No. 19-5568

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

REPLY TO BRIEF IN OPPOSITION

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REPLY TO THE BRIEF IN OPPOSITION

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

In its opposition, the government demonstrates a misunderstanding of this court's precedents on the importance of mitigating evidence in a capital case and understates the weight and significance of the mitigating evidence in this case that was never heard or considered by the jury that sentenced petitioner to death, evidence that raised the reasonable probability of one or more jurors voting for life instead of death.

1. The Government asserts that the compelling evidence presented by Petitioner at the § 2255 hearing would, in essence, have made no difference to the jury which sentenced Petitioner to death. (Opp. at 15-16.) This position ignores case law and fails to take into account the nature and quality of that evidence and that this a case brought pursuant to the Federal Death Penalty Act of 1994 ("FDPA"), where changing the vote of a single juror would mean a life sentence. (*See* Petition at 3-8.)

Notably, the Government fails to comment on the reality that its own expert neuropsychologist testified at the § 2255 hearing that he agreed with the conclusions of the experts presented on Petitioner's behalf that Petitioner indeed suffered from frontal lobe brain damage. Instead, the Government retreats to and reiterates an improper "nexus" argument, noting that the expert in question opined that the brain damage did not relate to the underlying crime committed. (Opp. at 19.) However, as

discussed below, such an argument should carry no persuasive weight since this Court in *Smith v. Texas*, 543 U.S. 37 (2004) and then in *Tennard v. Dretke*, 542 U.S. 274 (2004) flat out rejected any such requirement. The Government does not acknowledge that Dr. Martell, its expert neuropsychologist did acknowledge that evidence of brain damage is mitigating, even if it has no connection to the offense. (HT 657-58.) This was, of course, an accurate precis of the law of mitigation.

It is significant to this analysis that this is a federal capital prosecution brought pursuant to the FDPA. 18 U.S.C. §§ 3591-3599. The FDPA requires that a capital jury's decision on punishment be unanimous "whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence." 18 U.S.C. § 3593(e)(3).

In *Jones v. United States*, 527 U.S. 373 (1999), this Court resolved the issue of what occurs if the jury does not reach unanimity on the issue of punishment. Construing congressional intent, this Court concluded that in that circumstance the sentencing function reverts to the trial judge who may not impose a sentence of death. *Id.* at 380-81. Thus, in terms of what prejudice standard should apply to a finding of ineffective assistance of counsel in a federal capital case, the reviewing court should decide whether the evidence would have created a reasonable probability that the sentencing calculus of any one or more members of the sentencing jury would have yielded a life vote. As *Jones* held, even a single vote for life, or any conclusion of federal penalty phase deliberations that is anything but a unanimous vote for death,

means a defendant is spared a sentence of death.

2. This Court's settled capital-case jurisprudence has long emphasized the important constitutional principle that jurors tasked with the responsibility of deciding whether an individual defendant lives or dies must be presented with all readily available evidence in support of a life outcome. A defendant in a capital prosecution may submit to a jury all evidence relevant to mitigation. This well-established tenet of capital jurisprudence is rooted in *Lockett v. Ohio*, 438 U.S. 586 (1978), where a plurality of this Court held that "in all but the rarest kind of capital cases," a sentencing authority could not "be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record . . . as a basis for a sentence less than death." *Id.* at 604 (emphasis omitted); *see also Skipper v. North Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *California v. Ramos*, 463 U.S. 992, 1003 (1983) ("What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.").

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), this Court held that a constitutional death-penalty scheme "cannot limit the sentencer's consideration of *any relevant circumstance* that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider *any relevant information* offered by the defendant." *Id.* at 305-06 (emphasis added); *see*

also Green v. Georgia, 442 U.S. 95 (1979) (per curiam) (evidence rules may not be invoked to bar otherwise relevant mitigating evidence).

In *Buchanan v. Angelone*, 522 U.S. 269 (1998), Chief Justice Rehnquist, writing for a majority of the Court 20 years after *Lockett*, stated "in the [penalty] phase, we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination. [¶] In the [penalty] phase, our cases have established that the sentencer may not be precluded from considering . . . any constitutionally relevant mitigating evidence." *Id.* at 276 (citations omitted). In *Williams v. Taylor*, 529 U.S. 362 (2000), the Court noted that mitigating evidence can lessen a defendant's "moral culpability" even where such evidence "does not undermine or rebut the prosecution's death- eligibility case." *Id.* at 398.

The unbroken line of cases supporting liberal admission of mitigating evidence was extended by *Tennard*, where the Court rejected the notion, originating with the Texas Court of Criminal Appeals and repeatedly endorsed by the Fifth Circuit, that evidence is not mitigating unless there is a nexus between the evidence and the crime. In *Tennard*, a six-member majority of the Court reversed the Fifth Circuit and bluntly criticized that court's longstanding practice of imposing a restrictive nexus-based standard of relevance for the admission of mitigating evidence at the penalty-phase of Texas capital cases. *Tennard* reiterated that the threshold of relevance for mitigating evidence is minimal, and requires no nexus to the capital crime. 542 U.S. 274, 284-85 (the "meaning of relevance is no different in the context of mitigating evidence

introduced in a capital sentencing proceeding than in any other context" (citation omitted)). And *Tennard* explained that this requirement is constitutional in dimension: "[o]nce this low threshold for relevance is met, the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence." *Id.* at 285 (internal quotation and citations omitted).

In *Smith v. Texas*, decided five months after *Tennard*, this Court reiterated its rejection of any "nexus" requirement, stating, "[w]e rejected the Fifth Circuit's 'nexus' requirement in *Tennard* . . . ." 543 U.S. 37, 45. More recently, this Court reaffirmed the point:

> [O]ur cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future.

Abdul-Kabir v. Quarterman, 550 U.S. 233, 246 (2007); *see also Ayers v. Belmontes*, 549 U.S. 7, 21 (2006), where the Court described a jury's penalty-phase task as weighing "the finite aggravators against the *potentially infinite mitigators*." (emphasis added).

The vehicle through which a sentencing jury is able to hear and evaluate all available evidence in mitigation is based in the effort undertaken by the defense to uncover such information. In short, the Sixth Amendment requires that defense counsel investigate mitigating evidence and that a failure to do so denies a capital

defendant the effective assistance of counsel guaranteed by the Sixth Amendment. *E.g.*, *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (counsel must undertake "efforts to discover all reasonably available mitigating evidence"); *Williams v. Taylor*, 529 U.S. 362, 396-97 (2000) (counsel must "conduct a thorough investigation of the defendant's background"). In this overall context, the Court has recognized the particular importance of evidence bearing on a capital defendant's mental health. *See, e.g.*, *Rompilla v. Beard,* 545 U.S. 374 (2005); *Sears v. Upton*, 561 U.S. 945 (2010) (per curiam).

To reiterate, the jury that imposed Petitioner's sentence of death was not presented with readily available compelling evidence, particularly (but not exclusively) in the areas of mental health and childhood sexual abuse, which would have weighed heavily on life's side of the balance. The responsibility for this failure lies squarely with the ineffective performance of capital trial counsel.

The Petition should be granted to examine the circumstances that led to this constitutional failure. There is at least a reasonable probability that the evidence presented at the § 2255 hearing below would have altered the sentencing decision of one or more jurors.

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

While individual circuits are free to create their own procedures for reviewing requests for certificates of appealability, *see Hohn v. United States*, 524 U.S. 236, 245

(1998) these procedures cannot conflict with the plain language of the governing statute. *See* 28 U.S.C. § 2253(c)(1); *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2070-71 (2018). Nor may circuit procedures undermine the standard for whether a certificate of appealability should issue. *See, e.g.*, *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong").

Here, "a circuit justice or judge" would have granted a certificate of appealability on the issue of counsel's failure to object to improper prosecutorial arguments. *See Nelson v. United States*, 868 F.3d 636, 637 n.1 (8th Cir. 2017). As a "Court cannot construe a statute in a way that negates its plain text," a certificate of appealability should have issued. *Honeycutt v. United States*, 137 S. Ct. 1626, 1635 n.2 (2017).

It is important that the Court consider this issue, as it features an actual disagreement between reasonable jurists about whether a district court's determination is "debatable or wrong." *Nelson*, 868 F.3d at 637 n.1; *Miller-El*, 537 U.S. at 338. The Government's attempt to parse the language to assert that this is a disagreement over a disagreement is meritless (*see* Opp. at 24), as the "strength of the disagreement" between reasonable jurists is immaterial under *Miller-El*'s analysis (Opp. at 25). Here, two reasonable jurists believe that an issue has no merit; and one reasonable jurist believes the same issue has some merit.

The Government is also wrong to imply that this issue would only warrant review if a case had previously held that a dissent to a refusal to grant a certificate of appealability met the debatability threshold. (Opp. at 25.) Such a case is highly unlikely given that the majority of circuits explicitly hold that a single judicial opinion authorizing issuance of a certificate of appealability suffices to ensure its grant. (*See* Petition at 20-21 (citing practices in the Third, Fourth, Sixth, Seventh, and Ninth Circuits).) Further, three members of this Court have indicated their support for the very idea deemed unsupported by the Government. (*See* Petition at 20.) And the fact that this Court has not previously adjudicated the subject of this divergence in circuit law militates for, rather than against, its consideration now.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted: January 29, 2020.

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