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

BRIEF IN OPPOSITION

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CAPITAL CASE

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. To the extent the issue is not waived, did the unanimous opinion of the Court of Appeals for the Ninth Circuit correctly apply *Estelle v. Smith,* 451 U.S. 454 (1981) in ordering a new sentencing trial when the prosecutor sent in a psychologist as a stealth prosecutorial agent to interview Petrocelli after his right to counsel had attached, in a flagrant violation of his Fifth and Sixth Amendment rights under *Estelle*, and his trial was tainted by deliberate and egregious prosecutorial misconduct and prejudicial trial court errors?

2. Did the Ninth Circuit correctly hold that the Warden waived any defense to the *Estelle* issue because nowhere in his answering or supplemental briefs in the Ninth Circuit did he even cite *Estelle* or respond to Petrocelli's *Estelle* arguments?

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STATEMENT OF THE CASE

A. Procedural History.

This is a capital habeas corpus matter brought by respondent Tracy Petrocelli, a Nevada death row inmate, pursuant to 28 U.S.C. §§ 2253 & 2254. In 1982, Petrocelli was tried and convicted in Nevada state court for the murder of James Wilson, a Reno used car salesman. (App. 4.)[1] The Nevada Supreme Court affirmed Petrocelli's conviction and sentence. *Petrocelli v. State*, 692 P.2d 503 (Nev. 1985). His state post-conviction petition was denied on the merits. Petrocelli filed the federal petition at issue in 1994 "well before the April 24, 1996, effective date of the Antiterrorism and Effective Death Penalty Act of 1996," ("AEDPA"), so this is a pre-AEDPA case. (App. 4, 21-22.)[2]

After returning to state court to exhaust some claims, Petrocelli filed a *pro se* second federal petition on October 28, 1994, and then a counseled petition in 1996. (App. 19.) That petition raised, *inter alia*, a claim

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[1] "App." refers to the Appendix filed by Petitioner ("the Warden") accompanying his petition.

[2] In prior proceedings in the Ninth Circuit, the Warden refused to acknowledge this, and many of his arguments were based on the inapplicable AEDPA standard of review. Even in this Court, the Warden continues to apply the AEDPA standard in arguing that "clear and convincing evidence [is] necessary to override state court factual determinations under 28 U.S.C. § 2254(e)(1)." (Pet. at 3 n.1.) As the Ninth Circuit correctly held, review is *de novo* for questions of law and mixed questions of law and fact "whether decided by the district court or the state courts." (App. 22, quoting *Thomas v. Chappell*, 678 F.3d 1086, 1101 (9th Cir. 2012)).

regarding Jury Instruction No. 5, which "inaccurately led the jury to believe that Petitioner, under Nevada law, could receive parole," even though Nev. Rev. Stat. § 213.1099 prohibited the granting of parole to a prisoner who has a history of "[f]ailure in parole, probation, work release or similar programs," as did Petrocelli. (App. 20.)

The district court denied the petition, but the Ninth Circuit reversed on the jury instruction claim. (App. 20.) *Petrocelli v. Angelone*, 248 F.3d 877, 884-85, 887 (9th Cir. 2001).

Petrocelli filed a third state petition, which was denied and affirmed on appeal by the Nevada Supreme Court. (App. 20.) A fourth amended petition was filed in federal court, "the operative petition in this case." (App. 21.) The district court denied the petition but issued a certificate of appealability ("COA") on three claims, including a claim that "introduction of Dr. Gerow's testimony violated Petrocelli's Fifth and Sixth Amendment rights," the *Estelle* claim upon which the Ninth Circuit ultimately granted relief. (*Id*.) On June 17, 2016, the Ninth Circuit granted a COA as to three additional claims, including the challenge to Jury Instruction No. 5. (App. 21.)

After supplemental briefing and oral argument, on July 5, 2017, the Ninth Circuit issued a unanimous opinion granting penalty phase relief on Petrocelli's *Estelle* claim. *Petrocelli v. Baker*, 862 F.3d 809 (9th Cir. 2017) (App. 54-106.) The Ninth Circuit also took the unusual step of ordering that, "[a]t the direction of the Court, costs are hereby taxed against appellee." *Petrocelli v. Baker*, No. 14-99006, Docket No. 72 (July 5, 2017).

The Warden then filed for rehearing *en banc*, which was unanimously denied by the Ninth Circuit on August 23, 2017, as "no judge has requested a vote on whether to rehear the matter en banc." (App. 4.) The Ninth Circuit issued an amended unanimous petition on that date, *Petrocelli v. Baker*, 869 F.3d 710 (9th Cir. 2017) (App. 1-53), again granting penalty phase relief based on the *Estelle* violation, prosecutorial misconduct and egregious trial errors. (App. 41.)[3] A concurring opinion by Judge Christen went further and held that "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." (App. 41.)

The Director now asks this Court to grant *certiorari.* For the reasons discussed *infra,* the petition should be denied.

B. Facts Relevant To The Petition.

On April 18, 1982, Petrocelli was arrested for the March 29, 1982 murder of James Wilson, a Reno, Nevada used car dealer. (App. 5.) On April 20, 1982, Petrocelli was transported to Reno and interrogated and he requested psychiatric counseling. (App. 6.) That same day, April 20, the Public Defender of Washoe County was appointed as counsel for Petrocelli. (*Id*.) The following day, Petrocelli appeared in the Justice Court and was arraigned and bail was set. (*Id*.)

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[3] The Ninth Circuit granted a COA on six claims. As it granted relief on the *Estelle* claim, it did "not reach Petrocelli's other penalty phase claims." (App. 29.)

An attorney from the public defender and an investigator visited Petrocelli in the Washoe County Jail on April 21 at about 1:50 pm. (App. 7.) The prison log shows a visit from Dr. Lynn Gerow, "a psychiatrist who had been asked by Chief Deputy District Attorney Laxalt to evaluate Petrocelli's competency to stand trial," later that day. (*Id.*) Gerow signed in at about 3:50 pm. (*Id*.) "Petrocelli testified that he believed that Dr. Gerow had come to see him in response to his request for counseling." (*Id*.) On April 27, 1982, Dr. Gerow sent a letter to Prosecutor Laxalt in which he said he had visited Petrocelli at Laxalt's request. (App. 8.) Gerow found that Petrocelli had "developed a psychopathic personality" and Gerow would see him in the future in an "as-needed" basis, meaning "as needed by Mr. Laxalt." (App. 8-9.) Petrocelli's attorney testified that he did not know that Gerow was going to see his client and he would not have employed him as he "had a prosecution bias." (App. 9.)

At trial, defense counsel submitted written reports from three different mental health professionals—Dr. John Petrich, a psychiatrist; Dr. Martin Gutride, a psychologist; and Dr. John Chappel, a psychiatrist, but the defense did not call on any of them to give live testimony. (App. 12.) Dr. Petrich's evaluation was the most favorable, but it occurred prior to the killings. (App. 12.) Dr. Gutride concluded that Petrocelli had a high potential for violence, but he should be offered treatment "in a setting where the client can be closely monitored." (App. 14.) Dr. Chappel reported some of the same family background as Dr. Gutride, and concluded that Petrocelli was depressed and angry, and "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." (App. 15.) After introducing the reports, Dr. Gutride was called to the stand very briefly by the prosecutor, and his testimony was "under two pages of transcript." (App. 16.)

The prosecutor then called Dr. Gerow to the stand, over the objection of defense counsel. (App. 16.)

> 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."
> (App. 16-17.)

Petrocelli's jury was instructed with the unconstitutional Jury Instruction 5, which provided that a sentence of life without parole meant "the defendant shall not be eligible for parole," but also told the jurors—incorrectly—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." (App. 17.)[4] In final argument, the prosecutor then emphasized both Gerow's characterization of Petrocelli as an incurable, untreatable psychopath and the incorrect jury instruction, repeatedly urging the jury not to take a chance on Petrocelli's release. (App. 18-19.) The jury returned a death verdict. (App.19.)

The Ninth Circuit granted penalty phase relief, finding a "flagrant violation of [Petrocelli's] Fifth and Sixth Amendment rights under *Estelle*." (App. 35, 41.) The Court found that the Warden had waived any defense to this issue because "[i]n neither its answering brief nor its supplemental brief does the State so much as cite *Estelle*, let alone respond to Petrocelli's argument." (App. 29-30.) The Ninth Circuit also held that the state court findings were "not fairly supported by the record" and "are demonstrably wrong in nearly every particular." (App. 32.) The state court finding that counsel was appointed for Petrocelli on the day of Dr. Gerow's interview was wrong; the finding that there was an ambiguity as to whether Gerow or counsel arrived first at the jail was wrong; the finding that no reasonable counsel would conclude that Gerow was an agent for the prosecutor was wrong; the finding that

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[4] This instruction was held to be unconstitutional in *Sechrest v. Ignacio*, 549 F.3d 789, 798-99 (9th Cir. 2008).

Gerow would see Petrocelli again on an "as-needed" basis was wrong as Gerow testified that meant "as needed" by the prosecutor; and the holding that Gerow saw Petrocelli to provide him with treatment was also wrong, as Gerow interviewed him to determine his competency to stand trial. (App. 32-34.)

The Ninth Circuit found the parallels between this case and *Estelle* "striking." (App. 34.) This case was "even stronger" than *Estelle*, where the doctor was appointed by the court, but here he went at the behest of the prosecutor. (*Id.*) As in *Estelle*, Petrocelli had appointed counsel at the time of the visit, Gerow did not seek or obtain permission to visit or evaluate Petrocelli, and Gerow testified that the defendant was incurable. (App. 34-35.) The Ninth Circuit also found the error not harmless, as Dr. Gerow's testimony "was inconsistent with the reports of Drs. Gutride and Chappell," and his "more extensive live testimony [] conflicted with Gutride and Chappel's written reports." (App. 38.) Unlike the other doctors, Gerow "stated unequivocally that Petrocelli was dangerous and would always remain so, and that he was an untreatable psychopath for whom 'there is no cure.'" (App. 36-38.) Additionally, the effect of Gerow's testimony was "magnified" by Jury Instruction 5, which incorrectly indicated to the jury that Petrocelli could be released if sentenced to life without parole, and the prosecutor emphasized in final argument the possibility that Petrocelli could again walk free. (App. 39-40.)

The concurring opinion went further. Judge Christen held that "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." (App. 41, Christen, J., concurring.) The concurrence held that "[a] separate layer of error also infected this trial because the *Estelle* violation dovetailed with an inflammatory jury instruction." (App. 42.) This instruction was incorrect, as Nev. Rev. Stat. § 213.1099(4)(e) prohibited the reduction of a sentence to allow parole if the individual had failed in parole, probation or work programs, as had Petrocelli. (App. 49.) This same instruction had been found to be unconstitutional in *Sechrest, supra*, involving the same doctor and the same prosecutor, which "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." (App. 51-52.) These trial errors and prosecutorial misconduct were so egregious that the concurrence held that this case was one of the very few where the rarely-invoked *Brecht* [*v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993)] "footnote 9 error" warranted relief even without a showing "that the errors actually influenced the jury's verdict."[5] (App. 53.) This case presents "[t]he unusual case where the combination of misconduct and error infected the entire proceeding." (App. 52, quoting *Hardnett v. Marshall*, 25 F.3d 875, 880 (9th Cir. 1994)).

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[5] "*Brecht* footnote 9 error" has been employed only twice previously. (App. 42.)

SUMMARY

The Warden's petition is particularly ill-suited for this Court's review.

First, the Warden has waived his *Estelle* arguments, as the Ninth Circuit held: "[i]n 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." *Petrocelli*, 869 F.3d at 726.

Second, "[e]ven if the State had not waived its defense to Petrocelli's *Estelle* argument," the Ninth Circuit found a violation that was "not harmless." (App. 30.) The Warden's first question misstates the opinion of the Court below, which was not just based on the *Estelle* violation, but on "deliberate prosecutorial misconduct and egregious state court errors." (App. 41, 53, Christen, J., concurring).

Third, the Warden's argument misconstrues *Estelle*, *Buchanan v. Kentucky*, 483 U.S. 402 (1987) and *Powell v. Texas*, 492 U.S. 680 (1989). The Warden's argument rests on a wholly erroneous assumption that *Estelle* and *Buchanan* hold that when a defendant intends to present a mental defense, he waives his Fifth and Sixth Amendment rights. The Warden's argument is also in direct conflict with *Powell*, which, in addition to *Estelle* and *Satterwhite v. Texas,* 486 U.S. 249, 254-55 (1989), are all squarely in point here and foreclose the Warden's argument.

Fourth, there is no circuit split. The Ninth Circuit's decision is not in conflict with the one case cited by the Warden as authority for the alleged split, *Hernandez v.*

Johnson, 248 F.3d 344 (5th Cir. 2001). The Fifth Circuit has clearly indicated that *Hernandez* does not apply to situations such as Petrocelli's. Nor is the Ninth Circuit's holding in conflict with the decisions of any other circuit, or with any decision of this Court.

Fifth, the Warden's second question also misstates the issue, as Gerow's testimony was not "admissible expert opinion under state evidentiary law," but was inadmissible as the result of a violation of Petrocelli's *Miranda* [*v. Arizona,* 384 U.S. 436 (1966)] and *Estelle* rights and the question ignores the prejudicial effect of the egregious prosecutorial misconduct and erroneous jury instruction.

Finally, this is a pre-AEDPA case of limited precedential value because there are very few such pre-AEDPA cases in the pipeline yet to be decided.

The Director's arguments for *certiorari* are contrary to this Court's settled *Estelle* jurisprudence, other circuits' precedents, and they do not comport with the facts of this case, as shown herein. The petition should be denied.

REASONS FOR DENYING THE PETITION

I. The Warden Has Waived his *Estelle* Argument, as the Ninth Circuit Held.

The Warden asserts in a footnote that "[t]he Ninth Circuit briefly suggests that the warden waived any defense to the *Estelle* claim." (Pet. 11 n. 4.) The Ninth Circuit did not "briefly suggest" that the Warden had waived the *Estelle* claim, they clearly and expressly held that he had done just that: "We therefore conclude that the State has waived any defense to Petrocelli's *Estelle* claim." (App. 30.) The Ninth Circuit also explained why they so held:

> 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.
> (App. 29-30.)

Even so, the Warden asserts that this "conclusion is irrelevant to this Court's jurisdiction because the Ninth Circuit reached the merits of the claim anyway." (Pet. 11 n. 4.) However, the actual holding of the Ninth Circuit was that "[e]ven 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." (App. 30.) There was no "waiver of the waiver" by the Ninth Circuit, as the Warden seems to suggest, simply because the Ninth Circuit conducted an alternative merits review. The Warden provides no authority for

the proposition that an alternative merits ruling renders the prior holding "irrelevant." The Court discussed the *Estelle* issue in the alternative, which does not render its holding on waiver "irrelevant" to this Court's decision on whether to grant *certiorari*.

The Warden cites the rule that "[o]ur practice permits review of an issue not pressed below so long as it has been passed upon." (Pet. 11 n.4, citing *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330 (2010)). However, the rule in *Citizens United* derives from the rule announced in *United States v. Williams*, 504 U.S. 36, 44-45 (1992): "it is a permissible exercise of our discretion to undertake review of an important issue expressly decided by a federal court where, although the petitioner did not contest the issue in the case immediately at hand..." The issue here, as discussed *infra*, cannot be deemed so "important" as to justify a discretionary departure from this Court's normal practice.

The issue was not "passed upon" in the Ninth Circuit's alternative merits review because that review was only subsequent to their holding that the Warden had waived the issue. Additionally, the Warden's argument that "the Ninth Circuit's footnote relying on *Powell* in its amended opinion is an *express response* to the Warden's arguments in the petition for rehearing" (Pet. 11 n.4 (emphasis added)), is incorrect as nowhere in the amended opinion is the Warden's petition even mentioned, much less expressly responded to. Nor did the petition garner even one vote in favor of rehearing. (App. 4.)

It is well-settled that this Court "ordinarily will not decide questions not raised or litigated in the lower

courts." *California v. Taylor*, 353 U.S. 553, 556 n.2 (1957); *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987). Far from being "irrelevant," the Warden's waiver precludes review on certiorari. Thus, the Warden's *Estelle* argument fails at this point and this Court need go no further.

II. The Warden Misconstrues Both *Estelle* and *Buchanan.* (Petition Section I(A)).

The Warden attempts to show that "*Estelle* and *Buchanan* [*v. Kentucky*, 483 U.S. 402 (1987)] establish that Dr. Gerow's testimony did not violate the Sixth Amendment." (Pet. 12-15.) The Warden's arguments misstate the holdings of both cases, which are on all fours with the Ninth Circuit's holding in *Petrocelli*.

One full year before Petrocelli's trial, this Court held, in *Estelle v. Smith,* 451 U.S. 454 (1981) that a defendant's Fifth and Sixth Amendment rights are violated when a mental health expert testifies against the defendant based in part on communications made by the defendant during a court-ordered psychiatric examination. In *Estelle,* the state offered the testimony of Dr. James Grigson who testified that the defendant would be a continuing threat to society based on statements made by the defendant during a court-ordered examination. The testimony was held to violate the defendant's Fifth Amendment privileges, since he had not been informed of his right to remain silent; that any statements could be used against him in the sentencing proceeding; and his statements were "unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty." *Estelle* at 467.

The fact that the defendant was "questioned by a psychiatrist designated by the trial court to conduct a mutual competency examination, rather than a police officer, government informant or prosecuting attorney" was immaterial. *Id*. The psychiatrist:

> ...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 post-arrest custodial setting*. During the psychiatric evaluation respondent assuredly was "faced with a phase of the adversary system" and was "not in the presence of [a] person acting solely in his interest." Yet he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he would be sentenced to death. He was not informed, accordingly, he had a constitutional right not to answer the question put to him.
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> *Id.* at 467 (emphasis added, brackets in original, citations omitted).

The Supreme Court also noted that because the defendant had been indicted and counsel appointed before he was examined by the psychiatrist, and because counsel had not been notified of the examination, as with Petrocelli, the defendant's Sixth Amendment right to assistance of counsel had attached and was violated. *Id.* at 470-71; *Kirby v. Illinois,* 406

U.S. 682, 689 (1972); *Powell v. Alabama,* 287 U.S. 45, 57 (1932).

Strikingly similar to the testimony of Dr. Gerow at Petrocelli's trial, Dr. Grigson in *Estelle* testified at the penalty phase (with references to the similar testimony from Dr. Gerow in this case in brackets) as follows:

1. That...[the defendant] "is a very severe sociopath" (here Dr. Gerow testified that Petrocelli had a psychopathic personality, and the "callousness" fit him "quite well") [USCA9.1537, 1539];[6]

2. that "he will continue his previous behavior" (here Dr. Gerow testified that such people "tend to repeat violent actions because they don't learn from experience or punishment, so the propensity for future violence is quite high") [USCA9.1538];

3. that his sociopathic condition will "only get worse" (here, Dr. Gerow testified that "it gets considerably worse...and doesn't go away") [*Id.*];

4. that he has no "regard for another human being's property or for their life, regardless of who it may be" (here Dr. Gerow testified that such people are "very callous and selfish, someone unreliable and irresponsible...They ignore the rules") [USCA9.1537-1538];

5. that "[t]here is no treatment, no medicine...[brackets in original] that in any way at all modifies or changes this behavior" (here Dr. Gerow testified that "there's no treatment at all...[it] persists

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[6] "USCA9" refers to Petrocelli's Excerpts of Record filed in the Ninth Circuit, followed by the page number.

throughout life...it's not treatable...there is no cure") [USCA9.1538-1539];

6. that he "is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so" (here Dr. Gerow testified that such people "tend to repeat violent actions because they don't learn from experience or punishment, so the propensity for further violence is quite high") [USCA9.1537-1538]; and

7. that he has "no remorse or sorrow for what he has done." (Here Dr. Gerow testified that such people "are very callous and selfish...[and] unable to feel deeply about other people") [USCA9.1538-1539.]

Estelle v. Smith, 451 U.S. at 459.

In *Petrocelli*, the Ninth Circuit summarized its holdings on the *Estelle* violation as follows:

> The parallels between *Estelle* and this case are striking. Dr. Grigson [in *Estelle*], 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*.
> (App. 34-35.)

The Warden attempts to show that because "'[t]he State called Dr. Gerow to testify on rebuttal in response to Petrocelli's use of psychiatric evidence to establish mitigating circumstances," there was no Sixth Amendment violation because *Estelle* and *Buchanan* establish an exception in these circumstances. (Pet. 13.) That argument is without merit, as the offending testimony in *Estelle* was also presented in rebuttal. *Estelle*, 451 U.S. at 458. Additionally, ignored by the Warden, are *Estelle*'s holdings that the psychiatric interview is a "critical stage" of the proceedings requiring counsel; that advance notification of counsel that the examination "would encompass the issue of their client's future dangerousness" is required; that a defendant must have the "assistance of his attorneys in making the significant decision of whether to submit to the examination;" and "a defendant should not be forced to resolve such an important issue without the 'guiding hand of counsel.'" *Estelle*, 451 U.S. at 471, quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

Equally unavailing is the Warden's *Buchanan* argument. In *Buchanan*, a non-capital case, this Court distinguished *Estelle* because Buchanan himself had requested the evaluation, whereas in *Estelle* the trial judge ordered it. *Buchanan*, 483 U.S. at 422-23. Additionally, "[t]he rule of *Buchanan*, which we

reaffirm today, is that where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit the offense, the prosecution may present psychiatric evidence in rebuttal." *Kansas v. Cheever,* 134 S. Ct. 596, 601 (2013).[7] The requisite mental state to commit the offense is not in issue here.

In *Buchanan*, this Court held that, in contrast with *Estelle* and this case, "petitioner's counsel himself requested the psychiatric evaluation...It can be assumed—and there are no allegations to the contrary—that defense counsel consulted with petitioner about the nature of this examination." *Id*. at 424. The "proper concern of this [the Sixth] Amendment [was] the consultation with counsel, which petitioner undoubtedly had. Such consultation, to be effective, must be based on counsel's being informed about the scope and nature of the proceeding." *Id* at 424. Here, it is uncontroverted that Petrocelli's counsel "was not informed of the interview, nor consulted about the selection of the expert." (App. 46.) Hence *Buchanan* does not apply.

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[7] The *Cheever* sentence misleadingly quoted by the Warden (Pet. 11, "[a]ny other rule...") immediately follows this holding and thus refers to these limited circumstances, not to a blanket Fifth Amendment waiver, as the Warden contends. The Warden attempts to show that because "Petrocelli put his mental state at issue," any rebuttal is supposedly allowed. (Pet. 11.) This is not the holding of *Cheever*, Petrocelli did not do that, and his future dangerousness, not his mental state, was the substance of Gerow's testimony.

The Warden cites the holding in *Estelle,* 451 U.S. at 471 that "the defendant needs to be able to consult with counsel," (Pet. 14) but then argues that

> when the defendant elects to put his mental status at issue, he no longer has a Fifth Amendment privilege to exercise. And because counsel and the defendant are presumed to have discussed the consequences of placing the defendant's mental state at issue, there is no violation of the Sixth Amendment right to counsel.
> (Pet. 15.)

The Warden ignores *Estelle*'s explicit holding that the defendant's right to counsel includes the right to be informed about the scope and nature of the interview and the right of counsel to be so informed and consulted about the choice of an expert, *Estelle* at 424, none of which was done here. (App. 46.)

There is no suggestion in *Estelle* or *Buchanan* that when a defendant intends to present a mental defense he waives his Fifth or Sixth Amendment rights. The issue for Sixth Amendment purposes is whether, prior to the psychiatric interview, the defendant and his attorney receive sufficient notice and information of the scope, nature and intended uses of the evaluation.[8] *Buchanan,* 484 U.S. at 421-25; *Estelle,* 451 U.S. at 469-70; *Savino v. Murray,* 82 F.3d 593, 603-04 (4th Cir.), *cert. denied,* 518 U.S. 1036 (1996). *See also Gardner v.*

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[8] Thus the Warden misstates *Estelle* and *Buchanan* in arguing that there is no Sixth Amendment violation when the defendant has "an opportunity to consult with his attorney about the consequences of putting his mental state at issue." (Pet. 1.)

Johnson, 247 F.3d 551, 559-62 (5th Cir. 2001)(to comply with *Estelle,* psychiatrist must specifically tell the defendant that anything he says may be used against him at the sentencing proceeding).

Additionally, the Warden's argument that Gerow's testimony was permissible "rebuttal"is itself rebutted by his own pleadings. In his argument for harmless error, the Warden asserts that Gerow was not a rebuttal witness as "Dr. Gerow concurred with the diagnoses of Drs. Gutreide and Chappel," "[a]ll three doctors agreed," and it was allegedly either cumulative or admissible expert opinion. (Pet. 18-19.) This is erroneous, as it ignores the prejudicial aspects of Gerow's testimony. The Warden cannot have it both ways in arguing that Gerow's testimony was and was not rebuttal. (Pet. at 13-15.)

The facts of this case are more egregious than *Estelle.* In the trial prosecutor's mind, Dr. Gerow was there under false pretenses. (USCA9.748-54.) The prosecutor believed that Petrocelli wanted help but the psychiatrist went there not to "help" him but really to gather information to assist the prosecutor, including but not limited to gathering information regarding Petrocelli's competency. In this sense, Dr. Gerow was no different than the "false friend jailhouse informant" interrogating the detained defendant in order to obtain inculpatory information for the upcoming trial. Admissions obtained under these circumstances, without the giving and a waiver of *Miranda* rights, are

flatly inadmissible. *Miranda v. Arizona,* 384 U.S. 436 (1966).[9]

III. This Court's Holdings in *Satterwhite* and *Powell* Additionally Rebut the Warden's Argument.

In *Satterwhite v. Texas,* 486 U.S. 249, 254-55 (1989) this Court reversed a death penalty in a case where a psychiatrist visited the defendant after he was arraigned, charged, and counsel was appointed, without giving him *Miranda* warnings. This Court held that "the use of Dr. Grigson's testimony at the capital sentencing proceeding on the issue of future dangerousness violated the Sixth Amendment." *Satterwhite* at 255-56. As with Petrocelli, the psychiatrist testified that Satterwhite would unequivocally present a future threat to society; that he was a severe sociopath; and "concluded his testimony...with perhaps his most devastating opinion of all: he told the jury that Satterwhite was beyond the reach of psychiatric rehabilitation," *Id.* at 259-60, just as Gripon told Petrocelli's jury that "there is no cure." (App. 17.) The error was held to be harmful and prejudicial. *Id*. at 260.

This Court further weighed in on this issue in *Powell v. Texas,* 492 U.S. 680, 685 (1989) (*per curiam*), another reversal of a death penalty. This Court explicitly rebutted the Warden's arguments therein:

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[9] It is uncontroverted that the prosecutor did not tell Gerow to advise Petrocelli of his *Miranda* rights, and Gerow "was definite in his testimony that he did not do so." (App. 46.)

> the waiver discussions contained in [*Estelle*] and *Buchanan* deal solely with the Fifth Amendment right against self-incrimination. Indeed, both decisions separately discuss the Fifth and Sixth Amendment issues so as not to confuse the distinct analyses that apply. No mention of waiver is contained in the portion of either opinion discussing the Sixth Amendment right. This is for good reason. While it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony, it certainly is not unfair to require the state to provide counsel with notice before examining the defendant concerning future dangerousness.
> *Powell*, 492 U.S. at 685.

Powell explicitly explained the distinction between the Fifth and Sixth Amendment violations:

> The distinction between the appropriate Fifth and Sixth Amendment analyses was recognized in the *Buchanan* [*v. Kentucky*, 484 U.S. 402 (1987)] decision. In that case, the Court held that the defendant waived his Fifth Amendment privilege by raising a mental-status defense...This conclusion, however, did not suffice to resolve the defendant's separate Sixth Amendment claim. Thus, in a separate section of the Opinion, the Court went on to address the Sixth Amendment issue, concluding that on the facts of that case counsel knew what the scope of the examination would be before it took place...Indeed, defense counsel himself requested the psychiatric examination at issue

> in *Buchanan*...In contrast, in this case counsel did not know that the [psychiatrist's] examinations would involve the issue of future dangerousness...
>
> Because the evidence of future dangerousness was taken in deprivation of Petitioner's right to the assistance of counsel, and because there is no basis for concluding that Petitioner waived his Sixth Amendment right, we now hold that [*Estelle v.*] *Smith* and *Satterwhite* control and, accordingly, reverse the judgment of the Court of Criminal Appeals.
> *Powell,* 492 U.S. at 685-86.

Thus, *Powell* and *Buchanan* explicitly refute the Warden's argument that the "Ninth Circuit appears to suggest that it can rely upon *Powell* to sever the Fifth and Sixth Amendment issues," but "the Sixth Amendment question is dependant upon the resolution of the Fifth Amendment question." (Pet. 14.)

Additionally, the Warden again misleads in citing *Powell* to the effect that a remedy for a last-minute insanity defense "is granting a continuance to allow for an evaluation 'by a state-appointed psychiatrist.'" (Pet. at 14, citing *Powell* at 685.) The Warden omits the next sentence: "There would be no justification, however, for also directing that defense counsel receive no notice of this examination." *Powell*, at 685. Thus, *Powell* conclusively refutes the Warden's entire waiver or "rebuttal" argument.[10]

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[10] As the Ninth Circuit pointed out: "the admission of the testimony would still violate the Sixth Amendment because Petrocelli's counsel never received notice of the examination," (App. 35 n.1, citing *Powell* at 685.)

Powell, a case controlled by *Estelle,* is indistinguishable from Petrocelli's case, as is *Satterwhite.* Without Dr. Gerow's inadmissible testimony, the centerpiece of the prosecution's penalty case, it is reasonable to predict that Petrocelli would not have received the death penalty.

IV. The *Estelle* Violation Was Not Harmless.

The Warden asserts that "the only aspect of Dr. Gerow's testimony that is not cumulative of evidence presented by the defense was admissible opinion testimony" (App. 17), and Petrocelli "fails to establish actual prejudice because the only non-cumulative testimony provided by Dr. Gerow was an expert opinion that he could have testified to under state law without ever evaluating Petrocelli." (Pet 19.)[11] The Warden's harmlessness argument is based on a misrepresentation of both the facts and the law and is blatantly contradicted by the record.

The Warden again ignores the fact that Gerow's testimony was improperly obtained as a result of a violation of Petrocelli's *Estelle* and *Miranda* rights, and hence would have been excluded before the court reached the question of whether it could have been admissible as expert opinion testimony. Because of the *Estelle*/*Miranda* violation, it was not admissible under either state or federal law.

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[11] Similarly, the Warden misleadingly frames his second question as "[w]hether a habeas petitioner can establish actual prejudice where the challenged testimony was an admissible expert opinion under state evidentiary law." (Pet. i.)

The Ninth Circuit examined the harmless error question in detail and found numerous reasons why the error cannot be held to be harmless. In any capital case the "central question at sentencing is whether the defendant is likely to kill again." (App. 36.) *See also Satterwhite,* 486 U.S. at 260 ("The finding of future dangerousness was critical to the death sentence.") As discussed *supra*, Gripon's testimony was directed at the future dangerousness question in contrast to the other reports and testimony.

Nor was the other doctors' testimony cumulative as the Warden asserts, as "Dr. Gerow's testimony was inconsistent with the reports of Drs. Gutride and Chappell." (App. 38.) Dr. Gutride testified that Petrocelli wanted help, was in personal distress, and "may truly desire some mental health treatment." (App. 36-37.) He also concluded that "treatment should be offered" and that Petrocelli could conduct himself conventionally. (App. 37.) Dr. Chappell reported that Petrocelli was asking for help, wanted a further and more extensive evaluation, and this could be useful "in preventing any further homicidal outbursts of rage on his part." (App. 37.) Both Dr. Chappell and Dr. Gutride "held out the possibility of treatment." (*Id*.) Neither stated that he was untreatable. (App. 38.)

> However, Dr. Gerow's testimony was inconsistent with the reports of Drs. Gutride and Chappell. 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." (App. 38.)

The Warden's statement that "Dr. Gerow concurred with the diagnoses of Drs. Gutride and Chappel" (Pet. 18) is flatly contradicted by the record.

The Ninth Circuit also found that the error was not harmless under *Brecht*. Although "the jury had ample basis, both legal and emotional, for imposing a capital sentence," the relevant inquiry was "whether it would have done so absent Dr. Gerow's testimony." (App. 36.) The Court explained that Gerow was alone among three mental health experts in stating "unequivocally that Petrocelli was dangerous and would always remain so," and that his "psychopathic personality" was hopelessly untreatable. (App. 38.) Gerow's last words to the jury were "there is no cure." (*Id.*)

The "effect of Dr. Gerow's testimony was magnified by Jury Instruction 5," which incorrectly warned that a life without parole sentence could be cut short at the discretion of the Nevada Board of Pardon Commissioners, and by the prosecutor's closing argument "emphasiz[ing] Petrocelli's dangerousness." (App. 39-40.) The prosecution highlighted and took full advantage of the erroneous jury instruction:

> 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."
>
> (App. 18-19.)

The Ninth Circuit also observed that it had "encountered Dr. Gerow before," in *Sechrest v. Ignacio*, 549 F.3d 789 (9th Cir. 2008), where the "combined effect of Dr. Gerow's testimony and an instruction identical to Instruction 5 'had a substantial influence on the jury's decision to sentence Sechrest to death.'" (App. 40-41.) "Because there was 'more than a reasonable probability' that the jury would have imposed a life sentence absent the *Estelle* error," the Court concluded, "the error was not harmless." (App. 41, quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015)).

In *Sechrest,* "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." (App. 50.) The same "Dr. Gerow interviewed Sechrest without giving him his *Miranda* warnings" or informed the defendant or his counsel that he might testify. *Sechrest* held 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." *Sechrest* at 813, quoted at App. 51.

In *Sechrest*, as here, "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, quoted at App. 51. As the Ninth Circuit concurrence observed, "*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." (App. 52.) The concurring opinion also held that

> [t]he 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. (App. 53.)

In line with the concurring opinion, this Court has held that "[s]ome constitutional violations, however, by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. Sixth Amendment violations that pervade the entire proceeding fall within this category." *Satterwhite* at 256. In finding the same error prejudicial, this Court held, in language that applies here, "[t]he finding of future dangerousness was critical to the death sentence. Dr. Grigson was the only psychiatrist to testify on this issue, and the prosecution placed significant weight on his powerful and unequivocal testimony." *Id*. at 260.

The Warden's harmlessness argument also misrepresents the Ninth Circuit's holding, arguing

"[i]in its amended opinion, the Ninth Circuit retreated from two significant errors…[it] attempted to bootstrap the alleged *Estelle* error to a purported instructional error that the Court acknowledged had not been preserved for review." (Citing App. 87-88, 91-92.) The Ninth Circuit held no such thing. It held that "[i]t 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." (App. 40.) The Ninth Circuit held identically in the original opinion. (App. 93.) The Court held that "[w]e do not reach the question whether Jury Instruction 5 was constitutional at the time of Petrocelli's trial"(App. 39 n.2) because "[w]hether Jury Instruction 5 is constitutional or not, its effect on Gerow's improperly admitted testimony is the same." (App. 40.)

V. There is No "Circuit Split" Based on *Hernandez v. Johnson*. (Petition Section I(B))

The Warden has attempted to manufacture a "split of authority" to support his argument that the case is worthy of a grant of certiorari from this Court. (Pet. 15-17.) This argument is based on a single case, *Hernandez v. Johnson*, 248 F.3d 344 (5th Cir. 2001). Not only is *Hernandez* easily distinguishable and irrelevant, but, in addition, the Fifth Circuit itself has held that *Hernandez* is not applicable where the testimony went to the permanent and incurable state of the defendant's condition, as here. Even under the

Hernandez criteria, Petrocelli would be entitled to relief as Gerow testified his condition was not curable.[12]

Hernandez is easily distinguishable because:

1) *Hernandez* was governed by AEDPA and the state court holdings were upheld on the basis that they met the more stringent AEDPA criteria of an objectively reasonable interpretation of the facts and a reasonable application of the law. (*Hernandez*, 248 F.3d at 346). This case is pre-AEDPA.

2) In *Hernandez*, the defendant himself created "the impression that appellant may have been suffering from paranoid schizophrenia; the State's expert "did not express an opinion regarding future dangerousness" *Id*. at 348; and his testimony "was not a direct assertion of an expert opinion regarding future dangerousness, and [the state court held that] the trial court had specifically instructed the prosecutor that he could not do so." *Id*. at 348.

3) *Hernandez* involved a court-appointed expert examination; here the expert was a stealth prosecution agent.

4) The expert in *Hernandez* testified that his condition "with medication and treatment, remission

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[12] It is noteworthy that in attempting to distinguish *Estelle* and *Powell*, the Warden contrasts Nevada's "weighing" system using statutory aggravating circumstances with the Texas system that "requires the State to affirmatively prove three things at the penalty phase." (Pet. 12.) But the Warden completely relies on *Hernandez*, a Texas case decided under the Texas aggravating circumstances system, to show an alleged circuit split. (Pet. 15-17.)

can be sustained." Here Dr. Gerow stated "there is no cure."

In fact, the few cases that have cited *Hernandez* have followed it on facts that do not apply to Petrocelli but do apply to Mr. Hernandez. Here, Gerow 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,' that the propensity for further violence is 'quite high'...that being 'a psychopathic' was an incurable 'emotional disturbance,' and 'Gerow concluded his direct examination testimony by stating unequivocally, "There is no cure."' (App. 17.)

In the cases where *Hernandez* is followed, the facts are different from Petrocelli's; and where *Hernandez* is distinguished and not followed, it is based on facts similar to Petrocelli's. *See, e.g.*, cases following *Hernandez:*

Cole v. Dretke, 99 F. App'x 523, 532 (5th Cir. 2004) ("The lack of a direct future dangerousness opinion from Dr. Coons arguably supports a conclusion that there was no such Sixth Amendment error," citing *Hernandez*);

Nelson v. Quarterman, 472 F.3d 287, 307 (5th Cir. 2006) (sentencing phase relief denied; "based on the expert testimony at trial, the jury could have concluded that Nelson could be treated.")

Hernandez is not followed where, as here, the condition was not treatable:

Bigby v. Dretke, 402 F.3d 551, 571 (5th Cir. 2005) (granting sentencing phase relief and distinguishing

from *Hernandez* because "Bigby's mitigation evidence indicated that his condition cannot be adequately controlled or treated.")

The Fifth Circuit has explicitly limited *Hernandez* to treatable, curable conditions. *Robertson v. Cockrell,* 325 F.3d 243, 252 (5th Cir. 2003) ("In *Hernandez v. Johnson*, the disability was involuntary, but we stopped the inquiry after noting the transient character of the affliction, because the petitioner's mental illness could be controlled by medication and treatment.")

The Warden's effort to have *Hernandez* stand for a "circuit split" is a misrepresentation of the law and the facts. Indeed, the precedential value of *Hernandez* is now virtually nil, as the curable-permanent distinction it was based on was later held to be improper in *Tennard v. Dretke*, 542 U.S. 274, 287 (2004), two years after Mr. Hernandez's execution in 2002.

Hernandez and the cases citing it were mainly concerned with a different issue, the ability of Texas juries to give mitigating effect to various forms of mitigating evidence and disabilities in the jury instructions in the wake of *Penry v. Lynaugh*, 492 U.S. 302 (1989), *Penry v. Johnson*, 32 U.S. 782 (2001), and *Smith v Texas*, 543 U.S. 37 (2004). This issue has now been rendered obsolete by means of a new Texas jury instruction intended to allow full consideration of all relevant mitigating evidence.

Additionally, in *Bigby, supra*, the Fifth Circuit specifically distinguished *Hernandez*:

> Furthermore, although this circuit has previously held that mitigation evidence of mental illness could be considered within the

> context of the second special issue, if the illness can be controlled or go into remission, *see, e. g., Lucas*, 132 F.3d 1069; *see also Hernandez v. Johnson*, 248 F.3d 344 (5th Cir. 2001), Bigby's mitigation evidence indicated that his condition cannot be adequately controlled or treated.
> *Bigby*, 402 F.3d at 571.

Bigby was granted habeas relief, *Id*. at 572, and under the Fifth Circuit's own interpretation of *Hernandez*, so would Petrocelli, as Gerow, unlike the other medical experts, testified that his condition was incurable and that he would "continue to do this." (App. 48.)

Rule 10 of this Court ("Considerations Governing Review on Certiorari") states:

> [a] petition for writ of certiorari will be granted only for compelling reasons. The following...indicate the character of the reasons the Court considers:...(a) a United States court of appeals has entered a decision in conflict with another United States court of appeals on the same important matter...[or a] United States court of appeals has...decided an important federal question in a way that conflicts with relevant decisions of this Court."
> (Supreme Court Rule 10.)

Neither consideration is implicated here.

VI. This is a Rare Pre-AEDPA Case, Limited to Its Facts, and It Does Not Implicate Any State or National Interests.

The Warden has framed his first question as a categorical referendum on admission of expert opinion evidence violating the Fifth and Sixth Amendments "solely" because the State's expert conducted a pre-trial evaluation of the defendant without advising his attorney. (Pet. i.) As discussed herein, this is inaccurate, as other factors were involved, such as prosecutorial "misconduct [which] was deliberate, and egregious, [which] compromised the integrity of the trial." (App. 53.)

The Ninth Circuit's opinion did not set any categorical rule and the holding was restricted to the facts and circumstances of this case. Both the opinion (App. 30-41) and the concurring opinion (App. 41-53) stress the rare, flagrant, and egregious nature of the *Estelle* violation, even worse than in *Estelle* itself, as here Gripon saw Petrocelli at the behest of the prosecutor. The Warden's over-broad framing of his questions has no basis in the Ninth Circuit's factually limited determination of the State's misconduct and the trial errors in this case.

Additionally, as this is a pre-AEDPA case, it could not have much, if any, precedential value going forward, as AEDPA was passed in 1996 and there are extremely few pre-AEDPA cases still circulating. As in the court below and the district court, the Warden has strangely refused to acknowledge that the case is not governed by the more stringent AEDPA standards. For instance, the Warden claims that "clear and convincing evidence [is] necessary to override state court factual

determinations under 28 U.S.C. §2254(e)(1)." (Pet. 3 n.1.) Section 2254(e)(1) is an inapplicable AEDPA standard of review, and as Petrocelli's initial federal petition was filed before 1996, AEDPA does not apply. (App. 3.)

No jurist on the Ninth Circuit objected in any way to this decision or sought its reconsideration when presented with the opportunity to do so. The panel decision was not only unanimous, but garnered a concurrence by Judge Christen that went further and found *Estelle* error "with or without a showing that the errors actually influenced the jury's verdict." (App. 53.) No jurist even requested a vote on the Warden's petition for rehearing. (App. 4.) Even without the Warden's waiver and untenable arguments for a circuit split, the State's broad questions misstate the holdings of the Ninth Circuit.

CONCLUSION

The petition for certiorari should be denied.

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Respectfully submitted,

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