APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-99006
D.C. No. 3:94-cv-00459-RCJ

[Filed August 23, 2017]

TRACY PETROCELLI, *Petitioner-Appellant*,	)
v.	)
RENEE BAKER, Warden, *Respondent-Appellee.*	)

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, Senior District Judge, Presiding

Argued and Submitted September 16, 2016
San Francisco, California

Filed July 5, 2017
Amended August 23, 2017

Before: William A. Fletcher, Morgan Christen, and
Michelle T. Friedland, Circuit Judges.

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Order;
Opinion by Judge W. Fletcher;
Concurrence by Judge Christen

SUMMARY*

Habeas Corpus / Death Penalty

The panel filed an amended majority opinion and concurrence, denied a petition for panel rehearing, and denied on behalf of the court a petition for rehearing en banc, in Tracy Petrocelli's appeal from the denial of his pre-AEDPA habeas corpus petition challenging his Nevada state conviction and capital sentence for robbery and first-degree murder.

In the amended opinion, the panel affirmed the district court's denial of the petition with respect to the conviction, reversed the denial of the petition with respect to the death sentence, and remanded.

The panel held that because Petrocelli failed to invoke his right to counsel unambiguously, his April 19 interrogation was not conducted in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), or *Edwards v. Arizona*, 451 U.S. 477 (1981), and trial counsel was therefore not ineffective in failing to move to suppress testimony as fruit of the interrogation.

The panel rejected Petrocelli's contention that use at trial of his statements to detectives on April 20 and 27 violated his Fifth, Sixth, and Fourteenth Amendment rights. Because the State used the statements only for impeachment, the panel rejected

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Petrocelli's contention that his Fifth and Sixth Amendment rights were violated by the taking of his statements during interrogations at which his appointed counsel was not present. The panel rejected the defendant's contention that his statements were involuntary.

The panel affirmed the district court's conclusion that Petrocelli failed to exhaust his challenge to the jury instruction defining premeditation and deliberation.

The panel held that the State waived any defense to Petrocelli's contention that the admission of psychiatric testimony during the penalty phase violated his Fifth and Sixth Amendment rights under *Estelle v. Smith*, 451 U.S. 454 (1981). The panel held that even if the State had not waived its defense, admission of the testimony violated *Estelle*, where the psychiatrist, acting at the request of the prosecutor, visited Petrocelli in jail to determine his competency to stand trial, failed to provide *Miranda* warnings, did not seek or obtain permission from Petrocelli's appointed counsel to visit or evaluate him, and testified that Petrocelli was dangerous and incurable. The panel concluded that the error was not harmless.

Concurring, Judge Christen wrote separately because, in her view, even if the State could show that the prosecutor's tactics had not prejudiced the jury's verdict, Petrocelli's case is one of the very few in which deliberate prosecutorial misconduct and egregious trial errors warrant habeas relief.

COUNSEL

A. Richard Ellis (argued), Mill Valley, California, for Petitioner-Appellant.

Robert E. Wieland (argued), Senior Deputy Attorney General; Jeffrey M. Conner, Assistant Solicitor General; Adam Paul Laxalt, Attorney General; Office of the Attorney General, Carson City, Nevada; for Respondent-Appellee.

ORDER

The majority opinion and concurrence filed on July 5, 2017, and appearing at 862 F.3d 809, are hereby amended. An amended majority opinion and concurrence are filed concurrently with this order.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc is **DENIED**. No new Petition for Panel Rehearing or Petition for Rehearing en Banc will be entertained.

OPINION

W. FLETCHER, Circuit Judge:

In 1982, Tracy Petrocelli was convicted and sentenced to death in Nevada state court for the robbery and first-degree murder of James Wilson, a Nevada used car salesman. Petrocelli filed a federal petition for writ of habeas corpus before the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Petrocelli appeals the district court's denial of the writ.

We affirm the district court's denial of the writ with respect to Petrocelli's conviction but reverse with respect to his death sentence. We hold that admission of Dr. Lynn Gerow's psychiatric testimony during the penalty phase violated Petrocelli's Fifth and Sixth Amendment rights under *Estelle v. Smith*, 451 U.S. 454 (1981), and that the violation had a substantial and injurious effect on the jury's decision to impose the death sentence. *See Brecht v. Abrahamson*, 507 U.S. 619 (1993).

I. Background

A. Crime, Arrest, and Pre-Trial Interrogations

On March 29, 1982, Petrocelli went on a test drive of a Volkswagen pickup truck with James Wilson, a used car salesman, in Reno, Nevada. At some point during that test drive, Petrocelli shot and killed Wilson. Wilson's body was found buried in a crevice under some rocks and brush near Pyramid Lake. The lake is about thirty-five miles north of Reno. Wilson had been shot in the neck, chest, and back of the head.

Nearly a year before killing Wilson, in May 1981, Petrocelli had pleaded guilty in Washington State to kidnaping his girlfriend, Melanie Barker. He had received a suspended sentence conditioned on his completion of a drug treatment program. Petrocelli absconded from the treatment program twice and never completed it. Petrocelli shot and killed Barker in Washington State in October 1981, five months before he killed Wilson in Nevada.

Petrocelli was arrested for the Wilson murder in Las Vegas on April 18, 1982. The following day, he was interrogated in Las Vegas. Petrocelli was advised of his

Miranda rights, and he signed a statement indicating that he understood them. Petrocelli stated during the interrogation, "I'd sort of like to know what my . . . lawyer wants me to do." (Ellipsis in original.) He nonetheless continued to answer questions. Later in the interrogation, he admitted to having previously stolen a car from a "Dub Peterson" dealership in Oklahoma City after taking it for a test drive with a salesman.

Petrocelli was subsequently transported to Reno. On the afternoon of April 20, he was interrogated by Sergeants Glen Barnes and Abel Dickson, as well as two prosecutors from the District Attorney's Office of Washoe County, Bruce Laxalt and Don Nomura. At the beginning of the interrogation, Petrocelli made a variety of requests that he characterized as "preconditions" to talking. They included locating some of his property, facilitating a visit by his wife, bringing him photographs of Barker, arranging a television interview, and receiving psychiatric counseling. Dickson testified at a hearing outside the presence of the jury that no promises were made, but that Petrocelli was told that if his requests "could be done they would be done." After being informed of his *Miranda* rights, Petrocelli confessed to shooting both Wilson and Barker.

On April 20, the Public Defender of Washoe County was appointed as counsel for Petrocelli by order of the Reno Justice Court. On April 21, Petrocelli personally appeared in the Justice Court, where he was arraigned and bail was set.

The visitors' log for the Washoe County Jail shows that Larry Wishart, an attorney from the Washoe

County Public Defender's Office, and Tim Ford, an investigator from that office, visited Petrocelli on April 21, the day of his arraignment, at about 1:50 pm. (A date and time stamp of "82 APR 21 P 1 :5" appears on the photocopy of the log. The number specifying the minute is cut off on the photocopy in the trial court record.) A date and time stamp shows that their visit lasted about half an hour ("82 APR 21 2 :2"). The log shows a visit from Dr. Lynn Gerow later that day. Gerow was a psychiatrist who had been asked by Chief Deputy District Attorney Laxalt to evaluate Petrocelli's competency to stand trial.

The relevant page of the visitors' log is dedicated exclusively to visitors to Petrocelli. Wishart and Ford's entry, with their signatures, is on line three of the page. They wrote "WCPD/ATT" in the box asking for their "relationship." Dr. Gerow's entry, with his signature, is on line four, immediately below. He wrote "D.A." in the box asking for his "relationship." The entry by Wishart and Ford, stating their relationship to Petrocelli, would have been apparent to Gerow when he signed the log. A date and time stamp show that Gerow signed in at about 3:50 ("82 APR 21 P 3 :5"). There is no stamp showing when his visit ended. Gerow testified at trial that he spent two hours interviewing Petrocelli.

Petrocelli testified that he believed that Dr. Gerow had come to see him in response to his request for counseling. During his April 20 interview in Reno, Petrocelli had specified as one of his "preconditions" that he receive psychiatric counseling. Petrocelli testified consistently at a hearing outside the presence of the jury, saying that he had stated as one of his

preconditions: "I wanted to have psychiatric counseling while I was in the jail." He testified that he "saw a doctor Gerow once." When asked how long he spoke to Gerow, Petrocelli responded, "[I]t didn't seem like it was very long." When asked to estimate the time, Petrocelli responded, "Well, I never did even finish my conversation. He just cut me off in the middle and left."

On April 27, Dr. Gerow sent a letter labeled "confidential" to Prosecutor Laxalt in the District Attorney's office. He wrote:

> At your request I examined Mr. Maida [the name under which Petrocelli was then being held] at the Washoe County Jail on April 21, 1982. I had an opportunity to discuss his case with you prior to the psychiatric evaluation.
>
> . . .
>
> Mr. Maida was abused as a child. He was adopted at three years of age. . . . He was in trouble at school and home at an early age. He developed a psychopathic personality which is complicated by a history of severe drug abuse. . . .
>
> In my opinion Mr. Maida is both competent for understanding the charges and assisting his attorney and responsible (mens rea) for any alleged offense.
>
> I have determined to see Mr. Maida in the future on an "as needed" basis. If you require my involvement as circumstances develop, please feel free to call me.

Gerow testified in state post-conviction proceedings that when he wrote "as needed," he meant "as needed by Mr. Laxalt."

Wishart testified in state post-conviction proceedings that when he met with Petrocelli on April 21, he did not know that Dr. Gerow was going to see his client later that afternoon. Wishart testified that he would not have employed Gerow because he "had a prosecution bias."

Petrocelli was interrogated again on April 27. After being advised of his *Miranda* rights, Petrocelli made another statement.

B. Guilt Phase Trial

On April 28, 1982, Petrocelli was indicted on one count of robbery with a deadly weapon and one count of first-degree murder. The guilt phase of the trial began on July 27, 1982, and ran through August 5, 1982. At trial, the State contended in support of the robbery count that Petrocelli went on the test drive with Wilson in order to steal the truck, that he used his gun to try to force Wilson out of the truck, and that he shot Wilson when Wilson would not cooperate. To bolster its theory, the State called Melvin Powell, an Oklahoma car salesman, to testify that Petrocelli had stolen a car in a similar manner (though without injuring Powell) during a test drive in February 1982.

The defense contended, based on Petrocelli's testimony at trial, that Petrocelli had been a *bona fide* prospective purchaser with no intent to steal, and that Wilson was accidentally shot in the midst of a heated argument and struggle that resulted from haggling over the price of the truck. To impeach Petrocelli's

testimony, the State introduced portions of the statements that Petrocelli had made on April 20 and 27. To undermine Petrocelli's contention that the Wilson shooting was unintentional, the State impeached Petrocelli with his statement on April 20 that his earlier shooting of his girlfriend, Melanie Barker, was an "accident." The prosecutor also impeached Petrocelli by confronting him with other inconsistencies between his trial testimony and his statements to the detectives.

The jury found Petrocelli guilty of both charges.

C. Penalty Phase Trial

1. Aggravating Factors and Lay Testimony

In order to render Petrocelli death-eligible, the State had to establish at least one aggravating factor. During the penalty phase of Petrocelli's trial, the State sought to establish two such factors: (1) that the murder had been committed in the course of a robbery, and (2) that Petrocelli had previously been convicted of a violent felony, the kidnaping of his girlfriend Melanie Barker. (The first factor was later held by the Nevada Supreme Court to be invalid. *See McConnell v. State*, 102 P.3d 606, 624 (Nev. 2004) (per curiam). In reviewing Petrocelli's third petition for post-conviction relief, the Nevada Supreme Court held that use of this factor had been improper.)

To establish the first factor, Prosecutor Laxalt put John Lucas on the stand. Lucas had been in the Washoe County Jail with Petrocelli for about five weeks after Petrocelli's arrest for the Wilson murder. Lucas testified that Petrocelli had told him that he had shot Wilson in order to steal the truck. He also testified

that Petrocelli said he was "going to get rid of" the district attorney as well as an unidentified woman Petrocelli characterized as a "snitch."

The second factor was Petrocelli's conviction for kidnaping Barker. At trial, it was uncontested that he had later killed her. However, at the time of trial he had not been convicted of the killing. To establish the second factor, Prosecutor Laxalt called Melanie Barker's mother, Maureen Lawler, to testify about the circumstances that had led to the kidnaping. The jury had already learned during the guilt phase, from Petrocelli's testimony and from the testimony of an eyewitness, that Petrocelli had killed Barker. Lawler testified only as to the circumstances that had led to the kidnaping conviction. Lawler, who had lived with her daughter in the city of Kent, in western Washington, testified that Barker had gone to eastern Washington with Petrocelli for three days, that Barker had been "beaten on the face" and was "hysterical" when she returned home, and that at some point during the three days Barker had been told by Petrocelli that his friends would "do away with her." Lawler testified that after Barker had told Petrocelli that her mother would have the police looking for her, "He agreed to take her back. . . . At that point, she got away from him." Lawler also described a phone conversation, prior to the kidnaping, when Lawler had arranged for Petrocelli's wallet to be taken to the police station. Petrocelli objected to her having done so, and she testified that Petrocelli said he "would blow me away." Laxalt also called Joan Bleeker, who testified that Barker had come into a restroom during the time she was in eastern Washington and had asked Bleeker to call the police because she was being kidnaped.

Petrocelli testified, presenting his version of what had happened during the three days in eastern Washington in an attempt to show, despite his conviction, that he had not really kidnaped Barker. According to Petrocelli, Barker went with him voluntarily; they were accompanied by a friend of Petrocelli; they went out in public, eating in restaurants and going to stores together; and she and Petrocelli got in a fight as they were driving back to western Washington.

In the interval between the testimonies of Lawler and Bleeker, Prosecutor Laxalt played a tape recording of a portion of Petrocelli's interrogation on April 20 in which Petrocelli described the Wilson killing. Petrocelli had cried during his in-court testimony when describing the Wilson killing. The tape recording is not in the record, but it is apparent from the transcript that Laxalt played the tape to contrast Petrocelli's tearful demeanor during trial to an unemotional demeanor on April 20.

2. Professional Mental Health Evidence

Defense counsel Wishart submitted written reports by three different mental health professionals—Dr. John Petrich, a psychiatrist; Dr. Martin Gutride, a psychologist; and Dr. John Chappel, a psychiatrist. Wishart called none of the three to give live testimony.

Dr. Petrich's evaluation of Petrocelli's mental health and future dangerousness was the most favorable to Petrocelli, but his evaluation was of limited use to the defense. Petrich had evaluated Petrocelli in June 1981, when Petrocelli was in jail in Washington State on the kidnaping charge, prior to killing Barker and Wilson.

Drs. Gutride and Chappel evaluated Petrocelli in July 1982, after he had killed Barker and while he was in jail waiting to stand trial for killing Wilson. Gutride reported that Petrocelli was adopted at age two and a half, and had been physically abused by his biological mother. Petrocelli's adoptive mother died when Petrocelli was seventeen, and Petrocelli attempted suicide several months after the funeral. After his adoptive mother's death, he became close to his adoptive father for a brief time, but fell out of touch after his father remarried. Gutride reported that Petrocelli cried when he spoke about having lost contact with his father. Petrocelli was "placed in a military academy at age twelve because of discipline problems," and he joined the Marines at about age seventeen. While in the Marines, Petrocelli was arrested for fighting with policemen while drunk; shortly thereafter, he began going AWOL. He was eventually given a dishonorable discharge. Sometime around 1974, Petrocelli moved to Washington State, began working in a steel mill, and became, by his own admission, "increasingly unstable." In 1976, he attempted suicide. In 1977, he was arrested for theft but fled before his trial. He became a professional gambler in Reno, Nevada, and began abusing alcohol and drugs. He was arrested in 1980 for kidnaping Barker.

Dr. Gutride reported that Petrocelli "cried openly" during the interview and that his "distraught behavior had the quality of his practically begging for help." "[H]e desperately wants to know what is the matter with him and why he did the things he is charged with. He doesn't deny responsibility, but says he can't remember most of the circumstances surrounding the

various crimes." According to Gutride, Petrocelli told him he "ha[d] called crisis lines in every city, but been unable to get any help" and "ha[d] talked with psychiatrists while in other jails and been put off."

Dr. Gutride reported that throughout the interview, Petrocelli's "thought processes were logical and coherent, memory seemed good, but selective, and intelligence seemed quite adequate." However, "[o]nce formal testing began, the client seemed to lose those qualities. The difference was so striking that he appeared to be faking 'bad.'" Gutride concluded that Petrocelli was "clearly a lot brighter than his test scores reflect."

Dr. Gutride concluded that Petrocelli is "very impulsive," has "a high potential for violence," is "very mistrustful of others," and may be "a relatively high suicide risk." Gutride diagnosed Petrocelli with "antisocial personality with paranoid features." He noted that "[t]he personal distress he exhibited during the interview seems genuine and the client may truly desire some mental health treatment," though his "ability to profit from such treatment is questionable" because of his distrust of others. Gutride concluded by noting that Petrocelli "can be quite dangerous to others as well as himself and treatment should be offered in a setting where the client can be closely monitored."

Dr. Chappel reported some of the same family background information that Dr. Gutride reported. Chappel further reported that Petrocelli's arrest for kidnaping was "very traumatic" for him. Petrocelli "repeatedly asked for help" while in jail in Seattle, was seen by Dr. Petrich, and was put on an antipsychotic drug that helped him sleep. Petrocelli apparently

attempted to commit suicide shortly afterwards, and was put in solitary confinement as a result. Chappel reported that Petrocelli "viewed the experience as one of asking for help and not getting it." He recounted Petrocelli's description of shooting Barker. Petrocelli asserted that "there were times when a 'black box' of control in his head opened and a voice or an impulse told him to kill or do some other destructive act," but that he still did not "understand why his girlfriend had to die." Petrocelli "expresse[d] a wish for further evaluation or treatment so he [could] find out whether or not he killed on purpose."

Dr. Chappel concluded that Petrocelli was both "depressed and angry," with the depression "expressed through sobbing and tears," as well as various suicide attempts. His anger was directed "primarily at the police and the district attorneys." "He considers the Washoe County District Attorney as premeditating his murder. When this rage occurs [he] threatens to kill the prosecutor." Chappel diagnosed Petrocelli with impulse control disorder and antisocial personality disorder. He wrote that "a more extensive evaluation" would be useful in order for Petrocelli "to have a better understanding of the reasons for his loss of impulse control and his reason for killing someone who was close to him." Chappel observed that if Petrocelli were "not sentenced to death and executed . . . in his current state of mind he is very dangerous to those people to whom his rage is directed. A period of evaluation and a trial of treatment might serve a useful purpose in preventing any further homicidal outbursts of rage on his part."

After these three written reports were admitted into evidence, Prosecutor Laxalt called Dr. Gutride to the stand. Gutride's testimony was very short, filling just under two pages of transcript. In an attempt to undermine Gutride's diagnosis and the portions of his report that were favorable to Petrocelli, Laxalt drew Gutride's attention to his conclusion that Petrocelli had been "faking 'bad.'" Laxalt asked Gutride, "Despite the faking on the IQ test, et cetera, do you think this is a valid diagnosis?" Gutride replied that he could substantiate his diagnosis of "unsocial with paranoid tendencies" with a "long history." Gutride stated that the diagnosis "does not imply an individual is unable to think properly or conduct themselves conventionally. It relates mostly to a style of living."

Prosecutor Laxalt then called Dr. Gerow to the stand. Defense counsel Wishart objected on the grounds of psychiatrist-patient privilege, but the court overruled the objection. Laxalt introduced no written report by Gerow. Gerow testified that he had interviewed Petrocelli for two hours on April 21, and that as a result of his interview he had formed an opinion of Petrocelli's "mental and emotional personality traits." Gerow said that he agreed with Drs. Chappel and Gutride's diagnosis of "antisocial personality." However, Gerow referred to it as a "psychopathic" rather than an "antisocial" personality. Gerow described Petrocelli's personality as "rare," and as the personality of someone "who is very callous and selfish, someone unreliable and irresponsible." He testified that individuals with psychopathic personalities "are repeatedly in trouble with the law," because they "don't believe in the rules that society set up" and do not learn from punishment. He testified

that "[t]here is no treatment at all" for psychopathic personality, that the condition worsens during adolescent years, and that it "persists throughout life." Gerow testified that the violence potential of a psychopathic "varies," but that the propensity for further violence is "quite high" for individuals with a history of violence. Gerow testified that being "a psychopathic" was an incurable "emotional disturbance." Gerow concluded his direct examination testimony by stating unequivocally, "There is no cure."

3. Jury Instructions, Final Argument, and Verdict

Before final penalty-phase arguments, the judge instructed the jury. Jury Instruction 5 provided, "If the penalty is fixed at life imprisonment without the possibility of parole, the defendant shall not be eligible for parole." However, the instruction continued, indicating that the State Board of Pardon Commissioners had the power to release Petrocelli from prison even if the jury returned a sentence of life imprisonment without parole:

> Under the laws of the State of Nevada, any sentence imposed by the jury may be reviewed by the State Board of Pardon Commissioners. Whatever sentence you return in your verdict, this Court will impose that sentence. Whether or not the State Board of Pardon Commissioners upon review, if requested by the defendant, would change that sentence, this Court has no way of knowing. The State Board of Pardon Commissioners, however, would have the power to modify any sentence at a later date.

In his closing argument, Prosecutor Laxalt emphasized Dr. Gerow's testimony, Petrocelli's incurability, and the possibility that the Board of Pardon Commissioners could release Petrocelli from prison. Laxalt maintained that Petrocelli "is, has been, and will forever remain a cool unfeeling, callous, individual, and a cold-blooded thief and killer." "He will never change." He continued, "Dr. Gerow has said there is no treatment; he will be a psychopathic personality, unfortunately." "Extreme mental or emotional disturbance" cannot be a mitigating circumstance because such disturbance implies that "there is treatment available for this person. What psychopath means, essentially, is a mean, bad person who has never changed and who will continue to victimize." "[N]o society, no community, no county, no city, no state, should ever have to risk again Tracy Petrocelli on the street."

In his rebuttal argument, Prosecutor Laxalt pointed to the reports of Drs. Chappel and Gutride, noting that each had discussed the possibility of treatment: "That a period of evaluation and a time of treatment might serve a reasonable purpose. . . . Do we take that chance?" He answered this question by emphasizing Dr. Gerow's testimony. "[H]e will not learn from punishment. He will not learn, he cannot learn." Invoking the possibility of Petrocelli's release from prison, Laxalt concluded:

> I ask you to consider years down the road when the decisions are being made at the Pardons Board and the Parole Board and we have all gone our separate ways and Mr. Petrocelli is there, the sole person applying for the pardon or

> applying for parole crying tears of remorse and telling the people how it wasn't he who was the murderer of Mr. Wilson it was an accident and he got railroaded, and telling people that it wasn't he who was the murderer of Melanie it was an accident, and he was railroaded. . . . Because he will be there. He will be there. . . . That's a sad fact, but it's to be faced.

Laxalt asked that the jury "return a verdict of death for Mr. Tracy Petrocelli, a cold-blooded killer, who will always remain so."

The jury returned a sentence of death.

II. Post-trial Procedural History

The Nevada Supreme Court affirmed Petrocelli's conviction and sentence. *See Petrocelli v. State*, 692 P.2d 503 (Nev. 1985). Petrocelli filed a timely state petition for post-conviction relief, which was denied on the merits by the state courts. He then filed a federal habeas petition, which the district court dismissed without prejudice because it contained unexhausted claims. Petrocelli returned to state court to exhaust these claims, which the state courts dismissed as procedurally defaulted.

Petrocelli filed his second federal habeas petition *pro se* on October 28, 1994, and then filed a counseled amended petition in 1996. The amended petition raised various claims, including two claims challenging the reference to the Pardon Board in Jury Instruction 5. The first of those two claims, labeled "Ground 4," alleged that the instruction improperly suggested that Petrocelli could receive "a pardon or parole" if sentenced to life without the possibility of parole

because it allowed the jury to "inappropriately speculate." The second claim, labeled "Ground 6," alleged that the jury instruction "inaccurately led the jury to believe that Petitioner, under Nevada law, could receive parole" even though Nev. Rev. Stat. § 213.1099 prohibits the granting of parole to a prisoner who has a history of "[f]ailure in parole, probation, work release or similar programs." The district court dismissed Ground 6 and several other grounds as an "abuse of the writ" because they had not been raised in Petrocelli's first federal habeas petition. It then denied Petrocelli's amended petition in September 1997, finding all claims either unexhausted, procedurally defaulted, or nonmeritorious.

On appeal, we reversed in part and remanded for the district court to consider various claims it had improperly dismissed as an "abuse of the writ," including Ground 6. *Petrocelli v. Angelone*, 248 F.3d 877, 884–85, 887 (9th Cir. 2001). Because in his briefing to us Petrocelli had not made any argument with respect to Ground 4, we deemed that ground abandoned. *Id.* at 880 n.1. On remand, the district court found various claims unexhausted and stayed Petrocelli's petition in order to permit him to return to state court to exhaust them.

Petrocelli filed his third state petition for post-conviction relief on August 11, 2003, raising a number of claims. The state district court denied Petrocelli's petition, denying some claims on the merits and holding some claims procedurally barred. Petrocelli appealed from the state district court's denial, and the Nevada Supreme Court affirmed.

Petrocelli then returned to federal court and filed his fourth amended petition, the operative petition in this case. In his petition, he challenged, *inter alia*, Jury Instruction 5, in language similar to that used in the claim he had labeled "Ground 6" in his earlier petition. In this petition, he labeled the challenge "Claim 4." The district court dismissed Claim 4 after concluding that it corresponded to Ground 4 of Petrocelli's earlier petition, which we had deemed abandoned in our earlier decision. The district court required Petrocelli to abandon various claims it deemed unexhausted, and rejected the remaining claims on the merits.

The district court issued a certificate of appealability as to three claims: (1) a claim that trial counsel was ineffective for failing to object to the admission of Powell's testimony; (2) a claim that Petrocelli's April 20 and 27 statements were admitted in violation of the Fifth, Sixth, and Fourteenth Amendments; and (3) a claim that introduction of Dr. Gerow's testimony violated Petrocelli's Fifth and Sixth Amendment rights. We issued a certificate of appealability as to three additional claims, including a claim challenging Jury Instruction 5.

III. Jurisdiction and Standard of Review

We have jurisdiction over the district court's denial of Petrocelli's federal habeas petition pursuant to 28 U.S.C. §§ 1291 and 2253(c).

We review de novo a district court's decision to grant or deny a habeas petition. *Curiel v. Miller*, 830 F.3d 864, 868 (9th Cir. 2016). The petition at issue was filed in 1994, well before the April 24, 1996, effective date of the Antiterrorism and Effective Death Penalty

Act of 1996 ("AEDPA"). Thus, AEDPA's deferential standard of review does not apply. *See Woodford v. Garceau*, 538 U.S. 202, 207 (2003); *see also Thomas v. Chappell*, 678 F.3d 1086, 1100 (9th Cir. 2012) ("We have consistently held that where . . . a petitioner filed a habeas application before the effective date of AEDPA and the district court retained jurisdiction over the case, AEDPA does not apply even if the petitioner files an amended petition after the effective date of AEDPA.").

Under pre-AEDPA law, "we review de novo questions of law and mixed questions of law and fact, whether decided by the district court or the state courts." *Thomas*, 678 F.3d at 1101 (alteration omitted) (quoting *Sivak v. Hardison*, 658 F.3d 898, 905 (9th Cir. 2011)). Whether a constitutional error was harmless is a mixed question of law and fact that is reviewed de novo. *Ghent v. Woodford*, 279 F.3d 1121, 1126 (9th Cir. 2002). State court findings of fact are "entitled to a presumption of correctness unless they are 'not fairly supported by the record.'" *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (quoting former 28 U.S.C. § 2254(d)(8)).

IV. Discussion

A. Guilt Phase Claims

Petrocelli challenges his conviction on three grounds. First, he contends that his trial counsel was ineffective for failing to object to the testimony of Powell, the Oklahoma car salesman, on the ground that Powell's testimony was the fruit of Petrocelli's April 19 statement, which had been obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards*

v. Arizona, 451 U.S. 477 (1981). Second, he contends that the use at trial of his April 20 and 27 statements violated the Fifth, Sixth, and Fourteenth Amendments. Third, he contends that a guilt-phase jury instruction defining premeditation and deliberation unconstitutionally relieved the State of its burden of proving each element of the crime beyond a reasonable doubt.

For the reasons that follow, each contention fails.

1. Powell Testimony

Petrocelli contends that trial counsel was ineffective for failing to object to Powell's testimony as fruit of a *Miranda* and *Edwards* violation. As recounted above, Powell was a used car salesman from whom Petrocelli had stolen a car during a test drive, in a manner similar to his theft of the truck in Nevada. The prosecution learned of the prior vehicle theft during the April 19 interrogation when Petrocelli admitted he had stolen a vehicle from a "Dub Peterson" dealership in Oklahoma City.

To show ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and that he was prejudiced by the deficient performance. *Id.* at 687–88. A failure to make a motion to suppress that is unlikely to succeed generally does not constitute ineffective assistance of counsel. *See Premo v. Moore*, 562 U.S. 115, 124 (2011); *see also Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (holding that failure to make a motion to suppress

which would "be meritless on the facts and the law" does not constitute ineffective assistance of counsel).

Before beginning the interrogation on April 19, the police officers advised Petrocelli of his *Miranda* rights, and Petrocelli signed a statement indicating that he understood them. The officers then began questioning Petrocelli. For some time he answered questions freely. When he later became evasive, one of the officers observed, "I thought . . . you wanted to talk to us about this." Petrocelli responded, "I do," and continued answering questions. Shortly afterwards, Petrocelli stated, "I'd sort of like to know what my . . . lawyer wants me to do." (Ellipsis in original.) When the officer asked if Petrocelli had understood his rights, he answered that he did. Later in the questioning, Petrocelli stated, "I even have a . . . part-time attorney and just to answer questions for me." (Ellipsis in original.) The officer then asked, "Is it . . . what you're telling me is you don't want to answer any questions without an attorney?" (Ellipsis in original.) Petrocelli responded, "No. I just need to have something answered. That's all." The officer told him, "Well, we don't have an attorney . . . present with us right now. Like I indicated before if at any time you don't want to . . . answer any questions or make any statements you don't have to." (Ellipses in original.) The officer resumed questioning, and Petrocelli confessed to stealing cars by going to car lots and taking them for test drives. He mentioned one particular theft from a "Dub Peterson" dealership in Oklahoma City. This led the police to Powell, who testified at Petrocelli's trial.

When a suspect invokes his Fifth Amendment right to have counsel present during a custodial

interrogation, "the interrogation must cease until an attorney is present." *Miranda*, 384 U.S. at 474. Police may not continue questioning a suspect without counsel present "unless the accused himself initiates further communication." *Edwards*, 451 U.S. at 484–85. Only an unambiguous invocation of the right to counsel triggers protection under *Edwards*. An invocation is unambiguous if the accused "articulate[s] his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459 (1994). Applying this test, the Supreme Court held in *Davis* that the statement, "Maybe I should talk to a lawyer," was ambiguous and did not constitute a request for counsel. *Id.* at 462.

Under *Davis*, Petrocelli's language was insufficient to constitute an unambiguous invocation of counsel. Because Petrocelli failed to invoke his right to counsel unambiguously, the April 19 interrogation was not conducted in violation of *Miranda* or *Edwards.* Petrocelli's trial counsel was therefore not ineffective in failing to move to suppress Powell's testimony as fruit of the interrogation.

2. April 20 and April 27 Statements

Petrocelli contends that the use at trial of his statements to the detectives on April 20 and April 27 violated his Fifth, Sixth, and Fourteenth Amendment rights. Prosecutor Laxalt used Petrocelli's statement that his killing of Barker was an "accident" to impeach Petrocelli's testimony that the Wilson shooting was also an accident. Laxalt also impeached Petrocelli by

confronting him with various inconsistencies between his statements and his trial testimony.

Petrocelli contends that he invoked his right to counsel on April 19, and that his statements taken on that date and thereafter were therefore taken in violation of his Fifth and Sixth Amendment rights. Petrocelli's counsel was appointed on April 20 but was not present at the interrogations on April 20 and 27. Assuming without deciding that Petrocelli's Fifth or Sixth Amendment right was violated, the rule is well established that a voluntary statement taken in violation of the Fifth or Sixth Amendment may be used for impeachment. *See Michigan v. Harvey*, 494 U.S. 344, 345–46 (1990); *United States v. Gomez*, 725 F.3d 1121, 1125–26 (9th Cir. 2013). Because the State used the statements at issue only for impeachment, Petrocelli's contention fails.

Petrocelli next contends that his April 20 and 27 statements were involuntary and thus that their admission was unconstitutional. Statements are unconstitutionally involuntary when a "'defendant's will was overborne' by the circumstances surrounding the giving of a confession." *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

Petrocelli contends that his statements were involuntary because they were "obtained by inducements." "Inducements to cooperate are not improper . . . unless under the total circumstances it is plain that they have overborne the free will of the suspect." *United States v. Okafor*, 285 F.3d 842, 847 (9th Cir. 2002). Here, there is no indication that Petrocelli's will was overborne. Before making

statements on April 20, Petrocelli told officers he had several "preconditions." Sergeant Dickson testified that Petrocelli was told that they would do what they could, but that no promises were made. His interrogators' partial compliance with his preconditions, while perhaps an inducement to talk, hardly constituted an overbearing of his will.

Petrocelli also contends that his April 20 and 27 statements were involuntary because, on April 19, Sergeant Barnes told him that he thought talking to the detectives "could do . . . nothing but help." In *Henry v. Kernan*, 197 F.3d 1021 (9th Cir. 1999), we held that a confession was involuntary when the interrogating officer ignored a suspect's clear invocation of his right to counsel and stated, "Listen, what you tell us we can't use against you right now." *Id.* at 1027. We noted that the officers' refusal to cease questioning in the face of repeated requests for counsel "generate[d] a feeling of helplessness" and that the officers deliberately violated *Miranda* in order to obtain a statement they could use for impeachment purposes. *Id.* at 1028–29.

The circumstances of the *Henry* interrogation are significantly different from those of Petrocelli's interrogation. As discussed above, Petrocelli never clearly invoked his right to counsel on April 19. When Petrocelli was asked if he was requesting a lawyer, he responded "no." The officers' attempts to clarify whether Petrocelli was invoking his rights differentiate the April 19 interrogation from the *Henry* interrogation, both because they likely reduced the feeling of helplessness that concerned us in *Henry* and because they suggest the detectives were not attempting deliberately to violate *Miranda*.

Considering the totality of the circumstances, Sergeant Barnes' remark was not sufficiently coercive to render Petrocelli's April 20 and 27 statements involuntary.

3. Jury Instruction on Premeditation and Deliberation

Petrocelli contends that the jury instruction defining "premeditation" and "deliberation" violated due process by collapsing the two requirements and relieving the State of its burden of proving that the killing was both deliberate and premeditated. *See Byford v. State*, 994 P.2d 700, 712–15 (Nev. 2000); *Polk v. Sandoval*, 503 F.3d 903, 910–11 (9th Cir. 2007), *overruled in part by Babb v. Lozowsky*, 719 F.3d 1019, 1028–30 (9th Cir. 2013). The district court concluded that Petrocelli had not exhausted this claim and required Petrocelli either to abandon the claim or risk dismissal of his petition. Faced with this choice, Petrocelli filed a notice of abandonment "of all unexhausted claims." Petrocelli contends that the district court erroneously determined that the claim was unexhausted.

"Exhaustion requires the petitioner to 'fairly present' his claims to the highest court of the state." *Cooper v. Neven*, 641 F.3d 322, 326 (9th Cir. 2011) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999)). Petrocelli raised this jury instruction claim in his third state habeas petition, but he did not appeal the state district court's denial of the claim to the Nevada Supreme Court. Petrocelli argues that his failure to appeal to the Nevada Supreme Court should be excused, contending that he could not have raised the claim until our decision in *Polk* in 2007, when we held that a jury instruction collapsing the

premeditation and deliberation elements of first-degree murder violates the Due Process Clause. *Polk*, 503 F.3d at 904. This argument is unpersuasive in light of Petrocelli's having raised this claim in the state district court, before we decided *Polk*, and in light of his assertion that this claim was based "on clearly established and long existing federal law, namely *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *Francis v. Franklin*, 471 U.S. 307 (1985)."

B. Penalty Phase *Estelle* Claim

Petrocelli makes several penalty phase claims. In one of them, he contends that Dr. Gerow's testimony violated his Fifth and Sixth Amendment rights, articulated in *Estelle v. Smith*, 451 U.S. 454 (1981). We agree with this contention, and on that basis grant the writ as to the death penalty. We therefore do not reach Petrocelli's other penalty phase claims.

1. Waiver

The district court held that Petrocelli's *Estelle* claim was neither unexhausted nor procedurally defaulted, and that the Nevada Supreme Court denied it on the merits. On appeal to us, the State does not contest this holding. *See Robinson v. Lewis*, 795 F.3d 926, 934 (9th Cir. 2015) (holding that a petitioner waived an argument by failing to dispute the district court's rejection of the argument in his briefing on appeal).

Petrocelli spends six pages of his opening brief to us arguing that the admission of Dr. Gerow's testimony violated *Estelle.* The State does not respond to Petrocelli's *Estelle* argument. In neither its answering brief nor its supplemental brief does the State so much as cite *Estelle*, let alone respond to Petrocelli's

argument. We therefore conclude that the State has waived any defense to Petrocelli's *Estelle* argument.

2. *Estelle*

Even if the State had not waived its defense to Petrocelli's *Estelle* argument, we would hold that the admission of Dr. Gerow's testimony violated *Estelle* and that the violation was not harmless.

a. *Estelle* Violation

In *Estelle*, Dr. James Grigson was appointed by a Texas trial court to examine capital defendant Ernest Smith to determine his competency to stand trial. Grigson examined Smith for about ninety minutes and determined that he was competent. Grigson gave no *Miranda* warning to Smith during the course of the examination. At the time of the examination, Smith's Sixth Amendment right to counsel had attached. Grigson did not notify Smith's attorney that he would examine his client.

Dr. Grigson testified, over objection, during the penalty phase of Smith's trial as to his future dangerousness. He testified that Smith was "a very severe sociopath"; that Smith "will continue his previous behavior"; that Smith's sociopathic condition will "only get worse"; and that there "is no treatment, no medicine . . . that in any way at all modifies or changes this behavior." 451 U.S. at 459–60 (alteration in original) (internal quotation marks omitted). The jury returned a verdict of death.

The Supreme Court held that Dr. Grigson's testimony violated the Fifth and Sixth Amendments. The Court held that the Fifth Amendment privilege

against self-incrimination applied, and that *Miranda* warnings were required because "Dr. Grigson's prognosis as to future dangerousness rested on statements [Smith] made . . . in reciting the details of the crime." *Id.* at 464. "When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role . . . became essentially like that of an agent of the State." *Id.* at 467. The Court held that the Sixth Amendment right to counsel applied because "adversary judicial proceedings" had been initiated against Smith, and that Grigson's interview was a "critical stage" of the proceedings. *Id.* at 469–70. "[Smith] was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrists's findings could be employed." *Id.* at 471.

Estelle was decided in May 1981. Dr. Gerow interviewed Petrocelli in Washoe County Jail almost a year later, in April 1982. Petrocelli's trial took place during the last week of July and first week of August 1982.

In addressing Petrocelli's third petition for post-conviction relief, the state district court heard testimony from Dr. Gerow and from defense counsel Wishart, and received into evidence the Washoe County Jail visitors' log and Gerow's April 27 letter to Prosecutor Laxalt. In rejecting a claim of ineffective assistance of counsel, the court made factual findings directly relevant to Petrocelli's *Estelle* claim. The court wrote:

> The sequence of events appears to be as follows: Petitioner sought a psychiatrist on April 20, 1982. Laxalt briefed Gerow on April 21, and on that date, [Gerow] interviewed the Petitioner. Defense Attorney Wishart and Investigator Ford also interviewed Petitioner on April 21, 1982 subsequent to an appointment in the justice court on that date. It is not clear as to whether the doctor or the lawyer arrived at the jail first.

The court wrote, further, "Dr. Gerow and Prosecutor Laxalt are not entirely clear nor consistent about the purpose for which the doctor was hired. However, Gerow makes it clear that he informed Petitioner that the interview was not confidential and that he would see Petitioner again on an asneeded basis." The court concluded:

> Dr. Gerow's understanding of his engagement was to determine Petitioner's competency and to render some further treatment. . . . No reasonably effective trial or appellate counsel would conclude from this record that Dr. Gerow was a court-authorized psychiatrist nor an agent for the prosecutor.

The state district court's findings are "not fairly supported by the record" and thus are not entitled to a presumption of correctness. *Silva*, 279 F.3d at 835 (quoting former 28 U.S.C. § 2254(d)(8)). Indeed, its findings are demonstrably wrong in nearly every particular.

First, it is not true that counsel for Petrocelli was appointed on April 21, the day of Dr. Gerow's

interview. Rather, the appointment was made the day before, on April 20.

Second, it not true that there is an ambiguity "as to whether the doctor or the lawyer arrived at the jail first." The visitors' log at the Washoe County Jail is unambiguous. Defense attorney Wishart and investigator Ford signed the visitors' log at about 1:50 pm. They left at about 2:20 pm. Dr. Gerow signed the visitors' log at about 3:50 pm.

Third, it is not true that "[n]o reasonably effective . . . counsel would conclude . . . that Dr. Gerow was . . . an agent for the prosecutor." Gerow wrote "D.A." in the "relationship" box of the visitors' log. Wishart knew Gerow well. He testified in post-conviction proceedings that Gerow had a "prosecution bias," and that he never would have hired him.

Fourth, it is not true that Dr. Gerow "ma[de] clear that he informed Petitioner . . . that he would see Petitioner again on an as-needed basis." Gerow informed Prosecutor Laxalt in his April 27 letter that he would see Petrocelli on an "'as needed' basis." Gerow testified in state court post-conviction proceedings that he meant "as needed *by Mr. Laxalt*."

Fifth, it is not true that "Dr. Gerow's understanding of his engagement was . . . to render some further treatment." Gerow never had any understanding that he would provide treatment to Petrocelli. Petrocelli was under the illusion that Gerow had come to see him in response to his request for psychiatric counseling, but Gerow was under no such illusion.

The facts are that Prosecutor Laxalt asked Dr. Gerow to visit Petrocelli in the Washoe County Jail to

determine his competency to stand trial. Gerow interviewed Petrocelli in the jail in the late afternoon of April 21, shortly after defense attorney Wishart and investigator Ford had visited him. The Reno Justice Court had appointed the Washoe County Public Defender's office as counsel for Petrocelli the day before, on April 20. Wishart and Ford's names and signatures were on line three of the visitors' log of the jail, with the notation "WCPD/ATT." Gerow signed in as a visitor on line four of the same page with the notation "D.A." Wishart's name and capacity would have been easily visible to Gerow when he signed in. Gerow never sought permission from Wishart to evaluate Petrocelli. Laxalt never asked Gerow to provide treatment to Petrocelli, and Gerow never provided any. On April 27, Gerow wrote a letter to Laxalt reporting that he believed Petrocelli to be competent, and volunteered to provide further assistance to Laxalt "as needed." Gerow testified during the penalty phase of Petrocelli's capital trial. He testified, based on his interview with Petrocelli on April 21, that Petrocelli was dangerous and not treatable. Gerow's final words during direct examination were, "There is no cure."

The parallels between *Estelle* and this case are striking. Dr. Grigson, like Dr. Gerow in this case, visited the defendant in jail to determine his competency to stand trial. Grigson, like Gerow, failed to provide *Miranda* warnings. Grigson, like Gerow, was acting as an agent of the state. Indeed, the case against Gerow's testimony is even stronger than against Grigson's, for Grigson was appointed by the court, whereas Gerow was acting at the request of the prosecutor. The defendant in *Estelle*, like Petrocelli,

already had appointed counsel. Grigson, like Gerow, did not seek or obtain permission from defendant's counsel to visit or evaluate his client. Grigson, like Gerow, testified during the penalty phase of defendant's trial that the defendant was incurable.

We conclude from the foregoing that the admission of Dr. Gerow's testimony during the penalty phase of Petrocelli's trial was a flagrant violation of his Fifth and Sixth Amendment rights under *Estelle*.[1]

b. Harmless Error

An "error of the trial type" is not harmless if it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). "There must be more than a 'reasonable possibility' that the error was harmful." *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015) (quoting *Brecht*, 507 U.S. at 637). "[R]elief is appropriate only if the prosecution cannot demonstrate harmlessness." *Id.* at 2197. Where a judge "is in 'grave doubt as to the harmlessness of the error, the habeas petitioner must win.'" *Pensinger v. Chappell*, 787 F.3d 1014, 1029 (9th Cir. 2015) (quoting *California v. Roy*, 519 U.S. 2, 5 (1996) (per curiam)). We conclude that the *Estelle* error was not harmless.

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[1] Even if the introduction of Dr. Gerow's testimony could be understood as a rebuttal of Petrocelli's psychological evidence that suggested that Petrocelli would benefit from treatment, *see Buchanan v. Kentucky*, 483 U.S. 402, 422–23 (1987), the admission of the testimony would still violate the Sixth Amendment because Petrocelli's counsel never received notice of the examination, *see Powell v. Texas*, 492 U.S. 680, 685 (1989) (per curiam).

The jury knew that Petrocelli had committed two murders. He was on trial for murdering James Wilson, and the jury had been told that he had also murdered Melanie Barker. Maureen Lawler, Barker's mother, testified at the penalty phase as to the circumstances of the three-day kidnaping in Washington State. Petrocelli was death-eligible because when he killed Wilson he had already been convicted of kidnaping Barker. The jury had ample basis, both legal and emotional, for imposing a capital sentence. The question before us is whether it would have done so absent Dr. Gerow's testimony. The precise question is whether there was "more than a 'reasonable possibility'" that the jury would have imposed a life sentence if it had not heard Gerow's testimony. *Davis*, 135 S. Ct. at 2198 (quoting *Brecht*, 507 U.S. at 637). The burden is on the State to demonstrate that there was not such a possibility.

In any capital case, particularly if a defendant might eventually be released from prison, a central question at sentencing is whether the defendant is likely to kill again. We put to one side the report of Dr. Petrich, who evaluated Petrocelli before he killed Wilson and Barker. Not counting Petrich's report, there was evidence from three medical professionals who diagnosed Petrocelli, assessed his dangerousness, and evaluated his amenability to treatment.

Dr. Gutride reported that Petrocelli "cried openly" during his interview, and that his "distraught behavior had the quality of his practically begging for help." He reported that Petrocelli "desperately want[ed] to know what is the matter with him" and told Gutride that he had "called crisis lines in every city, but [had] been

unable to get any help." Gutride observed that "[t]he personal distress [Petrocelli] exhibited during the interview seems genuine" and that Petrocelli "may truly desire some mental health treatment." Gutride wrote that Petrocelli's "ability to profit from such treatment is questionable" because of his distrust of others, and he concluded that "treatment should be offered in a setting where the client can be closely monitored." In his live testimony, Gutride stated that his diagnosis did not "imply an individual is unable to think properly or conduct themselves conventionally. It relates mostly to a style of living."

Dr. Chappel reported that Petrocelli "repeatedly asked for help" while in jail in Seattle and that Petrocelli attempted to commit suicide while there. Chappel reported that Petrocelli "viewed the experience as one of asking for help and not getting it." Petrocelli "expresse[d] a wish for further evaluation or treatment so he [could] find out whether or not he killed on purpose." Chappel concluded that "a more extensive evaluation" would be useful in order for Petrocelli "to have a better understanding of the reasons for his loss of impulse control and his reason for killing someone who was close to him." Chappel wrote that "[a] period of evaluation and a trial of treatment might serve a useful purpose in preventing any further homicidal outbursts of rage on his part."

Both Dr. Gutride and Dr. Chappel concluded that Petrocelli wanted mental health treatment, and that he felt that he had sought and been denied such treatment. Both doctors held out the possibility of treatment. Gutride acknowledged that Petrocelli's ability to profit from treatment was "questionable"

because of his distrust of others, but he did not state that Petrocelli was untreatable. Rather, he recommended that Petrocelli be "closely monitored" during treatment. Chappel stated that treatment could be useful both for Petrocelli's own understanding and in order to prevent "further homicidal outbursts."

Dr. Gerow's testimony was inconsistent with the reports of Drs. Gutride and Chappel. Gerow stated unequivocally that Petrocelli was dangerous and would always remain so. He testified that Petrocelli had a psychopathic personality for which there is "no treatment at all." He elaborated, "A psychiatrist doesn't treat the condition because it's not treatable." Gerow's last words on direct examination were, "There is no cure."

Dr. Gerow's live testimony likely had a greater impact on the jury than the analyses of Drs. Gutride and Chappel. Defense counsel Wishart chose not to put Gutride and Chappel on the stand, submitting only their written reports. Prosecutor Laxalt called Gutride to the stand in an attempt to undermine his diagnosis and assessment of dangerousness on the ground that Petrocelli had "faked 'bad'" when taking formal intelligence tests. Gutride insisted that his diagnosis was correct, and that the diagnosis did not "imply an individual is unable to think properly or conduct themselves conventionally." Gutride's live testimony was very short, occupying not quite two pages of transcript. His testimony was followed directly by Gerow's more extensive live testimony that conflicted with Gutride and Chappel's written reports and Gutride's brief testimony. *See Satterwhite v. Texas*, 486 U.S. 249, 259–60 (1988) (referring to a psychiatrist's

testimony that defendant was "beyond . . . rehabilitation" as his "most devastating" statement).

The effect of Dr. Gerow's testimony was magnified by Jury Instruction 5, quoted above. Jury Instruction 5 indicated to the jury that even if it sentenced Petrocelli to life without parole, he might nonetheless be released by the Nevada Board of Pardon Commissioners.[2] Prosecutor Laxalt made sure that the jury understood the implications of Jury Instruction 5. In closing argument he emphasized Dr. Gerow's testimony that Petrocelli was an incurable psychopath, and the possibility of Petrocelli's release on parole:

> He will never change. There is no cure for being a psychopath. . . . Should the community bear the risk of ever having this defendant on the street again, walking free, on the run?
>
> . . .
>
> [N]o society, no community, no county, no city, no state, should ever have to risk again Tracy Petrocelli on the street.
>
> . . .

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[2] In *Sechrest v. Ignacio*, 549 F.3d 789, 810 (9th Cir. 2008), we held in a Nevada capital case that an instruction identical to Jury Instruction 5 was unconstitutional because it was inaccurate. At the time of Sechrest's trial, "an individual who [was] on probation at the time he commit[ed] another offense . . . [was] not eligible for parole by the Parole Board on that offense." *Id.* at 810. We do not reach the question whether Jury Instruction 5 was constitutional at the time of Petrocelli's trial.

> I ask you to consider years down the road when the decisions are being made at the Pardons Board and the Parole Board and we have all gone our separate ways and Mr. Petrocelli is there, the sole person applying for the pardon or applying for parole crying tears of remorse and telling the people how it wasn't he who was the murderer of Mr. Wilson it was an accident and he got railroaded, and telling people that it wasn't he who was the murderer of Melanie it was an accident, and he was railroaded. . . . Rehabilitation to be imposed in this case? That's a sad fact, but it's to be faced.

It is possible that Petrocelli has not preserved, on appeal to us, his ability to challenge the district court's dismissal of Claim 4, challenging Jury Instruction 5. But whether Petrocelli may now challenge the instruction is irrelevant to the harmlessness of the *Estelle* violation. In determining harmlessness, the question before us is not the constitutionality of the instruction but rather its effect on the improper admission of Dr. Gerow's testimony. Whether Jury Instruction 5 is constitutional or not, its effect on Gerow's improperly admitted testimony is the same.

We have encountered Dr. Gerow before. He testified for the prosecution in *Sechrest* in very much the same manner he testified for the prosecution in the case before us. Gerow testified that Sechrest "was an incurable sociopath" who was "extremely dangerous and could not be rehabilitated." *Sechrest*, 549 F.3d at 813. We held in *Sechrest* that the combined effect of Gerow's testimony and an instruction identical to Instruction 5 "had a substantial influence on the jury's

decision to sentence Sechrest to death." *Id.* We similarly conclude, in this case, that Gerow's improperly admitted testimony, understood in the light of Jury Instruction 5, "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637 (quoting *Kotteakos*, 328 U.S. at 776). Because there was "more than a 'reasonable possibility'" that the jury would have imposed a life sentence absent the *Estelle* error, the error was not harmless. *Davis*, 135 S. Ct. at 2198 (quoting *Brecht*, 507 U.S. at 637).

Conclusion

We affirm the district court's denial of Petrocelli's petition for a writ of habeas corpus with respect to the conviction, but reverse with respect to the death sentence. We remand with instructions to grant the writ as to the penalty unless, within a reasonable time, the State grants a new penalty phase trial or imposes a lesser sentence consistent with the law.

AFFIRMED in part, REVERSED in part, and REMANDED.

CHRISTEN, Circuit Judge, concurring:

I agree that Petrocelli's death sentence must be reversed. I write separately because, in my view, even if the State could show that the prosecutor's tactics had not prejudiced the jury's verdict, Petrocelli's case is one of the very few in which deliberate prosecutorial misconduct and egregious trial errors warrant habeas relief. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993) (stating that a deliberate and especially

egregious trial error, or one that is combined with a pattern of prosecutorial misconduct, might warrant habeas relief, even if the jury's verdict is not substantially influenced). *Brecht*'s footnote nine is rarely employed, but the Fifth and Seventh Circuits have each relied on it one time in cases where an error (or errors) did not easily fit into either the "structural error" or "trial error" category. The errors in Petrocelli's case were equally pervasive, flouted Supreme Court authority, and undermined the integrity of the criminal justice process.

Tracy Petrocelli's trial, from voir dire to the death penalty verdict, lasted just ten days (July 26–30, 1982; August 2–6, 1982). The penalty phase took one day. The introduction of evidence began at 11:30 AM on August 6, and the jury's verdict, a death sentence, was returned at 10:52 PM. The defense introduced brief psychiatric reports but only called Petrocelli to testify. The prosecution called Dr. Gerow, a psychiatrist, to testify about Petrocelli's mental condition. The majority opinion thoroughly and persuasively explains how the prosecutor procured Dr. Gerow's testimony and why the prosecutor's conduct was a flagrant violation of *Estelle v. Smith*, 451 U.S. 454 (1981) (holding that a psychiatrist's testimony about the defendant's future dangerousness in a capital felony trial violated the defendant's Fifth and Sixth Amendment rights where the defendant was not given *Miranda* warnings before his psychiatric examination).

A separate layer of error also infected this trial because the State's *Estelle* violation dovetailed with an inflammatory jury instruction. Specifically, the trial court told the jury that "[u]nder the laws of the State of

Nevada, . . . [t]he State Board of Pardon Commissioners . . . would have the power to modify any sentence at a later date." The prosecution told the jury that Petrocelli might someday walk the streets "[a]mong ordinary people" and "kill again" if the jury did not sentence him to death. The context and nature of these combined errors and misconduct so infected the integrity of the proceedings as to defy categorization and the typical harmlessness analysis.

Brecht's harmless-error standard applies on collateral review of federal constitutional trial errors. *See Brecht*, 507 U.S. at 622. Typically, "[t]rial error 'occur[s] during the presentation of the case to the jury,' and is amenable to harmless-error analysis because it 'may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial].'" *Id.* at 629 (alterations in original) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307–08 (1991)). Prosecutorial misconduct is trial error. *See Wood v. Ryan*, 693 F.3d 1104, 1113 (9th Cir. 2012). "At the other end of the spectrum of constitutional errors lie 'structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards.'" *Brecht*, 507 U.S. at 629 (quoting *Fulminante*, 499 U.S. at 309). Structural errors, such as the deprivation of the right to counsel, "infect the entire trial process" and require automatic reversal of the conviction. *Id.* at 629–30; *see also Hardnett v. Marshall*, 25 F.3d 875, 879 (9th Cir. 1994) (stating that unlike trial errors, structural errors "may not be considered harmless").

"Not every error, however, is easily shoe-horned into one of those neat categories." *United States v. Harbin*,

250 F.3d 532, 544 (7th Cir. 2001). "The nature, context, and significance of the violation, for instance, may determine whether automatic reversal or the harmless error analysis is appropriate." *Id.* (internal quotation marks and citation omitted). In footnote nine of *Brecht*, the Supreme Court left open the possibility "that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." 507 U.S. at 638 n.9. "This hybrid, [f]ootnote [n]ine error as we denominate it, is thus assimilated to structural error and declared to be incapable of redemption by actual prejudice analysis." *Hardnett*, 25 F.3d at 879. "The integrity of the trial, having been destroyed, cannot be reconstituted by an appellate court." *Id.*

In Petrocelli's case, the first error arose when the prosecutor used a psychiatrist to interview Petrocelli without informing his lawyer or advising him of his right to remain silent. The Supreme Court held in *Estelle* that the prosecution may not rely on statements made by a defendant during a psychiatric examination to prove future dangerousness if the defendant was not apprised of his *Miranda* rights and was denied the assistance of his counsel in deciding whether to submit to the examination. 451 U.S. at 467–71 ("When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a

postarrest custodial setting."). Decided in May of 1981, *Estelle* had been on the books for about a year when the state prosecutor enlisted Dr. Gerow to interview Petrocelli, and it had been controlling law for about fifteen months by the time the prosecutor called Dr. Gerow to testify. Despite *Estelle*'s clear rule that the government may not circumvent *Miranda* by using a health care professional as an agent to interview a defendant without the benefit of defense counsel, the prosecutor responded to Petrocelli's request for psychiatric help by sending Dr. Gerow to the jail to interview Petrocelli under the pretense of providing mental health counseling. There is no question that the prosecutor's goal was to use the result of the interview to prosecute Petrocelli, not to respond to Petrocelli's request for mental health counseling. The prosecutor later said as much, as did Dr. Gerow. It is equally clear that Petrocelli could not have anticipated that the doctor would testify for the prosecution.

In state post-conviction proceedings, the prosecutor testified and agreed that he asked Dr. Gerow to interview Petrocelli because he was concerned about a possible competency or insanity defense. The prosecutor testified that he "want[ed] to see what ma[de] [Petrocelli] tick," and also candidly admitted that he sent Dr. Gerow to interview Petrocelli for "a dual purpose." According to the prosecutor, "Mr. Petrocelli wanted to see a counselor, a psychiatrist. I wanted him to be seen by one in order to make sure that we had a competent defendant." The prosecutor selected Dr. Gerow, as opposed to another psychiatrist or psychologist, because he "had a lot of trust in Dr. Gerow." Despite the rule from *Estelle*, the prosecutor recalled that he had not instructed Dr. Gerow to tell

Petrocelli that he was there at the request of the prosecution, that he had not instructed Dr. Gerow to advise Petrocelli of his *Miranda* rights, and that he had not instructed Dr. Gerow about what to do if Petrocelli mentioned that he was represented by counsel—all because Dr. Gerow was supposedly seeing Petrocelli "jointly." Although the prosecutor described the interview as having a "dual purpose," defense counsel Lawrence Wishart denied that there was any joint defense purpose for the interview. He was not informed of the interview, nor consulted about the selection of the expert. In fact, Wishart was familiar with this psychiatrist, and he testified that he would not have hired Dr. Gerow because he thought Dr. Gerow had "a prosecution bias."

Dr. Gerow also testified in the post-conviction proceedings. He described conferring with the prosecutor by telephone before meeting with Petrocelli, and acknowledged that he met with Petrocelli on April 21, 1982, at the prosecutor's request, to determine whether Petrocelli was competent to stand trial and to assess Petrocelli's ability to distinguish right from wrong. Dr. Gerow doubted very much that the prosecutor instructed him to advise Petrocelli of his *Miranda* rights, and he was definite in his testimony that he did not do so. He also confirmed that when he wrote in his one-page letter report to the prosecutor that he would see Petrocelli again "as needed," he meant as needed by the prosecution, not as needed by Petrocelli.[1] In short, the record shows that Dr. Gerow's

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[1] Dr. Gerow's report verifies that he examined Petrocelli at the prosecutor's request, that Petrocelli was cooperative and an able historian, and that a mental status examination was performed.

interview with Petrocelli had no therapeutic purpose; it was arranged to advance the prosecution's case in blatant violation of *Estelle*.

The prosecution exploited its *Estelle* violation to full advantage at trial.[2] Having interviewed Petrocelli without informing him of his *Miranda* rights and without notifying Petrocelli's counsel, Dr. Gerow told the jury that he had diagnosed Petrocelli as "a psychopathic." He testified that although the "violence potential" of psychopaths "varies," the most concerning traits associated with psychopaths (incurability, callousness, a high propensity for violence) "describe[]

In seven lines of text, a single paragraph summarizes Petrocelli's social history from childhood, his mental health history from childhood, and the impression that he was not psychotic when interviewed. The letter then deems Petrocelli competent to stand trial, and states that Dr. Gerow will see Petrocelli again on an "as needed" basis.

[2] The State relies heavily on the Nevada Supreme Court's ruling that even if Petrocelli had properly preserved his claim that Dr. Gerow's interview violated *Miranda v. Arizona*, Petrocelli failed to show that it prejudiced him in light of other compelling testimony about future dangerousness. The State also repeats the Nevada trial court's factual errors and raises most of the arguments that the majority opinion addresses: (1) the incorrect statement that Petrocelli had not yet been appointed counsel when Dr. Gerow interviewed him; (2) the incorrect statement that Dr. Gerow informed Petrocelli that he would see him again on an "'as needed' basis"; (3) that it is not entirely clear for what purpose Dr. Gerow saw Petrocelli (perhaps not as an agent of the prosecutor); and (4) that any error was harmless because "[t]he jury heard other compelling evidence about Petrocelli's violent propensities during the guilt phase of his trial." Like the majority, I conclude that the State has not raised any persuasive defense to the alleged *Estelle* violation.

[Petrocelli] quite well." Dr. Gerow's last statement on direct examination went to Petrocelli's future dangerousness. He told the jury: "There is no cure." The prosecution's closing argument summarized the reports of the doctors who had evaluated Petrocelli, but relied most heavily on Dr. Gerow's testimony. The prosecutor adopted Dr. Gerow's terminology, referring to Petrocelli as "a . . . psychopathic," and ended his remarks about Petrocelli's "psychopathic" diagnosis by saying: "And we can go to Dr. Gerow. . . . [T]he sad and terrifying fact is [Petrocelli] will continue to do this."

To make matters worse, the prosecutor emphatically, repeatedly, and definitively emphasized that Petrocelli could someday be released if the jury did not sentence him to death. The prosecutor asked the jury: "Should the community bear the risk of ever having this defendant on the street again, walking free, on the run?" He elaborated:

> What psychopath means, essentially, is a mean, bad person who has never changed and who will continue to victimize. . . . [N]o society, no community, no county, no city, no state, should ever have to risk again Tracy Petrocelli on the street. They should not have to risk their fathers or daughters, or their brothers or themselves, that he might take a fancy to killing them as he has done, as you see from the people in this case . . . .

In his rebuttal, the prosecutor continued:

> But ladies and gentlemen, I ask you to consider years down the road when the decisions are being made at the Pardons Board and the Parole

> Board and we have all gone our separate ways and Mr. Petrocelli is there, the sole person applying for the pardon or applying for parole crying tears of remorse and telling the people how it wasn't he who was the murderer of Mr. Wilson it was an accident and he got railroaded, and telling people that it wasn't he who was the murderer of Melanie it was an accident, and he was railroaded.

Contrary to these statements, Petrocelli categorically was *ineligible* for parole under a statute passed by the Nevada legislature just months before his sentencing because he was on probation when he murdered James Wilson. Had the jury sentenced Petrocelli to life in prison without the possibility of parole, the prosecutor could not have known whether the State Board of Pardon Commissioners (Board) would have had the power to release him. *See* Nev. Rev. Stat. § 213.1099(4)(e) (prohibiting the reduction of a sentence to one allowing parole if the convicted individual had "[failed] in parole, probation, work release or similar programs").[3]

There is no question the prosecutor was aware that Petrocelli was on probation and had failed in "similar programs" at the time of this crime. Petrocelli had been convicted of kidnaping and he had twice left a drug treatment program. The prosecutor argued that Petrocelli's previous conviction for kidnaping should be

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[3] The implementation of § 213.1099(4) was contingent upon passage of a constitutional amendment that was put to the voters three months after Petrocelli's sentencing, and the retroactivity of the statute had not yet been determined.

treated as an aggravating factor, and he cross-examined Petrocelli about leaving the drug treatment program.

On appeal, the State's defense of Jury Instruction 5 and the prosecutor's unequivocal statement that Petrocelli could be granted parole if not sentenced to death, is that, before the statutory amendment, Nevada's Board generally had the authority to commute a sentence of life without the possibility of parole. But Petrocelli was on probation at the time of this crime and had twice absconded from a drug rehabilitation program. The Nevada Supreme Court declined to grant Petrocelli relief on the basis of Jury Instruction 5, but it directed trial courts to tell future juries: "Life imprisonment without the possibility of parole means exactly what it says, that the Defendant shall not be eligible for parole." *Petrocelli v. State*, 692 P.2d 503, 511 (1985), *holding modified after statutory amendment by Sonner v. State*, 930 P.2d 707 (1996).

The backdrop for the prosecutor's egregious *Estelle* trial error was this definitive statement of Nevada law suggesting the possibility of parole, which the prosecutor hammered during closing argument. If this combination does not put Petrocelli's case in *Brecht*'s footnote nine category, the scale certainly tips when one considers that these were not isolated incidents or inadvertent mistakes. In September 1983, the same prosecutor's office called Dr. Gerow to testify about a defendant's future dangerousness during the penalty phase of another death penalty case, *Sechrest v. Ignacio*, 549 F.3d 789, 798–99 (9th Cir. 2008). In *Sechrest*, Dr. Gerow was originally hired by defense counsel but he switched sides to become a prosecution

witness. *See id.* at 816. Our decision in that case explains that Dr. Gerow interviewed Sechrest without giving him *Miranda* warnings or otherwise informing the defendant or his counsel that he might testify for the prosecution. *See id.* at 798–99. We concluded in *Sechrest* that "Dr. Gerow's testimony that [the defendant] was extremely dangerous and could not be rehabilitated likely had a substantial influence on the jury's decision to sentence [the defendant] to death." *Id.* at 813.

Further, Petrocelli's trial was not the last capital case in which this prosecutor's office inaccurately represented that the defendant categorically would be eligible for parole if the jury did not impose the death sentence. In *Sechrest*, decided after § 213.1099(4) became effective, the prosecution told the jury that "the Board of Pardon Commissioners could change [the defendant's] sentence," *id.* at 798, and warned that if it did not impose a death sentence, it was "risk[ing] the life of some other person or child," *id.* at 811 (alteration in original). As a matter of fact and law, that was not true. Sechrest was ineligible for parole because he was on probation at the time he committed his offense, but an inaccurate jury instruction "reinforced the prosecutor's argument that the Board of Pardon Commissioners was the entity responsible for deciding Sechrest's term of imprisonment." *Id.* at 812.

In *Sechrest* we held: "Bottom line: the prosecutor misled the jurors to believe that if they did not impose the death penalty, [the defendant] could be released on parole and would kill again. In making his erroneous assertions, the prosecutor . . . most likely inflamed the passions of the jury." *Id.* at 812. *Sechrest* establishes

that this prosecutor's office had a game plan to disingenuously scare the jury about the likelihood that the defendant might be released to walk Reno's streets again.

In my view, Petrocelli's appeal presents "the unusual case where the combination of misconduct and error infected the entire proceeding." *Hardnett*, 25 F.3d at 880 (internal quotation marks omitted). The prosecution's misuse of Dr. Gerow, coupled with the inflammatory and misleading statements of Nevada law it used in at least two capital cases, pushes this case across the line into footnote nine error of the sort that led two other appellate courts to grant habeas relief. *See United States v. Bowen*, 799 F.3d 336 (5th Cir. 2015); *United States v. Harbin*, 250 F.3d 532, 545 (7th Cir. 2001).

Bowen arose from the prosecution of five former police officers involved in the killing of two unarmed men after Hurricane Katrina (the "Danziger Bridge shootings") and an alleged cover-up. *Bowen*, 700 F.3d at 339–40. Federal prosecutors in charge of the case engaged in a series of "ethical lapses" during the high-profile trial. *Id.* at 339. Although the Fifth Circuit could not conclude that the prosecutorial misconduct was "outcome-determinative," *id.* at 356, the court held that footnote nine error occurred when prosecutors leaked confidential information, anonymously posted on online news sources, and withheld information from the district court, *id.* at 339–46, 353–54. According to the Fifth Circuit: "The [prosecutors'] online commenting alone, which breached all standards of prosecutorial ethics, gave the government a surreptitious advantage in influencing public opinion, the venire panel, and the

trial itself." *Id.* at 353. "This case thus presents the unclassifiable and pervasive errors to which the Supreme Court referred in *Brecht* when it identified a category of errors capable of infecting the integrity of the prosecution to a degree warranting a new trial irrespective of prejudice." *Id.*

The Seventh Circuit considered an egregious error that similarly tipped the scales in favor of the prosecution in *Harbin.* There, the prosecution, but not the defense, was allowed to "save" a peremptory juror challenge until the sixth day of an eight-day trial. *See* 250 F.3d at 537–39. Although no one argued that the alternate juror who replaced the excused juror was biased, the Seventh Circuit held that the error defied the typical harmless error analysis, should be treated as structural, and required reversal, in accord with the "footnote nine exception." *See id.* at 544–48. The Seventh Circuit reasoned: "[T]he error was serious enough to effect a shift in the total balance of advantages in favor of the prosecution, which . . . could deprive defendants of a fair trial." *Id.* at 547.

So too here. The prosecutor's *Estelle* violation and other misconduct shifted the total balance of the penalty phase. This misconduct was deliberate, and egregious, and it compromised the integrity of the trial to a degree warranting a new sentencing trial with or without a showing that the errors actually influenced the jury's verdict.

For these reasons, I respectfully concur in the majority opinion, but I would also grant habeas relief based on *Brecht*'s footnote nine.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-99006
D.C. No. 3:94-cv-00459-RCJ

[Filed July 5, 2017]

TRACY PETROCELLI, *Petitioner-Appellant*,	)
v.	)
RENEE BAKER, Warden, *Respondent-Appellee.*	)

OPINION

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, Senior District Judge, Presiding

Argued and Submitted September 16, 2016
San Francisco, California

Filed July 5, 2017

Before: William A. Fletcher, Morgan Christen,
and Michelle T. Friedland, Circuit Judges.

Opinion by Judge W. Fletcher;
Concurrence by Judge Christen

SUMMARY[*]

Habeas Corpus / Death Penalty

The panel affirmed the district court's denial of Tracy Petrocelli's pre-AEDPA habeas corpus petition with respect to his Nevada state conviction for robbery and first-degree murder, and reversed the denial of the petition with respect to his death sentence.

The panel held that because Petrocelli failed to invoke his right to counsel unambiguously, his April 19 interrogation was not conducted in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), or *Edwards v. Arizona*, 451 U.S. 477 (1981), and trial counsel was therefore not ineffective in failing to move to suppress testimony as fruit of the interrogation.

The panel rejected Petrocelli's contention that use at trial of his statements to detectives on April 20 and 27 violated his Fifth, Sixth, and Fourteenth Amendment rights. Because the State used the statements only for impeachment, the panel rejected Petrocelli's contention that his Fifth and Sixth Amendment rights were violated by the taking of his statements during interrogations at which his appointed counsel was not present. The panel rejected the defendant's contention that his statements were involuntary.

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[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel affirmed the district court's conclusion that Petrocelli failed to exhaust his challenge to the jury instruction defining premeditation and deliberation.

The panel held that the State waived any defense to Petrocelli's contention that the admission of psychiatric testimony during the penalty phase violated his Fifth and Sixth Amendment rights under *Estelle v. Smith*, 451 U.S. 454 (1981). The panel held that even if the State had not waived its defense, admission of the testimony violated *Estelle*, where the psychiatrist, acting at the request of the prosecutor, visited Petrocelli in jail to determine his competency to stand trial, failed to provide *Miranda* warnings, did not seek or obtain permission from Petrocelli's appointed counsel to visit or evaluate him, and testified that Petrocelli was dangerous and incurable. The panel concluded that the violation had a substantial and injurious effect on the jury's decision to impose the death sentence.

Concurring, Judge Christen wrote separately because, in her view, even if the State could show that the prosecutor's tactics had not prejudiced the jury's verdict, Petrocelli's case is one of the very few in which deliberate prosecutorial misconduct and egregious trial errors warrant habeas relief.

COUNSEL

A. Richard Ellis (argued), Mill Valley, California, for Petitioner-Appellant.

Robert E. Wieland (argued), Senior Deputy Attorney General; Adam Paul Laxalt, Attorney General; Office

of the Attorney General, Carson City, Nevada; for Respondent-Appellee.

OPINION

W. FLETCHER, Circuit Judge:

In 1982, Tracy Petrocelli was convicted and sentenced to death in Nevada state court for the robbery and first-degree murder of James Wilson, a Nevada used car salesman. Petrocelli filed a federal petition for writ of habeas corpus before the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Petrocelli appeals the district court's denial of the writ.

We affirm the district court's denial of the writ with respect to Petrocelli's conviction but reverse with respect to his death sentence. We hold that admission of Dr. Lynn Gerow's psychiatric testimony during the penalty phase violated Petrocelli's Fifth and Sixth Amendment rights under *Estelle v. Smith*, 451 U.S. 454 (1981), and that the violation had a substantial and injurious effect on the jury's decision to impose the death sentence. *See Brecht v. Abrahamson*, 507 U.S. 619 (1993).

I. Background

A. Crime, Arrest, and Pre-Trial Interrogations

On March 29, 1982, Petrocelli went on a test drive of a Volkswagen pickup truck with James Wilson, a used car salesman, in Reno, Nevada. At some point during that test drive, Petrocelli shot and killed Wilson. Wilson's body was found buried in a crevice under some rocks and brush near Pyramid Lake. The

lake is about thirty-five miles north of Reno. Wilson had been shot in the neck, chest, and back of the head.

Nearly a year before killing Wilson, in May 1981, Petrocelli had pleaded guilty in Washington State to kidnaping his girlfriend, Melanie Barker. He had received a suspended sentence conditioned on his completion of a drug treatment program. Petrocelli absconded from the treatment program twice and never completed it. Petrocelli shot and killed Barker in Washington State in October 1981, five months before he killed Wilson in Nevada.

Petrocelli was arrested for the Wilson murder in Las Vegas on April 18, 1982. The following day, he was interrogated in Las Vegas. Petrocelli was advised of his *Miranda* rights, and he signed a statement indicating that he understood them. Petrocelli stated during the interrogation, "I'd sort of like to know what my . . . lawyer wants me to do." (Ellipsis in original.) He nonetheless continued to answer questions. Later in the interrogation, he admitted to having previously stolen a car from a "Dub Peterson" dealership in Oklahoma City after taking it for a test drive with a salesman.

Petrocelli was subsequently transported to Reno. On the afternoon of April 20, he was interrogated by Sergeants Glen Barnes and Abel Dickson, as well as two prosecutors from the District Attorney's Office of Washoe County, Bruce Laxalt and Don Nomura. At the beginning of the interrogation, Petrocelli made a variety of requests that he characterized as "preconditions" to talking. They included locating some of his property, facilitating a visit by his wife, bringing him photographs of Barker, arranging a television

interview, and receiving psychiatric counseling. Dickson testified at a hearing outside the presence of the jury that no promises were made, but that Petrocelli was told that if his requests "could be done they would be done." After being informed of his *Miranda* rights, Petrocelli confessed to shooting both Wilson and Barker.

On April 20, the Public Defender of Washoe County was appointed as counsel for Petrocelli by order of the Reno Justice Court. On April 21, Petrocelli personally appeared in the Justice Court, where he was arraigned and bail was set.

The visitors' log for the Washoe County Jail shows that Larry Wishart, an attorney from the Washoe County Public Defender's Office, and Tim Ford, an investigator from that office, visited Petrocelli on April 21, the day of his arraignment, at about 1:50 pm. (A date and time stamp of "82 APR 21 P 1 :5" appears on the photocopy of the log. The number specifying the minute is cut off on the photocopy in the trial court record.) A date and time stamp shows that their visit lasted about half an hour ("82 APR 21 2 :2"). The log shows a visit from Dr. Lynn Gerow later that day. Gerow was a psychiatrist who had been asked by Chief Deputy District Attorney Laxalt to evaluate Petrocelli's competency to stand trial.

The relevant page of the visitors' log is dedicated exclusively to visitors to Petrocelli. Wishart and Ford's entry, with their signatures, is on line three of the page. They wrote "WCPD/ATT" in the box asking for their "relationship." Dr. Gerow's entry, with his signature, is on line four, immediately below. He wrote "D.A." in the box asking for his "relationship." The

entry by Wishart and Ford, stating their relationship to Petrocelli, would have been apparent to Gerow when he signed the log. A date and time stamp show that Gerow signed in at about 3:50 ("82 APR 21 P 3 :5"). There is no stamp showing when his visit ended. Gerow testified at trial that he spent two hours interviewing Petrocelli.

Petrocelli testified that he believed that Dr. Gerow had come to see him in response to his request for counseling. During his April 20 interview in Reno, Petrocelli had specified as one of his "preconditions" that he receive psychiatric counseling. Petrocelli testified consistently at a hearing outside the presence of the jury, saying that he had stated as one of his preconditions: "I wanted to have psychiatric counseling while I was in the jail." He testified that he "saw a doctor Gerow once." When asked how long he spoke to Gerow, Petrocelli responded, "[I]t didn't seem like it was very long." When asked to estimate the time, Petrocelli responded, "Well, I never did even finish my conversation. He just cut me off in the middle and left."

On April 27, Dr. Gerow sent a letter labeled "confidential" to Prosecutor Laxalt in the District Attorney's office. He wrote:

> At your request I examined Mr. Maida [the name under which Petrocelli was then being held] at the Washoe County Jail on April 21, 1982. I had an opportunity to discuss his case with you prior to the psychiatric evaluation.
>
> . . .
>
> Mr. Maida was abused as a child. He was adopted at three years of age. . . . He was in

> trouble at school and home at an early age. He developed a psychopathic personality which is complicated by a history of severe drug abuse. . . .
>
> In my opinion Mr. Maida is both competent for understanding the charges and assisting his attorney and responsible (mens rea) for any alleged offense.
>
> I have determined to see Mr. Maida in the future on an "as needed" basis. If you require my involvement as circumstances develop, please feel free to call me.

Gerow testified in state post-conviction proceedings that when he wrote "as needed," he meant "as needed by Mr. Laxalt."

Wishart testified in state post-conviction proceedings that when he met with Petrocelli on April 21, he did not know that Dr. Gerow was going to see his client later that afternoon. Wishart testified that he would not have employed Gerow because he "had a prosecution bias."

Petrocelli was interrogated again on April 27. After being advised of his *Miranda* rights, Petrocelli made another statement.

B. Guilt Phase Trial

On April 28, 1982, Petrocelli was indicted on one count of robbery with a deadly weapon and one count of first-degree murder. The guilt phase of the trial began on July 27, 1982, and ran through August 5, 1982. At trial, the State contended in support of the

robbery count that Petrocelli went on the test drive with Wilson in order to steal the truck, that he used his gun to try to force Wilson out of the truck, and that he shot Wilson when Wilson would not cooperate. To bolster its theory, the State called Melvin Powell, an Oklahoma car salesman, to testify that Petrocelli had stolen a car in a similar manner (though without injuring Powell) during a test drive in February 1982.

The defense contended, based on Petrocelli's testimony at trial, that Petrocelli had been a *bona fide* prospective purchaser with no intent to steal, and that Wilson was accidentally shot in the midst of a heated argument and struggle that resulted from haggling over the price of the truck. To impeach Petrocelli's testimony, the State introduced portions of the statements that Petrocelli had made on April 20 and 27. To undermine Petrocelli's contention that the Wilson shooting was unintentional, the State impeached Petrocelli with his statement on April 20 that his earlier shooting of his girlfriend, Melanie Barker, was an "accident." The prosecutor also impeached Petrocelli by confronting him with other inconsistencies between his trial testimony and his statements to the detectives.

The jury found Petrocelli guilty of both charges.

C. Penalty Phase Trial

1. Aggravating Factors and Lay Testimony

In order to render Petrocelli death-eligible, the State had to establish at least one aggravating factor. During the penalty phase of Petrocelli's trial, the State sought to establish two such factors: (1) that the murder had been committed in the course of a robbery,

and (2) that Petrocelli had previously been convicted of a violent felony, the kidnaping of his girlfriend Melanie Barker. (The first factor was later held by the Nevada Supreme Court to be invalid. *See McConnell v. State*, 102 P.3d 606, 624 (Nev. 2004) (per curiam). In reviewing Petrocelli's third petition for post-conviction relief, the Nevada Supreme Court held that use of this factor had been improper.)

To establish the first factor, Prosecutor Laxalt put John Lucas on the stand. Lucas had been in the Washoe County Jail with Petrocelli for about five weeks after Petrocelli's arrest for the Wilson murder. Lucas testified that Petrocelli had told him that he had shot Wilson in order to steal the truck. He also testified that Petrocelli said he was "going to get rid of" the district attorney as well as an unidentified woman Petrocelli characterized as a "snitch."

The second factor was Petrocelli's conviction for kidnaping Barker. At trial, it was uncontested that he had later killed her. However, at the time of trial he had not been convicted of the killing. To establish the second factor, Prosecutor Laxalt called Melanie Barker's mother, Maureen Lawler, to testify about the circumstances that had led to the kidnaping. The jury had already learned during the guilt phase, from Petrocelli's testimony and from the testimony of an eye-witness, that Petrocelli had killed Barker. Lawler testified only as to the circumstances that had led to the kidnaping conviction. Lawler, who had lived with her daughter in the city of Kent, in western Washington, testified that Barker had gone to eastern Washington with Petrocelli for three days, that Barker had been "beaten on the face" and was "hysterical"

when she returned home, and that at some point during the three days Barker had been told by Petrocelli that his friends would "do away with her." Lawler testified that after Barker had told Petrocelli that her mother would have the police looking for her, "He agreed to take her back. . . . At that point, she got away from him." Lawler also described a phone conversation, prior to the kidnaping, when Lawler had arranged for Petrocelli's wallet to be taken to the police station. Petrocelli objected to her having done so, and she testified that Petrocelli said he "would blow me away." Laxalt also called Joan Bleeker, who testified that Barker had come into a restroom during the time she was in eastern Washington and had asked Bleeker to call the police because she was being kidnaped.

Petrocelli testified, presenting his version of what had happened during the three days in eastern Washington in an attempt to show, despite his conviction, that he had not really kidnaped Barker. According to Petrocelli, Barker went with him voluntarily; they were accompanied by a friend of Petrocelli; they went out in public, eating in restaurants and going to stores together; and she and Petrocelli got in a fight as they were driving back to western Washington.

In the interval between the testimonies of Lawler and Bleeker, Prosecutor Laxalt played a tape recording of a portion of Petrocelli's interrogation on April 20 in which Petrocelli described the Wilson killing. Petrocelli had cried during his in-court testimony when describing the Wilson killing. The tape recording is not in the record, but it is apparent from the transcript that Laxalt played the tape to contrast Petrocelli's

tearful demeanor during trial to an unemotional demeanor on April 20.

2. Professional Mental Health Evidence

Defense counsel Wishart submitted written reports by three different mental health professionals—Dr. John Petrich, a psychiatrist; Dr. Martin Gutride, a psychologist; and Dr. John Chappel, a psychiatrist. Wishart called none of the three to give live testimony.

Dr. Petrich's evaluation of Petrocelli's mental health and future dangerousness was the most favorable to Petrocelli, but his evaluation was of limited use to the defense. Petrich had evaluated Petrocelli in June 1981, when Petrocelli was in jail in Washington State on the kidnaping charge, prior to killing Barker and Wilson.

Drs. Gutride and Chappel evaluated Petrocelli in July 1982, after he had killed Barker and while he was in jail waiting to stand trial for killing Wilson. Gutride reported that Petrocelli was adopted at age two and a half, and had been physically abused by his biological mother. Petrocelli's adoptive mother died when Petrocelli was seventeen, and Petrocelli attempted suicide several months after the funeral. After his adoptive mother's death, he became close to his adoptive father for a brief time, but fell out of touch after his father remarried. Gutride reported that Petrocelli cried when he spoke about having lost contact with his father. Petrocelli was "placed in a military academy at age twelve because of discipline problems," and he joined the Marines at about age seventeen. While in the Marines, Petrocelli was arrested for fighting with policemen while drunk; shortly thereafter, he began going AWOL. He was

eventually given a dishonorable discharge. Sometime around 1974, Petrocelli moved to Washington State, began working in a steel mill, and became, by his own admission, "increasingly unstable." In 1976, he attempted suicide. In 1977, he was arrested for theft but fled before his trial. He became a professional gambler in Reno, Nevada, and began abusing alcohol and drugs. He was arrested in 1980 for kidnaping Barker.

Dr. Gutride reported that Petrocelli "cried openly" during the interview and that his "distraught behavior had the quality of his practically begging for help." "[H]e desperately wants to know what is the matter with him and why he did the things he is charged with. He doesn't deny responsibility, but says he can't remember most of the circumstances surrounding the various crimes." According to Gutride, Petrocelli told him he "ha[d] called crisis lines in every city, but been unable to get any help" and "ha[d] talked with psychiatrists while in other jails and been put off."

Dr. Gutride reported that throughout the interview, Petrocelli's "thought processes were logical and coherent, memory seemed good, but selective, and intelligence seemed quite adequate." However, "[o]nce formal testing began, the client seemed to lose those qualities. The difference was so striking that he appeared to be faking 'bad.'" Gutride concluded that Petrocelli was "clearly a lot brighter than his test scores reflect."

Dr. Gutride concluded that Petrocelli is "very impulsive," has "a high potential for violence," is "very mistrustful of others," and may be "a relatively high suicide risk." Gutride diagnosed Petrocelli with

"antisocial personality with paranoid features." He noted that "[t]he personal distress he exhibited during the interview seems genuine and the client may truly desire some mental health treatment," though his "ability to profit from such treatment is questionable" because of his distrust of others. Gutride concluded by noting that Petrocelli "can be quite dangerous to others as well as himself and treatment should be offered in a setting where the client can be closely monitored."

Dr. Chappel reported some of the same family background information that Dr. Gutride reported. Chappel further reported that Petrocelli's arrest for kidnaping was "very traumatic" for him. Petrocelli "repeatedly asked for help" while in jail in Seattle, was seen by Dr. Petrich, and was put on an antipsychotic drug that helped him sleep. Petrocelli apparently attempted to commit suicide shortly afterwards, and was put in solitary confinement as a result. Chappel reported that Petrocelli "viewed the experience as one of asking for help and not getting it." He recounted Petrocelli's description of shooting Barker. Petrocelli asserted that "there were times when a 'black box' of control in his head opened and a voice or an impulse told him to kill or do some other destructive act," but that he still did not "understand why his girlfriend had to die." Petrocelli "expresse[d] a wish for further evaluation or treatment so he [could] find out whether or not he killed on purpose."

Dr. Chappel concluded that Petrocelli was both "depressed and angry," with the depression "expressed through sobbing and tears," as well as various suicide attempts. His anger was directed "primarily at the police and the district attorneys." "He considers the

Washoe County District Attorney as premeditating his murder. When this rage occurs [he] threatens to kill the prosecutor." Chappel diagnosed Petrocelli with impulse control disorder and antisocial personality disorder. He wrote that "a more extensive evaluation" would be useful in order for Petrocelli "to have a better understanding of the reasons for his loss of impulse control and his reason for killing someone who was close to him." Chappel observed that if Petrocelli were "not sentenced to death and executed . . . in his current state of mind he is very dangerous to those people to whom his rage is directed. A period of evaluation and a trial of treatment might serve a useful purpose in preventing any further homicidal outbursts of rage on his part."

After these three written reports were admitted into evidence, Prosecutor Laxalt called Dr. Gutride to the stand. Gutride's testimony was very short, filling just under two pages of transcript. In an attempt to undermine Gutride's diagnosis and the portions of his report that were favorable to Petrocelli, Laxalt drew Gutride's attention to his conclusion that Petrocelli had been "faking 'bad.'" Laxalt asked Gutride, "Despite the faking on the IQ test, et cetera, do you think this is a valid diagnosis?" Gutride replied that he could substantiate his diagnosis of "unsocial with paranoid tendencies" with a "long history." Gutride stated that the diagnosis "does not imply an individual is unable to think properly or conduct themselves conventionally. It relates mostly to a style of living."

Prosecutor Laxalt then called Dr. Gerow to the stand. Defense counsel Wishart objected on the grounds of psychiatrist-patient privilege, but the court

overruled the objection. Laxalt introduced no written report by Gerow. Gerow testified that he had interviewed Petrocelli for two hours on April 21, and that as a result of his interview he had formed an opinion of Petrocelli's "mental and emotional personality traits." Gerow said that he agreed with Drs. Chappel and Gutride's diagnosis of "antisocial personality." However, Gerow referred to it as a "psychopathic" rather than an "antisocial" personality. Gerow described Petrocelli's personality as "rare," and as the personality of someone "who is very callous and selfish, someone unreliable and irresponsible." He testified that individuals with psychopathic personalities "are repeatedly in trouble with the law," because they "don't believe in the rules that society set up" and do not learn from punishment. He testified that "[t]here is no treatment at all" for psychopathic personality, that the condition worsens during adolescent years, and that it "persists throughout life." Gerow testified that the violence potential of a psychopathic "varies," but that the propensity for further violence is "quite high" for individuals with a history of violence. Gerow testified that being "a psychopathic" was an incurable "emotional disturbance." Gerow concluded his direct examination testimony by stating unequivocally, "There is no cure."

3. Jury Instructions, Final Argument, and Verdict

Before final penalty-phase arguments, the judge instructed the jury. Jury Instruction 5 provided, "If the penalty is fixed at life imprisonment without the possibility of parole, the defendant shall not be eligible for parole." However, the instruction continued, indicating that the State Board of Pardon

Commissioners had the power to release Petrocelli from prison even if the jury returned a sentence of life imprisonment without parole:

> Under the laws of the State of Nevada, any sentence imposed by the jury may be reviewed by the State Board of Pardon Commissioners. Whatever sentence you return in your verdict, this Court will impose that sentence. Whether or not the State Board of Pardon Commissioners upon review, if requested by the defendant, would change that sentence, this Court has no way of knowing. The State Board of Pardon Commissioners, however, would have the power to modify any sentence at a later date.

In his closing argument, Prosecutor Laxalt emphasized Dr. Gerow's testimony, Petrocelli's incurability, and the possibility that the Board of Pardon Commissioners could release Petrocelli from prison. Laxalt maintained that Petrocelli "is, has been, and will forever remain a cool unfeeling, callous, individual, and a cold-blooded thief and killer." "He will never change." He continued, "Dr. Gerow has said there is no treatment; he will be a psychopathic personality, unfortunately." "Extreme mental or emotional disturbance" cannot be a mitigating circumstance because such disturbance implies that "there is treatment available for this person. What psychopath means, essentially, is a mean, bad person who has never changed and who will continue to victimize." "[N]o society, no community, no county, no city, no state, should ever have to risk again Tracy Petrocelli on the street."

In his rebuttal argument, Prosecutor Laxalt pointed to the reports of Drs. Chappel and Gutride, noting that each had discussed the possibility of treatment: "That a period of evaluation and a time of treatment might serve a reasonable purpose. . . . Do we take that chance?" He answered this question by emphasizing Dr. Gerow's testimony. "[H]e will not learn from punishment. He will not learn, he cannot learn." Invoking the possibility of Petrocelli's release from prison, Laxalt concluded:

> I ask you to consider years down the road when the decisions are being made at the Pardons Board and the Parole Board and we have all gone our separate ways and Mr. Petrocelli is there, the sole person applying for the pardon or applying for parole crying tears of remorse and telling the people how it wasn't he who was the murderer of Mr. Wilson it was an accident and he got railroaded, and telling people that it wasn't he who was the murderer of Melanie it was an accident, and he was railroaded. . . . Because he will be there. He will be there. . . . That's a sad fact, but it's to be faced.

Laxalt asked that the jury "return a verdict of death for Mr. Tracy Petrocelli, a cold-blooded killer, who will always remain so."

The jury returned a sentence of death.

II. Post-trial Procedural History

The Nevada Supreme Court affirmed Petrocelli's conviction and sentence. *See Petrocelli v. State*, 692 P.2d 503 (Nev. 1985). Petrocelli filed a timely state petition for post-conviction relief, which was denied on

the merits by the state courts. He then filed a federal habeas petition, which the district court dismissed without prejudice because it contained unexhausted claims. Petrocelli returned to state court to exhaust these claims, which the state courts dismissed as procedurally defaulted.

Petrocelli filed his second federal habeas petition *pro se* on October 28, 1994, and then filed a counseled amended petition in 1996. The amended petition raised various claims, including two claims challenging the reference to the Pardon Board in Jury Instruction 5. The first of those two claims, labeled "Ground 4," alleged that the instruction improperly suggested that Petrocelli could receive "a pardon or parole" if sentenced to life without the possibility of parole because it allowed the jury to "inappropriately speculate." The second claim, labeled "Ground 6," alleged that the jury instruction "inaccurately led the jury to believe that Petitioner, under Nevada law, could receive parole" even though under Nev. Rev. Stat. § 213.1099, due to his probation violations, Petrocelli was not eligible for parole. The district court dismissed Ground 6 and several other grounds as an "abuse of the writ" because they had not been raised in Petrocelli's first federal habeas petition. It then denied Petrocelli's amended petition in September 1997, finding all claims either unexhausted, procedurally defaulted, or nonmeritorious.

On appeal, we reversed in part and remanded for the district court to consider various claims it had improperly dismissed as an "abuse of the writ," including Ground 6. *Petrocelli v. Angelone*, 248 F.3d 877, 884–85, 887 (9th Cir. 2001). Because in his

briefing to us Petrocelli had not made any argument with respect to Ground 4, we deemed that ground abandoned. *Id.* at 880 n.1. On remand, the district court found various claims unexhausted and stayed Petrocelli's petition in order to permit him to return to state court to exhaust them.

Petrocelli filed his third state petition for post-conviction relief on August 11, 2003, raising a number of claims. The state district court denied Petrocelli's petition, denying some claims on the merits and holding some claims procedurally barred. Petrocelli appealed from the state district court's denial, and the Nevada Supreme Court affirmed.

Petrocelli then returned to federal court and filed his fourth amended petition, the operative petition in this case. In his petition, he challenged, *inter alia*, Jury Instruction 5, in language similar to that used in the claim he had labeled "Ground 6" in his earlier petition. In this petition, he labeled the challenge "Claim 4." The district court dismissed Claim 4 after concluding that it corresponded to Ground 4 of Petrocelli's earlier petition, which we had deemed abandoned in our earlier decision. The district court required Petrocelli to abandon various claims it deemed unexhausted, and rejected the remaining claims on the merits.

The district court issued a certificate of appealability as to three claims: (1) a claim that trial counsel was ineffective for failing to object to the admission of Powell's testimony; (2) a claim that Petrocelli's April 20 and 27 statements were admitted in violation of the Fifth, Sixth, and Fourteenth Amendments; and (3) a claim that introduction of Dr. Gerow's testimony violated Petrocelli's Fifth and

Sixth Amendment rights. We issued a certificate of appealability as to three additional claims, including a claim challenging Jury Instruction 5.

III. Jurisdiction and Standard of Review

We have jurisdiction over the district court's denial of Petrocelli's federal habeas petition pursuant to 28 U.S.C. §§ 1291 and 2253(c).

We review de novo a district court's decision to grant or deny a habeas petition. *Curiel v. Miller*, 830 F.3d 864, 868 (9th Cir. 2016). The petition at issue was filed in 1994, well before the April 24, 1996, effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Thus, AEDPA's deferential standard of review does not apply. *See Woodford v. Garceau*, 538 U.S. 202, 207 (2003); *see also Thomas v. Chappell*, 678 F.3d 1086, 1100 (9th Cir. 2012) ("We have consistently held that where . . . a petitioner filed a habeas application before the effective date of AEDPA and the district court retained jurisdiction over the case, AEDPA does not apply even if the petitioner files an amended petition after the effective date of AEDPA.").

Under pre-AEDPA law, "we review de novo questions of law and mixed questions of law and fact, whether decided by the district court or the state courts." *Thomas*, 678 F.3d at 1101 (alteration omitted) (quoting *Sivak v. Hardison*, 658 F.3d 898, 905 (9th Cir. 2011)). Whether a constitutional error was harmless is a mixed question of law and fact that is reviewed de novo. *Ghent v. Woodford*, 279 F.3d 1121, 1126 (9th Cir. 2002). State court findings of fact are "entitled to a presumption of correctness unless they are 'not fairly

supported by the record.'" *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (quoting former 28 U.S.C. § 2254(d)(8)).

IV. Discussion

A. Guilt Phase Claims

Petrocelli challenges his conviction on three grounds. First, he contends that his trial counsel was ineffective for failing to object to the testimony of Powell, the Oklahoma car salesman, on the ground that Powell's testimony was the fruit of Petrocelli's April 19 statement, which had been obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981). Second, he contends that the use at trial of his April 20 and 27 statements violated the Fifth, Sixth, and Fourteenth Amendments. Third, he contends that a guilt-phase jury instruction defining premeditation and deliberation unconstitutionally relieved the State of its burden of proving each element of the crime beyond a reasonable doubt.

For the reasons that follow, each contention fails.

1. Powell Testimony

Petrocelli contends that trial counsel was ineffective for failing to object to Powell's testimony as fruit of a *Miranda* and *Edwards* violation. As recounted above, Powell was a used car salesman from whom Petrocelli had stolen a car during a test drive, in a manner similar to his theft of the truck in Nevada. The prosecution learned of the prior vehicle theft during the April 19 interrogation when Petrocelli admitted he had

stolen a vehicle from a "Dub Peterson" dealership in Oklahoma City.

To show ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and that he was prejudiced by the deficient performance. *Id.* at 687–88. A failure to make a motion to suppress that is unlikely to succeed generally does not constitute ineffective assistance of counsel. *See Premo v. Moore*, 562 U.S. 115, 124 (2011); *see also Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (holding that failure to make a motion to suppress which would "be meritless on the facts and the law" does not constitute ineffective assistance of counsel).

Before beginning the interrogation on April 19, the police officers advised Petrocelli of his *Miranda* rights, and Petrocelli signed a statement indicating that he understood them. The officers then began questioning Petrocelli. For some time he answered questions freely. When he later became evasive, one of the officers observed, "I thought . . . you wanted to talk to us about this." Petrocelli responded, "I do," and continued answering questions. Shortly afterwards, Petrocelli stated, "I'd sort of like to know what my . . . lawyer wants me to do." (Ellipsis in original.) When the officer asked if Petrocelli had understood his rights, he answered that he did. Later in the questioning, Petrocelli stated, "I even have a . . . part-time attorney and just to answer questions for me." (Ellipsis in original.) The officer then asked, "Is it . . . what you're telling me is you don't want to answer any questions without an attorney?" (Ellipsis in original.) Petrocelli

responded, "No. I just need to have something answered. That's all." The officer told him, "Well, we don't have an attorney . . . present with us right now. Like I indicated before if at any time you don't want to . . . answer any questions or make any statements you don't have to." (Ellipses in original.) The officer resumed questioning, and Petrocelli confessed to stealing cars by going to car lots and taking them for test drives. He mentioned one particular theft from a "Dub Peterson" dealership in Oklahoma City. This led the police to Powell, who testified at Petrocelli's trial.

When a suspect invokes his Fifth Amendment right to have counsel present during a custodial interrogation, "the interrogation must cease until an attorney is present." *Miranda*, 384 U.S. at 474. Police may not continue questioning a suspect without counsel present "unless the accused himself initiates further communication." *Edwards*, 451 U.S. at 484–85. Only an unambiguous invocation of the right to counsel triggers protection under *Edwards*. An invocation is unambiguous if the accused "articulate[s] his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459 (1994). Applying this test, the Supreme Court held in *Davis* that the statement, "Maybe I should talk to a lawyer," was ambiguous and did not constitute a request for counsel. *Id.* at 462.

Under *Davis*, Petrocelli's language was insufficient to constitute an unambiguous invocation of counsel. Because Petrocelli failed to invoke his right to counsel unambiguously, the April 19 interrogation was not

conducted in violation of *Miranda* or *Edwards*. Petrocelli's trial counsel was therefore not ineffective in failing to move to suppress Powell's testimony as fruit of the interrogation.

2. April 20 and April 27 Statements

Petrocelli contends that the use at trial of his statements to the detectives on April 20 and April 27 violated his Fifth, Sixth, and Fourteenth Amendment rights. Prosecutor Laxalt used Petrocelli's statement that his killing of Barker was an "accident" to impeach Petrocelli's testimony that the Wilson shooting was also an accident. Laxalt also impeached Petrocelli by confronting him with various inconsistencies between his statements and his trial testimony.

Petrocelli contends that he invoked his right to counsel on April 19, and that his statements taken on that date and thereafter were therefore taken in violation of his Fifth and Sixth Amendment rights. Petrocelli's counsel was appointed on April 20 but was not present at the interrogations on April 20 and 27. Assuming without deciding that Petrocelli's Fifth or Sixth Amendment right was violated, the rule is well established that a voluntary statement taken in violation of the Fifth or Sixth Amendment may be used for impeachment. *See Michigan v. Harvey*, 494 U.S. 344, 345–46 (1990); *United States v. Gomez*, 725 F.3d 1121, 1125–26 (9th Cir. 2013). Because the State used the statements at issue only for impeachment, Petrocelli's contention fails.

Petrocelli next contends that his April 20 and 27 statements were involuntary and thus that their admission was unconstitutional. Statements are

unconstitutionally involuntary when a "'defendant's will was overborne' by the circumstances surrounding the giving of a confession." *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

Petrocelli contends that his statements were involuntary because they were "obtained by inducements." "Inducements to cooperate are not improper . . . unless under the total circumstances it is plain that they have overborne the free will of the suspect." *United States v. Okafor*, 285 F.3d 842, 847 (9th Cir. 2002). Here, there is no indication that Petrocelli's will was overborne. Before making statements on April 20, Petrocelli told officers he had several "preconditions." Sergeant Dickson testified that Petrocelli was told that they would do what they could, but that no promises were made. His interrogators' partial compliance with his preconditions, while perhaps an inducement to talk, hardly constituted an overbearing of his will.

Petrocelli also contends that his April 20 and 27 statements were involuntary because, on April 19, Sergeant Barnes told him that he thought talking to the detectives "could do . . . nothing but help." In *Henry v. Kernan*, 197 F.3d 1021 (9th Cir. 1999), we held that a confession was involuntary when the interrogating officer ignored a suspect's clear invocation of his right to counsel and stated, "Listen, what you tell us we can't use against you right now." *Id.* at 1027. We noted that the officers' refusal to cease questioning in the face of repeated requests for counsel "generate[d] a feeling of helplessness" and that the officers deliberately violated

Miranda in order to obtain a statement they could use for impeachment purposes. *Id.* at 1028–29.

The circumstances of the *Henry* interrogation are significantly different from those of Petrocelli's interrogation. As discussed above, Petrocelli never clearly invoked his right to counsel on April 19. When Petrocelli was asked if he was requesting a lawyer, he responded "no." The officers' attempts to clarify whether Petrocelli was invoking his rights differentiate the April 19 interrogation from the *Henry* interrogation, both because they likely reduced the feeling of helplessness that concerned us in *Henry* and because they suggest the detectives were not attempting deliberately to violate *Miranda*. Considering the totality of the circumstances, Sergeant Barnes' remark was not sufficiently coercive to render Petrocelli's April 20 and 27 statements involuntary.

3. Jury Instruction on Premeditation and Deliberation

Petrocelli contends that the jury instruction defining "premeditation" and "deliberation" violated due process by collapsing the two requirements and relieving the State of its burden of proving that the killing was both deliberate and premeditated. *See Byford v. State*, 994 P.2d 700, 712–15 (Nev. 2000); *Polk v. Sandoval*, 503 F.3d 903, 910–11 (9th Cir. 2007), *overruled in part by Babb v. Lozowsky*, 719 F.3d 1019, 1028–30 (9th Cir. 2013). The district court concluded that Petrocelli had not exhausted this claim and required Petrocelli either to abandon the claim or risk dismissal of his petition. Faced with this choice, Petrocelli filed a notice of abandonment "of all unexhausted claims." Petrocelli contends that the

district court erroneously determined that the claim was unexhausted.

"Exhaustion requires the petitioner to 'fairly present' his claims to the highest court of the state." *Cooper v. Neven*, 641 F.3d 322, 326 (9th Cir. 2011) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999)). Petrocelli raised this jury instruction claim in his third state habeas petition, but he did not appeal the state district court's denial of the claim to the Nevada Supreme Court. Petrocelli argues that his failure to appeal to the Nevada Supreme Court should be excused, contending that he could not have raised the claim until our decision in *Polk* in 2007, when we held that a jury instruction collapsing the premeditation and deliberation elements of first-degree murder violates the Due Process Clause. *Polk*, 503 F.3d at 904. This argument is unpersuasive in light of Petrocelli's having raised this claim in the state district court, before we decided *Polk*, and in light of his assertion that this claim was based "on clearly established and long existing federal law, namely *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *Francis v. Franklin*, 471 U.S. 307 (1985)."

B. Penalty Phase *Estelle* Claim

Petrocelli makes several penalty phase claims. In one of them, he contends that Dr. Gerow's testimony violated his Fifth and Sixth Amendment rights, articulated in *Estelle v. Smith*, 451 U.S. 454 (1981). We agree with this contention, and on that basis grant the writ as to the death penalty. We therefore do not reach Petrocelli's other penalty phase claims.

1. Waiver

The district court held that Petrocelli's *Estelle* claim was neither unexhausted nor procedurally defaulted, and that the Nevada Supreme Court denied it on the merits. On appeal to us, the State does not contest this holding. *See Robinson v. Lewis*, 795 F.3d 926, 934 (9th Cir. 2015) (holding that a petitioner waived an argument by failing to dispute the district court's rejection of the argument in his briefing on appeal).

Petrocelli spends six pages of his opening brief to us arguing that the admission of Dr. Gerow's testimony violated *Estelle*. The State does not respond to Petrocelli's *Estelle* argument. In neither its answering brief nor its supplemental brief does the State so much as cite *Estelle*, let alone respond to Petrocelli's argument. We therefore conclude that the State has waived any defense to Petrocelli's *Estelle* argument.

2. *Estelle*

Even if the State had not waived its defense to Petrocelli's *Estelle* argument, we would hold that the admission of Dr. Gerow's testimony violated *Estelle* and that the violation was not harmless.

a. *Estelle* Violation

In *Estelle*, Dr. James Grigson was appointed by a Texas trial court to examine capital defendant Ernest Smith to determine his competency to stand trial. Grigson examined Smith for about ninety minutes and determined that he was competent. Grigson gave no *Miranda* warning to Smith during the course of the examination. At the time of the examination, Smith's Sixth Amendment right to counsel had attached.

Grigson did not notify Smith's attorney that he would examine his client.

Dr. Grigson testified, over objection, during the penalty phase of Smith's trial as to his future dangerousness. He testified that Smith was "a very severe sociopath"; that Smith "will continue his previous behavior"; that Smith's sociopathic condition will "only get worse"; and that there "is no treatment, no medicine . . . that in any way at all modifies or changes this behavior." 451 U.S. at 459–60 (alteration in original) (internal quotation marks omitted). The jury returned a verdict of death.

The Supreme Court held that Dr. Grigson's testimony violated the Fifth and Sixth Amendments. The Court held that the Fifth Amendment privilege against self-incrimination applied, and that *Miranda* warnings were required because "Dr. Grigson's prognosis as to future dangerousness rested on statements [Smith] made . . . in reciting the details of the crime." *Id.* at 464. "When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role . . . became essentially like that of an agent of the State." *Id.* at 467. The Court held that the Sixth Amendment right to counsel applied because "adversary judicial proceedings" had been initiated against Smith, and that Grigson's interview was a "critical stage" of the proceedings. *Id.* at 469–70. "[Smith] was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrists's findings could be employed." *Id.* at 471.

Estelle was decided in May 1981. Dr. Gerow interviewed Petrocelli in Washoe County Jail almost a year later, in April 1982. Petrocelli's trial took place during the last week of July and first week of August 1982.

In addressing Petrocelli's third petition for post-conviction relief, the state district court heard testimony from Dr. Gerow and from defense counsel Wishart, and received into evidence the Washoe County Jail visitors' log and Gerow's April 27 letter to Prosecutor Laxalt. In rejecting a claim of ineffective assistance of counsel, the court made factual findings directly relevant to Petrocelli's *Estelle* claim. The court wrote:

> The sequence of events appears to be as follows: Petitioner sought a psychiatrist on April 20, 1982. Laxalt briefed Gerow on April 21, and on that date, [Gerow] interviewed the Petitioner. Defense Attorney Wishart and Investigator Ford also interviewed Petitioner on April 21, 1982 subsequent to an appointment in the justice court on that date. It is not clear as to whether the doctor or the lawyer arrived at the jail first.

The court wrote, further, "Dr. Gerow and Prosecutor Laxalt are not entirely clear nor consistent about the purpose for which the doctor was hired. However, Gerow makes it clear that he informed Petitioner that the interview was not confidential and that he would see Petitioner again on an as-needed basis." The court concluded:

> Dr. Gerow's understanding of his engagement was to determine Petitioner's competency and to

> render some further treatment. . . . No reasonably effective trial or appellate counsel would conclude from this record that Dr. Gerow was a court-authorized psychiatrist nor an agent for the prosecutor.

The state district court's findings are "not fairly supported by the record" and thus are not entitled to a presumption of correctness. *Silva*, 279 F.3d at 835 (quoting former 28 U.S.C. § 2254(d)(8)). Indeed, its findings are demonstrably wrong in nearly every particular.

First, it is not true that counsel for Petrocelli was appointed on April 21, the day of Dr. Gerow's interview. Rather, the appointment was made the day before, on April 20.

Second, it not true that there is an ambiguity "as to whether the doctor or the lawyer arrived at the jail first." The visitors' log at the Washoe County Jail is unambiguous. Defense attorney Wishart and investigator Ford signed the visitors' log at about 1:50 pm. They left at about 2:20 pm. Dr. Gerow signed the visitors' log at about 3:50 pm.

Third, it is not true that "[n]o reasonably effective . . . counsel would conclude . . . that Dr. Gerow was . . . an agent for the prosecutor." Gerow wrote "D.A." in the "relationship" box of the visitors' log. Wishart knew Gerow well. He testified in post-conviction proceedings that Gerow had a "prosecution bias," and that he never would have hired him.

Fourth, it is not true that Dr. Gerow "ma[de] clear that he informed Petitioner . . . that he would see Petitioner again on an as-needed basis." Gerow

informed Prosecutor Laxalt in his April 27 letter that he would see Petrocelli on an "'as needed' basis." Gerow testified in state court post-conviction proceedings that he meant "as needed *by Mr. Laxalt*."

Fifth, it is not true that "Dr. Gerow's understanding of his engagement was . . . to render some further treatment." Gerow never had any understanding that he would provide treatment to Petrocelli. Petrocelli was under the illusion that Gerow had come to see him in response to his request for psychiatric counseling, but Gerow was under no such illusion.

The facts are that Prosecutor Laxalt asked Dr. Gerow to visit Petrocelli in the Washoe County Jail to determine his competency to stand trial. Gerow interviewed Petrocelli in the jail in the late afternoon of April 21, shortly after defense attorney Wishart and investigator Ford had visited him. The Reno Justice Court had appointed the Washoe County Public Defender's office as counsel for Petrocelli the day before, on April 20. Wishart and Ford's names and signatures were on line three of the visitors' log of the jail, with the notation "WCPD/ATT." Gerow signed in as a visitor on line four of the same page with the notation "D.A." Wishart's name and capacity would have been easily visible to Gerow when he signed in. Gerow never sought permission from Wishart to evaluate Petrocelli. Laxalt never asked Gerow to provide treatment to Petrocelli, and Gerow never provided any. On April 27, Gerow wrote a letter to Laxalt reporting that he believed Petrocelli to be competent, and volunteered to provide further assistance to Laxalt "as needed." Gerow testified during the penalty phase of Petrocelli's capital trial. He

testified, based on his interview with Petrocelli on April 21, that Petrocelli was dangerous and not treatable. Gerow's final words during direct examination were, "There is no cure."

The parallels between *Estelle* and this case are striking. Dr. Grigson, like Dr. Gerow in this case, visited the defendant in jail to determine his competency to stand trial. Grigson, like Gerow, failed to provide *Miranda* warnings. Grigson, like Gerow, was acting as an agent of the state. Indeed, the case against Gerow's testimony is even stronger than against Grigson's, for Grigson was appointed by the court, whereas Gerow was acting at the request of the prosecutor. The defendant in *Estelle*, like Petrocelli, already had appointed counsel. Grigson, like Gerow, did not seek or obtain permission from defendant's counsel to visit or evaluate his client. Grigson, like Gerow, testified during the penalty phase of defendant's trial that the defendant was incurable.

We conclude from the foregoing that the admission of Dr. Gerow's testimony during the penalty phase of Petrocelli's trial was a flagrant violation of his Fifth and Sixth Amendment rights under *Estelle*.

b. Harmless Error

An "error of the trial type" is not harmless if it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). "There must be more than a 'reasonable possibility' that the error was harmful." *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015) (quoting *Brecht*, 507 U.S. at 637). "[R]elief is

appropriate only if the prosecution cannot demonstrate harmlessness." *Id.* at 2197. Where a judge "is in 'grave doubt as to the harmlessness of the error, the habeas petitioner must win.'" *Pensinger v. Chappell*, 787 F.3d 1014, 1029 (9th Cir. 2015) (quoting *California v. Roy*, 519 U.S. 2, 5 (1996) (per curiam)). We conclude that the State has not demonstrated that the *Estelle* error was harmless.

The jury knew that Petrocelli had committed two murders. He was on trial for murdering James Wilson, and the jury had been told that he had also murdered Melanie Barker. Maureen Lawler, Barker's mother, testified at the penalty phase as to the circumstances of the three-day kidnaping in Washington State. Petrocelli was death-eligible because when he killed Wilson he had already been convicted of kidnaping Barker. The jury had ample basis, both legal and emotional, for imposing a capital sentence. The question before us is whether it would have done so absent Dr. Gerow's testimony. The precise question is whether there was "more than a 'reasonable possibility'" that the jury would have imposed a life sentence if it had not heard Gerow's testimony. *Davis*, 135 S. Ct. at 2198 (quoting *Brecht*, 507 U.S. at 637). The burden is on the State to demonstrate that there was not such a possibility.

In any capital case, particularly if a defendant might eventually be released from prison, a central question at sentencing is whether the defendant is likely to kill again. We put to one side the report of Dr. Petrich, who evaluated Petrocelli before he killed Wilson and Barker. Not counting Petrich's report, there was evidence from three medical professionals who

diagnosed Petrocelli, assessed his dangerousness, and evaluated his amenability to treatment.

Dr. Gutride reported that Petrocelli "cried openly" during his interview, and that his "distraught behavior had the quality of his practically begging for help." He reported that Petrocelli "desperately want[ed] to know what is the matter with him" and told Gutride that he had "called crisis lines in every city, but [had] been unable to get any help." Gutride observed that "[t]he personal distress [Petrocelli] exhibited during the interview seems genuine" and that Petrocelli "may truly desire some mental health treatment." Gutride wrote that Petrocelli's "ability to profit from such treatment is questionable" because of his distrust of others, and he concluded that "treatment should be offered in a setting where the client can be closely monitored." In his live testimony, Gutride stated that his diagnosis did not "imply an individual is unable to think properly or conduct themselves conventionally. It relates mostly to a style of living."

Dr. Chappel reported that Petrocelli "repeatedly asked for help" while in jail in Seattle and that Petrocelli attempted to commit suicide while there. Chappel reported that Petrocelli "viewed the experience as one of asking for help and not getting it." Petrocelli "expresse[d] a wish for further evaluation or treatment so he [could] find out whether or not he killed on purpose." Chappel concluded that "a more extensive evaluation" would be useful in order for Petrocelli "to have a better understanding of the reasons for his loss of impulse control and his reason for killing someone who was close to him." Chappel wrote that "[a] period of evaluation and a trial of

treatment might serve a useful purpose in preventing any further homicidal outbursts of rage on his part."

Both Dr. Gutride and Dr. Chappel concluded that Petrocelli wanted mental health treatment, and that he felt that he had sought and been denied such treatment. Both doctors held out the possibility of treatment. Gutride acknowledged that Petrocelli's ability to profit from treatment was "questionable" because of his distrust of others, but he did not state that Petrocelli was untreatable. Rather, he recommended that Petrocelli be "closely monitored" during treatment. Chappel stated that treatment could be useful both for Petrocelli's own understanding and in order to prevent "further homicidal outbursts."

Dr. Gerow's testimony was inconsistent with the reports of Drs. Gutride and Chappel. Gerow stated unequivocally that Petrocelli was dangerous and would always remain so. He testified that Petrocelli had a psychopathic personality for which there is "no treatment at all." He elaborated, "A psychiatrist doesn't treat the condition because it's not treatable." Gerow's last words on direct examination were, "There is no cure."

Dr. Gerow's live testimony likely had a greater impact on the jury than the analyses of Drs. Gutride and Chappel. Defense counsel Wishart chose not to put Gutride and Chappel on the stand, submitting only their written reports. Prosecutor Laxalt called Gutride to the stand in an attempt to undermine his diagnosis and assessment of dangerousness on the ground that Petrocelli had "faked 'bad'" when taking formal intelligence tests. Gutride insisted that his diagnosis was correct, and that the diagnosis did not "imply an

individual is unable to think properly or conduct themselves conventionally." Gutride's live testimony was very short, occupying not quite two pages of transcript. His testimony was followed directly by Gerow's more extensive live testimony that conflicted with Gutride and Chappel's written reports and Gutride's brief testimony. *See Satterwhite v. Texas*, 486 U.S. 249, 259–60 (1988) (referring to a psychiatrist's testimony that defendant was "beyond . . . rehabilitation" as his "most devastating" statement).

The effect of Dr. Gerow's testimony was magnified by an erroneous jury instruction. Jury Instruction 5, quoted above, indicated to the jury that even if it sentenced Petrocelli to life without parole, he might nonetheless be released by the Nevada Board of Pardon Commissioners. While a trial court may instruct a capital jury about the possibility of executive clemency, *California v. Ramos*, 463 U.S. 992, 994 (1983), "if an instruction is inaccurate or misleading it will not be upheld." *Hamilton v. Vasquez*, 17 F.3d 1149, 1160 (9th Cir. 1994). In *Sechrest v. Ignacio*, 549 F.3d 789, 810 (9th Cir. 2008), we held in a Nevada capital case that an instruction identical to Jury Instruction 5 was unconstitutional because it was inaccurate. Under Nevada law in the 1980s, "an individual who [was] on probation at the time he commit[ed] another offense . . . [was] not eligible for parole by the Parole Board on that offense." *Id.* at 810. Petrocelli had absconded twice from his drug treatment program in Washington State, thereby failing to satisfy a condition for successfully completing his probationary period. Petrocelli therefore would not have been eligible for parole from a Nevada life sentence. *See Geary v. State*, 930 P.2d 719, 723–24 (Nev. 1996) (per curiam). The use of Jury Instruction 5

in Petrocelli's case was thus unconstitutional for the same reason it was unconstitutional in *Sechrest*.

Prosecutor Laxalt made sure that the jury understood the implications of Jury Instruction 5. In closing argument he emphasized Dr. Gerow's testimony that Petrocelli was an incurable psychopath, and the possibility of Petrocelli's release on parole:

> He will never change. There is no cure for being a psychopath. . . . Should the community bear the risk of ever having this defendant on the street again, walking free, on the run?
>
> . . .
>
> [N]o society, no community, no county, no city, no state, should ever have to risk again Tracy Petrocelli on the street.
>
> . . .
>
> I ask you to consider years down the road when the decisions are being made at the Pardons Board and the Parole Board and we have all gone our separate ways and Mr. Petrocelli is there, the sole person applying for the pardon or applying for parole crying tears of remorse and telling the people how it wasn't he who was the murderer of Mr. Wilson it was an accident and he got railroaded, and telling people that it wasn't he who was the murderer of Melanie it was an accident, and he was railroaded. . . . Rehabilitation to be imposed in this case? That's a sad fact, but it's to be faced.

Laxalt's argument "had the effect of creating a false choice between sentencing [Petrocelli] to death and sentencing him to a limited period of incarceration." *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994).

It is possible that Petrocelli has not preserved, on appeal to us, his ability to challenge the district court's dismissal of Claim 4, challenging Jury Instruction 5. But whether Petrocelli may now challenge the instruction is irrelevant to the harmlessness of the *Estelle* violation. In determining harmlessness, the question before us is not the constitutionality of the instruction but rather its effect on the improper admission of Dr. Gerow's testimony. Whether Jury Instruction 5 is constitutional or not, its effect on Gerow's improperly admitted testimony is the same.

We have encountered Dr. Gerow before. He testified for the prosecution in *Sechrest* in very much the same manner he testified for the prosecution in the case before us. Gerow testified that Sechrest "was an incurable sociopath" who was "extremely dangerous and could not be rehabilitated." *Sechrest*, 549 F.3d at 813. We held in *Sechrest* that the combined effect of Gerow's testimony and an instruction identical to Instruction 5 "had a substantial influence on the jury's decision to sentence Sechrest to death." *Id.* We similarly conclude, in this case, that Gerow's improperly admitted testimony, understood in the light of Jury Instruction 5, "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637 (quoting *Kotteakos*, 328 U.S. at 776). If there was "more than a 'reasonable possibility'" that the jury would have imposed a life sentence absent the *Estelle* error, the error was not harmless. *Davis*,

135 S. Ct. at 2198 (quoting *Brecht*, 507 U.S. at 637). The State has the burden of demonstrating harmlessness, *id.* at 2197, and it has not carried that burden.

Conclusion

We affirm the district court's denial of Petrocelli's petition for a writ of habeas corpus with respect to the conviction, but reverse with respect to the death sentence. We remand with instructions to grant the writ as to the penalty unless, within a reasonable time, the State grants a new penalty phase trial or imposes a lesser sentence consistent with the law.

AFFIRMED in part, REVERSED in part, and REMANDED.

CHRISTEN, Circuit Judge, concurring:

I agree that Petrocelli's death sentence must be reversed. I write separately because, in my view, even if the State could show that the prosecutor's tactics had not prejudiced the jury's verdict, Petrocelli's case is one of the very few in which deliberate prosecutorial misconduct and egregious trial errors warrant habeas relief. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993) (stating that a deliberate and especially egregious trial error, or one that is combined with a pattern of prosecutorial misconduct, might warrant habeas relief, even if the jury's verdict is not substantially influenced). *Brecht*'s footnote nine is rarely employed, but the Fifth and Seventh Circuits have each relied on it one time in cases where an error (or errors) did not easily fit into either the "structural

error" or "trial error" category. The errors in Petrocelli's case were equally pervasive, flouted Supreme Court authority, and undermined the integrity of the criminal justice process.

Tracy Petrocelli's trial, from voir dire to the death penalty verdict, lasted just ten days (July 26–30, 1982; August 2–6, 1982). The penalty phase took one day. The introduction of evidence began at 11:30 AM on August 6, and the jury's verdict, a death sentence, was returned at 10:52 PM. The defense introduced brief psychiatric reports but only called Petrocelli to testify. The prosecution called Dr. Gerow, a psychiatrist, to testify about Petrocelli's mental condition. The majority opinion thoroughly and persuasively explains how the prosecutor procured Dr. Gerow's testimony and why the prosecutor's conduct was a flagrant violation of *Estelle v. Smith*, 451 U.S. 454 (1981) (holding that a psychiatrist's testimony about the defendant's future dangerousness in a capital felony trial violated the defendant's Fifth and Sixth Amendment rights where the defendant was not given *Miranda* warnings before his psychiatric examination).

A separate layer of error also infected this trial because the State's *Estelle* violation dovetailed with an inflammatory and incorrect jury instruction. Specifically, the trial court told the jury that "[u]nder the laws of the State of Nevada, . . . [t]he State Board of Pardon Commissioners . . . would have the power to modify any sentence at a later date." This instruction (Jury Instruction 5) was wrong because Petrocelli was not eligible for parole. *See* Nev. Rev. Stat. § 213.1099(4); *Sechrest v. Ignacio*, 549 F.3d 789, 810 (9th Cir. 2008). Yet the prosecution told the jury that

Petrocelli might someday walk the streets "[a]mong ordinary people" and "kill again" if the jury did not sentence him to death. The context and nature of these combined errors and misconduct so infected the integrity of the proceedings as to defy categorization and the typical harmlessness analysis.

Brecht's harmless-error standard applies on collateral review of federal constitutional trial errors. *See Brecht*, 507 U.S. at 622. Typically, "[t]rial error 'occur[s] during the presentation of the case to the jury,' and is amenable to harmless-error analysis because it 'may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial].'" *Id.* at 629 (alterations in original) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307–08 (1991)). Prosecutorial misconduct is trial error. *See Wood v. Ryan*, 693 F.3d 1104, 1113 (9th Cir. 2012). "At the other end of the spectrum of constitutional errors lie 'structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards.'" *Brecht*, 507 U.S. at 629 (quoting *Fulminante*, 499 U.S. at 309). Structural errors, such as the deprivation of the right to counsel, "infect the entire trial process" and require automatic reversal of the conviction. *Id.* at 629–30; *see also Hardnett v. Marshall*, 25 F.3d 875, 879 (9th Cir. 1994) (stating that unlike trial errors, structural errors "may not be considered harmless").

"Not every error, however, is easily shoe-horned into one of those neat categories." *United States v. Harbin*, 250 F.3d 532, 544 (7th Cir. 2001). "The nature, context, and significance of the violation, for instance, may determine whether automatic reversal or the harmless

error analysis is appropriate." *Id.* (internal quotation marks and citation omitted). In footnote nine of *Brecht*, the Supreme Court left open the possibility "that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." 507 U.S. at 638 n.9. "This hybrid, [f]ootnote [n]ine error as we denominate it, is thus assimilated to structural error and declared to be incapable of redemption by actual prejudice analysis." *Hardnett*, 25 F.3d at 879. "The integrity of the trial, having been destroyed, cannot be reconstituted by an appellate court." *Id.*

In Petrocelli's case, the first error arose when the prosecutor used a psychiatrist to interview Petrocelli without informing his lawyer or advising him of his right to remain silent. The Supreme Court held in *Estelle* that the prosecution may not rely on statements made by a defendant during a psychiatric examination to prove future dangerousness if the defendant was not apprised of his *Miranda* rights and was denied the assistance of his counsel in deciding whether to submit to the examination. 451 U.S. at 467–71 ("When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting."). Decided in May of 1981, *Estelle* had been on the books for about a year when the state prosecutor enlisted Dr. Gerow to interview

Petrocelli, and it had been controlling law for about fifteen months by the time the prosecutor called Dr. Gerow to testify. Despite *Estelle*'s clear rule that the government may not circumvent *Miranda* by using a health care professional as an agent to interview a defendant without the benefit of defense counsel, the prosecutor responded to Petrocelli's request for psychiatric help by sending Dr. Gerow to the jail to interview Petrocelli under the pretense of providing mental health counseling. There is no question that the prosecutor's goal was to use the result of the interview to prosecute Petrocelli, not to respond to Petrocelli's request for mental health counseling. The prosecutor later said as much, as did Dr. Gerow. It is equally clear that Petrocelli could not have anticipated that the doctor would testify for the prosecution.

In state post-conviction proceedings, the prosecutor testified and agreed that he asked Dr. Gerow to interview Petrocelli because he was concerned about a possible competency or insanity defense. The prosecutor testified that he "want[ed] to see what ma[de] [Petrocelli] tick," and also candidly admitted that he sent Dr. Gerow to interview Petrocelli for "a dual purpose." According to the prosecutor, "Mr. Petrocelli wanted to see a counselor, a psychiatrist. I wanted him to be seen by one in order to make sure that we had a competent defendant." The prosecutor selected Dr. Gerow, as opposed to another psychiatrist or psychologist, because he "had a lot of trust in Dr. Gerow." Despite the rule from *Estelle*, the prosecutor recalled that he had not instructed Dr. Gerow to tell Petrocelli that he was there at the request of the prosecution, that he had not instructed Dr. Gerow to advise Petrocelli of his *Miranda* rights,

and that he had not instructed Dr. Gerow about what to do if Petrocelli mentioned that he was represented by counsel—all because Dr. Gerow was supposedly seeing Petrocelli "jointly." Although the prosecutor described the interview as having a "dual purpose," defense counsel Lawrence Wishart denied that there was any joint defense purpose for the interview. He was not informed of the interview, nor consulted about the selection of the expert. In fact, Wishart was familiar with this psychiatrist, and he testified that he would not have hired Dr. Gerow because he thought Dr. Gerow had "a prosecution bias."

Dr. Gerow also testified in the post-conviction proceedings. He described conferring with the prosecutor by telephone before meeting with Petrocelli, and acknowledged that he met with Petrocelli on April 21, 1982, at the prosecutor's request, to determine whether Petrocelli was competent to stand trial and to assess Petrocelli's ability to distinguish right from wrong. Dr. Gerow doubted very much that the prosecutor instructed him to advise Petrocelli of his *Miranda* rights, and he was definite in his testimony that he did not do so. He also confirmed that when he wrote in his one-page letter report to the prosecutor that he would see Petrocelli again "as needed," he meant as needed by the prosecution, not as needed by Petrocelli.[1] In short, the record shows that Dr. Gerow's

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[1] Dr. Gerow's report verifies that he examined Petrocelli at the prosecutor's request, that Petrocelli was cooperative and an able historian, and that a mental status examination was performed. In seven lines of text, a single paragraph summarizes Petrocelli's social history from childhood, his mental health history from childhood, and the impression that he was not psychotic when

interview with Petrocelli had no therapeutic purpose; it was arranged to advance the prosecution's case in blatant violation of *Estelle*.

The prosecution exploited its *Estelle* violation to full advantage at trial.[2] Having interviewed Petrocelli without informing him of his *Miranda* rights and without notifying Petrocelli's counsel, Dr. Gerow told the jury that he had diagnosed Petrocelli as "a psychopathic." He testified that although the "violence potential" of psychopaths "varies," the most concerning traits associated with psychopaths (incurability, callousness, a high propensity for violence) "describe[] [Petrocelli] quite well." Dr. Gerow's last statement on direct examination went to Petrocelli's future

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interviewed. The letter then deems Petrocelli competent to stand trial, and states that Dr. Gerow will see Petrocelli again on an "as needed" basis.

[2] The State relies heavily on the Nevada Supreme Court's ruling that even if Petrocelli had properly reserved his claim that Dr. Gerow's interview violated *Miranda v. Arizona*, Petrocelli failed to show that it prejudiced him in light of other compelling testimony about future dangerousness. The State also repeats the Nevada trial court's factual errors and raises most of the arguments that the majority opinion addresses: (1) the incorrect statement that Petrocelli had not yet been appointed counsel when Dr. Gerow interviewed him; (2) the incorrect statement that Dr. Gerow informed Petrocelli that he would see him again on an "'as needed' basis"; (3) that it is not entirely clear for what purpose Dr. Gerow saw Petrocelli (perhaps not as an agent of the prosecutor); and (4) that any error was harmless because "[t]he jury heard other compelling evidence about Petrocelli's violent propensities during the guilt phase of his trial." Like the majority, I conclude that the State has not raised any persuasive defense to the alleged *Estelle* violation.

dangerousness. He told the jury: "There is no cure." The prosecution's closing argument summarized the reports of the doctors who had evaluated Petrocelli, but relied most heavily on Dr. Gerow's testimony. The prosecutor adopted Dr. Gerow's terminology, referring to Petrocelli as "a . . . psychopathic," and ended his remarks about Petrocelli's "psychopathic" diagnosis by saying: "And we can go to Dr. Gerow. . . . [T]he sad and terrifying fact is [Petrocelli] will continue to do this."

To make matters worse, the prosecutor emphatically, repeatedly, and incorrectly emphasized that Petrocelli could someday be released if the jury did not sentence him to death. The prosecutor asked the jury: "Should the community bear the risk of ever having this defendant on the street again, walking free, on the run?" He elaborated:

> What psychopath means, essentially, is a mean, bad person who has never changed and who will continue to victimize. . . . [N]o society, no community, no county, no city, no state, should ever have to risk again Tracy Petrocelli on the street. They should not have to risk their fathers or daughters, or their brothers or themselves, that he might take a fancy to killing them as he has done, as you see from the people in this case . . . .

In his rebuttal, the prosecutor continued:

> But ladies and gentlemen, I ask you to consider years down the road when the decisions are being made at the Pardons Board and the Parole Board and we have all gone our separate ways and Mr. Petrocelli is there, the sole person

> applying for the pardon or applying for parole crying tears of remorse and telling the people how it wasn't he who was the murderer of Mr. Wilson it was an accident and he got railroaded, and telling people that it wasn't he who was the murderer of Melanie it was an accident, and he was railroaded.

Contrary to these statements, Petrocelli categorically was *ineligible* for parole under Nevada law at the time of his sentencing because he was on probation when he murdered James Wilson. Had the jury sentenced Petrocelli to life in prison without the possibility of parole, the State Board of Pardon Commissioners (Board) would not have had the power to release him. *See* Nev. Rev. Stat. § 213.1099(4)(e) (prohibiting the reduction of a sentence to one allowing parole if the convicted individual had "[failed] in parole, probation, work release or similar programs").

There is no question the prosecutor was aware that Petrocelli was on probation and had failed in "similar programs" at the time of this crime. Petrocelli had been convicted of kidnaping and he had twice left a drug treatment program. The prosecutor argued that Petrocelli's previous conviction for kidnaping should be treated as an aggravating factor, and he cross-examined Petrocelli about leaving the drug treatment program.

On appeal, the State's only defense of Jury Instruction 5 and the prosecutor's strong suggestion that Petrocelli could be granted parole if not sentenced to death, is that, at the time of the trial, Nevada's Board *generally* had the authority to commute a sentence of life without the possibility of parole. But

that general rule had no application in Petrocelli's case. Petrocelli was ineligible for parole under Nevada law because he was on probation at the time of this crime and had twice absconded from a drug rehabilitation program. The Nevada Supreme Court declined to grant Petrocelli relief on the basis of Jury Instruction 5, but it did not rule that the instruction was correct; it directed trial courts to tell future juries: "Life imprisonment without the possibility of parole means exactly what it says, that the Defendant shall not be eligible for parole." *Petrocelli v. State*, 692 P.2d 503, 511 (1985), *holding modified after statutory amendment by Sonner v. State*, 930 P.2d 707 (1996).

The backdrop for the prosecutor's egregious *Estelle* trial error was this incorrect statement of Nevada law suggesting the possibility of parole, which the prosecutor hammered during closing argument. If this combination of errors does not put Petrocelli's case in *Brecht*'s footnote nine category, the scale certainly tips when one considers that these were not isolated incidents or inadvertent mistakes. In September 1983, the same prosecutor's office called Dr. Gerow to testify about a defendant's future dangerousness during the penalty phase of another death penalty case, *Sechrest v. Ignacio*, 549 F.3d 789, 798–99 (9th Cir. 2008). In *Sechrest*, Dr. Gerow was originally hired by defense counsel but he switched sides to become a prosecution witness. *See id.* at 816. Our decision in that case explains that Dr. Gerow interviewed Sechrest without giving him *Miranda* warnings or otherwise informing the defendant or his counsel that he might testify for the prosecution. *See id.* at 798–99. We concluded in *Sechrest* that "Dr. Gerow's testimony that [the defendant] was extremely dangerous and could not be

rehabilitated likely had a substantial influence on the jury's decision to sentence [the defendant] to death." *Id.* at 813.

Further, Petrocelli's trial was not the last capital case in which this prosecutor's office inaccurately represented that the defendant would be eligible for parole if the jury did not impose the death sentence. In *Sechrest*, the prosecution told the jury that "the Board of Pardon Commissioners could change [the defendant's] sentence," *id.* at 798, and warned that if it did not impose a death sentence, it was "risk[ing] the life of some other person or child," *id.* at 811 (alteration in original). As a matter of fact and law, that was not true. Sechrest, like Petrocelli, was ineligible for parole because he was on probation at the time he committed his offense. Just like in Petrocelli's case, an inaccurate jury instruction "reinforced the prosecutor's argument that the Board of Pardon Commissioners was the entity responsible for deciding Sechrest's term of imprisonment." *Id.* at 812.

In *Sechrest* we held: "Bottom line: the prosecutor misled the jurors to believe that if they did not impose the death penalty, [the defendant] could be released on parole and would kill again. In making his erroneous assertions, the prosecutor . . . most likely inflamed the passions of the jury." *Id.* at 812. *Sechrest* establishes that this prosecutor's office had a game plan to disingenuously scare the jury about the likelihood that the defendant might be released to walk Reno's streets again.

In my view, Petrocelli's appeal presents "the unusual case where the combination of misconduct and error infected the entire proceeding." *Hardnett*, 25 F.3d

at 880 (internal quotation marks omitted). The prosecution's misuse of Dr. Gerow, coupled with the inflammatory and incorrect statements of Nevada law it used in at least two capital cases, pushes this case across the line into footnote nine error of the sort that led two other appellate courts to grant habeas relief. *See United States v. Bowen*, 799 F.3d 336 (5th Cir. 2015); *United States v. Harbin*, 250 F.3d 532, 545 (7th Cir. 2001).

Bowen arose from the prosecution of five former police officers involved in the killing of two unarmed men after Hurricane Katrina (the "Danziger Bridge shootings") and an alleged cover-up. *Bowen*, 700 F.3d at 339–40. Federal prosecutors in charge of the case engaged in a series of "ethical lapses" during the high-profile trial. *Id.* at 339. Although the Fifth Circuit could not conclude that the prosecutorial misconduct was "outcome-determinative," *id.* at 356, the court held that footnote nine error occurred when prosecutors leaked confidential information, anonymously posted on online news sources, and withheld information from the district court, *id.* at 339–46, 353–54. According to the Fifth Circuit: "The [prosecutors'] online commenting alone, which breached all standards of prosecutorial ethics, gave the government a surreptitious advantage in influencing public opinion, the venire panel, and the trial itself." *Id.* at 353. "This case thus presents the unclassifiable and pervasive errors to which the Supreme Court referred in *Brecht* when it identified a category of errors capable of infecting the integrity of the prosecution to a degree warranting a new trial irrespective of prejudice." *Id.*

The Seventh Circuit considered an egregious error that similarly tipped the scales in favor of the prosecution in *Harbin*. There, the prosecution, but not the defense, was allowed to "save" a peremptory juror challenge until the sixth day of an eight-day trial. *See* 250 F.3d at 537–39. Although no one argued that the alternate juror who replaced the excused juror was biased, the Seventh Circuit held that the error defied the typical harmless error analysis, should be treated as structural, and required reversal, in accord with the "footnote nine exception." *See id.* at 544–48. The Seventh Circuit reasoned: "[T]he error was serious enough to effect a shift in the total balance of advantages in favor of the prosecution, which . . . could deprive defendants of a fair trial." *Id.* at 547.

So too here. The prosecutor's *Estelle* violation and other misconduct shifted the total balance of the penalty phase. This misconduct was deliberate, and egregious, and it compromised the integrity of the trial to a degree warranting a new sentencing trial with or without a showing that the errors actually influenced the jury's verdict.

For these reasons, I respectfully concur in the majority opinion, but I would also grant habeas relief based on *Brecht*'s footnote nine.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

3:94-cv-0459-RCJ-VPC

[Filed October 8, 2013]

TRACY PETROCELLI, Petitioner,

vs.

RENEE BAKER, *et al.*, Respondents.

ORDER

Introduction

This action is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Tracy Petrocelli, a Nevada prisoner sentenced to death. The case is before the court for resolution of the merits of the claims remaining in Petrocelli's fourth amended petition for a writ of habeas corpus. The court will deny Petrocelli's petition and direct that judgment be entered accordingly.

Background Facts and Procedural History

In its January 4, 1985, decision on Petrocelli's direct appeal, the Nevada Supreme Court stated, as follows,

the facts of the case as revealed by the evidence at trial:

> Tracy Petrocelli's journey to Reno began in Washington where he killed his fiancee. He fled Washington and apparently drove to Colorado in a Corvette, to Oklahoma in a van and to Reno in a Datsun which he stole while "test driving" the vehicle. Upon arriving in Reno, Petrocelli decided he needed a four-wheel drive truck to get around in the snow. The next day, his search for a vehicle ultimately led to a local used car dealer. The dealer, James Wilson, acceded to Petrocelli's request for a test drive of a Volkswagen (VW) pickup, and the two drove off with the dealer at the wheel. At about 1:30 p.m., a Dodge dealer saw them driving north on Kietzke Lane. Approximately forty-five minutes later, a Reno patrolman saw one person driving a truck matching the description of the VW speeding toward Pyramid Lake.
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> That evening, Petrocelli was picked up on the Pyramid Highway and given a ride to Sutcliffe. He told the driver that his motorcycle had broken down. In Sutcliffe, Petrocelli got a ride to Sparks with a local game warden. Petrocelli then took a cab to Reno and apparently paid his fare from a two-inch roll of bills.
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> The next day, the game warden and his partner looked for Petrocelli's motorcycle. Instead, they found the VW truck with bloodstains and bullet holes on the passenger side. The car dealer's body was found later that day in a crevice, covered with rocks, sagebrush

and shrubbery. His back pockets were turned slightly inside out and empty; his wallet was missing. The victim, who usually carried large amounts of cash with him, had been shot three times with a .22 caliber weapon. One shot was to the neck; another shot was to the heart. The third shot was to the back of the head from a distance of two to three inches.

In the abandoned truck, .22 caliber bullet casings were found. When he was arrested, Petrocelli was carrying a .22 caliber semi-automatic pistol which he testified he always carried loaded and ready to fire. Ballistics tests on the casings found in the abandoned VW revealed that they had been fired from Petrocelli's pistol. Tests on the bullet found in Wilson's chest and a test bullet fired from Petrocelli's pistol also revealed similar markings.

At trial, Petrocelli provided his own account of the killing. After driving off the car lot, the car dealer stopped at a gas station and filled the truck. From the station, Petrocelli drove the truck. He and Wilson proceeded to argue about the price of the truck. Petrocelli laid $3,500.00 on the dashboard and offered a total of $5,000.00 cash. The car dealer was insulted and called him a "punk." Later, on the way back, Wilson twice grabbed for the steering wheel. Petrocelli then pulled out his pistol and said: "Now who is the punk." The victim laughed and said he had a gun also, although Petrocelli never saw one. The car dealer tried to take the pistol from Petrocelli

> as he continued to drive. As they struggled, the gun went off two or three times. Petrocelli testified, "I knew it was shooting, and I was just trying to pull it away from him.... It was an accident. It was an accident. I didn't do anything. I just tried to keep him from getting the gun." Petrocelli drove to a nearby doctor's office, went up to the door, but did not go in because he "didn't know how to tell him [doctor] there was someone hurt, shot in the car." Thereafter, Petrocelli went to a bowling alley and called the hospital, but "didn't know what to say." He then returned to the truck, drove to Pyramid Lake and hid the car dealer's body under some rocks. Petrocelli began walking after his truck bogged down, but then returned to the vehicle to retrieve his gloves and the gun. He also picked up the car dealer's wallet, took his money, threw the business and credit cards into the wind, and discarded the wallet. Petrocelli then walked to the highway where he obtained rides back to Reno.

Petrocelli v. State, 101 Nev. 46, 48-49, 692 P.2d 503, 505-06 (1985) (emendations in original).

Petrocelli was convicted by a jury of first degree murder and robbery with the use of a deadly weapon. *See* Exhibits 4, 5 (ECF No. 163-2, pp. 12-17).[1] He was

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[1] Unless otherwise noted, the exhibits identified by numbers in this order were filed by Petrocelli, and are located in the record at ECF Nos. 163 through 169. And, unless otherwise noted, the exhibits identified by letters in this order were filed by respondents, and are located in the record at ECF Nos. 36 and 70 through 76.

sentenced to death for the murder, and to thirty years in prison for the robbery. *See id*.

Petrocelli appealed. *See* Exhibit Z (ECF No. 75-1, pp. 117-64) (opening brief); Exhibit AA (ECF No. 76, pp. 2-49) (answering brief); Exhibit BB (ECF No. 76, pp. 50-75) (reply brief). The Nevada Supreme Court affirmed on January 4, 1985. *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985); *see also* Exhibit 9 (ECF No. 163-3, pp. 1-27). Petrocelli's petition for rehearing was denied on March 19, 1985. Exhibit II (ECF No. 118-19).

On August 12, 1985, Petrocelli filed a petition for post-conviction relief in the state district court. Exhibit H (ECF No. 70-2, pp. 72-81). On March 20, 1985, the state district court held an evidentiary hearing. Exhibit Y (ECF No. 75, p. 133 - ECF No. 75-1, p. 115) (transcript). On December 31, 1986, the state district court denied the petition. Exhibit I (ECF No. 70-2, p. 138 - ECF No. 70-3, p. 8). Petrocelli appealed. Exhibit JJ (ECF No. 76, pp. 121-42 (opening brief); Exhibit KK (ECF No. 76, p. 143 - ECF No. 76-1, p. 31) (answering brief); Exhibit LL (ECF No. 76-1, pp. 32-49) (reply brief). On June 23, 1988, the Nevada Supreme Court dismissed the appeal. Exhibit NN (ECF No. 76-1, pp. 51-56).[2]

On August 24, 1988, Petrocelli filed a petition for writ of habeas corpus in this court, initiating the case

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[2] The court refers to this state-court proceeding as Petrocelli's "first state habeas action."

of *Petrocelli v. Whitley*, CV-N-88-0446-HDM.[3] Exhibit 16 (ECF No. 164, pp. 2-17). Counsel was appointed to represent petitioner. *See* Exhibits 2 and 5 to Respondents' February 7, 1997 Filing (ECF No. 55).[4] On May 31, 1989, upon a motion by Petrocelli, the court ordered his first federal habeas action, case number CV-N-88-0446-HDM, dismissed without prejudice, to allow him to return to state court to further exhaust his claims. *See* Exhibits 6, 7, 8, 9, 10, and 11 to Respondents' February 7, 1997 Filing.

On March 10, 1989, Petrocelli filed a petition for writ of habeas corpus in state district court. Exhibit PP (ECF No. 36, pp. 19-26). The state district court dismissed that petition on January 22, 1992. Exhibit UU (ECF No. 36, pp. 109-23). Petrocelli appealed. *See* Exhibit WW (ECF No. 36, p. 125 - ECF No. 36-1, p. 38) (opening brief); Exhibit XX (ECF No. 36-1, pp. 40-94) (answering brief); Exhibit YY (ECF No. 36-1, pp. 95-104) (reply brief). The Nevada Supreme

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[3] The court here uses its older system of file numbers to identify Petrocelli's first federal habeas action. Using the court's current file number system, that case would be identified as *Petrocelli v. Whitley*, 3:88-cv-0446-HDM.

[4] On February 7, 1997, in this case, respondents filed a document entitled: "Response to Petitioner's Explanation Why Grounds 26, 27, 28, 6 and 9 Should Not Be Barred As An Abuse of the Writ" (ECF No. 55) ("Respondents' February 7, 1997 Filing"). Attached to that document are eleven exhibits, which are copies of documents filed in *Petrocelli v. Whitley*, CV-N-88-0446-HDM.

Court dismissed the appeal on December 22, 1993. Exhibit ZZ (ECF No. 36-1, p. 106 - ECF No. 36-2, p. 1).[5]

Petrocelli then initiated this, his second, federal habeas corpus action, on July 13, 1994. He filed the original petition for writ of habeas corpus in this action on October 28, 1994 (ECF No. 4). Counsel was appointed for Petrocelli (ECF Nos. 7, 8, 24). On February 9, 1996, Petrocelli filed a first amended habeas petition (ECF No. 28).

Respondents then filed a motion to dismiss, arguing that certain claims in the first amended petition were unexhausted, procedurally barred, and constituted an abuse of the writ (ECF No. 36). The court granted that motion, in part, and dismissed five claims from the first amended petition (ECF Nos. 46, 56). In a subsequent order, entered September 30, 1997, the court denied the first amended habeas petition, ruling that certain claims in it were an abuse of the writ and that certain claims were procedurally defaulted, and denying the remainder of the claims on their merits (ECF No. 78). Judgment was entered (ECF No. 79).

Petrocelli appealed (ECF No. 80). On March 8, 2001, the court of appeals affirmed in part, reversed in part, and remanded. *Petrocelli v. Angelone*, 248 F.3d 877 (9th Cir.2001) (copy of opinion in record at ECF No. 88). The court of appeals affirmed this court's denial, on the merits, of certain of Petrocelli's claims, and reversed this court's determinations that certain claims were an abuse of the writ and that certain claims were

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[5] The court refers to this state-court proceeding as Petrocelli's "second state habeas action."

procedurally defaulted. *Id*. The court of appeals remanded for further proceedings. *Id*.

Following the remand, the district court heard from the parties regarding the status of the remanded claims, with respect to the exhaustion of those claims in state court (*see* ECF Nos. 92, 93, 94, 97, 98, 99, 101). In an order entered February 7, 2003 (ECF No. 100), the court ruled that the remanded claims were "mixed," meaning that some of them had been exhausted in state court and some had not. The court extended to Petrocelli the opportunity to amend his petition to remove the unexhausted claims, and exhaust those claims in state court during a stay of this action. Petrocelli opted to take that course: he filed a second amended petition (ECF No. 104), and then, to correct typographical errors, a third amended petition (ECF No. 108), and on May 28, 2003, the court ordered this action stayed pending Petrocelli's exhaustion of claims in state court (ECF No. 109).

On August 11, 2003, Petrocelli filed a petition for writ of habeas corpus in the state district court. Exhibit 26 (ECF No. 165, pp. 2-43). Petrocelli later filed a supplement to that petition. Exhibit 32 (ECF No. 165-3, pp. 80-93). The state district court held evidentiary hearings. Exhibits 29, 30, 31 (ECF No. 165-2, and ECF No. 165-3, pp. 2-78) (transcripts). The petition was denied and dismissed by the state district court on April 14, 2006. Exhibit 36 (ECF No. 166, pp. 30-40). Petrocelli appealed. *See* Exhibit 38 (ECF Nos. 166-2, 166-3) (opening brief); Exhibit 39 (ECF No. 166-4) (answering brief); Exhibit 40 (ECF Nos. 166-5, 167)

(reply brief). The Nevada Supreme Court affirmed on July 26, 2007. Exhibit 41 (ECF No. 167-2, pp. 2-15).[6]

On November 16, 2007, upon a motion by Petrocelli, the stay of this action was lifted (ECF No. 147). On January 11, 2009, Petrocelli filed his fourth amended petition for writ of habeas corpus (ECF No. 162). The fourth amended petition is now Petrocelli's operative petition. It includes 31 claims for habeas corpus relief, including several with subparts.

On May 26, 2009, respondents filed a motion to dismiss (ECF No. 173). The court ruled on that motion on March 23, 2010 (ECF No. 200), granting it in part and denying it in part. The court dismissed Grounds 1, 2, 3, 4, 5, 6(a), 6(b), 7(a), 7(c), 7(d), 8(a), and 8(c), of Petrocelli's fourth amended petition. *See* Order entered March 23, 2012 (ECF No. 200), p. 37. In addition, the court found the following claims to be unexhausted in state court: Grounds 7(e), 8(b), 9, 11, 14, 15(a), 15(b), 15(c), 15(d), 15(e), 16(a), 16(b), 16(c), 16(d), 16(e), 16(f), 16(g), 16(h), 16(i), 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and 31. *Id*. at 37-38. With respect to the unexhausted claims, the court ordered that Petrocelli was to abandon those claims, make a motion for a stay of this action to allow him to return to state court to exhaust those claims, or face dismissal of his entire action under *Rose v. Lundy*, 455 U.S. 509 (1982).

On April 20, 2010, Petrocelli filed a motion for reconsideration, requesting that the court reconsider the dismissal of Grounds 3 and 4 (ECF No. 201). The

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[6] The court refers to this state-court proceeding as Petrocelli's "third state habeas action."

court denied that motion in an order entered on August 10, 2010 (ECF No. 209).

On April 21, 2010, Petrocelli filed a motion for stay, requesting that this federal action be stayed again while he returns to state court to exhaust his unexhausted claims (ECF No. 203). The court denied the motion for stay in an order entered on March 10, 2011 (ECF No. 218).

On April 6, 2011, Petrocelli filed a motion for reconsideration, asking the court to reconsider its denial of his motion for stay (ECF No. 220). The court denied that motion for reconsideration on October 5, 2011 (ECF No. 224).

Petrocelli then filed a motion (ECF No. 225) requesting permission to appeal the denial of the motion for stay. Petrocelli also filed, in the court of appeals, a petition for extraordinary writ of mandamus, contesting the denial of that motion, as well as an emergency motion for stay pending determination of the petition for a writ of mandamus. *See* Notice of Filings, filed October 31, 2011 (ECF No. 226). On November 3, 2011, the court of appeals denied the petition for writ of mandamus and the emergency motion for stay (ECF No. 227). On December 7, 2011, the court denied the motion requesting permission to appeal (ECF No. 231).

On November 4, 2011, Petrocelli filed a notice of abandonment of unexhausted claims, abandoning the claims held by the court to be unexhausted (ECF No. 228). This left, in the fourth amended petition, the following claims to be resolved on their merits: Grounds 6(c), 6(d), 7(b), 7(f), 10, 12, and 13.

Respondents filed an answer (ECF No. 239), responding to the remaining claims in the fourth amended petition, on April 3, 2012. Petrocelli filed a reply on July 18, 2012 (ECF No. 245).

Standard of Review

Petrocelli's federal habeas corpus action was initiated, and his original habeas corpus petition filed, prior to enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* Petition for Writ of Habeas Corpus (ECF No. 4), filed October 28, 1994. Therefore, pre-AEDPA standards apply. *Lindh v. Murphy*, 521 U.S. 320, 322-23 (1997).

Respondents argue that, because the operative amended habeas petition, Petrocelli's fourth amended petition, was filed after the enactment of AEDPA, the standard of review imposed by AEDPA should apply. *See* Answer (ECF No. 239), pp. 15-24. That argument, however, runs contrary to Ninth Circuit precedent. *See Thomas v. Chappell*, 678 F.3d 1086, 1100-01 (2012), *cert. denied*, 133 S.Ct. 1239 (2013). In *Thomas*, the court of appeals stated:

> We have consistently held that where, as here, a petitioner filed a habeas application before the effective date of AEDPA and the district court retained jurisdiction over the case, AEDPA does not apply even if the petitioner files an amended petition after the effective date of AEDPA.

Thomas, 678 F.3d at 1100; *see also Sivak v. Hardison*, 658 F.3d 898, 905 (9th Cir. 2011 (applying pre-AEDPA standards where initial petition was filed prior to AEDPA's enactment and amended petition was filed after AEDPA's enactment); *Allen v. Roe*, 305 F.3d 1046,

1049 & n.1 (9th Cir. 2002) (same); *Robinson v. Schriro*, 595 F.3d 1086, 1098-99 (9th Cir.), *cert. denied*, 131 S. Ct. 566 (2010) (same); *Hamilton v. Ayers*, 583 F.3d 1100, 1105 (9th Cir.2009) (same); *Jackson v. Brown*, 513 F.3d 1057, 1068-69 (9th Cir.2008) (same). The court, therefore, applies pre-AEDPA standards to Petrocelli's claims.

Applying pre-AEDPA standards, the court reviews questions of law, and mixed questions of law and fact, de novo, with no deference to the state court's legal conclusions. *Williams v. Taylor*, 529 U.S. 362, 400 (2000); *Dubria v. Smith*, 224 F.3d 995, 1000 (9th Cir.2000) (en banc); *McKenzie v. McCormick*, 27 F.3d 1415, 1418 (9th Cir.1994) (en banc). A petitioner "must convince the district court 'by a preponderance of evidence' of the facts underlying the alleged constitutional error." *McKenzie*, 27 F.3d at 1418-19 (citing *Johnson v. Zerbst*, 304 U.S. 458, 469 (1938), and *Bellew v. Gunn*, 532 F.2d 1288, 1290 (9th Cir.1976)). The court presumes "that the state court's findings of historical fact are correct and defer[s] to those findings 'in the absence of convincing evidence to the contrary' or a demonstrated lack of 'fair support in the record.'" *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir.2001) (en banc).

Analysis

Ground 6(c)

In Ground 6(c) of his fourth amended petition, Petrocelli claims that his constitutional rights were violated "due to the failure of trial counsel to provide reasonably effective assistance at the guilt/innocence phase of his trial," "for failing to object to the admission

of the handgun." Fourth Amended Petition (ECF No. 162), pp. 144, 150.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded a two prong test for analysis of claims of ineffective assistance of counsel: a petitioner claiming ineffective assistance of counsel must demonstrate (1) that his attorney's representation "fell below an objective standard of reasonableness," and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688; *see also id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

Petrocelli presented this claim to the Nevada Supreme Court on his appeal from the dismissal of his second state habeas petition. *See* Appellant's Opening Brief, Exhibit WW, pp. 9-13. In its order dismissing Petrocelli's appeal, the Nevada Supreme Court stated the following:

> Petrocelli was arrested by a SWAT team in his home, taken outside and handcuffed. The police then performed a protective sweep of the house during which time they found a pistol in a flight bag in the bedroom closet. The pistol was later determined to be the murder weapon. At trial, the State offered the murder weapon into evidence without objection from Petrocelli's counsel. Petrocelli now claims that the seizure of the murder weapon violated the United States Supreme Court's standards for protective sweeps

> in *Maryland v. Buie*, 494 U.S. 325 (1990), and adopted by this court in *Hayes v. State*, 106 Nev. 543, 797 P.2d 962 (1990). He maintains that the trial testimony of the arresting officers did not show the specific and articulable grounds necessary to support a reasonable belief that there was someone in the house posing a danger to the officers. In addition, he contends that the murder weapon was not in plain view, thus necessitating a search warrant.
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> The seizure of the murder weapon was arguably unlawful. The search of a flight bag in a closet was not within the realm of a protective sweep. Therefore, Petrocelli's counsel should have objected to the admission of the murder weapon. However, even though trial counsel's failure to object possibly fell below an objective standard of reasonableness, the requisite prejudice is not present. There was overwhelming evidence of Petrocelli's guilt apart from the admission of the murder weapon, primarily from Petrocelli's own testimony. Therefore, even if trial counsel was ineffective, the ineffectiveness did not prejudice the outcome of Petrocelli's case. In turn, appellate counsel and post-conviction counsel were not ineffective for failing to raise this issue.

Order Dismissing Appeal, Exhibit ZZ, p. 5 (ECF No. 36-1, p. 110).[7]

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[7] As is discussed above, Petrocelli's claims are subject to pre-AEDPA standards. In this order, the court notes the state courts' rulings on Petrocelli's claims, but does not afford those rulings

Petrocelli raised this claim as Ground 16 in his first amended petition in this action. *See* First Amended Petition (ECF No. 28), p. 15. This court dismissed that claim on procedural grounds. The court of appeals reversed that ruling, and remanded the claim for a determination either on other procedural grounds or on the merits. *See Petrocelli v. Angelone*, 248 F.3d 877, 887-88 (9th Cir. 2001).

This court agrees with the analysis of the Nevada Supreme Court. There is no conceivable way that the admission of the murder weapon into evidence prejudiced Petrocelli's defense. At trial, there was no question who killed Wilson, and there was no question what weapon was used. *See* Petrocelli's Opening Statement, Exhibit P, pp. 5-14 (ECF No. 73-1, pp. 66-75).

The evidence showed that the victim, James Wilson, took Petrocelli for a test drive in Reno in a Volkswagen pickup truck. *See* Testimony of Eddie Wilson, Exhibit M, pp. 60-72 (ECF No. 72-1, pp. 51-63). Later that night, Petrocelli was walking in cold, snowy weather near the west shore of Pyramid Lake, about 30 miles from Reno, when he asked a passing motorist for, and was given, a ride to a small store. *See* Testimony of Don Dalton, Exhibit M, pp. 77-89 (ECF No. 72-1, pp. 68-80). Petrocelli went into that store, appearing tired and cold, and asked for a ride to Reno. *See* Testimony of Stanley Williams, Exhibit M, pp. 89-101 (ECF No. 72-1, pp. 80-92). A Pyramid Lake game warden, who happened to be in the store, agreed to give

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deference. The court reviews questions of law, and mixed questions of law and fact, de novo.

Petrocelli a ride, took him out to look for the motorcycle he said he wrecked, and then gave him a ride to Sparks. *See id*. In Sparks, Petrocelli got into a taxi, and was driven to Reno, where he paid the taxi fare from a thick wad of cash. *See* Testimony of Rodney Wilson, Exhibit N, pp. 122-133 (ECF No. 73, pp. 126-37). The next day, the Volkswagen pickup truck was found near Pyramid Lake, not far from where Petrocelli had been walking the night before. *See* Testimony of Stanley Williams, Exhibit M, pp. 89-101 (ECF No. 72-1, pp. 80-92). There were bloodstains in the truck. *See id*.; *see also* Testimony of Richard Ross, Exhibit M, pp. 101-29 (ECF No. 72-1, pp. 92-120); Testimony of Harold A. Hazard, Exhibit N, pp. 16-63, 67 (ECF No. 73, pp. 20-67, 71). There were bullet holes in the roof, the passenger side above the door, and the windshield, and there were .22 caliber bullet casings in the truck. *See* Testimony of Richard Ross, Exhibit M, pp. 101-29 (ECF No. 72-1, pp. 92-120); Testimony of Harold A. Hazard, Exhibit N, pp. 16-63, 67 (ECF No. 73, pp. 20-67, 71). Wilson's body was found nearby, in a rocky crevice, covered with rocks and sagebrush. *See* Testimony of Richard Ross, Exhibit M, pp. 101-29 (ECF No. 72-1, pp. 92-120); Testimony of Waldemar Eklof III, Exhibit M, pp. 130-39 (ECF No. 72-1, pp. 121-30); Testimony of Vernon McCarty, Exhibit M, pp. 144-55 (ECF No. 72-1, pp. 135-46), and Exhibit N, pp. 1-10 (ECF No. 73, pp. 5-14). There was blood around one of Wilson's front pockets; Wilson's back pockets were turned slightly inside out, and were empty, and his wallet was missing. *See* Testimony of Vernon McCarty, Exhibit M, pp. 144-55 (ECF No. 72-1, pp. 135-46), and Exhibit N, pp. 1-10 (ECF No. 73, pp. 5-14). Wilson had been shot three times: once in the neck, once in the heart, and

once in the back of the head from a distance of two to three inches. *See id*.

Petrocelli testified that he killed Wilson with his own .22 caliber pistol. *See* Testimony of Tracy Petrocelli, Exhibit P, pp. 38-40 (ECF No. 73-1, pp. 99-101), pp. 69-70 (ECF No. 73-1, pp. 130-31), p. 89 (ECF No. 73-1, p. 150); *see also* Exhibit P, p. 11 (ECF No. 73-1, p. 72) (admission in Petrocelli's opening statement that it was Petrocelli's gun that was used to kill Wilson: "He has a gun on him and he takes it out, and ...."). Petrocelli claimed that he did not mean to kill Wilson – that he did so by accident in the course of a dispute and struggle – but Petrocelli never contested that he shot Wilson, and that he did so with his own .22 pistol. In light of the evidence at trial, especially Petrocelli's own testimony, the admission of the murder weapon into evidence was unnecessary to the proof of Petrocelli's guilt.

Petrocelli also testified that in October 1981 he killed his girlfriend, Melanie Barber, with the same .22 pistol. *See* Testimony of Tracy Petrocelli, Exhibit P, p. 95 (ECF No. 73-1, p. 156). Admission of the pistol into evidence was not necessary to this testimony. In light of Petrocelli's testimony that he killed Barber and Wilson with the same gun, the admission of the gun into evidence did not contribute anything to the prosecution's showing of the similarities of the two killings.

Therefore, even assuming that the discovery of the handgun was improper, and assuming counsel's performance, in failing to object to its admission into evidence, was unreasonable, there was no violation of Petrocelli's constitutional right to effective assistance

of counsel, because there is no reasonable probability that, but for the admission of the handgun into evidence, the result of the trial would have been different. Petrocelli was not prejudiced by his attorney's failure to object to the admission of the handgun into evidence. The court will deny Petrocelli relief on Ground 6(c).

Grounds 6(d) and 13

In Ground 6(d), Petrocelli claims that his constitutional rights were violated "due to the failure of trial counsel to provide reasonably effective assistance at the guilt/innocence phase of his trial," "for failing to object to the testimony of Melvin Powell." Fourth Amended Petition, pp. 144, 160. Petrocelli claims that, after his arrest on April 19, 1982, he was interviewed by detectives at the Las Vegas police department, and, in the course of that interview, the detectives violated his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). *Id.* at 160-63. He claims, in turn, that the April 19, 1982, interview led investigators to Melvin Powell, and, therefore, his trial counsel should have objected to Powell's testimony. *Id*. at 163. In Ground 13, Petrocelli claims that his Fifth and Sixth Amendment rights were violated as a result of the post-arrest interrogations. Fourth Amended Petition, p. 248.

The Nevada Supreme Court ruled as follows:

> Looking at the transcript of Petrocelli's interrogation, it is arguable whether he did indeed request counsel or whether he waived the right to have counsel present. However, even if the failure to object to the admission of

> Petrocelli's statements was ineffective on the part of trial counsel, the requisite prejudice is not present. Petrocelli testified at trial and admitted killing both the victim in this case and his girlfriend in Washington. It is therefore highly unlikely that the outcome of Petrocelli's trial would have been different had Melvin Powell not testified.

Exhibit ZZ, pp. 6-7 (ECF No. 36-1, pp. 111-12).

Petrocelli raised these claims as Grounds 18, 19, 20, and 22 in his first amended habeas petition in this action. See First Amended Petition (ECF No. 28), pp. 16-19. This court dismissed these claims on procedural grounds. The court of appeals reversed that ruling, and remanded these claims for a determination either on other procedural grounds or on the merits. *See Petrocelli v. Angelone*, 248 F.3d 877, 887-88 (9th Cir. 2001).

Petrocelli acknowledges that "[b]efore the interview he was advised of his *Miranda* rights and signed a statement that he understood them." Fourth Amended Petition, p. 160. In addition, at the beginning of the statement, Petrocelli was read his *Miranda* rights, and he stated that he understood them. Exhibit J-1, "State's Exhibit PPPP," pp. 2-3 (ECF No. 71-1, pp. 19-20). However, Petrocelli claims that his *Miranda* rights were violated because the interview was not terminated when the following exchange occurred:

> A [Petrocelli]: What I want to know is what's, you know. The only thing ... see ... I don't know if you could even answer my question. But ... I'd like to sort of know ... I mean ... you know. You'll

get what you want, you know. I'm just saying that I'd like to know what ... ah ... I mean because they got this other thing in Washington.

Q [detective]: Um hum.

A.: And I'd sort of like to know what my ... lawyer wants me to do and ... or what I should do or ... you know.

Q: Um hum.

A: I mean ... That's the only thing I just don't know. That's all. You know ... I mean ah ....

Q: Well I ... I explained your rights to you ....

A: Um hum.

Q: ... and you understood your rights?

A: Um hum.

Q: Is that correct?

A: Um hum.

Q: ... What I don't understand is ah ... how when you indicated you knew why we were down here and wanting to talk to you ....

A: I told the police ... like I said ... I said, "I'd sign anything you want. You write it out the way you want it and I'd sign it."

Q: Why?

A: ... Because, you know, it's ah ... I mean that's what you want.

Q: Well, all we want's the truth, Tracy. I don't want anything that's not there.

A: But ah ... I just ... and that's the only thing I didn't know, you know, was how I ... you know ... I don't know a lot about the law, you know. But I mean ....

Q: I mean ....

A: You write it out and I'll sign it.

Q: Well, we don't do things like that. You know ... what we're talking to you about ... was ah ... this murder up here. You indicated that you wanted to talk to us. Ah ... if you didn't feel like talking or if you don't want to talk, contrary to popular belief, we don't hold anybody down and make 'em talk to us.

A: ... I had in mind. I mean I'm telling you the truth, I ... like I told the policeman I says ... "Whatever you fill out, I'll sign it."

* * *

A: Well, who's going to want me first? You know, Wash ....

Q: (Interrupts) We do. You're in custody with us.

A: Um hum.... See, I just ... I even have a ... part-time attorney and just to answer questions for me.

Q: Is it ... what you're telling me is you don't want to answer any questions without an attorney?

A: No. I just need to have something answered. That's all.

Q: Well, we don't have an attorney ... present with us right now. Like I indicated before if at any time you don't want to ... answer any questions or make any statements you don't have to. See, this is something that you're doing ah ... totally voluntarily. Okay, we're not forcing you into ah ... doing anything. It's up to you. I think it could do ... nothing but help you. Okay? I don't know if you need any kind of help. I don't know if you've ever had any kind of help. But we need to find out ... exactly what happened out there. I mean I ... I don't know what kind of struggle there was in the car. I don't know what prompted this ... action. I mean, I wasn't there. I don't know exactly ... what happened. I know pretty close, I but I don't know exactly.... Would you feel more comfortable if we got a stenographer to write a statement down for you to sign it?

A: ... If you'd ... a signed statement saying whatever you want, right? Isn't that sufficient?

Q: No sir, it isn't.

Exhibit J-1, "State's Exhibit PPPP," pp. 12-13, 16-17 (ECF No. 71-1, pp.29-30, 33-34).

Later in the interview, Petrocelli told the investigators that he had stolen cars from automobile dealers by taking them for test drives, and he described how he stole a vehicle in that manner from a dealership in Oklahoma City called "Dub Peterson." *Id*. at pp. 20, 22-26 (ECF No. 71-1, pp. 37, 39-43). Petrocelli claims

this led the investigators to Melvin Powell, who testified about Petrocelli's Oklahoma City robbery. Fourth Amended Petition, p. 163; *see* Exhibit O, pp. 49-61 (ECF No. 73-1, pp. 18-30) (testimony of Melvin Powell).

At Petrocelli's trial, Powell testified that he worked as a car salesman at Dub Richardson Ford, in Oklahoma City. Exhibit O, p. 50, (ECF No. 73-1, p. 19). He testified that in the days before February 10, 1982, Petrocelli approached him and expressed interest in a 1981 Datsun 280ZX automobile. *Id*. at 50-52 (ECF No. 73-1, pp. 19-21). Petrocelli spoke with Powell on three or four occasions, and took two test drives in the 280ZX. *Id*. at 52. According to Powell, Petrocelli came into the dealership to take the second test drive on February 10, 1982. *Id*. at 53 (ECF No. 73-1, p. 22). Powell testified that, during the second test drive, when he suggested that Petrocelli turn the car around and go back to see if they could make a deal, Petrocelli did not answer and continued driving, heading out of town. *Id*. at 55 (ECF No. 73-1, p. 24). Powell testified that he then asked Petrocelli what he was doing, and said, "Let's turn around and go back, and, you know, do some business." *Id*. at 56 (ECF No. 73-1, p. 25). According to Powell, Petrocelli looked over at him and said, "I don't want to hurt you, but I'm going to take your car." *Id*. Powell testified that he responded that he didn't care if Petrocelli took the car, and asked to be let out. *Id*. He testified that Petrocelli told him that he would have to take him out to where it would take him quite a while to walk back. *Id*. Powell testified that he was afraid of Petrocelli, and did not resist. *Id*. Petrocelli took Powell about twenty miles out of town. *Id*. On the way, according to Powell's testimony,

Petrocelli asked Powell if he had any money, and Powell said he had two or three dollars. *Id.* at 56-57 (ECF No. 73-1, pp. 25-26). Powell testified that Petrocelli told Powell to give him that money, but let him keep some change to use a telephone. *Id*. at 57. Powell testified that Petrocelli then let him out of the car. *Id*. Powell testified that he never saw the car again. *Id*. On cross-examination, Powell testified that Petrocelli called him the next day. *Id*. at 59 (ECF No. 73-1, p. 28). On redirect examination, Powell testified that, in the course of that call the next day, Petrocelli asked if he was okay, and told him he was leaving the car at a location near Erick, Oklahoma. *Id*. at 60 (ECF No. 73-1, p. 29). However, Powell testified that the car was never recovered. *Id*.

A suspect subject to custodial interrogation has a Fifth and Fourteenth Amendment right to consult with an attorney and to have an attorney present during questioning, and the police must explain this right to the suspect before questioning. *Miranda v. Arizona*, 384 U.S. 436, 469-73 (1966). When an accused invokes his right to have counsel present during custodial interrogation, he may not be subjected to further questioning until counsel has been made available or the suspect himself reinitiates conversation. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). This "prophylactic rule [is] designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey*, 494 U.S. 344, 350 (1990).

In *Davis v. United States*, 512 U.S. 452 (1994), the Supreme Court declined to extend the rule of *Edwards* to situations in which the suspect makes a vague or

ambiguous reference to an attorney after previously waiving his *Miranda* rights. *Davis*, 512 U.S. at 459. The suspect in *Davis* explicitly waived his right to counsel, both orally and in writing, before the interrogation began; then, later, during the questioning, he said, "Maybe I should talk to a lawyer." *Id*. at 454-55. The Court held that, under the circumstances, that was not an unambiguous invocation of the right to counsel, and the questioning did not have to stop:

> The applicability of the "'rigid' prophylactic rule" of *Edwards* requires courts to "determine whether the accused *actually invoked* his right to counsel." *Smith v. Illinois*, [469 U.S. 91, 95 (1984)] (emphasis added), quoting *Fare v. Michael C.*, 442 U.S. 707, 719, 99 S.Ct. 2560, 2569, 61 L.Ed.2d 197 (1979). To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. *See Connecticut v. Barrett*, [479 U.S. 523, 529 (1987)]. Invocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *McNeil v. Wisconsin*, [501 U.S. 171, 178 (1991)]. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. *See ibid*. ("[T]he likelihood that a suspect would wish counsel to be present is not the test for applicability of

> *Edwards*"); *Edwards v. Arizona*, supra, 451 U.S., at 485, 101 S.Ct., at 1885 (impermissible for authorities "to reinterrogate an accused in custody if he has *clearly* asserted his right to counsel") (emphasis added).
>
> Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." *Smith v. Illinois*, 469 U.S., at 97-98, 105 S.Ct., at 494 (brackets and internal quotation marks omitted). Although a suspect need not "speak with the discrimination of an Oxford don," post, at 2364 [at 512 U.S. 476] (SOUTER, J., concurring in judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect. *See Moran v. Burbine*, 475 U.S. 412, 433, n. 4, 106 S.Ct. 1135, 1147, n. 4, 89 L.Ed.2d 410 (1986) ("[T]he interrogation must cease until an attorney is present only [i]f the individual states that he wants an attorney") (citations and internal quotation marks omitted).

Davis, 512 U.S. at 458-59.

In this case, as in *Davis*, before the April 19, 1982, interrogation began, Petrocelli was informed of, and waived, his *Miranda* rights, both orally and in writing. *See* Exhibit J-1, "State's Exhibit PPPP," pp. 2-3 (ECF No. 71-1, pp. 19-20); *see also* Fourth Amended Petition,

p. 160 ("Before the interview he was advised of his *Miranda* rights and signed a statement that he understood them.").

Thereafter, during the questioning, Petrocelli made comments to the effect that he had questions he would "sort of" like to ask an attorney:

- "I'd sort of like to know what my ... lawyer wants me to do and ... or what I should do or ... you know."
- "I mean ... That's the only thing I just don't know. That's all. You know ... I mean ah ...."
- "But ah ... I just ... and that's the only thing I didn't know, you know, was how I ... you know ... I don't know a lot about the law, you know. But I mean ....
- "See, I just ... I even have a ... part-time attorney and just to answer questions for me."

Exhibit J-1, "State's Exhibit PPPP," pp. 12-13, 16-17 (ECF No. 71-1, pp.29-30, 33-34). Petrocelli never said that he wished to have counsel present for the questioning, and Petrocelli never said that he wished not to answer further questions before consulting a lawyer or without a lawyer present. Petrocelli did not make an unambiguous request for counsel.

Apparently seeking clarification, the investigator asked: "Is it ... what you're telling me is you don't want to answer any questions without an attorney?" And, Petrocelli answered: "*No*. I just need to have something answered. That's all." Exhibit J-1, "State's Exhibit

PPPP," p. 16 (ECF No. 71-1, p. 33) (emphasis added). The investigator then noted that there was not an attorney present, reiterated that "if at any time you don't want to ... answer any questions or make any statements you don't have to," and properly went on with the questioning. *Id*.

Because Petrocelli did not unambiguously request counsel, under *Davis* there was no requirement that the police discontinue the questioning. There was no *Miranda* violation, and, therefore, Petrocelli's trial counsel was not ineffective for failing to object to Powell's testimony on the ground that it was the fruit of a *Miranda* violation.

Moreover, this court agrees with the Nevada Supreme Court that, even if, for the sake of analysis, it is assumed that there was a *Miranda* violation on account of the investigators' failure to cease the interrogation after the exchange discussed above, there is no reasonable probability that, but for counsel's failure to object to Powell's testimony on that basis, the result of Petrocelli's trial would have been different. *See Strickland*, 466 U.S. at 688; *see also id*. at 694.

It is undisputed that Petrocelli killed Wilson, and there was solid evidence, beyond Powell's testimony, that Petrocelli killed him maliciously, intentionally, wilfully, deliberately and with premeditation, and in the course of a robbery. In light of the evidence, Petrocelli's self-serving and uncorroborated story – that the shooting happened accidentally, during a struggle resulting from a dispute over the price of the truck – was not believable.

There is no controversy about who killed Wilson; Petrocelli testified that he killed Wilson. *See* Testimony of Tracy Petrocelli, Exhibit P, pp. 38-41 (ECF No. 73-1, pp. 99-102). Petrocelli, however, claimed in his testimony that the killing was an accident – that it happened after he pulled out his gun, in the course of a dispute over the price of the truck he was test driving. *Id*. at 40. But the circumstantial evidence belies Petrocelli's version of the events.

The evidence showed that Petrocelli fired six shots, and three of those shots hit Wilson. *See* Testimony of Harold A. Hazard, Exhibit N, pp. 31, 36 (ECF No. 73, pp. 36, 41); Testimony of Vernon McCarty, Exhibit N, p. 2 (ECF No. 73, p. 6). One of those shots was to the back of Wilson's head from a distance of two to three inches. *See* testimony of Vernon McCarty, Exhibit N, p. 2 (ECF No. 73, p. 6); Testimony of David Atkinson, Exhibit N, pp. 99-100 (ECF No. 73, pp. 103-04); Testimony of William John Diamond, Exhibit N, pp. 139-43 (ECF No. 73, pp. 143-47).

After the shooting, Petrocelli did not report what happened to the police or to anyone else. Instead, he took Wilson's body to a remote area about 30 miles from Reno, near Pyramid Lake, and hid it in a rocky crevasse. Then, after getting the truck stuck and abandoning it, he lied about what had happened to the people he encountered on his way back to Reno. *See* Testimony of Don Dalton, Exhibit M, pp. 80-86 (ECF No. 72-1, pp. 71-77; Testimony of Stanley Williams, Exhibit M, pp. 90-98 (ECF No. 72-1, pp. 81-89); Testimony of Rodney Wilson, Exhibit N, pp. 124-25 (ECF No. 73, pp. 128-29).

When Wilson's body was found, his back pockets were turned slightly inside out, and were empty, and his wallet was missing. *See* Testimony of Vernon McCarty, Exhibit M, pp. 144-55 (ECF No. 72-1, pp. 135-46), and Exhibit N, pp. 1-10 (ECF No. 73, pp. 5-14). There were blood stains around his front left pocket. *See* Testimony of William John Diamond, Exhibit N, p. 138 (ECF No. 73, p. 142). Petrocelli admitted that, after he killed Wilson, he took $1300 from his wallet. *See* Testimony of Tracy Petrocelli, Exhibit P, pp. 46-47 (ECF No. 73-1, pp. 107-08); *see also id*. at p. 121 (ECF No. 73-1, p. 182). Later that night, Petrocelli paid a taxi fare from a thick wad of cash. *See* Testimony of Rodney Wilson, Exhibit N, pp. 124-26 (ECF No. 73, pp. 128-30).

In light of the evidence at trial, even excluding Powell's testimony, Petrocelli's claim that the killing of Wilson was accidental was implausible. There is no reasonable probability that, but for Powell's testimony, the result of Petrocelli's trial would have been different.[8]

Other than his *Miranda* argument, Petrocelli makes no colorable argument, and does not suggest that he can make a factual showing, that his statements were given involuntarily, in violation of the Fifth and Fourteenth Amendments. In considering the voluntariness of a confession, a court "examines

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[8] Petrocelli points out, in his briefing, that the prosecutor argued at trial that the Powell testimony was the only, or the strongest, evidence of Petrocelli's intent to commit robbery. See Exhibit M, pp. 157-63 (ECF No. 72-1, pp. 148-54). The court is not bound by those arguments of the prosecutor. There is no reasonable probability that the jury would have come to any different conclusion in this case without Powell's testimony.

whether a defendant's will was overborne by the circumstances surrounding the giving of a confession." *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (citation and internal quotation marks omitted); *Doody v. Ryan*, 649 F.3d 986, 1008 (9th Cir.2011). "The due process test takes into consideration the totality of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation." *Dickerson*, 530 U.S. at 434 (citations and internal quotation marks omitted). The ultimate question is: "Is the confession the product of an essentially free and unconstrained choice by its maker?" *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973) (citation omitted). Petrocelli does not articulate any colorable claim that his statements were not voluntary, and he does not tie any such claim to any facts that he could establish. *See* Fourth Amended Petition, pp. 248-51; Reply, pp. 88-102. Nor does Petrocelli articulate a colorable claim, or point to any evidence supporting a claim, that there was a violation of his Sixth Amendment right to counsel. *See id*.

The court will deny Petrocelli relief with respect to Grounds 6(d) and 13.

Ground 7(b)

In Ground 7(b), Petrocelli claims that his constitutional rights were violated "due to the failure of trial counsel to provide reasonably effective assistance at the penalty phase of his trial," "for failing to properly object to evidence of a prior conviction, allowing the jury to find the aggravating factor of a conviction of a felony involving the use of force." Fourth Amended Petition, pp. 164, 180.

At the penalty phase of the trial, the prosecution sought to prove that two aggravating circumstances existed with respect to Wilson's murder, such that Petrocelli was eligible for the death penalty. *See* Closing Argument of Prosecution, Exhibit U, pp. 74-84 (ECF No. 75, pp. 77-87). The aggravating circumstances asserted by the prosecution were that the murder was committed in the course of a robbery (*see* NRS 200.033(4)), and that the murder was committed by a person previously convicted of a felony involving the use or threat of violence (*see* NRS 200.033(2)(b)). *See id*. With regard to the second of the alleged aggravating circumstances, the prosecution sought to prove that Petrocelli had previously, in Washington, been convicted of a kidnapping involving the use or threat of violence. *See id*. at 78-81; *see also id*. at 86, 89-90 (defense acknowledged in its closing argument that the prosecution's basis for the alleged NRS 200.033(2) aggravating circumstance was the Washington kidnapping conviction). Beyond Petrocelli's own admission that he had been convicted of felony kidnapping in Washington, the prosecution introduced the testimony of two witnesses, Maureen Lawler and Joan Bleeker, to prove that the kidnapping involved the use or threat of violence. *See* Testimony of Maureen Lawler, Exhibit U, pp. 35-45 (ECF No. 75, pp. 38-48); Testimony of Joan Bleeker, Exhibit U, pp. 47-60 (ECF No. 75, pp. 50-63); *see also* Testimony of Tracy Petrocelli, Exhibit R, p. 18 (ECF No. 74, p. 165) (admitting that he had been previously convicted of felony kidnapping). The jury found both aggravating circumstances alleged by the prosecution to exist. *See* Exhibit U, p. 98 (ECF No. 75, p. 101).

Petrocelli claims that his trial counsel was ineffective for "failing to properly object to evidence of a prior conviction, allowing the jury to find the aggravating circumstance of a conviction of a felony involving the use of force." *See* Fourth Amended Petition, p. 180. It appears to be Petrocelli's position that the prosecution's proof of the prior felony aggravator was improper because the conviction was of a degree of kidnapping that in Washington does not necessarily involve use or threat of violence, and Petrocelli's counsel should have objected to the prosecution's introduction of extrinsic evidence to show that the kidnapping did, in fact, involve the use or threat of violence.

Petrocelli made this same claim in Ground 12 of his first amended habeas petition in this action. *See* First Amended Petition (ECF No. 28), p. 13. That claim was denied by this court in the order entered September 29, 1997. *See* Order entered September 29, 1997 (ECF No. 78), p. 18. The court of appeals affirmed that ruling. *Petrocelli v. Angelone*, 248 F.3d 877, 889-92 (9th Cir. 2001). To the extent that the claim made in Ground 7(b) of Petrocelli's fourth amended petition is the same as the claim made in Ground 12 of his first amended petition -- that is, to the extent that the claim in Ground 7(b) focuses on counsel's failure to object to evidence regarding the Washington kidnapping -- it is foreclosed by the doctrine of law of the case. "Under the law of the case doctrine, a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir.1997). "The doctrine is not a limitation on a tribunal's power, but rather a guide to

discretion." *Id*. "A court may have discretion to depart from the law of the case where: (1) the first decision was clearly erroneous; (2) an intervening change in the law has occurred; (3) the evidence on remand is substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result." *Id*. "Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion." *Id*. Therefore, as this claim has been fully adjudicated, the law of the case doctrine applies, and it precludes reconsideration of this claim.

There is another facet of Ground 7(b), however, as it is presented in Petrocelli's fourth amended petition. Petrocelli includes, in his statement of facts in support of Ground 7(b), a discussion of his trial counsel's advice regarding his decision to testify at the guilt phase of his trial, and the effect his decision to testify had on the admission of evidence regarding the killing of Melanie Barber. *See* Fourth Amended Petition, pp. 180-82. The court, though, sees no connection between those matters and the admission of the testimony of Lawler and Bleeker at the penalty phase of the trial to establish the nature of Petrocelli's prior kidnapping conviction. Furthermore, the admission of evidence regarding the killing of Melanie Barber had no impact on the aggravating circumstances found by the jury; at the time of Petrocelli's trial in Nevada, he had not been convicted of murder for the Barber homicide, and that killing was not used as an aggravating circumstance. Moreover, Petrocelli's complaint about his counsel's advice regarding his decision to testify is separately set forth in Petrocelli's fourth amended habeas petition as Ground 6(b), and that claim has been dismissed. *See*

Order entered March 23, 2010 (ECF No. 200), pp. 11-12 (dismissing Ground 6(b) on the basis that the claim was raised in Petrocelli's first amended petition, denied by this court, and then abandoned by Petrocelli on appeal).

In short, whether Ground 7(b) is construed as a claim regarding Petrocelli's counsel's failure to object to evidence concerning the Washington kidnapping conviction, or as a claim regarding counsel's advice regarding Petrocelli's decision to testify at trial, or as both, the claim is not procedurally viable. The court will deny Petrocelli habeas corpus relief with respect to Ground 7(b).

Ground 7(f)

In Ground 7(f), Petrocelli claims:

> Even if no single instance of ineffectiveness at either phase of the trial rises to the level of prejudice requiring a new trial, under the *Strickland* standards, ineffectiveness must be assessed in terms of the cumulative impact of all instances of deficient performance and prejudice.

Fourth Amended Petition, p. 186. Petrocelli incorporates in Ground 7f the facts and arguments he sets forth in all of Grounds 6 and 7. *Id*.

Two of Petrocelli's claims of ineffective assistance of counsel are pertinent to this cumulative error claim: the claims in Grounds 6(c) and 6(d). As is discussed above, with respect to Ground 6(c), the court assumes, for the purpose of this order, that Petrocelli's counsel acted unreasonably in not challenging the admission of the handgun into evidence at the guilt phase of his

trial, but the court concludes that Petrocelli was not prejudiced by that evidence. As is also discussed above, with respect to Ground 6(d), the court finds that Petrocelli's *Miranda* rights were not violated in the April 19, 1982 interview, and, in addition and alternatively, the court finds that Petrocelli was not prejudiced by the testimony of Melvin Powell, which allegedly stemmed from the April 19, 1982, interview.

As is discussed above, the court sees no way that the admission of the handgun into evidence prejudiced Petrocelli – that evidence had no bearing on any contested factual issue in the case. *See* discussion, *supra*, pp. 8-11. That remains the conclusion of the court when the attorney error identified in Ground 6(c) is considered together with the attorney error considered in the alternative in Ground 6(d). There is no synergy between the handgun evidence and the Powell testimony; the two were unrelated. Because there was no conceivable prejudice to Petrocelli from the admission of the handgun into evidence, and because the handgun evidence and the Powell testimony were wholly unrelated and without any evidentiary synergy, the cumulative error analysis is no different from the prejudice analysis of the attorney error considered in the alternative in Ground 6(d). *See* discussion, *supra*, pp. 18-19.

The court finds, therefore, that, even if it is assumed that Petrocelli's *Miranda* rights were violated in the April 19, 1982, interview, as asserted by Petrocelli in Ground 6(d), and even if that error is considered together with the attorney error assumed for purposes of the analysis of Ground 6(c), there is no reasonable probability that, but for counsel's errors, the

result of Petrocelli's trial would have been different. *See Strickland*, 466 U.S. at 688, 694. The alleged attorney errors under consideration here did not have a substantial and injurious effect or influence on the jury's verdict, and did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. *See Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 298, 302-03 (1973); *Parle v. Runnels,* 505 F.3d 922, 926-27 (9th Cir.2007).

The court will deny Petrocelli habeas corpus relief with respect to Ground 7(f).

Ground 10

In Ground 10, Petrocelli claims that "the statutorily-mandated reasonable doubt instruction unconstitutionally minimized the state's burden of proof and infected the trial and sentencing process." Fourth Amended Petition, p. 197.

At Petrocelli's trial, the court instructed the jury as follows with regard to the definition of "reasonable doubt":

> A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt, to be reasonable, must be actual

> and substantial, not mere possibility or speculation.

See Exhibit D, Instruction No. 12 (ECF No. 70, p. 129).[9] Citing *Cage v. Louisiana*, 498 U.S. 39 (1990), Petrocelli argues that "this definition of 'reasonable doubt' creates a standard of proof which is below the standard of proof required by the constitution for the State to secure a conviction." Fourth Amended Petition, p. 197. Petrocelli focuses his argument upon the second sentence – "It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life" -- and on the last sentence – "Doubt to be reasonable, must be actual and substantial, not mere possibility or speculation." *Id*. at 197-98.

Petrocelli presented this claim to the Nevada Supreme Court on the appeal in his second state habeas action. *See* Exhibit WW, pp. 32-33. The Nevada Supreme Court ruled as follows:

> ... [Petrocelli] contends that the statutory definition of reasonable doubt contained in the jury instructions given at his trial violated his right to due process. He maintains that the language of the Nevada instruction is similar to a Louisiana instruction, language that was later declared unconstitutional by the United States Supreme Court in *Cage v. Louisiana*, 498 U.S. 39 (1990). However, this court has held that the same reasonable doubt standard used in

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[9] Between 1967 and 1991, this definition of reasonable doubt was codified at NRS 175.211.

> Petrocelli's trial does not violate due process. *Lord v. State*, 107 Nev. 28, 806 P.2d 548 (1991). In light of our holding in *Lord*, Petrocelli's argument is meritless.

Order Dismissing Appeal, Exhibit ZZ, p. 7.

Respondents argue that this same claim was made as Ground 1 of Petrocelli's first amended petition in this case, that the claim was denied in this court's September 30, 1997, order, and that the court of appeals affirmed that ruling on appeal. *See* Answer, p. 61. Respondents argue that, therefore, the claim has been fully adjudicated and is barred by the law of the case doctrine. *Id*. However, this claim is not the same as the claim in Ground 1 of the first amended petition. Ground 1 of the first amended petition concerned comments regarding the reasonable doubt standard made by the trial judge during jury voir dire. *See* First Amended Petition (ECF No. 28), p. 8. That is not the claim at issue here.

This claim, Ground 10 of the fourth amended petition, is much the same as Ground 25 of the first amended petition. *See id*. at 20. Ground 25 of the first amended petition was one of the claims remanded to this court from the court of appeals for further consideration. *See Petrocelli v. Angelone*, 248 F.3d 877, 887-88 (9th Cir. 2001). Ground 10 is now properly before this court with respect to its merits.

The claim in Ground 10 fails on its merits, however. The Ninth Circuit Court of Appeals has held this same Nevada jury instruction constitutional, both before and after *Cage* was decided by the Supreme Court. *See Ramirez v. Hatcher*, 136 F.3d 1209, 1214 (9th Cir.),

cert. denied, 525 U.S. 967 (1998); *Darnell v. Swinney*, 823 F.2d 299, 302 (9th Cir.1987), *cert. denied*, 484 U.S. 1059 (1988). Also, more recently, in a capital case subject to AEDPA standards, the Ninth Circuit Court of Appeals ruled that the law of this circuit forecloses a claim such as this, and held the issue to be unworthy of a certificate of appealability. *See Nevius v. McDaniel*, 218 F.3d 940, 945 (9th Cir.2000). In view of *Ramirez*, *Darnell*, and *Nevius*, the court concludes that Ground 10 is without merit. The court will deny Petrocelli habeas corpus relief with respect to Ground 10.

Ground 12

In Ground 12, Petrocelli claims that his rights under the Fifth and Sixth Amendments were violated due to "the admission of testimony from Dr. Gerow, who presented psychiatric testimony against the defendant based on communications made by the defendant during a court-ordered psychiatric examination." Fourth Amended Petition, pp. 220, 238; *see also*, *generally*, *id*. at 220-47. In Ground 12, Petrocelli also claims that it was ineffective assistance of counsel for his appellate counsel and his state post-conviction counsel to fail to claim violations of his Fifth and Sixth Amendment rights, as well as the psychotherapist-patient privilege, on his direct appeal and in his first and second state habeas actions. *Id*. at 238-44.

Petrocelli asserted a similar claim, without the ineffective assistance of counsel claims, in his first amended petition in this action as Ground 26. *See* First Amended Petition (ECF No. 28), p. 20. This court dismissed that claim on procedural grounds. The court of appeals reversed that ruling, and remanded the

claim for a determination either on other procedural grounds or on the merits. *See Petrocelli v. Angelone*, 248 F.3d 877, 887 (9th Cir. 2001).

Petrocelli then asserted this claim in state court in his third state habeas action. Exhibit 26 (ECF No. 165, pp. 2-43). Petrocelli later filed a supplement to that petition. Exhibit 32 (ECF No. 165-3, pp. 80-93). The state district court held evidentiary hearings. Exhibits 29, 30, 31 (ECF No. 165-2, and ECF No. 165-3, pp. 2-78) (transcripts). The state district court "denied and dismissed" the petition on April 14, 2006, rejecting this claim on its merits. Exhibit 36 (ECF No. 166, pp. 30-40). Petrocelli appealed, raising this claim before the Nevada Supreme Court. *See* Exhibit 38 (ECF Nos. 166-2, 166-3) (opening brief); Exhibit 39 (ECF No. 166-4) (answering brief); Exhibit 40 (ECF Nos. 166-5, 167) (reply brief). The Nevada Supreme Court affirmed on July 26, 2007. Exhibit 41 (ECF No. 167-2, pp. 2-15). The Nevada Supreme Court addressed the merits of this claim as follows:

> Petrocelli next contends that even if reweighing is permissible, our analysis should exclude consideration of Dr. Lynn Gerow's testimony during the penalty hearing as it violated doctor-patient privilege [footnote omitted] and his Fifth Amendment right to remain silent. Even assuming this testimony was improperly admitted, however, it has had no impact on our reweighing or harmless error analysis. At the penalty hearing, after Petrocelli testified on his own behalf and the defense introduced reports from psychiatrist Dr. John Chappel and psychologist Dr. Martin Gutride,

Dr. Gerow testified during the State's rebuttal case. Dr. Gerow testified that persons suffering from psychopathic personality, like Petrocelli, and who have a history of violence tend to repeat violent acts and thus the propensity for further violence is high. Both Dr. Chappel and Dr. Gutride diagnosed Petrocelli with antisocial personality disorder and described him as dangerous to others. Dr. Chappel offered a more positive prognosis than Dr. Gerow in terms of Petrocelli's response to treatment, concluding that treatment might prevent any further homicidal outbursts of rage. Dr. Gutride, however, was less optimistic than Dr. Chappel, concluding that Petrocelli's ability to profit from mental health treatment was questionable in light of the depth of his mistrust of others. Dr. Gerow testified that he had not reviewed Dr. Gutride's report but agreed with Dr. Chappel's diagnosis. [Footnote: We also cannot ignore that the jury heard other compelling evidence of Petrocelli's violent propensities during the guilt phase of his trial when the State presented evidence that he had killed his girlfriend five months before Wilson's murder. Although this evidence could not have been alleged at that time as an aggravating circumstance (because he had not yet been formally convicted of the girlfriend's murder), the jury could have properly considered it in exercising its discretion to impose a death sentence *after* it had determined that Petrocelli was death eligible, *i.e.,* [that] no mitigating circumstances were sufficient to outweigh one or more aggravating circumstances.] Accordingly, because Dr.

> Gerow's testimony was essentially cumulative, we conclude that any error in admitting Dr. Gerow's testimony did not unduly prejudice Petrocelli.

Order of Affirmance, Exhibit 41, pp. 7-8 (ECF No. 167-2, pp. 8-9) (emphasis in original); *see also id*. at 13 (ECF No. 167-2, p. 14) ("And, as we explained above, Petrocelli failed to show that the admission of Dr. Gerow's testimony unduly prejudiced him in light of other compelling evidence demonstrating his future dangerousness.").

First, the court finds no merit in Petrocelli's claim to the extent it is based on his assertion that his counsel in his first and second state habeas actions were ineffective. *See* 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.).

Turning to Petrocelli's claims that Dr. Gerow's testimony violated his rights under the Fifth and Sixth Amendments, this court agrees with the Nevada courts that, assuming Dr. Gerow's testimony should have been excluded, Petrocelli was not prejudiced. Petrocelli argues that Dr. Gerow's testimony "was the cornerstone of the prosecution's argument of 'future dangerousness' which in turn was the cornerstone of their argument for the death penalty." Fourth Amended Petition, pp. 220. There was, however, a great deal of evidence, aside from Dr. Gerow's testimony, indicating that Petrocelli was dangerous and not susceptible to treatment.

First, the jury saw the evidence regarding Petrocelli's killing of Wilson, and Petrocelli's behavior immediately following that killing. Petrocelli did not report the shooting, and he did not get help for Wilson; rather, Petrocelli drove some 30 miles out of Reno to a remote area near Pyramid Lake and buried Wilson's body in a rock pile. Petrocelli then lied to the people he came into contact with about what he was doing at Pyramid Lake. Moreover, in the penalty phase of the trial, the jury heard Petrocelli's cold demeanor with respect to the killing in a recorded interview with the police. *See* Exhibit U, pp. 46-47 (ECF No. 75, pp. 49-50).

The jury also heard an eyewitness, Lloyd Maloney, describe in detail Petrocelli's killing of his girlfriend, 18-year-old Melanie Barker, less than six months before he killed Wilson. *See* Testimony of Lloyd Maloney, Exhibit R, pp. 54-62 (ECF No. 74-1, pp. 5-13). Maloney's description of Petrocelli's killing of Barker included the following:

> Q: What happened then?
>
> A: He was dragging her backward out of the place. They started up the hallway.
>
> About that time the lady that I was sitting with, I shoved her around the corner, and as I looked down the hallway again, she was beginning to fall for some reason. I don't know. Maybe he had hit her.
>
> Q: Without speculating. Just describe what you saw.

> A: As she was going toward the floor, he was saying, "If you keep screaming I will shoot you."
>
> She didn't stop screaming. So, as she was going down he fired the weapon once. It hit her in the leg. As she landed on the floor, he was turning.
>
> The weapon went off again, and the third time he had both hands on the gun, pointed directly at her head and fired the shot.

Id. at 56.

Furthermore, Maureen Lawler, Melanie Barker's mother, testified in the penalty phase of Petrocelli's trial about Petrocelli's kidnapping of Barker about six months before he killed her, and about a year before he killed Wilson. Exhibit U, pp. 35-45 (ECF No. 75, pp. 38-48). Lawler testified that one night Barker did not return from her work as a waitress, and was missing for three days. *Id.* at 38-39 (ECF No. 75, pp. 41-42). She testified that when Barker reappeared, she had been "beaten on the face" and she was "hysterical." *Id.* at 39-40 (ECF No. 75, pp. 42-43); *see also* Testimony of Joan Bleeker, Exhibit U, pp. 47-48 (ECF No. 75, pp. 50-51) (When Bleeker encountered Barker, in a restroom at a gas station, Barker said "she was being kidnapped," "was scared," and "was getting knocked around," and she asked Bleeker to get Petrocelli's license plate number and call the police.); *see also* Testimony of Tracy Petrocelli, Exhibit U, p. 54 (ECF No. 75, p. 57) (admitting that he hit Barker). Lawler testified that Barker told her that Petrocelli had kidnapped her at gunpoint. Exhibit U, p. 40 (ECF No. 75, p. 43). Lawler testified that Barker told her that during the

kidnapping Petrocelli told her that "they would be picked up by a friend bringing a seaplane on the river ... [a]nd some of his friends would do away with her." *Id*. Lawler also testified that in a telephone conversation with Petrocelli, prior to the kidnapping of Barker, they had a dispute about a wallet and keys that Petrocelli had left in a car, and Petrocelli threatened to "blow [her] away." *Id*. at 41-42 (ECF No. 75, p. 44-45).

The evidence of Petrocelli's dangerousness also involved Petrocelli's statements and actions after the killing of Wilson. John J. Lukas was in jail with Petrocelli while Petrocelli was awaiting trial, and he testified in the penalty phase of Petrocelli's trial about conversations he had with Petrocelli in jail. Exhibit U, pp. 22-35 (ECF No. 75, pp. 25-38). Lukas testified that Petrocelli wanted him to help with an escape attempt, and threatened him. *Id*. at 26 (ECF No. 75, p. 29). Moreover, Lukas testified as follows about what Petrocelli planned to do if he escaped:

> Q: Would you state what Mr. Petrocelli said he was going to do after he got out?
>
> A: He was going to get rid of the snitch.
>
> Q: And who was that?
>
> A: Some girl in Vegas or something that he thought had pissed him off.
>
> Q: Did he say what he was going to do to her?
>
> A: Get rid of her.
>
> Q: Did he say anything else?

A: That was about it.

Q: Did he have plans with respect to anyone else, Mr. Lucas?

A: He said he'd get rid of the DA and all that, you know.

Id. at 31 (ECF No. 75, p. 34).

In the defense case in the penalty phase of the trial, Petrocelli introduced the reports of two psychiatrists and a psychologist regarding his mental status. Those reports spoke to Petrocelli's dangerousness.

Defense Exhibit 3, in the penalty phase of the trial, was a report by John Petrich, M.D., of a psychiatric evaluation of Petrocelli, dated June 19, 1981, written while Petrocelli was in jail in Washington awaiting trial on the kidnapping charges. Exhibit J3, pp. 3-8 (ECF No. 71-2, pp. 53-58). In the report, Dr. Petrich stated:

> The defendant's psychiatric diagnosis is that of polydrug abuse with special emphasis on amphetamines. In addition, I strongly suspect that the defendant may have recurrent depressive episodes which are behind his drug abuse. That is, the drug abuse may in fact be an attempt at self-treatment for this recurrent depressive condition.

Id. at 3 (ECF No. 71-2, p. 53). Later in the report, under the heading "Diagnosis," Dr. Petrich reported Petrocelli's diagnosis as follows:

> Polydrug abuse - amphetamines and alcohol. Rule out manic depressive illness or cyclothymic personality disorder.

Id. at 6 (ECF No. 71-2, p. 56). With regard to the likelihood of Petrocelli committing acts of violence in the future, Dr. Petrich's report states:

> With special reference to violence on the part of the defendant, it appears that he does admit, in periods of excitement, of making holes in the wall with his fists and has struck Melanie three times during the course of their highly conflicted relationship. He denies other episodes of violence and his history is free of significant criminal behavior. He states he has never hurt anyone in a fit of violence nor used a weapon. He does admit making angry threats toward Melanie because he perceived that she was not understanding nor supportive of him.

Id. at 5 (ECF No. 71-2, p. 55). In this regard, the report also states:

> With reference to the defendant's likelihood to commit further criminal acts or to be dangerous to the public, I must state that with control of the mood swings and alcohol and drug rehabilitation, he appears to present a minimal risk to the community. However, I must emphasize that he would require an intensive treatment program to achieve these goals.

Id. at 6 (ECF No. 71-2, p. 56). Of the three reports introduced into evidence by the defense, Dr. Petrich's report was the most supportive of the defense position that Petrocelli's mental condition might be susceptible

to treatment, and that he may not present a danger of violence in the future. However, there were two obvious factors that undermined the weight of Dr. Petrich's opinions. First, Dr. Petrich's report was written about three months before Petrocelli killed Barker, and about nine months before Petrocelli killed Wilson. In opining about Petrocelli's mental status, Dr. Petrich did not have the benefit of knowing about those two killings, nor the statements and conduct of Petrocelli with regard to them. Second, Dr. Petrich made clear that the goals of control of Petrocelli's mood swings and alcohol and drug rehabilitation would require an intensive treatment program. However, the jury heard that, following the kidnapping conviction, and before he killed Barker and Wilson, Petrocelli had twice left a drug rehabilitation program, after only one day on each occasion. On cross examination in the penalty phase of his trial, Petrocelli testified as follows:

> Q: How long did you stay with the drug rehabilitation?
>
> A: One day.
>
> Q: Then you came to Reno, isn't that correct?
>
> A: Yes.
>
> Q: Then you were arrested at gunpoint at a bank in Sparks?
>
> A: Yes.
>
> Q: Then returned to the State of Washington?
>
> A: Yes.

Q: Then placed back on probation by the judge?

A: Yes. I was put back on the drug program.

Q: How long did you stay the second time?

A: One day.

Exhibit U, p. 56 (ECF No. 75, p. 59). Because Dr. Petrich's report was written before Petrocelli twice rejected the sort of treatment recommended by Dr. Petrich, and before Petrocelli killed Barker and Wilson, his opinion that Petrocelli, with treatment, would pose minimal risk to the public, carried little evidentiary weight.

Defense Exhibit 2, in the penalty phase of the trial, was a report by John N. Chappel, M.D., of a psychiatric evaluation of Petrocelli, dated July 20, 1982. Exhibit J3, pp. 9-13 (ECF No. 71-2, pp. 59-63). Dr. Chappel's report includes portions graphically conveying Petrocelli's[10] potential for violence:

> Mr. Maida spent three years in the Marines. He denies any thoughts of killing anyone until he entered the service. His goal up to that time had been to play professional baseball. He was "scared of killing. But, they emphasized it until I believed I could." On one occasion a fellow marine kicked his bunk, "I pulled my gun and said I'll kill you." He was courtmartialed for this episode. In fights prior to being in the Marines Mr. Maida would regularly lose. However, in the

[10] "John Maida" was an alias used by Petrocelli.

> Marines "I found I started enjoying it. I knew I could kill – if they pushed me."
>
> Once when he was in Alaska he got into a fight with a man who was much bigger. He won that fight and afterwards the man told him that he had backed off when he became convinced that Mr. Maida would kill him if they continued. "People told me they could see death in my eyes."
>
> * * *
>
> The major disturbance at the present time is emotional. Mr. Maida is both depressed and angry. The depression is expressed through sobbing and tears. He had considered suicide several times, both in the jail in Seattle and in Washoe County, where he earlier tried to hang himself. His anger and rage are directed primarily at the police and the district attorneys in Seattle and Washoe County. He considers the Washoe County District Attorney as premeditating his murder. When his rage occurs Mr. Maida threatens to kill the prosecutor.

Exhibit J3, pp. 10, 12 (ECF No. 71-2, pp. 60, 62). Dr. Chappel wrote the following under the heading "Diagnostic Impression":

> Impulse control disorder.
>
> Antisocial personality disorder
>
> On the basis of the above examination it is my opinion that Mr. Maida is legally competent to stand trial. He has a factual understanding of

> the charges against him. He has sufficient mental capacity to understand the difference between right and wrong and to be able to cooperate with counsel in preparation of his defense.
>
> It is further my opinion that a more extensive evaluation of Mr. Maida might serve some useful purposes. First, it would be useful to him to have a better understanding of the reasons for his loss of impulse control and his reason for killing someone who was close to him. Second, if Mr. Maida is not sentenced to death and executed, it is my opinion that in his current state of mind he is very dangerous to those people to whom his rage is directed. A period of evaluation and a trial of treatment might serve a useful purpose in preventing any further homicidal outbursts of rage on his part. There is a third reason for having evaluation and treatment before his trial. In his present state of mind he is likely to display some of his impulsive and angry behavior in the court room. This could be damaging, prejudicial, and dangerous.

Id. at 12-13 (ECF No. 71-2, pp. 62-63). So, in essence, Dr. Chappel characterized Petrocelli as "very dangerous" and subject to "homicidal outbursts of rage," and supported that characterization with detailed background information, but suggested that "[a] period of evaluation and a trial of treatment *might* serve a useful purpose in preventing any further homicidal outbursts of rage on his part." *Id*. (emphasis added).

Defense Exhibit 1, in the penalty phase of the trial, was a report by Martin E. Gutride, Ph.D., of a psychological evaluation of Petrocelli, dated July 30, 1982. Exhibit J3, pp. 14-18 (ECF No. 71-2, pp. 64-68). After setting forth background information about Petrocelli's life, Dr. Gutride's report states that he believed Petrocelli to be "faking bad" in his responses to psychological testing. *Id*. at 17 (ECF No. 71-2, p. 67). The report continues:

> The pattern of the client's responses, however, point to some basic characteristics which appear valid for him. Specifically, he is a very impulsive individual who functions completely emotionally when upset. At such times, he does not exercise any control or rational thinking processes. He is an angry person, with a high potential for violence. He seems to view his life as a struggle against authority and "the system." He is unlikely to act within normal social conventions. The client is very mistrustful of others and seems very much alone in the world. He has little sense of connectiveness with parent figures, particularly mother. He may find it quite difficult to establish and maintain positive heterosexual relationships. There are indications the client may have a death wish and his history of suicide attempts, as well as violence towards others, makes him a relatively high suicide risk at this time.

Id. at 17-18 (ECF No. 71-2, pp. 67-68). Dr. Gutride's report concludes as follows:

> The diagnostic impression based on history and his response style during this evaluation is that

> of an antisocial personality with paranoid features. He is capable of losing contact with reality when emotionally upset and behaving purely emotionally, with little concern for what he's doing. The personal distress he exhibited during the interview seems genuine and the client may truly desire some mental health treatment. His ability to profit from such treatment is questionable [due] to the depth of this client's distrust of others. He can be quite dangerous to others as well as himself and treatment should be offered in a setting where the client can be closely monitored.

Id. at 18 (ECF No. 71-2, p. 68). In his testimony in the prosecution's rebuttal case, in the penalty phase of the trial, Dr. Gutride reiterated that he felt that Petrocelli had been faking in his responses to the testing, and he went on to testify as follows, regarding the nature of an antisocial personality disorder:

> Q: Does an unsocial personality in – have anything to do with being insane or insanity?
>
> A: It does not imply an individual is unable to think properly or conduct themselves conventionally. It relates mostly to a style of living. Unsocial with paranoid tendencies.

Exhibit U, p. 64 (ECF No. 75, p. 67). In short, Dr. Gutride found Petrocelli to be "quite dangerous," and "an angry person, with a high potential for violence," and opined that Petrocelli's "ability to profit from ... treatment is questionable." Exhibit J3, pp. 17-18 (ECF No. 71-2, pp. 67-68).

Against this background, with respect to the evidence concerning Petrocelli's potential for future dangerousness, in response to the defense's introduction into evidence of the reports of Dr. Petrich, Dr. Chappel, and Dr. Gutride, the prosecution called Dr. Gerow to testify. Exhibit U, pp. 65-69 (ECF No. 75, pp. 68-72). Dr. Gerow testified – consistent with the opinions of Dr. Chappel and Dr. Gutride – that he diagnosed Petrocelli as having a psychopathic or antisocial personality. *Id*. at 66 (ECF No. 75, p. 69). Dr. Gerow explained that the two terms, "psychopathic personality" and "antisocial personality," are synonymous. *Id.* Dr. Gerow testified as follows:

> Q: Would you describe a psychopathic personality?
>
> A: Everybody has a personality. A psychopathic personality is fortunately, a rare personality. It's someone who is very callous and selfish, someone unreliable and irresponsible. It's someone who cannot form ties to other people, someone who is superficial in their relationship –
>
> * * *
>
> A: Someone who forms superficial relationships with other people because they are unable to form strong ties or feel deeply about other people.
>
> Q: What is the person's ability to live within the law? How does that person relate to society?
>
> A: People with psychopathic personalities are repeatedly in trouble with the law.

Q: What's the reason?

A: The reasons primarily are that they don't believe in the rules that society set up that governs the rest of us. They ignore the rules and are therefore constantly in trouble. The other reason is when they get in trouble they don't learn from it so they continue to get into trouble because the experience of punishment doesn't help us.

Q: Is there any treatment for a psychopathic personality?

A: There is no treatment at all. A psychiatrist doesn't treat the condition because it's not treatable.

Q: Is it long-standing or does it go away?

A: It starts early in life, it gets considerably worse during the adolescent years and doesn't go away. It persists throughout life.

Q: What's the violence potential of a psychopathic?

A: It varies among psychopathics but people who have this personality problem, who have a history of violence, tend to repeat violent actions because they don't learn from experience or punishment, so the propensity for further violence is quite high.

* * *

Q: Is being a psychopathic, is that in your opinion, a mental disturbance?

A: Yes, it's a mental disturbance.

Q: Is it an emotional disturbance?

A; Yes, it's an emotional disturbance.

Q: For which there is no cure?

A: There is no cure.

Id. at 66-68 (ECF No. 75, pp. 69-71). It is notable that none of this testimony by Dr. Gerow relied at all upon his examination of Petrocelli; rather, in this testimony, Dr. Gerow merely conveyed his opinions about psychopathy and antisocial personality disorder, in general. This testimony was proper, despite the arguable violations of Petrocelli's rights under the Sixth Amendment and vis-a-vis the psychotherapist-patient privilege. The only testimony by Dr. Gerow that related his opinions about psychopathy and antisocial personality disorder to Petrocelli, in particular, was the following:

> Q: How does that relate to Mr. Petrocelli? You said you diagnosed him as a psychopathic. How do all the things – the no cure, the callousness, how does that apply to him?
>
> A: I think that describes him quite well.
>
> Q: Everything that you have of the individual –
>
> A: Yes?

Id. at 68 (ECF No. 75, p. 71).

The prosecutor addressed the doctors' opinions about Petrocelli's mental status, in his closing argument, as follows:

> Number two. The murder was committed while the defendant was under the influence of extreme mental or emotional distress. Now, all the doctors have said that Mr. Petrocelli is an antisocial, also known as a psychopath, which means he is unable – he will not live within society, will not live within the rules, does what he pleases, victimizes, is callous and cool and manipulative, and does all these things, which of course, we saw evidence of in this case. All three doctors have agreed. It's unusual for doctors to agree. It's extremely unusual for doctors to agree. But they do in this case and each one of them says, Dr. Gutride, that he is an angry person with a high potential of violence. He seems to view his life as a struggle against authority and such. He is unlikely to act within normal society's conventions. Dr. Gutride says, his ability to profit from such treatment, in other words, treatment of this – Dr. Gerow has said there is no treatment, he will be a psychopathic personality unfortunately. "Very rare," Dr. Gerow said. His ability to profit from such treatment is questionable. He can be quite dangerous to us, to others. That's Dr. Gutride.
>
> Dr. Chappel. Dr. Chappel is not consistent as to the date. He discusses, in his opinion, the current state of mind as very dangerous to most people at whom his rage is directed – and the antisocial personality. And we have one other

report which I will be getting back to. This other report – is a duplicate – of Mr. Petrocelli in Seattle, of the kidnapping, and I commend it to you for great knowledge. That's the report on which he got probation.

Remember what Mr. Petrocelli did with Mr. Gutride was in defect when he said he was faking, -- faking it up -- being manipulative of the doctor. The doctor goes on, selfish, antisocial personality. He was put on an alcohol and drug rehabilitation, and appears to present a minimal risk to the community. To the rest of this, it discusses, that he was placed in an alcohol rehabilitation center from which he escaped, and first came to Reno, was sent back and placed back in the rehabilitation center where he escaped the first date, and killed the victim of the kidnapping.

This report is not worth the paper it's written on. One, it's a year ago. Two, three doctors here are able to see the true Tracy Petrocelli, and his aims, have said that he is a psychopath and I submit to you that although, perhaps maybe if you stretch the word and thought, that might be a mitigating circumstance because it might be extreme mental or emotional disturbance. I would submit to you, implicit in that is, there is treatment available for this person. What psychopath means, essentially, is a mean, bad person who has never changed and who will continue to victimize.

Exhibit U, pp. 82-84 (ECF No. 75, pp. 85-87).[11] The prosecutor revisited this issue in his rebuttal argument:

> When you have been diagnosed by three doctors as being a psychopath, callous, a cold and manipulative killer – an affliction – like psycho, a psychotic, where you're insane, but an affliction is not a psychopath, a psychopathic killer, which is what Tracy Petrocelli is. It's a perversion of the language and a humanitarian spirit in the mitigating circumstances, is called being a person who will continue to kill, a person who will continue to rob and will continue to steal because he just doesn't give a darn about other people. He's callous, insensitive, and selfish. It's a perversion of the state statutes, it's a perversion of the word mitigating, to call that an affliction, and to put Tracy Petrocelli in the same group of people who need help, mentally ill people.
>
> Mr. Wishart [defense counsel] made reference to the fact that Dr. Chappel talked about a treatment plan and that Dr. Gerow at all talks about a treatment plan too, and draws of that that Melanie Barker is dead and James Wilson is dead, but reads carefully within what Dr. Chappel says, an excellent psychiatrist, he thinks he is terrible here – he says, if placed under sentence of death and executed, then it's my opinion the current state of mind, that he is

[11] Dr. Gutride's name and Dr. Chappel's name are misspelled in parts of the transcript. Those misspellings are corrected here.

dangerous to most people who are in the direction of his rage. That a period of evaluation and a time of treatment might serve a reasonable purpose. It might serve a purpose in preventing more murders. Do we take that chance? By the way, what do we say? And this is a concern to other prisoners in prison with Mr. Petrocelli when we say, "Here is Mr. Petrocelli to spend some years among you; he is a homocidal (sic) psychopathic, dangerous to those at whom his rage is directed."

If he gets some treatment we might be able to prevent anymore murders – might – what do we say to them?

Dr. Gutride, "His ability to profit from treatment is questionable due to the depth of this client's distrust of others." He can be quite dangerous to others. As well as, also, even if treatment should be offered, if it is, because these are doctors, all within a setting where the clients can be closely monitored so he – so he doesn't kill anyone, is what it means. That's me – not the doctor – so he doesn't kill anyone. He isn't likely, say the doctors, to act within normal social conventions. That's stated unqualified there. And we can go to Dr. Gerow. Ladies and gentlemen, that he says he is mentally sick could be confused in mitigating, but to call Tracy Petrocelli a sick man – because sick implies an ability to be cured but the sad and terrifying fact is he will continue to do this.

* * *

> There is the statement he will not learn from punishment. He will not learn, he cannot learn.

Id. at 92-94 (ECF No. 75, pp. 95-97). The closing argument of the prosecutor illustrated that Dr. Gerow's opinions did not stand out appreciably from, or add significantly to, the opinions of Drs. Chappel and Gutride.

If, as is here assumed, the testimony of Dr. Gerow violated Petrocelli's rights, the violation would justify overturning Petrocelli's death sentence only if Petrocelli could establish that the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also Pizzuto v. Arave*, 280 F.3d 949, 970 (2002) (applying harmless error analysis to Fifth and Sixth Amendment violations, for using "uncounseled, non-Mirandized statements" against capital defendant). The court finds that Petrocelli has not made any such showing. 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. Furthermore, Dr. Gerow's testimony was not so divergent from the testimony of Drs. Chappel and Gutride so as to significantly affect the outcome of the trial. Moreover, there was ample evidence, aside from the testimony of Dr. Gerow, that Petrocelli would pose a danger to others in the future: the evidence of Petrocelli's killing of Wilson and Petrocelli's behaior immediately following that killing; Lloyd Maloney's testimony about Petrocelli's killing of 18-year-old

Melanie Barker less than six months before he killed Wilson; the testimony of Maureen Lawler, Barker's mother, about Petrocelli's kidnapping of Barker about a year before Wilson's murder; Lawler's testimony that, in a telephone conversation with Petrocelli prior to his kidnapping of Barker, Petrocelli threatened to "blow [her] away;" the testimony of John J. Lukas, who had been in jail with Petrocelli while Petrocelli was awaiting trial, that Petrocelli wanted him to help with an escape attempt, and threatened him; Lukas' testimony that Petrocelli told him that after his escape he planned to "get rid of" a woman he considered a snitch, and planned to also "get rid of" the district attorney; Dr. Petrich's opinion that Petrocelli would require "intensive treatment" in order to present minimal danger to the community; Petrocelli's testimony that he twice left drug treatment after one day; Dr. Chappel's opinion that if Petrocelli "is not sentenced to death and executed, it is my opinion that in his current state of mind he is very dangerous to those people to whom his rage is directed;" Dr. Gutride's opinion that Petrocelli's ability to profit from treatment "is questionable [due] to the depth of [his] distrust of others," and that "he can be quite dangerous to others as well as himself and treatment should be offered in a setting where the client can be closely monitored." In view of the nature of Dr. Gerow's testimony, and in view of the other evidence regarding Petrocelli's capacity for violence, the court finds that Petrocelli has not shown that the testimony of Dr. Gerow had a substantial and injurious effect or influence in determining the jury's verdict.

With respect to Petrocelli's related claims of ineffective assistance of his appellate counsel, for

failing to assert his claims regarding the testimony of Dr. Gerow on direct appeal, a petitioner claiming ineffective assistance of counsel must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. Petrocelli has not shown that there is a reasonable probability that, had the claims regarding Dr. Gerow been raised on appeal, the outcome in state court would have been different.

The court will deny Petrocelli habeas corpus relief with respect to Ground 12.

Certificate of Appealability

This is a final order adverse to the petitioner. Therefore, Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts mandates that this court must issue or deny a certificate of appealability. *See* 28 U.S.C. § 2253(c); Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts; Fed. R. App. P. 22(b).

The standard for the issuance of a certificate of appealability requires a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c). The Supreme Court has interpreted 28 U.S.C. §2253(c) as follows:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's

> assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir.2000).

The court finds that, applying these standards, a certificate of appealability is warranted with respect to Grounds 6(d), 12, and 13, of Petrocelli's fourth amended habeas petition. The court will grant a certificate of appealability as to those claims. The court declines to issue a certificate of appealability for Petrocelli's remaining claims.

IT IS THEREFORE ORDERED that petitioner's fourth amended petition for writ of habeas corpus (ECF No. 162) is **DENIED**.

IT IS FURTHER ORDERED that petitioner is granted a certificate of appealability with respect to Grounds 6(d), 12, and 13 of his fourth amended petition for writ of habeas corpus.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment accordingly.

Dated this 8th day of October, 2013.

/c/ R. James
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
******* DISTRICT OF NEVADA**

CASE NUMBER: 3:94-CV-00459-RCJ

[Filed October 9, 2013]

TRACY PETROCELLI,
Petitioner,

V.

RENEE BAKER, *et al.*,
Respondents.

JUDGMENT IN A CIVIL CASE

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

_X_ **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that petitioner's fourth amended petition for writ of habeas corpus (ECF No. 162) is **DENIED**.

IT IS FURTHER ORDERED that petitioner is granted a certificate of appealability with respect to Grounds 6(d), 12, and 13 of his fourth amended petition for writ of habeas corpus.

October 9, 2013

LANCE S. WILSON
Clerk

/s/ J. Cotter
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

3:94-cv-0459-RCJ-VPC

[Filed April 9, 2014]

TRACY PETROCELLI, Petitioner,	)
vs.	)
RENEE BAKER, *et al.*, Respondents.	)

ORDER

Introduction

In this capital habeas corpus action, in an order entered October 9, 2013, the court denied the petitioner, Tracy Petrocelli, habeas corpus relief (ECF No. 246) on the remaining claims in his fourth amended habeas petition -- Grounds 6(c), 6(d), 7(b), 7(f), 10, 12, and 13 -- and granted a certificate of appealability with respect to three of his claims -- Grounds 6(d), 12, and 13.

On November 4, 2013, Petrocelli filed a "Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. Proc. 59(e)" (ECF No. 248). Respondents filed an opposition to that motion on January 30, 2014 (ECF

No. 252). Petrocelli filed a reply on February 20, 2014 (ECF No. 254). In this order, the court denies the motion to alter or amend judgment.

Standards Applicable to Rule 59(e) Motion

Petrocelli's motion to alter or amend judgment was filed on November 4, 2014, 26 days after entry of the judgment. It was, therefore, timely filed under Federal Rule of Civil Procedure 59(e).

"A motion for reconsideration under Rule 59(e) should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir.1999) (en banc) (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir.1999)). In *McDowell*, the court quoted Charles Alan Wright, *et al.*, Federal Practice and Procedure, as follows:

> Since specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion. However, reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly. There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct *manifest errors of law or fact upon which the judgment is based*. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if

> necessary to prevent manifest injustice.... Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

McDowell, 197 F.3d at 1255 n.1 (quoting 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (2d ed.1995)) (emphasis in original); *see also Ybarra v. McDaniel,* 656 F.3d 984, 998 (9th Cir.2011).

Ground 6(c)

Petrocelli first asks the court to reconsider its denial of relief on Ground 6(c) of his fourth amended habeas petition. Motion to Alter or Amend, pp. 5-10.

In Ground 6(c), Petrocelli claims that his constitutional rights were violated "due to the failure of trial counsel to provide reasonably effective assistance at the guilt/innocence phase of his trial," "for failing to object to the admission of the handgun." Fourth Amended Petition (ECF No. 162), pp. 144, 150.

In the order entered October 9, 2013, the court applied *Strickland v. Washington*, 466 U.S. 668 (1984), and denied this claim, ruling that "[t]here is no conceivable way that the admission of the murder weapon into evidence prejudiced Petrocelli's defense." Order entered October 9, 2013 (ECF No. 246), p. 9. The court explained that "[a]t trial, there was no question who killed Wilson, and there was no question what weapon was used." *Id*. at 9-10 (citing Petrocelli's Opening Statement, Exhibit P, pp. 5-14 (ECF No. 73-1, pp. 66-75)).[1] The court explained, further, in the

[1] As in the October 9, 2013, order, unless otherwise noted, the exhibits identified by numbers were filed by Petrocelli, and are

October 9, 2013, order, that Petrocelli testified that he killed James Wilson with his own .22 caliber pistol, and Petrocelli also testified that in October 1981 he killed his girlfriend, Melanie Barber, with the same .22 pistol. *See id*. at 11 (citing Testimony of Tracy Petrocelli, Exhibit P, pp. 38-40 (ECF No. 73-1, pp. 99-101), pp. 69-70 (ECF No. 73-1, pp. 130-31), p. 89 (ECF No. 73-1, p. 150), p. 95 (ECF No. 73-1, p. 156)). The court concluded:

> Therefore, even assuming that the discovery of the handgun was improper, and assuming counsel's performance, in failing to object to its admission into evidence, was unreasonable, there was no violation of Petrocelli's constitutional right to effective assistance of counsel, because there is no reasonable probability that, but for the admission of the handgun into evidence, the result of the trial would have been different. Petrocelli was not prejudiced by his attorney's failure to object to the admission of the handgun into evidence.

Id. at 11.

In his motion to alter or amend judgment, Petrocelli argues that the court applied an incorrect standard in assessing the question of prejudice under *Strickland*. *See* Motion to Alter or Amend Judgment, pp. 5-7. This argument is meritless. The court applied the well-established prejudice standard prescribed by the

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located in the record at ECF Nos. 163 through 169, and, unless otherwise noted, the exhibits identified by letters were filed by respondents, and are located in the record at ECF Nos. 36 and 70 through 76.

Strickland case. In the October 9, 2013 order, the court stated:

> In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded a two prong test for analysis of claims of ineffective assistance of counsel: a petitioner claiming ineffective assistance of counsel must demonstrate (1) that his attorney's representation "fell below an objective standard of reasonableness," and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688; *see also id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

Order entered October 9, 2013, p. 8. Petrocelli has not shown that the court committed clear error in this regard.

Next, Petrocelli argues that the court misconstrued his analysis of the harmfulness of the admission of the murder weapon into evidence. *See* Motion to Alter or Amend Judgment, pp. 7-9. Petrocelli argues that the admission of the pistol into evidence "led directly to the jury being allowed to hear evidence of the prior murder of Melanie Barker." Reply in Support of Motion to Alter or Amend Judgment, p. 6; *see also* Motion to Alter or Amend Judgment, p. 9. Petrocelli has never shown, however, that admission of the murder weapon into evidence was necessary to the admission of evidence regarding the Barker killing. Petrocelli admitted that

he killed Wilson and Barker with the same gun. Testimony of Tracy Petrocelli, Exhibit P, pp. 38-40 (ECF No. 73-1, pp. 99-101), pp. 69-70 (ECF No. 73-1, pp. 130-31), p. 89 (ECF No. 73-1, p. 150), p. 95 (ECF No. 73-1, p. 156)). There was no question about that at trial. As far as this court can tell, the evidence regarding the Barker killing would have been admitted whether or not the murder weapon was actually introduced into evidence; Petrocelli has not shown otherwise. Petrocelli adds nothing new to his argument on this point in his motion to alter or amend the judgment, and he has not shown clear error.

Petrocelli then goes on, in his motion to alter or amend the judgment, to argue that the court erred in failing to consider, cumulatively, his claims of ineffective assistance of trial counsel. *See* Motion to Alter or Amend Judgment, pp. 9-10. This argument is without merit. Ground 7(f) of Petrocelli's fourth amended habeas petition asserts that "[e]ven if no single instance of ineffectiveness at either phase of the trial rises to the level of prejudice requiring a new trial, under the *Strickland* standards, ineffectiveness must be assessed in terms of the cumulative impact of all instances of deficient performance and prejudice." Fourth Amended Petition, p. 186. The court ruled on that claim in the October 9, 2013 order, considering, cumulatively, the effect of all conceivable trial attorney error shown by Petrocelli. *See* Order entered October 9, 2013, pp. 23-24.

Petrocelli also asks the court to reconsider the denial of a certificate of appealability with respect to Ground 6(c). However, because Petrocelli has not made any showing of any possibility that he could have been

prejudiced by the admission of the murder weapon into evidence, the court remains of the opinion that the denial of this claim is beyond debate by reasonable jurists. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir.2000).

The court will deny the motion to alter or amend judgment, in all respects, with regard to Ground 6(c).

Grounds 6(d) and 13

In Ground 6(d), Petrocelli claims that his constitutional rights were violated "due to the failure of trial counsel to provide reasonably effective assistance at the guilt/innocence phase of his trial," "for failing to object to the testimony of Melvin Powell." Fourth Amended Petition, pp. 144, 160. Petrocelli claims that, after his arrest on April 19, 1982, he was interviewed by detectives at the Las Vegas police department, and, in the course of that interview, the detectives violated his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). *Id*. at 160-63. He claims, in turn, that the April 19, 1982, interview led investigators to Melvin Powell, and, therefore, his trial counsel should have objected to Powell's testimony. *Id*. at 163. In Ground 13, Petrocelli claims that his Fifth and Sixth Amendment rights were violated as a result of the post-arrest interrogations. Fourth Amended Petition, p. 248.

In the October 9, 2013, order, citing *Davis v. United States*, 512 U.S. 452 (1994), the court ruled that there was no *Miranda* violation, because Petrocelli did not unambiguously request counsel, and there was, therefore, no requirement that the police discontinue

the questioning. *See* Order entered October 9, 2013, pp. 16-18. Thus, Petrocelli's trial counsel was not ineffective for failing to object to Powell's testimony on the ground that it was the fruit of a *Miranda* violation. *See id*. The court also ruled, in the October 9, 2013, order, that, even if, for the sake of analysis, it is assumed that there was a *Miranda* violation, there is no reasonable probability that, but for counsel's failure to object to Powell's testimony on that basis, the result of Petrocelli's trial would have been different. *See id*. at 18-19 (citing *Strickland*, 466 U.S. at 688, 694).

Petrocelli moves for reconsideration of these rulings, but asserts only the same arguments that appeared in his fourth amended petition and his reply. Petrocelli adds nothing new with regard to these claims, and he does not show that the court committed clear error. The motion to alter or amend judgment will be denied with regard to Grounds 6(d) and 13.

Ground 7(b)

In Ground 7(b) of his fourth amended petition, Petrocelli claims that his constitutional rights were violated "due to the failure of trial counsel to provide reasonably effective assistance at the penalty phase of his trial," "for failing to properly object to evidence of a prior conviction, allowing the jury to find the aggravating factor of a conviction of a felony involving the use of force." Fourth Amended Petition, pp. 164, 180.

The court ruled that "[t]o the extent that the claim made in Ground 7(b) of Petrocelli's fourth amended petition is the same as the claim made in Ground 12 of his first amended petition -- that is, to the extent that

the claim in Ground 7(b) focuses on counsel's failure to object to evidence regarding the Washington kidnapping -- it is foreclosed by the doctrine of law of the case." Order entered October 9, 2013, pp. 21-22. To the extent that Ground 7(b) also includes allegations concerning trial counsel's advice regarding Petrocelli's decision to testify at the guilt phase of trial, that same claim is separately set forth in Ground 6(b) of the fourth amended petition, and has been dismissed. *See* Order entered October 9, 2013, p. 22; *see also* Order entered March 23, 2010 (ECF No. 200), pp. 11-12 (dismissing Ground 6(b) on the basis that the claim was raised in Petrocelli's first amended petition, denied by this court, and then abandoned by Petrocelli on appeal). The court, therefore, denied relief on Ground 7(b), and denied Petrocelli a certificate of appealability with regard to that claim. *See* Order entered October 9, 2013, pp. 20-23.

Petrocelli appears to request reconsideration of the denial of a certificate of appealability with regard to Ground 7(b). *See* Motion to Alter or Amend Judgment, p. 28. However, he sets forth no argument whatsoever with respect to that request.

The court, therefore, will deny Petrocelli's motion to alter or amend the judgment with regard to Ground 7(b).

Ground 7(f)

Next, Petrocelli asks the court to reconsider its denial of relief on Ground 7(f).

In Ground 7(f), Petrocelli claims:

> Even if no single instance of ineffectiveness at either phase of the trial rises to the level of prejudice requiring a new trial, under the *Strickland* standards, ineffectiveness must be assessed in terms of the cumulative impact of all instances of deficient performance and prejudice.

Fourth Amended Petition, p. 186. Petrocelli incorporates in Ground 7(f) the facts and arguments he sets forth in all of Grounds 6 and 7. *Id*.

In the October 9, 2013, order, the court denied relief on Ground 7(f), ruling as follows:

> Two of Petrocelli's claims of ineffective assistance of counsel are pertinent to this cumulative error claim: the claims in Grounds 6(c) and 6(d). As is discussed above, with respect to Ground 6(c), the court assumes, for the purpose of this order, that Petrocelli's counsel acted unreasonably in not challenging the admission of the handgun into evidence at the guilt phase of his trial, but the court concludes that Petrocelli was not prejudiced by that evidence. As is also discussed above, with respect to Ground 6(d), the court finds that Petrocelli's *Miranda* rights were not violated in the April 19, 1982, interview, and, in addition and alternatively, the court finds that Petrocelli was not prejudiced by the testimony of Melvin Powell, which allegedly stemmed from the April 19, 1982, interview.
>
> As is discussed above, the court sees no way that the admission of the handgun into evidence

prejudiced Petrocelli – that evidence had no bearing on any contested factual issue in the case.... That remains the conclusion of the court when the attorney error identified in Ground 6(c) is considered together with the attorney error considered in the alternative in Ground 6(d). There is no synergy between the handgun evidence and the Powell testimony; the two were unrelated. Because there was no conceivable prejudice to Petrocelli from the admission of the handgun into evidence, and because the handgun evidence and the Powell testimony were wholly unrelated and without any evidentiary synergy, the cumulative error analysis is no different from the prejudice analysis of the attorney error considered in the alternative in Ground 6(d)....

The court finds, therefore, that, even if it is assumed that Petrocelli's *Miranda* rights were violated in the April 19, 1982, interview, as asserted by Petrocelli in Ground 6(d), and even if that error is considered together with the attorney error assumed for purposes of the analysis of Ground 6(c), there is no reasonable probability that, but for counsel's errors, the result of Petrocelli's trial would have been different. *See Strickland*, 466 U.S. at 688, 694. The alleged attorney errors under consideration here did not have a substantial and injurious effect or influence on the jury's verdict, and did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. *See Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993); *Donnelly v. DeChristoforo*, 416 U.S. 637,

643 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 298, 302-03 (1973); *Parle v. Runnels*, 505 F.3d 922, 926-27 (9th Cir.2007).

Order entered October 9, 2013, pp. 23-24 (citations omitted).

In arguing for reconsideration of this ruling, Petrocelli asserts – as he does with regard to Ground 6(c), discussed above – that the jury "heard the circumstances of the shooting of Ms. Barker because of the introduction of the pistol," and that he was therefore prejudiced by counsel's failure to object to admission of the pistol, as well as the attorney error alleged in Ground 6(d). *See* Motion to Alter or Amend Judgment, p. 12. But, again, there is no showing that admission of the handgun into evidence led to admission of evidence regarding the Barker homicide; every indication is that evidence of the Barker homicide would have been admitted with or without the handgun in evidence. There is no showing of any prejudice flowing from the admission of the handgun into evidence. Therefore, it remains that the cumulative error analysis is no different from the prejudice analysis of the attorney error considered in the alternative with respect to Ground 6(d).

Because Petrocelli has added nothing to the analysis of Ground 7(f), the court remains of the opinion that the denial of this claim is beyond debate by reasonable jurists, and that a certificate of appealability is unwarranted with regard to it. *See Slack*, 529 U.S. at 484; *see also James*, 221 F.3d at 1077-79.

The court will deny the motion to alter or amend judgment in all respects with regard to Ground 7(f).

Ground 10

In Ground 10, Petrocelli claims that "the statutorily-mandated reasonable doubt instruction unconstitutionally minimized the state's burden of proof and infected the trial and sentencing process." Fourth Amended Petition, p. 197.

In the October 9, 2013, order, after ruling Ground 10 procedurally viable and subject to resolution on its merits, the court ruled on the claim as follows:

> The claim in Ground 10 fails on its merits, however. The Ninth Circuit Court of Appeals has held this same Nevada jury instruction constitutional, both before and after *Cage* [*v. Louisiana*, 498 U.S. 39 (1990)] was decided by the Supreme Court. *See Ramirez v. Hatcher*, 136 F.3d 1209, 1214 (9th Cir.), *cert. denied*, 525 U.S. 967 (1998); *Darnell v. Swinney*, 823 F.2d 299, 302 (9th Cir.1987), *cert. denied*, 484 U.S. 1059 (1988). Also, more recently, in a capital case subject to AEDPA standards, the Ninth Circuit Court of Appeals ruled that the law of this circuit forecloses a claim such as this, and held the issue to be unworthy of a certificate of appealability. *See Nevius v. McDaniel*, 218 F.3d 940, 945 (9th Cir.2000). In view of *Ramirez*, *Darnell*, and *Nevius*, the court concludes that Ground 10 is without merit. The court will deny Petrocelli habeas corpus relief with respect to Ground 10.

Order entered October 9, 2013, p. 26.

In his motion to alter or amend the judgment, Petrocelli appears to request reconsideration of the denial of a certificate of appealability with regard to Ground 10 (*see* Motion to Alter or Amend Judgment, p. 28), but he sets forth no argument with respect to that request.

The court, therefore, will deny Petrocelli's motion to alter or amend the judgment with regard to Ground 10.

Ground 12

In Ground 12 of his fourth amended habeas petition, Petrocelli claims that his rights under the Fifth and Sixth Amendments were violated due to "the admission of testimony from Dr. Gerow, who presented psychiatric testimony against the defendant based on communications made by the defendant during a court-ordered psychiatric examination." Fourth Amended Petition, pp. 220, 238; *see also, generally, id*. at 220-47. In Ground 12, Petrocelli also claims that it was ineffective assistance of counsel for his appellate counsel and his state post-conviction counsel to fail to claim violations of his Fifth and Sixth Amendment rights, as well as the psychotherapist-patient privilege, on his direct appeal and in his first and second state habeas actions. *Id*. at 238-44.

In the October 9, 2013, order, the court denied habeas relief on this claim. The court first ruled meritless Petrocelli's independent claim based on alleged ineffectiveness of counsel in his first and second state habeas actions. *See* Order entered October 9, 2013, p. 28 (citing 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral postconviction proceedings

shall not be a ground for relief in a proceeding arising under section 2254.")). Then, turning to Petrocelli's claims that Dr. Gerow's testimony violated his rights under the Fifth and Sixth Amendments, the court ruled that, assuming Dr. Gerow's testimony should have been excluded, Petrocelli was not prejudiced. *Id*. at 28-40. Finally, the court ruled that, with respect to Petrocelli's claims of ineffective assistance of his appellate counsel, for failing to assert his claims regarding the testimony of Dr. Gerow on direct appeal, Petrocelli made no showing that there is a reasonable probability that, had the claims regarding Dr. Gerow been raised on appeal, the outcome in state court would have been different. *Id*. at 40. The court denied Petrocelli relief on Ground 12, but granted him a certificate of appealability with respect to that claim. *Id*. at 40-41.

Petrocelli now asks the court to reconsider its ruling on Ground 12. *See* Motion to Alter or Amend Judgment, pp. 14-25.

Petrocelli first argues that the court should reconsider its ruling on this claim in light of *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler*, ___ U.S. ___, 133 S.Ct. 1911, 1918, 185 L.Ed.2d 1044 (2013). In *Martinez* and *Trevino*, the Supreme Court established that, in certain circumstances, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of trial counsel, if state post-conviction counsel was ineffective for not raising the claim. Petrocelli argues:

> Although this Court did consider the claim on its merits, to the extent it was denied on the basis

> that it was not raised in the initial round of state habeas proceedings, that holding should now be reconsidered in light of the holdings in [*Martinez*] and [*Trevino*].

Motion to Alter or Amend Judgment, p. 14; *see also* Reply in Support of Motion to Alter or Amend Judgment, p. 9. And, he reiterates his position at the conclusion of this argument, as follows:

> Hence, these claims are not procedurally defaulted. Mr. Petrocelli has asserted that ineffective assistance of state habeas counsel serves as "cause" for any procedural default of his claims of ineffective assistance of trial counsel not brought in the initial state habeas proceedings, under the newly-recognized *Martinez/Trevino* exception.

Id. at 19. This argument by Petrocelli is completely beside the point, however. The court simply did not hold the claim in Ground 12 to be procedurally defaulted. *See* Order entered October 9, 2013, pp. 28-40. The court ruled on Ground 12 solely on its merits. *Id*. Petrocelli's citation to *Martinez* and *Trevino*, and his argument that, in light of those cases, any procedural default of Ground 12 should be excused, is frivolous.

Next, Petrocelli argues that the court erred in ruling that "assuming Dr. Gerow's testimony should have been excluded, Petrocelli was not prejudiced." *See* Motion to Alter or Amend Judgment, pp. 19-25; *see also* Order entered October 9, 2013, p. 28. In this part of his motion to alter or amend judgment, Petrocelli reargues the issue whether he was prejudiced by Dr. Gerow's

testimony. In the October 9, 2013, order, the court set forth its analysis of this issue in detail. *See* Order entered October 9, 2013, pp. 28-40. Petrocelli offers nothing new on this issue in his motion to alter or amend judgment, and he does not show that the court committed clear error.

The court will deny the motion to alter or amend judgment with regard to Ground 12.

IT IS THEREFORE ORDERED that petitioner's Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. Proc. 59(e) (ECF No. 248) is **DENIED**.

Dated this 9th day of April, 2014.

/c/ R. James
UNITED STATES DISTRICT JUDGE