategic decision I made, and I advocated it very strongly." (Evid. Tr. 265.) Nelson could have gone against that advice, but did not. (Evid. Tr. 265-66.). Berrigan supported this strategy by challenging the Government's ability to conduct its own mental health evaluation at every turn. Only when he was unsuccessful, did he reach the calculated, strategic decision to recommend to Nelson that he not cooperate with the Government's evaluation. Berrigan admitted that this strategy was a product of his professional experience handling a number of death penalty cases. In those cases, Berrigan explained, if the last thing the jury heard before beginning deliberations was the Government's mental health expert, he lost. Berrigan's decision was to have Nelson exposed to less evidence that could result in the jury finding that the aggravating factors outweighed any mitigating factors, resulting in a hope that Nelson would receive a life sentence.

3. Mental Health Testimony Nelson Claims Should Have Been Presented.

During the evidentiary hearing, Nelson called several expert witnesses to testify regarding his brain damage. Dr. Carolyn Crawford, a neonatologist, summarized the

myriad problems which were documented in Nelson's birth records, including compromised neurological development. (Evid. Tr. 514-526). However, during the evidentiary hearing, Dr. Crawford testified that information/studies on areas of brain injury and brain damage were not available in 2001 – she could testify in terms of risk factors, but she could not have offered this same testimony (i.e. the lingering effects of prenatal and neonatal insults) based upon her review of the records back in 2001. (Evid. Tr. 525.).

Dr. Reuben Gur, neuropsychologist with a specialty in brain imaging and behavior also testified. Dr. Gur testified that the MRI test, the PET test and the neuropsych testing all showed frontal system damage in Mr. Nelson's brain. (Evid. Tr. 582). Dr. Gur opined that the abnormalities in Mr. Nelson's brain were important for regulating behavior. However, Dr. Gur admitted that he had not actually conducted a neuropsychological evaluation of Mr. Nelson. Dr. Gur also admitted that in his testing there was no comparative value for the lesion found in Nelson's brain imaging by looking at Exhibit P80 at 11. (Evid. Tr. 600-01.) Consequently, with no baseline comparison value, his imaging provides no useful information.

Dr. Dan Martell, a forensic neuropsychologist, who studies the brain and behavior, and particularly the effects of brain damage on human behavior, testified as a government witness. (Evid. Tr. 631.) Government Exhibit 118A is his CV, and Government Exhibit 118 is a copy of his report on Nelson. (Evid. Tr. 634.) He evaluated Nelson on September 9-10, 2010, for 9 1/2 hours at Terre Haute. (Evid. Tr. 635-36.) He previously attempted to evaluate Nelson earlier in the fall of 2001 at the Government's request, but Nelson refused to be evaluated. (Evid. Tr. 636.) Despite the level of brain

impairment from the testing and examination, Dr. Martell testified that looking at Nelson's behavior in the course of committing the crime, there was no finding of impulsivity. Dr. Martell continued by stating that Nelson tried to carry out his fantasy on another victim, and when that did not work, he selected another youthful, more easily controlled victim. Nelson laid in wait, hid himself, brought electrical cords to bind the victim, kidnapped her, he took off at a high rate of speed in such a way that people would not be able to see him or identify him. He took the victim to a secluded area, bound her up so she could not get away – these things, Dr. Martell argued, show planning as opposed to impulsive acting out. For those reasons, Dr. Martell did not believe that Nelson's brain damage played a significant role in him committing this crime. (Evid. Tr. 649.). Dr. Martell also testified that he did not believe that Nelson met the standards with regard to not understanding the wrongfulness of his behavior, because Nelson attempted to avoid being seen and attempted to get rid of incriminating evidence. Dr. Martell testified, "If you didn't know it was wrong, there's no reason to get rid of the truck, to wipe it down for evidence, to try and remove fibers from the crime scene that could identify him." (Evid. Tr. 650). Dr. Martell testified that he had reviewed the reports of Dr. Daniel Foster, Dr. Michael Gelbort, Natalie Novick Brown, Dr. Xavier Amador, Dr. Carolyn Crawford, Dr. Leslie Lebowitz, Dr. Ruben Gur, a social history report prepared by Jill Miller and one of the dermatological reports from Dr. Roger Jones. Dr. Martell testified that none of these reports changed his opinions regarding Nelson. (Evid. Tr. 651,656-659).

4. Standard

> In the context of a claim that relates to the failure to pursue a mitigation strategy based on expert psychological testimony, the focus is on whether counsel conducted an adequate investigation and whether counsel's decision to refrain from further investigation and presentation of mental health mitigation was reasonable. . . .It must be determined whether there was any reasonable justification for counsel's conduct and whether the course of action taken by counsel would not have been taken by any reasonably competent attorney.

Honken v. U.S., 42 F.Supp.3d 1090-91(internal citations omitted).

> The extent of trial counsel's preparation for the mitigation phase does not have to be "ideal," and the court's inquiry must not disregard what trial counsel *did* do. [Worthington v. Roper, 631 F.3d 487, 501 (8th Cir. 2011)]. Deficient performance is established only "'where the record is clear that no reasonable attorney . . .would have failed to pursue further evidence.'" Id. (quoting Link [v. Luebbers], 469 F.3d at 1203).

Johnson v. U.S., 860 F.Supp.2d 663, 878 (N.D.Iowa 2012).

5. Was Counsel's Performance Deficient?

Berrigan testified at the evidentiary hearing that when the case was tried in 2001, the established norms of capital defense representation required an investigation into a defendant's mental health. (Evid. Tr. 193). Berrigan testified that coming into the case, he knew according to the standard of care and practice, "that there should be a psychological examination, evaluation, investigation of Mr. Nelson." (Evid. Tr. 195). Berrigan testified that he had never changed his mind about the need for a neurological or neuropsychological examination of Nelson, he intended to get it done eventually, but it was never scheduled. (Evid. Tr. 200).

Habeas counsel argue that when Berrigan accepted the case he was overworked and over-committed and he was working under an incorrect assumption that he would get only one continuance of the trial date. Habeas counsel argue that during the time he

was appointed on Nelson's case, Berrigan spent six weeks preparing for and trying a capital case in Kansas, he had U.S. Supreme Court deadlines in two or three capital cases where executions were pending, he was involved in another federal capital case in Iowa, he was involved in a complex medical malpractice case until July 2001, he underwent quintuple coronary artery bypass surgery on August 8, 2001 and on the same day he underwent surgery, he accepted an appointment in another demanding capital case in Kansas. When he entered the case, Berrigan informed his co-counsel, Susan Hunt, that he would be solely responsible for the mitigation case and that he would be "calling all the shots on mitigation issues." (Evid. Tr. 100). One of the first things Berrigan did was cancel the neuropsychological assessment that Dr. Cowan was scheduled to conduct, even though he testified that he knew that the issue of "potential neurological impairment and neurological deficits" was something which needed to be explored. (Evid. Tr. 197). When Berrigan was asked at the evidentiary hearing about whether he should have accepted the Nelson case, he testified:

> Looking back, no, no. I have the most -- utmost respect for Judge Hays. In fact, I think she's a brilliant judge, and I've had nothing but wonderful experiences with her. And the same is true of Judge Gaitan, frankly, who I've known almost -- I've known him since the start of my legal career and both as a state court trial judge and appellate judge and a federal district judge. And I think looking back in my desire not to disappoint them in some way and the trust that they had put in me in taking Mr. Nelson's case, somehow blinded me to my responsibilities to Mr. Nelson, and there's no real good excuse for that. It's nothing but pride and conceit, and I regret it now that I ever agreed to get involved in the case. . . . .I was very busy.

(Evid. Tr. 244-45).

Habeas counsel argue that this is "not a case where counsel acted out of ignorance of prevailing professional norms or did not know how to go about investigating potential neurocognitive deficits. Instead, this is a case where counsel

were aware of their obligations but failed to meet them." (Nelson's Proposed Findings of Fact, p. 17).

The Court agrees that this is not a case where counsel acted out of ignorance or did not know how to go about investigating the mental health issues involved in this case. However, the Court does not find the reasons offered by counsel for failing to conduct the necessary mental health investigation to be credible. The reasons advanced by Berrigan that he "just dropped the ball" on finding a replacement neuropsychologist for Dr. Cowan (Evid. Tr. P. 229) or that he was blinded to his responsibilities by pride and conceit (Evid. Tr. 244-45), are simply unbelievable. Rather, the Court sees this as a calculated strategy to act in a manner which is obviously deficient, so that on habeas review the Court will set aside the sentence. This is a strategy which Berrigan recently successfully employed in another capital habeas case. See Johnson v. U.S., 860 F.Supp.2d 663 (2012). In that case, Berrigan initially hired a mental health expert, Dr. Logan and directed him to explore Johnson's mental state at the time of the offenses. However, shortly thereafter, before Dr. Logan's second interview with Johnson, Berrigan directed Dr. Logan not to interview Johnson about or to address in any way, her mental state at the time of the offenses. Johnson argued that even after Dr. Logan identified a number of "red flags" suggesting that she suffered from brain impairment, Berrigan did nothing to follow up on those red flags. Johnson also argued that Berrigan made no effort to keep Dr. Logan working or to initiate investigations by other mental health experts until shortly before her trial. She also argues that her counsel "bungled" their way through the requirements of Fed.R.Crim.P. 12.2. In that case, Berrigan admitted that his decision to preclude mental health

evidence relating to her mental state at the time of the offenses was "a horrible mistake." Id. at 882. The Court further noted that the reason advanced by Berrigan for failing to present mental health evidence – because he had had a bad experience with the disclosure of mental health evidence in a capital case years earlier- a "once burnt, twice shy" excuse was not sufficient. The Court noted:

> Learned Counsel [Berrigan] did not do any real independent analysis-and certainly no consultation with either Johnson's trial experts or the other members of the trial team-of the issues presented by this case before rejecting that line of mitigation. If Learned Counsel's decision to reject such a mitigation defense was in some sense strategic, it was the worst strategic decision by any defense counsel that I have ever seen in my entire career: It effectively doomed Johnson's mitigation case from the start.

Id. at 886. The Court in that case found Berrigan's performance to be deficient. The Court also concluded that Johnson established prejudice because the expert testimony of brain dysfunction and impairment presented at the evidentiary hearing "paints a dramatically different picture of Johnson at the time of the offenses than trial counsel presented and offers a connection between her mental state and her conduct at the time of the offenses that was completely or almost completely missing from the trial presentation." Id. at 890. The Court concluded that Johnson was entitled to relief from the verdicts because there was a "'reasonable probability that a competent attorney, aware of the available mitigating evidence would have introduced it at sentencing, and that had the jury been confronted with this mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.'" Id. 891 (quoting Sinisterra v. United States, 600 F.3d 900, 906 (8th Cir. 2010)).

In the instant case, the Court also finds that Berrigan's performance regarding

investigation and presentation of the mental health testimony to be deficient. As noted above, at the time that Berrigan became involved with the case, the neuropsychologist, Dr. Cowan, had been hired and was ready to conduct his examination. However, the day before the examination, Berrigan cancelled the appointment. Berrigan testified that the evaluation should have taken place, but "we dropped the ball. It should have happened. Other things came up to the forefront, and I never got back to it. There's no excuse, really no excuse at all." (Evid. Tr. 200). Likewise, the Court also finds unbelievable Berrigan's explanation for why he did not have other mental assessments or examinations conducted of Nelson. Berrigan testified that in 2000, the law was unsettled regarding whether the government could examine a defendant if the defendant introduced evidence of mental health issues in the penalty phase. Berrigan testified that "I was hoping, frankly, you [the Court] might make the decision that maybe this evidence shouldn't come in, but it became very clear to me in the course of litigation and certainly in front of Magistrate Hays, that the government was going to get a mental health evaluation of our client if we went ahead and tried to put in mental health evidence of any form." (Evid. Tr. 228). "But we did litigate the issue does the government get access to Mr. Nelson, and the question had been resolved unequivocally, yes, if you go ahead, Berrigan, and put on any psych testimony in this case, even in the penalty phase, they get access to Mr. Nelson, and that means they get to testify. And I thought that was a bad idea." (Evid. Tr. 229).

As early as May 2001, the Government had filed a motion seeking a psychiatric examination of Nelson. (Case No. 99-303, Doc. # 231). Berrigan objected to the scope of the information sought and also asserted that the Court should not compel Nelson to submit to a mental health examination by government experts. Alternatively, the defendant argued that if the Court compelled the defendant to undergo a government examination, it should impose significant safeguards. On August 17, 2001, Magistrate

Hays entered an Order which granted in part the Government's Motion and imposed safeguards to preserve Nelson's rights. One of the safeguards imposed by the Court was that the results of any court-ordered examination as well as the results of any examination initiated by the defendant were to be filed under seal prior to the start of trial. The results were to be released only in the event of a guilty verdict and after the defendant confirmed his intent to offer mental health or mental condition evidence in mitigation. On September 4, 2001, defendant filed his Notice of Intent to Rely on Mental Health Evidence at the Penalty Phase of Trial. Defendant indicated that he intended to rely on the testimony of Dr. Dan Foster. As of the date of that filing, defendant indicated that Dr. Foster had not completed his evaluation of the defendant and no information as to his diagnostic conclusions was currently available. On September 21, 2001, defendant filed an appeal of Magistrate Hays' Order. On October 15, 2001, a government expert attempted to examine and conduct psychological testing of the defendant. However, Nelson refused to participate in such examination. In an Order dated October 26, 2001, the Court affirmed Judge Hay's August 17, 2001 Order, noting that the Eighth Circuit had recently stated in United States v. Allen, 247 F.3d 741 (8th Cir. 2001), "[t]here is no doubt that a district court has the authority to order a defendant who states that he will use evidence from his own psychiatric examination in the penalty phase of a trial to undergo a psychiatric examination by a government-selected psychiatrist before the start of the penalty phase." Id. at 773, citing, United States v. Webster, 162 F.3d 308, 338-40 (5th Cir. 1998), cert. denied, 528 U.S. 829 (1999). "The government must be able to put on a fair rebuttal to a defendant's mitigation evidence during sentencing." Allen, 247 F.3d at 773. The Government then subsequently filed on October 26, 2001, a motion to bar defendant from presenting any mental health testimony. In an Order dated November 15, 2001, the Court asked defendant to submit in camera, an outline of specifically what mental health testimony he intended to present

in mitigation, and to outline which witnesses would be testifying regarding this issue and whether the testimony of these witnesses would be based on a personal examination they conducted of the defendant or whether their testimony would be based on other matters, such as a review of the defendant's medical records. In materials submitted to the Court, Berrigan indicated that he intended to offer the testimony of two psychologists: Dr. Mark Cunningham and Dr. Daniel Foster. These witness would testify in basically three areas: 1) Testimony of Dr. Cunningham related to the defendant's future dangerousness; 2) Testimony of Dr. Cunningham related to risk factors and developmental obstacles which the defendant has exhibited and faced in childhood and adolescence. Berrigan stated that the testimony of Dr. Cunningham, although psychological testimony, is not based on interviews with the defendant and will not attempt to explore Dr. Cunningham's opinions regarding the defendant's mental health, his psychological profile, any mental health diagnoses or any other psychological testimony pertaining specifically to the defendant. 3) Testimony of Dr. Foster. Berrigan stated that Dr. Foster is the forensic psychologist hired by the defense to evaluate the defendant's mental health. Dr. Foster met with Nelson for approximately nine hours and had also reviewed written materials. Berrigan indicated that he was unable to speak with Dr. Foster, but counsel stated he is not at all sure that Dr. Foster could base his mental health testimony regarding the defendant's pervasive developmental disorder on the memorandums and information provided by counsel alone. This Court concluded that the testimony of Dr. Foster would not be allowed, as it appeared that his testimony would be based at least in part on interviews conducted with the defendant. The court allowed the testimony of Dr. Cunningham on 1) future dangerousness and 2) psychological testimony relating to risk factors and developmental obstacles, because this testimony was not based on any interviews with or psychological tests of the defendant. (Case No. 99-303, Doc. # 403). Thus, it should

have been obvious to Berrigan, shortly after his entry into the case that he would only be allowed to present mental health evidence in mitigation if the Government was also allowed an opportunity to conduct its own examination of the defendant. However, without knowing what the results of the examination would be, there is no reasonable basis for directing Nelson to refuse the examination.

As habeas counsel noted, "that litigation took place in a vacuum since the defense had not investigated Mr. Nelson's mental health and had no mental health case to present or protect." (Nelson's Proposed Findings of Fact and Conclusions of Law, p. 26). Habeas counsel also argue that it was unreasonable for Berrigan not to have Nelson examined, because "any defense mental-health evidence could be withdrawn if that evaluation were deemed harmful and the Government's experts would not be permitted to testify since their sole purpose was to rebut any defense case." (Nelson's Proposed Findings, p. 27).

The Court agrees and concludes that Berrigan was strategically deficient in cancelling the neuropsychological examination of Nelson and in failing to reschedule such examination and also in failing to have any other assessments conducted to assess whether Nelson suffered any brain damage, dysfunction or other cognitive impairments. The Court also finds that Berrigan was strategically deficient in advising Nelson not to submit to an examination by government experts, which effectively prevented him from presenting any mental health evidence in the mitigation phase.

6. Was the Failure to Present Mental Health Evidence and Testimony Prejudicial?

As discussed above, the Strickland inquiry has two prongs and both prongs must be satisfied before relief is granted. To establish prejudice, petitioner "must establish a 'reasonable probability that a competent attorney, aware of the available mitigating evidence would have introduced it at sentencing, and that had the jury been confronted

with this mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.'" Sinisterra, 600 F.3d at 906 (quoting Wong v.Belmontes, 558 U.S. at __, 130 S.Ct. 383,386, 175 L.Ed.2d 328 (2009)).

> "A claim of ineffective assistance based on the failure to consult and call an expert requires 'evidence of what a scientific expert would have stated' at trial in order to establish Strickland prejudice." Rodela-Aguilar v. United States, 596 F.3d 457,462 (8th Cir.2010)(quoting Day v.Quarterman, 566 F.3d 527,538 (5th Cir. 2009) and also citing Delgado v. United States, 162 F.3d 981,983 (8th Cir.1998)). Even if counsel performed deficiently in failing to present more favorable expert testimony, a petitioner may not be able to prove prejudice, if the prosecution already had in its hands strong contrary expert testimony. See Cole v. Roper, 623 F.3d 1183, 1190 (8th Cir.2010). Similarly, a petitioner cannot show prejudice merely by showing that more documentation could have been offered to support a testifying expert's opinion; the petitioner must show that there is a reasonable probability that the jurors' decision would have been different, had all of the supporting documentation been introduced. Williams, 612 F.3d at 956.

Johnson, 860 F.Supp.2d at 880.

In the instant case, as discussed above, habeas counsel have shown what type of mental health evidence could have been presented during the mitigation phase, had Berrigan and other members of the trial team adequately investigated Nelson's mental health. For example, Dr. Carolyn Crawford identified compromised neurological development Nelson suffered after his birth. The neuropsychological testing and imaging performed as part of the post-conviction challenge, showed that Nelson performed significantly below normal levels on standard testing instruments. Dr. Gur's analysis examined data from the neuropsychological testing, an MRI and a PET scan. This data confirmed that Nelson suffered brain damage.

In Sears v. Upton, 561 U.S. 945, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010), the Supreme Court stated:

> "To assess [the] probability [of a different outcome under Strickland], we consider the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding-and reweig[h] it against the evidence in aggravation." [Porter v. McCollum], 558 U.S., at __ [,130 S.Ct., at 453-54](internal quotation marks omitted; third alteration in original).
> That same standard applies – and will necessarily require a court to "speculate" as to the effect of the new evidence- regardless of how much or how little mitigation evidence was presented during the initial penalty phase. . . .In all circumstances, this is the proper prejudice standard for evaluating a claim of ineffective representation in the context of a penalty phase mitigation investigation.

Id. at 956.

In the instant case, the Court is convinced that even when the additional evidence of brain damage is added to the mitigation side of the scale, that the outcome would have been the same. In other words, the Court finds that Nelson has not shown that there is a reasonable probability that even one juror's decision would have been different.

7. Aggravation Evidence

The Government presented thirty witnesses over a two day period. James Shannon Robinson testified that on September 29, 1999, Nelson picked him up at a temporary labor service to do construction work. (Trial Tr. 90-91.) During the day they spent working together, Nelson revealed to Mr. Robinson that he wanted to kidnap a female, take her to a remote location where he could torture her, rape her, electrocute her, and then kill and bury her. (Trial Tr. 95.) Nelson bragged that he was going back to the penitentiary anyway, and "wanted to go for something big." (Trial Tr. 96.) Mr. Robinson did not report this to the authorities at the time because he simply did not believe Nelson. (Trial Tr. 99.). Only ten days before the kidnapping of Pamela Butler on

October 2, 1999, in the middle of the night, Nelson, holding a knife to the throat of Michanne Mattson, a medical student, attempted to drag her kicking and struggling from her apartment parking lot to his white Ford pickup. (Trial Tr. 105, 118, 146.) Ms. Mattson testified that she finally dropped limply to the pavement. Despite the fact that Nelson had managed to get handcuffs around one of her wrists, he could drag her no more, and he broke off the attack, warning her over and over, "If you look at me, bitch, I'll kill you." (Trial Tr. 115-16.) Nelson fled in his pickup truck.

Around 4:00 p.m., on Tuesday, October 12, 1999, Nelson told a friend of his that he knew where a 14-year-old girl was and that "right now is the time to get her, take her, kill her, rape her." (Trial Tr. 149.) A little over one hour later in Kansas City, Kansas, ten-year-old Pamela Butler left her home on her roller skates to go one and one-half blocks to the local gas station to buy some cookies and soda. (Trial Tr. 171-75, 188-89.) Her sister, 11-year-old Penny Butler, was playing on the front porch and watched her sister leave. (Trial Tr. 174.)

Meanwhile, a white Ford pickup, with the driver's door left ajar, had parked along Scott Street, the route Pamela had taken many times before. (Trial Tr. 61-63, 175.) She skated the same route home, and as she neared the pickup, Nelson "came up from out the truck and grabbed her and threw her in the truck and slammed the door." (Trial Tr. 176.) Seeing this, Penny Butler began screaming. (Trial Tr. 176, 189.) Hearing her screams, her teenage sister Casey Eaton came out of the house and looked to where Penny was pointing and saw a white pickup pulling away. (Trial Tr. 189.) As the pickup drove past the screaming girls, Nelson gestured to them with his middle finger. (Trial Tr. 177, 192.) The sounds of the screams and the squealing of tires attracted the attention

of Paul Wilt who was sitting in his truck visiting a friend nearby. (Trial Tr. 206.) Mr. Wilt gave chase and, although he eventually lost sight of Nelson's truck, he was able to get its license tag number – 177CE2. (Trial Tr. 210.) Between 6:30 p.m. and 7:00 p.m. that same evening, Carl and Shirley Condra drove to their church, the Grain Valley, Missouri, Christian Church, on an errand. Parked behind the church was a white Ford pickup, license plate number 177CE2. The truck was unlocked and empty. Suspicious of the truck, they tried to find a police officer. Finding none, they went home. After seeing the 10:00 p.m. news of the abduction and description of the truck used, they immediately called the police. (Trial Tr. 69-70.) Sometime around 8:00 p.m. or thereafter that same evening, Nelson drove to his mother's house in Kansas City, Missouri. (Trial Tr. 77.) He and his mother drove to the Oasis Bar which was a block and a half away from the victim Pamela Butler's home. (Trial Tr. 77.) While Nancy Nelson drank, her son played a video game. (Trial Tr. 89, 699.) After leaving the bar, they stopped at the gas station where Pamela Butler had bought her cookies and soda. Nelson purchased Pepsi and some cigarettes. (Trial Tr. 700-01.) Nelson and his mother were at his girlfriend's house when the news was broadcast about Pamela Butler's abduction. Nelson registered no anxiety, no remorse, no grief, or other reaction. They left and returned to Nancy Nelson's residence. (Trial Tr. 77, 699-702.) At around 11:00 p.m., Patti Griffith, the next-door neighbor to Nancy Nelson, saw Nelson on the passenger side of the white pickup wiping the dashboard and underneath areas while periodically glancing up and down the street. (Trial Tr. 220-22.) Later that same night, Mrs. Griffith was awakened by a noise. When she looked out of her window, she noticed that the pickup truck was gone and that Nelson was pacing around in his yard. (Trial Tr. 223-24.) Around 2:00

a.m., in the morning of Wednesday, October 13th, Nelson called for a cab. The dispatcher who took the call remembered him as calm, as "real cool" and "cool as a cucumber," even to the point of telling her a joke. (Trial Tr. 226-27.) Around 9:00 a.m., on Wednesday morning, the white Ford pickup truck, license number 177CE2, was found abandoned ten blocks from Nelson's residence. (Trial Tr. 79.) The truck, which appeared to have been recently cleaned, had been left unlocked with the keys lying on the floorboard. (Trial Tr. 79-80, 252-53.) The manhunt for Nelson and the search for 10-year-old Pamela Butler continued throughout Wednesday with no success except for a brief sighting of Nelson in the vicinity of his girlfriend's home. (Trial Tr. 233-36.)

On Thursday, October 14th, Laurie Torrez, a civilian employee of the Kansas City, Kansas Police Department, took lunch to her husband at the Santa Fe rail yards and, taking a detour along the dike road (Trial Tr. 237-39), spotted Nelson under the 18th Street Bridge. She called the police. (Trial Tr. 240-41.) Nelson had injured his leg while attempting to lower himself from the bridge and, being unable to escape, submitted to capture. (Trial Tr. 585-87.) Before a helicopter arrived to extract him from the area, a considerable crowd of watchers had assembled. (Trial Tr. 266-68.) From somewhere in the crowd, a voice yelled out, "What about the girl?" (Trial Tr. 268.) Nelson looked at Officer Keith, the arresting officer, and said, "I know where she's at, but I'm not saying right now." (Trial Tr. 269.) Later that same day, a complaint was filed against Nelson for the kidnapping of 10-year-old Pamela Butler. Her body, however, had not yet been found. The information provided by Mr. and Mrs. Condra had prompted law enforcement to intensify searching efforts on the fields, woods, and ponds in the vicinity of the Grain Valley, Missouri, Christian Church.

On Friday, October 15, law enforcement personnel, searching shoulder to shoulder in the woods and fields east of the church, discovered the white sports bra Pamela had last been wearing. Nearby, they found her underpants, and then ten-year-old Pamela Butler's nude body was found buried under a pile of brush. (Trial Tr. 85, 285-93.) A wire ligature was wrapped around her throat. (Trial Tr. 303, 319.)

Results of the autopsy revealed numerous scrapes and abrasions and blunt trauma injury to Pamela Butler's mouth and head. (Trial Tr. 321-27.) Her hymen had been torn near the time of death and there was evidence of redness and irritation in the genital area consistent with a sexual assault having occurred. (Trial Tr. 327-29.) The cause of her death was strangulation. (Trial Tr. 329.)

Pamela Butler's underpants were submitted to the Federal Bureau of Investigation for DNA analysis. (Trial Tr. 87.) Examination revealed the presence of semen in the crotch area of her underpants. (Trial Tr. 345.) When compared to a sample of Nelson's blood, test results conclusively showed that he was the source of the DNA in the semen stain. (Trial Tr. 346.)

On April 5, 2000, the Government filed a notice of intent to seek the death penalty (amended June 9, 2000), alleging both statutory and non-statutory aggravators. Among the non-statutory aggravators alleged was that the offense was particularly cruel and involved serious mental and physical abuse to this child and that Nelson completely lacked remorse for having killed her. These allegations were most evident from the trial testimonies of inmate Frazier, who described the torture cell Nelson intended to build in order to hold his victims captive before raping and killing them. (Trial Tr. 503-04.) Inmate Bailey testified that he overheard Nelson mimicking the child's "high-pitched

screams . . . cries for mommy. Help me. Don't hurt me. Don't kill me." (Trial Tr. 362.) In obvious disgust, Bailey asked Nelson "[h]ow could [he] do that to that little girl?" Nelson simply responded, "You wouldn't believe it." (Trial Tr. 363.)

In addition to the horrific facts of the case, the jury heard evidence about the uniqueness of victim Pamela Butler and the impact of her death on the lives of her family, and that Nelson had, among other things, three prior Missouri state convictions for stealing and a conviction for attempted escape from custody. (Trial Tr. 475-77.) Other evidence presented included information that while in custody on this offense at CCA, Nelson talked about escaping (Trial Tr. 518-19), he unraveled a section of the prison fencing (Trial Tr. 520-21), and he fashioned two workable handcuff keys. (Trial Tr. 424-26.) Nelson threatened to mace his State probation officer (Trial Tr. 486), and while at CCA, in an unprovoked assault, he beat a correctional officer (Trial Tr. 455) and threatened to kill yet another correctional officer. (Trial Tr. 589.).

8. Mitigation Evidence

As detailed above, Nelson presented numerous mitigation witnesses, including his mother, his aunts, siblings, a former teacher and principal, family friends, a landlord, prison guards, an employer, former babysitter and her daughter and a forensic psychologist, Dr. Cunningham. The jury heard the testimony of these witnesses describe Nelson's chaotic home life, the abuse suffered by Nelson and his mother at the hands of his violent father. The jury heard from Nelson's siblings how their mother was often absent and neglected them, the squalid living conditions that the family endured and how they often moved from place to place. There was also evidence presented describing the learning difficulties Nelson suffered throughout his years in school and

how he was placed in special education classes. A former employer testified that while Nelson worked for him he was pleasant and was a good worker. The jury also heard from a prison guard about how Nelson was often threatened and verbally harassed by other inmates while he was housed at CCA. There was also evidence presented describing the physical abuse that Nelson suffered as a child when his mother left him with a babysitter. Dr. Cunningham also testified concerning the effect of the childhood abuse and neglect on Nelson's character and development. In his testimony, Dr. Cunningham explained how the squalid condition and abusive and violent nature of Nelson's upbringing affected the formation of his character. Dr. Cunningham testified that Nelson would be less violent as he aged.

During the Evidentiary Hearing, habeas counsel allege that if Berrigan had adequately investigated and presented evidence of Nelson's mental health, the following additional evidence would have been presented to the jury:

- The neuropsychological examination conducted by Michael Gelbort, Ph.D. in 2005 (P53), which confirmed that Nelson suffered frontal lobe dysfunction.
- The assessment by Natalie Novik Brown, Ph.D. in 2006 in her preliminary investigation of Fetal Alcohol Spectrum Disorder (P48);
- The PET scan and MRI imaging conducted by a private imaging facility near Mr. Nelson's place of confinement in Terre Haute, Indiana in 2010 (P56 PET; P57 MRI);
- The findings of clinical psychologist Xavier Amador, Ph.D. (P60, 61, 62, 63). He testified that Nelson suffered from a cognitive disorder, not otherwise specified, post-traumatic stress disorder, psychotic disorder, not otherwise specified and a personality disorder which would impair his functioning. Dr. Amador also concluded that Nelson's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired. He also concluded that Nelson committed the offense under the influence of severe mental disturbances

that affected his perceptions, judgment, impulses and ability to conform his conduct. (Evid. Tr. 436-440). He also testified that he saw evidence of a frontal lobe disturbance. (Evid. Tr. 441).

- The neuroimaging study by Ruben Gur, Ph.D. (P58, 59, 81). Dr. Gur testified that Nelson had significantly reduced white matter in both the front and occipital lobes of his brain. Dr. Gur testified that the MRI, the PET and the neuropsychological testing all showed that Nelson had structural damage to the frontal lobe of his brain. Dr. Gur opined that Nelson's abnormalities would make it difficult for him to regulate his behavior, including his sexual impulses (Evid. Tr. 582-83).

- The analysis of Mr. Nelson's birth records by neonatologist Carolyn Crawford, M.D. (P45). Dr. Crawford testified that Nelson's mother received almost no pre-natal care, before Nelson was born. Additionally, she testified that Nelson was born prematurely and he suffered several complications after his birth which required him to be hospitalized.

- Dr. Martell's own findings (P54). With regard to Mr. Nelson, Dr. Martell identified "brain damage, brain dysfunction and neurological impairments". (T4.657.) Dr. Martell acknowledged that his findings – and the identical findings of the other experts – would be mitigating as to penalty. (Evid. Tr.657-58.)

In assessing whether Nelson has shown that he was prejudiced by Berrigan's actions and inactions regarding the presentation of his mental health evidence, and whether he has shown that there is a reasonable probability of a different outcome, the Court considered "the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding-and reweig[hed] it against the evidence in aggravation." Sears v. Upton, 561 U.S. at 956. After reweighing the evidence, the Court is convinced that the result would have been the same. While the circumstances surrounding Nelson's birth, childhood and early adulthood are distressing and why they may help to explain why he acted as he did, the Court does not believe that there is a reasonable probability that even one juror would have voted to sentence Nelson to life in prison. This conclusion is bolstered by the fact that only a single juror

found the existence of only one mitigating factor – that "being subjected to physical and emotional abuse as a small child permanently altered Keith Dwayne Nelson's psyche and personality and detracted from his ability to be a successful and insightful adult." No jurors voted in favor of any of the remaining nine mitigating factors[4]. (Case No. 99-303, Jury Verdict, Doc. No. 420). The aggravating evidence of the crime and the victim impact testimony was simply too overwhelming. No amount of mental health evidence or testimony relating to brain damage and a difficult upbringing could overcome the fact that Nelson kidnapped a ten-year old girl who had roller skated to the store to buy cookies, sexually assaulted her, strangled her and left her naked body in the woods. For these reasons the Court **DENIES** Nelson's Claim of Ineffective Assistance of Counsel on Claim A(4) - Failure to conduct adequate investigation of defendant's mental health and Claim A(5) - Advising or instructing defendant to decline to submit to a mental health examination by a government examiner.

[4] The other mitigating factors submitted were:
2. "Many years of gross neglect and a lack of parental supervision contributed greatly to Keith Dwayne Nelson's own sense of self-worthlessness and depression." 3. Despite his own deprived childhood, Keith Dwayne Nelson has shown affection, good judgment and love in caring for the young son of his former girlfriend, Kerri Dillion." 4. "Keith Dwayne Nelson has been a devoted and caring son to his mother, Nancy Nelson." 5. "Keith Dwayne Nelson has been a loyal and faithful brother to his four siblings." 6. "In the past, Keith Dwayne Nelson has been a hardworking and dedicated employee to his boss, and a financially responsible boyfriend to his girlfriend and her son while they all lived together." 7. "Keith Dwayne Nelson has admitted his guilt and pleaded guilty to the murder of Pamela Butler without any promise or expectation of leniency." 8. "Keith Dwayne Nelson will be of low risk of violent behavior in prison and can live the rest of his life peacefully and productively if allowed to die of old age behind bars." 9. "Keith Dwayne Nelson can be a positive influence on the life of his young son, counseling, teaching and caring for the boy as he grows up over the ensuing decades." 10. "If allowed to live, Keith Dwayne Nelson can remember and agonize over the death of Pamela Butler which he caused on October 12, 1999 and in the process of many years of remorse and contrition, he will become a better person that the young man who caused her death."

C. Failure to Make Objections to Allegedly Inflammatory and Improper Comments in the Government's Closing Argument and Rebuttal – Claim A(15)(e).

The following are the statements which Nelson believes were objectionable from the initial closing argument:

• The Government argued that the jury should vote for death because, "If this crime doesn't call for the death penalty, what crime does?" (Trial Tr. 1113.)

• The Government argued that the jury should vote for death because, "We need to protect our children. We need to send a message to guys like the defendant . . . ." (Trial Tr. 1113.)

• The Government argued that the death penalty should be imposed because, "The community cries out for justice." (Trial Tr. 1114.)

• The Government argued that legally appropriate and relevant mitigating evidence was "all this excuse testimony" and a "guilt trip." (Trial Tr. 1123, 1124.)

• The Government argued that the jury should impose a death penalty simply because the Government recommended it "without reservation." (Trial Tr. 1128.)

The following are the statements which Nelson believes were objectionable from the rebuttal closing argument:

• The Government argued that the case was about the "slaughter" of "our children." (Trial Tr. 1155.)

• The Government argued that legally appropriate and relevant mitigating evidence was "an excuse," "the blame game," "the abuse excuse," and an effort by trial counsel to claim the crime was "somebody else's fault." (Trial Tr. 1156.)

• The Government argued that the mitigating evidence was not worthy of jury consideration since it didn't "explain why" the crime occurred. (Trial Tr. 1158.)

• The Government argued that Movant was "a rotten human being." (Trial Tr. 1158.)

• The Government argued that defense counsel's efforts to persuade the jury of mitigating evidence was "a smoke screen" and an attempt to "divert [the jury] from what this case is really about, the slaughter of an innocent." (Trial Tr. 1158-59.)

• The Government argued that defense counsel's efforts to persuade the jury of mitigating evidence masked counsel's true motive, i.e., "What they want you to do is have him escape justice." (Trial Tr. 1159.)

• The Government argued that mercy was weakness. (Trial Tr. 1159.)

• The Government argued that Appellant was "evil at his core." (Trial Tr. 1161.)

• The Government argued that jurors should rely on the prosecution's experience and expertise, and positioned the case as a referendum on capital punishment by telling the jury, "There is no clearer call for the death penalty than there is in this case," and, later, "If not him, who? If not now, when? If killing and raping a kid isn't enough, then we don't need a death penalty. We don't need a death penalty." (Trial Tr. 1161; 1163.)

• The Government argued that the jury should impose a sentence of death since the jury "represent[ed] the people of the United States in this case . . . ." (Trial Tr. 1162.)

• The Government argued that the jurors should close their eyes and re-live the horrors of the victim's last hours, calling upon the jury to "Think about . . . what that little girl was thinking," and to imagine, "What was she thinking?" and to "Imagine what she experienced in that last part of her life," and to "Close your eyes, and . . . envision [the abduction and murder]." (Trial Tr. 1161-62.)

• The Government argued that a verdict of death was the only just verdict and that the jurors were "the dispensers of justice," and that the victim's mother "Waits for you to give her some justice. And justice in this case can only be had by imposing a sentence of death," essentially suggesting to the jury that a sentence of death should be imposed because that's what the victim's survivors wished. (Trial Tr. 1162.)

• The Government argued that, "[T]he death penalty was enacted for crimes like this." (Trial Tr. 1163.)

Berrigan testified at the Evidentiary Hearing that the comments were all improper and he should have objected to portions of the Government's closing argument, but he did not. He testified that he had no tactical reason for not objecting. (Evid. Tr. 241, 243). "The Eighth Circuit has been reluctant to grant habeas corpus relief to petitioners based solely on objectionable prosecutorial rhetoric in closing arguments. 'A claim of

prosecutor misconduct in closing argument . . . calls for an exceptionally limited review of this issue.'" Evans v. King, No. 10-4045(SRN/SER), 2012 WL 4128682, *20 (D.Minn. July 30, 2012)(quoting James v. Bowersox, 187 F.3d 866, 869 (8th Cir.1999)).

Where there was no contemporaneous objection to statements alleged to be misconduct the appellate court reviews for plain error. U.S. v.Coutentos, 651 F.3d 809, 822 (8th Cir. 2011). Under plain error review, to obtain relief, a defendant must show (1) that there was error; (2) that the error was plain; and (3) that it affected the defendant's substantial rights. Id. The appellate court assesses the prejudicial effect of misconduct by considering: (1) the cumulative effect of the misconduct, (2) the strength of the properly admitted evidence of the defendant's guilt, and (3) the curative actions taken by the trial court. Id.

"[A] prosecutor's improper comments [during argument to the jury] will be held to violate the Constitution only if they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Parker v. Matthews, ___U.S.__, 132 S.Ct. 2148, 2153, 183 L.Ed.2d 32 (2012) (quoting Darden v. Wainwright, 477 U.S. 168,181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)(in turn quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). "Federal habeas relief should only be granted if the prosecutor's . . .argument was so inflammatory and so outrageous that any reasonable trial judge would have *sua sponte* declared a mistrial" and the petitioner established "a reasonable probability that the outcome [of the trial] would have been different but for the improper statements." Kennedy v. Kemma, 666 F.3d 472, 481 (8th Cir.2012)(citations omitted).

> To determine whether a prosecutor's statement infected Petitioner's trial with unfairness, the court examines the totality of the circumstances. Kellogg v. Skon, 176 F.3d 447, 451 (8th Cir.1999), Antwine v. Delo, 54 F.3d 1357,1363 (8th Cir.1995)(listing factors including (1) the type of prejudice that arose from the argument, (2) defense counsel's efforts to minimize the effect in his argument, (3) whether [the] jury was properly instructed in the jury instructions, and (4) whether there is a reasonable probability that the outcome would have been different.)

Robinson v. Dormire, No. 4:10CV01205AGF, 2013 WL 5421963, *6 (E.D.Mo. Sept. 26, 2013).

In analyzing the factors, the court presumes that Nelson was prejudiced by the comments made during the government's initial and rebuttal arguments. However, the Court also finds that Mr. Berrigan mitigated the effects of these statements in his closing argument. Mr. Berrigan stated in his closing argument:

> He didn't have to plead guilty. Didn't have to do it at all.
>
> But accepting responsibility does not automatically mean, as the prosecution suggested, that's the death penalty, that this is such a horrible crime there are no other options. Because if you'll recall when you came in here to be selected to sit, the judge asked you questions about that, is anybody here automatically going to impose the death penalty, and nobody, not one of you raised your hands.
>
> And then I asked you, do you remember, what about a case of the murder of a ten-year-old girl, murder and rape of a ten-year-old girl, in your mind, would the death penalty be the only appropriate penalty in the case? Nobody here raised their hands. The people that raised their hands, they were let go. Every one of you said no, I'm going to follow the instructions of the court. I can consider, even in that case, I can consider a sentence of life without parole, I can do that.
>
> And, indeed, that's what the law requires you to do. It requires that. There's no such thing as what Mr. Whitworth is talking about. There's no such thing as some crime that says you do this, you get the death penalty. That is absolutely in contravention of the law. Absolutely. We need not be here if that's the law. We need not have a hearing. This would have been settled. Death, death penalty for Keith Nelson.
>
> But we obviously are here and we obviously presented evidence and you have been listening very intently. You have to make the determination.

(Trial Tr. p. 1135-36).

Berrigan also told the jury that it was up to each one of them to decide if the death penalty was appropriate in this case. He argued:

> The law says aggravating circumstances have to be proven beyond a reasonable doubt. You all have to agree.
>
> It says mitigating circumstances, you don't have to agree. You each decide in your own heart and conscience what do I think the mitigating circumstances are. What are they to me. And you weigh them yourself. You remember that difference.
>
> The law says if you want to impose the death penalty, all twelve people have to agree. Any one or two or three of you can say no, not for me. You have that power to do that because of the awesome individual responsibility that you take when you sign up as a juror in this kind of case. In your hands, each one of your hands, is the life of Keith Nelson because any one of you can say no, and then it doesn't happen. It doesn't happen at all. The judge has told you you're never required to impose the death penalty. It's never required.

(Trial Tr. p. 1137).

Mr. Berrigan also argued to the jury to refute some of the Government's statements regarding Pamela Butler:

> There has been some discussion by Mr. Whitworth remember Pamela Butler, remember what the end of her life must have been like. And I suspect we'll hear more of that, how horrific her death was. And nobody is disputing that. But ask yourself again why are they putting me through that? Is this to get me so inflamed and so impassioned that I'm not going to make a reasoned, calm, considered determination about what the punishment is going to be. Because that's what the law requires. That's what's in your instructions.

(Trial Tr. P. 1152).

After reviewing these portions of Berrigan's closing argument, the Court finds that Berrigan adequately minimized any prejudicial effect from the Government's initial closing argument or rebuttal argument.

The Court also finds that the jury was properly instructed. In Penalty Phase Instruction No. 4, the jury was told, "[c]ertain things are not evidence. I shall list those things for you now: statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence." (Case No. 99-303, Doc. # 419). Finally, with regard to the last factor, the Court finds that Nelson has not shown that there is a reasonable probability that he would have received a life sentence, if the improper arguments had been objected to. The crime in this case involved the kidnapping, sexual assault and strangulation of a ten-year-old girl. The Court finds that it is more likely that the jury voted for a death sentence based on the heinous facts of the case and was not swayed by the Government's improper closing arguments. Accordingly, the Court hereby **DENIES** Nelson's Motion for Relief on Claim A(15)(e)-Failure to Make Objections to Allegedly Inflammatory and Improper Comments in the Government's Closing Argument and Rebuttal.

D. Allegations of Appellate Counsel's Constitutional Ineffectiveness: Failure To Conduct Adequate Review of the Trial Record and the Law. Failure To Raise on Appeal the Government's Allegedly Improper Comments in Closing Arguments – Claims B(1) & B(2)(c)

When the case was set on the appeal schedule, Berrigan moved to withdraw and asked that his former co-worker at the State Public Defender System, Jennifer Brewer[5], be appointed to handle the appeal. Brewer handled a number of death eligible cases at the state and federal level and was focusing on appellate work. Consequently, she was appointed. Berrigan stated that he has great admiration for Jennifer Brewer and her appellate work. (Evid. Tr. 247.) He did not meet with her to discuss issues regarding the

[5] Jennifer Herndon was formerly known as Jennifer Brewer.

appeal, but he did hand her his trial notes. (Evid. Tr. 248.) Hunt maintained the appointment and continued to represent Nelson on appeal with Brewer.

Brewer had more capital case experience (trial and appellate) than Hunt and was located in St. Louis, while Hunt was in Kansas City. (Evid. Tr. 80.) Brewer was aware that this was Hunt's first capital trial. After being appointed, Brewer and Berrigan met face-to-face, with Berrigan giving Brewer his transcript and parts of the file to use for appeal preparation. (Evid. Tr. 132.) Hunt talked with Brewer via e-mail or phone. (Evid. Tr. 80-81.) Brewer went through and reviewed the trial transcripts, reading them completely to determine what issues she thought should be argued in the appeal. (Evid. Tr. 133.) Brewer testified that these issues were "sort of, I don't know, complex or technical, capital-specific issues, issues I had drafted before or issues that I had experience with in capital litigation." (Evid. Tr. 138.) Brewer stated that she believed that Hunt was going to draft the "more guilt-phase related issues or issues that didn't require any particular capital experience." (Evid. Tr. 138.) Brewer stated that she was familiar with the ABA guidelines for capital counsel, explaining that every possible issue should be explored that has some merit. (Evid. Tr. 117.) Hunt acknowledged that when page limitations are factored in not all possible issues are raised but your best issues. (Evid. Tr. 86.)

Hunt was handling the change of venue issue, statement of facts as relating to that issue, and some other issues involving jury selection, while Brewer was handling all appeal issues relating to the penalty phase. They communicated mostly via e-mail, sending drafts back and forth to each other. They applied for, and were granted, several extensions by the Eighth Circuit. (Evid. Tr. 81.) During the deposition taken in

anticipation of the § 2255 hearing, Brewer accused Hunt of malfeasance by not handling the other appellate issues that were her responsibility. (Evid. Tr. 83.) Hunt denied the accusations and stated that those responsibilities were in fact Brewer's.

This dispute arose because each attorney believed the other should have raised additional issues on appeal. Hunt believed that Brewer should have prepared the issues because she was the more experienced appellate and capital litigator, while Brewer alleged that the responsibility was Hunt's. Brewer did not keep any documentation or notes with respect to the division of labor with Hunt on the brief. Brewer's account of the responsibilities in this matter is at odds with the fact that she was the editor of the brief. In other words, it was her responsibility to collect the parts each worked on, then put them together in a single coherent document. Consequently, Brewer was the last person to set eyes on the brief. She would have seen it deficient, if indeed it was, and could have simply asked the court of appeals for an extension of time. Given the nature of the case (it being a capital matter), the request would have no doubt been granted. Brewer hides behind a docket entry that indicates that no further extensions will be allowed. The problem with this position is that on one previous occasion, in this very appeal, Brewer had been told that no further extensions would be allowed, but she nonetheless asked for a continuance and received it. (Evid. Hrg. 136.) Additionally, during her testimony, Brewer acknowledged that she was communicating with the appellate court right up until the time the brief was filed. (Brewer Depo. Tr. 81.) The need to do so was driven by the fact that Nelson's brief was overlong and Brewer needed the court's authority to obtain permission to file a longer than anticipated brief. (Brewer Depo. Tr. 79-81.) The

appellate court granted her request. Through these contacts Brewer never chose to ask for additional time to file the brief later, to supplement the brief, or to file a Rule 28(j) letter. (Evid. Tr. 139.)

Nelson argues that Ms. Brewer agreed that the government's closing arguments were improper. (Evid. Tr. 118). She also agreed that these were significant and obvious issues that were stronger than some of those issues actually raised in the brief. (Evid. Tr. 126). Ms. Herndon stated that she had not made a strategic choice to omit these arguments and agrees that they should have been raised on appeal. Nelson argues that had these issues been raised on appeal, there is a reasonable possibility that his sentence of death would have been vacated on appeal.

Ineffective assistance claims cannot be based on counsel's alleged failure to raise a meritless argument. See Gray v. Bowersox, 281 F.3d 749, 756 n. 3 (8th Cir. 2002). Further, when a legal argument has no merit, it follows that a defendant cannot be prejudiced as a consequence of its absence as an appellate issue. See Thompson v. Jones, 870 F.2d 432, 434–35 (8th Cir.1988). "In other words**,** appellate counsel is not ineffective simply because that lawyer fails to raise an issue on appeal that has no substance." Delk v. Smith, No. 13-CV-89 (JRT/SER), 2014 WL 538586,*12 (D.Minn. Feb. 11, 2014). As noted above, the Court finds that there is no merit in Nelson's claim that his counsel was ineffective for failing to object to the Government's closing arguments. Accordingly, because the argument had no merit, Ms. Herndon and Ms. Hunt were not ineffective for failing to raise this issue on appeal. Therefore, the Court hereby **DENIES** Nelson's claims B(1) and B(2)(c).

IV. CONCLUSION

For the reasons stated above, the Court hereby **DENIES** habeas relief on the six claims which were remanded from the Eighth Circuit Court of Appeals. The Court further denies Nelson a certificate of appealability, in that the issues raised are not debatable among reasonable jurists, nor could a court resolve the issues differently.

Date: March 31, 2015
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge

No. 10. The previous instructions I have already given to you and I won't repeat them, but you'll have them if you have the need to look back.

(THEREUPON, THE COURT READ INSTRUCTIONS 10 THROUGH 27 TO THE JURY.)

THE COURT: Okay. We're going to now have closing arguments and we'll begin with the prosecution.

GOVERNMENT'S CLOSING ARGUMENT

MR. WHITWORTH: May it please the court, Mr. Berrigan, Ms. Hunt, members of the jury.

On September 29th, 1999, the defendant was working with a man by the name of Shannon Robinson at a job and he told -- the defendant told Mr. Robinson that day about a plan he had, a plan to kidnap, rape, torture and kill a little girl in the woods. He talked about this plan he had to get a piece of property, remote, out in the woods. Mr. Robinson thought he was just weird and acting crazy and didn't believe him.

The defendant acted on that plan on October 2nd, 1999 when he attempted to abduct Michanne Mattson, a medical student at K.U. Med Center. He attempted to kidnap her from her apartment complex in the late night or early morning hours of that day by putting a knife to her throat and putting handcuffs on her and dragging her across the parking lot. Unfortunately he picked a woman, an adult

woman who was too strong, who fought him and got away. Thank God she got away.

The next day he saw Steve Underwood, his friend and coworker, and bragged about the fact that he had tried to kidnap a woman by putting a knife to her throat and putting handcuffs on her. This desire inside the defendant continued and he decided to get a little girl and he began searching for a little girl and he found one the day this happened on October 12th, 1999.

You will recall the evidence that the defendant, came back to his house where he lived with Kerri Dillion, and Steve Underwood is there in the front yard after having picked up the boys from school. It was about 4:05 p.m. on that fateful day, when the defendant excitedly ran up to Mr. Underwood and told him he had found one, he had found a 14-year-old girl, now is the time to kidnap her, to rape her, to torture her, and to kill her in the woods. Underwood unfortunately thought he was just acting weird and crazy. He wasn't.

That day Pamela Butler, a little ten-year-old girl, 5th grade student, a bright, intelligent little girl, on the right in this photograph, went to school. She liked school. She liked her teacher. She liked her friends. She was a typical ten-year-old girl. For those of us who have children, we've seen our kids go through those

stages. A ten-year-old girl, she liked being with her friends. She was fun-loving. She liked music. She liked to trade clothes with her friends, spend the night with her friends. An innocent child.

When she came home from school that day she put on her rollerblades, and like a lot of little ten-year-olds, they have a sweet tooth. She wanted to go down to the corner to get some cookies and juice, and she asked her older sister permission to do that. It was just down the street, the store where she was going to go. She lived in this area (indicating.) And she skated down the street to this little convenience store where she bought her juice and cookies. No doubt in a great mood on a fine autumn day. The last thing she suspected was what was about to happen to her.

As she drove down, or after she got her cookies and juice, she went back down this road, and this man right here was sitting in his truck, lurking, waiting for her to come back. He had planned it. He was no doubt sitting excitedly in that pickup truck, thinking about raping this little girl and killing her. And we know that he thought about it a long time because he told people about it before it happened. He planned it out. There's no question about that. This was premeditated, cold-blooded murder.

Now, does this crime warrant the death penalty?

We submit to you that if this crime doesn't warrant the death penalty, then what crime does? We need to protect our children. We need to send a message to guys like the defendant if they do this they're going to pay the ultimate price that Congress has provided for this type of -- one of those rare crimes that warrants the death penalty.

Now, I want you to think about today as you're hearing us argue what was that little girl thinking in her last moments on this earth, her innocence ripped from her, begging for the defendant not to hurt her.

As he took her out, he grabbed her up off the street in front of her sisters. Imagine the horror they went through seeing this. The defendant knew he had been caught, because Paul Wilt chased him for a long time. He knew he had been spotted, but yet he was determined to continue with his twisted fantasy to rape and kill a little girl.

And he drove her across the state line to Missouri, over in Grain Valley, where he took her out into the woods and drug her across that field, no doubt, in a remote area in the woods, just as he had talked about earlier.

He took her back there and he ripped her clothes from her body, her little body, her 93-pound four-foot-ten-inch body. And look at him. He's a strong

man, a man who was employed in manual labor, carrying buckets of concrete up out of basements. She didn't have a chance. He ripped her clothes from her body, panties and her sports bra, and then violated her. What was she thinking? Freshly broken hymen the medical examiner said. What was she thinking? He could see as he removed her clothes that she was nothing more than a child. And yet he didn't stop. He didn't stop.

He took this electrical cord, that he had no doubt cut earlier, and he placed it around her neck and he slowly, after having his way with her, twisted the life out of her little body. This is the way he left her, with the cord around her neck and her poor, bruised and damaged body showing injuries that he had beaten her about the face and about the eyes. You heard the medical examiner's testimony that he beat her before he killed her. Imagine what she experienced in that last part of her life.

Now, do these actions warrant the death penalty? We submit to you that it does. We submit to you that there are very few crimes that could be worse than this, and the community cries out for justice in this case.

Now, how do you get there? The judge has given you the blueprint on how to get there, and you have to consider a lot of things and we want you to consider not only our evidence, but the defendant's evidence. That's

your job, that's your duty. You have been a very attentive jury and we do appreciate that very much.

We have to prove, the government has to prove beyond a reasonable doubt the statutory aggravating factors and the nonstatutory aggravating factors beyond a reasonable doubt. What does reasonable doubt mean? Reasonable doubt is a doubt based upon reason and common sense. There is no instruction that says you have to leave your reason and common sense out in the hallway when you sign on as jurors and are sworn in. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Now, it's defined in Instruction No. 13.

You know, you have -- you are probably sitting there right now and after having heard all evidence in this case you've probably got this feeling inside of you that, you know, this case -- this case, after what he did, this case warrants the death penalty. That's your reason and your common sense that's telling you that. Don't leave that behind when you're deliberating in this case and you're considering all the evidence.

Now, let's go through the things you need to find. First of all, you need to find that the defendant is 18 years old. Instruction No. 16. We have proven that. Here's the defendant's birth certificate, Government's Exhibit No. 11. He was well past 18 when he committed this

crime.

Second, we need to prove beyond a reasonable doubt that the defendant intentionally killed Pamela Butler, that he intentionally killed the victim, Pamela Butler, by strangling her. To establish that the defendant intentionally killed the victim, the government must prove that the defendant killed the victim with a conscious desire to cause the victim's death.

He's already admitted to that. He pled guilty. Government's Exhibit 50 is a transcript of portions of that guilty plea. He has already admitted that. It's not in dispute and it's not in dispute that he was over 18 when he committed this crime.

Third, you need to find the statutory aggravating factors beyond a reasonable doubt. The first one is that the death occurred during the commission of the kidnapping of Pamela Butler. That's not in dispute. There's no question about that.

You need to find that he did it for some benefit or reason. He didn't do it for ransom or reward. He did it for his own twisted sexual gratification. That's why he did it. So we have proven that. There's no question about that statutory aggravating factor.

The second statutory aggravating factor is that the defendant committed the offense in an especially

heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim, Pamela Butler, that is, he forcibly kidnapped her and took her to a remote area where he sexually abused and strangled her.

Now, clearly this qualifies as serious physical abuse to the victim. Look at this poor body. Look what he did to her. If that's not serious physical abuse, I don't know. He beat her. He raped her. He strangled her. If that's not serious physical abuse, then I don't know what is.

Let's move on. Now, I want to go on down further. I can't cover all this because I don't have enough time, but I'm going to cover parts of it.

MR. BERRIGAN: I'm very sorry to interrupt.

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING PROCEEDINGS WERE HAD:)

MR. BERRIGAN: I don't know what exhibit this is, but the record should reflect it is the picture of Pamela Butler laying on a white tarp that we previously objected to. It has now been on the overhead for more than five minutes, which I think is completely inappropriate. It seeks merely to inflame the passions and prejudices of the jury and I'm going to ask the court to instruct the prosecution to remove it. Certainly he has made his comments about it some time ago.

MR. WHITWORTH: Judge, this is closing argument. I'm at the point where I'm trying to prove --

THE COURT: I think you've had adequate time to leave it on the video. I think you can't leave it on there indefinitely.

(THE PROCEEDINGS RETURNED TO OPEN COURT.)

MR. WHITWORTH: Now, cruel means that the defendant intended to inflict a high degree of pain by torturing in addition to killing the victim. Depraved means that the defendant relished the killing or showed indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim.

How do we know that he relished in it? Because he talked about how he had this plan. He was excited about this. We heard from Steve Bailey, the inmate out at CCA, that the defendant apparently fantasizes about it at night. He still gets his kicks from what he did to this little girl. There's no remorse here. There's no remorse in this case.

The third statutory aggravating factor is that the defendant committed the offense after substantial planning and premeditation to cause the death of Pamela Butler. He made the statements to Shannon Robinson, to Michanne Mattson. He tried to kidnap Michanne Mattson. That's further evidence that he had a plan. Steve

Underwood, he made the statements to him. And Ed Frazier, the inmate at CCA who he confided in and how he talked about this plan he had to take this girl out to a remote -- to a remote area, he described a torture chamber he wanted to set up where he would take women and that he would confine them, he would rape them and use them and eventually kill them.

Now, these are things that he said after he committed the crime of killing Pamela Butler. I submit to you do you want to take a chance that this defendant will ever get out of prison?

MR. BERRIGAN: I'm going to object. May we approach.

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING PROCEEDINGS WERE HAD:)

MR. BERRIGAN: That's a completely inappropriate comment. The two sentences available here are the death penalty or life imprisonment without possibility of parole. And now the prosecutor is asking the jurors whether or not they want to take a chance that the defendant might get out of prison, knowing full well there's no possibility of that.

THE COURT: Escape is a possibility.

MR. WHITWORTH: That is just where I was headed.

THE COURT: I think that's fair game here.

(THE PROCEEDINGS RETURNED TO OPEN COURT.)

MR. WHITWORTH: Do you want to take a chance that this defendant may ever get out of prison after the evidence we heard about his attempts and thoughts about escaping. My God, he already has one conviction for attempted escape. Do you want to take that chance?

Let's talk about the fourth statutory aggravating factor, that Pamela Butler was particularly vulnerable due to her youth, that is, she was ten years old at the time of the offense. She was in fifth grade. She was four foot ten inches tall. She weighed 93 pounds. She was a little girl. She didn't have a chance. She was particularly vulnerable.

Now, let's go on next to the nonstatutory aggravating factors. The first one is that the defendant poses a future danger based upon the probability that he will commit criminal acts of violence that would constitute a continuing threat to society as evidenced, for example, by one or more of the following among others: (a) Keith Dwayne Nelson has boasted of his desire to kidnap a girl, kill her and bury her remains. We have already covered that. He likes to do that.

(b) Keith Dwayne Nelson has boasted of his plans to create a relation with a female who would assist him with future abductions of other females. We heard that

evidence. I won't repeat that.

(c) Keith Dwayne Nelson has boasted of his plans to buy a rural isolated plot of ground to further his abduction plans. He said that to two witnesses, Robinson and Frazier, and also to Underwood. That's three.

(d) Keith Dwayne Nelson on October 2nd, 1999, attempted to abduct Michanne Mattson. You heard that testimony. It was credible testimony. He used handcuffs and he put a knife to her throat.

(e) Keith Dwayne Nelson has displayed a complete lack of remorse for the killing of Pamela Butler. Now, we know that from not only the testimony of Ed Frazier, the inmate, and also from Steve Bailey. He still fantasizes about this. But one thing that I think is of particular interest is the audio tape that the defendant put into evidence. In that audio tape he talks about how he messed up and he appears to be emotionally upset.

But members of the jury, if you go back and listen to that I think you'll conclude it's a reasonable inference that the defendant was upset because he'd been caught and he just found out his girlfriend was pregnant and he was upset about the fact that he wasn't going to get to see his child. He was upset about the fact that he was going to spend Christmas in jail. There was no remorse for the killing of Pamela Butler. He's never shown any remorse

for the killing of Pamela Butler. Only feeling sorry for himself because he got caught.

Now, the next one is that Keith Nelson has been involved in assaultive and disruptive behavior while incarcerated and while under judicial supervision.

You remember the testimony of Parole Officer Kandi Randall. The defendant came into her office one day with a mace can.

You also recall the testimony of Assistant Warden Moore about his disruptive behavior at CCA, throwing urine. Roger Moore Jr. was in his cell to retrieve cleaning supplies and the defendant surprisingly just attacked him and started hitting him.

Captain Bob Super testified that he -- his life has been threatened by the defendant. They put on a witness to dispute that, but the fact remains that Bob Super testified the defendant threatened him, threatened to kill him. And you can consider all that evidence when deciding on this particular factor.

Next, Keith Dwayne Nelson has attempted to escape while incarcerated. That has happened before. He has been convicted of that.

Now, I also submit to you anyone who is cunning enough to make -- carve handcuff keys out of a toothbrush is thinking about doing something. He's thinking about

getting out and escaping. He's talked to guards about it. He's talked to inmates about it. Believe me, folks, this defendant, given the opportunity, will try to escape.

Now, (h), Keith Nelson has expressed a desire or intent to escape while incarcerated. Carlos Acevedo, you also recall his testimony, the defendant told him that he would rather die trying to escape than let the government kill him.

The next one is that Keith Nelson has a significant criminal history including felony convictions for burglary second degree, and stealing. There's the certified convictions right there (indicating.)

Now, let's move on to the defendant's defense, the mitigating factors. And I'm going to have to -- I'm not going to be able to cover all this, but I want to talk to you about a few of them.

Dr. Cunningham talked about all these factors that have influenced this defendant's life. And, members of the jury, common sense tells you that the environment that he grew up in was not good and that it did probably contribute to the person he has become. There's no question about that. We don't dispute that.

But you know what, so what? If you go this far and commit this kind of a crime, isn't it time to draw the line? Isn't it time for all this excuse testimony, that

your mom and dad were bad parents, that you wet your bed, that you had this bad childhood, at some point you've got to draw the line and say no more, we're tired of it. If you do something this horrible, this vile, this vicious, you've got to pay the ultimate penalty.

Robert Frost had a poem that talked about how people who -- this man who was going through the woods and the path diverted into two paths, and it talks about how one road was less traveled and one was more traveled and it talks about how the road you select in your life, the important decisions in your life affects what kind of a person you are.

This defendant took the wrong road. His twin brother, who was raised in the same environment, has turned into a productive member of the United States Army. He's made the right decisions.

This defendant decided to live a life of crime and he's going to have to deal with those consequences, just like we all have to deal with the consequences of the decisions we make in our lives.

Now, in a few minutes I think you're going to hear about -- you're going to hear from Mr. Berrigan, who is a fine lawyer. Ms. Hunt and Mr. Berrigan have done a fine job, but I anticipate you're going to hear things that are intended to put a guilt trip on you, things like you

don't have to -- you don't have to kill my client. Put him in jail for the rest of his life where he can die as a shuffling-around prisoner and old man. You're not -- that's intended to put a guilt trip on you. You're not killing anybody. You're making a recommendation of the death penalty.

MR. BERRIGAN: I'm going to object again, Judge. I'm sorry. May we approach.

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING PROCEEDINGS WERE HAD:)

MR. BERRIGAN: The court has already instructed the jurors that the court has to impose whichever sentence that they impose themselves. Mr. Whitworth is attempting to deflect the responsibility for that awesome decision from the jury to somebody else. It's not merely a recommendation. What they decide is going to be the sentence is in fact going to be the sentence. We know that by operation of law. The court has instructed them that way.

This comment that Mr. Whitworth made improperly diminishes the responsibility of the jurors respecting their solemn obligation to impose the sentence, and it is their obligation to do that.

THE COURT: I understand where you're going, Mr. Berrigan.

What's your response?

MR. WHITWORTH: I didn't get to finish my argument. My follow-up is going to be that the judge will be required to follow your decision, but the United States government will be putting the defendant to death, not them.

THE COURT: Well, the way it was framed certainly gives that impression. I think you need to say that --

MR. WHITWORTH: I'm going to.

THE COURT: -- rather than infer something different than that. So the objection is sustained.

MR. BERRIGAN: I'm asking that the last comments, the jury be instructed to disregard the last comments of counsel.

THE COURT: Well, I won't do that. I think you need to restate it.

MR. WHITWORTH: I can.

MR. BERRIGAN: That request is denied?

THE COURT: Yes.

MR. WHITWORTH: That's what I was getting ready to do.

(THE PROCEEDINGS RETURNED TO OPEN COURT.)

MR. WHITWORTH: If this jury -- if you all decide in your wisdom that a death penalty sentence is appropriate in this case, the judge must follow that. Make no mistake

about it. You're not killing anybody. The United States government will be the entity responsible for putting the defendant to death. And Congress has said that in a crime, in this kind of a rare crime, the death penalty may be appropriate. We submit to you that it is.

THE COURT: May I speak with counsel.

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING PROCEEDINGS WERE HAD:)

THE COURT: I don't think you've gone far enough, Mr. Whitworth. I think the instructions tell them that they are imposing the death penalty, and you can't say it any different from that. And I think you have. Now, I mean, you can correct it or I'll correct it.

MR. WHITWORTH: I'll correct it.

(THE PROCEEDINGS RETURNED TO OPEN COURT.)

MR. WHITWORTH: These instructions say there's no question that if you recommend the death penalty it will happen. It is an awesome responsibility. No question about that. But it's warranted in this case, and I'm not meaning to belittle that in any way whatsoever. It's a tough decision. We know that.

Now, you also may hear quotes from the Bible about mercy and forgiveness, and I submit to you that you need to ask yourself what mercy the defendant showed Pamela Butler when this happened. What mercy did he show?

You're going to hear name-calling about snitch witnesses. We don't also get to pick our witnesses. We used some inmates and, you know, members of the jury, sometimes we don't get to pick all our witnesses. That's who the defendant is living with right now. We called them because we thought you would want to hear that testimony. Sometimes -- there is an old phrase that's used, sometimes you have to deal with the sinners to get to the devil, and that's what we did. We are going to give them some consideration for their testimony, and we don't apologize for that.

Finally, I want to say in closing that we need to think about Pamela Butler here. We need to think about her family, her mother and father, her friends. Imagine the horror and the pain that they have suffered over the last two years as a result of losing this beautiful little girl, having her snatched from their lives, and this defendant did it and he needs to pay for it, and we submit to you that in this particular case, and we make this recommendation without reservation, that the death penalty is warranted.

I thank for your attention.

DEFENDANT'S CLOSING ARGUMENT

MR. BERRIGAN: May it please the court.

THE COURT: Mr. Berrigan.

THE COURT: Okay.

(THE PROCEEDINGS RETURNED TO OPEN COURT.)

THE COURT: I know you have been sitting there for a couple hours now. Why don't we take a brief recess before we wrap up the closing argument, and I mean brief, just an opportunity to go to the restroom and then we'll come back in and finish up. Shouldn't be much more time. Maybe another 15, 20 minutes, and then you'll have plenty of time to smoke cigarettes or do whatever you need to do.

I ask you not to discuss the case among yourselves or with others. About a ten minute break. Thank you. And leave the Instructions.

(Recess)

THE COURT: Is the government ready?

MR. MILLER: Thank you, Your Honor.

GOVERNMENT'S REBUTTAL ARGUMENT

MR. MILLER: Ladies and gentlemen, her name was Pamela Butler. She was ten years old. She loved her mother. She had freckles. Jenna Fries was her best friend. She liked to rollerskate. She was good at music. She was bad at spelling. She had a bright future. She was four foot eight tall. She taught Holly Woods about life. This case is about her. This case is about what he did to her.

You see, this case, ladies and gentlemen, is

not -- it's not about this (indicating.) No. It's not. What it is, is about this (indicating.) It's about a ten-year-old girl getting strangled.

And it's not about a photograph of a kid playing baseball because we know she'll never play baseball.

MR. BERRIGAN: I'm sorry. Your Honor, I'm sorry. That's not in evidence.

MR. MILLER: I'm sorry.

It's not about the other photographs that may have been introduced in evidence. It's about tears to a ten-year-old girl's hymen. Right there and right there (indicating.) No ten-year-old girl's hymen should look that way. Never. Never.

And they ask you why I show you these photographs. I will tell you why: Because that's what this case is about. It's about something horrific. It's about something evil. And I want you to go back there and think about that. I want you to think about our children and what he did to one of our children.

It is about this case, the slaughter, the slaughter of Pamela Butler. It is about the slaughter of a ten-year-old. It is about the slaughter of innocence. The slaughter of innocence.

You see, ladies and gentlemen, this case is also about choices. Counsel talked to you about the defendant's

background, and it was not pretty. It was ugly. And they talked to you about his childhood. And regardless of what he said to you, he seeks -- they want you to use it as an excuse, an excuse for the defendant's barbaric choice in this case. He's a bed-wetter. His mother was an alcoholic. His father was absent. The blame game. The abuse excuse. Put your foot down and say no. Say no.

He wants to tell you he's not responsible for his choices. Hold him responsible for his choices. It was somebody else's fault. That's what he wants you to think. It was everybody else's fault. It's not my fault. But, you see, Kenny Morse didn't kill that girl. Billy back in Fort Worth, he didn't kill that girl. He killed that girl.

His brothers and sisters were raised in the same environment -- or his brothers, excuse me, in the same environment as he was. Regardless of what their intellectual capacities were, maybe they were smarter, maybe they were quicker, but they chose, they chose not to kill a ten-year-old girl. Hold him responsible for his actions by imposing the only appropriate sentence in this case, and that is a sentence of death. To not do so not only denigrates the victim Pamela Butler, it denigrates his brothers in the sense they've done right, and it denigrates every other person, you heard the teacher talk, every other

person who had similar circumstances that's chosen to lead a lawful life.

Remember too, ladies and gentlemen, because somebody calls something mitigating doesn't make it mitigating. Wishing doesn't make it so. You see, you have to go through a process here. You have to first believe that he proved the proposition to you and that in fact it's mitigating.

For instance, here we have number nine, Keith Dwayne Nelson can be a positive influence on the life of his young son, counseling, teaching and caring for the boy as he grows up over the ensuing decades. Do you believe that was proven to you? What evidence showed you that that actually could happen. Do you believe somebody who kills a ten-year-old can be a positive influence on anybody?

He talks to you about the electrical cord. Was that proven to you? Did Kenny Morse beat Nancy Nelson? I bet you he did. There's no doubt in my mind and I don't think there's a doubt in any of your minds. Did he attach an electrical cord to her? No, he didn't. No, he didn't. Again, not something that's been proven to you. Moreover, it's not proven that anybody actually knew about it, that it actually occurred.

THE COURT: Let me interrupt you, Mr. Miller. Can I speak to counsel.

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING PROCEEDINGS WERE HAD:)

THE COURT: I think you've had that displayed --

MR. MILLER: I'm sorry, Judge. I didn't do it on purpose.

(THE PROCEEDINGS RETURNED TO OPEN COURT.)

MR. MILLER: And when you go through the weighing process ask yourself what mitigates against the rape and cold-blooded murder of a child? What mitigates against the utter contempt, the utter contempt he showed for this ten-year-old girl? Nothing. Absolutely nothing mitigates against that kind of an action. See, a lousy childhood may explain why somebody steals. It may explain why somebody drinks. It may actually explain why somebody becomes a drug dealer. But this is a case of the murder of a ten-year-old girl, and it doesn't explain that.

See, ladies and gentlemen, sexual murders of children, as Dr. Cunningham said, are rare. He committed this act not because his parents were abhorrent, and they were. He committed it because he is rotten at his core. He is a rotten human being. He is bad. And sometimes people are bad.

The mitigating evidence in this case is nothing more than a smoke screen. It's an attempt to divert you from what this case is really about, the slaughter of an

innocent.

What they want you to do is have him escape justice. Don't do that. Sometimes the act standing alone, the act, because it is so senseless, because it is so brutal, because it is so savage, that act standing alone, regardless of what else goes on in somebody's life, means that they deserve the death penalty.

Counsel's plea at the end of his argument to you is one for mercy. It was a plea for mercy. Don't confuse mercy with weakness. Don't confuse the natural tendency of decent persons like yourselves to be kind to other people. You have an obligation to uphold the law, and that takes courage.

Mercy. Mercy. Under what twisted notion of fairness would a society reward its most vicious members? Mercy ceases to be a concept worthy of a civilized nation if it is not reserved for those truly unfortunate cases. A mother steals to feed her children. Kenny Nelson steals to feed his brothers. A man commits a robbery to obtain money for his mother's sickness. To those persons you show mercy. You do not excuse their behavior, but you recognize that it is deserving of special treatment.

Do you show mercy for somebody who beat a ten-year-old girl, hit her in the mouth, hit her in the head, left contusions on her brain? Do you show mercy for

a man who dragged a ten-year-old girl, a helpless ten-year-old girl through the woods, sticks ripping into her body, to unleash in that area, that area of the remote woods, to unleash the most savage and vile acts imaginable upon her? Do you show mercy for that person? Do you show mercy for a person who derives some kind of sick pleasure from reliving his brutal acts in his jail cell? Do you show mercy for a man who would violate a ten-year-old girl for some unholy and wanton purpose? My God, a ten-year-old girl.

Would you show mercy for a man who takes an electrical cord and puts it around the neck of that ten-year-old, and as she cries for her mother makes it tighter and tighter and tighter and tighter? Do you want to show mercy for that person? Do you want to show mercy for a man who shows absolutely no remorse, who plays video games within hours, within hours of killing and raping a ten-year-old girl?

Mr. Berrigan argued to you that the tape shows some sort of remorse. It does not show remorse. It shows regret. Regret that he got caught. If you want to know what's really going on in that tape, listen to the very end of it. Listen to the very end, because the minute Kerri Dillion gets off that phone, boom, his demeanor changes immediately and he goes back to the same old Keith Nelson,

the same Keith Nelson that abducted a ten-year-old girl on October 12th, 1999.

Ladies and gentlemen, for all those reasons you do not show mercy for this person.

People who do good, people who are good, they deserve good things to happen to them. Pamela Butler deserved good things. She deserved to grow up. She deserved to go to prom. She deserved to get married. She deserved to have a career, because she was good at her core.

People who are evil, people who do evil, they deserve justice, and in this case, this man who is evil at his core, can only have justice -- or justice can only be imposed by the death penalty. There is no clearer call for the death penalty than there is in this case.

This is how Pamela Butler looked just one day before she died (indicating.) That's how she looked. See the smile on her face. That was one of the last smiles she ever had.

And I'm going to ask you now, please close your eyes. Every one of you, please close your eyes, and I want you to envision her skating. Really think about it. And I want you to envision now the smile on her face. I want you now to envision the horror on her face as she's abducted. I want you to envision the look on her face as she is

dragged across the woods. I want you to envision the look on her face, really think about it, as her clothes are ripped from her, as she is ravished, as he mounts this ten-year-old girl, and she's crying, crying for her mother. Think of the look on her face. My God. My God. Think of the horror on her face as that cord goes around her and he squeezes every ounce of innocence out of her.

Please open your eyes.

But think of those things. When you go back there, this is exactly what the government asks you to think about, because this, ladies and gentlemen, this is no way for a ten-year-old girl to go to heaven. It just ain't right.

As you sit there, you are simply not twelve people. You are the conscience of the community. You represent the people of the United States in this case. You are the dispensers of justice. It's not His Honor. Judge Gaitan has to do what you do. It's not the government. You and you alone are the dispensers of justice, and Cherri West waits for you to at least give her some justice. She can't have all justice because her daughter is gone. But you have the ability to give her some justice. And justice in this case can only be had by imposing a sentence of death.

Ladies and gentlemen, the death penalty was

enacted for crimes like this. Make no mistake. It was meant for the murder of children. Because if not him, who? If not now, when? If killing and raping a kid isn't enough, then we don't need a death penalty. We don't need a death penalty.

In a minute, you will begin your deliberations. Recognize that, unlike the victim, he will not be taken to some remote area in the woods. He will not be abducted. He will not be strangled. He will not be sodomized. He will not be left in some field somewhere. He will have time, he will have time to make amends with his God.

Justice in this case, if you look at the crime and you look at the defendant, justice in this case, ladies and gentlemen, absolutely demands, it absolutely demands the imposition of the death penalty. Do nothing less. And when you do, when you go back into that jury room, remember this face. Remember her name was Pamela Butler and she was ten years old.

Thank you.

THE COURT: Okay, ladies and gentlemen of the jury, in just a moment I will be recessing in order that you may begin your deliberations upon your verdict in this case.

Before doing so, I'm going to excuse the alternates, and I mention the word "excuse" because I'm not