

IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 2018

MATTHEW L. SMELTZER,

Petitioner,

- VS -

AUDREY KING,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMI L. FERRARA
Attorney at Law
964 Fifth Avenue, Suite 335
San Diego, CA 92101
(619) 239-4344
Counsel for Petitioner

TABLE OF CONTENTS

Authorities Cited	iv
Question Presented for Review	Prefix
Petition for Writ of Certiorari	1
Jurisdiction and Citation of Opinion Below	2
Constitutional Provision at Issue	2
Introduction	2
Background	4
Argument	8
PETITIONER WAS DENIED HIS DUE PROCESS RIGHT TO PRESENT A COMPLETE DEFENSE DURING HIS CIVIL COMMITMENT TRIAL WHEN THE TRIAL COURT PRECLUDED HIS EXPERT FROM PROVIDING A LEGAL BASIS FOR THE PROPER DEFINITION OF VOLITIONAL IMPAIRMENT IN ORDER TO CORRECT AN ERRONEOUS STANDARD WHICH HAD BEEN PROVIDED BY THE GOVERNMENT'S EXPERTS	8
A. Applicable Law	8
B. Relevant State Court Proceedings	10
C. Petitioner's Due Process Rights Were Violated When the Trial Court Precluded His Expert From Testifying About The Legal Basis For the Proper Volitional Impairment Test	15

D. Section 2254 Relief is Required Because This
Erroneous Ruling Error Fatally Infected Petitioner’s
Trial 19

Conclusion 21

Appendix:

Appendix “A” (Magistrate Judge Report and
Recommendation)

Appendix “B” (District Court Order Adopting
Report And Recommendation And Judgment)

Appendix “C” (Memorandum Of Ninth Circuit
Court of Appeals)

TABLE OF AUTHORITIES

CASES

<u>Addington v. Texas</u> , 441 U.S. 418 (1979)	8
<u>California v. Trombetta</u> , 467 U.S. 479 (1984)	2,8-9,16
<u>Crane v. Kentucky</u> , 476 U.S. 683 (1986)	9
<u>Francis S. v. Stone</u> , 221 F.3d 100 (2nd Cir. 2000)	19
<u>Humphrey v. Cady</u> , 405 U.S. 504 (1972)	8
<u>Kansas v. Crane</u> , 534 U.S. 407 (2002)	3,11,15-16
<u>Kansas v. Hendricks</u> , 521 U.S. 346 (1997)	11,15-16
<u>Lisenba v. California</u> , 314 U.S. 219 (1941)	19
<u>Matteo v. Superintendent, SCI Albion</u> , 171 F.3d 877 (3d Cir.1999)(en banc))	19
<u>People v. Burris</u> , 126 Cal. Rptr. 2d 113 (Cal. Ct. App. 2002)	7,10-18
<u>People v. Lowe</u> , 19 Cal. Rptr. 3d 860 (Cal Ct. App. 2012)	10
<u>Specht v. Patterson</u> , 386 U.S. 605 (1967)	8
<u>Washington v. Texas</u> , 388 U.S. 14 (1967)	16

FEDERAL STATUTES

28 U.S.C. § 1254	2
28 U.S.C. § 2254	6,19

STATE STATUTES

Cal. Welf. & Inst. Code § 6600(a)(1).....	9
Cal. Welf. & Inst. Code § 6600(d).....	9
Cal. Welf. & Inst. Code § 6603(a).....	10
Cal. Welf. & Inst. Code § 6603(c)(1).....	10
Cal. Welf. & Inst. Code § 6604.....	9

QUESTION PRESENTED FOR REVIEW

Whether Petitioner's due process right to present a complete defense in his civil commitment trial was violated when the state court prevented him from eliciting testimony from his expert witness as to the legal foundation for the proper volitional impairment standard in order to correct an erroneous standard that had been provided previously by the government's experts?

No. _____

OCTOBER TERM, 2018

MATTHEW L. SMELTZER,

Petitioner,

- VS -

AUDREY KING,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 8, 2019.

JURISDICTION AND CITATION OF OPINION BELOW

On March 8, 2019, the Ninth Circuit affirmed Petitioner's conviction in an unpublished Memorandum opinion, attached as Exhibit "C" to this petition. This Court therefore has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION AT ISSUE

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

US Const. amend. XIV.

INTRODUCTION

This case presents a straightforward application of the bedrock constitutional rule that criminal defendants be "afforded a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485 (1984). Petitioner was tried by the State of California on the allegation that he should be indeterminately committed because he was a sexually violent predator ("SVP"). The case law of the Court requires that, in such a case, the government be required to show that a person's "lack of control must be 'serious,' such that it makes it difficult,

if not impossible, for the person to control his dangerous behavior.” Kansas v. Crane, 534 U.S. 407, 413 (2002).

During trial, two experts for the government incorrectly testified that the requisite lack of control could be established simply by demonstrating that an individual re-offended. To rebut this incorrect standard which conflicted with Crane, Petitioner attempted to have his expert discuss People v. Burris, 126 Cal. Rptr. 2d 113 (Ct. App. 2002), the California case which provides the proper standard for SVP cases. The trial court precluded such testimony, and the state appellate court affirmed, finding that Petitioner’s due process rights “were not impeded by the trial court’s ruling precluding both the People’s and the defense experts from expounding on the case law underlying the volitional impairment definition.” [CR 15-5 at 14].¹ The Ninth Circuit Court of Appeals declined habeas relief on this claim. With this petition for a writ of certiorari, Petitioner asks the Court to grant review of this case in order to decide whether the Due Process Clause affords a civil commitment defendant the right to have his expert witness discuss the legal foundation for the correct volitional impairment standard when the government’s expert witness previously has provided an erroneous standard to the jury.

¹ “CR” denotes Petitioner’s state court clerk’s record. “ER” denotes his excerpts of record filed in the Ninth Circuit Court of Appeals; “RT” denotes the reporter’s transcript of proceedings.

BACKGROUND

In 1985, Petitioner, then 29 years of age, was accused of inappropriately touching a 10-year-old girl. [ER 11]. These allegations were investigated, but not pursued by the authorities. Id. In 1991, Petitioner was convicted of three counts of committing lewd acts against a child under the age of 14. Id. at 11-12. Petitioner was granted probation for these offenses, with a ten-year suspended prison sentence. Id.

In 1994, Petitioner violated his probation by being with his children without supervision. Id. at 13. The trial court modified and reinstated his probation Id. A few months later, he again violated his probation by possessing obscene material involving quasi human/animal figures that his therapist concluded were “pedophilic in nature.” Id. The trial court revoked his probation and sent him to prison in 1995 to serve the ten-year sentence. Id.

Petitioner was released on parole in 1999. Id. His parole was violated after he was found with cartoon videos which would appeal to children, and for corresponding with children in a foreign country. Id. He was returned to prison for these violations, and was released in December 2000. Id.

In 2002, Petitioner again violated the terms of his parole by attempting to correspond with underage girls, and viewing child pornography. Id. Following the

commission of the child pornography offense, Petitioner was determined to be a sexually violent predator and was committed to a state hospital. Id.

B. Civil Commitment Proceedings

In June 2010, the San Diego County District Attorney's Office filed an amended petition for involuntary treatment of an SVP, seeking a civil involuntary commitment of Petitioner pursuant to Cal. Welfare and Institutions Code § 6600 et seq.. [CR 15-1 at 20-32]. This petition sought Petitioner's indeterminate commitment on the basis that Petitioner was a sexually violent predator with a mental disorder, and that he was likely to engage in sexually violent predatory criminal behavior in the future. Id. at 22.

The first trial resulted in a hung jury. Id. The second trial resulted in the jury finding that Petitioner was an SVP. [CR 15-1 at 136]. The trial court subsequently ordered that Petitioner be committed to the Department of Mental Health for an indeterminate term. Id.

C. Direct Appeal

In June 2012, Petitioner filed a direct appeal of the commitment order in the California Court of Appeal. [CR 15-3]. Among other issues presented in the appeal, Petitioner argued that the trial court violated his Due Process rights when it: (1) improperly limited his ability to present expert testimony to clarify the proper

legal standard regarding volitional impairment; and (2) declined to modify a jury instruction which improperly instructed the jury on this same issue. [CR 15-3 at 37, 56]. The Court of Appeal denied all of Petitioner's claims in an unpublished opinion. [ER 45-65]. As to the first claim, the Court of Appeal found that the trial court's ruling precluding his expert from discussing case law establishing the applicable legal standard for the volitional impairment question did not violate his due process rights. [ER 53-58]. With regard to the instructional claim, the Court of Appeal found that any error in declining to modify the instruction was harmless beyond a reasonable doubt. [ER 59-64]. The California Supreme Court rejected his petition for review without comment. [ER 142].

D. Federal Habeas

Petitioner filed a pro se 28 U.S.C. § 2254 petition in the U.S. District Court for the Southern District of California in which he raised these claims. [CR 1]. After dismissing the petition for failing to comply with various procedural requirements, Petitioner filed an amended petition to which the government responded. [ER 66-144].

In his Report and Recommendation ("R&R"), the magistrate judge recommended that the district court deny both of these claims. Id. As to the expert witness claim, the R&R found that this claim failed because "Smeltzer's counsel's

examination of [defense expert] Dr. Abrams “includ[ed] a lengthy discussion of Dr. Abrams’ definition of volitional impairment,” and therefore “Petitioner’s counsel was not precluded from presenting expert witness testimony on the issue of volitional impairment.” [ER 26]. On the instructional issue, the R&R concluded that this claim should be denied because, in the “context of the entire trial record, it is clear that the seriousness required was conveyed to the jury.” [ER 29].

Following the issuance of the R&R, the district court appointed counsel to draft objections to the R&R. After counsel did so, the district court adopted the R&R in its entirety, and denied the petition. [ER 3-9]. As to the expert testimony issue, the district court found that the California Court of Appeal correctly denied this claim because expert witnesses testifying as to whether a person meets the criteria for classification as an SVP need not be “permitted to discuss the specifics of every case involving a sexually violent predator classification; such discussions are not required for the jury to ‘know[] whether the experts’ opinions were based on the appropriate criteria.’” [ER 6] (citation omitted).

The Ninth Circuit Court of Appeals also rejected this claim, finding that “[d]efense counsel was able to question the state’s experts and Smeltzer’s expert on the legal requirement to establish a volitional impairment[,]” and that “[a] case-by-case factual recitation of *People v. Burris*, 126 Cal. Rptr. 2d 113 (Ct. App.

2002) was irrelevant to the jury’s task of determining whether Smeltzer had a mental illness that made it difficult to control his dangerous behavior.” [Ex. “C” at 2].

ARGUMENT

PETITIONER WAS DENIED HIS DUE PROCESS RIGHT TO PRESENT A COMPLETE DEFENSE DURING HIS CIVIL COMMITMENT TRIAL WHEN THE TRIAL COURT PRECLUDED HIS EXPERT FROM PROVIDING A LEGAL BASIS FOR THE PROPER DEFINITION OF VOLITIONAL IMPAIRMENT IN ORDER TO CORRECT AN ERRONEOUS STANDARD WHICH HAD BEEN EARLIER PROVIDED BY THE GOVERNMENT’S EXPERTS

A. Applicable Law

“Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” Addington v. Texas, 441 U.S. 418, 425 (1979); see also Humphrey v. Cady, 405 U.S. 504, 509 (1972)(such protection is necessary because civil commitment entails a “massive curtailment of liberty” in the constitutional sense). A person facing civil commitment has the right to “be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own.” Specht v. Patterson, 386 U.S. 605, 610 (1967).

“Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be

afforded a meaningful opportunity to present a complete defense.” California v. Trombetta, 467 U.S. 479, 485 (1984). “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment . . . , the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” Crane v. Kentucky, 476 U.S. 683, 690 (1986)(citations omitted).

California Welfare and Institutions Code § 6604 provides that, if “the court or jury determines that [a] person is a sexually violent predator, the person shall be committed for an indeterminate term to the custody of the State Department of State Hospitals for appropriate treatment and confinement in a secure facility” Cal. Welf. & Inst. Code § 6604. A “[s]exually violent predator” is “a person who has been convicted of a sexually violent offense . . . and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.” Cal. Welf. & Inst. Code § 6600(a)(1).

A “[d]iagnosed mental disorder” includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.” Id. at § 6600(d). California’s Sexually

Violent Predator Act “specifically contemplates [that] the trier of fact will have the benefit of expert opinion and analysis[,]” see § 6603(a) & (c)(1), and experts testifying on this issue are permitted to articulate the standard they use to form their opinion because, without doing so, the “jury would not know [] whether the experts’ opinions were based on the appropriate criteria.” People v. Lowe, 19 Cal. Rptr. 3d 860, 863 (Cal Ct. App. 2012).

B. Relevant State Court Proceedings

At trial, the government called two expert witnesses (Owen and Simon) and Petitioner called one – Dr. Abrams. [CR 17 at 11-12]. All three experts testified about the standard that they used to determine whether Petitioner has a “volitional impairment.” Id. at 10-17. In the context of section 6600, this testimony concerned whether Petitioner had a “condition affecting [his] . . . volitional capacity that predisposes [him] to the commission of criminal sexual acts in a degree constituting [him] a menace to the health and safety of others.” Cal. Welf. & Inst. Code § 6600(a)(1).

Dr. Owen testified what he understood to be the definition of volitional control based upon People v. Burris, 126 Cal. Rptr. 2d 113 (Cal. Ct. App. 2002). [RT 194-95]. As to this issue, Dr. Owen testified: “[y]ou mentioned me knowing about the law. I think the Burris decision in talking about failure to be deterred by prior

consequences is really a great definition here of volitional impairment.” [RT 194-95].

When asked what that definition was, Dr. Owen stated that “the definition is that if a man is basically placed on community supervision and fails it, he has not been detoured (sic) by a prior consequence, that’s volitional impairment according to that decision.” Id. at 195. On cross-examination, Dr. Owen testified he did not recall seeing the term “serious” in the case law, and stated that if he had earlier agreed that seriousness was a requirement under the case law, he had spoken incorrectly. [ER 59-63].

Dr. Simon also relied on his understanding of the Burris case in rendering his opinion on the volitional control issue. [RT 328]. Dr. Simon testified that along with data points, the “other reason for my opinion is that I rely on the People v. Burris case law, which instructed as I understand it, that volitional impairment by that court was defined as someone who evidences a pattern of detection followed by punishment followed by new sex offenses, that that is evidence of a – that the person’s not likely to be deterred by the threat of future criminal prosecution and that that would indicate volitional impairment.” [RT 328]. In line with this definition, Dr. Simon testified that Petitioner’s crimes evidenced his volitional impairment. [RT 327-28].

Dr. Abrams testified as to both volitional impairment and risk assessment. [RT 780, 782]. He explained that two cases from the Court, Kansas v. Hendricks, 521 U.S. 346 (1997), and Kansas v. Crane, 534 U.S. 407 (2002), set the minimal constitutional criteria on the control issue, each requiring serious difficulty in controlling one's behavior. [RT 783-84]. He then referred to three California cases, one being Burris, to explain that the proper test was whether a person was "unable to control that dangerousness." [RT 784]. Because the government's experts had understated the requirements of the volitional impairment test based on their interpretations of Burris, the defense wanted to have Dr. Abrams explain how Burris applied to the instant case. Defense counsel informed the trial court that he needed to address Burris because the testimony of Dr. Owens made a "false finding based on that case and in my opinion left a false impression with the jurors as to what that case stands for." [RT 818-20]. Defense counsel further argued that the government experts reduced the volitional control inquiry to nothing more than whether the subject has a history of offending more than once, rather than the correct definition that the person must have a serious difficulty controlling his or her behavior. Id.

The trial court denied Petitioner the right to ask Dr. Abrams specific questions about Burris, or why the government's interpretation of it was incorrect.

Id. On direct appeal to the California Court of Appeal, the court described the issue as follows:

After [the government's] testimony was presented to the jury, defense counsel argued to the trial court that People's expert Dr. Owens had given the jury a "false impression" regarding the definition of volitional impairment set forth in the Burris case which he used in formulating his opinion, and accordingly the trial court had improperly precluded defense counsel from asking Dr. Abrams (who had a law degree) about his interpretation of the Burris case. Defense counsel asserted that although he could argue the People's expert had used a flawed definition of volitional impairment, it would be "a meaningless argument" if there was no foundational support for the argument that the expert did not properly understand the case. The prosecutor argued the court had not erred because defense counsel was allowed to ask Dr. Abrams about his interpretation of the law that he used to form his opinions, and the court had merely excluded a lengthy recitation and interpretation of each case.

The trial court ruled that additional questioning of Dr. Abrams on this point had minimal relevance, and the relevance was substantially outweighed by the likelihood of confusion under Evidence Code section 352. The court reasoned the important issue was whether the expert used the proper standard on the lack of control requirement; the parties could argue to the jury if an expert did not use the proper standard; and testimony by the experts explaining the case law would usurp the court's function and be irrelevant and confusing.

[CR 15-5 at 13-14].

In rejecting the claim that denying Petitioner the right to present this testimony from Dr. Abrams violated the Due Process Clause, the Court of Appeals found:

Smeltzer argues the People's expert witnesses misstated the volitional impairment requirement by reducing it "to simply nothing more than a history of offending more than once," rather than the correct definition that the person must have a serious difficulty controlling his or her behavior. He asserts the trial court's limitation on the defense expert's testimony, including regarding the Burris decision cited by the People's experts, precluded him from confronting the People's experts about their misstatements.

Contrary to Smeltzer's contention, he was not precluded from challenging the People's experts' reliance on recidivism as a factor showing control impairment. Defense counsel elicited testimony from the defense expert that the correct standard was whether the person had serious difficulty controlling sexual misbehavior, and recidivism was simply one relevant factor to consider. Smeltzer has not explained how testimony from the defense expert on the specifics of the Burris decision would have meaningfully augmented the defense expert's testimony on this point.

The record shows Smeltzer had a full opportunity to present testimony from his expert witness on the definition of volitional impairment, and his due process rights were not impeded by the trial court's ruling precluding both the People's and the defense experts from expounding on the case law underlying the volitional impairment definition.

[CR 15-5 at 14].

B.

Petitioner's Due Process Rights Were Violated When the Trial Court Precluded His Expert From Testifying About The Legal Basis For the Proper Volitional Impairment Test

In rejecting Petitioner's claim that his due process rights were violated by the preclusion of this testimony, the Ninth Circuit found that "Defense counsel was able to question the state's experts and Smeltzer's expert on the legal requirement to establish a volitional impairment[,]” and that “[a] case-by-case factual recitation of *People v. Burris*, 126 Cal. Rptr. 2d 113 (Ct. App. 2002) was irrelevant to the jury's task of determining whether Smeltzer had a mental illness that made it difficult to control his dangerous behavior." [Ex. "C" at 2-3]. Given the instant record, both of these conclusions are erroneous.

Starting with the Ninth Circuit's first conclusion – that Petitioner's due process rights were not implicated because his counsel was able to question both the state's experts and his own expert on the legal requirement to establish a volitional impairment – this is not at all what the record shows. As set forth above, the government's two expert witnesses provided to the jury statements of law that the applicable volitional control standard turned simply on whether the subject has a history of offending more than once. This is not the correct standard. As the Court made clear in Hendricks, 521 U.S. at 346, and Crane, 534 U.S. at 407, the proper

standard is whether the government has “coupled proof of dangerousness with the proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality,’” see Hendricks, 521 U.S. at 358, and the corresponding lack of control must be ‘serious,’ such that it makes it difficult, if not impossible, for the person to control his dangerous behavior.” Crane, 435 U.S. at 411. According to the government’s experts, however, any sex offender who is caught a second time necessarily is assumed to have a volitional impairment.

Following the government’s misleading testimony on this crucial point, Petitioner had the due process right, through his own expert, not simply to inform the jury what the proper legal standard was, but to tell the jury why his standard was the correct one, and the government’s was not. See Trombetta, 467 U.S. at 485 (criminal defendants must be afforded a meaningful opportunity to present a complete defense); Washington v. Texas, 388 U.S. 14, 19 (1967)(right of accused to present his own witnesses to establish a defense is “fundamental element of due process of law.”). Merely having his expert state a different standard without being able to explain its proper legal foundation simply created a “battle of the experts,” denying Petitioner his due process right to present a complete defense.

Likewise, the Ninth Circuit’s finding that a discussion of Burris was “irrelevant to the jury’s task of determining whether Smeltzer had a mental illness that

made it difficult to control his dangerous behavior,” [Ex. “C”], ignores the undisputed facts of this case. During his examination of Dr. Abrams, counsel for Petitioner attempted to elicit testimony regarding Burris, “a California case that I feel that I need to be able to get into.” [RT 784]. After the trial court denied this line of testimony, and following an unrecorded sidebar conference, counsel for Petitioner explained precisely why this testimony was so important:

I do not believe this impedes or, you know, overlaps the Court's authority to instruct the jury as to what the law is, and the Court would obviously instruct the jury as to what the law in this case would be, but I believe I am entitled to lay the foundation And explain what the basis for the forensic Psychologists' understanding of the law in forming their opinion is.

And I think, more importantly, I should be entitled to allow or show that at least one of these forensic psychologists did not understand the law or had a flawed impression of the law especially since he was able to present that flawed impression to the jury without anything to show that it was, in fact, flawed.

The court indicated that I would be able to argue that the impression was flawed in my argument, which I understand, but it's a meaningless argument if I don't have anything to support what I'm saying. I'd basically just be standing up there and saying, ‘you have no reason to believe me, but that evaluator didn't get the case right.’

Without having any proof that that evaluator didn't have the case right, my concern is that this jury is left with what was a flawed impression of the case law in that case, which

absolutely not only does not support that evaluator's interpretation of volitional impairment, but more directly supports my interpretation fairly directly.

[RT 819-20].

As counsel explained, and the state and federal courts have disregarded, eliciting Dr. Abrams' testimony about what the proper volitional control standard was, and his opinion that the government failed to establish that Petitioner lacked volitional control, represented just part of the necessary expert presentation from the defense. Equally important to Petitioner's defense was the opportunity to have his expert tell the jury why the government experts' legal interpretations were wrong, and their conclusions flawed. Had Dr. Abrams been able to testify on the specifics of the Burris decision, it would have significantly augmented his defense because he would not just have presented his own legal basis and conclusions, he also would have discredited the legal foundations and conclusions of the government's two expert witnesses.

The state and federal courts' failure to see any difference between Petitioner's expert merely presenting his own opinion and standard on the volitional impairment point, and his expert also being able to discredit the improper standards provided by the government experts, necessitates review of this case by the Court. When the government experts incorrectly stated the relevant legal standards and

based their adverse opinions on those standards, due process required that Petitioner have the ability not just to present contrary testimony, but also the ability to show the jury why the standard opined by the government's witnesses was incorrect. In this particular instance, this required allowing Petitioner's expert to refer to and discuss the supporting case law to demonstrate what the proper standard actually was.²

D. Section 2254 Relief Is Required Because This Erroneous Ruling Error Fatally Infected Petitioner's Trial

Denial of due process in a criminal trial "is the failure to observe that fundamental fairness essential to the very concept of justice. . . . We must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." Lisenba v. California, 314 U.S. 219, 236 (1941). In the AEDPA context, while some "increment of incorrectness beyond error is required . . . the increment need not be great; otherwise, habeas relief would be limited to state court decisions "so far off the mark as to suggest judicial incompetence.'" Francis S. v. Stone, 221 F.3d 100, 110 (2nd Cir. 2000)(quoting Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 889 (3d Cir.1999)(en banc)).

² Because the trial court, on the volitional control issue, failed to provide to the jury a specific instruction including the seriousness requirement, the error in precluding this testimony was not cured by any subsequent instructions provided by the state court.

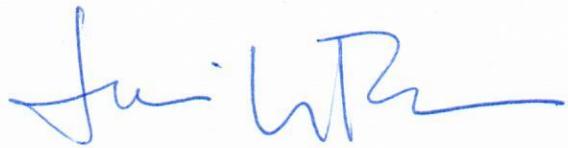
The state court's erroneous decision "fatally infected the trial" by allowing the jury to judge Petitioner based on a lower volitional impairment standard than that created by the Court, and in a case where evidence that Petitioner was a SVP was far from overwhelming. Petitioner's first trial resulted in a hung jury, and experts disagreed as to whether he qualified as a SVP. Regarding the issue of volitional control, Petitioner had not committed any sexual crimes involving contact with a victim since the 1991 incident, and while he was in custody for some of that time, he had no rules violations while in state custody and had not offended in a SVP manner since 1991. [RT 769].

While the evidence against Petitioner was not overwhelming, the unfairness of excluding this clarifying testimony by his expert was tremendous. Two government experts opined that Petitioner lacked volitional control simply because he had re-offended, a conclusion based upon an incorrect legal premise. Instead of having a full and fair opportunity to correct this testimony and set the jury straight on what they were selected to decide, Petitioner was unfairly limited in his opportunity to do so. The result was an otherwise close case that likely was swayed in the government's favor by incorrectly based expert testimony that the jury did not have sufficient information to consider appropriately. Review of this case by the Court is warranted to correct this egregious error.

CONCLUSION

For the above reasons, Petitioner respectfully requests that the Court grant the instant petition to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,



Dated: June 6, 2019

JAMI L. FERRARA
Attorney at Law
964 Fifth Avenue, Suite 335
San Diego, CA 92101
(619) 239-4344
Counsel for Petitioner