No. _____

In The Supreme Court of the United States

JONATHON WILLIAM-DURAND NEUHARD,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

"It is estimated that over 5 million adults in the U.S. live with autism. Despite this significant number, the unique challenges and strengths of adult autism remain primarily overshadowed by the focus on childhood diagnoses." Jason Jones, Adult Autism Essentials: A Step-By-Step Approach to Navigating Relationships, Professional Life and Finding Resources While Celebrating Our Strengths, July 15, 2024. For example, " high functioning autistics (HFA) are often proficient with 'masking,' a term defined as, 'hiding or disguising oneself in order to better fit in.' (National Autistic Society-NAS, 2022)." Tyler T. Whitney, PsyD., Advocating for the Overlooked Needs of Autistic Individuals in the US Criminal Justice System, Autism Spectrum News, July 5th, 2023. These factors reflect that today and in the future America's criminal justice system is seeing and will continue to see an influx of autistic adults facing prosecution in state and federal courts. How to measure effective representation of those autistic adults, although always on a case-by-case basis, needs to be reviewed and clarified by this Court. An autistic adult, although masking as a neurotypical adult, may in some cases have instances of adaptive functioning in life similar to that of a child of around ten years old without autism. Although viewed as competent to stand trial and devoid of a mental disease or defect, the autistic adult defendant may be functioning in many ways as a ten-year-old child.

Accordingly, the first question presented is:

WHETHER A TRIAL DEFENSE ATTORNEY, REPRESENTING AN ADULT AUTISTIC CRIMINAL DEFENDANT, WHO ENLISTS AS EXPERT WITNESSES TWO MENTAL HEALTH PROFESSIONALS WITH NO EXPERIENCE OR EXPERTISE WITH AUTISTIC ADULTS, AND WHO DECIDES AFTER SOME RESEARCH THAT IF THE JURY LEARNED DURING TRIAL THAT THE CLIENT IS AUTISTIC THEY WILL PERCEIVE THE DEFENDANT AS "A MENTALLY ILL MONSTER WHO COULD NOT CONTROL HIS

IMPULSES TO SEXUALLY ABUSE CHILDREN" REGARDLESS OF WHETHER AN EXPERT TESTIFIES THAT IS AN INVALID CONCLUSION, EVEN THOUGH, AFTER CONCEALING THE DEFENDANT'S AUTISM THROUGHOUT THE TRIAL, INTENDS TO AND DOES REVEAL THE DEFENDANT'S AUTISM TO THE JUDGE AND PROSECUTOR AT THE SENTENCING AS A MITIGATING CIRCUMSTANCE, PROVIDES EFFECTIVE ASSISTANCE OF COUNSEL AS REQUIRED BY THE SIXTH AMENDMENT TO THE CONSTITUTION.

In an effort to address criminal defendants who "suffer[] from a significantly reduced mental capacity" that "contributed substantially to the commission of the offense," a downward departure may be warranted. U.S.S.G. §5K2.13, Diminished Capacity (Policy Statement). This would seem an essential guidepost for a criminal defense attorney representing an adult autistic criminal defendant and an integral part of any mitigation strategy when representing an autistic adult defendant and raising his autism as a sentencing mitigator.

Accordingly, the second question presented is:

WHETHER A TRIAL DEFENSE ATTORNEY, REPRESENTING AN ADULT AUTISTIC CRIMINAL DEFENDANT, PROVIDES THE CONSTITUTIONALLY GUARANTEED EFFECTIVE ASSISTANCE OF COUNSEL IN SENTENCING BY PRESENTING LIMITED EVIDENCE OF THE CLIENT'S AUTISM, SEEKING A LENGTHY PRISON SENTENCE, NOT ADVOCATING FOR TREATMENT OR SPECIAL PLACEMENT DUE TO AUTISM, NOT REQUESTING A U.S.S.G. §5K2.13 SENTENCE REDUCTION FOR DIMINISHED CAPACITY, AND FAILING TO USE THE DEFENDANT'S AUTISM, A LIFE-LONG CONDITION, TO REBUT THE COURT'S ACKNOWLEDGED AGGRAVATORS, AFTER HIDING THE CLIENT'S AUTISM THROUGHOUT THE TRIAL FROM NOT ONLY THE JURY, BUT BOTH THE JUDGE AND PROSECUTOR.

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PETITION FOR A WRIT OF CERTIORARI

Jonathon William-Durand Neuhard respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF RELATED PROCEEDINGS

United States of America v. Jonathon William-Durand Neuhard, 119 F.4th 1064 (6th Cir. 2024), No. 22-2120, opinion issued and judgment entered October 25, 2024, affirming district court's denial of Neuhard's §2255 habeas motion.

United States of America v. Jonathon William-Durand Neuhard, No. 2:15-cr-20425 (E.D. Mich.), judgment entered October 18, 2022, granting in part and denying in part Neuhard's §2255 habeas motion.

United States of America v. Jonathon William-Durand Neuhard, No. 17-2422 (6th Cir.), opinion issued and judgment entered May 20, 2019, affirming the district court on direct appeal, *United States v. Neuhard*, 770 F. App'x 251, 252-59 (6th Cir. 2019).

United States of America v. Jonathon William-Durand Neuhard, No. 2:15-cr-20425 (E.D. Mich.), original judgment entered November 11, 2017, amended judgment entered April 27, 2018.

United States of America v. Jonathon William-Durand Neuhard, No. 2:15-cr-20425 (E.D. Mich.), order granting & denying in part application for certificate of appealability, April 3, 2023.

OPINIONS BELOW

The Sixth Circuit Court of Appeals' opinion is published at *United States of America v. Jonathon William-Durand Neuhard*, 119 F.4th 1064 (6th Cir. 2024), and is reproduced at Appendix ("App.") A, 1-13.

United States of America v. Jonathon William-Durand Neuhard, No. 2:15-cr-20425 (E.D.

Mich.), judgment entered October 18, 2022, granting in part and denying in part Neuhard's §2255 habeas motion, and is reproduced at App. D, 19-44.

United States of America v. Jonathon William-Durand Neuhard, No. 17-2422 (6th Cir.), opinion issued and judgment entered May 20, 2019, affirming the district court on direct appeal, *United States v. Neuhard*, 770 F. App'x 251, 252-59 (6th Cir. 2019), and is reproduced at App. F, 58-64.

United States of America v. Jonathon William-Durand Neuhard, No. 2:15-cr-20425 (E.D. Mich.), original judgment entered November 11, 2017, amended judgment entered April 27, 2018.

JURISDICTION

The Sixth Circuit Court of Appeals rendered its opinion on October 25, 2024. No rehearing petition was filed. On January 15, 2025, Justice Kavanaugh extended the time for filing a petition for certiorari to and including March 24, 2025. (Application 24A694.) This Court has jurisdiction under 28 U.S.C. §1254(1).

The federal district court had jurisdiction of this case pursuant to 28 U.S. Code § 2255 and 18 U.S.C. §3231 because Petitioner was charged with violations of 18 U.S.C. §2251 and §2252A. The Court of Appeals had jurisdiction of this appeal pursuant to 28 U.S.C. §1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Constitution, Amend. VI.

18 U.S. C. §2251(e) provides in pertinent part:

"Any individual who violates, or attempts or conspires to violate, this section shall be fined under

this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward ... such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years ...."

STATEMENT OF THE CASE

Appellant Jonathon Neuhard was indicted on July 9, 2015, on charges of production of child pornography for four sexually explicit photographs (count one), receipt of child pornography for two videos downloaded onto his laptop (count two), and possession of the videos and the four photos (count three). Indictment, R. 12, Page ID# 21.

After a jury trial, Neuhard was convicted of production, receipt and possession of child pornography, pursuant to 18 U.S.C. §2251(a) (count one), 18 U.S.C. §2252A(2)(count two) and 18 U.S.C. §2252A(5)(B)(count three). He was sentenced to 420 months on count one, 240 months on count two, and 120 months on count three to run concurrently with each other for a total sentence of 35 years. Amended Judgment, R. 165, Pg ID# 1619.

Neuhard's convictions and sentences were affirmed on appeal by the Sixth Circuit Court of Appeals. *United States v. Neuhard*, 770 Fed. Appx. 251 (6th Cir. 2019); Opinion, R. 169, Pg ID# 1633.

Neuhard's Certiorari Petition was denied by this Court on November 25, 2019. Letter, R. 172, Pg ID# 1651. *Neuhard v. United States*, 140 S.Ct. 570 (2019).

On November 24, 2020 Neuhard, by counsel, filed a motion, pursuant to 28 USC 2255, to vacate his convictions and sentence with a supporting brief. Motion to Vacate, R. 175, Page ID# 1658. The district court on October 18, 2022 entered an Opinion and Order Granting in Part and

Denying in Part the Motion to Vacate. Opinion, R. 197, Page ID# 1849; App. D, 19-44. The district court denied all of Neuhard's claim except the claim that appellate counsel performed deficiently by failing to file a notice of appeal of the Amended Judgment regarding restitution despite Neuhard's specific request to do so. *Id.*, Page ID# 1873.

On April 3, 2023, the district court granted in part and denied in part Neuhard's Application for a Certificate of Appealability ("COA"). Order, 04/03/2023; R. 205, Page ID# 2079-2083; App., E45-57. The district court found that "reasonable jurists could debate (1) whether trial counsel provided ineffective assistance by failing to present evidence of Neuhard's autism at trial, (2) whether trial counsel provided ineffective assistance by failing to request an evidentiary hearing regarding the Government witness' polygraph testimony, and (3) whether appellate counsel provided ineffective assistance by failing to raise the denial of trial counsel's oral motion for mistrial on appeal" and granted a COA as to those issues. *Id.*, Page ID# 2082. The court below "decline[d] to grant a" COA "with respect to any of the other grounds raised" in his motion, including his claim that trial counsel "was ineffective for failing to adequately present evidence of Neuhard's autism as a mitigating factor at sentencing." *Id.*

Neuhard sought unsuccessfully in the Sixth Circuit to expand the COA as to the claim that trial counsel was ineffective at sentencing for failing to adequately present evidence of Neuhard's autism as a mitigating factor. Order, 06/22/2023, Doc. 15; Order, 09/20/2023, Doc. 23; App. B 14-17. The Sixth Circuit denied Neuhard's rehearing petition on the denial of his COA application. Order. 06/22/2023; App. C 18.

The investigation into Neuhard began when his niece, MV-1, then nine years old, told her grandmother and mother that Neuhard had sexually assaulted her. A state investigation ensued,

including a search of Neuhard's home. During the search, a tablet computer and Neuhard's cell phone and laptop were seized.

A forensic examination of the tablet detected a memory card with four deleted images of child pornography. Each of the images were embedded with data indicating GPS coordinates and that the images had been recorded with a cell phone similar to the one seized at Neuhard's home. The state's investigation was referred to Homeland Security Investigations.

MV-1 testified that on one occasion Neuhard showed her a pornographic video, telling her, "this is what you have to do to me," and molested her. On another occasion, according to MV-1, Neuhard took pictures of her genitals and bare chest with his cell phone. She was seven or eight years old when these incidents were said to take place.

In his opening statement, Korn[1] said numerous people stayed at the house and had access to Neuhard's computer, phone, tablet, and memory card. R. 125, Pg ID# 822-823. Sanchez Fernandez and Rustam Razzaq had lived at the house, and Forest McNiff worked on a remodeling project there for an extended period of time. *Id.*, Page ID# 970-980. Debra Razzaq, who owned the house, testified that everyone who stayed at or visited the house had access to that device and many people used it. R. 127, Pg ID# 1064.

Homeland Security Investigations agent Lisa Keith testified she investigated child pornography crimes. R. 126, Pg ID# 963-964. Agent Keith interviewed the three men, and when the prosecutor asked her about the men's "demeanor" during the interviews, the agent testified their demeanor was "cooperative, helpful, offered to take lie detector tests . . . ." R. 126, Pg ID# 981.

Neuhard immediately asked for a sidebar and objected to the testimony about the offers to

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[1] Mr. Korn ("Korn") was Neuhard's counsel at trial and sentencing.

take lie detectors. *Id.* Neuhard asked to introduce testimony from a state detective who had interrogated Neuhard that he too had also offered to take a polygraph. The Government objected and argued the only remedy was to strike the testimony and instruct the jury not to consider it. The trial court agreed only to strike the testimony and instruct the jury to disregard the reference to the three men's offers to take lie detector tests. *Id.*, Pg ID# 982-984. The trial court gave the jury a cautionary instruction to disregard the testimony about the men offering to take polygraphs and not consider it. *Id.*, Pg ID# 984-985.

After the Government rested, Neuhard moved for a new trial and argued that the agent's testimony about the three men's offers to take lie detector tests violated an agreement with the Government that there would be no testimony about the state detective urging Neuhard to take a polygraph during Neuhard's uncounseled interview or about Neuhard's offer to take a polygraph. *Id.*, Pg ID# 1019. Korn argued that his defense theory – "everything I have done from the start" – was to identify other people who could have committed the crimes charged against Neuhard. Korn argued the agent's testimony about the other men offering to take polygraphs was "very damaging" to the defense and was now the "elephant in the room" that could not be cured by a jury instruction but required a new trial. *Id.*, Pg ID# 1019-1020.

The Government argued that Neuhard had offered to take a polygraph, but that offer had later been withdrawn by Neuhard's attorney, the erroneous testimony was unintentional, and the way to correct the error was to strike the testimony and instruct the jury as the trial court had already done. *Id.*, Pg ID# 1020-1021. The trial court initially denied the new trial motion without prejudice to the defense raising it in writing after trial. *Id.*, Pg ID# 1023-1024. Korn never took up that invitation, despite an extension of 60 days in which to file a motion. Stipulation and Order, R. 122, Pg ID# 584.

When the court denied Neuhard's mistrial motion, Korn returned to his earlier request. "[I]f the Court is not going to grant the motion for a new trial, then, and I'm not saying this would be sufficient, but ... if the Court denies my motion for a new trial, ...then I would ask the Court to allow me ... to put Detective Zupic back on the stand just to ask him ... if my client offered to take a polygraph, and that's it. I think we should balance the equation." *Id.*, Pg ID# 1022-1023. After further colloquy with the parties, the court stated, "... no. I'm just going to deny it." *Id.*, Pg ID# 1025.

On direct appeal, the Sixth Circuit ruled that the agent's testimony that the three potential suspects had offered to take lie detector tests was only marginally relevant under FRE 403, and that the "the district court was within its discretion to remedy that error by issuing a limiting instruction, which we presume the jury followed." *United States v. Neuhard*, 770 Fed. Appx. at 255; R. 169, Pg ID# 1641. Neuhard's appellate counsel did not raise the mistrial claim.

In the habeas proceedings below, the Government filed its response to the motion to vacate, which included the affidavits of Neuhard's trial attorney, Korn, and his appellate attorney, Margaret Sind Raben. Response & Exhibits A & B, R, 184, Page ID# 1765-1774. Neuhard's habeas attorney introduced the evaluations of Neuhard's autism by Andrew Maltz, Ph.D., licensed psychologist, to establish Neuhard's autism deficits. Sealed Record.

Korn elected not to reveal Neuhard's autism to the judge, prosecutor or the jury until the judicial sentencing phase out of fear that awareness of his client's autism would cause the jury, and presumably the judge and prosecutor, to perceive Neuhard as a mentally ill monster who could not control his impulses to sexually abuse children regardless of whether an expert testified that such conclusions are invalid.

On April 3, 2023, the federal district court granted in part and denied in part Petitioner Neuhard's Application for a COA. Order, 04/03/2023; ECF No. 205, Page ID# 2079-2083. The court below "decline[d] to grant a certificate of appealability with respect to any of the other grounds ... including his [Neuhard's] claim that trial counsel was ineffective for failing to adequately present evidence of Neuhard's autism as a mitigating factor at sentencing." *Id.*

On June 22, 2023, a single circuit judge entered an order denying Neuhard's motion to expand the COA to include Neuhard's claim that trial counsel provided ineffective assistance of counsel at sentencing (trial counsel was ineffective for failing to adequately present evidence of Neuhard's autism as a mitigating factor at sentencing).[2] Order, 06/22/2023; Document 15. Neuhard sought a panel rehearing on the single judge's denial of the COA, which was also denied. Order, 09/20/2023; Document 23.

In its opinion, the Sixth Circuit ruled that "Neuhard's claim fails on *Strickland*'s first prong because Korn acted reasonably when investigating Neuhard's autism and deciding not to introduce autism evidence at trial." App. A 1-13. The Sixth Circuit also held that "Neuhard has not demonstrated a reasonable probability that the district court would have granted a mistrial had Korn immediately requested an evidentiary hearing after the polygraph comments. So, he has not shown prejudice as required by Strickland." Finally, the Sixth Circuit concluded that "Neuhard's appellate counsel did not perform inadequately by failing to raise the mistrial issue on appeal."

Additional facts are discussed within the Petition, *infra*.

The Sixth Circuit Court of Appeals' opinion, *United States of America v. Jonathon William-*

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[2] Neuhard's application to expand the COA was decided by Circuit Judge Moore. FRAP 22(b)(2).

Durand Neuhard, 119 F.4th 1064 (6th Cir. 2024), was rendered on October 25, 2024. No rehearing petition was filed. On Jan 15, 2025, Justice Kavanaugh extended the time for filing a petition for certiorari to and including March 24, 2025. (Application 24A694.)

REASONS FOR GRANTING THE WRIT

1. The Decision Below in a Published Opinion Endorsing as a Reasonable Trial Strategy Concealing the Defendant's Autism From the Judge, Jury and Prosecutor Until Sentencing Not Only Deprives Neuhard, an Autistic Defendant, of the Effective Assistance of Counsel, But Also Puts a Judicial Stamp of Approval on This Strategy at a Time When the Prosecution of Autistic Criminal Defendants is Constantly Increasing.

"It is estimated that over 5 million adults in the U.S. live with autism. Despite this significant number, the unique challenges and strengths of adult autism remain primarily overshadowed by the focus on childhood diagnoses." Jason Jones, Adult Autism Essentials: A Step-By-Step Approach to Navigating Relationships, Professional Life and Finding Resources While Celebrating Our Strengths, July 15, 2024. For example, " high functioning autistics (HFA) are often proficient with 'masking,' a term defined as, 'hiding or disguising oneself in order to better fit in.' (National Autistic Society-NAS, 2022)." Tyler T. Whitney, PsyD., Advocating for the Overlooked Needs of Autistic Individuals in the US Criminal Justice System, Autism Spectrum News, July 5th, 2023.

Recent information from the Centers for Disease Control and Prevention estimates over 5.4 million adults in the United States have autism spectrum disorder, or ASD—more than 2% of the population. "1 in 45 adults in the U.S. have autism." https://www.autismspeaks.org/autism-statistics-asd. America's criminal justice system is experiencing more adult autistic criminal defendants and that reality will likely only increase in the future. This is the context in which defendant Neuhard was represented ,tried, convicted and sentenced.

"Under *Strickland [v. Washington*, 466 U.S. 668 (1984),] [the Supreme Court] first determine[s] whether counsel's representation 'fell below an objective standard of reasonableness.'" *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 1482 (2010), quoting *Strickland*, 466 U.S. at 688. "Then [the court] ask[s] whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Padilla*, 1482, quoting *Strickland*, 694.

The district court found and the evidence at the habeas evidentiary hearing established Neuhard's trial attorney Korn "'noticed immediately' during their initial meeting that Neuhard 'was unusually slow to respond to questions and often responded in a rigid and awkward manner'"; "consulted about Neuhard's affect and autism with Neuhard's first attorney and the psychologist prior counsel had engaged"; "reviewed Neuhard's school records as well as books and articles about autism and criminal sexual conduct cases"; "discussed the matter with Neuhard's parents and Neuhard himself on several occasions"; and "was aware of Neuhard's flat affect during Neuhard's [law enforcement] interrogation." Opinion and Order Resolving Habeas Motion, 12-13; R.197, Page ID #1860-61. [3]

According to Korn, "'after considering all the information' he had obtained, he "made a strategic decision not to introduce evidence of [Neuhard's] autism unless it was absolutely necessary." *Id.*, 13; 1861. Korn "was concerned that the marginal benefit to Neuhard of introducing evidence of Neuhard's autism 'would be outweighed by the risk that the jury would perceive

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[3] It would appear from the record that Neuhard's autism, although a life-long condition, was not diagnosed or recognized throughout his life by doctors, educational institutions, or even his family, probably in some large part by Neuhard's ability to "mask" his autism in an effort to fit into society, a common trait of the autistic.

[Neuhard] as a mentally ill "monster" who could not control his impulses to sexually abuse children' regardless of whether an expert testified that such conclusions are invalid.'" *Id.*, 13; 1861. Korn "*hoped* that the jury would ascribe an innocent explanation to Neuhard's unemotional response during the interrogation." *Id.*; (emphasis added). Ultimately, Korn "determined that introducing testimony of Neuhard's autism 'would increase, not decrease, the odds of conviction." *Id.*

By trial counsel's own admission, "'after considering all the information' he had obtained, he "made a strategic decision not to introduce evidence of [Neuhard's] autism *unless it was absolutely necessary.*" Opinion and Order Resolving Habeas Motion, 13; R.197, Page ID #1861; (emphasis added). This so-called "strategy" is inherently a two-part plan of action. The first prong of the admitted strategy is a decision not to introduce evidence of Neuhard's autism at trial *unless and until circumstances*, apparently at trial, *required the introduction of that evidence*. The second prong, although not overtly expressed, but a necessary consequence, requires Korn to have been prepared to introduce such evidence should the necessity arise.

Korn's investigation of autism was facially deficient and less than comprehensive to arrive at such a concealment strategy. Korn's assumption also demonstrates his belief that neurotypical people, including the jurors, would perceive someone with acknowledged autism to be a mentally ill sexual predator.

"Autism is a neurological developmental disability with an estimated prevalence of one to two percent of the American and worldwide population. The diversity of the disability means that each person's individual experience of autism and needs for supports and services can vary widely." Autism, Office of Disability Employment Policy, U.S. Department of Labor, https://www.dol.gov/agencies/odep/ program-areas/autism. Fed. R. Evid. 201(c)(2), *Judicial Notice*

of Adjudicative Facts. "However, all children, youth, and adults on the autism spectrum experience a common atypical neurological profile with several key traits. Namely, they have atypical language and communication, social interaction, motor coordination and sensory processing, and executive functioning." *Id.*

Individuals with autism have "[p]ersistent deficits in social communication and social interaction across multiple contexts...." Diagnostic Criteria for 299.00 Autism Spectrum Disorder, American Psychiatric Association's Diagnostic and Statistical Manual, Fifth Edition (DSM-5) (2013). However, that diagnostic criteria contains no reference to sexuality or mental illness.

It has long been recognized that locating a competent expert to diagnose autism, *i.e.*, one with experience and expertise with autism, is exceedingly difficult and even more so for an adult rather than a child's diagnosis. For example:

> Finding a provider who is qualified to diagnose ASD in adults may be challenging. Professionals who commonly diagnose individuals on the autism spectrum include psychiatrists and psychologists. Providers who predominantly work with children, however, may or may not accept adult patients or have a full understanding of how autism manifests in adults. Similarly, many psychiatrists and psychologists who primarily work with adults may not have expertise in autism. It is best to contact potential providers to assess their willingness and expertise in working with adult patients on the autism spectrum. In general, diagnoses should be made using input from a variety of sources including standardized diagnostic instruments such as the ADOS or ADI-R.

Diagnostic referrals, AASPIRE Healthcare Toolkit for Healthcare Providers, https://autismandhealth.org/?a=pv&p=detail&t=pv_asd&s=asd_asd&theme=dk&; Fed. R. Evid. 201(c)(2); *In re Omnicare, Inc. Securities Litigation*, 769 F. 3d 455, 465-466 (6th Cir. 2014).

This disparity between an expert competent to diagnose adult autism and one who is not competent to do so is reflected in Dr. Maltz's evaluation provided for the habeas action. Dr. Maltz

noted that neither of the two experts retained by Korn, Ms. Zoltowski and Dr. Miller, "have a speciality in the area of Autism."[4] Sealed Record, Dr. Maltz's Psychological Evaluation, 07/24/2020, 9-10.

Yet, the Sixth Circuit put its seal of approval on Korn's reliance on his experts despite their lack of speciality training in autism, noting that Korn "took reasonable steps to investigate this issue" and "reached out to prior counsel's expert witness who had diagnosed Neuhard with autism" and "also contacted a second psychologist who had previously evaluated Neuhard but found it inconclusive whether Neuhard had autism." *Neuhard v. United States, supra*, 1069-1070.

In other words, a mental health professional who has no speciality experience or expertise in treating autism, let alone autistic adults, satisfies professional standards for acquiring an expert to evaluate autism in an adult. This is a denigration of the Sixth Amendment's obligation to conduct a reasonable investigation and undermines all of Korn's strategic decisions regarding Neuhard's autism.

Dr. Maltz evaluated Neuhard's adaptive functioning in life, and concluded his functioning and thinking is similar to that of a child of around ten years old without autism.[5] This diagnosis would have easily rebutted the government's sentencing arguments that Neuhard's alleged "mild

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[4] Dr. Steven Miller, Ph.D., ("Miller") was the expert presented on autism at Neuhard's sentencing. Dr. Andrew Maltz, Ph.D., ("Maltz") was the psychologist presented by Neuhard in the habeas corpus action.

[5] Neuhard's age equivalent for Personal was 6 years 1 month; Interpersonal Relationships was 2 years 4 months; Play and Leisure was 6 years 4 months; and Domestic was 8 years 10 months, to list a few. Sealed Record, Neuhard's Exhibit B, Dr. Maltz's Psychological Evaluation, 07/24/2020, p. 7. "In application, his Age Equivalents are significant because they give an indication of the age levels at which he actually functions in spite of his chronological age and average cognitive abilities." *Id.*, p. 9.

autism" did not qualify as a mitigating factor and that some of the effects of his autism were actually aggravating factors. Sentencing, ECF No. 154, Pg ID# 1521-1524.

To advance his strategy of concealing Neuhard's autism from the jury, Korn omitted any steps to be prepared to counter any problems Neuhard's autism presented during the jury trial. Did Korn have an expert witness prepared to testify during trial about Neuhard's autism and its effect, if any, on Neuhard's behavior? No. Had he provided in discovery medical or mental health records or expert tomes on autism that he might present at trial? No. See Fed. R. Crim. P. 16(b), *Discovery and Inspection*; FRE 803(18). Korn had not prepared any means or methodology for introducing evidence of Neuhard's autism should that become "absolutely necessary." How to present evidence of Neuhard's autism, if necessary, required a well formulated approach, yet Korn apparently had nothing planned or prepared, despite obviously aware of the potential problem that actually arose during trial. Indeed, it was an integral part of his espoused strategy.

Similarly, Korn did not have an investigator, paralegal, or any defense third party observing Neuhard throughout the trial to determine whether Neuhard's non-typical autistic behavior during trial was observed or noticed by one or more jurors. That simple precaution would have ensured Neuhard's behavior at the defense table throughout the trial was monitored. A defense attorney, such as Korn, could not consistently conduct that surveillance throughout the trial, while performing his litigation obligations.

The jury's ability to view physical indicators of Neuhard's autism undoubtedly occurred as they watched Neuhard throughout the trial at the defense table and as they evaluated the evidence presented, including videos of Neuhard's interrogation by law enforcement. The danger Korn feared that the jury would see Neuhard as socially different, awkward and non-typical was clear and present

and virtually inevitable during the trial. In Korn's strategy, those perceptions could easily cause some or all of the jurors to conclude that Neuhard was a mentally ill monster who sexually abuses children.[6]

Korn surmised that the jury once aware to some degree of Neuhard's autism would perceive it as an indicator of his guilt of the charged crimes. Despite this realization, Korn admittedly had not prepared an approach to monitor Neuhard's in court demeanor or the defense would counter this extremely likely trial occurrence. Although aware of the unusual nature of Neuhard's conduct during his interrogations and the evidence to be introduced at trial, Korn "*hoped* that the jury would ascribe an innocent explanation to Neuhard's unemotional response during the interrogation." This would appear to be a wing and a prayer strategy – wishing and hoping rather than planning and executing a competent strategy. This is the essence of an inadequate investigation and trial preparation. Korn had not prepared any means or methodology for introducing evidence of Neuhard's autism should that become "absolutely necessary," which was an integral part of his espoused strategy.

Korn's dismissed this concern noting that "there was nothing unusual about defendant's demeanor in the courtroom during trial. He comported himself well, took notes during the testimony, and consulted with trial counsel in an appropriately subdued manner." Korn's Affidavit, 3, R. 184-2, Page ID# 1767. But, Neuhard's behavioral manifestations, as Korn was well aware, do not result

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[6] Korn knew nothing about any juror's familiarity or life experiences with autistic individuals as he pursued no juror investigation that would have revealed that type of information. Although there may be adequate reasons for not making such inquiries through juror questionnaires or voir dire questions, the absence of such information made it impossible for Korn to appreciate how individual jurors would react to obvious non-neurotypical reactions by Neuhard as reflected in evidence of witnesses' testimonial observations and the visual recorded law enforcement interrogations as well as Neuhard's in-court reactions during the trial.

in loud or physical outbursts. Neuhard's atypical manifestations instead are easily recognized as inappropriate, even though subdued actions rather than disturbing outbursts.

Korn's position is apparently premised on the erroneous idea that *only* an overt outburst apparent to the judge, prosecutor and defense counsel, disrupting the proceedings would be noticed by the jury. Jurors constantly watch defendants to gauge their reactions during the trial, including defendants' reactions to testimony and how defendants interact with their lawyers. A competent trial lawyer should assume that at least one juror's eyes are on the defense table at any given time.

Even more damning is that Korn, aware of Neuhard's obvious flat affect and that it would be introduced by the prosecution in testimony and videos, had no alternative strategy to counter its prejudicial impact other than Neuhard's autism. Korn did nothing to assist the jury in disregarding the implications of Neuhard's ever present atypical behaviors, but only hoped the jury would on their own attribute those behaviors to some undisclosed non-malevolent factor. Neuhard's reactions during his interrogations, apparent in testimony and videos, could have created an inference of guilt.

The Sixth Circuit appeared to rely on Korn's self-serving conclusion that "[d]uring the proceedings, Neuhard sat at counsel table and 'comported himself well, took notes during the testimony, and consulted with trial counsel in an appropriately subdued manner.'" *Neuhard v. United States*, 119 F. 4th 1064, 1070 (6th Cir. 2024), citing R. 184-2, Page ID 1767. Undoubtedly, neither Korn nor any defense member monitored Neuhard's demeanor during trial as Korn was actively representing Neuhard before the jury. Apparently, the courts below erroneously believed only an outburst by Neuhard could influence the jury against Neuhard.

The Sixth Circuit also emphasized that Korn, "after several consultations with Neuhard," settled on his strategy of concealing Neuhard's autism from the jury. *Neuhard*, 170. The agreement

of a defendant with age equivalents of child of ten without autism does not make a strategy reasonable.

Korn intentionally concealed from the judge and prosecutor Neuhard's autism before and during the jury trial.[7] The government in opposing the habeas petition "contest[ed] whether Neuhard even has autism." Opinion and Order, 11; R. 197, Page ID# 1859.

Korn did nothing in pretrial proceedings to advise the trial court and the prosecution of Neuhard's autism to pave the way for being able to introduce evidence of Neuhard's autism should that become necessary. Despite Korn's fear that the jury's knowledge of Neuhard's autism would be adverse to Neuhard, Korn filed no pretrial motion to preclude any reference to Neuhard's autism unless necessary to explain a misinterpretation of Neuhard's words or behaviors.

"Attorneys who represent defendants with mental disorders should explore all mental state questions that might be raised, including whether the client's capacities at the time of police interrogation bear on the admissibility or reliability of any incriminating statements that were made .... and whether the defendant's mental state at the time of the offense might support a defense to the charge, a claim in mitigation of sentence, or a negotiated disposition." ABA Mental Health Standards, *supra*, Standard 7-1.4(c), *Roles of the attorney representing a defendant with a mental disorder*.

The district court's conclusion that "[t]rial counsel's failure to introduce evidence of

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[7] "Officials throughout the criminal justice system should recognize that people with mental disorders have special needs that must be reconciled with the goals of ensuring accountability for conduct, respect for civil liberties, and public safety." ABA Criminal Justice Mental Health Standards (Fourth Edition August 8, 2016), Standard 7-1.2(a), *Responding to persons with mental disorders in the criminal justice system.*

Neuhard's autism at trial was clearly a strategic decision" is undermined by the facts, the law and prevailing professional norms of effective representation. Opinion/Order, 11; R. 197, Page ID# 1859. Had Korn in pretrial proceedings informed the court and prosecutor of Neuhard's autism, the trial court would have been alerted to observe Neuhard's in-court conduct at the defense table throughout the trial as well as been prepared for both the introduction of Neuhard's autism as an explanation of courtroom developments and/or as a mitigation sentencing factor.[8]

Such a situation arose at trial. Not surprisingly, as Neuhard's affect due to his autism appears flat compared to persons not so afflicted. Korn apparently made a pretrial decision to conceal Neuhard's autism in part since it was agreed Neuhard would not testify as Neuhard would appeared unemotional despite the emotionally charged allegations. Yet Korn took no protective measures in advance of trial or during trial, even though it was apparent that Neuhard's affect would be apparent not only from Neuhard's presence and reactions in front of the jury, but from evidence regarding Neuhard's interrogations that was provided in discovery.

The government made Neuhard's lack of affect an issue during the testimony of police detective Kupic, who interviewed Neuhard twice. The detective repeatedly said Neuhard's demeanor and responses during his questioning were "robotic," "reserved, unemotional," and "[s]hort with his answers." Transcript; R. 125, Pg ID# 840-841; emphasis added. A series of five video clips from the station interview, which had been provided to the defense in discovery, were then played. *Id.* at Pg ID# 845-847. As the detective testified and as the jurors viewed in the videos, Neuhard's responses to such serious and emotionally charged accusations were unusually unemotional, which

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[8] The sentencing guidelines directly acknowledge that shorter sentences may be warranted when a defendant's mental capacity contributes substantially to the commission of the offense. U. S. S. G., §5K2.13, Diminished Capacity (Policy Statement).

is not surprising for one with autism. But without any information regarding Neuhard's autism, the jury may have concluded that Neuhard was simply cold hearted, cold blooded, heartless and/or simply guilty of the charges.

One of Korn's experts, Jennifer Zoltowski, in her Psychological Evaluation report, after diagnosing Neuhard as meeting the DSM-5 criteria for Autism Spectrum Disorder, explained that "[p]ersons with ASD present as unempathetic and uncaring, often making police and other investigators unduly suspicious." Sealed Record, Zoltowski's Psychological Evaluation, pp. 14-15. Obviously, Korn should have been prepared for this problem, but took no action when it occurred in court. Korn is hoisted on his own petard.

Evidence of Neuhard's autism, whether from an expert witness or lay witnesses, would have been admissible. When a witness, such as detective Kupic, who lacked any prior experience with the accused, describes the accused as lacking any emotional response to the questioning, that commentary creates an inference that the accused must be guilty and entitles the defense to counter that evidence with an expert opinion concerning the potential cause of his lack of emotion, such as autism or some other mental condition. See, *e.g.*, *McKinney v. Commonwealth of Kentucky*, 60 S.W.3d 499, 504-505 (Ky. 2001).

Korn's decision to conceal from the jury Neuhard's autism was a failure to act that deprived Neuhard of the effective assistance of counsel. It was necessary at that point to inform the court and the jury of Neuhard's autism to counter the witness' solicited observations that created an inference of guilt.

The Sixth Circuit disregarded detective Kupic's commentaries on Neuhard's demeanor during interrogation, which were reinforced to the jury by viewing the tapes of the interrogation. The

Sixth Circuit erroneously stated "[n]othing at trial suggested Korn should have changed course" and revealed Neuhard's autism. *Neuhard v. United States*, 119 F. 4th 1064, 1070 (6th Cir. 2024). Merely cross-examining the witness about the interrogation did not erase that inference of guilt caused by the witness' comments and the videos themselves.

Similarly, the government in argument regarding a prosecution witness's blurting out that three individuals had agreed to take a polygraph examination emphasized that Neuhard, when unrepresented, had offered to take a polygraph but his attorney had later withdrawn that offer. *Id.*, Pg ID# 1020-21. At that point Korn should have informed the judge that Neuhard is autistic, which would have impacted his uncounseled offer, and should have offered to provide evidence of that autism. Due to Korn's concealment strategy, even the prosecutor was unaware of the defendant's autism.

The district court below held that Korn's "decision" that "the potential benefits of introducing Neuhard's autism at trial were not worth the risks" was "clearly well-reasoned, regardless of whether other attorneys might have made a different one," citing *Miller v. Francis*, 269 F. 3d 609, 616 (6th Cir. 2001). Opinion/Order, 14; R. 197, Page ID# 1862. However, *Miller* specifically states that, "[d]espite the strong presumption that defense counsel's decisions are guided by sound trial strategy, it is not sufficient for counsel to merely articulate a reason for an act or omission alleged to constitute ineffective assistance of counsel. The trial strategy itself must be objectively reasonable." *Id.*

It is difficult to conclude Korn's concealment strategy "was clearly well-reasoned," as found by the district court and the Sixth Circuit. Opinion/Order, 14; R.197, Page ID# 1862; *Neuhard v. United States*, 119 F. 4th 1064,1070. Korn's assistance was not objectively reasonable considering all the circumstances. "[T]hat a theory might be reasonable, in the abstract does not obviate the need

to analyze whether counsel's failure to conduct an adequate [investigation] before arriving at [a] particular theory [was] prejudicial." *Sears v. Upton*, 561 U.S. 945, 953 (2011).

Although Korn's experts apparently misdiagnosed the extent to which Neuhard's autism stunted his social development, neither advised Korn that the jury, if it learned Neuhard was autistic, would perceive Neuhard as a mentally ill monster who could not control his impulses to sexually abuse children. Consequently, the district court's emphases on Korn having "consulted about Neuhard's affect and autism with Neuhard's first attorney and the psychologist prior counsel had engaged"as well as "discussed the matter with Neuhard's parents and Neuhard himself on several occasions" does not make Korn's decision not to prepare and be able to present evidence of Neuhard's autism during trial and at sentencing a reasonable strategy. Opinion/Order, 12-13; R.197, Page ID# 1860-61.

Who was the Jonathon Neuhard that Mr. Korn was defending on these charges? Dr. Maltz, the expert presented at the habeas proceeding, evaluated Neuhard's adaptive functioning in life, and concluded his functioning and thinking to be similar to that of a child of around ten years old without autism. Neuhard's age equivalents also exposes Neuhard's life-long "masking."

Dr. Maltz, provided documentary evidence in the form of psychological tests that revealed the extent of Neuhard's autism and that his autism was much more debilitating than the "mild/less severe" form of autism diagnosed by Korn's sentencing experts, Ms. Zoltowski and Dr. Miller, neither of whom specialized in autism, even assuming *arguendo* autism may be assessed in degrees.

Korn's representation of Neuhard fell below an objective standard of reasonableness for a defense attorney representing an autistic defendant functioning in many significant ways as a ten-year-old child without autism.

"Counsel should consider whether the client appears to have a mental impairment or other disability that could adversely affect the representation." American Bar Association (ABA) Criminal Justice Standards, The Defense Function, Fourth Edition (2017), Standard 4-3.1(c), *Establishing and Maintaining An Effective Client Relationship*. This includes clients "suffering from a mental impairment or other disability." *Id.*, Standard 4-3.1(d).

The district court below exposed the defect in Korn's approach to sentencing stating both the trial and habeas psychologists "agree that Neuhard has higher cognitive abilities than those with – what Dr. Maltz would say is incorrectly labeled as – "severe' autism." Opinion and Order, *supra*, 19; R. 197, Page ID# 1867. The habeas district court below completely overlooked that Neuhard's autism constituted "cognitive impairments" and "volitional impairments" that entitled Neuhard to a substantial downward departure at sentencing and erroneously focused solely on Neuhard's cognitive ability.

Korn's inadequate investigation into autism was why he "had no reason to doubt Dr. Miller's competency at the time." This Court "certainly ha[s] never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Sears v. Upton*, *supra*, 130 S.Ct. at 3266.

As Korn did not begin representing Neuhard until March 2016, he should have had access to and consulted the DSM-5 (2013), *supra*, not only to understand autism spectrum disorder, but also to evaluate any expert's diagnosis and advice. Order of Appointment, 03/24/2016; R. 49. The Autism Spectrum Disorder Diagnostic Criteria, although addressing varying level of requisite support, does not refer to any notion of "mild" or "severe" autism.

The district court held that "[d]uring the sentencing hearing, trial counsel argued at length

that Neuhard's autism had profoundly impacted his life and that the Court should consider it as a mitigating factor." Opinion and Order, R. 197, *supra*. Korn's actions refute that holding.

The Revised Presentence Investigation Report noted that "NEUHARD stated he was diagnosed with Autism in February 2016. *Counsel for the defendant declined to provide any further information about this diagnosis*." Sealed Record, Revised Presentence Investigation Report, Revised 07/10/2017, *Mental and Emotional Health*, p. 14, ¶ 78; (emphasis added). That Report stated "[t]he probation officer has not identified any factors that would warrant a departure from the applicable sentencing guideline range." *Id.*, *Factors that May Warrant Departure*, p. 19, ¶ 107. This failure to provide that information for the presentence report was a continuation of Korn's strategy to conceal Neuhard's autism. That strategy of concealment adversely impacted his sentencing strategy.

Korn's failed to adequately present and explain Neuhard's life-long autism and its presence at age 17. The sentencing judge concluded that "there really aren't a lot of mitigating factors," which was primarily due to counsel throughout trial and at sentencing failing to present autism as a mitigating factor demonstrating a life-long developmental disability. *Id.*, Page ID# 1538.

Were Korn's failures to emphasize Neuhard's lifelong autism and the resulting deficiencies even at sentencing the result of Korn's overarching strategic belief that a person who learned of Neuhard's autism would perceive Neuhard as a mentally ill monster who could not control his impulses to sexually abuse children regardless of whether an expert testified that such conclusions are invalid?

By concealing Neuhard's autism during pretrial proceedings, Korn precluded the judge from evaluating both Neuhard during the trial and the evidence presented through the lens of Neuhard's

autism. Without raising Neuhard's autism in the pretrial proceedings or during the trial, Korn allowed the judge to perceive Neuhard as an individual devoid of any disability until sentencing when Korn suddenly revealed Neuhard's condition.

Admittedly, Neuhard did not obtain a COA on the issue of Korn's ineffective use of Neuhard's autism at sentencing, but there is in every case a symbiotic relationship between the guilty phase of a trial and sentencing, even judicial sentencing. Trial defense counsel cannot present a portrait of the defendant during the guilt-innocence phase as a person devoid of mental and emotional deficits and then unveil a completely different individual at sentencing. This strategy lacks credibility and undermines the sentencing presentation. That is why in Neuhard's case the sentencing judge concluded that "there really aren't a lot of mitigating factors," even though Neuhard was "functioning and thinking similar to that of a child of around ten years old without autism," as the evidence at the habeas proceeding established.

The prejudicial implications of this tactical omission as to the production, receipt and possession of child pornography charges and the sentence are virtually impossible to discount. How would a jury assess the culpability of a ten-year-old child without autism looking at child pornography? How would a judge sentence that same ten-year-old boy for possessing and receiving child pornography? Certainly neither judge nor jury would view the culpability of that child-like man the same way they would assess the culpability of a grown man with no autism or other developmental disorder.

A writ of certiorari should be granted on this federal constitutional claim.

2. The Circuit Court's Decision Below to Deny Petitioner a Certificate of Appealability on the Issue of Whether Trial Counsel Was Ineffective for Failing to Adequately Present Evidence of Neuhard's Autism as a Mitigating Factor at Sentencing Deprives This Court of an Opportunity to Address How Federal Courts Should Evaluate Defense Counsel's Sentencing Advocacy When Representing Adult Autistic Defendants.

On April 3, 2023, the federal district court below "decline[d] to grant a certificate of appealability with respect to any of the other grounds ... including his [Neuhard's] claim that trial counsel was ineffective for failing to adequately present evidence of Neuhard's autism as a mitigating factor at sentencing." Order, 04/03/2023; ECF No. 205, Page ID# 2079-2083.

On June 22, 2023, a single circuit judge entered an order denying Neuhard's motion to expand the COA to include Neuhard's claim that trial counsel provided ineffective assistance of counsel at sentencing (trial counsel was ineffective for failing to adequately present evidence of Neuhard's autism as a mitigating factor at sentencing).[9] Order, 06/22/2023; Document 15. Neuhard sought a panel rehearing on the single judge's denial of the COA, which was also denied. Order, 09/20/2023; Document 23.

The single circuit judge ruled as follows:

> In his application for a certificate of appealability in the Sixth Circuit, he [Neuhard] presents a new argument: trial counsel was ineffective for failing to argue that Neuhard was entitled to a downward departure due to his diminished capacity, pursuant to USSG § 5K2.13. We generally do not review claims not presented to the district court. *United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006); *see also Charette v. Bell*, 106 F. App'x 327, 331 (6th Cir. 2004).

Order, 06/22/2023, p. 3; Document 15.

The June 22 order is incorrect. Neuhard did not present a new claim in his COA application to the Sixth Circuit, but simply a new argument in support of the claim of ineffective assistance of

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[9] Neuhard's application to expand the COA was decided by Circuit Judge Moore. FRAP 22(b)(2).

counsel at sentencing with regard to Neuhard's autism, which was undeniably presented to the district court.[10] Raising a new supportive argument on appeal is perfectly permissible and may not be disregarded by an appellate court on the basis it was not presented to the district court.

"Once a federal claim is '"properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010) (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)).

This Court's controlling precedents precluded the circuit judge from refusing to consider new arguments in support of a claim properly before the court on the grounds that the supporting arguments were not made to the district court. This prejudicial error invalidates the circuit judge's denial of Neuhard's application to expand the COA to include a claim that was presented to and denied by the district court.

Even assuming *arguendo* that it was a new claim, federal courts have recognized an exception can be made, however, for exceptional cases or if failing to consider the argument would result in a plain miscarriage of justice. The question with regard to the failure of trial counsel to use Neuhard's autism to obtain a downward departure due to diminished capacity meets the criteria for the exception, if necessary.

The issue, if it is not found to be merely a supportive argument, is for COA purposes

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[10] The district court in its order on Neuhard's COA application twice described this claim as trial counsel's failure to "adequately present evidence of Neuhard's autism as a mitigating factor at sentencing." Order, 04/03/23, 2, 4; R. 205, Page ID# 2080, 2082. This claim, as recognized by the district court, clearly embraced the argument regarding counsel's failure to seek a sentence reduction for diminished capacity. Autism as diminished capacity is a mitigating sentencing factor.

presented with sufficient clarity and completeness to ensure a proper resolution. This issue/supporting argument requires no further development of the record at the district court level, and the government "will not be prejudiced by the inability to present evidence to that court. The government apparently had no objection to Neuhard's use of trial counsel's failure to seek a diminished capacity downward departure as an example of trial counsel's ineffectiveness at sentencing with regard to the deficient use of Neuhard's autism. The government filed no response to the application to expand the COA to include this issue, even though the government had filed a response in opposition to Neuhard's application for the requested COAs in the district court. R. 204, Page ID # 2066.

The circuit judge also reformulated Neuhard's claim into trial counsel's failure "to obtain a somewhat more detailed or favorable assessment from another expert" and deemed this reframed claim "insufficient" to justify relief for ineffective assistance at sentencing. Order, 06/22/2023, 3, *supra*.

Because the Sixth Circuit denied the COA application for this claim and did not review it on the merits, two separate courses are available to this Court if consideration of this claim is warranted. On this record, this Court could grant certiorari and adjudicate this claim on the merits. Another available procedure, if necessary, is the grant-vacate-remand (GVR). "Title 28 U. S. C. § 2106 appears on its face to confer upon this Court [the U. S. Supreme Court] a broad power to GVR: 'The Supreme Court or any other court of appellate jurisdiction may . . . vacate . . . any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances.'" *Lawrence v. Chater*, 516 U.S.163, 166 (1996). "The GVR order has, over the past 50 years [prior to 1996], become an

integral part of th[is] Court's practice, accepted and employed by all sitting and recent Justices." *Id.*

This Court uses its decision to grant certiorari, vacate a lower court judgment, and remand the case [GVR] as a cautious and deferential measure designed to aid the court below by flagging a particular issue that it does not appear to have fully considered and assist the United States Supreme Court by obtaining the benefit of the lower court's insight.

The Sixth Circuit's failure to decide or reach a federal constitutional claim presented to it by Neuhard does not preclude a grant of certiorari.

This Court has emphasized that the inquiry to decide whether to grant a COA "is not coextensive with a merits analysis." *Buck v. Davis,* 137 S. Ct. 759, 773 (2017). A district court's rejection of a claim does not mean a COA should be denied on the claim; "when a COA is sought, the whole premise is that the prisoner 'has already failed'" to prevail on the claim. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). A COA shall be granted on each claim for which the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2); *accord, Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). A "substantial showing" means a showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.*

"[A] COA ruling is not the occasion for a ruling on the merit[s]." *Miller-El v. Cockrell*, *supra*, 437 U.S. at 331. "Any doubt whether to grant a COA is resolved in favor of the petitioner ....." *Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir. 2000).

The district court held that"[t]rial counsel had no reason to doubt Dr. Miller's competency [psychologist presented at sentencing] at the time" and "nothing in Dr. Miller's report indicated that

further investigation into Neuhard's autism was necessary." Opinion and Order, 19; ECF No. 197, Page ID # 1867. However, it has long been recognized that locating a competent expert to diagnose autism, *i.e.*, one with experience and expertise with autism, is exceedingly difficult and even more so for an adult rather than a child's diagnosis.

The trial prosecutor at sentencing argued that "certain of these findings as to the ASD symptoms manifested by defendant operate as aggravators in this case: An intense anger, a lack of impulse control." *Id.*, Page ID# 1523. *But see* U.S.C.G. §5K2.13, Diminished Capacity (Policy Statement).

"A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense." §5K2.13, *supra*, Diminished Capacity.

"For purposes of this policy statement— 'Significantly reduced mental capacity' means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful." *Id.*, Commentary, Application Note.

The importance of the diminished capacity downward departure policy has been explained:

> *To use a finding of diminished capacity as an aggravating factor for sentencing purposes misunderstands the relationship between U.S.C.G. § 5K2.13 and 18 U.S.C. § 3553(a).* The principal purposes of a criminal sentence are to further goals of retribution, deterrence, and incapacitation. See *United States v. Dyer*, 216 F.3d 568, 570 (7th Cir.2000). The sentencing guidelines and the § 3553(a) factors ensure that

> judges consider these purposes when sentencing defendants. A person who cannot understand the wrongfulness of his actions or control his actions due to a reduced mental capacity is less culpable and less able to be specifically deterred than a person who is not mentally ill, and a long sentence for such a defendant may not serve the purposes of punishment. Id. For these reasons, § 5K2.13 gives judges the discretion to reduce sentences for defendants suffering from diminished capacity. A finding of diminished capacity could also lead to the conclusion that the most effective way of incapacitating the defendant and preventing him from committing further crimes is to provide needed medical care outside a prison setting.

U.S. v. Portman, 599 F. 3d 633, 638 (7th Cir. 2010); (emphasis added).

"In prior cases" the Sixth Circuit "has held that diminished mental capacity is found where a defendant's condition affects his ability to process information or to reason." *U.S. v. Barajas-Nunez*, 91 F. 3d 826, 831 (6th Cir. 1996).

"'[S]ignificantly reduced mental capacity' included both cognitive impairments (i.e., an inability to understand the wrongfulness of the conduct or to exercise the power of reason) and volitional impairments (i.e., an inability to control behavior that the person knows is wrongful). The application note specifically includes both types of impairments in the definition of significantly reduced mental capacity." *U.S, v. Sadolsky*, 234 F. 3d 938, 942 (6th Cir. 2000). "Section 5K2.13 does not distinguish between SRMCs that explain the behavior that constituted the crime charged and SRMCs that explain the behavior that motivated the crime. In other words, § 5K2.13 does not require a direct causal link between the SRMC and the crime charged." *Sadolsky*, 943.

This use of diminished mental capacity in sentencing was well established long before Neuhard's trial. Yet Korn failed to even seek a downward departure on the specific basis of diminished mental capacity.[11] According to the Revised Presentence Investigation Report,

[11] Neuhard "has persistent deficits in his social communication, social interaction as noted by deficits in social/emotional reciprocity, deficits in non-verbal communicative behaviors used for social interaction, and deficits in developing and maintaining an understanding in

"NEUHARD stated he was diagnosed with Autism in February 2016. *Counsel for the defendant declined to provide any further information about this diagnosis.*" Sealed Record, Presentence Investigation Report, Revised 07/10/2017), *Mental and Emotional Health*, p. 14, ¶ 78; (emphasis added). As a result, the Revised Presentence Investigation Report states "[t]he probation officer has not identified any factors that would warrant a departure from the applicable sentencing guideline range." *Id.*, *Factors that May Warrant Departure*, p. 19, ¶ 107.

The habeas court noted that, "[d]uring the sentencing hearing, trial counsel argued at length that Neuhard's autism had profoundly impacted his life and that the court should consider it a mitigating factor." Opinion and Order, 10/18/2022, p. 18; ECF No. 197, Page ID# 1866. Yet trial defense counsel failed to refer to or argue in any way that Neuhard was entitled to a downward departure due to an accused's diminished capacity pursuant to §5K2.13, Diminished Capacity. Disappointingly, the court below at trial and in the habeas proceedings as well as the prosecutors also failed to appreciate the application of §5K2.13 to Neuhard's autism. The district court in denying this claim exposed the defect in Korn's approach to sentencing by stating both the trial and habeas psychologists "agree that Neuhard has higher cognitive abilities than those with – what Dr. Maltz would say is incorrectly labeled as – "severe' autism." Opinion and Order, 10/18/2022, p. 19, Page ID# 1867. The courts below completely overlooked that Neuhard's autism constituted "cognitive impairments" and "volitional impairments" that entitled Neuhard to a substantial downward departure due to diminished capacity and erroneously focused solely on his cognitive ability.

The inability of Neuhard's trial counsel to appreciate the deficiencies and inaccuracies within

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relationships." Sealed Record, Neuhard's Exhibit B, Dr. Maltz's Psychological Evaluation, 07/24/2020, p. 7.

the evaluation provided by his expert, Dr. Miller, was the result of his inadequate investigation that resulted in Korn's guiding belief that any knowledge of Neuhard's autism would cause the jury to view him as "a mentally ill monster who could not control his impulses to sexually abuse children." Opinion and Order, 12-13; ECF No. 197, Page ID 1860-61.

Korn did nothing to prepare to present or otherwise advance Neuhard's autism in either pretrial or trial proceedings, including discovery production, to reinforce or complement the presentation of Neuhard's autism as a mitigating sentencing factor. This was not a strategy; this was negligence in investigation and litigation constituting ineffectiveness.[12]

"[T]hat a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate [investigation] before arriving at [a] particular theory"was prejudicial. *Sears v. Upton*, 561 U.S. 953, 130 S.Ct. 3259, 3265 (2010). Thus, a purported strategic decision is automatically objectively unreasonable when the attorney has failed to adequately investigate his or her options and make a reasonable choice between them. *Sears*, 561 U.S. at 954.

This Court has "rejected any suggestion that a decision to focus on one potentially reasonable trial strategy ... was 'justified as a tactical decision' when 'counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." A 'tactical decision' is a precursor to concluding that counsel has developed a 'reasonable' mitigation theory in a particular case." *Sears*, 529 U.S. at 396.

According to the district court, "Neuhard argues that trial counsel erred by using a report

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[12] Korn's failure to appreciate Neuhard's autism could justify a downward departure under U. S. S. G. §5K2.13 Diminished Capacity, *supra*, reveals the inadequacy of Korn's investigation and research.

prepared by Dr. Steven Miller, Ph.D., that referred to Neuhard's autism as 'mild/less severe' because the Government argued at sentencing that Neuhard's mild autism should not count as a mitigating factor and should instead count as an aggravating factor." Opinion & Order, 18, 10/18/2022, ECF No. 197, Page ID# 1866. The habeas court below held "nothing in Dr. Miller's report indicated that further investigation into Neuhard's autism was necessary." *Id.*, p. 19.

Korn had obviously not investigated whether a doctor inexperienced with treating autism is competent to diagnose and treat an adult with autism, as Korn selected experts with no experience or expertise in treating autistic adults.

This Court "certainly ha[s] never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Sears v. Upton*, 561 U.S. at 396.

The district court recognized that "reasonable jurists could debate (1) whether trial counsel provided ineffective assistance by failing to present evidence of Neuhard's autism at trial," yet denied the COA on the "claim that trial counsel was ineffective for failing to adequately present evidence of Neuhard's autism as a mitigating factor at sentencing." Order, 04/03/2023; Page ID# 2079-2083. These two claims actually complement and interact with each other. This in itself justifies granting an expansion of the COA to include this autism sentencing claim.

Released in 2013, the DSM-5, *supra*, was and remains the standard reference that healthcare providers use to diagnose mental and behavioral conditions, including autism. Yet the Autism Spectrum Disorder Diagnostic Criteria contains no reference to sexuality and, although addressing varying level of requisite support, does not refer to any notion of "mild" autism. Fed. R. Evid., Rule 201, *Judicial Notice of Adjudicative Facts*.

As Korn did not begin representing Neuhard until 2015, he should have had access to and consulted the DSM-5 (2013) not only to understand autism spectrum disorder, but also to evaluate any expert's diagnosis and advice.

Individuals with autism have "[p]ersistent deficits in social communication and social interaction across multiple contexts, as manifested by," for example, "[d]eficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions" and "[d]eficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication." Diagnostic Criteria for 299.00 Autism Spectrum Disorder, DSM-5, *supra.*

According to his habeas affidavit, trial counsel reviewed books and articles about autism and criminal sexual conduct cases. Yet, those sources should not have persuaded Korn to believe that an autistic individual, like Neuhard, would be perceived "as a mentally ill 'monster' who could not control his impulses to sexually abuse children."

The COA application addressed both the performance analysis and the prejudice component. In the Defendant's Sentencing Memorandum, "Defense counsel respectfully recommends a sentence of imprisonment of 25 years, to be followed by a substantial period of supervised release." Sealed Record, Defendant's Sentencing Memorandum, 11/02/2017, p. 12. Although the Sentencing Memorandum briefly discussed Neuhard's autism, trial counsel followed those references with this disclaimer: "Defense counsel is not asking this Honorable Court to excuse or minimize Defendant's

criminal actions." *Id.*, pp. 2, 8. Not only did trial counsel fail to seek a downward departure specifically under §5K2.13, Diminished Capacity (Policy Statement), counsel expressly told the sentencing court that Neuhard's autism does not excuse or minimize his criminal actions. Such an argument is diametrically opposed to a diminished capacity downward departure under §5K2.13, which acknowledges that significantly reduced mental capacity has a significantly impaired ability to (1) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (2) control behavior that the defendant knows is wrongful, as explained above.

Trial counsel implicitly argued to the sentencing court that Neuhard's autism would not justify a downward departure for diminished capacity and failed to effectively use autism as a mitigating factor. A t 25-year sentence, according to trial counsel, "would also take into consideration the difficulties the Defendant has had to cope with his entire life and the potential for rehabilitation that new treatment modalities now afford individuals suffering from the affliction of autism." *Id.*, p. 9.

Korn's mitigation argument completely eviscerated the goals of the diminished capacity downward departure. In addition to giving "judges the discretion to reduce sentences for defendants suffering from diminished capacity ...[a] finding of diminished capacity could also lead to the conclusion that the most effective way of incapacitating the defendant and preventing him from committing further crimes is to provide needed medical care outside a prison setting." *U.S. v. Portman, supra*, at 638. Trial counsel's argument for a 25-year sentence was the complete antithesis of a sentence significantly reduced in length and type by autism.

Trial counsel did not even argue that Neuhard, due to his autism, would benefit most from treatment, and that any risk of recidivism would be more appropriately addressed through treatment

rather than incarceration. Trial counsel also failed to advise the sentencing court that Neuhard due to his autism and conviction for a child pornography would be at more risk from inmate attacks than a neurotypical inmate.

"Permitting sentencing courts to consider the widest possible breadth of information about a defendant 'ensures that the punishment will suit not merely the offense but the individual defendant.'" *Pepper v. U.S.*, 562 U.S. 476, 131 S.Ct. 1229, 1240 (2011), quoting *Wasman v. United States*, 468 U.S. 559, 564 (1984).

"Diminished mental capacity is a ground stated in the sentencing guidelines themselves for a lower sentence. U.S.C.G. § 5K2.13." *U.S. v. Cunningham*, 429 F. 3d 673, 679 (7th Cir. 2005). "[A] heavy sentence for an offender of diminished mental capacity may be incompatible with the primary purposes of sentencing as set forth in § 3553(a)(2). *U.S. v. Jackson*, 547 F. 3d 786, 795 (7th Cir. 2008).

"In prior cases [the Sixth Circuit] has held that diminished mental capacity is found where a defendant's condition affects his ability to process information or to reason." *U.S. v. Barajas-Nunez*, 91 F. 3d 826, 831 (6th Cir. 1996). Autism meets this criteria, particularly as Neuhard's functioning and thinking is similar to that of a child of around ten years old without autism, according to the expert at the habeas proceedings.

It is obvious that Neuhard's trial attorney did not conduct an adequate investigation into Neuhard's autism, the sentencing guidelines on diminished capacity or the relevant case law on diminished capacity. Those failures completely undermined trial counsel's effectiveness at Neuhard's sentencing.

Neuhard "was sentenced to 420 months on Count One, 240 months on Count Two, and 120

months on Count Three, to run concurrently for a total sentence of 35 years." Opinion and Order, 10/18/2022, p. 1; Page ID# 1849. Trial counsel would have had a much better chance to reach a total sentence of 25 years or less by seeking a significant downward departure pursuant to diminished capacity, §5K2.13, and the case law interpreting it, due to Neuhard's acknowledged autism. Prejudice is manifest.

The presentence report identified a single prior conviction at age 17 for criminal sexual conduct, third degree, described as a rape of a 15-year-old female, for which Neuhard received a probated sentence. Sealed Record, Revised Presentence Report, 07/10/17, pp. 10-12. Although Korn in his objections to the presentence report and at sentencing argued on legal grounds that Neuhard's conviction at 17 under the Holmes Youthful Trainee Act (HYTA) should not be considered, counsel never raised Neuhard's autism as a reason to discount or mitigate the significance of that youthful conviction, even though "[a]utism is a life-long developmental disability." Sealed Record, Dr. Maltz's Psychological Evaluation, 07/24/2020, p. 11. Due to this ineffective use of Neuhard's autism, the sentencing judge explained that "a HYTA is a great disposition for people who change," but "instead of changing, you continued to engage in inappropriate sexual conduct." Sentencing Hearing, 01/18/18, 58; RN, Page ID # 1539.

This demonstrates that trial counsel failed to adequately present and explain Neuhard's diminished capacity due to his life-long autism and its presence at age 17. The sentencing judge concluded that "there really aren't a lot of mitigating factors," which was primarily due to trial defense counsel throughout trial and at sentencing failing to present autism as a mitigating factor demonstrating a life-long developmental disability, constituting diminished capacity as a sentencing mitigator. *Id.*, Page ID# 1538.

Neuhard has demonstrated that the rulings below barring habeas corpus relief on this federal constitutional claim of ineffective assistance of counsel at sentencing is itself debatable among jurists of reason and justifies the grant of a COA on this claim. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Neuhard has also demonstrated that reasonable jurists could debate whether this section of the petition should have been resolved in a different manner and that the issues presented in that section are adequate to deserve encouragement to proceed further. Neuhard should have obtained a COA on this claim. In fact, Neuhard has demonstrated that Korn provided ineffective assistance of counsel at sentencing for his failure to effectively use Neuhard's autism as a mitigating factor.

This Court should grant a writ of certiorari on this federal constitutional claim.

CONCLUSION

On the basis of the first question presented that the Neuhard's trial counsel deprived him of the effective assistance of counsel by failing to present evidence of Neuhard's autism at trial, this Court should grant the writ of certiorari and decide this federal constitutional claim on the merits.

On the basis of the second question presented that Neuhard's trial counsel denied Neuhard the effective assistance of counsel for failing to adequately present evidence of Neuhard's autism as a mitigating factor at sentencing, this Court should reverse the Sixth Circuit Court of Appeals' denial of the COA on this claim, and either decide this claim on the merits as established by the evidence of record or, if necessary, grant the writ, vacate the opinion below and remand this claim to the Sixth Circuit Court of Appeals to address this federal constitutional question.

Respectfully submitted,

/s/ J. Vincent Aprile II

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