CAPITAL CASE

No. _____

In the Supreme Court of the United States

RICKY ALLEN FACKRELL, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

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

MAUREEN SCOTT FRANCO
Federal Public Defender

JUDY FULMER MADEWELL
First Assistant Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206-1205
(210) 472-6700
(210) 472-4454 (Fax)

NICOLE DEBORDE HOCHGLAUBE
Hochglaube & DeBorde, P.C.
3515 Fannin St.
Houston, Texas 77004
Tel.: (713) 526-6300
Fax: (713) 808-9444

Counsel of Record for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether an unrecorded conference in chambers is a "hearing or trial," or "proceeding," under Federal Rule of Appellate Procedure 10(c) such that a statement of the conference can be prepared and complete the record on appeal.[1]
2. Whether the Fifth and Eighth Amendments' requirement of individualized sentencing prohibits the government from arguing that a capital defendant is a future danger, and therefore should be executed, based, in substantial part, on rebuttal testimony and evidence about violent acts by other inmates and negligent conduct by prison officials with no connection to the defendant's case.
3. Whether the district court had to answer the deliberating capital jury's note asking, "what is the process if we are not unanimous with our verdict?" and to respond in the defendant's presence.

---

[1] The petition for writ of certiorari in *Savage v. United States*, No. 20-1389, raises a related question about Federal Rule of Appellate Procedure 10: "Whether the Third Circuit properly held—in conflict with decades of federal practice endorsing flexible procedures to assemble a complete record on appeal—that an appellant seeking a complete appellate record must overcome procedural impediments lacking any basis in Rule 10's text."

No. _____

In the Supreme Court of the United States

RICKY ALLEN FACKRELL, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*

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

Ricky Allen Fackrell asks that a writ of certiorari issue to review the opinion and judgment entered on March 12, 2021, by the United States Court of Appeals for the Fifth Circuit.

PARTIES TO THE PROCEEDING

The Petitioner in this Court is Ricky Allen Fackrell, who was a defendant-appellant below. Christopher Emory Cramer was a codefendant-appellant.

The Respondent in this Court is the United States of America, which was the plaintiff-appellee.

RELATED CASES

United States District Court for the Eastern District of Texas:

United States v. Cramer et al., No. 1:16-CR-26 (June 13, 2018)

United States Court of Appeals for the Fifth Circuit:

United States v. Fackrell et al., No. 18-40598 (Mar 12, 2021 and May 17, 2021) (judgment and order denying petition for rehearing en banc)

United States Supreme Court:

Cramer v. United States, No. _____

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

OPINIONS BELOW

The opinion of the United States court of appeals (App., *infra*, 1a-34a) is reported at 991 F.3d 589 (5th Cir. 2021). The court's order denying the petition for rehearing en banc (App., *infra*, 55a-56a) is unreported.

JURISDICTION

The court of appeals entered judgment on March 12, 2021, and denied panel and en banc rehearing on May 17, 2021. This petition is filed within 150 days of the entry of the order denying rehearing. *See* SUP. CT. R. 13.1, 13.5; Miscellaneous Order, 589 U.S. ___ (Mar. 19, 2020). This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTE, AND FEDERAL RULES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, "nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, … to be confronted with the witnesses against him[.]"

The Eighth Amendment to the United States Constitution provides, in pertinent part, "nor cruel and unusual punishments inflicted."

The full text of 18 U.S.C. §§ 3591 to 3595 of the Federal Death Penalty Act of 1994 (FDPA) are set forth in the Appendix to this petition. *See* App., *infra*, 57a-70a.

The full text of Federal Rule of Appellate Procedure (FRAP) 10 is reprinted in the Appendix. *See* App., *infra*, 71a-73a. The provision, Rule 10(c), provides:

Rule 10. The Record on Appeal

. . .

> **(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable.** If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

The full text of Federal Rule of Criminal Procedure 43 is set forth in the Appendix. *See* App., *infra*, 74a-75a.

INTRODUCTION

Ricky Fackrell raises two substantive questions. Those questions, however, are prefaced by an important procedural one: whether an unrecorded conference in chambers is a "hearing or trial," or "proceeding," under FRAP 10(c) so a statement of the conference can be prepared and complete the record on appeal. The district court held off-the-record proceedings, including chambers proceedings in which it ruled on such substantive matters as the testimony of a surprise government witness who had a conflicted attorney and the jury instructions. Despite granting a pretrial defense motion to record all proceedings, the court did not ensure these proceedings were recorded and rejected Fackrell's efforts to reconstruct them. The court's refusal to permit completion of the record on appeal prevented meaningful appellate review—including this Court's review—and impeded the full and effective administration of justice.

The substantive issues also present reason to grant certiorari. In arguing Fackrell was a future danger and should be sentenced to death, the government was permitted to introduce evidence of violent acts by other inmates and negligent behavior by prison officials, unconnected with the case. This Court has never addressed whether the government can offer third-party conduct to support

argument about a capital defendant's future dangerousness. Because of the Eighth Amendment's demand for individualized capital sentencing, such evidence cannot constitutionally support a death verdict.

There is reason to believe that at least one juror hesitated in voting for death. Fackrell presented a strong mitigation case, and the jury found 56 mitigating factors. While deliberating whether they would sentence Fackrell to die, the jurors sent a note to the district court asking, "what is the process if we are not unanimous with our verdict?" Over trial counsel's objection, the court instructed the jurors to continue their deliberations, citing *Jones v. United States*, 527 U.S. 373 (1999). In *Jones*, this Court held that the Eighth Amendment does not require that jurors be told of the consequences of their failure to unanimously agree on a capital sentence. *Id.* at 381. The Court has not decided, however, whether courts may refuse to answer a direct question from jurors on this subject.

The Court should review these important questions.

STATEMENT OF THE CASE

The government charged Ricky Fackrell and his codefendant, Christopher Cramer, with aiding and abetting first-degree murder, in violation of 18 U.S.C. § 1111, alleging they killed another inmate

at the United States Penitentiary in Beaumont, Texas. The government sought the death penalty against both defendants.

Appellate counsel's attempts to reconstruct key portions of the record were denied. Before trial, the defense attorneys asked the district court to instruct the court reporter "to take down and to record all proceedings," including "[a]ll pre-trial hearings," "[a]ll objections made by the defense counsel and the United States Attorney, and all rulings of the Court thereon," "[a]ll objections to the Charge of the Court made by the defense counsel and the United States Attorney," and "[a]ll bench conferences." The court granted the motion.

Nonetheless, the district court held numerous unrecorded proceedings throughout the capital trial. Some occurred inside the courtroom; others occurred in the judge's chambers. In the unrecorded proceedings, the parties litigated and the judge decided substantive matters. For example, one of the unrecorded chambers conferences involved a last-minute jailhouse witness whom the government intended to call during the selection phase. The witness was represented by one of Cramer's attorneys, and her potential testimony raised Fifth Amendment concerns. A new attorney was arranged for her, and she entered a guilty plea in time to testify against Fackrell and Cramer. In another unrecorded chambers

conference, the defense attorneys raised specific objections to the court's decisions to exclude some mitigating factors from the selection-phase jury instructions.

For Fackrell's appeal, new counsel were appointed. Without transcripts of the unrecorded proceedings, appellate counsel could not assess whether issues raised during those proceedings presented grounds for appeal. Counsel therefore sought to reconstruct the known proceedings, under FRAP 10(c). *See* App., *infra*, 77a-121a.[2] Counsel consulted with defense attorneys present at those proceedings and, based on their input, prepared statements of four proceedings. In response to counsel's service of the first prepared statement, the government noted its opposition to making any Rule 10(c) statements part of the record. The district court denied counsel's requests to hold a hearing, settle and approve the four statements, include them in the record, and make available notes or other records of other unrecorded proceedings to assist with their reconstruction. The court expressed doubt that Rule 10(c) applied to chambers conferences, and implied the trial attorneys had

---

[2] *See also* Fackrell's Reply Br., Case No. 18-40598, Doc. No. 00515528059 at 59 (listing unrecorded open court proceedings).

not requested the conferences be recorded and were given sufficient opportunity to make a record. *See* App., *infra*, 35a-42a.

On appeal, Fackrell argued the record was incomplete. Because of the missing transcripts and Rule 10(c) statements, appellate counsel could not confidently identify and litigate issues, including ones raised on appeal about excluded testimony and evidence and selection-phase jury instructions. Furthermore, the court of appeals did not have a full record upon which to assess and decide all issues, as the Constitution and FDPA require. The court held that an unrecorded chambers "discussion," in which the district court heard arguments on the defense motion to exclude the surprise government witness's testimony, was not a "hearing or trial" within the meaning of FRAP 10(c). It also held that an unrecorded chambers conference, in which the parties discussed, negotiated, and lodged full objections to the jury charge, was not covered under the Court Reporters' Act because it did not occur in open court. Finally, the court held that Fackrell had not shown the missing portions of the record to be substantial and significant.

The district court permits the government to introduce evidence of third-party conduct to bolster its future-danger argument. Before sentencing, the government provided notice it

intended to prove the non-statutory aggravating factor of future dangerousness.

Fackrell and Cramer filed a joint defense motion to preclude improper cross-examination of defense experts and improper rebuttal testimony from government witnesses on the future dangerousness aggravator. They intended to call Roy Gravette and Mark Bezy, both former Bureau of Prisons (BOP) wardens, to testify that the BOP could adequately control them at the Administrative Maximum Facility at the United States Penitentiary Florence in Colorado (ADX). They asked the district court to prohibit the government from cross-examining these experts "about specific acts of violence allegedly committed in BOP by persons who are in no way connected to the individual defendant being sentenced." *See* App., *infra*, 123a-144a. The court denied the motion. *See* App., *infra*, 43a-49a.

At the selection stage, Fackrell and Cramer introduced evidence they did not pose a future threat of violence. The defense experts testified Fackrell and Cramer would be designated to ADX and could be safely housed there. They testified about similar inmates who were successfully housed at ADX. Bezy testified that, although there had been problems at ADX in the past, the BOP had made changes so such incidents could not occur now.

On cross-examination, the prosecutor repeatedly questioned the defense witnesses about specific conduct by the unrelated inmates, Ishmael Petty, Tommy Silverstein, and David Hammer. The prosecutor described an incident where Petty "Spiderman'd himself to the wall and jumped and stabbed three staff members, including a librarian." To emphasize Petty's conduct, the prosecutor showed, over defense objection, a video of Petty escaping from his cell and attacking the staff members. *See* App., *infra*, 50a-51a. The prosecutor stressed to the jury that "whatever the policies BOP is going to put into place," the people who work there "can make mistakes."

In rebuttal, the prosecutor called David Berkebile, another former BOP warden, and asked him about the Petty incident. Although the jury had already viewed a video of the incident, the prosecutor painstakingly reviewed details with the expert. The prosecutor also, over defense objection, introduced through this witness five photographs of homemade weapons found in Petty's cell.

When arguing that Fackrell posed a future danger, the prosecutor directed the jury to the Petty incidents:

> You heard -- did not hear that there was any evidence or any testimony that violence could be prevented at ADX. You saw the video of Ishmael Petty taking advantage of human error to engage in violence. You saw the pictures of the weapons that he was able to make at what the defense

> experts have called the "most secure prison in the country." It didn't prevent those actions from Ishmael Petty. It didn't prevent him from making weapons.

The jury unanimously found the non-statutory aggravating factor of future dangerousness and sentenced Fackrell to death.

On appeal, Fackrell argued that the district court had erred in letting the government offer evidence of third-party conduct—including the Petty video—to prove he posed a future danger. The court of appeals rejected the argument.

The district court refuses to answer the capital jury's question about the effect of non-unanimity regarding the sentence. Before trial, Fackrell requested that the jurors be instructed during *voir dire* that if they failed to unanimously agree on a sentence, the trial court would impose a sentence of life imprisonment without parole. The instruction was legally permissible and has been given in many federal capital trials. Omitting the instruction, counsel argued, risked misleading jurors who may be reluctant to impose a sentence of death or to speculate wrongly about the consequences of failing to agree with the other jurors. The court denied the motion.

During sentencing deliberations, the jurors sent a note to the district court asking, "what is the process if we are not unanimous with our verdict?" Fackrell requested the jurors be told that, if they were not unanimous, the court would impose a sentence of life

imprisonment without parole. Relying on its prior order, the court refused the request, stating the instruction was not required by the Eighth Amendment, as interpreted by this Court. It instructed the jurors merely to "[p]lease continue your deliberations." *See* App., *infra*, 52a-54a. The next morning, the jurors informed the court they had reached a unanimous decision and sentenced Fackrell to death.

REASONS FOR GRANTING THE WRIT

I. The Court should grant certiorari to decide whether an unrecorded conference in chambers is a "hearing or trial," or "proceeding," under Federal Rule of Appellate Procedure 10(c).

FRAP 10(c) allows appellants to prepare statements of the evidence or proceedings when transcripts of hearings or trials are unavailable. The statements, and any objections or proposed amendments by appellees, are submitted to the district court. After the court settles and approves the statements, the rule requires that the statements be included in the record on appeal.

In setting out this reconstruction procedure, Rule 10(c) ensures that anything necessary for appeal is incorporated into the record. This allows counsel to fulfill the duty to notice and assert errors and courts to review and correct those errors. Meaningful appellate review also protects society's interest in the fair and efficient

administration of justice. The public monitors the administration of justice by accessing, reviewing, and discussing court records.

The court of appeals held that a chambers proceeding, in which the district court heard arguments on a defense motion to exclude a government witness's testimony, was not a "hearing or trial" under Rule 10(c). This interpretation conflicts with that of other courts of appeals. It is contrary also to the rule's plain language and thwarts its purpose.

Because this issue is important for the completeness of federal and state appellate records in criminal and civil cases and for meaningful appellate review, the Court should grant this petition for certiorari. If the Court finds that the trial attorneys should have objected to the district court's failure to ensure all proceedings were recorded, the Court should grant this petition to decide whether the district court's failure to ensure recording or to allow statements of the proceedings to be included in the record is structural error.

A. The Fifth Circuit's interpretation of Rule 10(c) conflicts with other courts of appeals'.

The Fifth Circuit's interpretation conflicts with that of other courts of appeals, which have found that unrecorded chambers conferences can, and should, be reconstructed under Rule 10(c). *See United States v. Savage*, 970 F.3d 217, 240 (3d Cir. 2020)

(stating that Rule 10 provides for the "eventuality" of appellate attorneys not having participated in trial and not being expected to know what happened in untranscribed conferences, including chambers conferences about the jury instructions); *Von Kahl v. United States*, 242 F.3d 783, 792 (8th Cir. 2001) (noting regarding an "in-chambers discussion" that "[w]here an untranscribed proceeding is to be at issue on appeal, [Rule] 10(c) provides a mechanism by which an appellant can attempt to reconstruct a record"); *United States v. Mills*, 597 F.2d 693, 698 (9th Cir. 1979) (stating, regarding an in-chambers conference in which a possible plea bargain was discussed, that "[i]n order to augment the record on appeal concerning proceedings which were not reported, the provisions of Rule 10(c)" should be followed).

The Fifth Circuit's interpretation of Rule 10(c) also conflicts with other courts of appeals' understandings of it. Other courts have assumed that Rule 10(c) allows appellants to place before them statements of chambers proceedings. *See United States v. Burton*, 387 F. App'x 635, 637 (7th Cir. 2010) ("We know what happened in chambers because appellate counsel filed a statement under Rule 10(c)"); *United States v. Hammerman*, 528 F.2d 326, 329 n.7 (4th Cir. 1975) ("No record of [the chambers] conference was made. However, appellants offered under Rule 10(c) [a prepared

statement]"). Courts have also premised relief on chambers proceedings being reconstructed under Rule 10(c). *See, e.g.*, *United States v. Burns*, 104 F.3d 529, 539 (2d Cir. 1997) ("Because [the appellant] has failed to comply with [reconstructing, under Rule 10(c), the discussion in chambers about the remaining charges], we cannot rule in his favor.").[3]

B. The Fifth Circuit's interpretation of Rule 10(c) frustrates consideration of ultimate questions, including in capital cases.

The Fifth Circuit interpreted Rule 10(c) to hold that a chambers conference, in which the district court heard arguments on a defense motion to exclude a government witness's testimony, was not a "hearing or trial." That interpretation is contrary to the rule's plain language and thwarts the rule's purpose.

1. The Fifth Circuit's interpretation is contrary to Rule 10(c)'s plain language.

Interpreting Rule 10(c), the Fifth Circuit held that a chambers proceeding, in which the district court heard arguments on a defense motion to exclude a government witness's testimony, was not a "hearing or trial." *See* App. 33a. The court provided no analysis

---

[3] *See also* Brief for the United States in Opposition at 20–21, *Savage v. United States*, No. 20-1389 (Oct. 7, 2021) (citing cases).

or citations for its interpretation and was wrong for two reasons. First, these conferences were "hearings." And, second, the rule applies to both "hearings" and "proceedings."

The "discussion" the district court held in chambers was a "hearing." Although it, and the other chambers "discussions," were not open to the public, the court held them to decide factual and legal issues, such as whether to admit the testimony of a surprise government witness and what to include in the jury instructions. *See, e.g.*, *Pennsylvania v. Ritchie*, 480 U.S. 39, 44 (1987) (discussing "an in-chambers hearing" on a defense motion); *United States v. Ruan*, 966 F.3d 1101, 1137 (11th Cir. 2020) (describing an "in-chambers hearing" regarding a witness's competency to testify); *San Juan Prod., Inc. v. San Juan Pools of Kansas, Inc.*, 849 F.2d 468, 475–76 (10th Cir. 1988) (discussing an "in-chambers hearing" in which the court denied an extension motion). Regardless of where a "discussion" to decide factual and legal issues is held, it is a "hearing" within the meaning of Rule 10(c).

Second, the chambers "discussion" was a "proceeding" under Rule 10(c). In interpreting Rule 10(c), the Fifth Circuit quoted only part of the rule, focusing on the phrase, "hearing or trial." The entire first sentence reads: "If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the

evidence *or proceedings* from the best available means, including the appellant's recollection." FED. R. APP. P. 10(c) (emphasis added). So, where a transcript of a trial is unavailable, the appellant can prepare a statement of the "proceedings" under Rule 10(c). *See United States v. Gunter*, 631 F.2d 583, 589 (8th Cir. 1980) (discussing an "in-chambers proceeding" in which the trial court met with the parties to discuss the prosecution's additional identification evidence); *United States v. Allick*, 274 F. App'x 128, 133 (3d Cir. 2008) (using the terms "conference," "proceeding," and "discussion" to refer to a chambers meeting with the parties to discuss a juror note). Regardless of how a chambers conference is labeled, it is covered under Rule 10(c).

2. The Fifth Circuit's interpretation thwarts Rule 10's purpose.

Rule 10 protects the "right to have incorporated in the record anything which actually occurred in the trial court which [appellate counsel] thinks necessary to make his points on appeal." FED. R. CIV. P. 75 advisory committee's notes to 1946 amendments (abrogated 1967) (discussing amendments to Rule 10's predecessor); *see also Controlled Demolition, Inc. v. F.A. Wilhelm Const. Co.*, 84

F.3d 263, 269 (7th Cir. 1996) (discussing this purpose of Rule 10).[4] Denying parties the opportunity to place statements of unrecorded chambers proceedings before the appellate courts thwarts Rule 10's purpose. *See Athridge v. Rivas*, 141 F.3d 357, 362 (D.C. Cir. 1998) ("We are not persuaded by the appellees' argument that [Rule] 10(c) is inapplicable because the [pretrial chambers] proceeding cannot be characterized as a 'hearing or trial.' The purpose of [Rule] 10(c) would be thwarted by such a narrow reading.").

As the D.C. Circuit noted, "appellate consideration of the ultimate question in a case must not be frustrated by failure to include in the record preliminary proceedings which were in reality part of the trial process, and which might be found to be of vital significance on appeal." *Id.* (cleaned up). Appellate consideration of ultimate questions in Fifth Circuit cases is frustrated by failing to include chambers proceedings in the record. *See, e.g.*, *HTC Corp. v. Telefonaktiebolaget LM Ericsson*, 12 F.4th 476, 490 n.1 (5th Cir.

---

[4] Without those portions of the record, errors such as those involving Federal Rule of Criminal Procedure 43(a), guaranteeing defendants' right to be present at every trial stage, may require reversal. *See, e.g.*, *United States v. Brown*, 571 F.2d 980, 987 (6th Cir. 1978) (finding that any Rule 43(a) error from defendants not being present at an in-chambers conference harmless because the court had a record of the conference and did not have the slightest doubt regarding lack of prejudice). Fackrell was not present at any of the chambers conferences.

2021) (Higginson, J., concurring) (noting that the informal charge conference in chambers was not recorded and that "I would have benefitted from the complete record"). Appellate consideration is frustrated further by the Fifth Circuit's holding, which prevents statements of unrecorded chambers proceedings from being included in the record.

C. The interpretation of this procedural rule affects the completeness of federal and state appellate records and the ability of appellate counsel to fulfill their duty, especially in capital cases.

While off-the-record conferences can help trial courts and parties address scheduling and other administrative matters, they are commonly used also to litigate and decide substantive issues important to the outcome of federal and state cases. *See, e.g.*, *Savage*, 970 F.3d at 241 ("[O]ff-the-record charge conferences routinely occur in the Eastern District of Pennsylvania (and elsewhere)."); *Walters v. Cent. States Coca-Cola Bottling Co.*, 2001 WL 1263680, at *4 (N.D. Ill. Oct. 17, 2001) ("It is common to hold pretrial conferences in chambers."); *Suan v. State*, 511 So. 2d 144, 147 (Miss. 1987) (noting the court had confronted untranscribed off-the-record proceedings before, directing court reporters to preserve chambers and bench conferences, and stating trial judges must enforce the court's directive).

When conferences or other proceedings are not preserved, Rule 10(c) provides federal appellants a mechanism for placing the evidence or proceedings before the courts. Similar or nearly identical state procedural rules provide state appellants this mechanism. *See* App., *infra*, 76a. And, state courts have used Rule 10(c) and federal courts' decisions regarding it as guides for their rules or procedures and as authority for their decisions.[5]

Appellate counsel is to "faithfully discharge the obligation which the court has placed on him [to notice plain errors or defects]." *Hardy v. United States*, 375 U.S. 277, 280 (1964) (discussing the statutory scheme for federal appeals); *see also* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 10.8 (2003) (setting out counsel's duty to assert legal claims, including considering each potentially available claim, investigating thoroughly the basis for each, evaluating each, and presenting a claim as forcefully as possible). Without complete records on appeal, including statements of unreported or untranscribed proceedings, counsel cannot fulfill these duties.

---

[5] *See, e.g.*, *McCulloch v. Campbell*, 60 So. 3d 909, 915 (Ala. Civ. App. 2010) (reiterating that Alabama's Rules of Appellate Procedure 10(d) "is equivalent" to Rule 10(c) and the state court has looked to federal court authority to decide questions about the rule).

Without statements of unrecorded proceedings, appellate courts cannot review issues meaningfully or at all. *See, e.g.*, *Von Kahl*, 242 F.3d at 792 (describing the court's review on appeal as being "severely circumscribed" and the record as being "insufficient to determine [the issue]," where the appellant did not follow Rule 10(c)'s procedure to reconstruct the chambers conference); *cf. United States v. Carrazana*, 70 F.3d 1339, 1343 (D.C. Cir. 1995) ("Where successful reconstruction efforts have been made, we and other courts have noted the benefit even to the point of declaring that review had not been frustrated.") (internal citations omitted). Courts have been concerned about the problem of their review being frustrated by unrecorded conferences. *See, e.g.*, *Savage*, 970 F.3d at 241 ("[W]e observe that the practice [of unrecorded charge conferences] does have the potential to allow a legal error to go unnoticed and uncorrected."); *see also Fountain v. State*, 601 S.W.2d 862, 863 (Ark. 1980) ("We are concerned, as are other courts, about 'off the record' conferences.").

The problem of incomplete records is particularly concerning in capital appeals such as this one, for two reasons. First, the FDPA requires a court to "review the entire record." 18 U.S.C. § 3595(b); *see United States v. Fulks*, 454 F.3d 410, 421 n.4 (4th Cir. 2006) ("[W]e are obliged to 'review the entire record' and consider two

issues not raised by him."). Second, a court's review of the entire record of a death penalty case, including transcripts of the proceedings, "safeguard[s] against arbitrariness and caprice," as the Constitution requires. *Dobbs v. Zant*, 506 U.S. 357, 358–59 (1993) (cleaned up) (reversing and remanding for refusal to consider the full transcript of the capital sentencing hearing). Because death is different, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Zant v. Stephens*, 462 U.S. 862, 884–85 (1983) (cleaned up).

Because of the incomplete record in this capital case, the court of appeals could not review an entire record or act as a constitutional safeguard. The record did not reveal the bases for constitutional issues that arose during trial, such as the strikes of all Black venire persons and the factors around Fackrell's absence from a day of the penalty phase. *See* App., *infra*, 106a-108a. This undermines the reliability of the determination that death is appropriate punishment here.

D. The Court should grant certiorari to decide whether a trial court's failures to ensure all proceedings are recorded and to allow Rule 10(c) statements to be included in the record are structural errors.

If the Court finds that this case is a poor vehicle because the trial attorneys should have objected to the district court's failure to ensure that the court reporters recorded all proceedings, the Court should grant certiorari to decide whether a trial court's failures to do so, and to allow statements of them to be included in the record, are structural errors. The importance of records of court proceedings to the administration of justice cannot be overstated.

1. The district court's failures are structural errors.

Although the trial attorneys requested that all proceedings be transcribed, the incomplete record does not show whether counsel objected to the court's failure to enforce the instruction. If the Court finds that counsel should have objected, the Court should grant certiorari to decide whether a trial court's failures to ensure that all proceedings are recorded, and to allow the Rule 10(c) statements to be included in the record, are structural errors.

A structural error is a "structural defect affecting the framework within which the trial proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). A trial error—"error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence

presented in order to determine whether its admission was harmless beyond a reasonable doubt"—is not structural error. *Id.* at 307–08. Here, the trial court's failures to ensure that all proceedings were recorded, and to allow the Rule 10(c) statements to be included in the record, did not occur during the presentation of the case to the jury. For example, the unrecorded chambers conferences about the government's witness testimony and the jury instructions occurred before and after the jury entered at the beginning of the day and left at the end. Furthermore, the trial court's failures cannot be quantitatively assessed for harmlessness. Evidence from unrecorded proceedings cannot be assessed in the context of "other evidence presented," without Rule 10(c) statements.

2. Records of court proceedings help fulfill the right to meaningful appellate review, protect the public interest in the administration of justice, and facilitate the monitoring of that administration.

Transcripts or statements of proceedings allow appellate counsel to fulfill their duty to notice and assert errors and courts to review and correct those errors, fulfilling the right to meaningful appellate review. Meaningful appellate review also protects the public interest in the fair and correct administration of justice. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) ("[T]he right

at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest.").

The public monitors the administration of justice by accessing, reviewing, and discussing court records. "[T]he courts of this country recognize a general [common law] right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). That right of access applies to transcripts of sidebar and chambers conferences at which substantive rulings are made. *See United States v. Smith*, 787 F.2d 111, 116 (3d Cir. 1986) (explaining that the public, usually the press, can monitor, observe, and comment on the judge's and judicial process's activities by inspecting transcripts of such conferences). Without access to transcripts or statements of these proceedings, the public cannot properly monitor the administration of justice. *See NBC Subsidiary (KNBC-TV), Inc. v. Superior Ct.*, 980 P.2d 337, 363 (Cal. 1999) ("[A] proceeding that would be subject to a right of access if held in open court does not lose that character simply because the trial court chooses to hold the proceeding in chambers."). Such monitoring of criminal trials is important as they are rare and determine whether individuals' lives or liberties will be taken away.

The Court should grant certiorari to decide these issues.

II. The Court should decide whether permitting the government to introduce evidence of unrelated conduct by others in the prison system to argue for a capital defendant's death violates the Fifth and Eighth Amendments' requirement of individualized sentencing.

This Court has long held that "[w]hat is important at the selection stage [of a capital case] is an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. at 879. In making that determination, the Court has approved the prosecution's use of the non-statutory aggravating factor of future dangerousness. *See Simmons v. South Carolina*, 512 U.S. 154, 164 (1994); *Barefoot v. Estelle*, 463 U.S. 880, 896–97 (1983); *Jurek v. United States*, 428 U.S. 262, 274–76 (1976). While this non-statutory aggravating factor may relate to the death penalty decision, it must be appropriately tailored to prove the individual's future dangerousness.

The government frequently argues, however, that a capital defendant will be a future danger in prison because of the inability of prisons, including those controlled by the BOP, to safely secure him. In these arguments, the government relies on conduct by others. The conduct most frequently cited is violent conduct by inmates unrelated to the capital defendant and incompetent or negligent conduct by prison officials. But the government's argument for death based on the conduct of others conflicts with the

Constitution's requirement of individualized sentencing. Some federal courts of appeals have suggested there must be limits placed on such evidence and testimony but others, like the Fifth Circuit here, do not agree.

This Court should grant certiorari to provide guidance on whether the prosecution's argument that a defendant should be put to death based on the conduct of others, namely violent conduct by unrelated inmates and incompetent, negligent conduct by prison officials, violates the Fifth and Eighth Amendments' requirement of individualized sentencing.

A. The Constitution's requirement of individualized sentencing is critically important when the government alleges future dangerousness.

Under the Eighth Amendment, there is "a special 'need for reliability'" in determining whether death is the appropriate sentence in a capital case. *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (quoting *Gardner v. Florida*, 430 U.S. 349, 363–34 (1977)). That is because, as this Court has recognized, death is different. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see also Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). "The fundamental respect for humanity underlying the Eighth Amendment … requires consideration of the character and record of the individual offender and the circumstances of the particular offense

as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304.

The decision to sentence an individual to death also "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process,'" for this would violate the "due process of law." *Johnson*, 486 U.S. at 585 (quoting *Zant v. Stephens*, 462 U.S. at 884–85). Accordingly, this Court has required that a sentencing jury's discretion be carefully and adequately guided in its death penalty deliberations. *Gregg v. Georgia*, 428 U.S. 153, 193 (1976).

To ensure guided discretion in federal capital cases, the FDPA created an analytical framework to both limit the class of death-eligible defendants and ensure that death sentences are given only to the worst of those defendants. Under the FDPA, if the jury finds the defendant death eligible, it must then make the "selection decision"—a determination whether the defendant should be sentenced to death or life imprisonment. *See* 18 U.S.C. §§ 3591–93; *see also Jones*, 527 U.S. at 376–77. The Act requires that, in making this determination, the jury weigh all the aggravating and mitigating factors. *Jones*, 527 U.S. at 376–77; § 3593(e). Aggravating factors include those listed in the FDPA and non-statutory

aggravating factors. 18 U.S.C. § 3592(c); *see also Jones*, 527 U.S. at 377–78 & n.2.

Here, the government alleged the non-statutory aggravating factor of future dangerousness—that Fackrell "represents a continuing danger to the lives and safety of other persons" and "is likely to commit criminal acts of violence in the future that would constitute a continuing and serious threat to the lives and safety of others."

The future-dangerousness aggravating factor is a prosecutorial favorite in federal capital cases. One study found that prosecutors raised claims of future dangerousness in 77% of federal capital cases.[6] That is so because it allows the prosecution to draw attention to acts of violence or misconduct that otherwise might not be presented to the jury. *See, e.g.*, *United States v. Corley*, 519 F.3d 716, 723–25 (7th Cir. 2008) (allowing evidence of unadjudicated conduct as relevant to future dangerousness); *United States v. Lee*, 274 F.3d 485, 494–95 (8th Cir. 2001) (same). The future dangerousness factor may also be used to suggest that, should the jury sentence the defendant to life imprisonment, and he kills again, it will

---

[6] Mark D. Cunningham et al., *Assertions of "Future Dangerousness" at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence*, 32 L. & HUM. BEHAV. 46 (2008).

be the jurors' fault. *See, e.g.*, *Tucker v. Kemp*, 762 F.2d 1496, 1508 (11th Cir. 1985) (en banc) (prosecutor improperly argued that any future victim would be on the jury's conscience).

This Court first addressed future dangerousness affirming the Texas capital-punishment scheme adopted in response to *Gregg*'s moratorium on the death penalty. *See Jurek*, 428 U.S. at 274–76; *see also Barefoot v. Estelle*, 462 U.S. at 896–901. While the Court rejected the defendants' broad claim that predicting future dangerousness was too speculative,[7] it acknowledged that the factor might produce arbitrary sentences and stressed that "[w]hat is essential is that the jury have before it all possible relevant information *about the individual defendant* whose fate it must determine." *Jurek*, 428 U.S. at 274–76 (emphasis added).

When the defendant is facing life imprisonment as the only alternative to death, the jury's consideration must be limited to whether he—not someone else—will engage in violence in the prison setting. *Shafer v. South Carolina*, 532 U.S. 36, 37–38 (2001). And the prosecution, this Court stated in dicta, "is free to argue

---

[7] More recent studies substantiate claims that predictions of future dangerousness are seriously flawed. *See generally* Cunningham et al., *Assertions of "Future Dangerousness"*; *see also* Mark D. Cunningham et al., *"Capital Jury Decision-Making: The Limitations of Predictions of Future Violence,"* 15 PSYCH., PUB. POL'Y & L. 223 (2009).

that … executing [the defendant] is the only means of eliminating the threat to the safety of other inmates or prison staff." *Simmons*, 512 U.S. at 165 n.5. But the government's argument must be tailored to the individual who is being sentenced.

At the selection stage of Fackrell's death penalty trial, the government repeatedly drew the jury's attention to the actions of others in the prison system, who were unrelated to Fackrell and his offense. The government questioned defense witnesses about the actions of Petty and other inmates—who had been released from ADX through the step-down program and who had committed acts of violence in high security BOP facilities, including ADX. The government provided the jury with greater details of Petty's attack on the ADX staff and his homemade weapons.

If, as here, the government may direct the jurors' attention to the conduct of others, the question of the defendant's individual characteristics will be overshadowed.

B. The Fifth Circuit's decision appears to conflict with the Fourth and Eleventh Circuits' and raises Eighth Amendment concerns.

Some of the federal courts of appeals have suggested there must be limits to such prosecution evidence and argument in seeking the death penalty. *See, e.g.*, *United States v. Caro*, 597 F.3d 608, 625 (4th Cir. 2010) (finding "troubling" and improper a prosecutor's

argument for death because BOP could not be relied upon to control the defendant); *Tucker*, 762 F.2d at 1508 (finding "disturbing" and improper a prosecutor's argument that the jury must sentence a defendant to death because others, such as the parole board, will be incompetent and derelict in their duties). This Court held that such argument at the guilt/innocence stage was improper. *See Darden v. Wainwright*, 477 U.S. 168, 179–80 (1986).

Other courts of appeals, such as the Fifth Circuit here, view such government argument as permissible. *United States v. Fackrell*, 991 F.3d 589, 601 (5th Cir. 2021) ("Our court has made clear just how broad" the government's argument can be); *United States v. Ebron*, 683 F.3d 105, 148 (5th Cir. 2012) (rejecting Ebron's argument that the government could not rely on BOP's potential errors to argue he posed a future danger); *United States v. Johnson*, 223 F.3d 665, 674 (7th Cir. 2000) (allowing government testimony and argument about violent conduct by a prison gang unrelated to the capital defendant as evidence "of the ability of the federal prison system to defang the murderers in its custody").

The Fifth Circuit's view permitted the government to go beyond descriptions of the violent actions of others. The government, over defense objection, introduced pictures of Petty's homemade weapons found in his cell at ADX and showed to the jury a video of Petty

escaping from his cell and attacking ADX staff members. The video, unlike many others shown, was clear and provocative, and permitted jurors to imagine Fackrell committing Petty's acts and to believe that the BOP could not safely house Fackrell:

> You saw the video of Ishmael Petty taking advantage of human error to engage in violence. You saw the pictures of the weapons that he was able to make at what the defense experts have called the "most secure prison in the country." It didn't prevent those actions from Ishmael Petty. It didn't prevent him from making weapons.

The government argued further, "there is no place that is going to guarantee with 100% certainty that no violence can occur." And it introduced, as a related reason to sentence Fackrell to death, the mistakes and negligence of BOP staff. The defense witnesses, under cross-examination, agreed these other inmates' violent actions likely would not have happened but for the failure of BOP staff. Former warden Berkebile testified, "generally procedures don't fail, people fail." But other courts have suggested that the possible future incompetence of BOP personnel should not be "invoked to alter the jury's perception of its role at capital sentencing"—to turn the jury's attention from the defendant to other actors. *See Tucker*, 762 F.2d at 1508; *see also Caro*, 597 F.3d at 625 (same); *see also Darden*, 477 U.S. at 179–80 (holding such argument improper at the guilt/innocence stage).

Permitting a death sentence to be based on the violent conduct of unrelated inmates and incompetence in the prison system is contrary to the requirement for individualized sentencing. It also risks arbitrary decisions about who receives the death penalty. The government's arguments could be applied to all capital defendants. *Cf. United States v. Cisneros*, 363 F. Supp. 2d 827, 840 (E.D. Va. 2005) (holding inadmissible statements about a gang, including allegations of murders and assaults, that did not refer to the defendant's individual acts or intentions). If the government can rely on extraneous conduct to argue that a capital defendant cannot be safely housed in the BOP, then perhaps all capital defendants are continuing threats and must be executed—there is no limiting factor. Such a result is contrary to this Court's admonition that "[t]he death penalty is reserved for a narrow category of crimes and offenders." *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (citing *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). "[E]ach person in the custody of BOP is unique." *United States v. Sampson*, 2016 WL 4497747, at *1 (D. Mass. 2016). The Eighth Amendment requires consideration of that uniqueness.

Justice Sotomayor recently acknowledged the constitutional infirmity of permitting the government to ask for a death sentence by pointing to the conduct of others. In *United States v. Calvert*,

the government asked the jury to sentence the defendant "to death in part because of a different person's violent conduct that had nothing to do with Calvert." 141 S. Ct. 1605, 1607 (2021) (Sotomayor, J., statement on denial of certiorari). "Juries must have a clear view of the 'uniquely individual human beings' they are sentencing to death, … not one tainted by irrelevant facts about other people's crimes. *Id.* (citing *Woodson*, 428 U.S. at 304). The question presented here arises frequently in capital cases where future dangerousness is at issue. The Fourth and Eleventh Circuits have indicated limits should be placed on the evidence allowed to prove that a defendant is a future danger. The Fifth Circuit has not.[8]

This Court should grant certiorari to clarify the extent to which the government can present evidence of others' unrelated conduct to argue for a capital defendant's death.

---

[8] Many states also permit jurors to consider future dangerousness as an aggravating sentencing factor. *See, e.g., Hicks v. Alabama,* 2019 WL 3070198, at *34 (Ala. Crim. App. July 12, 2019); *Harris v. Oklahoma*, 164 P.3d. 1103, 1111–12 (Okla. Crim. App. 2007). Texas requires an affirmative answer to the question before imposition of a death sentence. *See* Tex. Code Crim. Proc. art. 37.071(2)(b)(1).

III. The Court should grant certiorari to provide guidance on how the federal district courts are to respond to juries' questions about unanimity in the capital sentencing phase.

This case raises the important question: whether a district court should answer a deliberating capital jury's question asking what "is the process" if the jury cannot reach a unanimous verdict in the sentencing phase. This Court's decision in *Jones v. United* States, 527 U.S. 373 (1999), does not answer the question here, and the federal courts' differing answers lead to disparate outcomes, in violation of the Eighth Amendment's prohibition against arbitrary death sentences.

The issue presents a related and important concern: whether a district court's refusal to substantively respond to the jury's question chills jurors' ability to report when they are deadlocked. Because these are important concerns that implicate federal law unaddressed by this Court, this Court should grant review.

The FDPA recognizes that for any or no reason, jurors may be unable to reach unanimous agreement on a sentence of death or life imprisonment. The statute provides for the district court to sentence the defendant to life imprisonment. *See* 18 U.S.C. § 3594; *Jones*, 527 U.S. at 379. But while this Court said in *Jones* it would not "require" that the jury be instructed about the consequences of non-unanimity in every federal capital case, it did not give lower

courts blanket authorization to refuse to answer this question when specifically asked by the deliberating jury. But this Court noted, approvingly, in *Jones*, that the final instructions told the jurors they could "report that they were unable to reach agreement." *Jones*, 527 U.S. at 394. This suggests that should jurors ask such a question, the court must answer.

Because *Jones* did not address this specific issue, lower courts are left to figure out how to address such questions. In Fackrell's case, the deliberating jury sent a note to the district court asking, "what is the process if we are not unanimous in our verdict?" Fackrell asked that the jurors be told that if they were not unanimous, the court would impose a sentence of life imprisonment without the possibility of release. The court refused and instructed the jury only to "please continue your deliberations." The next morning, the jury returned a verdict of death. The Fifth Circuit determined that the court's refusal to answer the jury's question was appropriate in light of *Jones*.

However, in *United States v. Christensen*, another federal capital case tried only a year after Fackrell's, jurors sent a note to the district court saying: "We need help – the jury would like to know what the results are if there is no unanimous decision. Section VI #3 page 19 is not clear." Jury Notes 7, No. 2:17-cr-20037-JES-JEH

(C.D. Ill. 2019), ECF No. 487. After consulting with the parties, the court sent back the following response:

> I refer you back to page 30 instruction 16 Duty to Deliberate for your review.
>
> Having said that, if after weighing the aggravating and mitigating factors as instructed, you are still unable to unanimously agree as to a sentence of life without possibility of release, or a sentence of death, and you so inform the Court of that, the Court will impose a sentence of life without the possibility of release.

Id. at 8. Thus, unlike the trial court in Fackrell's case, the court in *Christensen* provided a substantive answer in line with this Court's precedent.[9] *See, e.g.*, *Lowenfeld v. Phelps*, 484 U.S. 231, 234–35 (1988) (when capital sentencing jurors reported themselves divided and asked for further instructions, the court gave a supplemental charge—later approved by this Court—that "if the jury is unable to unanimously agree on a recommendation the Court shall impose the sentence of Life Imprisonment"). This Court long ago held that "[w]hen a jury makes explicit its

---

[9] In *Christensen*, approximately 10 minutes after the jurors received the court's response, they informed the judge that they were "ready to present their findings." Jury Notes 9, ECF No. 487. The jurors told the court they were unable to reach a unanimous verdict, and the court sentenced the defendant to life imprisonment, Judgment 2, ECF No. 484.

difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612–13 (1946).

A district court's refusal to answer the jurors' question about the lack of unanimity also may chill their ability to report that they are deadlocked and may encourage them to enter a hasty verdict. Here, the court did not let the jurors know that they could report back if they were deadlocked, and they announced a verdict the next morning—likely because they were left with the mistaken impression they had to reach a verdict no matter what. Similarly, in *United States v. Hall*, another federal capital case, the foreperson reported to the trial court that the jury "with 100% certainty" could not reach a unanimous verdict. 945 F.3d 1035, 1047 (8th Cir. 2019), *cert. denied*, 141 S. Ct. 1694 (2021). After being told to continue their deliberations, they reached "agreement" approximately an hour later. *Id.*

In both cases, the courts essentially approved a scheme whereby jurors are discouraged from reporting that they are deadlocked and are more likely to impose death sentences for fear that they may be stuck in the court indefinitely if they do not.

This Court has held "that capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). But the district

court's refusal to answer the jury's question here perpetuated an arbitrariness that violates the Eighth Amendment. *See Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (invalidating death sentences that were "cruel and unusual in the same way that being struck by lightning is cruel and unusual" because petitioners were "among a capriciously selected random handful upon which the sentence of death has in fact been imposed") (Stewart, J., concurring); *id.* at 313 ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed") (White, J., concurring).

This petition is not a mere request for error correction. Nor is it simply speculative that unless this Court intervenes, the federal death penalty will likely continue to be applied in an arbitrary manner. Two deliberating capital juries asked the same question; Christensen's trial judge responded to the question while Fackrell's trial judge refused to do so. The disparate results, a sentence of life without parole for Christensen and a death sentence for Fackrell, reveal that how courts respond—if they do respond—to this simple but important question has broad implications in applying the federal death penalty. This Court should grant review.

Finally, the Court should grant certiorari to determine whether a response should have been made in Fackrell's presence. In *Rogers v. United States*, 422 U.S. 35 (1975), this Court found that the trial court had violated the "rule of orderly conduct of trial by jury," which is essential to the "right to be heard" and was later codified in Federal Rule of Criminal Procedure 43, when the court did not respond to the jury's question in open court with both the defendant and jurors present.

But Fackrell's case is different from *Rogers*: he claims that the failure to respond to the jury note in his presence violates the Due Process Clause of the Fifth Amendment and the right to presence under the Sixth Amendment. *Rogers* addressed the question under Rule 43 only. Critically, where *Rogers* suggested that a Rule 43 violation may be subject to harmless error analysis, it did not discuss whether a constitutional violation is subject to harmless error analysis or is a structural error requiring immediate reversal.

The Fifth Circuit did not address Fackrell's claim that the trial court's written response to the jury's question violated his right to presence under the Fifth and Sixth Amendments, and Rule 43. Nevertheless, his case presents an appropriate vehicle for the Court to address an important question: whether such an error is structural. This Court should, therefore, grant the writ.

CONCLUSION

FOR THESE REASONS, this petition for writ of certiorari should be granted.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
Tel.: (210) 472-6700
Fax: (210) 472-4454

/s Judy Fulmer Madewell
JUDY FULMER MADEWELL
First Assistant Federal Public Defender

NICOLE DEBORDE HOCHGLAUBE
Hochglaube & DeBorde, P.C.
3515 Fannin St.
Houston, Texas 77004
Tel.: (713) 526-6300
Fax: (713) 808-9444

Counsel of Record for Petitioner

DATED: October 14, 2021