No. _____ CAPITAL CASE

In The
Supreme Court of the United States

E.K. McDANIEL, WARDEN,
Petitioner,

v.

RICKY DAVID SECHREST,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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July 13, 2009

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QUESTION PRESENTED: CAPITAL CASE

This Court has held in capital cases that mandatory death sentences are unconstitutional because they do not allow "consideration of the character and record of the individual offender and the circumstances of the particular offense." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). This Court has also held that "the entire post-conviction record, viewed as a whole" must be considered in determining whether error occurred. *Williams v. Taylor*, 529 U.S. 362, 399 (2000). With these two cases in mind, Petitioner presents the following question:

Did sentencing phase error require the Ninth Circuit Court of Appeals to reverse a sentence of death?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those listed in the caption.

The Petitioner is E. K. McDaniel, Warden of the Ely State Prison, who has constructive custody over the Petitioner. John Ignacio, the former Warden of the Nevada State Prison, was the previous Warden listed as the Appellant in the United States Court of Appeals for the Ninth Circuit. Fed. R. App. P. 43(c); Sup. Ct. R. 35(3).

The Respondent is Ricky David Sechrest.

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Petitioner E. K. McDaniel, Warden of the Ely State Prison ("Warden"), respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is published at 549 F.3d 789 (9th Cir. 2008). Pet. App. 1a. The Order of the United States District Court denying petition for writ of habeas corpus is unpublished. Pet. App. 50a. The Nevada Supreme Court's opinion affirming the petitioner's conviction and sentence is published at 705 P.2d 626 (Nev. 1985). Pet. App. 146a. The Nevada Supreme Court's opinion affirming the denial of state post-conviction relief is published at 826 P.2d 564 (Nev. 1992). Pet. App. 159a.

JURISDICTION

The Court of Appeals entered its decision on December 5, 2008. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* on April 14, 2009. Pet. App. 166a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The former provisions of 28 U.S.C. § 2254 apply to this case. Pet. App. 168a. Respondent Ricky David Sechrest filed his federal petition for writ of habeas corpus prior to April 24, 1996.

STATEMENT OF THE CASE

Ricky David Sechrest ("Sechrest") horrifically murdered two small, vulnerable children, aged nine and ten. When suspicion fell upon him, and he was interviewed by police, he confessed his crimes, describing how he lured the two girls from a local ice-skating rink by claiming that his grandmother, the babysitter for one of the two girls, had sent him to the ice arena to pick the girls up.

After abducting these two children, Sechrest took them to remote area near Reno, Nevada. There, according to Sechrest's confession, he murdered both children before masturbating over one of the bodies.

Not surprisingly, a jury found Sechrest guilty of two counts of first-degree murder and first-degree kidnapping. Also not surprisingly, the same jury sentenced Sechrest to death.

However, during the penalty hearing, the defense attorney, Don Aimar, did not object when the prosecutor called a defense-retained psychiatrist, Dr. Lynn Gerow, as a witness. Dr. Gerow testified that Sechrest was a sociopath and unlikely to change. Of course, this was already readily apparent to the jury based on the facts surrounding the two murders and the manner in which they were committed.

Additionally, in his closing argument during the penalty phase, the trial prosecutor minimized the chances that Sechrest would actually die in prison if sentenced to life without the possibility of parole.

The Nevada Supreme Court affirmed Sechrest's conviction and sentence. *Sechrest v. State*, 705 P.2d 626 (Nev. 1985); Pet. App. 146a. Six and a half years later, the Nevada Supreme Court also affirmed the denial of state post-conviction relief. *Sechrest v. State*, 826 P.2d 564 (Nev. 1992); Pet. App. 159a.

Sechrest then turned to the federal courts. Ultimately, the Ninth Circuit Court of Appeals granted Sechrest habeas corpus relief on the penalty phase of his trial. *Sechrest v. Ignacio*, 549 F.3d 789 (9th Cir. 2008); Pet. App. 1a.

Despite the depravity of Sechrest's crime, the Court of Appeals found that the prosecutor's comments violated Sechrst's due process rights and that these comments had a substantial and injurious effect on the jury's verdict. *Sechrest*, 549 F.3d at 808 (*citing Brecht v. Abrahamson*, 507 U.S. 619, 627 (1991)); Pet. App. 42a-43a. Likewise, the Court of Appeals found that trial counsel's conduct, in allowing Dr. Gerow to testify, fell below an objective standard of reasonableness and that Sechrest was prejudiced by counsel's conduct. *Id.* at 815 (*citing Strickland v. Washington*, 466 U.S. 668, 688 (1984)); Pet. App. 43a-44a.

Additionally, the Court of Appeals dismissed Petitioner's argument that the nature of Sechrest's crime made a sentence of death almost inevitable:

> Finally, the State argues that because Sechrest's crime was one "of utter depravity-unthinkable by most people in the abstract," we would "demean both *Brecht* and the jury that sentenced Sechrest to death" if we held that the

> constitutional violation prejudiced Sechrest. This argument, however, is analogous to the argument that the Supreme Court condemned in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). In *Godfrey*, the Supreme Court reviewed an affirmation of a death sentence "based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.'" 446 U.S. at 428, 100 S.Ct. 1759. The Supreme Court reversed, reasoning that "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" *Id.* at 428-29, 100 S.Ct. 1759.
>
> In short, all first degree murders can be described as "unthinkable." Merely labeling them as such does not mean that all jurors will find that they warrant the death penalty, nor does the label relieve us of our duty to determine whether the constitutional errors that occurred in this case deprived Sechrest of a fair trial.

549 F.3d at 814-15; Pet. App. 42a.

By contrast, the state district judge who ruled on Sechrest's state post-conviction petition noted:

> There are capital cases which seem borderline because of the confused mental state of the Defendant or perhaps the degree of provocation

> from the victim or victims. There are capital cases which seem borderline because of the motive of the Defendant or because of some mitigating aspect about his or her character. In a given case, evidence of profound remorse can play a role.
>
> Nothing like these circumstances are present in the case of Ricky Sechrest. This Court does not feel that this case is borderline, or that Ricky Sechrest was denied a fair hearing.

Pet. App. 183a-84a.

The Court of Appeals denied rehearing and the suggestion for rehearing *en banc*. Pet. App. 166a. This timely petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

In deciding federal habeas corpus cases, the Ninth Circuit Court of Appeals has ignored or misapplied this Court's precedent, finding error in the sentencing phase of capital litigation at a rate disproportionate to the amount of error found in the guilt phase of capital litigation. *See, e.g., Brown v. Sanders*, 546 U.S. 212, 215 (2006) (addressing only death sentence after Court of Appeals upheld guilt verdict but overturned death sentence); *Calderon v. Coleman*, 525 U.S. 141, 144 (1998) (noting Court of Appeals upheld guilt verdict but overturned death sentence); *Styers v. Schriro*, 547 F.3d 1026, 1036 (9th Cir. 2008) (upholding guilt verdict but overturning death sentence); *Hovey v. Ayers*, 458 F.3d 892, 931 (9th Cir. 2006) (same).

There may be a variety of reasons that a habeas petitioner receives relief for a death penalty more often than for the underlying conviction. Respectfully, it appears that one such reason is that federal courts look at the guilt and sentencing phases as two discrete events, rather than by looking at both phases as two portions of one trial—and forget that jurors have often heard days and sometimes weeks of testimony about the brutal nature of an offense. These jurors have already found, beyond a reasonable doubt, that the defendant committed the crime. Reviewing courts, such as the Ninth Circuit Court of Appeals, appear to overlook the facts supporting the conviction and the weight of aggravating evidence presented when choosing to reverse a sentence of death.

The Warden agrees with this Court's jurisprudence that the death penalty should not be "automatic," but rather that States must "limit the class of murderers to which the death penalty may be applied." *Brown*, 546 U.S. at 216. *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (mandatory death sentences unconstitutional because they do not allow "consideration of the character and record of the individual offender and the circumstances of the particular offense"). Petitioner does not seek to undermine this principle. However, error alone should not be sufficient to overturn a death verdict without weighing the effect the alleged error had on the outcome of the penalty phase.

This Court has also held that "the entire post-conviction record, viewed as a whole" must be considered in determining whether error occurred. *Williams v. Taylor*, 529 U.S. 362, 399 (2000). Appellate courts, such as the one in this very case, give

passing reference to this principle without recognizing that certain classes of homicides, either because of the nature of the perpetrator or the nature of the killing itself, make the imposition of a death sentence highly probable. In such a case, while the jury is never required to impose a death sentence, only the most compelling of mitigation evidence will forestall a sentence of death.

This Court has held that a death penalty regime must "tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). To that end, the Court noted, "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" *Id.* at 428-29.

Justice Stewart authored *Godfrey* for the Court. However, Justice Stewart is also famously remembered for his concurrence in an obscenity case where he stated, "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Likewise, the kidnapping and killing of young children, particularly if there is a sexual element as part of the offense, is one such circumstance where people know it is likely a capital case when they hear about it.[1]

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[1] Killing a police officer in the line of duty; causing wanton pain and suffering before the actual killing; and serial homicides might qualify as other circumstances where a sentence of death is more likely than not to be imposed absent the most compelling mitigation evidence.

As this Court is well aware, in order for a habeas corpus petitioner to obtain relief, he or she is required to show that any error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 509 U.S. 619, 638 (1993).

In this particular case, the prosecutor's comments during the closing argument in the penalty phase did not have either a "substantial and injurious effect" or any "influence" whatsoever in determining the jury's verdict.

The jury had been presented with overwhelming evidence, including Sechrest's own confession, and knew already how monstrous Sechrest's crime actually was. According to the Nevada Supreme Court:

> In April of 1983, Doris Schindler hired Zella Weaver to baby-sit her ten-year old daughter, Maggie Schindler. In addition to caring for Maggie during weekday afternoons and evenings at the Schindler residence, Mrs. Weaver would pick Maggie up from the Meadowood Ice Arena when Maggie was through ice skating on Saturdays.
>
> On May 14, 1983, a neighbor of the Schindler's drove Maggie and her friend, Carly Villa, to Meadowood and dropped them off to skate. Later that afternoon Mrs. Weaver went to Meadowood to pick up Maggie and Carly but could not find them. The police were notified, and an investigation was begun.
>
> On June 7, 1983, the bodies of Maggie and Carly were found in Lagomarsino Canyon, a

remote area east of Reno, by two young men who were out shooting. The bodies, which had been covered with loose dirt, were found about 50 yards apart. A pair of ice skates and skate guards with the name "Maggie S." on them were found near one of the gravesites.

Ricky David Sechrest is Zella Weaver's grandson and lived at her home. Sechrest had been seen outside the Schindler home several times while waiting to pick up his grandmother when she finished baby-sitting there. The record establishes that Maggie had been at the Weaver residence before and that Sechrest knew that his grandmother routinely picked Maggie up at Meadowood Mall on Saturdays.

On June 14, 1983, Sechrest gave an inculpatory statement to Officer Bogison and Detective Eubanks of the Reno Police Department while he was being questioned at the Sparks Police Department on an unrelated grand larceny charge. He admitted that he had picked up Maggie and Carly from the Meadowood Mall Ice Arena. He said that he asked Maggie if she wanted to go for a ride and she had agreed. They drove out to Lagomarsino Canyon. Sechrest claimed that they were walking around the hills rock hunting when Carly fell over backward and hit her head. Sechrest said he thought the girl was dead because when he checked her pulse, she did not have one. He said Maggie began to "freak out on him" and was "between hysterical and crying." Sechrest said that he knew it was wrong to be up there with the girls to begin with, so when Maggie

> began to run he panicked, caught her and hit her over the back of the head with a rock. After hitting the girl three or four more times with the rock after she had fallen, Sechrest went to his car and got a shovel. He returned to where Carly was lying and thought she was still alive; so he hit her "once or twice" in the head with the edge of the shovel. He then buried the girls with loose dirt. In his statement Sechrest admitted that he performed an act of masturbation on Maggie's body, but, according to him, at the time the girl was already dead.

Sechrest v. State, 705 P.2d 626, 628-29 (Nev. 1985); Pet. App. 147a-48a. Faced with these facts, nothing but the most compelling argument or evidence that anyone could make or present during the sentencing phase would have had a substantial and injurious effect on the jury's verdict.

In this case, the Court of Appeals held:

> [T]he prosecutor's repeated misstatements regarding the likelihood of Sechrest's release from prison by parole were he to be sentenced to life without the possibility of parole violated Sechrest's due process right to a fair trial, and that the violation had substantial and injurious effect on the jury's sentencing decision, carried out by the trial judge, to impose the death penalty.

Sechrest, 549 U.S. at 808; Pet. App. 27a. This conclusion flies in the face of the overwhelming evidence presented at the guilt phase. Assuming, without conceding, that the prosecutor made four

improper comments regarding Sechrest's ultimate sentence, there is little the prosecutor could have said or done that would have made the jury more likely to impose a sentence of death than it already was.

As the District Court eloquently stated:

> The Court finds that the most important considerations informing the jury's sentencing decision must have been the aggravating circumstances related to the nature of the crimes. The jury found that the murders were committed in the course of kidnappings and sexual assaults, and that they were committed to avoid lawful arrest or effect an escape from custody. The jury also found that the murders involved torture, depravity of mind, or mutilation of the victims. Sechrest took two innocent and trusting young girls—one nine years old and the other ten years old—to a remote location and brutally murdered then using rocks and a shovel. Sechrest then undressed one of the dead girls, attempted to have intercourse with her lifeless body, and then, when he could not, masturbated and ejaculated onto her body. The aggravating factors related to the specific circumstances were surely the predominate factor behind the jury's imposition of the death penalty. In view of the entire record in this case, the Court finds that the misstatements of the prosecutor regarding the possibility of executive clemency

> did not have a substantial and injurious effect or influence in determining the jury's verdict.

Pet. App. 80a-81a.[2]

The District Court's analysis was similar to a conclusion the Seventh Circuit found in another death penalty case. "[E]ven without this evidence, the jurors had *overwhelming* evidence from which they could conclude that Jones was a ruthless and habitual killer deserving of the death penalty. In other words, the scales were already *heavily* tipped in the direction of Jones's fitness for the death penalty." *Jones v. Page*, 76 F.3d 831, 855 (7th Cir. 1996).

The same can be said with respect to the Court of Appeals' finding of ineffective assistance of counsel during the penalty phase. As this Court is well aware, in order for counsel's conduct to be ineffective as a matter of law, the conduct must 1) fall below an objective standard of reasonableness; and 2) prejudice the defendant. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). More specifically, "When a defendant challenges a death sentence, . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. *Cf. Bible v. Ryan*, No. 07-99017, 2009 Westlaw 1874343,

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[2] In making this analysis, the District Court assumed that Sechrest received ineffective assistance of counsel, even though the District Court ultimately found that counsel was not ineffective.

*9 (9th Cir. July 1, 2009) (upholding death sentence and following *Strickland* standard).

Assuming without conceding that defense counsel's conduct fell below an objective standard of reasonableness when he agreed to allow the prosecution to call a defense psychiatrist as a witness during the penalty phase, there is, again, no way that this testimony created a reasonable probability that the result of the sentencing would have been different. The jury had already heard the gruesome evidence with respect to Sechrest's homicide. Once the prosecution presented evidence of the aggravating circumstances, nothing but the most compelling defense argument or evidence would have saved Sechrest from a death sentence.

Of course, no compelling argument was made. This left the Ninth Circuit Court of Appeals to place unreasonable weight on the effect the alleged error had on the sentencing jury.

In addition to finding that trial counsel's conduct was reasonable, the District Court also concluded that Sechrest was not prejudiced:

> The testimony of Dr. Gerow did not bear on any of the aggravating circumstances found by the jury. Those aggravating circumstances would have weighed heavily on the side of death penalty even if Dr. Gerow had not testified.
>
> With the respect to possible mitigation, absent the testimony of Dr. Gerow, Sechrest may have been better able to argue for mitigation on the basis of a lack of a prior criminal record. The

Court, however, finds that this would have made little difference. As it was, Aimar was able to show that Sechrest had no crimes of violence in his criminal record; given the nature of the crimes at issue in this case, that was the main point to be made.

Also, generally, without the testimony of Dr. Gerow, Sechrest could have made a better case that he might be able to change for the better while in prison. This is where Dr. Gerow's testimony was, perhaps, most harmful to Sechrest. It was clear to the jury that Sechrest was dangerous; Dr. Gerow's testimony was that he would not change. Even here, however, the Court finds that the damage was minimal in comparison to the nature of the aggravating factors.

The jury found that the murders were committed in the course of kidnappings and sexual assaults, and that they were committed to avoid lawful arrest or effect an escape from custody. The jury found that the murders involved torture, depravity of mind, or mutilation of the victims. Sechrest took two young girls into the hills and bludgeoned them to death with rocks and a shovel. He undressed one of the girls, attempted to have intercourse with her dead body, and when he could not, he masturbated, and ejaculated onto the girl's body. The aggravating factors found by the jury, rooted in the terrible circumstances of the killings, are such that this Court cannot find any reasonable probability that Sechrest might

> have avoided the death penalty if Dr. Gerow had been precluded from testifying.

Pet App. 141a-42a.

The District Court's analysis was similar to a conclusion the Fourth Circuit found in another death penalty case.

> As did the district court, we recognize that the overwhelming case against Eaton made the task of defending him very difficult. . . . Further, in the face of the Commonwealth's overwhelming evidence, we can ascribe no prejudice to any alleged errors by counsel; like the district court, we cannot identify a reasonable probability that Eaton would have escaped conviction and a sentence of death.

Eaton v. Angelone, 139 F.3d 990, 994 (4th Cir. 1998).

Sechrest committed horrible, brutal crimes. The Court of Appeals erred in its analysis. The Warden respectfully asks this Court to grant certiorari and review this case.

CONCLUSION

The Warden respectfully asks that this Court grant his Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals.

Respectfully Submitted,

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