No. 17-769

In the Supreme Court of the United States

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

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

REPLY BRIEF FOR PETITIONER

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Estelle v. Smith, 451 U.S. 454 (1981), does not allow a defendant to use his mental status as a sword while hiding behind the Fifth and Sixth Amendments to prevent the prosecution from challenging his defense. That principle applies equally in a penalty hearing where the defendant presents psychiatric evidence to establish mitigating circumstances. *Estelle*, 451 U.S. at 472. Precluding presentation of relevant psychiatric evidence on rebuttal "would undermine the adversarial process, allowing a defendant to provide the jury, through an expert operating as a proxy, with a one-sided and potentially inaccurate view of his mental state …." *Kansas v. Cheever*, 134 S. Ct. 596, 601 (2013). And where the only arguably inadmissible evidence is cumulative of evidence the defense already presented, any error is harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

Suggesting that the similarities between this case and *Estelle* are "striking" ignores a material fact that changes the analysis under *Estelle*: Petrocelli opened the door to rebuttal evidence by presenting his own psychiatric evidence. Petrocelli's reliance on jailhouse informant testimony supports the Warden's position: statements improperly obtained by jailhouse informants are admissible for impeachment. *See*, *e.g.*, *Kansas v. Ventris*, 556 U.S. 586 (2009). The rationale for admitting such statements as impeachment material dovetails with the reasons for allowing psychiatric evidence on rebuttal. *Cheever*, 134 S. Ct. at 601 ("The admission of this rebuttal testimony harmonizes with the principle that when a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination.").

Additionally, there is no prejudice: the only aspect of Dr. Gerow's testimony that was not already before the jury is an independently admissible expert opinion. *See* App. 158, 160 (noting Drs. Chappel and Gutride described Petrocelli as "very dangerous," "subject to 'homicidal outburst of rage,'" and having "a high potential for violence"). And Petrocelli's attempts to turn this case into something more than a violation of *Estelle*, including falsely asserting that the prosecutor utilized an incorrect jury instruction to enflame the passions of the jury, are not supported by the law or the record.

Petrocelli fails to provide this Court with a reason to deny the petition. This case presents more than the prototypical issues of federalism, comity, and finality that exist in every habeas case. It gives the Court an opportunity to bring clarity to two issues that are likely to arise in AEDPA and non-AEDPA cases alike: (1) application of the Fifth and Sixth Amendments when a defendant puts his mental health at issue in a penalty hearing, and (2) application of harmless error in habeas cases.[1] This case warrants review.

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[1] Petrocelli attacks the Warden's challenge to the Ninth Circuit's rejection of the Nevada courts' factual findings as improperly relying upon a provision of AEDPA. Opp. at 1 n.2. But the presumption of correctness predates AEDPA. *See Sumner v. Mata*, 449 U.S. 539 (1981). And regardless of whether the former version of 28 U.S.C. § 2254(d) or the present version of 28 U.S.C. § 2254(e)(1) applies, it should follow that a federal court may not substitute its own unsupported factual determinations for what it believes to be "unsupported" state court findings. *See infra* Part II(C) (discussing contradictions between the record and the Ninth Circuit's factual findings).

I. The *Estelle* argument is not waived, and the petition squarely presents an issue that is not addressed by *Powell* or *Satterwhite* and identifies a clear split of authority.

The Warden disputes that he waived anything. Even if he did, Petrocelli's assertion that *Estelle*, *Satterwhite v. Texas*, 486 U.S. 249 (1988), and *Powell v. Texas*, 492 U.S. 680 (1989), foreclose the Warden's position is unsupportable. And the amended opinion creates a split of authority with a decision of the Fifth Circuit.

A. The Warden's *Estelle* argument is not waived.

While the Warden's Ninth Circuit answering brief did not cite *Estelle*, the Warden challenged Petrocelli's claim that Dr. Gerow's testimony was inadmissible while identifying the Nevada courts' determination that Dr. Gerow's testimony was offered to rebut defense efforts to establish mitigating circumstances through Drs. Chappel and Gutride. Respondent-Appellee's Answering Brief at 43-45, *Petrocelli v. Baker*, 869 F.3d 710 (9th Cir. 2017) (No. 14-99006) (Dkt. 27). Additionally, the Ninth Circuit decided the issue and expressly addressed the Warden's current position on *Estelle* in the amended opinion. App. 35 n.1.

This Court reviews judgments, not statements in opinions. *Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015). The Ninth Circuit's judgment directs the district court to conditionally grant Petrocelli's habeas petition, and the Warden's petition identifies issues based on the record that are worthy of this Court's review and undermine the validity of the judgment.

B. This Court can, and should, consider the *Estelle* issue.

Even if the *Estelle* argument was waived (which it wasn't), this Court can, and should, review the Ninth Circuit's judgment. *See*, *e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330 (2010) ("'Our practice permits review of an issue not pressed below so long as it has been passed upon.'") (citations and brackets omitted). The Ninth Circuit's amended opinion contains an obvious flaw: it overlooks this Court's acknowledgment that the facts of this case are materially different from *Estelle*, *Satterwhite*, and *Powell*. While accusing the Warden of misconstruing *Estelle*, Petrocelli fails to address *Estelle*'s express recognition that the facts of this case require a different result. And Petrocelli's attempts to distinguish *Buchanan v. Kentucky*, 483 U.S. 402 (1987), identify a gap in this Court's jurisprudence that can be filled with this case. Finally, the amended opinion creates a split of authority with *Hernandez v. Johnson*, 248 F.3d 344 (5th Cir. 2001).

1. This case squarely presents facts that distinguish this case from cases like *Estelle*, *Satterwhite*, and *Powell*.

Petrocelli doubles down on the Ninth Circuit's assertion that this case is the same as *Estelle*, except worse because the prosecutor sent Dr. Gerow to see Petrocelli.[2] Opp. 7, 15. But this ignores *Estelle*'s

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[2] Petrocelli's emphasis on the prosecution sending Dr. Gerow to see Petrocelli, rather than the trial court, creates another split of authority. The Third Circuit has concluded that testimony from an "outside expert" retained by the prosecutor to evaluate the

acknowledgment that the Fifth and Sixth Amendments do not preclude admission of compelled psychiatric testimony when the defendant puts his mental status at issue in a penalty hearing. 451 U.S. at 472.

First, Petrocelli suggests that the rebuttal nature of Dr. Gerow's testimony makes no difference because *Estelle*, too, involved rebuttal testimony. Opp. 17. However, in *Estelle*, Dr. Grigson only testified on rebuttal because a pretrial ruling precluded the prosecution from calling him during its case-in-chief. *Estelle*, 451 U.S. at 458-59. Had Dr. Grigson been called to rebut psychiatric evidence from the defense, *Estelle* would have ended differently. *Id.* at 472. Rebuttal evidence, like Dr. Gerow's, is permitted under *Estelle*.

This same distinction applies to *Satterwhite* and *Powell*. Petrocelli quotes language from *Satterwhite* acknowledging that only the prosecution presented psychiatric evidence in the penalty hearing. Opp. 29. And the same is true of *Powell*. *See* Pet. 12-15.

Also, Petrocelli misleadingly responds to the Warden's argument that the remedy for a surprise presentation of psychiatric evidence is a court-ordered evaluation. Opp. 23. The rule from *Estelle* is not designed to allow a defendant to present psychiatric evidence in his defense and then use the Fifth or Sixth Amendment to preclude relevant rebuttal from the State by refusing to undergo a court-ordered evaluation. *Estelle* put defense counsel on notice that

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defendant did not violate *Estelle*. *Re v. Snyder*, 293 F.3d 678, 681-83 (3d Cir. 2002).

putting his client's mental health at issue opens the door to psychiatric evidence on rebuttal. *Buchanan*, 483 U.S. at 424-25.[3] The choice that *Estelle* leaves for the defendant is deciding between not presenting his psychiatric evidence or submitting to an evaluation; *Estelle* does not allow him to put on his evidence *and* reject the evaluation.[4] And Petrocelli does not argue that he and his attorney were unaware of Dr. Gerow's evaluation.

Finally, Petrocelli's comparison to jailhouse informants drives home the Warden's emphasis on the contradiction between the Ninth Circuit's rulings regarding admissibility of Petrocelli's statements for impeachment purposes and Dr. Gerow's testimony as rebuttal evidence. *Compare* Opp. at 20, *with* Pet. 1, 13 n.5. This Court has already said that statements improperly obtained from jailhouse informant can be used for impeachment. *Ventris*, 556 U.S. at 593. And

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[3] Petrocelli's view of *Estelle* in this regard also disagrees with the Third Circuit's holding in *Re*, where that court rejected an argument that prior notice of a surprise rebuttal expert would have allowed defense counsel to change strategy. 293 F.3d at 683.

[4] Petrocelli also appears to assert that *Estelle* provides for a choice of expert. Opp. 19. But the citation Petrocelli provides for *Estelle* does not exist. More importantly, *Estelle* approvingly cited lower court decisions recognizing that the defendant could be ordered to undergo an evaluation "conducted by the *prosecution's* psychiatrist," 451 U.S. at 465-66 (emphasis added), and that such a prescription would apply in the penalty phase too, *id*. at 472. And the Court further approved of the lower court's decision to leave open the question whether a defendant would be precluded from presenting his own psychiatric evidence if he refused to undergo a court-ordered psychiatric evaluation. *Id*. 466 at n.10, 472.

this Court has already recognized that the reasons for admitting statements for impeachment dovetails with the reasons for admitting psychiatric testimony on rebuttal. *See Cheever*, 134 S. Ct. at 601.

This case is different from *Estelle*, *Satterwhite*, and *Powell*. Petrocelli should not be able to avoid this Court's review by misrepresenting the law and facts.

2. Petrocelli's attempts to distinguish *Buchanan* merely identify a gap in this Court's jurisprudence that is ripe for consideration.

Petrocelli attempts to distinguish this case from *Buchanan* because this case does not involve Petrocelli's mental state at the time of the offense. Opp. 17-18. But that distinction highlights an important issue that is ripe for this Court's consideration.

This Court indicated in *Estelle* that its holding does not preclude the prosecution from presenting psychiatric evidence if the defendant puts his mental health at issue. 451 U.S. at 465-66, 472. This Court has reaffirmed that point with respect to the guilt phase of trial. *Buchanan*, 483 U.S. at 421-25. This case will allow the Court to address application of *Estelle* to a penalty hearing.

3. The amended opinion creates a split of authority.

The Fifth Circuit has established two points that conflict with the amended opinion: (1) that an expert's testimony answering hypothetical questions about a psychiatric condition does not implicate the Sixth

Amendment; and (2) the psychiatric evidence offered to rebut the defense's psychiatric evidence does not violate the Sixth Amendment. *Hernandez*, 248 F.3d at 346-49. Petrocelli fails to address either point.

Rather than addressing *Hernandez*'s application of *Estelle*, Petrocelli addresses *Hernandez*'s application of the Eighth Amendment to a state-specific aspect of Texas sentencing law. Opp. 32-33. None of Petrocelli's citations link to authority addressing *Hernandez*'s application of the Sixth Amendment; they are—as Petrocelli passingly concedes—focused on Eighth Amendment concerns about a jury's ability to give effect to mitigating evidence under Texas's special circumstances. Opp. 33.[5] The amended opinion does not apply the Eighth Amendment. The amended opinion, however, does create a split with *Hernandez* on application of the Sixth Amendment.[6]

II. Any violation of *Estelle* is harmless.

Petrocelli fails to squarely address the Warden's harmless error argument. His response is that Dr. Gerow's testimony was inadmissible because it violated the Fifth and Sixth Amendments. But that is precisely the second question presented by this case. Petrocelli provides no real response to the Warden's arguments on the *harmlessness* of the alleged error. Instead, he

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[5] Petrocelli's argument that he would receive relief under *Hernandez* is misleading because he is relying on the Fifth Circuit's evaluation of Texas law under the Eighth Amendment that is irrelevant to a weighing state like Nevada. *See* Pet. 12-14.

[6] The absence of a Fifth Amendment violation is glaring when considering *Buchanan* and *Cheever*.

ducks the issue and turns to the concurring opinion from below to argue that the extreme remedy of granting relief without requiring a showing of prejudice is warranted. But the record and the law undercut Petrocelli's characterization of this case.

A. The only arguably inadmissible testimony is cumulative of defense evidence.

As the district court noted, Dr. Chappel indicated that Petrocelli is "'very dangerous' and subject to 'homicidal outburst of rage," and "Dr. Gutride found Petrocelli to be 'quite dangerous,' and 'an angry person with a high potential for violence….'" App. 158, 160. Dr. Gerow agreed, and his testimony was offered to rebut Petrocelli's evidence that antisocial personality disorder is treatable. Dr. Gerow's opinion on that issue is an independently admissible expert opinion.

Petrocelli cites no authority to the contrary. Instead, he insists that Dr. Gerow's testimony should have been excluded because it violated the Fifth and Sixth Amendments. Petrocelli's response ducks the real issue. If the trial court had excluded Dr. Gerow's testimony that he evaluated Petrocelli, Dr. Gerow still could have testified as to his expert opinion on the treatability of the diagnosis reached by Petrocelli's experts.

Petrocelli quotes the Ninth Circuit's summary of Dr. Gerow's testimony, which emphasizes the point. Opp. 5. Dr. Gerow acknowledged that he agreed with the diagnosis reached by the other doctors. The remaining testimony the Ninth Circuit identified is an admissible expert testimony about the characteristics of antisocial personality disorder. Thus, the only evidence that

could have violated the Fifth and Sixth Amendments is cumulative of evidence Petrocelli already presented through Drs. Gutride and Chappel. Any error is harmless under *Brecht*.

B. Jury Instruction 5 correctly stated Nevada law.

Petrocelli relies heavily on the Ninth Circuit's initial conclusion that Jury Instruction 5 was unconstitutional because it misstated Nevada law to suggest that the prosecutor used Dr. Gerow's testimony to improperly emphasize that Petrocelli could be paroled from a life sentence. Opp. 2, 6, 10, 26, 30. The Ninth Circuit retreated from that position after the Warden's petition for rehearing established that the instruction correctly stated controlling state law. App. 39 n.2. But Petrocelli continues to advance this erroneous position.

The Ninth Circuit was wrong to rely on *Sechrest v. Ignacio*, 549 F.3d 789 (9th Cir. 2008), to conclude that Jury Instruction 5 did not properly state Nevada law. Petrocelli's trial took place before Nevada enacted a constitutional amendment that triggered the change in statutory provisions that rendered the instruction erroneous in *Sechrest*. Respondents-Appellants' Petition for Panel Rehearing Under Fed. R. App. P. 40-1 and Circuit Rule 40-1 and Rehearing *en banc* Under Fed. R. App. P. 35 and Circuit Rule 35-1 at 14-15, *Petrocelli v. Baker*, 869 F.3d 710 (9th Cir.) (No. 14-99006) (Dkt. 73-1).

Petrocelli's continued assertion that Jury Instruction 5 incorrectly stated Nevada law is false, undermining his position that the prosecutor used an

incorrect instruction to enflame the passions of the jury. The prosecutor's argument was properly based on then controlling Nevada law.

C. The record does not support Petrocelli's theory of intentional prosecutorial misconduct.

Finally, Petrocelli insists that this case is about more than a mere violation of *Estelle*. Opp. 10, 29. In addition to the mischaracterization of Jury Instruction 5, Petrocelli's suggestion that the prosecutor blatantly disregarded Petrocelli's constitutional rights is unsupported.

The Ninth Circuit's determination that the state courts appointed counsel on April 20, 1982, conflicts with the record. App. 34. Petrocelli signed an affidavit seeking appointment of counsel on April 20, 1982, which apparently remained unknown to the prosecutors because the document was not initially filed with the courts, and Petrocelli *verbally declined the appointment of counsel at his initial appearance*. RSEOR[7] 0211, 0229-30, 0586-87. Defense counsel confirmed that he had not yet been appointed to represent Petrocelli when he went to the jail on April 21, 1982. RSEOR 0071-76. And confusion about the

[7] As in the petition, RSEOR refers to Respondents-Appellees' Supplemental Excerpts of Record. The relevant pages of the excerpts cited in this reply can be found in Volumes I, II, and IV of the RSEOR under Dkt. 21-10 of *Petrocelli v. Baker*, 869 F.3d 710 (9th Cir.) (No. 14-99006).

status on appointment of counsel remained until May. RSEOR 0581-89.[8]

In any event, the factual issues regarding timing of the appointment of counsel are irrelevant to application of *Estelle* because the rebuttal exception applies regardless of when the right to counsel attached. And as the district court concluded, the real facts completely undercut the propriety of habeas relief in this case. App. 149-170. The record does not support the existence of error, let alone an error so egregious that it warrants the extreme remedy of granting habeas relief in the absence of prejudice.

CONCLUSION

This Court's case law—in this context and in others—establishes that a defendant may not use the Fifth or Sixth Amendments to undermine the adversarial process by cutting off the prosecution's ability to test the validity of the defendant's own evidence. The Ninth Circuit's amended opinion conflicts with that principle. And there is no legitimate question about the absence of prejudice. The only aspect of Dr. Gerow's testimony that could conceivably

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[8] Even if the facts showed that the prosecutor knew, and intentionally disregarded, that counsel had been appointed, exclusion of Dr. Gerow's rebuttal testimony is not the proper remedy. This Court has held that limiting the prosecution's use of statements deliberately elicited in violation of the Sixth Amendment to impeachment serves as a sufficient deterrent and encourages the prosecution to seek the evidence it needs to prove its case through legitimate means. *See*, *e.g.*, *Ventris*, 556 U.S. at 593-94 (rejecting exclusion as remedy for Sixth Amendment violations).

violate *Estelle* is cumulative of Petrocelli's own evidence. Dr. Gerow's remaining testimony is an independently admissible expert opinion. This Court's review is warranted.

Respectfully submitted,

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