No. _____

In the Supreme Court of the United States

TIMOTHY FILSON, Warden,
Petitioner,
v.
TRACY PETROCELLI,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

ADAM PAUL LAXALT
Attorney General of Nevada
LAWRENCE VANDYKE*
Solicitor General
JEFFREY M. CONNER
Assistant Solicitor General
100 North Carson Street
Carson City, NV 89701
(775) 684-1100
LVanDyke@ag.nv.gov
* *Counsel of Record*

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

CAPITAL CASE

QUESTIONS PRESENTED

While Tracy Petrocelli was in custody on the underlying charge of murder, the State sent Dr. Lynn Gerow, a psychiatrist, to evaluate Petrocelli. At trial, the defense presented three expert reports on Petrocelli's mental condition to establish mitigating circumstances. The State called Dr. Gerow on rebuttal.

Dr. Gerow testified that he agreed with the diagnoses independently reached by two of Petrocelli's experts—antisocial personality disorder—but he disagreed with those experts on whether antisocial personality disorder is treatable. The Ninth Circuit granted habeas relief, concluding that Dr. Gerow's testimony violated the Fifth and Sixth Amendments because he had evaluated Petrocelli without advising him of his right to remain silent or obtaining defense counsel's permission to conduct the evaluation.

The questions presented are:

1. Whether the admission of an expert opinion offered to rebut a defendant's mitigating evidence on the treatability of the defendant's psychiatric condition violated the Fifth and Sixth Amendments solely because the State's expert conducted a pretrial evaluation of the defendant without advising the defendant of his right to remain silent or obtaining defense counsel's permission to conduct the evaluation.

2. Whether a habeas petitioner can establish actual prejudice where the challenged testimony was an admissible expert opinion under state evidentiary law.

PARTIES TO THE PROCEEDING

Petitioner Timothy Filson is the warden of the Ely State Prison in Nevada, and substitutes Renee Baker, who was the named warden in the Court of Appeals. Respondent Tracy Petrocelli is an inmate at Ely State Prison.

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When a criminal defendant uses his mental status as a sword, he may not use his silence as a shield to deprive the State of any opportunity to rebut his defense. *See*, *e.g.*, *Estelle v. Smith*, 451 U.S. 454, 465 (1981) ("When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting proof on an issue that he interjected into the case."). Just as a defendant opens himself to cross-examination and impeachment by taking the stand at trial, a defendant that puts his mental status at issue waives his Fifth Amendment privilege against self-incrimination and opens himself to a compelled psychiatric evaluation. *Id.* at 465-66 (citing with approval decisions holding that a defendant who put his mental state at issue can be compelled to undergo an evaluation "by the prosecution's psychiatrist"); *see also Powell v. Texas*, 492 U.S. 680, 685 (1989) (acknowledging that a possible remedy for a defendant's last-minute insanity defense is a continuance to allow for an evaluation "by a state-appointed psychiatrist").

It follows that no violation of the Sixth Amendment occurs when a defendant elects to present psychiatric evidence in support of his defense after having an opportunity to consult with his attorney about the consequences of putting his mental state at issue. *Buchanan v. Kentucky*, 483 U.S. 402, 425 (1987) (noting that the proper Sixth Amendment concern is "the consultation with counsel," and that *Estelle* notified attorneys that putting their client's mental status at issue opens the door to "the use of psychological

evidence by the prosecution in rebuttal"). These principles do not change simply because a defendant waits until the penalty phase of a capital trial to put his mental status at issue. *Estelle*, 451 U.S. at 472. The absence of a violation of the Fifth and Sixth Amendments in this case is definitively established by the *Estelle* Court's recognition that the Fifth and Sixth Amendments do not bar states from presenting psychiatric testimony in a penalty hearing if the defendant puts his mental state at issue by presenting psychiatric evidence of his own. *Id*. (acknowledging that the Fifth and Sixth Amendments do not prevent the state from presenting psychiatric evidence to prove its case on punishment "where a defendant intends to introduce psychiatric evidence *at the penalty phase*") (emphasis added); *see also Buchanan*, 483 U.S. at 421-24 (concluding that the admission of an expert report to rebut a defense of extreme emotional disturbance did not violate the Fifth or Sixth Amendment).

When the Warden's petition for rehearing exposed this weakness in the Ninth Circuit's rationale,[1] the

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[1] While not specifically presented as a point for review in this petition, the Warden's petition for rehearing also pointed out that the Ninth Circuit's rejection of various state court factual findings was suspect because the Ninth Circuit's factual determinations on the appointment of counsel were contradicted by evidence in the record. Respondents-Appellants' Petition for Panel Rehearing Under Fed. R. App. P. 40-1 and Circuit Rule 40-1 and Rehearing *en banc* Under Fed. R. App. P. 35 and Circuit Rule 35-1 at 5 n.3, *Petrocelli v. Baker*, 869 F.3d 710 (9th Cir.) (No. 14-99006) (Dkt. 73-1) (hereinafter cited as Pet. for Reh'g). The Ninth Circuit's factual determinations on when the Sixth Amendment right to counsel attached have no impact on the arguments presented here. But beyond the obvious point that the Ninth Circuit is not a fact-

court hedged its position by adding a footnote to its amended opinion that seeks refuge from this Court's application of the Sixth Amendment in *Powell*. App. 35 n.1. But this case presents a question distinct from, and not addressed by, *Powell*. Instead, *Estelle*'s recognition that the Fifth and Sixth Amendments do not prohibit psychiatric testimony when the defendant has put his mental state at issue, which this Court reaffirmed in *Buchanan*, controls here. And to the extent there is any doubt about how to apply *Estelle* to the facts of this case, the Ninth Circuit's amended opinion creates a conflict with *Hernandez v. Johnson*, 248 F.3d 344 (5th Cir. 2001), where the Fifth Circuit held that (1) a psychiatrist's expert testimony only answering hypothetical questions about a specific mental condition did not implicate the Sixth Amendment; and (2) the psychiatrist's testimony on *redirect* indicating he personally evaluated the defendant did not violate the Sixth Amendment because the questioning on redirect was a response to the defendant's attempt to develop mitigating circumstances through cross-examination of the State's expert.

Even assuming Petrocelli could establish a violation of the Fifth or Sixth Amendments, the Ninth Circuit's harmless-error analysis is even more dubious than its merits analysis. The Warden's petition for rehearing

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finding body, the Ninth Circuit's disregard for evidence in the record that undercuts its own factual determinations is far from the clear and convincing evidence necessary to override state court factual determinations under 28 U.S.C. § 2254(e)(1) and is all the more reason for this Court to question the Ninth Circuit's amended opinion.

exposed critical errors in the Ninth Circuit's original harmless-error analysis, causing the court to alter the analysis in its amended opinion.[2] Despite a few changes to address some of the Warden's arguments, the new harmless-error analysis of the amended opinion remains flawed and cannot withstand the scrutiny that this Court's opinions require in the habeas context. *See*, *e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (requiring a showing of actual prejudice to obtain relief on habeas review).

What the Ninth Circuit characterized as "Gerow's more extensive live testimony," when compared to the "not quite two pages" of Dr. Gutride's testimony, amounted to a mere *four* pages of the trial transcript. App. 38; Respondents-Appellees' Supplemental Excerpts of Record Volume X of XI at 1758-64, *Petrocelli v. Baker*, 869 F.3d 710 (9th Cir.) (No. 14-99006) (Dkt. 21-10) (hereinafter referred to as RSEOR). In those four pages, beyond testifying that his evaluation of Petrocelli led him to concur with the diagnosis of antisocial personality disorder[3] reached by

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[2] The Ninth Circuit's original opinion improperly placed the burden of proving harmlessness on the Warden and attempted to bootstrap the alleged *Estelle* violation to an unpreserved, non-existent claim of instructional error in a manner that could best be described as a cumulative error, rather than harmless error, analysis. App. 87-88, 91-92; *see also* Pet. for Reh'g at 10-14. The Ninth Circuit abandoned those aspects of the original opinion in its amended opinion. App. 35, 39.

[3] Dr. Gerow did disagree with the other doctors on what terminology to use when identifying Petrocelli's condition—he characterized the condition as having a psychopathic personality. App. 161. But a review of the most recent version of the

Petrocelli's own experts, Dr. Gerow's testimony consisted of an expert opinion on whether someone with antisocial personality disorder is amenable to treatment—a point Dr. Gerow could have testified to under state evidentiary law without ever evaluating Petrocelli. App. 161-63; RSEOR at 1760-64. Thus, Petrocelli cannot establish that any purported error under *Estelle* resulted in *actual prejudice* because Dr. Gerow's non-cumulative testimony was an admissible expert opinion in light of Petrocelli's own uncontroverted evidence that he has antisocial personality disorder. Nev. Rev. Stat. 50.275; Nev. Rev. Stat. 50.285(1). Certiorari is warranted.

OPINIONS BELOW

The original opinion reversing the judgment of the district court and a concurring opinion are reported at *Petrocelli v. Baker*, 862 F.3d 809 (9th Cir. 2017). *See also* App. 1-53. The order denying rehearing, amended opinion, and concurring opinion are reported at *Petrocelli v. Baker*, 869 F.3d 710 (9th Cir. 2017). *See also* App. 54-106. The order and judgment of the United States District Court for the District of Nevada denying the petition are not reported. App. 107-174.

Diagnostic and Statistical Manual of Mental Disorders (DSM-5) supports Dr. Gerow's testimony that psychopathy has been used interchangeably with antisocial personality disorder. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 659 (5th ed. 2013) ("This pattern has also been referred to as *psychopathy*, *sociopathy*, or *dyssocial personality disorder*.") (italics in original).

JURISDICTION

The Ninth Circuit entered judgment reversing the district court's judgment on July 5, 2017 (App. 54, 94), and denied the petition for rehearing and rehearing *en banc* on August 23, 2017 (App. 4). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides that "No person … shall be compelled in any criminal case to be a witness against himself …."

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment of the U.S. Constitution provides that: "No State shall … deprive any person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code provides, in part, that:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

I. Factual Background

Thirty-five years ago, Tracy Petrocelli robbed and murdered James Wilson in Washoe County, Nevada. App. 5. Petrocelli was later arrested in Las Vegas, Nevada, bringing a five-month multi-state crime spree to an end. App. 5-6.

While Petrocelli was held in the Washoe County Jail on the pending charge of murder, the prosecutor developed a concern about issues of competency and the possibility of Petrocelli attempting to develop an insanity defense. App. 45. As a result, he sent Dr. Gerow to the jail to evaluate Petrocelli. App. 45.

The State of Nevada ultimately sought the death penalty against Petrocelli. App. 10. During the guilt phase of the trial, the jury heard evidence that Petrocelli had killed his ex-girlfriend, Melanie Barker, in Washington State before coming to Nevada. App. 10. Additionally, during the State's case-in-chief of the trial's penalty phase, the jury heard evidence of Petrocelli's prior violent history. App. 10-12 This included a prior conviction for kidnapping Ms. Barker—an incident unrelated to Petrocelli ultimately killing her—which satisfied one of Nevada's statutory aggravating circumstances. App. 11.

The defense did not call any witnesses during the penalty-phase of the trial. App. 12. Defense counsel merely offered three expert reports from mental health professionals that had evaluated Petrocelli. App. 12. As the Ninth Circuit alluded to in its opinion, one of those evaluations did not provide much assistance to the defense because it was conducted before Petrocelli

murdered Ms. Barker and Mr. Wilson. App. 12. But the other two reports—separately authored by Drs. Gutride and Chappel—indicated that the two doctors diagnosed Petrocelli with antisocial personality disorder and that Petrocelli's mental condition could be improved through treatment. App. 14-15.

On rebuttal, the State called two witnesses. First, the State called Dr. Gutride to briefly question him about a statement from his report that Petrocelli was "faking 'bad'" during some testing. App. 16. Then the State called Dr. Gerow. App. 16. The defense asserted an objection based on the psychiatrist-patient privilege, but then stipulated to Dr. Gerow's qualifications to testify after the trial court overruled the objection. App. 16; RSEOR at 1760. After confirming that he evaluated Petrocelli, Dr. Gerow explained that his impression was that Petrocelli had a psychopathic personality. App. 161; 1761. The prosecutor redirected Dr. Gerow to explain that psychopathy is synonymous with antisocial personality disorder. App. 161; RSEOR 1761. And Dr. Gerow then went on to explain (1) the general nature of antisocial personality disorder; (2) that he reviewed Dr. Chappel's report and agreed with the "diagnostic impressions" of the report and the diagnosis of antisocial personality disorder; and (3) that antisocial personality disorder is not a treatable condition. App. 161-63; RSEOR 1761-63.

Based on the evidence, the jury determined that the State proved its aggravating circumstances beyond a reasonable doubt. App. 19. The jury sentenced Petrocelli to death after concluding that any mitigating circumstances were insufficient to outweigh the aggravating circumstances. App. 19.

II. The Proceedings Below

After the jury sentenced Petrocelli to death, the Nevada Supreme Court affirmed the conviction. App. 19. The Nevada Supreme Court further affirmed the denial or dismissal of multiple state habeas petitions. App. 19-20.

Petrocelli initially filed a federal habeas petition, which was dismissed for lack of exhaustion. App. 19. When Petrocelli filed a second federal petition after returning to state court, the federal district court dismissed various claims as an abuse of the writ and denied the other claims on the merits. App. 19-20. However, on appeal, the Ninth Circuit reversed the district court's decision in part in *Petrocelli v. Angelone*, 248 F.3d 877 (9th Cir. 2001). App. 20.

On remand, after another return to state court, the district court found Petrocelli had abandoned one claim for relief, required abandonment of various other claims for lack of exhaustion, and denied the remainder of the petition on the merits. App. 21. In relevant part, the district court assumed error regarding the admission of Dr. Gerow's testimony but concluded any error was harmless and did not result in any prejudice because other evidence indicated that "Petrocelli was dangerous and not susceptible to treatment." App. 149. And the Court further noted that "Dr. Gerow's testimony was largely academic, in that, for the most part, it did not focus on Petrocelli specifically, but rather consisted mainly of his opinions about psychopathy and antisocial personality disorder in general," and was not so distinguishable from evidence provided through Drs. Chappel and Gutride that it would "significantly affect the outcome of the trial."

App. 168. The district court also denied a motion to alter or amend the judgment under FED. R. CIV. P. 59(e) because Petrocelli failed to offer anything "new" or establish "that the court committed clear error." App. 191.

Petrocelli appealed after the district court denied the post-judgment motion. The Ninth Circuit denied relief on each of Petrocelli's claims with the exception of a claim that asserted a violation of Petrocelli's Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel under *Estelle*. App. 4-41. In a concurring opinion, Judge Christen indicated that she would also find extraordinary prejudicial error under this Court's decision in *Brecht*. App. 41-53.

REASONS FOR GRANTING THE PETITION

In finding error in this case, the Ninth Circuit stated that "[t]he parallels between *Estelle* and this case are striking." App. 34. But the Ninth Circuit ignored a fundamental difference between the two cases grounded in a distinction this Court identified in *Estelle*: Petrocelli opened the door to the State's psychiatric evidence when he attempted to establish mitigating circumstances with psychiatric evidence of his own. *Estelle*, 451 U.S. at 472 (acknowledging that the Fifth and Sixth Amendments do not prevent the state from presenting psychiatric evidence to prove its case on punishment "where a defendant intends to introduce psychiatric evidence *at the penalty phase*") (emphasis added).

I. The Ninth Circuit's Amended Opinion Conflicts with this Court's Decisions Applying the Fifth and Sixth Amendments and Creates a Split of Authority on Application of the Sixth Amendment.[4]

Because Petrocelli put his mental state at issue, it is beyond dispute that Dr. Gerow's testimony did not violate the Fifth Amendment. "Any other rule would undermine the adversarial process, allowing a defendant to provide the jury, through an expert operating as a proxy, with a one-sided and potentially inaccurate view of his mental state …." *Kansas v. Cheever*, 134 S. Ct. 596 (2013). The Ninth Circuit's footnote turning to *Powell* to establish a violation of the Sixth Amendment poses a closer question (App. 35 n.1), but this case is distinguishable from *Powell* and falls squarely within the exception this Court identified in

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[4] The Ninth Circuit briefly suggests that the Warden waived any defense to the *Estelle* claim. App. 29-30. While the Warden do not concede this point, the Ninth Circuit's conclusion is irrelevant to this Court's jurisdiction because the Ninth Circuit reached the merits of the claim anyway. *See*, *e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330 (2010) ("'Our practice permits review of an issue not pressed below so long as it has been passed upon.'") (citations and brackets omitted); *see also Gordan v. Duran*, 895 F.2d 610, 612 (9th Cir. 1990) (acknowledging a habeas petitioner must still carry his burden of proof even where the State failed to respond to claim). Furthermore, the Ninth Circuit's footnote relying on *Powell* in its amended opinion is an express response to the Warden's arguments in the petition for rehearing, asserting that *Estelle*'s exception applies to this case. App. 35 n.1; Pet. for Reh'g at 5-10. Finally, the Warden unquestionably asserted that any error was harmless in the answering brief. Respondent-Appellee's Answering Brief at 75-90, *Petrocelli v. Baker*, 869 F.3d 710 (9th Cir.) (No. 14-99006) (Dkt. 19).

Estelle, and reaffirmed in *Buchanan*. And to the extent there is any doubt about application of the Sixth Amendment in this case, the Ninth Circuit's amended opinion creates a conflict with the Fifth Circuit's decision in *Hernandez*. Certiorari is warranted.

A. *Estelle* and *Buchanan* establish that Dr. Gerow's testimony did not violate the Sixth Amendment.

Estelle's exception and *Buchanan*'s rule control. Unlike in *Powell*, Petrocelli used his mental status in an attempt to establish mitigating circumstances during the penalty phase of his trial. App. 16. That this occurred during the penalty phase of a capital trial does not change the analysis. *Estelle*, 451 U.S. at 472. *Powell* is inapposite, and Dr. Gerow's testimony did not violate the Sixth Amendment.

Unlike in "weighing" states like Nevada that use statutory aggravating circumstance to satisfy Eighth Amendment concerns in capital sentencing, Texas's capital sentencing system requires the State to affirmatively prove three things at the penalty phase, including that the defendant has a likelihood of future dangerousness. *Compare* App. 10, *with Estelle*, 451 U.S. at 457-58. In *Powell*, this Court found a violation of the Sixth Amendment because, despite Powell's presentation of an insanity defense during the *guilt phase* of his trial, his attorney was not informed that a court-ordered competency and sanity evaluation might be used by the State to meet its affirmative burden of proving Powell's future dangerousness at the *penalty phase*. 492 U.S. at 684-85. This, the *Powell* Court held, deprived Powell of the opportunity to consult with his attorney about Powell's ability to object to the

expanded scope of the evaluation, which violated Powell's Sixth Amendment right to counsel. *Id*. Under *Estelle*, Powell could have objected to the expanded scope of the evaluation to prevent the State from using the evaluation to establish future dangerousness. *Estelle*, 451 U.S. at 468-69. But without notifying him and his attorney of that concern, Powell was deprived of the opportunity to consult with his attorney on that point.

The circumstances of this case are fundamentally different and present a question that *Powell* did not address. Here, the State did not offer psychiatric testimony from Dr. Gerow's evaluation of Petrocelli to prove something it had the burden to prove in its case-in-chief. The State called Dr. Gerow to testify on rebuttal in *response* to Petrocelli's use of psychiatric evidence to establish mitigating circumstances. App. 12-17. As a result, contrary to the Ninth Circuit's determination that Dr. Gerow's testimony violated the Sixth Amendment, this case presents a set of facts that the *Estelle* Court acknowledged would cause it to conclude that proffers, like Dr. Gerow's testimony, are admissible. *Estelle*, 451 U.S. at 472. Had defense counsel not presented psychiatric evidence to establish mitigating circumstances, Dr. Gerow's testimony would have been inadmissible. But when defense counsel sought to develop mitigating circumstances by putting Petrocelli's mental status at issue, he knowingly opened the door to the State's evidence on rebuttal.[5]

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[5] Such a conclusion was reached by the Ninth Circuit panel in a closely related context. Petrocelli raised a challenge to the admissibility of a statement he made to law enforcement under the Fifth and Sixth Amendments, but the Ninth Circuit concluded that

Buchanan, 483 U.S. at 425 (noting that *Estelle* notified attorneys that putting their client's mental status at issue opens the door to "the use of psychological evidence by the prosecution in rebuttal"). And had Dr. Gerow not already evaluated Petrocelli prior to trial, the likely remedy would have been a continuance to allow a state-appointed psychiatrist to evaluate Petrocelli. *Estelle*, 451 U.S. at 465-66 (citing with approval decisions holding that a defendant who put his mental state at issue can be compelled to undergo an evaluation "by the prosecution's psychiatrist"); *see also Powell*, 492 U.S. at 685 (acknowledging that a possible remedy for a defendant's last-minute insanity defense is granting a continuance to allow for an evaluation "by a state-appointed psychiatrist").

The Ninth Circuit appears to suggest that it can rely upon *Powell* to sever the Fifth and Sixth Amendment issues. App. 35 n.1. But the Sixth Amendment question is dependent upon the resolution of the Fifth Amendment question. The right to counsel is important in this context—as this Court has repeatedly noted—because the defendant needs to be able to consult with counsel on whether to *exercise his Fifth Amendment privilege against self-incrimination*. *See*, *e.g.*, *Estelle*, 451 U.S. at 471 (explaining the

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the statement was admissible even assuming a violation of the Fifth and Sixth Amendments because Petrocelli's prior statements were merely offered for impeachment purposes. App. 26. The cases that the Ninth Circuit relied upon to reach that conclusion are based on the very same logic that serves as the foundation for the exception from *Estelle*. *See*, *e.g.*, *Michigan v. Harvey*, 494 U.S. 344, 350-51 (1990) (noting that a petitioner who takes the stand cannot use the Fifth Amendment as "a shield against contradiction of his untruths") (internal quotation marks omitted).

importance of "the guiding hand of counsel" with respect to a defendant's decision to undergo evaluation or exercise his Fifth Amendment right to remain silent) (internal quotations omitted). But when the defendant elects to put his mental status at issue, he no longer has a Fifth Amendment privilege to exercise. And because counsel and the defendant are presumed to have discussed the consequences of placing the defendant's mental state at issue, there is no violation of the Sixth Amendment right to counsel. *Buchanan*, 483 U.S. at 424-25.

Here, unlike in *Powell*, Petrocelli placed his mental status at issue *during the penalty phase* of his trial by presenting psychiatric evidence to establish mitigating circumstances. App. 13-15. The State then presented Dr. Gerow's testimony to rebut Petrocelli's mitigation evidence. App. 16-17. That does not violate *Estelle*; it presents the exact circumstances that the *Estelle* Court acknowledged would have caused it to conclude the State's psychiatric testimony was admissible. *Estelle*, 451 U.S. at 472. No violation of the Fifth or Sixth Amendment occurred under this Court' precedent.

B. The Ninth Circuit's decision creates a split of authority with the Fifth Circuit.

The Ninth Circuit's amended opinion creates a split of authority with the Fifth Circuit on two relevant points. In *Hernandez v. Johnson*, 248 F.3d 344, 347 (5th Cir. 2001), a psychiatrist's testimony on direct examination addressed only hypothetical questions about whether someone with antisocial personality disorder would pose a risk of future dangerousness while incarcerated. The psychiatrist merely offered an expert opinion on the attributes of someone with

antisocial personality disorder. *Id*. The psychiatrist then testified about his actual evaluation of Hernandez on redirect *after* defense counsel attempted to develop mitigating circumstances on cross-examination of the State's expert. *Id*. The Fifth Circuit determined that the psychiatrist's testimony did not violate the Sixth Amendment. *Id*. at 347-49.

Here, Dr. Gerow's non-cumulative testimony focused on the hypothetical question of whether someone with antisocial personality disorder could be successfully treated and was offered to rebut the conclusions from Drs. Chappel's and Gutride's reports on treatability of antisocial personality disorder. App. 161-63; RSEOR 1761-63.

Under those circumstances, the Ninth Circuit's conclusion that Dr. Gerow's testimony violated the Sixth Amendment creates two conflicts with *Hernandez*. First, under the Fifth Circuit's reasoning in *Hernandez*, Dr. Gerow's expert testimony on hypothetical questions about whether someone with antisocial personality disorder is amenable to treatment would not implicate the Sixth Amendment at all. Second, assuming Dr. Gerow testifying that he personally evaluated Petrocelli—regardless of the fact that his diagnosis was cumulative of the diagnosis reached by Petrocelli's own experts—does implicate Sixth Amendment concerns, the testimony would be admissible in the Fifth Circuit because it was offered to rebut Petrocelli's attempt to establish mitigating circumstances. Thus, to the extent there is any dispute about how to apply *Estelle* to this set of facts, the Ninth Circuit's opinion is in conflict with *Hernandez*. This Court's review of that conflict is warranted.

II. Any Error is Harmless Under *Brecht* Because the only Aspect of Dr. Gerow's Testimony that is not Cumulative of Evidence Presented by the Defense was Admissible Opinion Testimony.

Even if admission of Dr. Gerow's testimony had violated the Fifth and Sixth Amendments—which it did not—a proper harmless-error analysis shows that admission of Dr. Gerow's testimony was harmless. The only aspect of Dr. Gerow's testimony that was not already known to the jury was an otherwise admissible expert opinion.

"For reasons of finality, comity, and federalism, habeas petitioners are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice." *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015) (quoting *Brecht*, 507 U.S. at 637) (internal quotation marks). At the very least, a petitioner must leave the reviewing court in virtual equipoise as to whether the error had a substantial and injurious effect on the verdict. *O'Neal v. McAninch*, 513 U.S. 432 (1995).

In its amended opinion, the Ninth Circuit retreated from two significant errors in the original opinion. Originally the court improperly placed the burden of proving harmlessness on the Warden and attempted to bootstrap the alleged *Estelle* error to a purported instructional error that the Court acknowledged had not been preserved for review. App. 87-88, 91-92. Despite correcting those errors, the harmless-error

analysis in the amended opinion remains flawed.[6] The amended opinion fails to consider that the aspect of Dr. Gerow's testimony it found to be prejudicial—his opinion that someone with antisocial personality disorder is an untreatable psychopath—is an expert opinion that was admissible regardless of whether Dr. Gerow had ever evaluated Petrocelli. App. 35-41.

A quick review of the entirety of Dr. Gerow's testimony—a mere *four pages* of trial testimony[7]—shows that Dr. Gerow concurred with the diagnoses of Drs. Gutride and Chappel. App. 16-17. RSEOR 1760-64. All three doctors agreed on the diagnosis of antisocial personality disorder. App. 13-17. Indeed, Dr. Gerow testified that he reviewed Dr. Chappel's report and agreed with it with one obvious exception: the only material point the three doctors disagreed about was whether Petrocelli could be treated successfully.[8] RSEOR 1762-63. But Dr.

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[6] While not necessary to the Warden's argument here—that Petrocelli cannot prove actual prejudice because the jury never received any inadmissible evidence—all the other evidence supporting Petrocelli's violent tendencies that the district court identified in its harmless-error analysis only strengthens the Warden's position.

[7] The Ninth Circuit places emphasis on the fact that Dr. Gerow's live testimony likely had a greater impact on the jury than Petrocelli's expert reports. App. 38. But defense counsel had an obvious strategic reason for not calling the two doctors: only presenting their reports avoided the risk of exposing the two doctors to cross-examination.

[8] Again, Dr. Gerow would characterize Petrocelli as having a psychopathic personality, but the DSM-5 confirms that antisocial personality disorder and psychopathy are often used interchangeably. *See supra* note 3.

Gerow's view on treatability of antisocial personality disorder is an expert opinion that Dr. Gerow could have testified to by relying solely on the reports of the other doctors, which were already before the jury. NEV. REV. STAT. 50.275; NEV. REV. STAT. 50.285(1). Accordingly, Petrocelli failed to establish that a purported violation of the Fifth or Sixth Amendments resulted in actual prejudice; Dr. Gerow's testimony was either cumulative of evidence already before the jury or an admissible expert opinion.

CONCLUSION

The Ninth Circuit's amended opinion is at odds with this Court's precedent. To the extent there is any doubt on that point, the amended opinion creates a conflict with the Fifth Circuit's decision in *Hernandez*. And even if Petrocelli could establish a violation of the Fifth or Sixth Amendments, he decidedly fails to establish actual prejudice because the only non-cumulative testimony provided by Dr. Gerow was an expert opinion that he could have testified to under state law without ever evaluating Petrocelli. This case calls for this Court's review.

Respectfully submitted,

ADAM PAUL LAXALT
Attorney General of Nevada
LAWRENCE VANDYKE*
Solicitor General
JEFFREY M. CONNER
Assistant Solicitor General
100 North Carson Street
Carson City, NV 89701
(775) 684-1100
LVanDyke@ag.nv.gov
* *Counsel of Record*

Counsel for Petitioner

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