No. 19-5568

IN THE SUPREME COURT OF THE UNITED STATES

KEITH D. NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

# BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

JOHN M. PELLETTIERI
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the lower courts erred in denying postconviction relief on petitioner's claim that his trial counsel was ineffective for not investigating and presenting additional evidence of petitioner's mental health and sexual abuse he suffered as a child as mitigation evidence at his capital sentencing hearing.

2. Whether the court of appeals impermissibly referred petitioner's request for a certificate of appealability to a three-judge panel for disposition by majority vote.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Mo.):

Nelson v. United States, No. 04-CV-8005 (July 27, 2015)

United States v. Nelson, No. 99-CR-303 (Dec. 20, 2012)

United States Court of Appeals (8th Cir.):

United States v. Nelson, No. 02-1757 (Dec. 24, 2003)

Nelson v. United States, No. 07-3071 (Oct. 27, 2008)

United States v. Nelson, No. 12-4025 (Oct. 1, 2013)

Nelson v. United States, No. 15-3160 (Mar. 11, 2019)

Supreme Court of the United States:

Nelson v. United States, No. 03-10620 (Jan. 10, 2005)

IN THE SUPREME COURT OF THE UNITED STATES

______________

No. 19-5568

KEITH D. NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

_______________

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

_______________

BRIEF FOR THE UNITED STATES IN OPPOSITION

_______________

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 909 F.3d 964. The order of the district court (Pet. App. 34a-86a) is reported at 97 F. Supp. 3d 1131.

## JURISDICTION

The judgment of the court of appeals was entered on November 28, 2018. A petition for rehearing was denied on March 11, 2019. On June 5, 2019, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including August

8, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Missouri, petitioner was convicted on one capital count of kidnapping resulting in death, in violation of 18 U.S.C. 1201(a)(1). Pet. App. 4a-5a. Petitioner received a capital sentence. Id. at 5a. The court of appeals affirmed. 347 F.3d 701. Petitioner subsequently filed a motion under 28 U.S.C. 2255 to set aside, reduce, or vacate his sentence. The district court denied the motion, Pet. App. 34a-86a, and the court of appeals affirmed, id. at 1a-30a.

1. On September 29, 1999, petitioner told a coworker that he wanted to kidnap a woman and take her outside the city to torture, rape, electrocute, kill, and bury her. Pet. App. 2a. Petitioner stated that he expected to go back to prison for other charges regardless and that he "ought to go back for something big." Id. at 2a, 19a. The coworker dismissed petitioner's statements as a crude joke and did not report them to the police. Id. at 2a.

Three days later, petitioner attacked and attempted to abduct medical student Michanne Mattson. Pet. App. 2a, 20a. Petitioner followed Mattson in his truck until she parked her car in the parking lot of her apartment complex. Id. at 2a-3a. As Mattson

approached the front door, petitioner rushed up behind her, grabbed her, placed an eight-inch knife to her throat, forced a handcuff on her left wrist, and proceeded to drag her through the parking lot toward his truck as she struggled to free herself. Id. at 3a, 20a. Petitioner repeatedly threatened to kill Mattson or slit her throat if she made any noise. Id. at 20a. Mattson managed to escape petitioner's grasp and began to cry for help, at which point petitioner fled. Ibid.

On October 12, 1999, petitioner told another acquaintance about a girl whom he wanted to kidnap, rape, torture, and kill. He stated that "now was the time to do it." Pet. App. 3a, 20a. Approximately an hour later, petitioner parked his truck on the street near the home of 10-year-old Pamela Butler. When Pamela rollerskated by, petitioner jumped out, grabbed her around the waist, threw her in the truck, and drove away. Id. at 3a, 21a. As he fled with Pamela, petitioner drove past screaming witnesses -- including Pamela's 11-year-old sister -- and "flipped [them] off." Id. at 21a (citation omitted; brackets in original). One witness chased petitioner in his own vehicle and, despite losing him, managed to record the license plate number of petitioner's truck. Id. at 3a, 21a.

Following the abduction, petitioner assaulted Pamela, vaginally raped her, and strangled her to death with wire. Pet. App. 4a, 22a-23a. He deposited Pamela's corpse in a wooded area

behind a church. Id. at 3a-4a, 22a. At around 8 p.m. that evening, petitioner went to his mother's house, and together they drove to a bar a block and a half from the scene of the kidnapping. Id. at 21a. Petitioner played video games while his mother drank. Ibid. Petitioner and his mother later went to the home of petitioner's girlfriend, where they saw news of Pamela's abduction broadcast on television. Ibid. Petitioner displayed no anxiety, remorse, grief, or other reaction. Ibid. A neighbor of his mother saw him later that night wiping the dashboard and underneath areas of his truck while glancing up and down the street. Id. at 22a.

Investigators commenced a manhunt for petitioner. Pet. App. 4a. At 9 a.m. on October 13, 1999, petitioner's truck was found abandoned ten blocks from his residence. Id. at 4a, 22a. On October 14, members of the public spotted petitioner hiding under a bridge, and apprehended him until the police arrived. Ibid. After the police took petitioner into custody, an onlooker shouted, "What about the girl?" Id. at 22a (citation omitted). Petitioner looked at the arresting officer and said, "I know where she's at, but I'm not saying right now." Ibid. (citation omitted).

Investigators found Pamela's body the following day, buried under a pile of brush. Pet. App. 22a. A wire ligature was wrapped around her throat. Ibid. An autopsy revealed numerous scrapes and abrasions and blunt force trauma to her mouth and head. Her genital area was red and irritated and her hymen had been torn

near the time of her death. Petitioner's semen (confirmed by DNA analysis) was found in the crotch area of her underpants. Id. at 23a.

2. A federal grand jury returned an indictment charging petitioner with one capital count of kidnapping resulting in death, in violation of 18 U.S.C. 1201(a)(1), and one capital count of murder in the course of crossing state lines with intent to engage in a sexual act with a child under the age of 12, in violation of 18 U.S.C. 2241(c) and 2245. Pet. App. 4a-5a. The government provided notice of its intent to seek the death penalty. Id. at 72a. Petitioner pleaded guilty to the count of kidnapping resulting in death, in violation of 18 U.S.C. 1201(a)(1), leaving a jury to determine whether he should receive a death sentence in accordance with the Federal Death Penalty Act of 1994, 18 U.S.C. 3591 et seq. See Pet. App. 5a. Under the Act, a death sentence is warranted only if the jury determines that the aggravating factors proved by the government outweigh any mitigating factors proved by the defendant. See United States v. Lee, 715 F.3d 215, 219 (8th Cir. 2013), cert. denied, 574 U.S. 834 (2014).

At the penalty-phase hearing, the government argued that six aggravating factors supported a death sentence: (1) Pamela's death occurred during the commission of a kidnapping; (2) petitioner committed the offense in an especially heinous, cruel, or depraved manner by torturing or causing serious physical harm to Pamela;

(3) petitioner committed the murder after substantial planning and premeditation; (4) Pamela was a particularly vulnerable victim due to her youth; (5) petitioner had a significant criminal history, including felony convictions for burglary and stealing; and (6) petitioner would be a danger to others in the future, as evidenced, inter alia, by his stated desire to kidnap and torture other girls. See Jury Instructions 24-30; Trial Tr. 1116-1123.

In support of those aggravating factors, the government presented testimony from 30 witnesses. Pet. App. 19a. A number of those witnesses testified in detail about petitioner's attempted abduction of medical student Michanne Mattson and his kidnapping, rape, and murder of Pamela. See id. at 19a-26a, 35a-40a. One prison inmate housed with petitioner testified to conversations in which petitioner expressed his desire to commit additional kidnappings and rapes and to construct a torture cell to hold future victims captive. Id. at 23a-24a, 72a. Another inmate testified about three separate occasions on which he overhead petitioner mimicking Pamela's pleas for mercy. Id. at 24a. The jury also heard evidence about petitioner's prior convictions for stealing and attempted escape from custody, as well as his escape efforts while in custody in this case, including unraveling a section of the prison fencing and fashioning two workable handcuff keys. Id. at 25a, 73a. The government presented evidence that while detained for Pamela's murder petitioner had

also beaten a correctional officer in an unprovoked assault and threatened to kill another correctional officer. Ibid. Finally, Pamela's family members testified about the impact of her loss. Id. at 73a.

Petitioner claimed ten mitigating factors. See Jury Instructions 33-34. He argued that (1) he was subjected to physical and emotional abuse as a child that permanently altered his psyche and personality; (2) he suffered parental neglect that contributed to a sense of self-worthlessness and depression; (3) he had demonstrated affection and good judgment toward the son of his former girlfriend; (4) he was a devoted son to his mother; (5) he was a loyal and faithful brother to his siblings; (6) he had been a hardworking and dedicated employee and financially responsible for his former girlfriend and her son; (7) he had admitted guilt and pleaded guilty without any promise or expectation of leniency; (8) he would have a low risk of violent behavior in prison and would be able to live the rest of his life peacefully and productively; (9) he could be a positive influence on his own son in the future; and (10) he could become a better person through years of contrition if allowed to live. Ibid.

In support of those asserted mitigating factors, petitioner presented evidence about his family and upbringing from several witnesses, including his mother and two brothers. His evidence demonstrated that petitioner's family had a history of physical

abuse, alcohol abuse, and mental illness. See Pet. App. 12a-15a, 40a-45a. It also showed that petitioner suffered an extremely difficult childhood. He was born prematurely and remained in the hospital for several weeks because of trouble breathing. Trial Tr. 613-614. Petitioner's father physically abused his mother, causing her to flee to a different State with the children. She herself was an alcoholic who largely neglected her children, and the family lived in squalor. Petitioner spent part of his time with a babysitter whose alcoholic husband abused him and his brothers. Petitioner struggled at school and had a bed-wetting problem. See Pet. App. 12a-15a, 40a-45a.

Petitioner also presented expert testimony from Dr. Mark Cunningham, a forensic and clinical psychologist. See Pet. App. 44a-45a. Dr. Cunningham "explained to the jury how the squalid conditions and abusive and violent nature of [petitioner's] childhood affected the formation of [his] character." Id. at 45a. He identified "factors that would have been damaging to [petitioner] across his development," specifically mentioning the "serious mental illness on both sides of [petitioner's] family"; his mother's alcoholism; his "[e]motional neglect and inadequate supervision and guidance"; his "[p]hysical abuse"; his exposure to "domestic violence in the household"; and his "[l]earning disability," "[p]robable attention deficit hyperactivity disorder," and "[p]eer isolation and alienation." Trial Tr. 994-

995. Dr. Cunningham testified that all of these factors and others likely contributed to petitioner's criminal conduct. See id. at 994-1025.

The jury unanimously determined that the evidence established all of the aggravating factors alleged by the government. Gov't C.A. Br. 20. One juror found the existence of one of the mitigating factors asserted by petitioner -- namely, that he was "subjected to physical and emotional abuse as a small child [that] permanently altered [his] psyche and personality and detracted from his ability to be a successful and insightful adult." See Pet. App. 75a-76a (citation omitted). No jurors found the existence of any of the other nine mitigating factors alleged by petitioner. Id. at 76a. After weighing the aggravating and mitigating factors, the jury unanimously voted in favor of a death sentence. Trial Tr. 1167-1168.

At the sentencing hearing, the district court granted petitioner the opportunity to address the court. Petitioner "show[ed] no remorse for what he had done" and "blistered the district court and the victim's family with a profanity laden tirade." Pet. App. 24a. He declared that "[i]t's not that hard" to kill a ten-year-old girl, that Pamela's family members were disingenuous and were not actually "sad" or "depressed," and that he would "never bow down to the system." Gov't C.A. Br. 20-21. The district court imposed the death sentence. Pet. App. 5a.

3. The court of appeals affirmed petitioner's sentence on direct appeal, 347 F.3d 701, and this Court denied certiorari, 543 U.S. 978. Petitioner then filed a motion under 28 U.S.C. 2255 to set aside, reduce, or vacate his sentence.

The district court initially denied the petition without a hearing, and petitioner filed an application in the court of appeals for a certificate of appealability (COA) on 60 separate issues. Pet. App. 5a. The court of appeals granted the COA on six ineffective-assistance-of-counsel claims, including that petitioner's lawyers (1) failed to conduct an adequate mitigation investigation; (2) failed to conduct an adequate investigation of petitioner's mental health; (3) advised petitioner not to submit to a government mental-health examination; (4) failed to object to improper comments by the government during closing arguments; (5) failed to conduct an adequate review of the law and trial record on appeal; and (6) failed to raise on appeal the claim that the government made improper comments during closing. Id. at 6a. The court of appeals concluded that an evidentiary hearing was necessary to resolve those claims and remanded to the district court. 297 Fed. Appx. 563, 565.

On remand, the district court held a four-day hearing. Pet. App. 36a. As relevant here, the court received testimony that petitioner was sexually abused as a child. See id. at 18a-19a. It also heard from several mental-health experts, including one

called by the government. See id. at 9a-12a, 56a-58a, 74a-75a. Petitioner's witnesses testified that he suffered from damage to his frontal lobe, "the part of the brain key to regulating behavior and impulse control." Id. at 9a; see id. at 9a-12a, 74a-75a. Dr. Xavier Amador, a clinical and forensic psychologist, also testified that petitioner suffered from "psychotic disorder." Id. at 11a. The government's mental-health witness, Dr. Dan Martell, a forensic neuropsychologist, agreed that petitioner suffered from damage to his frontal lobe, id. at 11a-12a, 25a-26a; Hearing Tr. 643-644, but explained that the damage did not significantly contribute to petitioner's criminal conduct, which reflected "planning as opposed to impulsive acting out." Pet. App. 25a.

Following the hearing, the district court denied relief. Pet. App. 34a-86a. The court observed that under Strickland v. Washington, 466 U.S. 668 (1984), petitioner "must show both deficient performance by counsel and prejudice" to prevail on an ineffective-assistance claim. Pet. App. 36a (citation omitted). It first found that defense counsel had not rendered ineffective assistance by failing adequately to investigate petitioner's background for mitigating evidence. Id. at 37a-52a. The court emphasized that "counsel conducted a thorough mitigation investigation and presented a comprehensive mitigation case to the jury," id. at 51a, that the investigation firm retained by defense counsel "spent over 400 hours working on [petitioner's] case,"

ibid., and that "the mitigation case was presented over a period of two days and [petitioner's] attorneys called seventeen witnesses," ibid. And the court explained that petitioner's postconviction counsel had "not uncovered any 'powerful' new evidence," but had "simply discovered a larger quantity of mitigation evidence." Id. at 52a.

The court next determined that defense counsel had not rendered ineffective assistance by failing to obtain or introduce the results of mental-health testing at petitioner's sentencing hearing. Pet. App. 52a-76a. The court concluded that counsel performed deficiently by failing to procure any assessments of "whether [petitioner] suffered any brain damage, dysfunction or other cognitive impairments." Id. at 66a. But the court found that petitioner was not prejudiced by his counsel's deficient performance. Id. at 66a-76a. The court "considered 'the totality of available mitigation evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding -- and reweigh[ed] it against the evidence in aggravation.'" Id. at 75a (quoting Sears v. Upton, 561 U.S. 945, 955-956 (2010) (per curiam)) (brackets in original). "After reweighing the evidence, the Court [was] convinced that the result would have been the same." Ibid. The court noted that only a single juror had found the existence of a single mitigating factor, and determined that "the aggravating evidence of the crime and the victim impact testimony was simply

too overwhelming" for the new mitigating evidence to move the needle. Id. at 75a-76a.

The court also rejected petitioner's ineffective-assistance claim based on his lawyer's failure to object to improper closing arguments or to challenge those arguments on appeal. Pet. App. 77a-82a. The court found that any resultant prejudice was sufficiently cured by defense counsel's closing arguments and the court's jury instructions. Id. at 79a-82a.

4. Petitioner sought a COA from the court of appeals, which, pursuant to circuit procedures, referred the motion to a three-judge panel for disposition by majority vote. See 8th Cir. Internal Operating Procedure I.D.3. The court initially denied petitioner's application, but subsequently granted a petition for panel rehearing. Pet. App. 7a, 31a-33a. As relevant here, it ultimately granted a COA on whether petitioner received ineffective assistance because his lawyers failed adequately to investigate mitigation evidence, failed to obtain mental-health evidence, and instructed him not to submit to a government mental-health exam. Id. at 7a. Judge Wollman would have also granted a COA on the claim relating to improper closing arguments. Id. at 32a n.1. Judge Smith would have denied the application in its entirety. Ibid.

The court of appeals then affirmed the district court's denial of relief. Pet. App. 1a-30a. In rejecting his ineffective-

assistance-of-counsel claims, the court determined that, even assuming petitioner had shown deficient performance by counsel, he had not shown the prejudice necessary to prevail under Strickland. Pet. App. 8a-9a. The court reviewed in detail the mitigating evidence that petitioner introduced at trial and on collateral review, id. at 9a-19a, and, citing this Court's decisions in Porter v. McCollum, 558 U.S. 30 (2009) (per curiam), and Wiggins v. Smith, 539 U.S. 510 (2003), the court reweighed that evidence against the aggravating evidence, Pet. App. 19a-27a. It emphasized that "the jury heard substantial mitigating evidence," which the court again summarized. Id. at 26a-27a. The court of appeals found "no reasonable probability" that the jury would have reached a different verdict had the additional mitigating evidence been introduced at petitioner's trial. Id. at 27a. The court instead determined, on its review of the record, "that the result would have been the same." Id. at 26a.

ARGUMENT

Petitioner contends (Pet. 10-19) that he received ineffective assistance of counsel because his lawyers failed to investigate and present certain mitigating evidence. He also contends (Pet. 19-22) that the court of appeals was required to grant a COA on his claim relating to improper closing arguments based on Judge Wollman's dissent from the denial of one, and that this Court's review is warranted because the courts of appeals have adopted

different circuit procedures for addressing applications for a COA. The decision below was correct, and any variability in the courts of appeals' procedures for addressing COAs does not warrant this Court's review. The petition for a writ of certiorari should be denied.

1. Petitioner renews his claim that his trial counsel was defective for failing to collect and present additional mitigation evidence pertaining to brain damage and sexual abuse he suffered as a child. The court of appeals' factbound determination, which petitioner does not allege to be in conflict with any decision of another circuit, was correct and does not warrant additional review.

a. Under Strickland v. Washington, 466 U.S. 668 (1984), an ineffective-assistance claim "has two components." Wiggins v. Smith, 539 U.S. 510, 521 (2003). First, the defendant must show that his counsel's performance was deficient by demonstrating that it "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. As a general matter, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. Next, the defendant must "affirmatively prove prejudice," by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 693-694.

In Sears v. Upton, 561 U.S. 945 (2010) (per curiam), this Court explained "the proper prejudice standard for evaluating a claim of ineffective representation in the context of penalty phase mitigation investigation." Id. at 956. In that context, the defendant must show "a reasonable probability that [the jury] would have returned with a different sentence" had it been presented with the additional mitigation evidence that the defendant claims his trial counsel should have uncovered and presented. Wiggins, 539 U.S. at 536. In determining whether the defendant has made such a showing, the court must "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." Sears, 561 U.S. at 955-956 (citations omitted; brackets in original). The Court has emphasized that the prejudice inquiry in this context is a "probing and fact-specific analysis" and "will necessarily require a court to 'speculate' as to the effect of the new evidence." Ibid.

b. Petitioner contends (see, e.g., Pet. 11, 14) that the court of appeals used the wrong standard to evaluate his claim of prejudice. But as required by this Court's precedents, the court of appeals "reweighed the totality of the available mitigation evidence -- both that offered at trial and that offered at the evidentiary hearing -- against evidence in aggravation to determine wither a reasonable probability exists that [petitioner]

would have received a different sentence." Pet. App. 26a (citing Porter v. McCollum, 558 U.S. 30, 41 (2009) (per curiam)). Petitioner cannot quarrel with this analytical framework, which is black-letter law. See Sears, 561 U.S. at 955-956.

Contrary to petitioner's assertions, the court of appeals did not "conclude[] there could be no prejudice because [petitioner's] jury heard some other mitigating evidence at trial," Pet. 11, or "that the nature of the crime necessarily precluded a finding of Strickland prejudice and that a sentence of death was inevitable under any conceivable circumstances," Pet. 14. Instead, the court carefully evaluated the evidence adduced at trial and on collateral review in performing the weighing required by this Court's precedents and finding no reasonable probability that the jury would have reached a different outcome had it received the additional evidence adduced on collateral review. See Pet. App. 9a-26a. Nothing in the court's analysis deviated from the governing standard.

c. Petitioner also errs in arguing that the court of appeals applied the governing standard incorrectly to the facts of this case by giving short shrift to the new mitigating evidence.

Petitioner first points (Pet. 11-12) to additional evidence that he was sexually abused as a child. But the jury heard considerable evidence concerning petitioner's difficult childhood, both with respect to abuse and more generally. The jury heard

that petitioner was physically abused both by his father and a babysitter's husband. Pet. App. 14a-15a. It also heard that petitioner's mother was an alcoholic who largely neglected petitioner and his siblings, and that as a result the family lived in squalid conditions. Id. at 12a-13a. A clinical and forensic psychologist testified that the difficulties petitioner suffered during his childhood contributed to his character and development. Id. at 15a. The additional sexual-abuse evidence on which petitioner now relies would not have been reasonably likely to produce a different outcome than the "substantial mitigating evidence" presented at trial did. Id. at 26a.

In any event, the district court found that defense counsel did not perform deficiently by failing to obtain or present additional evidence about petitioner's troubled upbringing, which includes the evidence about sexual abuse. Pet. App. 45a-52a. The court observed that petitioner's counsel "conducted a thorough mitigation investigation and presented a comprehensive mitigation case to the jury"; one investigation firm alone devoted "over 400 hours" to the case, and "the mitigation case was presented over a period of two days and [petitioner's] attorneys called seventeen witnesses to testify on his behalf." Id. at 51a. In light of this finding, even a reversal on the prejudice prong would likely not save petitioner's Section 2255 petition.

Petitioner also points to evidence that he suffers from cognitive impairment and damage to his frontal lobe, possibly as a result of complications at the time of his birth and his mother's alcoholism, which his witnesses testified would affect his impulse control. See Pet. App. 9a-12a, 74a-75a. But as both the district court and the court of appeals found, that evidence would likewise not have changed the outcome. The crime that petitioner committed resulted from planning and patience rather than impulsivity. See id. at 58a. Petitioner initially formulated a plan to kidnap and torture a female, and then attempted to execute that plan on Michanne Mattson. When this first attempt was foiled, Nelson selected another victim and abducted her ten days later, taking her to a secluded area before raping and murdering her. Ibid. He acted to avoid being identified as he drove away, wiped the truck clean, abandoned it, and then absconded. Ibid. He expressed no remorse afterward, and instead told another inmate about plans to commit similar crimes in the future -- crimes that he could have been in a position to commit had his sophisticated efforts to escape from prison not been foiled. Id. at 21a, 23a-25a. Even if the jury heard and credited testimony about a lack of "impulse control," Pet. 13 (internal quotation marks omitted), no reasonable probability exists that it would have viewed this crime to be a product of it, or considered petitioner any less culpable or dangerous because of it.

To the extent that petitioner suggests that new evidence about "childhood sexual abuse" or "mental health" is "uniquely compelling" and "persuasive," so as to categorically require resentencing, Pet. 11-12, that suggestion is ill-founded. Like any other mitigating evidence, both categories of evidence must be weighed in light of all the other mitigating and aggravating evidence. See, e.g., Bobby v. Van Hook, 558 U.S. 4, 12 (2009) (per curiam) (rejecting prejudice claim despite additional mitigating evidence pertaining to childhood physical abuse); Schriro v. Landrigan, 550 U.S. 465, 480 (2007) (rejecting prejudice claim despite evidence that petitioner "may * * * have been genetically predisposed to violence," "was exposed to alcohol and drugs in utero, which may have resulted in cognitive and behavioral deficiencies," and "was abandoned by his birth mother and suffered abandonment and attachment issues") (citation omitted). And that case-specific inquiry supports the judgment below here.

Neither the new evidence of mental health nor the new evidence of sexual abuse could overcome the overwhelming evidence of aggravation presented by the prosecution. The aggravating evidence included the "horrific facts of the case" (Pet. App. 72a), but was not limited to them. The jury also heard evidence regarding petitioner's complete lack of remorse, including his mimicry of Pamela's pleas for mercy; his ongoing aspirations to rape, torture, and murder women on a systematic basis; his prior

attempted rape and murder of Michanne Mattson; his violent behavior in prison, including the assault of a correctional officer; and his multiple prior criminal convictions, including for attempting to escape from custody. Id. at 68a-73a. The jury unanimously determined that the evidence established all of the aggravating factors alleged by the government. Gov't C.A. Br. 20. No reasonable probability exists that the additional mitigation evidence petitioner now advances would have caused the jury to reach a different result.

2. Petitioner separately contends (Pet. 19-23) that the court of appeals was required to grant a COA on his ineffective-assistance claim regarding allegedly improper closing arguments because one judge on the three-judge panel that considered his application voted in favor of granting the COA on that claim. Petitioner further contends (Pet. 20-23) that this Court's review is warranted because practices in the courts of appeals differ as to whether the vote of a single judge is sufficient to mandate the issuance of a COA. Both contentions lack merit.

a. Section 2253 of Title 28 provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from * * * the final order in a proceeding under section 2255." 28 U.S.C. 2253(c)(1). It further provides that "[a] certificate of appealability may issue under paragraph (1) only if the applicant

has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). To satisfy that standard, an applicant must show that the district court's "resolution [of the postconviction claims] was debatable amongst jurists of reason." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

b. Petitioner's primary contention (Pet. 19) is that Section 2253 should be read to permit an appeal any time a single circuit judge on a multi-judge panel evaluating an application for a COA votes in favor of granting a COA. That contention is foreclosed by this Court's precedents. In Hohn v. United States, 524 U.S. 236 (1998), this Court "construe[d] [Section] 2253(c)(1) as conferring the jurisdiction to issue certificates of appealability upon the court of appeals rather than by a judge acting under his or her own seal." Id. at 245. And this Court has also held that the courts of appeals may adopt differing local procedures for issuing COAs. The predecessor version of Section 2253 stated that "[a]n appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding * * * unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." 28 U.S.C. 2253 (1952). Interpreting that provision in In re Burwell, 350 U.S. 521 (1956) (per curiam), this Court refused to "lay down a procedure for the Court of Appeals to follow for the entertainment of such applications on their merits." Id. at 522.

The Court made clear that "[i]t is for the Court of Appeals to determine whether such an application to the court is to be considered by a panel of the Court of Appeals, by one of its judges, or in some other way deemed appropriate by the Court of Appeals within the scope of its powers." Ibid. The Court emphasized that "[i]t is not for this Court to prescribe how the discretion vested in a Court of Appeals, acting under [28 U.S.C. 2253], should be exercised." Ibid.

Burwell's holding remains good law. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 105, 110 Stat. 1220, amended Section 2253 to its current form by, inter alia, replacing the phrase "certificate of probable cause" with "certificate of appealability" and expanding the provision's coverage to encompass both state and federal prisoners. But none of those changes modified the provision's basic structure or those aspects of its language relevant to the question presented here. This Court in Hohn cited both Burwell and local circuit practices in construing the amended Section 2253. 524 U.S. at 242-243, 245. And the Federal Rules of Appellate Procedure provide that "[a] request [for a COA] addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes." Fed. R. App. P. 22(b)(2) (emphasis added).

In light of this framework, petitioner errs in asserting (Pet. 23) that the differing practices adopted by the circuits for

evaluating requests for COAs present a "circuit split" for this Court to "resolve." The statutory framework, as interpreted by this Court in Burwell and further elaborated in the Federal Rules, expressly anticipates that circuits will independently adopt their own procedures for addressing COAs. See Hohn, 524 U.S. at 242 ("[E]very Court of Appeals except the Court of Appeals for the District of Columbia Circuit has adopted Rules to govern the disposition of certificate applications."). The Eighth Circuit accordingly had authority to refer petitioner's request for a COA to a three-judge panel for disposition by majority vote. See 8th Cir. Internal Operating Procedure I.D.3.

c. In a variant on his first argument, petitioner contends (Pet. 23) that Judge Wollman's vote to grant a COA on the additional ineffective-assistance claim in itself renders that claim "debatable" under Miller-El, 537 U.S. at 336, thus entitling him to a COA. But as discussed, Burwell expressly permits courts to adopt differing procedures for resolving requests for COAs, including "by a panel of the Court of Appeals" or by "one of its judges," 350 U.S. at 522, and assigning a request to a panel does not mean that the applicant has three independent opportunities for the COA to be granted. In any event, a disagreement among judges about the threshold question of debatability does not automatically mean that the underlying merits question is similarly debatable. See Miller-El, 537 U.S. at 336. Even if

disagreement amongst judges could qualify as one indicium of whether the threshold standard is satisfied, depending on context -- such as the strength of the disagreement, or the persuasiveness of the dissenter's reasoning -- petitioner offers no reason to think that the panel erred in denying the COA on his additional claim here.

The sole decision petitioner cites on the "debatability" issue is not to the contrary, as it merely invokes dissent as indicative of debatability in the circumstances of that particular case, which involved a dissent on the merits in an earlier direct appeal where the dissenter contended the error was "glaring." Order at 2, Shields v. United States, No. 15-5609 (6th Cir. Nov. 4, 2015) (cited at Pet. 22). Petitioner identifies no decisions that categorically treat dissent of any kind as satisfying the debatability threshold or that reached a different outcome on facts and legal arguments similar to those here.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

JOHN M. PELLETTIERI
Attorney

JANUARY 2020