No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

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DAVID JOHN TELLES, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

--ooOoo--

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. What is the correct standard for reviewing denied motions for competency hearings, under 18 U.S.C. § 4241(a) and constitutional due process? Is reversal required under either the unlimited review previously applied by the Ninth Circuit, or for abuse of discretion as applied by some other circuits, when the denied motions were supported by declarations of counsel and psychiatric reports directly connecting the defendant's mental disorder to incompetency?

2. Where experts disagree on whether a defendant's poor performance on a court-ordered examination is malingering or due to his autism and learning disorders, may courts treat it as a failure to submit to the examination and exclude his psychiatric expert from trial under Federal Rule of Criminal Procedure 12.2, thus implicating his Fifth and Sixth Amendment rights to present a mental-disorder defense?

3. Does a court violate a defendant's Fifth and Sixth Amendment rights to represent himself, asserted 41 days before trial, by finding a purpose of delay from the defendant's stated intention to request a continuance, no matter who represented him? What are appropriate parameters to the timeliness requirement of *Faretta v. California,* 422 U.S. 806 (1974), and what limitations should be placed on courts' discretion to find exceptions thereto?

4. Must courts engage in case-specific inquiries under Federal Rules of Evidence 702 and 403 when grooming and compliant-victim expert testimony is challenged at trial and on appeal, which cannot be "foreclosed" by another decision's approval of distinct grooming testimony on plain-error review?

RELATED PROCEEDINGS

The following proceedings are directly related to the instant case:

- *United States v. David John Telles*, No. 4:16-cr-00424-JSW, United States District Court for the Northern District of California, Judgment entered June 21, 2019.
- *United States v. David John Telles*, Nos. 19-10218, 19-10402, United States Court of Appeals for the Ninth Circuit, published opinion filed at 18 F.4th 290 on July 29, 2021, and amended and superseded upon denial of petition for rehearing en banc on November 16, 2021.

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Petitioner David John Telles respectfully prays that a Writ of Certiorari issue to review the published decision of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Northern District of California, convicting Petitioner of online enticement of a minor, 18 U.S.C. § 2422(b); travel with intent to engage in illicit sexual conduct § 2423(b); and engaging in illicit conduct in foreign places, § 2423(c). As set forth in his accompanying motion, Petitioner requests leave to proceed *in forma pauperis*, as he is indigent and counsel was appointed to represent him in each federal court below.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment is published at 18 F.4th 290 and it appears with its Order Denying Rehearing and Rehearing *en Banc* as Appendix A.

JURISDICTION

The Ninth Circuit filed its Opinion affirming Mr. Telles's convictions on July 29, 2021, which it then amended and superseded upon denial of his Petition for Rehearing and Rehearing *en Banc* on November 16, 2021. App. A.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely pursuant to Supreme Court Rule 13.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment of the United States Constitution provides in pertinent part: "No person shall … be subject for the same offence to be twice put in jeopardy of life or limb; … nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

[1] "App." refers to the Appendix to the instant petition, "AOB" refers to Appellant's Opening Brief, "ARB" refers to Appellant's Reply Brief, and "PFR" refers to Appellant's Petition for Rehearing and for Rehearing *en Banc*. "ER" refers to the Excerpts of Record filed on appeal, with "SER" referring to the sealed excerpts, and "EPER" referring to the excerpts filed *ex parte*.

> confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
>
> 18 U.S.C. § 4241(a) provides:
>
> At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

Subdivision (c) provides: "The hearing shall be conducted pursuant to the provisions of section 4247(d);" which in turn provides: "The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing."

STATEMENT OF THE CASE

I. THE PROCEEDINGS IN THE DISTRICT COURT.

A. Trial Proceedings Related to the Issues Raised on Appeal.

David John Telles was indicted on October 13, 2016, with charges of online enticement of a minor, 18 U.S.C. § 2422(b); travel with intent to engage in illicit sexual conduct, § 2423(b); and engaging in illicit conduct in foreign places, § 2423(c). 1-ER-15-20.

The district court permitted Mr. Telles's first two sets of appointed counsel to withdraw, in light of their cited breakdowns of trust and communication with their client. 1-SER-834; 7-EPER-1252. However, the court denied Telles's motion to replace or supplement his new counsel, Michael Stepanian, in June of 2018. 1-ER-28-33. On September 4, 41 days before trial was set to commence, Mr. Stepanian moved to withdraw, while raising concerns for Telles's competency, and Telles requested to represent himself. 1-ER-36, 7-EPER-1276-81. Mr. Stepanian filed formal motions for a competency hearing on September 6 and 11, attaching a declaration detailing his observations and research, as well as a report by a forensic psychiatrist with expertise in autism, Dr. Denise Kellaher, explaining her diagnosis of Telles with Autism Spectrum Disorder (ASD) and how it was preventing him from rationally assisting with his defense. 2-ER-242-49, 278-307; 7-EPER-1285-86. The court denied these requests on October 1, 2018. 1ER-60.

Following a hearing on *in limine* motions on October 12, Telles was found non-responsive in the lockup. 1-ER-104. He was subsequently hospitalized in a catatonic state for five days. 1ER-105; 4-ER-777. The court denied a renewed competency motion and excluded Telles's forensic psychiatrist from trial. 1ER-109; 2-ER-415. Following hearings regarding Telles's condition on October 15 and 16, the court found Telles was malingering and voluntarily absenting himself from the proceedings. 3-ER-664-65.

The trial began on October 17, 2018, with instructions, opening arguments, and witness testimony streamed into Telles's hospital room. 4-ER-677-78. Telles became responsive that afternoon and was present when trial resumed on October 22. 1-ER-125; 3-ER-760. As the prosecuting witness was leaving the courtroom after testifying on October 23, Telles stood up and fell backwards, again non-responsive, and was removed on a gurney and placed in lockup, with further proceedings audio-streamed in. 5-SER-1052, 1062-63; *see* PFR 12, fn.2. Trial counsel's mistrial motion was denied. 5-SER-1063-65.

Telles was found unconscious again on October 24, and the proceedings were audio-streamed to his jail. 4-ER-777-80. Trial counsel renewed his competency-hearing motion, which the court denied. 4-ER-780. Telles regained consciousness later that morning and was brought to trial. 4-ER-782.

Later that day, when Stepanian attempted to discuss with Telles whether he would testify, Telles appeared to not understand what was happening in the proceedings or recognize the names of parties, and counsel renewed the competency-hearing motion. 4-ER-788. The court did not address the motion, but it admonished Telles about his right to testify, while finding him "playacting," "unwilling to testify and … exercising his right to remain silent." 4-ER-791-93.

On October 29, the jury returned guilty verdicts on all counts. 1ER-141.

On April 3, 2019, the court denied Telles's motion for acquittal or a new trial based on his initial appearance in jail clothing, his absences from trial,

and the court's improper comments before the jury. 1-ER-150-64. On April 9, the court denied Stepanian's renewed motions to withdraw and for a competency hearing, as well as Telles's renewed request for new counsel. 1-ER-165-73; 2-ER-423.

On June 18, 2019, following his incoherent allocution, Telles was sentenced to 302 months in federal custody, with 15 years of supervised release. 1-ER-174, 191.

B. Evidence Presented at Trial.

T.B. was a troubled fourteen-year-old British girl, whom Telles began communicating with through a video game on May 10, 2014. 5-SER-932-39. A KIK messenger account linked to Telles's email address, but in his son's name, had thousands of chats with accounts managed by T.B. 5-SER-873-98. Her accounts presented different personas, including differently-aged versions of herself, boys, and medical professionals. 5-SER-920-22, 949-51, 1015; 6-SER-1191-1232. T.B. created horrifying stories of her personas' and family-members' deaths, abuse by fictional foster-family-members, a fall requiring hospitalization, and a rape resulting in pregnancy, vaginal damage, and surgery. 5-SER-921-32, 949-52, 996-1018, 1045-47; 6-SER-1185-1233. Telles appeared to respond to these fantastical stories with sexual interest, concern, love, and offers of assistance. *See*, *e.g.*, 5-SER 896, 947-49, 1032-35, 1043-44 (also discussing his autism and dyslexia); 6-SER-1205-15.

T.B. believed she was chatting with Telles's teenage son at first, but eventually understood she was communicating with an adult. 5-SER-944-47. They became "boyfriend and girlfriend" and said they loved each other. 5-SER-948, 1032. Telles talked about marriage and coming to England for her. 5-SER-954-55. He bought a ring and showed her his expedited passport, writing: "Told u everything well be fine I will be there soon I love you." 5-SER-859-66, 881-82; 6-SER 1148. Telles told his teenage kids about "everything, marriage, new mom," while acknowledging to T.B. the age issue, saying "we have to say older like 18, maybe 17." 5-SER-882-83; 6-SER-1148-49. Telles asked to see T.B.'s passport, and his phone contained its screenshot, indicating 2000 as her birth year. 5-SER-895, 954-55. T.B. created the rape story and impersonated a doctor explaining the injury to Telles so he would not try to have sex with her. 5-SER 951-52, 1018, 1051; 6-SER-1172.

Telles arrived in England on June 15. 5-SER-1061. T.B. sent him a map to find her. 5-SER 888-89; 6-SER-1176-77. Telles suggested she pack her passport, birth certificate, money, and medicine, clear her phone, and leave her parents a note. 5-SER-890-92; 6-SER-1173-81. T.B. climbed out the window and walked to the end of her road, where Telles picked her up and drove to a hotel. 5-SER-956-59. They had sexual activities that night and the following morning, and Telles presented the ring and proposed marriage. 5-SER 962-68.

After spending the day looking for a fictional lawyer T.B. had created, purportedly to help them marry in Scotland, they spent the night in a different

hotel and performed an additional sexual act. 5-SER-1048-50. They were awoken the next morning by a call from T.B.'s father to Telles's phone, and Telles told her they had to get away. 5-SER-977. While Telles drove, T.B. spoke to her father, who promised the police would not get involved and he would help them get married. 5-SER-980-81. Telles told T.B. her father was lying, he would have Telles sent to prison where he would die from his hernia, making her a murderer, and she would get in trouble for lying about her age. 5-SER-977-84.

When T.B.'s father found them, Telles told him he had been helping T.B., referencing the rape and surgery stories, but her father refuted them. 5-SER-984-85. The police arrived and arrested Telles. 5-SER-985.

When interviewed by the police that day, T.B. "was angry at everyone but David" and did not reveal any sexual contact, because she did not want him to get in trouble. 5-SER-985-86. Two months later, T.B. told the police everything she could remember because she began to feel angry at Telles, thinking he may have not actually loved her. 5-SER-986-87. Though she had told them she had first told Telles she was 16, she now believes she always had said she was 14. 5-SER-987-88.

Forensic DNA evidence supplied by T.B. and Telles was presented supporting their sexual activity. Forensic-psychologist, Dr. Darrel Turner, provided opinion testimony on grooming behavior and compliant victims, discussed in Part D, below.

II. THE APPEAL AND DECISIONS IN THE NINTH CIRCUIT

Telles raised seven issues on appeal.[2] Summarized briefly, they explained the district court violated his constitutional rights by denying his attorney's repeated requests for a competency hearing, excluding his psychiatric expert from trial, denying his timely request to represent himself, continuing with trial while he was hospitalized in a catatonic state, admitting a Government psychiatrist's expert testimony on grooming and delayed-disclosure evidence without making express reliability findings, applying a 5-level enhancement for "repeat and dangerous" sex offenders, and making other unreasonable evidentiary rulings and an inappropriate comment, which combined in effect with the above errors to render the proceedings fundamentally unfair.

Many of the issues center around Telles's diagnosis of Autism Spectrum Disorder by a federally-employed forensic psychiatrist and expert on autism and sex offending, which involve two competing factual interpretations: 1) Mr. Telles's autism implicated his ability to form the requisite criminal intents and his capacity to rationally understand and assist in his defense, leading to multiple secessions of counsel, a (denied) *Faretta* motion, and erratic behavior; 2) Mr. Telles was malingering throughout the assessments and proceedings.

[2] Telles's first and second attempts to file overlength Opening Briefs of 23,760 and 21,439 words, respectively, were denied by the Ninth Circuit, which ultimately accepted his third brief of 17,999 words.

Based on their individual examinations of Telles, his retained psychiatrist opined the former, and the Government's psychologist opined the latter.

Telles explained in his briefs that precedent required the district court to assume the truth of his proffers and submit these competing expert opinions to a due-process competency hearing in accordance with 18 U.S.C. §§ 4241(a) & 4247(d). AOB & Reply I. Had he been found competent following a hearing, then the jury was entitled to hear both experts' testimony and resolve whether Telles had ASD, which impacted his criminal intent, AOB & Reply II; and, his timely *Faretta* motion should have been granted, AOB & Reply III.

Instead, the district court repeatedly found each of Telles's aberrant episodes to be malingering, without ever holding the requested due-process competency hearings. It further used the Government psychologist's original malingering diagnosis as a basis for excluding his psychiatrist from trial, by deeming Telles's poor performance on the court-ordered examination a failure to submit thereto, and again to conclude the catatonic Telles was more-likely malingering than suffering from severe psychological disturbances. *See* AOB & Reply Part IV. And, contrary to the unreasonably harsh lens it had applied in excluding Telles's psychiatric expert without holding a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993), *see* AOB & Reply Part II.C; the court permitted a Government-retained psychiatrist to opine on "grooming" and "delayed-disclosure" profile evidence,

without pointing to anything in its lengthy proffer that ensured its reliability or relevance, under Federal Rules of Evidence 702, *see* AOB & Reply Part V.

The Ninth Circuit affirms these erroneous rulings by departing from its own precedent and that of this Court, omitting the detailed analysis of Telles's psychiatrist and counsel while mislabeling their opinions "conclusory," failing to conduct the requisite fact-specific review of the district court's evidentiary gate-keeping decisions challenged on review, and failing to accord sufficient weight to the constitutional defense rights at stake in the challenged rulings. Its perplexing decision to publish the opinion leaves the jurisprudence in a conflicted and incoherent state, as the only new law it creates is in its implicit departures from precedent, and its factual omissions makes reasoned application of its analysis challenging. It invites other courts to likewise simply omit the details supporting the experts' opinions they reject or accept, while permitting courts to push forward with trial when faced with a difficult defendant, regardless of established constitutional, precedential, and procedural mandates.

Telles's Petition for Rehearing and for Rehearing *En Banc* was denied on November 16, 2021.

REASONS FOR GRANTING THE PETITION

CERTIORARI IS NEEDED TO REMEDY MULTIPLE SPLITS OF AUTHORITY AND SETTLE IMPORTANT ISSUES OF CONSTITUTIONAL LAW.

A. The Published Opinion Departs from Precedent Requiring Courts to Grant Motions for Competency Hearings, where Supported by the Reasoned Opinions of Counsel and Psychiatrists, and It Intensifies a Split of Authority on the Standard of Review for a Denied Motion.

18 U.S.C. § 4241(a) requires courts to hold a requested competency hearing, "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." Applying this Court's authority, the Ninth Circuit had repeatedly held this test satisfied "any time 'there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competenc[e].'" *United States v. Duncan*, 643 F.3d 1242, 1247-50, fn.2 (9th Cir. 2011); *Moore v. United States*, 464 F.2d 663, 666 (9th Cir. 1972) ("due process evidentiary hearing is constitutionally compelled at any time that there is 'substantial evidence' that the defendant may be mentally incompetent to stand trial" (citing *Pate v. Robinson*, 383 U.S. 375 (1966)); U.S. Const. amends. V, VI.

In the relatively rare circumstance where a formal competency-hearing motion was denied, the Ninth Circuit had previously applied "'comprehensive' review of the evidence, … 'not limited by either the abuse of discretion or clearly erroneous standard,'" in asking "whether a reasonable judge, situated

as was the trial judge who denied the motion, should have experienced doubt with respect to the defendant's competence." *Duncan*, 643 F.3d at 1247; *see also de Kaplany v. Enomoto*, 540 F.2d 975, 980-81 (9th Cir. 1976) (en banc) ("*Pate* and *Drope* teach that appellate review of a failure to provide a hearing on competence to stand trial is comprehensive and not limited by either the abuse of discretion or clearly erroneous standard"); *but see United States v. Garza*, 751 F.3d 1130, 1134 (9th Cir. 2014) (describing this as "limited" inquiry, in plain-error review of failure to hold sua-sponte hearing). The opinion ignores *Duncan* and *de Kaplany*; and instead of assuming the truth of the proffered evidence from Telles's counsel and psychiatrist expressly connecting his medical disorder with incompetence, the Opinion omits their analysis explaining that connection in detail, while labeling it "conclusory," and defers to the district court's impressions. *Compare United States v. Telles*, 18 F.4th 290, 298-300 (2021), with *Duncan*, 643 F.3d at 1247-50, fn.2.

Such deferential review is particularly unwarranted for denied briefed motions, supported by detailed declarations and reports easily accessible to the appellate court. *See* Reply 2-5 (distinguishing, *e.g., United States v. Brugnara*, 856 F.3d 1198 (9th Cir. 2017), *United States v. Turner*, 897 F.3d 1084 (9th Cir. 2018) (both defendants found competent to represent themselves, yet argued on appeal their erratic behavior required sua-sponte hearings); 2-ER-278-308. The Opinion omits this analysis and engages in a more-deferential review than previously required by it and this Court, even when applying plain-error

review. *Compare* 18 F.4th at 299-301, *with* AOB 20-33 (discussing, *e.g.*, *Drope v. Missouri*, 420 U.S. 162 (1975); *Anderson v. Gipson*, 902 F.3d 1126, 1134 (9th Cir. 2018); *United States v. Dreyer*, 705 F.3d 951, 960-61 (9th Cir. 2013); *Duncan*, 643 F.3d at 1245-50; *Maxwell v. Roe*, 606 F.3d 561 (2010); *United States v. Friedman*, 366 F.3d 975 (9th Cir. 2004)).

Even where other circuits have left section 4241's "reasonable cause" to the trial court's discretion, they find it abused when the court fails to grant a requested hearing supported by declarations of counsel and psychiatrists connecting a disorder with incompetence, even with competing opinions. *See United States v. Mason*, 52 F.3d 1286, 1291-93 (4th Cir. 1995); *United States v. Soldevila-Lopez*, 17 F.3d 480, 487, 490 (1st Cir. 1994); *cf. Griffin v. Lockhart*, 935 F.2d 926, 930-31 (8th Cir. 1991) (on habeas review, finding "sufficient doubt was raised about Griffin's competency for trial," where "three doctors, in a collective opinion, were unable to arrive at a consensus on whether Griffin was competent"); *compare United States v. Patterson*, 713 F.3d 1237, 1242-44 (10th Cir. 2013) (finding no abuse of discretion where counsel's declaration insufficiently connected Patterson's prior Attention Deficit Disorder diagnosis and difficulty paying attention to incompetence standard); *United States v. Gonzalez-Ramirez*, 561 F.3d 22, 26-28 (1st Cir. 2009) (finding no abuse where request premised on single suicide attempt, with no mental illness history or expert opinion on incompetence).

In a prior survey of its precedent, the Ninth Circuit identified two key factors requiring competency hearings: strong evidence of a medical disorder and its "clear connection" with incompetence. *Garza*, 751 F.3d at 1135-36. It found the first factor established by either undisputed medical evidence or disputed medical evidence coupled with erratic behavior. *Id.* It found the second factor established by remarkably-minimal evidence from counsel: *i.e.*, stating the disorder was the defendant's reason for not allocuting or asking for recesses to prevent his client's psychotic breaks. *Id.* at 1136; *see also Pate*, 383 U.S. at 384-86 & fn.6-8 (citing counsel's similar concerns in finding hearing was required); *Medina v. California,* 505 U.S. 437, 450 (1992) ("defendant's inability to assist counsel can, in and of itself, constitute probative evidence of incompetence," of which "counsel will often have the best-informed view"); *Anderson*, 902 F.3d at 1133-35 (finding erratic behavior and attorney's concerns required hearing and California court's subjective application of substantial-evidence test was contrary to established Supreme Court law). Thus, until now, the Ninth Circuit's analysis had aligned with this Court's explanation "that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of those factors standing alone may, in some circumstances, be sufficient." *Drope*, 420 U.S. at 180.

Here, Telles's autism diagnosis was undisputed, manifested in repeated erratic behavior, and both his counsel and psychiatrist expressly connected his autism to his inability to rationally understand and assist his defense. *See* AOB 13-17. By deeming their connections "conclusory," while omitting their detailed analysis establishing the connections, the Opinion surreptitiously departs from the controlling precedent it cites, permitting other courts to disregard evidence this Court had previously identified as compelling due-process hearings, without any guidance for assessing the distinction. 18 F.4th at 300 & fn.2.

Specifically, counsel submitted a 5-page declaration explaining his research and consultations with experts on competency and autism, Telles's irrational behaviors impacting his defense, and concluding:

> Mr. Telles's obstructionist and confrontational manner and inability to communicate effectively with counsel are consistent with his condition of having Autism Spectrum Disorder, recognized in the DSM-5. Based on the information I have been provided, it is my opinion that his inability to communicate with me and my colleagues in an effort to prepare his defense is rooted in and related to this existing, demonstrable disorder.

2-ER-283-88; 7-EPER-1285-86.

Counsel attached a 9-page report by Dr. Denise Kellaher, a federally-employed psychiatrist with expertise on autism, directly explaining her evaluation and diagnosis, how Telles's ASD rendered him incompetent, and how competence could be restored, which she arrived at after interviewing Telles for nine hours and his parents for two. 2-ER-290-307. Though the

Opinion acknowledges this ASD diagnosis, 18 F.4th at 296, 300, it mislabels her opinion on competency as "conclusory," while omitting her explanation of ASD's impact on Telles's competence, including:

> Based upon the available information and my evaluation, Mr. Telles currently lacks capacity to stand trial. At present, he does not demonstrate a rational understanding of the court and he is unable to assist his attorneys in a rational manner. He appears unaware or misunderstands the role of his attorneys as his own legal team of experts tasked to defend him. In the last few months, Mr. Telles has concluded that his current attorneys are unqualified to represent him because they are not Autism experts and as a consequence, his attitude towards them has grown increasingly hostile. He perceives them as unhelpful and as antagonistic to his case as the Assistant U.S. Attorney and the Judge. … While Mr. Telles acknowledges having fixations, inflexibility and rituals that make it difficult for his attorneys to work with him, he does not appear to fully appreciate how his conduct has prolonged his detention or how it may impact the course of his case.
>
> Mr. Telles has significant cognitive and behavioral inflexibility associated with his ASD that impacts his reasonable ability to interact with his lawyers. His intense fixation on correcting perceived inaccuracies in the evidentiary record and other documents has stymied collaboration.…
>
> [¶¶]
>
> Without a competency restoration program, Mr. Telles will *unlikely* attain fitness to stand trial in the foreseeable future. Like the typical ASD individual, Mr. Telles struggles seeing the larger picture, interacting with others, and adapting to new or changing circumstances. These ASD related issues will continue to interfere with his capacity to stand trial if Mr. Telles is not given the opportunity to learn and understand the fundamentals of court so he may better serve his interests.

2-ER-305-06. Thus, a correctly-comprehensive review of Dr. Kellaher's reports reveals more-substantial "connection" evidence than courts had previously found required hearings. *Compare*, *e.g.*, *Garza*, 751 F.3d at 1136 (citing, *e.g., Dreyer*, 705 F.3d at 958-59); *Anderson*, 902 F.3d at 1129-30, 1134; *Mason*, 52 F.3d at 1291-93; *Griffin*, 935 F.2d at 930-31.

The Opinion obscures the purpose of the substantial-evidence test, which is not to determine whether the proffered evidence establishes incompetency, but whether it requires exploration in a due-process hearing. Until now, the Ninth Circuit had recognized:

> Once there is such evidence from any source, *there is a doubt that cannot be dispelled by resort to conflicting evidence*. The function of the trial court in applying *Pate's* substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? It[s] sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency.

Moore, 464 F.2d at 666 ("court's 'failure to make such inquiry thus deprived [Moore] of his constitutional right to a fair trial' … unless we can say that there was before the trial court no substantial evidence casting doubt upon his competency at any time before he was sentenced") (quoting *Pate*, 383 U.S. at 385); *accord United States v. Day,* 949 F.2d 973, 982 (8th Cir. 1991).

The Opinion abandons this well-established mandate to *assume* the proffered evidence's truth, while latching onto a prior decision's having noted a "high" bar set for its distinct plain-error review of a post-hoc claim considering a disputed medical disorder with no connection to erratic behavior or

incompetence. 18 F.4th at 300 & fn.2, citing *Garza*, 751 F.3d at 1135. It omits *Garza's* discussion of how easily attorneys can provide the "connection," noted above, as well as the specific evidence trial counsel provided here, connecting Telles's disorder to incompetence. *See Garza*, 751 F.3d at 1136; 2-ER-283-88, 7-EPER-1285-86. It finds "Telles's difficulties with his attorneys appear to stem from his spite," without pointing to evidence establishing spite. 18 F.4th at 300 & fn.2. And, it credits the court's conclusion Telles's difficulties were "of his own making," while disregarding medical evidence demonstrating how Telles's *autism* created his difficulties. *Compare id.* at 1091, 1098; *with* 2-ER-305-06.

The federal rules and precedent recognize that trial courts are not experts in distinguishing willfully-obstructive behavior from obstructive behavior caused by a medical disorder, and thus compel them to explore competing medical expert assessments through the presentation and cross-examination of evidence in a due-process hearing. *Pate*, 383 U.S. at 384-86; *Duncan*, 643 F.3d at 1249-50; *United States v. Graves*, 98 F.3d 258, 262 (7th Cir. 1996) (noting judges are not medical experts and must obtain advice); 18 U.S.C. §§ 4241(a), 4247(d).

A due-process hearing could have permitted Dr. Kellaher to explain her opinion that Telles's autism and learning disabilities caused his difficulties in completing the assessments both she and the Government's psychologist, Dr. Martell, had performed, which the Opinion omits while crediting Martell's interpreting Telles's difficulties as malingering in addressing subsequent

competence-hearing motions and the exclusion of Dr. Kellaher's testimony. *See* 2-ER-374, 389-91, 409-10;[3] 18 F.4th at 298-302. Likewise, she could have developed the connection between Telles's autism and his attempts to draft documents "correcting" the factual record and to directly negotiate with the Government, which counsel had cited as demonstrating Telles's irrational understandings of proceedings, which was causing repeated conflicts with counsel. *See* 1-ER-32-33 (court's admonishing Telles against communicating with Government); 2-ER-283-88, 305-06, 314 (court's striking material Telles provided for counsel's motion); 7-EPER-1285-86.

This Court reversed where insufficient weight was given to conflicting medical reports, and an immediate competency examination could have avoided proceeding with an unconstitutional trial in defendant's absence. *Drope*, 420 U.S. at 175-82. Here, Telles's mental condition severely

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[3] For example, in her later report supporting her proffered testimony, for which she had also reviewed Dr. Martell's interview, Dr. Kellaher wrote:

> Mr. Telles has a history of learning disabilities that may explain his resistance during portions of testing in both Dr. Martell's and my examinations. With Dr. Martell, Mr. Telles repeatedly expressed difficulty with word comprehension and with having to read 344 questions. With me, he had similar difficulties in understanding statements that had contractions like "don't" and interpreting descriptive words … *(almost never, seldom, occasionally, frequently, and almost always).* Once I converted these descriptors to numerical percentages (an alternative option provided by the test), he was able to get through most questions with only an occasional clarification needed.

2-ER-390.

deteriorated to the point of his 5-day catatonic state, which likewise presented circumstances requiring the trial's suspension "until such [competency] evaluation could be made." *Id.* at 181-82. The court abandoned that course and found Telles's absence voluntary based on the testimony of attending doctors who could not communicate with Telles, but had reviewed Dr. Martell's report and opined Telles was more-likely "malingering" than experiencing "conversion disorder," another mental condition. 3-ER-532-33, 657-58. For reasons unrelated to her psychiatric expertise, Dr. Kellaher was excluded from those proceedings, leaving the examining doctors uninformed of her distinct diagnoses and ruling-out malingering. 3-ER-534.[4] In denying another four

[4] Appellant's explanations that Dr. Kellaher's federal employment did not raise ethical problems prohibiting her testimony, as the court had erroneously assumed, were omitted from the Opinion. *See* AOB II.E. Federal prosecutors appear to be successfully discrediting and preventing psychiatrists from providing expert testimony for criminal defendants based solely on the fact that one branch of the federal government employs them (here, the Veterans Administration) and another branch is an opposing party in the criminal trial, by citing statutes and regulations designed to prevent corrupt self-dealing. *See* AOB II.E, discussing 5 C.F.R. § 2635.805 and 18 U.S.C. §§ 203, 205, & 208. Some federal courts have recognized these ethical rules cannot be used to trump the constitutional rights of criminal defendants to present expert testimony on matters entirely unrelated to the expert's federal employment, as should have been the case here. *See*, *e.g.*, *United States v. Lecco*, 495 F. Supp. 2d 581 (S.D.W. Va. 2007); *Dean v. Veterans Admin. Regl. Off.,* 151 F.R.D. 83 (N.D. Ohio 1993). Though the district court did not expressly rely on these statutes as a basis to exclude Dr. Kellaher from trial, it referenced the misplaced ethical allegations when it excluded her from the absentia proceedings, declaring she had "no credibility in this court at all." *See* AOB IV, 3-ER-534. To the extent this legal misunderstanding impacted the court's erroneous failures to hold competency hearings and its exclusion of Dr. Kellaher's testimony, and may be impacting other federal defendants throughout the country, it further supports the need for certiorari.

competency-hearing motions raised in response to Telles's continued erratic behavior, including his incoherent allocution, the trial court appeared to be relying more on confirmation bias than precedent. *See* AOB 28-34.

The Panel's misplaced deference and lopsided presentation of the evidence supporting counsel's renewed motions continues its distortion of the substantial-evidence test. *Compare* 18 F.4th at 299-301; *with Pate*, 383 U.S. at 385; *Moore*, 464 F.2d at 666. Courts must not be permitted to elevate their own psychiatric impressions over experts', without first affording the opportunity to present and cross-examine them. *See Graves*, 98 F.3d at 262; *Anderson*, 902 F.3d at 1135 ("*Pate* and its progeny demand more than such speculation: they demand a competency hearing.") The Opinion's erecting a *threshold* bar too high to withstand the reasoned submissions of Telles's counsel and psychiatrist, amply-supported by repeated erratic behaviors, dismantles the established framework protecting the due-process rights of incompetent defendants. *See Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996); *Pate*, 383 U.S. at 384-86; *Drope*, 420 U.S. at 175-82; §§ 4241(a), 4247(d). While no one would like to see a repeat of this trial, avoidance of that outcome is not a proper basis for the factual and legal gymnastics engaged in by both lower courts here.

Certiorari is required to preserve these fundamental rights and the uniformity of precedent protecting them, and to address the split of authority regarding the appropriately "comprehensive," unlimited, standard of review for failures to hold requested or *sua sponte* competency hearings. *See*, *e.g.*, *de*

Kaplany, 540 F.2d at 983 (finding *Pate* requires comprehensive'" review of evidence, "not limited by either the abuse of discretion or clearly erroneous standard"); *Duncan*, 643 F.3d at 1247 (*accord* for review of denied motion); *Garza*, 751 F.3d at 1134 (describing essentially same test as "limited" in *sua sponte* context); *Mason*, 52 F.3d at 1289-90 (reviewing for abuse of discretion); *Soldevila-Lopez*, 17 F.3d at 487 (same); Supreme Court Rule 10(a)&(c). The Opinion, and the district court's rulings it upholds, "has so far departed from the accepted and usual course of judicial proceedings," it calls for "an exercise of this Court's supervisory power." Supreme Court Rule 10(a). At a minimum, this Court may vacate the published opinion and remand the matter with instructions to apply its authority and sections 4241 and 4247(d), assume the truth of the proffered evidence of incompetence, and hold a due process hearing with the rights to present further evidence and cross-examine witnesses. *Cf. Clayton v. Gibson*, 199 F.3d 1162, 1169-70 (10th Cir. 1999) (finding retrospective competency hearing feasible).

B. The Opinion Unreasonably Departs from Precedent by Elevating a Disputed Rule Violation over the Defendant's Constitutional Right to Present a Mental-Disorder Defense.

The Opinion omits most of the analysis presented in the multi-faceted Part II of Telles's briefs and upholds the trial court's total exclusion of Telles's psychiatric expert through a questionable interpretation of a procedural rule. Specifically, the trial court had found Telles failed to submit to a court-ordered examination by the Government's psychologist under Federal Rule of Criminal

Procedure 12.2(c)&(d), because that psychologist opined Telles's tortured responses to his lengthy assessments over the course of several hours constituted malingering. 1-ER-145-46; 2-ER-361-71. Both the trial court and the court of appeal omitted consideration of the contrary analysis by Telles's psychiatrist of that video-taped examination and Telles's similarly poor performance on her assessments, which concluded it was due to his autism and learning disabilities. 2-ER-389-91, 409-10.

The Opinion cites no authority applying Rule 12.2(c)&(d), let alone authority finding a subjectively-poor performance on an attended court-ordered examination may constitute failure to submit. Its affirming the total exclusion of Dr. Kellaher's ASD testimony as a sanction for a disputed rule violation dangerously departs from precedent, which required considering the "decisive value" of proffered evidence and whether its exclusion is disproportionate to the violation. *See United States v. Finley*, 301 F.3d 1000, 1017-18 (9th Cir. 2002) (finding total exclusion of psychiatric expert was "a too harsh remedy" for Rule 16 violation) (quoting *Taylor v. Illinois*, 484 U.S. 400, 408 (1988)) (because "'[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense,' courts should use particular caution in applying the drastic remedy of excluding a witness").

Here, Dr. Kellaher reviewed Dr. Martell's video-taped examination of Telles, noted he "repeatedly expressed difficulty with word comprehension and with having to read 344 questions" and had:

> exhibited very similar behaviors during both of the expert examinations. As on mine, Mr. Telles required frequent redirection from Dr. Martell to pay attention to the evaluation. … His conduct was nearly the same during both experts' examinations even though Mr. Telles perceived me to be on the side of his defense in the case; in other words, he impeded my work against his own best interests. This conduct on both examinations may be explained by his ASD. He was cognitively rigid, he had reading problems, and he engaged in idiosyncratic behavior interests—these are better attributed to his ASD and his learning disorder and not malingering.

2-ER-390-91 (also noting Telles "ultimately complied with Dr. Martell's frequent redirections"), 409-10 ("Dr. Martell appeared to inappropriately arrive at an opinion that Mr. Telles was malingering based on incomplete personality testing and tests of effort, which may falsely represent feigning and could be better explained by other psychiatric or medical conditions about which I am better prepared to speak.") The jury should have been presented with the experts' competing analysis of Telles's mental disorders, including whether he was malingering, and reached their own conclusions.

The Opinion improperly omits this evidence demonstrating how Telles's examination difficulties were not a willful violation of the court's order, but rather evidenced his DSM-5-recognized disorder, which required a competency hearing and/or presentation of his mental-disorder defense through his qualified autism expert. Excluding his expert was a too-harsh remedy, given the fundamental defense rights at stake, other means for remedying prejudice, and no "other way of explaining the possibility that [Telles] suffered from a mental disorder." *Finley*, 301 F.3d at 1018.

The Opinion's addressing only the Rule 12.2 issue, while omitting Telles's arguments demonstrating the district court's improper exclusion of Dr. Kellaher's medical-disorder testimony through its misapplication of precedent on Federal Rules of Evidence 702 and 704 to her detailed 30-page report, replete with authoritative footnotes, and erroneously discrediting her due to misapprehended ethical rules, additionally requires certiorari, vacation, and remand. *See* AOB Part II.C; 2-ER-372-401; fn.4, *supra*. Until now, the Ninth Circuit had consistently and appropriately elevated the defendant's right to present medical evidence in support of his defense over courts' personal disagreements with experts' factual and medical conclusions. *See*, *e.g.*, *United States v. Ray,* 956 F.3d 1154, 1159 & fn.7 (9th Cir. 2020) (correct Rule 702 & 704 application requires determining "the relevance of the psychological evaluation the expert conducted and the medical diagnoses he made, not his ultimate legal conclusion regarding the defendant's mental state," and cautioning Rule 704 limits, but does not preclude, testimony); *United States v. Christian*, 749 F.3d 806, 811-14 (9th Cir. 2014) (same); *United States v. Bacon*, 979 F.3d 766, 768-70 (9th Cir. 2020) (overruling mandatory-retrial remedy but otherwise affirming *Ray*, *Christian, et al.*); *United States v. Cohen*, 510 F.3d 1114, 1123-27 (9th Cir. 2007) (finding fixed-belief testimony would have assisted jury and proper way to exclude potentially-inadmissible aspects "was not to bar [psychiatrist] from testifying altogether, but to sustain the government's objections to particular questions likely to elicit inadmissible

evidence"); *Finley*, 301 F.3d at 1007-16 (same); U.S. Const. amends. V, VI. Likewise here, Telles was entitled to have the jury resolve the experts' conflicting interpretations of his conduct *as well* as his performance on their examinations.

Certiorari is required to maintain consistency of opinion and prevent courts from arbitrarily excluding medical testimony fundamental to the defense, based on disputed rule violations and courts' subjective resolutions of conflicting psychological evidence.

C. The Opinion Undermines the Constitutional Right to Self-Representation by Upholding the Denial of a Knowing and Abundantly-Timely Request, Based on the Trial Court's Speculation of a Dilatory Purpose.

Forty-one days before trial was set to commence, Telles moved to represent himself, in the alternative to his renewed request for new counsel. 1-ER-24, 36. He made the request during the first hearing that was held after his prior request for new counsel had been denied three months earlier, amid ongoing strategic disputes. 1-ER-28; 2-ER-436-43. He additionally indicated he would be requesting a continuance, *no matter who represented him*, in order to permit "actual legal preparation." 2-ER-444-46.

In its seminal decision, this Court found a defendant's constitutional right to conduct his own defense was violated when the trial court denied his knowing request made "weeks before trial." *Faretta v. California*, 422 U.S. 806, 835-36 (1974). This Court has not further specified the parameters for finding such requests timely, but the Ninth Circuit has interpreted *Faretta* to require

the granting of a knowing and voluntary request before the jury is empaneled "so long as it is not made for purposes of delay and the defendant is competent." *United States v. Farias*, 618 F.3d 1049, 1051-52 & fn.2 (9th Cir. 2010); *see also Jones v. Norman*, 633 F.3d 661, 667 (8th Cir. 2011) ("A request to proceed pro se is constitutionally protected only if it is 'timely, not for purposes of delay, unequivocal, voluntary, intelligent and the defendant is competent.'" (quoting *United States v. Maness*, 566 F.3d 894, 896 (9th Cir.2009))); *Munkus v. Furlong*, 170 F.3d 980, 984 (10th Cir. 1999) (same).

Citing Telles's intention to seek a continuance and the prior delays caused by his substitutions of counsel, the trial court found delay was the *Faretta* motion's purpose and denied it on that basis.[5] 1-ER-64; 5-SER-854-55. By affirming this denial, the Opinion conflicts with precedent and stretches a limited exception so far as to swallow *Faretta's* rule, rendering the constitutional right to defend oneself subject to arbitrary denial if it is asserted in concert with (or in anticipation of) a continuance request and follows other delays related to representation. *See Farias*, 618 F.3d at 1054-55 (reversing where court preemptively stated it would not permit continuance, and

[5] The court additionally questioned Telles's competence to represent himself (in contrast to his competence to stand trial), based on prior statements he had made about his autism causing difficulties in understanding the proceedings, while he was requesting new counsel; however the focus of its denial was its speculation Telles's purpose was to delay the proceedings and prejudice the Government. *See* 5-SER-854-56; 1-ER-63-64 (written order jointly denying his motion for self-representation and counsel's motions to withdraw and for a competency hearing.)

defendant accordingly withdrew request to represent himself). It ignores that every prior decision addressing untimely requests occurred on the literal *eve* of trial or later, exponentially-increasing the need for a continuance. *See* AOB 61-66 (citing, *e.g.*, *United States v. Kaczynski*, 239 F.3d 1108, 1116 (9th Cir. 2001); *Armant v. Marquez*, 772 F.2d 552 (9th Cir. 1985)).

Here, though it had obtained Telles's affirmation that his anticipated continuance motion was disconnected from his *Faretta* request, the court denied his Sixth Amendment right by speculating a contrary purpose. 2-ER-444-46. Telles had made his actual purpose quite clear: irreconcilable differences with counsel. 2-ER-440-46. The Opinion's affirming this *Faretta* denial over an anticipated continuance motion, which the court presumably could have denied while still honoring Telles's fundamental right to defend himself six weeks later, conflicts with its precedent and this Court's recognition of this fundamental right. *See Armant*, 772 F.2d at 555-58 (proceeding to trial with unwanted counsel, rather than granting *Faretta* motion made on first day of trial and conditioned on continuance, violated constitutional rights (citing *Powell v. Alabama,* 287 U.S. 45, 59 (1932))); *Faretta*, 422 U.S. at 835-36 (finding self-representation must be permitted when knowingly requested weeks before trial).

Dr. Kellaher's reports reveal Telles's autism created the breakdowns with and secessions of his multiple appointed attorneys. *See*, *e.g.*, 1-ER-21, 22; 2-ER-305, 375. Mr. Stepanian repeatedly attempted to obtain a competency

hearing and/or withdraw from the dysfunctional representation. *See*, *e.g.*, 18 F.4th at 295-299; AOB I; 1-ER-24, 166-67, 37; 3-ER-538; 4-ER-780, 788. After improperly deeming Telles competent to be tried without the required due-process hearing, the court conversely cited concerns his autism may render him incompetent to represent himself and refused to let Stepanian withdraw. 1-ER-64; 5-SER-855-56. The Opinion upholds this inconsistent decision sacrificing Telles's fundamental rights, because Telles had merely expressed his *intention* to request a continuance along with his request to represent himself or have new counsel, following prior trial delays due to irreconcilable differences with appointed counsel. *See* 18 F.4th at 302.

The Opinion's only cited case on delay does not support its conclusion it needed "no further proof" delay was Telles's purpose. *Id.* (citing *Fritz v. Spalding*, 682 F.2d 782, 784 (9th Cir. 1982)). While *Fritz* noted a simultaneous continuance request after similar delays would be "strong evidence," it cautioned the inquiry "does not stop there." 682 F.2d at 784. Indeed, where the trial court had denied Fritz's day-of-trial *Faretta* request because it believed further delay was needed for Fritz to prepare his insanity defense, the Ninth Circuit reversed, citing this too-narrow focus on *effect* and holding defendants may not be "deprived of [the self-representation] right absent an affirmative showing of purpose to secure delay." *Id.* at 784-85.

The published Opinion conflicts with this precedent and this Court's analysis in *Faretta* and reveals the difficulties lower courts are facing without

more-specific guidance from this Court on timeliness. *See Hill v. Curtin*, 792 F.3d 670, 678-79 (6th Cir. 2015) (finding the only clearly-established Supreme Court law on timeliness requires self-representation to be granted when requested weeks before trial, and courts otherwise have wide latitude to define timeliness). Certiorari is required to clarify the timeliness parameters and reign in the ad hoc exceptions lower courts are applying in their attempts to balance constitutional rights with administrative prerogatives, in order to prevent courts from extending the reach of a limited exception crafted for pretextual motions so far that it swallows the constitutional guarantee provided defendants like Mr. Telles, who asserted his fundamental right to self-representation nearly six weeks before trial.

D. The Opinion Improperly Used its New *Halamek* Decision to Foreclose Appellant's Distinct and Preserved Arguments that the Government Expert's Behavioral Profile Evidence Lacked Reliability, in Conflict with this Court's Precedent.

Mr. Telles explained on appeal that the district court abused its discretion by admitting Dr. Darrel Turner's testimony that diverse fractions of interviewed child sex abusers exhibit behaviors experts have labeled "grooming," and diverse fractions of victims delay reporting, without making express reliability findings. AOB 81-86; Reply 37-38; PFR 21-22 (citing*, e.g.*, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999); *United States v. Valencia-Lopez*, 971 F.3d 891, 898 (9th Cir. 2020) ("The Supreme Court has made it abundantly clear that reliability is the lynchpin," and "a district court

abdicates its gatekeeping role [under Rule 702], and necessarily abuses its discretion, when it makes no reliability findings.") Telles had argued in both courts that the proffered testimony failed Rule 702's reliability requirements and constituted improper profile evidence, citing the correctly-thorough reliability assessment of grooming evidence undertaken by the district court in *United States v. Raymond*, 700 F. Supp. 2d 142 (D. Me. 2010). *See* AOB IV; Reply IV.

Specifically, Turner's testimony attributing identified "grooming" behaviors to diverse fractions of abusers was an insufficiently-reliable basis to prove Telles's intent from similar conduct, and its only probative value was as impermissible profile evidence. AOB 81-87 (citing studies finding, i.e., less than 20% of interviewed abusers gave gifts or convinced their victims to not disclose the abuse); Reply 38-42. Telles had explained it functioned similarly to the "drug courier profile evidence" courts have *rejected* as substantive evidence suggesting possible criminal intent from innocent behavior. *See* AOB 84-85 (citing, e.g., *Raymond*, 700 F. Supp. 2d at 154-55; *United States v. Montas*, 41 F.3d 775, 783-84 (1st Cir. 1994); Reply 39 *(*citing *United States* v. *Lui*, 941 F.2d 844, 847-48 (9th Cir.1991)); *see also United States v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983) (denouncing "use of drug courier profiles as substantive evidence of guilt."); *but see* 1-ER-239.b-c (court perplexingly citing unnamed drug-trafficking profile precedent for admitting Turner's proffered testimony).

Telles additionally demonstrated the proffered delayed-disclosure evidence was similarly deficient in reliability and relevance, even pointing to a scholarly article contained in the expert's nearly 400-page proffer expressly finding such evidence *unreliable* under *Daubert* and irrelevant, given studies revealing the general public understood minors often delay disclosure, as well as Turner's own article discussing ethical challenges in applying "the imperfect science" of sex offending, and that it served only to improperly boost the prosecuting witness's credibility. *See* AOB 83 & Reply 40-41 (citing, e.g., *Raymond*, 700 F. Supp. 2d at 145; *United States v. Rohrer*, 708 F.2d 429, 434 (9th Cir. 1983) ("expert psychiatric testimony bearing on [witness] credibility … threatens to usurp the jury's function of determining guilt"); 2ER 256-61).

Telles explained the trial court's cursory finding that Turner's opinion was "based upon sound scientific methodology based upon the existing record in the case,"[6] and its refusal to identify its relevance, when specifically asked by counsel, did not qualify as an express or reasoned finding of reliability and relevance as required under Rule 702 and Ninth Circuit precedent. AOB 78-84 & Reply 37-38 (citing, e.g., *Valencia-Lopez*, 971 F.3d at 898; *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1190 (9th Cir. 2019) (finding implicit-reliability finding insufficient); 1-ER-239.i). Nor did it expressly weigh any minimal probative value against the prejudicial effect of permitting the trial's only psychiatric expert to label Telles's behaviors as predatory, under Federal

[6] Turner did not review case-specific facts before testifying. 4-ER-711.

Rule of Evidence 403. *See* AOB 36-41, 85-88 (citing, e.g., *Daubert*, 509 U.S. at 595 ("Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it;" thus, a "judge in weighing possible prejudice against probative force under Rule 403 … exercises more control over experts than over lay witnesses."); *Parle v. Runnels*, 505 F.3d 922, 932 (2007)).

The Opinion entirely omits this analysis and improperly deems the arguments foreclosed by its recent decision in *United States v. Halamek*, 5 F.4th 1081, 1086-89 (9th Cir. 2021), which applied plain-error analysis to distinct grooming testimony provided by an FBI interviewer. In *Kumho Tires*, this Court emphasized the case-specific nature of a trial court's reliability inquiry, explaining:

> the specific issue before the court was not the reasonableness *in general* of a tire expert's use of a visual and tactile inspection …. Rather, it was the reasonableness of using such an approach, along with Carlson's *particular method of analyzing the data thereby obtained, to draw a conclusion regarding the particular matter to which the expert testimony was directly relevant.*

526 U.S. at 153-54. The Opinion abandons this requisite case-specific inquiry, by letting its more-deferential analysis of a police investigator's unobjected testimony regarding grooming behaviors *foreclose* a contrary result in a factually-distinct case where the defense had twice challenged the reliability and relevance of a forensic psychiatrist's proffered testimony discussing specific studies (with less-than compelling results) of grooming behaviors and delayed disclosures, of which the trial court made no express reliability findings.

Where defendants challenge proffered expert testimony below and on appeal, correct application of *Kumho Tires* should require reviewing courts to examine the record to evaluate the trial court's reliability assessment. *See Valencia-Lopez*, 971 F.3d at 898; *Raymond*, 700 F. Supp. 2d at 153-55 (distinguishing other courts' approvals of similar testimony due to insufficient reliability findings). Here, there was no *Daubert* hearing, and *had* Turner's 400-page proffer been examined before approving his testimony, it should have revealed his opinions were not sufficiently reliable nor probative of criminal intent to warrant its admission under Federal Rules of Evidence 403 and 702. The trial court's inability to specifically identify *how* it found it reliable or relevant, particularly when contrasted with the unduly harsh lens with which it had viewed Telles's proffered psychiatric expert, demonstrates it had abdicated its gatekeeping role. *Compare* AOB II.C *with* IV; 1-ER-239.i. The Opinion's subsequent failure to engage in the requisite case-specific review of the trial court's exercise of discretion and its treating *any* expert testimony regarding behaviors of abusers or victims as *per se* admissible under *Halamek* departs from this Court's precedent and prejudices defendants in the Ninth Circuit. *See Kumho Tire*, 526 U.S. at 149, 153-54, 158.

Certiorari is required to clarify the proper standard of review for preserved Rule 403 and 702 challenges and remedy the insufficient analysis in both *Telles* and *Halamek*.

CONCLUSION

For the foregoing reasons, a writ of certiorari to the Ninth Circuit should be granted to address the questions presented or to vacate and remand for reconsideration in light of the clear conflicts with this Court's authority.

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