No. 14-772

In the Supreme Court of the United States

SHERMAN LAMONT FIELDS, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

CAPITAL CASE

1. Whether the court of appeals correctly denied petitioner a certificate of appealability (COA) on his claim that he received ineffective assistance of counsel at the penalty phase of his capital trial by virtue of his counsel's failure to present mental health evidence.

2. Whether the court of appeals correctly denied petitioner a COA on his claim that he was entitled by 28 U.S.C. 2255 to an evidentiary hearing on the issue of his competence to waive his right to counsel at trial.

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OPINIONS BELOW

The opinion of the court of appeals denying a certificate of appealability (Pet. App. 3a-82a) is reported at 761 F.3d 443. The order of the district court denying relief under 28 U.S.C. 2255 (Pet. App. 91a-242a) is unreported. The opinion of the court of appeals on direct review is reported at 483 F.3d 313.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2014. A petition for rehearing was denied on September 30, 2014 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on December 29, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was found guilty on seven counts relating to his escape from federal custody and subsequent murder of his ex-girlfriend. After a separate penalty-phase hearing conducted pursuant to the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591-3598, the jury unanimously recommended that petitioner be sentenced to death on the murder count, and the district court sentenced him to death. The court of appeals affirmed, 483 F.3d 313, and this Court denied certiorari, 552 U.S. 1144. Petitioner then filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255. The district court denied petitioner's motion, Pet. App. 91a-242a, and declined to issue a certificate of appealability (COA), *id.* at 240a-241a. The court of appeals denied petitioner's motion for a COA. *Id.* at 3a-82a.

1. In September 2001, petitioner was arrested on federal firearms charges and placed in federal custody in the McLennan County Detention Center in Waco, Texas. Pet. App. 97a. In November 2001, petitioner bribed a corrections officer, obtained a key to a fire-escape door, and escaped. *Ibid.*

Petitioner obtained a car and a .32 caliber revolver from a friend. Pet. App. 97a. That evening, he visited his ex-girlfriend, Suncerey Coleman, at Hillcrest Hospital in Waco, where she was attending to her newborn baby. *Ibid.* After convincing Coleman to leave the hospital, petitioner drove Coleman to Downsville, Texas. *Ibid.* There, petitioner and Coleman had sexual intercourse. Petitioner then shot Coleman twice in the head, killing her. *Ibid.*

About two weeks after the murder, petitioner was apprehended, but only after he had committed an armed carjacking and additional firearms offenses. Pet. App. 98a; Gov't C.A. Br. 6. Both before and after his re-arrest, petitioner bragged to acquaintances and fellow inmates that he had murdered Coleman. Gov't C.A. Br. 6; see, *e.g.*, 10 Trial Tr. 1425-1427.

2. a. A grand jury charged petitioner with using and carrying a firearm during and in relation to his escape, resulting in intentional murder, and with six other offenses relating to his escape and crime spree while at large. Pet. App. 92a. The maximum sentence on the murder count is death, see 18 U.S.C. 924(j)(1), and the government provided notice of its intent to seek the death penalty. 6:01-cr-00164 Docket entry (Docket) No. 63 (May 23, 2003).

b. Several times before trial, petitioner sought to waive his right to counsel and proceed pro se. See, *e.g.*, Docket No. 317-1, at 2 (Mar. 22, 2010). Although petitioner had withdrawn his prior requests to proceed pro se, see, *e.g.*, Docket No. 317-5, at 3-4 (Mar. 22, 2010), on the eve of trial, he again informed the district court that he wished to represent himself, 1 Trial Tr. 13-14. The district court then conducted an "extensive inquiry" to determine if petitioner's waiver of counsel was made voluntarily and intelligently. Pet. App. 116a. The court explained to petitioner that he would be making a "terrible mistake" if he chose to represent himself, and petitioner's counsel told the district court that they had similarly informed petitioner that he would be in "grave danger" if he waived representation. 1 Trial Tr. 8, 20. Nevertheless, petitioner maintained that he wanted to represent himself because he believed his attorneys were "working with

the prosecutor instead of working for [him]." *Id.* at 13. The district court responded by telling petitioner that "there is no possibility that your lawyers are working with the government." *Id.* at 22.

Before the district court ruled on petitioner's waiver request, the government suggested that the court examine petitioner's competency. 1 Trial Tr. 24-26. Petitioner's counsel informed the court that petitioner had already been examined by a psychiatrist and had been determined to have an IQ of 114 and no signs of mental impairment. *Id.* at 26-27. Although petitioner's counsel reported that petitioner had "never given [them] any indication that he [was] incompetent in the sense that he [did not] understand what's going on," the district court decided to "bend over backwards" to have petitioner examined before trial "out of an abundance of caution." *Id.* at 27.

The district court arranged for petitioner to be examined by psychiatrist Dr. Steven Mark the following Monday morning. 1 Trial Tr. 31. After examining petitioner, Dr. Mark reported to the court that petitioner "went through a standard interview for competency and current mental status." 2 Trial Tr. 60. While petitioner "had some history of depression," Dr. Mark stated, it did "not interfere with [his] competency." *Ibid.* He ultimately concluded that petitioner "is not psychotic," "is not organic," "appeared able to think through questions and not distract," and could competently make the decision to represent himself. *Id.* at 60-61. Following Dr. Mark's report, the district court found that petitioner had made a voluntary and

intelligent waiver of his right to counsel and allowed petitioner to represent himself. Pet. App. 120a.[1]

c. Petitioner proceeded pro se at the guilt phase of his trial. The jury convicted petitioner on all seven counts. Pet. App. 92a.

d. The district court then convened a separate capital sentencing proceeding pursuant to the FDPA. On the threshold grounds that determine eligibility for the death penalty, petitioner stipulated to one statutory aggravating factor, *i.e.*, that he had previously been convicted of a felony involving "the use or attempted or threatened use of a firearm * * * against another person." 18 U.S.C. 3592(c)(2). In addition, the government presented evidence that petitioner committed the murder during his escape, another statutory aggravator. See 18 U.S.C. 3592(c)(1).

The government also presented a lengthy case to demonstrate why the death penalty should be imposed, adducing evidence of non-statutory aggravating factors such as petitioner's history of violence and likely future dangerousness.[2] The government called 21 witnesses, many of whom testified about petitioner's behavior while incarcerated, including his repeated escape attempts and uncontrollable behavior. See,

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[1] Petitioner's trial attorney later explained that he had repeatedly" told petitioner "not to waive his right to counsel." Docket No. 300-5, at 2 (Mar. 1, 2009). Nevertheless, petitioner was "adamant, believing that if he asked the questions, the witnesses would be forced to tell the truth—a dynamic that he felt would not exist if the witnesses were examined by counsel." *Ibid.*

[2] The term nonstatutory aggravating factor" refers to any aggravating factor that is not specifically described in 18 U.S.C. 3592. Section 3592(c) provides that the jury may consider "whether any other aggravating factor for which notice has been given exists." See *Jones* v. *United States*, 527 U.S. 373, 378 n.2 (1999).

e.g., 15 Trial Tr. 2085-2086, 2169-2170; 16 Trial Tr. 2302-2310. During his incarceration, petitioner had repeatedly made threats against guards and their family members; he also had made a list of guards that he wanted to shoot. See, *e.g.*, 15 Trial Tr. 2099, 2123, 2126, 2155, 2160, 2166, 2172, 2233-2234, 2239, 2256.

The government introduced testimony concerning petitioner's prior involvement with violent crime. A Waco, Texas, police detective testified that in 1992, petitioner pleaded guilty to attempted murder with a deadly weapon after shooting a man in the head during a drive-by shooting. 15 Trial Tr. 2149-2150. Following his release from an eight-year prison sentence for the crime, petitioner took part in another shooting. *Id.* at 2176-2177. When petitioner was ultimately arrested for this second shooting, he was in possession of a firearm. *Ibid.*

The government also presented testimony from petitioner's ex-wife, April Fields, the mother of three of petitioner's children. 15 Trial Tr. 2201-2202. Fields testified that petitioner frequently raped her, beat her, and threatened to kill her. *Id.* at 2203, 2205. On one occasion, petitioner showed their daughter a handgun and said, "This is what I'm going to kill your mama with." *Id.* at 2209.

Finally, the government presented testimony from Coleman's sister, Josalyn Rawlins, who described Coleman as a beloved family member who left behind three small children. 16 Trial Tr. 2364-2365. Coleman's mother also testified that she would "never be able to express" how her daughter's death had "devastated" her life. *Id.* at 2367.

Petitioner's penalty phase team included two attorneys, an investigator, a psychiatrist, and a mitigation specialist. Gov't C.A. Br. 16. Together, they presented an extensive mitigation case, including nine witnesses. *Id.* at 16-17. Three employees of correctional facilities testified that petitioner had behaved well during his recent incarceration, 16 Trial Tr. 2377-2378, 2381, 2386, and Jan Bye, the mitigation specialist, detailed petitioner's personal background for the jury, *id.* at 2389-2410, 2431. Among other things, she testified about the abuse and neglect petitioner suffered at the hand of family members, and his exposure to traumatic events. *Ibid.* Petitioner saw three close friends killed "in a violent way" and witnessed a drunk driver kill his grandfather. *Id.* at 2401. A psychiatrist, Dr. Jack Price, also testified that petitioner had a high-average IQ and was capable of bettering himself in prison. *Id.* at 2473-2481.

Petitioner's mother testified regarding the difficulties that petitioner had faced during his childhood. 16 Trial Tr. 2456-2470. She explained that her live-in boyfriend of eight years had repeatedly beaten her and petitioner until she later shot the boyfriend, ending the violence. *Id.* at 2458-2463. Petitioner's family then moved to a dangerous housing project, and petitioner's mother married another abusive man who ultimately shot her in the head. *Id.* at 2460-2466. A minister who knew petitioner also testified that petitioner never recovered from the trauma of his grandfather's death and that petitioner's death would have a negative impact on the minister and petitioner's family. *Id.* at 2443-2450.

Petitioner's counsel also introduced evidence about petitioner's alleged positive attributes. One of peti-

tioner's previous girlfriends testified that petitioner had always treated her with respect and was a positive influence on their daughter. 16 Trial Tr. 2454-2456. Petitioner's uncle described him as a "hardworking person" who helped with his grandfather's lawn-care business and was good with his grandfather's horses. *Id.* at 2434-2435. Petitioner's mother read a poem that petitioner had written for her. *Id.* at 2468.

Following petitioner's mitigation case, the jury determined that petitioner was eligible for a death sentence by unanimously finding, beyond a reasonable doubt, that he was at least 18 years old at the time of the murder, 18 U.S.C. 3591(a); that he had the requisite intent, *ibid.*; and that the government had proved at least one statutory aggravating factor, 18 U.S.C. 3592(c).

Turning to the selection of the appropriate sentence, the jury unanimously found beyond a reasonable doubt the existence of three non-statutory aggravating factors—that petitioner caused "injury, harm, and loss" to Coleman's family and friends; previously participated in "other serious acts of violence"; and was "likely to commit serious acts of violence in the future." Special Findings Form 6-7. The jury unanimously found that the "aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death." *Id.* at 15. The district court sentenced petitioner to death in accordance with the jury's recommendation.

3. The court of appeals affirmed in March 2007. 483 F.3d 313, 314. The court rejected petitioner's arguments on each of the 15 issues he had raised in

his appeal. *Ibid.* This Court denied certiorari. 552 U.S. 1144 (2008).

4. In 2009, petitioner filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence, Docket Nos. 297 & 298 (Jan. 14, 2009), 300 (Mar. 1, 2009), 318 (Apr. 12, 2010), raising 49 grounds for relief, Pet. App. 98a. Petitioner asserted, among other claims, that he had been incompetent to waive his right to counsel and that the district court's decision allowing him to do so violated the Fifth, Sixth, and Eighth Amendments. *Id.* at 98a. Additionally, petitioner claimed that he was denied his right to counsel and due process when the district court allegedly conducted an inadequate hearing to determine his competence and that his counsel had been ineffective for failing to conduct a sufficient investigation into his competency. *Id.* at 98a-99a. Petitioner also raised multiple claims for relief based on his counsel's alleged failure to conduct an adequate penalty phase investigation, *id.* at 101a-102a, including the failure to adequately investigate petitioner's alleged mental illnesses, *id.* at 98a-99a; see also Docket No. 298, at 23 (Jan. 14, 2009).

In support of his incompetency and mental-illness claims, petitioner relied primarily on the declaration of Dr. George W. Woods, a licensed physician specializing in psychiatry and neuropsychiatry, who had interviewed petitioner in prison six years after his trial. Docket No. 319-1, at 1 (Apr. 12, 2010). In Dr. Woods's view, "[a]s a result of * * * social, psychological, developmental, familial, cultural, and environmental factors," petitioner's "development and functioning have been severely impaired throughout his life, including the time of the capital offense for

which he is incarcerated, the time of his pretrial detention, his pretrial preparation of his defense, and the time of his trial, up through the present." *Id.* at 22-23. Dr. Woods opined that petitioner suffers from Bipolar Disorder and Post-Traumatic Stress Disorder and that the symptoms of petitioner's "multiple psychiatric disorders impaired his competency to waive his right to counsel." *Id.* at 23.

Petitioner also submitted declarations from, among others, Dr. Price and Ms. Bye. In his declaration, Dr. Price explained that he had evaluated petitioner in 2003 and 2004 at the request of petitioner's trial counsel. Docket No. 319-5, at 1 (Apr. 12, 2010). Dr. Price explained that he had conducted an IQ test and clinical interview of petitioner, and while he had not conducted any neuropsychological testing of petitioner, he "did not find any suggestion of congenital or acquired brain damage." *Ibid.* Moreover, Dr. Price explained that while he did not evaluate petitioner on the issue of his competency to waive counsel, he had discussed the issue with petitioner's trial counsel and "opined that while [he] found no mental disorder that specifically precluded [petitioner's] competency to represent himself, * * * [petitioner's] decision to do so was poor judgment on his part." *Id.* at 1-2.

In her affidavit, Ms. Bye, the mitigation specialist who had testified at trial, explained that during her meetings with petitioner, she had "learned that [he] had experienced a great deal of trauma in his life." Docket No. 319-6, at 1 (Apr. 12, 2010). She explained that she believed that a thorough understanding of petitioner's mental health was critical to the mitigation case, but she "was also aware of several prior evaluations and diagnoses of [petitioner] which [she]

thought were suspect and which made [petitioner] look dangerous." *Id.* at 2. Ms. Bye understood that the government had copies of these evaluations and expected that they would be introduced at trial. *Ibid.* While Ms. Bye stated that she should have advocated for a fuller mental health evaluation of petitioner, she made clear that petitioner's counsel "did what they felt was best." *Ibid.*

5. The district court denied petitioner's motion, without conducting an evidentiary hearing. Pet. App. 91a-242a.

a. With respect to petitioner's claim that he had been incompetent to waive his right to counsel, the district court found that neither petitioner's "right to counsel nor his due process rights were violated in connection with the trial court's determination at trial on the issue of [petitioner's] competency to waive counsel and represent himself." Pet. App. 126a. The court recognized that "[a] criminal defendant may not be tried unless he is competent, and he may not waive his right to counsel or plead guilty unless he does so 'competently and intelligently,'" *id.* at 114a (quoting *Godinez* v. *Moran*, 509 U.S. 389, 396 (1993)), and it explained that "'[t]he focus of a competency inquiry is the defendant's mental capacity' and that the 'question is whether he has the ability to understand the proceedings,'" *id.* at 115a (quoting *Godinez*, 509 U.S. at 401 n.12).

The district court then recounted the "extensive inquiry" it conducted before trial to determine whether petitioner's waiver of counsel was made voluntarily and intelligently. Pet. App. 116a. The court noted that it had "explained in detail to [petitioner] the consequences of proceeding *pro se* in the criminal trial"

and that, "[d]uring the course of the Court's inquiry, [petitioner] expressed his understanding regarding the charges in his case, including the fact that he was charged with capital murder in Count 3." *Ibid.* The court found that "[t]he record before [it] demonstrates that [petitioner] waived his right to counsel intelligently and voluntarily." *Id.* at 117a. The court noted that petitioner's demeanor at the time, as well as his "coherent pleadings with the Court," supported its conclusion. *Id.* at 118a.

The district court also found that the pre-trial proceedings to determine whether petitioner was competent to waive his right to counsel were adequate. Pet. App. 120a-121a. The court explained that petitioner's counsel had stated that petitioner had "been examined by a psychologist, Dr. Randy Price, who reported that [petitioner] was not mentally retarded and, in fact, fairly bright." *Id.* at 119a. Moreover, the court noted, petitioner's counsel had stated that petitioner "had never given any indication 'that he was incompetent in the sense that he doesn't understand what's going on.'" *Ibid.* (quoting 1 Trial Tr. 27). The court explained that, nevertheless, it had ordered that petitioner be examined by Dr. Mark, who "went through a standard interview for competency and current mental status" and reported that petitioner "had some history of depression in the past and maybe some now with his current situation, but it does not interfere with his competency," and that petitioner "appeared able to make decisions adequately for himself." *Id.* at 120a.

In light of this record, the court found that "Dr. Mark's thirty-minute examination of [petitioner] on the limited issue of competence—when coupled with

[petitioner's] observed demeanor at trial, his attorney's observation after extensive interactions with [petitioner], and Dr. Price's evaluation focusing on [petitioner's] intelligence—did not deprive [petitioner] of his procedural due process rights as to the adequacy of the [c]ourt's inquiry into the competence issue." Pet. App. 122a.

The district court found that neither the declaration of Dr. Woods, nor the other evidence submitted by petitioner, altered that conclusion. Pet. App. 122a-124a. While noting that petitioner had suffered from trauma in his life, the court stated that "the question of mental competence to stand trial or waive counsel 'focuses on a limited aspect of a defendant's present mental condition'" and, "[a]t the time of trial, [petitioner] was competent to waive counsel as he demonstrated a rational understanding of the proceedings and was able to converse with his counsel and the [c]ourt regarding his defense." *Id.* at 124a (citation omitted).

b. The district court also rejected petitioner's argument that his counsel had rendered ineffective assistance by failing to conduct a competent penalty phase investigation. Pet. App. 184a-203a. After reciting the legal standard articulated in *Strickland* v. *Washington*, 466 U.S. 668 (1984), the court reviewed trial counsel's investigation and the mitigation evidence presented at trial. Pet. App. 184a-187a. Specifically, the court explained that Ms. Bye, the mitigation specialist, had "provided compelling testimony about [petitioner's] often violent and disruptive childhood." *Id.* at 195a. Additionally, petitioner's relatives had "provided testimony that echoed [petitioner's] violent, chaotic, and disruptive childhood." *Id.* at 196a.

The district court then rejected petitioner's argument that counsel was ineffective for failing to investigate petitioner's history of mental illness. Pet. App. 201a. After noting the opinion offered by Dr. Woods, the district court recognized that "[i]t is possible that further information regarding any mental illness suffered by [petitioner] or the genetic predisposition to mental illness based on his family history could have been mitigating if true." *Id.* at 200a (citing *Porter* v. *McCollum*, 558 U.S. 30, 41-42 (2009)). At the same time, the court also recognized that such evidence "can be both mitigating and aggravating," because in addition to helping the jury to understand petitioner, it "may have militated in favor of finding that [petitioner] was a future danger to society." *Ibid.*[3]

The district court found that petitioner's counsel had not rendered deficient performance. It explained that Dr. Price stated that, while he had not conducted neuropsychological testing on petitioner, he did not find any suggestion of congenital or acquired brain damage. Pet. App. 201a. Petitioner's "counsel reasonably relied on this evaluation regarding whether [petitioner] suffered from any type of brain damage or dysfunction as to not investigate any further." *Ibid.* Moreover, in light of Ms. Bye's admission that she was aware of past examinations of petitioner that made him "look dangerous," "[a]dditional evidence regarding mental illness or brain dysfunction * * * could have influenced the jury to feel that [petitioner] remained a dangerous threat to society," and the court

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[3] The district court noted however, that the trial record "is not totally devoid of evidence regarding issues of mental illness and brain dysfunction." Pet. App. 200a-201a (citing testimony from Ms. Bye and Dr. Price).

concluded that "counsel had a reasoned basis for not making any further inquiries" on the matter. *Id.* at 202a.

The district court also found that, even assuming counsel had rendered deficient performance by failing to adduce additional evidence on mental illness and possible brain damage, petitioner was not prejudiced. Pet. App. 202a. The court explained that "[t]he record reflects that the government had presented compelling aggravating evidence regarding [petitioner's] future dangerousness." *Id.* at 203a. The court concluded that given that evidence, petitioner "has not established a reasonable probability that a jury would not have sentenced him to death based on counsel's purported deficiencies." *Ibid.*

c. The district court rejected petitioner's request for an evidentiary hearing on his various claims. Pet. App. 238a. It explained that "[n]o evidentiary hearing is warranted in a [28 U.S.C. 2255] proceeding where the written submission of the parties and the district court's existing record provide sufficient information to dispose of the motion without a hearing." Pet. App. 238a. Here, the court found, "the extensive record and written submissions [are] sufficient to dispose of each ground for relief." *Ibid.*

d. The district court sua sponte denied petitioner a COA on his claims, concluding that petitioner "failed to make a substantial showing of the denial of a constitutional right." Pet. App. 241a.[4]

6. Petitioner moved the court of appeals for a COA on nine claims, including his trial counsel's alleged ineffectiveness in failing to conduct an adequate pen-

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[4] The district court subsequently denied petitioner's motion for reconsideration Pet. App. 83a-90a.

alty phase investigation on petitioner's mental illness, and petitioner's alleged incompetence to waive his right to counsel. Pet. App. 9a. The court of appeals denied petitioner's motion. *Id.* at 3a-82a.

a. The court of appeals held that "reasonable jurists would not debate the district court's rejection of [petitioner's] [ineffective assistance of counsel (IAC)] claim with respect to his counsel's performance in presenting mitigating evidence of [petitioner's] mental illness and family history of mental illness." Pet. App. 23a. Although the court assumed—without deciding—that petitioner's counsel's performance was deficient, it determined that "the district court's holding that counsel's performance did not prejudice [petitioner] is not debatable." *Id.* at 24a The court explained that it had "considered 'the totality of the available mitigation evidence,' and performed the required reweighing of this evidence against that in aggravation." *Ibid.* (quoting *Porter*, 558 U.S. at 41). The court held that the district court's findings were not debatable because there is "not a probability 'sufficient to undermine confidence in the outcome,' *Wiggins* [v. *Smith*, 539 U.S. 510, 534 (2003)], that, if trial counsel had presented the mitigating evidence of mental illness to the jury, the jury would have reached a different result." Pet. App. 24a. The court explained that "[e]vidence of mental illness can be mitigating, in that it can influence a jury's appraisal of a defendant's moral culpability." *Id.* at 24a-25a (citing *Porter*, 558 U.S. at 42). "However, such evidence can also be 'double-edged,' * * * since it can lead a jury to conclude that a defendant poses a future risk of violence." *Id.* at 25a (citing *Martinez* v. *Quarterman*,

481 F.3d 249, 255 (5th Cir. 2007), cert. denied, 552 U.S. 1146 (2008)).

The court of appeals recognized that "[t]he mental health evidence that [petitioner] asserts should have been presented may have led the jury to find an additional mitigating factor related to that evidence." Pet. App. 25a. But the court explained that "even if the jury made such a finding, the jury would have weighed it, along with the other mitigating factors, against the severe aggravating factors that led the jury to impose the death penalty in the first place." *Ibid.* As the court noted:

> The jury heard testimony that [petitioner]: escaped from prison, subsequently murdered Coleman, and later carjacked [another woman] while using a gun; shot a man in the head during a drive-by shooting in 1991, pled guilty to attempted murder, and received an eight-year prison sentence for the crime; participated in another drive-by shooting in 2000; raped and beat his ex-wife, April Fields, threatened to kill her, and at one point drove her to a dark, wooded area where he made her get out of the car and pulled a gun on her, but decided not to kill her; attempted to escape from prison after his arrest for Coleman's murder by removing an air vent in the ceiling; and engaged in violent conduct and threatened the lives of correctional officers while he was imprisoned.

Id. at 27a.

The court of appeals also noted the jury's unanimous finding that petitioner had "'participated in attempted murders and other serious acts of violence' before killing Coleman" and concluded that petitioner "'[was] likely to commit serious acts of violence in the

future which would be a continuing and serious threat to the lives and safety of others.'" Pet. App. 27a. The court held that, given that record, "reasonable jurists would not debate the district court's holding that the verdict would not have changed even had the jury heard evidence of [petitioner's] mental illness." *Id.* at 27a-28a.

b. The court of appeals also held that petitioner was not entitled to a COA on the issue of his competence to waive his right to counsel. Pet. App. 41a. The court began by recounting the proceedings in the district court, including the district court's admonitions to petitioner about the waiver, as well as Dr. Mark's conclusion that petitioner could "make the decision to represent himself and be competent." *Id.* at 43a. The court then concluded that "jurists of reason would not disagree with the district court's holding, because [petitioner] does not show that his competency fell below a standard that would have required the district court to deny his request to represent himself." *Id.* at 47a.

The court of appeals explained that "Dr. Woods's declaration, executed in 2010, six years after [petitioner's] trial, is not sufficient to establish that the district court's careful and reasoned decision that [petitioner] was competent to waive counsel is debatable." Pet. App. 47a.[5] The court noted that the district court allowed petitioner to represent himself only

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[5] The court also found unpersuasive the documents from petitioner's teenage years suggesting PTSD and bipolar disease, and his inmate grievance reports" because these documents, which dealt with periods before petitioner's trial, would "not cause reasonable jurists to disagree with the district court's conclusion about [petitioner's] competency at the time of trial." Pet. App. 48a.

after "considering [petitioner's] pro se oral motion for access to a law library and his motion to change venue, questioning [petitioner] about his decision to waive counsel, speaking with [petitioner's] counsel about his competency, arranging for [petitioner's] psychiatric evaluation by Dr. Mark, and considering the results of Dr. Mark's evaluation." *Ibid.* Considering this record, the court of appeals held that "[r]easonable jurists would not debate the district court's conclusion that its inquiry into the issue demonstrated that [petitioner] 'ha[d] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,' and a 'rational as well as factual understanding of the proceedings against him.'" *Ibid.* (quoting *Dusky* v. *United States*, 362 U.S. 402 (1960) (per curiam)).

c. At the conclusion of its opinion, the court of appeals noted that "[t]he district court held that [petitioner] was not entitled to an evidentiary hearing because the record and written submissions were sufficient to dispose of each ground for relief." Pet. App. 81a. It then held that "reasonable jurists would not debate the district court's holding because the record and [petitioner's] motion are adequate to dispose of each of [petitioner's] claims." *Ibid.*

ARGUMENT

Petitioner contends that the court of appeals erred in denying a COA because (1) his counsel rendered ineffective assistance by failing to discover evidence of petitioner's mental illness and present it to the jury in petitioner's mitigation case (Pet. 10-21); and (2) the district court erred in failing to conduct an evidentiary hearing under 28 U.S.C. 2255(b) on petitioner's competency to waive his right to counsel (Pet. 22-29).

Those contentions lack merit. The court of appeals correctly denied a COA on petitioner's claims, and its opinion does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. a. The court of appeals correctly rejected petitioner's claim of ineffective assistance of counsel. As the court explained, this Court's cases require a defendant claiming ineffective assistance of counsel to show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that the deficient performance prejudiced the defendant because there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Pet. App. 11a-14a (quoting *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005)). As the court of appeals further noted, when a defendant's claim is based on his trial counsel's alleged failure to offer certain evidence in mitigation, a court assessing prejudice 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." *Id.* at 14a (quoting *Porter* v. *McCollum*, 558 U.S. 30, 41 (2009)) (internal quotation marks omitted).

The court of appeals correctly applied those legal principles to the facts of petitioner's case. The court assumed, without deciding, that petitioner's counsel was deficient in failing to present evidence of petitioner's bipolar disorder and post-traumatic stress disorder (PTSD). Pet. App. 24a. It then "performed the required reweighing of [the totality of available mitigation] evidence against that in aggravation" and concluded that the failure to present such evidence

was not prejudicial. *Ibid.* The court expressly acknowledged that "[e]vidence of mental illness can be mitigating, in that it can influence a jury's appraisal of a defendant's moral culpability," and it further recognized that the evidence here "may have led the jury to find an additional mitigating factor related to that evidence." *Id.* at 24a-25a. Nonetheless, the court concluded that "even if the jury made such a finding, the jury would have weighed it, along with other mitigating factors, against the severe aggravating factors that led the jury to impose the death penalty in the first place." *Id.* at 25a. The court ultimately determined that "[r]easonable jurists would not disagree with the district court's conclusion that the jury's calculus would not have changed if [the mental illness evidence] had been presented." *Id.* at 26a.

In reaching that conclusion, the court of appeals properly emphasized the strength of the aggravating circumstances weighing in favor of the death sentence. The court highlighted the brutality of the charged crime—which involved the murder of a mother of a newborn infant—along with petitioner's record of other horrific conduct, including his escape from prison; his carjacking of a woman with a gun; his drive-by shooting of a man in the head in 1991; his prior guilty plea to attempted murder; his participation in another drive-by shooting in 2000; his rapes, beatings, and threats to kill his ex-wife; and his threats to the lives of correctional officers. Pet. App. 27a. The court noted the jury's unanimous conclusions that petitioner (1) had "participated in attempted murders and other serious acts of violence" before killing his ex-girlfriend, and (2) "is likely to commit serious acts of

violence in the future which would be a continuing and serious threat to the lives and safety of others." *Ibid.*

In the course of that fact-intensive analysis, the court of appeals also noted that evidence of mental illness—in addition to potentially mitigating a defendant's culpability—can also be "double-edged," insofar as it "can lead a jury to conclude that a defendant poses a future risk of violence." Pet. App. 25a (citing cases); see *id.* at 27a. The court identified that consideration as one factor supporting its conclusion that reasonable jurists would not debate the district court's conclusion that petitioner was not prejudiced by his counsel's failure to present evidence of his mental illness. *Id.* at 27a-28a.

b. Petitioner argues (Pet. 10-19) that the court of appeals erroneously rejected his ineffective-assistance-of-counsel claim based on a categorical, per se rule that counsel's failure to present evidence of mental illness can never be prejudicial under *Strickland* v. *Washington*, 466 U.S. 668 (1984). His understanding of the decision below is mistaken.

As explained above, the court of appeals made clear not only (1) that "[e]vidence of mental illness can be mitigating" in general, but also (2) that in this particular case, the evidence at issue "may have led the jury to find an additional mitigating factor related to that evidence." Pet. App. 24a-25a. The court also "performed the required reweighing of [all mitigating evidence, including the mental illness evidence] against that in aggravation." *Id.* at 24a. The court rejected petitioner's claim not because evidence of mental illness is categorically incapable of establishing prejudice, but rather because that evidence does not estab-

lish prejudice under the particular circumstances of this case. *Id.* at 24a-28a.

Petitioner correctly points out that the court of appeals noted the "double-edged" nature of the mental illness evidence mitigation evidence. Pet. App. 24a-25a, 27a. But this consideration was only a single factor in the court's ultimate decision, which was primarily based on petitioner's "violent crimes, his history of violence, [and] the jury's finding that he posed a risk of future violence." *Id.* at 27a. Nothing in the court's opinion states or implies that a counsel's failure to present mental health evidence is categorically incapable of establishing prejudice under *Strickland*. Indeed, the court's detailed reweighing of the evidence indicates that it was not embracing any such per se rule. See *id.* at 24a-28a.[6]

Petitioner is also incorrect (Pet. 18) to argue that the court of appeals has a "pattern" of decisions applying a per se rule. The decisions petitioner cites (Pet. 18-19) mention the double-edged nature of proffered evidence as a factor relevant to the prejudice analysis,

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[6] The court of appeals' recognition that the evidence proffered by petitioner could be "double-edged" was correct. This Court and the courts of appeals have recognized that some types of evidence have the potential to be viewed as both mitigating and aggravating by a jury. See, *e.g.*, *Burger* v. *Kemp*, 483 U.S. 776, 793-794 (1987); *Martinez* v. *Quarterman*, 481 F.3d 249, 258 (5th Cir. 2007), cert. denied, 552 U.S. 1146 (2008); *Emerson* v. *Gramley*, 91 F.3d 898, 906 (7th Cir. 1996), cert. denied, 520 U.S. 1122 (1997). In particular, evidence of a defendant's mental illness may show lesser culpability for a defendant's actions, or it might show evidence of a violent pattern of misbehavior that culminated in the capital offense. Cf. *Burger*, 483 U.S. at 793-794; *Brewer* v. *Reynolds*, 51 F.3d 1519, 1527 (10th Cir. 1995), cert. denied, 516 U.S. 1123 (1996).

but they do not apply a per se rule.[7] Those decisions are consistent with the fact-intensive prejudice analysis that the court of appeals performed in this case.

c. Petitioner argues (Pet. 12) that the decision below conflicts with this Court's precedent because it "consider[ed] evidence of petitioner's mental illness solely as an aggravating factor or a risk of future dangerousness." As discussed above, that premise is incorrect. See pp. 16-17, 22-24, *supra* (noting court of appeals' repeated acknowledgment that such evidence can be mitigating); Pet. App. 24a, 27a. As petitioner recognizes (Pet. 12), "the prejudice inquiry under *Strickland* is properly conducted by weighing the mitigating evidence introduced by the petitioner against any aggravating aspects of criminal behavior." That is exactly the analysis employed below. See Pet. App. 24a-28a (reweighing the evidence).

Contrary to petitioner's argument (Pet. 11-15), the court of appeals' fact-bound analysis of the evidence here is fully consistent with this Court's precedent,

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[7] See *Brown* v. *Thaler*, 684 F.3d 482, 499 (5th Cir. 2012) (noting that the proffered evidence was double-edged, but finding no prejudice when the aggravating evidence was "overwhelming"), cert. denied, 133 S. Ct. 1244 (2013); *Ladd* v. *Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002) (noting that some mitigation evidence was double-edged, but that "most significantly, the evidence of Ladd's future dangerousness was overwhelming"); *Dowthitt* v. *Johnson*, 230 F.3d 733, 745 (5th Cir. 2000) (noting that the proffered evidence was double-edged and included evidence that the petitioner had molested and attempted to rape his niece), cert. denied, 532 U.S. 915 (2001); *Faulder* v. *Johnson*, 81 F.3d 515, 519 (5th Cir.) (noting that the proffered evidence was double-edged because it showed petitioner "came from a loving, supportive family which would make him less sympathetic"), cert. denied, 519 U.S. 995 (1996).

including *Williams* v. *Taylor*, 529 U.S. 362 (2000), *Wiggins* v. *Smith*, 539 U.S. 510 (2003), and *Rompilla*, 545 U.S. 374. Each of those decisions simply applied *Strickland*'s long-settled principles to the particular facts of the case before the Court.[8] Those are the same principles employed by the court below, see Pet. App. 11a-14a. None of the cases cited by petitioner bars a court from acknowledging—when conducting the *Strickland* prejudice analysis—that some types of mitigating evidence may cast a defendant in a negative light. In fact, the Court's decision in *Wiggins* implies the opposite, as it expressly recognizes that some types of evidence can be "double edge[d]" in the sense at issue here. 539 U.S. at 535.

d. For similar reasons, petitioner is also wrong to argue (Pet. 15-19) that the court of appeals' decision conflicts with decisions from other courts of appeals. The cases petitioner cites (Pet. 16-17) are—like the decision below—fact-bound applications of the principles embraced in *Strickland*. No conflict of authority exists.

Petitioner's emphasis on *Wilson* v. *Sirmons*, 536 F.3d 1064, 1095 (10th Cir. 2008), is misplaced. There, the Tenth Circuit held that the petitioner was entitled to an evidentiary hearing on his ineffective-assistance

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[8] See *Rompilla*, 545 U.S. at 393-394 (O'Connor, J., concurring) ("today's decision simply applies our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*"); see also *Wiggins*, 539 U.S. at 521 ("We established the legal principles that govern claims of ineffective assistance of counsel in *Strickland*."); *id.* at 522 ("we * * * made no new law in resolving Williams' ineffectiveness claim"); *Williams*, 529 U.S. at 390 ("the merits of [Williams's] claim are squarely governed by our holding in *Strickland*").

claims, which were based in part on his counsel's failure to present evidence of his mental health. *Id.* at 1096. Although the court acknowledged that the mental health evidence was "not necessarily mitigating and may have a 'double-edged sword' effect," it refused to conclude that the failure to present such evidence was necessarily "inconsequential." *Id.* at 1095-1096. In doing so, the court implicitly recognized that such evidence must be assessed on a case-by-case basis. That approach is consistent with the court of appeals' analysis here. See Pet. App. 24a-28a.

2. Petitioner also contends (Pet. 22-29) that he is entitled to a COA to appeal the district court's failure to conduct an evidentiary hearing on his competency to waive his right to counsel and to proceed pro se at the guilt phase of his trial. Petitioner asserts (Pet. 22) that he was entitled to an evidentiary hearing because he "presented evidence undermining the reliability of [the district court's competency] hearing, as well as offering a psychiatrist's opinion that reached the opposite conclusion—that [petitioner] was not competent to waive counsel and proceed [pro se]." That contention is without merit, and the denial of a COA here does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

a. Petitioner has failed to establish his entitlement to a COA to appeal the district court's denial of an evidentiary hearing. A COA is warranted "only if" the applicant has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). It follows that a district court's decision not to hold an evidentiary hearing is reviewable only to the extent that it is subsumed within a constitutional claim on

which a COA may be granted. See, *e.g.*, *Alix* v. *Quarterman*, 309 Fed. Appx. 875, 878 (5th Cir.) (per curiam), cert. denied, 558 U.S. 833 (2009).

Section 2255(b) provides that when a federal prisoner raises a claim on collateral attack, a district court need not grant a hearing if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. 2255(b). An evidentiary hearing is therefore not required if the defendant's claims do not raise a factual dispute or if the trial record refutes his claim. See, *e.g.*, *Schriro* v. *Landrigan*, 550 U.S. 465 (2007); *Hill* v. *Lockhart*, 474 U.S. 52, 60 (1985). A district court's decision not to hold an evidentiary hearing is reviewed for abuse of discretion. See, *e.g.*, *United States* v. *Moya*, 676 F.3d 1211, 1214 (10th Cir. 2012).

Here, the court of appeals correctly applied those principles when reviewing the district court's denial of petitioner's competency claim. The court began by correctly explaining the legal rules governing that claim, noting that (1) a criminal defendant may waive his right to counsel if he does so competently and intelligently, and (2) the standard for competency requires the defendant to have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." Pet. App. 44a (quoting *Dusky* v. *United States*, 362 U.S. 402, 402 (1960) (per curiam) and citing other precedents of this Court).

The court of appeals then held that jurists of reason would not dispute the district court's fact-intensive holding that petitioner had satisfied this standard. Pet. App. 45a-49a. The court of appeals

emphasized the extensive record evidence supporting the district court's analysis, including petitioner's pro se motions filed before his waiver of the right to counsel, the court's on-the-record colloquy with petitioner about that waiver, the results of the pre-trial psychiatric evaluation, and the court's conversations with petitioner's counsel about the competency issue. *Id.* at 47a.

The court of appeals also addressed—and rejected—petitioner's argument that the new evidence he submitted in connection with the Section 2255 motion was sufficient to cast doubt on the district court's conclusions. Pet. App. at 47a-48a. As the court of appeals correctly explained, "Dr. Woods's declaration, executed in 2010, six years after [petitioner's] trial, is not sufficient to establish that the district court's careful and reasoned decision that [petitioner] was competent to waive counsel is debatable." *Id.* at 47a.[9]

In light of this analysis, the court of appeals properly rejected petitioner's request for an evidentiary hearing. It explained that "[i]n a [Section] 2255

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[9] The courts below were entitled to conclude that the record at the time of trial was the best indicator of petitioner's competency. A retrospective determination of competency is difficult and potentially unreliable even in the best of circumstances. See *Drope* v. *Missouri*, 420 U.S. 162, 183 (1975). Much of petitioner's proffered evidence was developed long after the trial, and the limited evidence petitioner proffered that dated from before his trial likewise did not undermine the district court's conclusion. As the court of appeals explained, petitioner's psychiatric evaluations as a teenager date from 1989, and the inmate grievance reports which petitioner proffered date from approximately six months before trial; therefore, neither would "cause reasonable jurists to disagree with the district court's conclusion about [petitioner's] competency at the time of trial." Pet. App. 48a.

proceeding, a hearing is required '[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" Pet. App. 80a-81a (quoting 28 U.S.C. 2255(b)). The court then concluded that "reasonable jurists would not debate the district court's holding" that no hearing was necessary, because "the record and [petitioner's] motion are adequate to dispose of each of [his] claims." *Id.* at 81a.

b. Petitioner is wrong to assert (Pet. 26) that the decision below conflicts with this Court's decisions in *Sanders* v. *United States*, 373 U.S. 1 (1963), and *Ford* v. *Wainwright*, 477 U.S. 399 (1986). Contrary to petitioner's assertions, neither decision establishes a categorical rule that district courts must hold an evidentiary hearing in any case involving mental health evidence. Although this Court remanded both *Sanders* and *Wainwright* for the lower courts to assess the particular facts at issue in those cases, it did not do so based on the sort of categorical rule urged by petitioner. *Sanders*, 373 U.S. at 19-20; *Wainwright*, 477 U.S. at 410-418 (applying standard set forth in 28 U.S.C. 2254 (1986)). Any rule requiring an evidentiary hearing in all cases involving mental health evidence, regardless of the facts and circumstances, would violate the plain text of Section 2255(b), which authorizes a district court to forego a hearing if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."

c. Petitioner is also wrong to assert (Pet. 25-29) that the circuits diverge in their approaches to granting evidentiary hearings. The law is clear that "a claim may be dismissed without an evidentiary hearing if the claim is inadequate on its face or if the rec-

ord affirmatively refutes the factual assertions upon which it is based." *Shaw* v. *United States*, 24 F.3d 1040, 1043 (8th Cir. 1994). That is the rule that the court of appeals applied below, Pet. App. 81a, and that the other courts of appeals likewise apply. See, *e.g.*, *Puglisi* v. *United States*, 586 F.3d 209, 213 (2d Cir. 2009); *In re Lindsey*, 582 F.3d 1173, 1175 (10th Cir. 2009) (per curiam); *Torzala* v. *United States*, 545 F.3d 517, 525 (7th Cir. 2008), cert. denied, 556 U.S. 1130 (2009); *United States* v. *Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003); *United States* v. *Butt*, 731 F.2d 75, 77 (1st Cir. 1984) (joined by Breyer, J.).[10]

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[10] As petitioner notes (Pet. 25 n.8), some courts, including the Fifth Circuit, require petitioners in Section 2255 proceedings to support their claims with some "independent indicia of the likely merit of [their] allegations, typically in the form of one or more affidavits from reliable third parties." *United States* v. *Cervantes*, 132 F.3d 1106, 1110 (5th Cir. 1998). That standard—which demands only that a defendant be put to his proof, rather than resting on mere allegations—is entirely consistent with the statute and with this Court's precedent. See *Schriro*, 550 U.S. at 474 (to qualify for a hearing, petitioner must submit evidence sufficient to convince the court that petitioner "could * * * prove the petition's factual allegations, which, if true, would entitle [him] to federal habeas relief. * * * [I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing."). While other courts of appeals have used different language to express this concept, they apply a nearly identical approach. For example, the Second Circuit, which petitioner asserts (Pet. 25 n.8) requires only "a *prime facie* showing that a movant is entitled to relief," has held that to qualify for an evidentiary hearing, it is not enough that a Section 2255 petitioner merely "set[] forth his or her legal and factual claims, accompanied by relevant exhibits." *Puglisi*, 586 F.3d at 214. Rather, the district court must then "review[] those materials and relevant portions of the record in the underlying criminal proceeding" and "determine[] whether, viewing the evi-

Petitioner suggests (Pet. 26-27) that the Third, Fourth, and Tenth Circuits apply a different standard in cases involving evidence of mental health and "generally grant evidentiary hearings for petitioners to explore colorable constitutional claims of mental incapacity." But the most recent Tenth Circuit case that petitioner cites—which is itself over four decades old—makes clear that no hearing is necessary in such cases when the claim is "conclusively refuted by the files and records in a case." *Nolan* v. *United States*, 466 F.2d 522, 524 (1972). More recent cases from that circuit, meanwhile, likewise embrace the general rule that a district court may deny a Section 2255 motion without holding a hearing when "the prisoner has failed even to allege facts on which relief could be predicated, or the record conclusively contradicts the prisoner's allegations." *In re Lindsey*, 582 F.3d at 1175-1176.

Petitioner's reliance on the Third Circuit's unpublished decision in *United States* v. *Cherys*, 405 Fed. Appx. 589 (2011), is equally unavailing. There, the court acknowledged that a district court may deny an evidentiary hearing when the files and records of the case conclusively establish that the movant is not entitled to relief. *Id.* at 591 (citing *United States* v. *McCoy*, 410 F.3d 124, 131 (3d Cir. 2005), and *United States* v. *Lilly*, 536 F.3d 190, 195 (3d Cir. 2008)). The same goes for petitioner's invocation of the Fourth Circuit's unpublished decision in *United States* v. *Golden*, 37 Fed. Appx. 659 (2002) (per curiam). In

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dentiary proffers, where credible, and record in the light most favorable to the petitioner, the petitioner, who has the burden, may be able to establish at a hearing a *prima facie* case for relief." *Ibid.*

that case, the court noted that no hearing is required when "it is clear from the pleadings, files, and records that a movant is not entitled to relief." *Id.* at 659. In short, no division of authority exists.

d. Finally, petitioner's suggestion (Pet. 27-28) that the district court erred by relying in part on his personal recollection of the trial proceedings is also mistaken. This Court has expressly indicated that a judge presiding over a Section 2255 motion may rely on his "recollection of the events at issue" when deciding whether to dismiss the motion without first holding a hearing. *Blackledge* v. *Allison*, 431 U.S. 63, 74 n.4 (1977); see *Machibroda* v. *United States*, 368 U.S. 487, 495 (1962) (implying that in some circumstances the district court can "completely resolve [the allegations] by drawing upon his own personal knowledge or recollection"). Petitioner's reliance (Pet. 28) on *Dziurgot* v. *Luther*, 897 F.2d 1222 (1st Cir. 1990) (per curiam), for the contrary proposition is misplaced. That decision itself expressly states that in appropriate cases, "[a] district judge may rely, of course, on his own personal observation and recollection of events at trial to supplement the record." *Id.* at 1225.

In any event, although the district court in this case did mention petitioner's "demeanor before the Court" at the time he waived his right to counsel, Pet. App. 117a, the bulk of its analysis rested on the extensive record, including the transcripts of its pre-trial colloquy with petitioner, the pro se motions filed by petitioner, and the report of a court-appointed psychiatrist. *Id.* at 116a-121a. Petitioner is therefore incorrect (Pet. 28) in suggesting that the court relied primarily on its own recollection of the proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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