Nos. 21-5991 and 21-5995

IN THE SUPREME COURT OF THE UNITED STATES

RICKY ALLEN FACKRELL, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

CHRISTOPHER EMORY CRAMER, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASES

QUESTIONS PRESENTED

1. Whether petitioners were entitled to reversal of their convictions and death sentences on the ground that the district court denied petitioners' motion under Federal Rule of Appellate Procedure 10(c) to supplement the record on appeal with proposed reconstructions of four in-chambers discussions with counsel for the parties that were not recorded by a court reporter, where the court of appeals determined that the discussions were not substantial or significant in the circumstances of this case.

2. Whether the district court abused its discretion by allowing the government to respond to expert opinion testimony from defense witnesses that petitioners could be housed safely at a maximum-security prison, and therefore could not be a danger to others in the future, with evidence of violent conduct by inmates at that facility.

3. Whether the district court reversibly erred in responding to a jury note, inquiring about the procedures that would apply if the jury could not reach a unanimous verdict, with a note that the jury should "Please continue your deliberations."

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Tex.):

United States v. Cramer, No. 16-CR-26 (Jan. 30, 2020)

United States v. Cramer, No. 16-CR-26 (May 8, 2018)

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OPINIONS BELOW

The opinion of the court of appeals (21-5991 Pet. App. 1a-34a) is reported at 991 F.3d 589.[1] The opinions and orders of the district court (Pet. App. 35a-42a, 43a-49a) are not published in

[1] Citations to the "Pet. App." in this brief refer to the appendix to the petition for a writ of certiorari in Fackrell v. United States, No. 21-5991 (Oct. 14, 2021).

the Federal Supplement but are available at 2018 WL 7822169 and 2020 WL 8920386.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2021. A petition for rehearing was denied on May 17, 2021 (Pet. App. 55a-56a). The petitions for writs of certiorari were filed on October 14, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Texas, petitioners were each convicted of first-degree murder, in violation of 18 U.S.C. 1111. D. Ct. Doc. 671, at 1 (June 13, 2018) (Cramer Judgment); D. Ct. Doc. 673, at 1 (June 13, 2018) (Fackrell Judgment). On the jury's recommendation, the district court imposed capital sentences. Cramer Judgment 2; Fackrell Judgment 2. The court of appeals affirmed. Pet. App. 1a-34a.

1. In 2014, petitioners -- who were then inmates at the United States Penitentiary in Beaumont, Texas, and members of a nationwide prison gang known as the Soldiers of Aryan Culture -- murdered fellow inmate and gang member Leo Johns for violating gang rules against drugs, alcohol, and gambling. Pet. App. 2a-4a; see Gov't C.A. Br. 4-5 (collecting trial evidence). Although members of the gang offered to carry out punishments short of

death, petitioner Cramer -- the gang's ranking member at the Beaumont prison -- decided to kill Johns instead. Gov't C.A. Br. 5-6. Petitioner Fackrell, the gang's second-in-command at the prison, volunteered to carry out the punishment. Id. at 6-7.

After postponing the murder to avoid cancellation of a visit by Fackrell's family, petitioners attacked Johns in another inmate's cell with two long knives made of steel. Gov't C.A. Br. 6-8. Petitioner Cramer repeatedly stabbed Johns in the front while petitioner Fackrell stabbed him in the back. Id. at 8. When Johns briefly got away and made for the door, Fackrell stabbed him in the eye and around his face. Ibid. Petitioners left Johns for dead and shoved his body under a bunk, but Johns later managed to crawl to his cell and open the door. Id. at 8-9. Seeing this, petitioner Cramer went back and attacked Johns again. Id. at 9.

Johns died of multiple stab wounds. Gov't C.A. Br. 9. A forensic pathologist found a total of 68 stab wounds on his face, chest, back, legs, arms, and buttocks, including seven stab wounds to the lungs. Id. at 9-10.

2. A grand jury returned an indictment charging petitioners with first-degree murder, in violation of 18 U.S.C. 1111, and conspiracy to commit murder, in violation of 18 U.S.C. 1117. Superseding Indictment 1-2. The government dismissed the conspiracy charge before trial. See Pet. App. 35a. A jury found petitioners guilty of first-degree murder and, after a separate

penalty-phase proceeding, recommended capital sentences for both petitioners. Id. at 1a-4a. The district court imposed such sentences. Id. at 4a.

a. At the penalty phase of the trial, the jury was required under the Federal Death Penalty Act of 1994, 18 U.S.C. 3591 et seq., to determine with respect to each petitioner whether aggravating factors proved by the government sufficiently outweighed any mitigating factors proved by the petitioner to justify the death penalty. See Jones v. United States, 527 U.S. 373, 377-378 (1999). As relevant here, the government alleged as an aggravating factor, inter alia, that each petitioner would be a danger to others in the future, while petitioners alleged as mitigating factors, inter alia, that they could be reformed or safely housed at the federal maximum-security prison in Florence, Colorado. See Pet. App. 2a-4a.

Prior to trial, the government indicated that it would "not introduce evidence of instances of violence by inmates other than Cramer and Fackrell to affirmatively establish" their future dangerousness, but that such topics might be relevant -- on cross-examination of defense experts or on rebuttal -- to respond to evidence presented by petitioners. Pet. App. 45a. In its sentencing phase case-in-chief, the government introduced evidence about petitioners' past conduct, including evidence of their repeated acts of violence in prison. See C.A. ROA 8948-8953, 9273-

9275 (government's opening statements). Petitioners, however, introduced evidence about other prisoners as part of their own defense cases.

Cramer introduced expert testimony from Roy Timothy Gravette, a former employee of the Bureau of Prisons (BOP). C.A. ROA 10159-10161. Gravette testified that if Cramer received a sentence of life without parole, he would likely be housed at the maximum-security federal prison in Florence, Colorado. Id. at 10186. Gravette testified about the security procedures at the prison, see, e.g., id. at 10190-10203; stated that he was not aware of anyone escaping from a cell in the 24 years the prison had been in operation, id. at 10204-10205; and gave his opinion that petitioner Cramer could be housed at the prison in a manner that would be safe for himself, other inmates, and prison staff, id. at 10219-10220. On cross-examination, the government showed a video and questioned Gravette about an episode in which an inmate at the prison (Ishmael Petty) had gotten out of his cell and attacked three prison employees; the video and questioning caused Gravette to acknowledge that his testimony on direct examination had been mistaken. Id. at 10233-10236. The government also elicited testimony that at a federal capital sentencing hearing for another defendant (David Paul Hammer), Gravette had testified that Hammer could be housed safely in a federal penitentiary, but that Hammer

subsequently murdered another inmate while serving a life sentence in federal prison. Id. at 10267-10271.

Fackrell offered expert testimony from another former BOP employee, Mark Bezy. C.A. ROA 10773-10776. On direct examination, Bezy testified about the security procedures at the maximum-security prison in Colorado and specifically testified about the incident in which Petty attacked three prison employees. See id. at 10823-10833. Bezy also testified about an inmate housed at the prison (Tommy Silverstein) who had murdered three inmates and a BOP staff member while in federal prison. Id. at 10834-10836, 10839-10840. And Bezy gave his opinion that Fackrell could be housed safely at the prison. Id. at 10843. On cross-examination, the government questioned Bezy further about the Petty incident. Id. at 10872-10874.

In its rebuttal case, the government introduced testimony from David Berkebile, a former BOP employee who was the warden of the maximum-security prison in Colorado between 2012 and 2014. C.A. ROA 11148-11151. Berkebile testified about the procedures at the prison and about instances of violence by prisoners there, including incidents involving Petty. See id. at 11194-11211.

b. During jury selection, petitioners had requested permission to discuss with potential jurors what would happen if the jury failed to reach a unanimous verdict at the penalty phase -- namely, that the district court would sentence petitioners to

life in prison without the possibility of release. See Gov't C.A. Br. 118. The district court had denied the motion, noting that this Court had held in Jones, supra, that a jury instruction as to the effect of jury deadlock in federal capital cases is not constitutionally required. See C.A. ROA 2921-2923.

Consistent with that ruling -- and without objection by petitioners -- the district court, when instructing the jury at the penalty phase of the trial, did not instruct the jury regarding the result of a possible failure to reach a unanimous verdict. See C.A. ROA 11401-11406. The court did instruct the jury, consistent with petitioners' own proposed instructions, that if jurors "need[ed] to communicate with [the court] during [their] deliberations, the foreperson should write the message and give it to the court security officer," and the court would "either reply in writing or bring you back into the courtroom to respond to your inquiry," id. at 11460, 11527-11528; see D. Ct. Doc. 309, at 21 (Jan. 10, 2018) (petitioners' proposed jury instructions).

On the first day of the penalty-phase jury deliberations, the jury sent a note to the district court asking, "What is the process if we are not unanimous with our verdict?" Pet. App. 52a. The court disclosed the note to petitioners and their counsel in open court and informed the parties that it intended to respond to the jury by stating, "Please continue your deliberations." Ibid. Petitioners renewed their previous request to inform the jury that

the court would impose a sentence of life without parole if the jury could not reach a unanimous verdict, and the court denied the request for the same reasons that it had denied petitioners' earlier motion. Id. at 52a-54a. The court explained that it wanted the jury to continue deliberations in the hope of reaching a unanimous verdict, noting that the jury had not informed the court it was hopelessly deadlocked and assuring the parties that the court would deal with such circumstances if they were to arise. Ibid. The court sent a note to the jurors instructing them to "[p]lease continue your deliberations." Id. at 31a (brackets in original). The following day, the jury unanimously returned a verdict recommending a sentence of death for both petitioners. D. Ct. Doc. 582 (May 10, 2018); D. Ct. Doc. 583 (May 10, 2018).

c. Petitioners filed notices of appeal in June 2018. See D. Ct. Doc. 686 (June 20, 2018); D. Ct. Doc. 688 (June 20, 2018). More than 18 months later, while the appeal was still pending, they filed a motion under Federal Rule of Appellate Procedure 10(c) asking the district court to settle and approve a proposed statement regarding an unrecorded discussion between the district court and counsel in the district court's chambers on May 7, 2018, during trial. Pet. App. 77a-86a. According to petitioners, the subject of the discussion was the prospective testimony of the government's final witness, Elizabeth Rose, who was housed in the holding cell next to petitioners during the trial and reported to

authorities that she overheard petitioners making fun of the prosecutor's opening statement and laughing about stabbing Johns 74 times. See id. at 32a-33a. While that Rule 10(c) motion was pending, petitioners filed another motion seeking, as relevant here, settlement and approval of statements regarding three additional unrecorded in-chambers discussions. Id. at 89a-109a.

The district court denied the motions. Pet. App. 35a-42a. The court expressed doubt that Rule 10(c) -- which permits a court to settle and approve "a statement of the evidence or proceedings" if the "transcript of a hearing or trial is unavailable," Fed. R. App. P. 10(c) -- applied to the "off-the-record conferences held in chambers," Pet. App. 36a-37a. The court observed that petitioners, when they participated in the in-chambers discussions, had the opportunity to return to the courtroom to make a record or to request a court reporter's presence at the conferences. Id. at 37a. And the court indicated that, "[i]n any event," because "nearly nineteen months [had] elapsed from the date of the in-chambers conference and [petitioners'] Motion for Statement," the court was "unable to remember the specifics of the conference with sufficient clarity to settle and approve [petitioners'] proposed statement." Id. at 38a. The court noted that the government also did "not recall the specifics of the conference" and therefore could not "serve objections or proposed amendments to [petitioners'] proposed statements." Ibid.

3. The court of appeals affirmed. Pet. App. 1a-34a.

The court of appeals found that even assuming petitioners had properly preserved an objection to the admission of testimony about violence by other inmates at the maximum-security prison in Florence, Colorado, the district court did not abuse its discretion by permitting that testimony. Pet. App. 9a-10a. The court of appeals observed that "[t]he Federal Death Penalty Act permits the introduction of aggravating and mitigating evidence unless 'its probative value is outweighed by the danger of creating unfair prejudice,'" Pet. App. 10a (quoting 18 U.S.C. 3593(c)), and explained that the statute permits evidence showing that execution "is the only means of eliminating the threat" that a capital defendant would pose "to the safety of other inmates or prison staff," ibid. (internal quotation marks and citation omitted).

The court of appeals also determined that the district court did not err in providing a written response to the juror note asking what would happen if the jury was not unanimous with its verdict. Pet. App. 31a. The court of appeals further determined that the district court did not abuse its discretion by declining to provide a supplemental instruction regarding the consequences of a non-unanimous jury. Ibid. In doing so, the court of appeals cited this Court's decision in Jones, observed that "Congress did not require such an instruction among the mandatory instructions that the district court must give," ibid., and noted that the jury

instructions "explained that each juror must consider the evidence individually to render a verdict" and "instructed the jurors that the verdict must represent the judgment of each of them and that they each must decide the case for themselves," ibid.

Finally, the court of appeals found no reversible error in the district court's denial of petitioners' motion to settle and approve their proposed statements regarding the in-chambers discussions that were not recorded by a court reporter. Pet. App. 32a-33a. The court of appeals determined that the in-chambers discussion about the testimony of Rose was not a "hearing or trial" within the meaning of Federal Rule of Appellate Procedure 10(c). Pet. App. 33a. The court of appeals also explained that, if a district court is unable to reconstruct a missing portion of the record and the defendant is represented by new counsel on appeal, reversal is warranted only if the missing portion is "substantial and significant." Id. at 32a. The court of appeals concluded that petitioners had failed to demonstrate such substantiality and significance here. See id. at 33a.

ARGUMENT

Petitioners renew (21-5991 Pet. 11-40; 21-5995 Pet. 11-37) their contentions that their convictions and capital sentences should be reversed because the district court (1) declined to approve and settle their proposed statements of in-chambers discussions that were not recorded by a court reporter; (2)

permitted the government to introduce evidence about violence by inmates at the federal maximum-security prison in Florence, Colorado in order to respond to petitioners' arguments that they could be detained there safely; and (3) responded to a jury question in writing and declined to provide a supplemental instruction regarding the consequences of a non-unanimous jury at the penalty phase of the case. The court of appeals correctly rejected all three contentions, and its decision does not implicate any circuit conflict warranting this Court's review. The petitions for writs of certiorari accordingly should be denied.

1. Petitioners contend (21-5991 Pet. 11-24; 21-5995 Pet. 14-25) that the district court committed structural error by declining to approve and settle proposed statements regarding unrecorded in-chambers discussions under Federal Rule of Appellate Procedure 10(c), and that the court of appeals should accordingly have set aside their convictions and sentences. That contention is incorrect and does not implicate any conflict among the courts of appeals that warrants this Court's review in this case.

a. Rule 10(a) of the Federal Rules of Appellate Procedure provides that the record on appeal includes "the transcript of proceedings, if any." Fed. R. App. P. 10(a)(2). Rule 10(c) provides that "[i]f 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). The appellant must serve the proposed statement on the appellee, who may serve "objections or proposed amendments." Ibid. "The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval." Ibid.

In arguing that the lower courts misapplied Rule 10(c), petitioners focus primarily (e.g., 21-5991 Pet. 12, 14; 21-5995 Pet. 11, 16) on the district court's May 7, 2018 in-chambers discussion of potential testimony by Rose. In their petitions for writs of certiorari, they assert that during that discussion, the district court "heard arguments on a defense motion to exclude" Rose's testimony. 21-5991 Pet. 12; see id. at 14 (same); 21-5995 Pet. 11, 16 (same). The proposed statement that petitioners submitted for resolution to the district court, however, does not appear to reflect any argument about whether Rose would be permitted to testify. See Pet. App. 83a-85a. Instead, according to the proposed statement, the participants in the discussion -- who included counsel for petitioners and the government as well as counsel for Rose -- explained that petitioner Cramer had filed a written motion to exclude Rose's testimony; discussed whether one of Cramer's attorneys who had previously represented Rose would be required to withdraw from Cramer's defense if Rose testified; and agreed that Rose should finalize an agreed-upon plea deal in her own case before providing any testimony. Ibid. The court also

emphasized, according to petitioners' proposed statement, that the parties should "get this on the record." Id. at 85a. And following the in-chambers discussion, the parties did just that: the court held a recorded, in-court hearing at which it heard argument on the written motion to exclude Rose's testimony, then entered a written order denying that motion. See C.A. ROA 8431-8438 (hearing); id. at 22114-22119 (written motion); id. at 22140 (order denying motion).

Given those particular facts, the court of appeals reasonably determined (Pet. App. 33a) that the "discussion of Rose's testimony" at the in-chambers conference "was not a 'hearing or trial' within the meaning of Rule 10." Petitioners' proposed statement of what occurred during that in-chambers conference does not indicate that the district court heard argument about whether Rose's testimony would be admissible at trial; instead, the proposed statement indicates that the discussion focused primarily on questions of timing in Rose's separate case and the logistics of having her enter a guilty plea in that case before a magistrate judge under Federal Rule of Criminal Procedure 11(c)(1)(C). See Pet. App. 85a. A discussion of those sorts of timing and logistical details, carried out in an unrecorded conversation in the judge's chambers with counsel for the defense and prosecution as well as counsel for a potential witness, need not be considered a "hearing or trial" for purposes of Federal Rule of Appellate

Procedure 10(c) -- particularly where, as here, the discussions purportedly included the district court's direction that the parties should make a record regarding the matter and the parties did so at an in-court hearing held on the same day. See C.A. ROA 8431-8438.

Petitioners also refer in passing to a handful of other in-chambers discussions that were not recorded, as to which the district court also denied their motion to approve statements under Rule 10(c). See 21-5991 Pet. 14, 21, 23; 21-5995 Pet. 25. The court of appeals did not address whether those other in-chambers discussions qualified as "hearing[s] or trial[s]" about which a statement could be approved under Federal Rule of Appellate Procedure 10(c). See Pet. App. 33a. Instead, the court rejected petitioners' argument as to those in-chambers discussions on a different ground, which it recognized also applied to the in-chambers discussion about Rose's case. Specifically, the court determined that petitioners had "not demonstrated that these [asserted] omissions are substantial or significant," ibid., as they had acknowledged that they were required to do in order to obtain reversal, see Fackrell C.A. Br. 137 ("For this [c]ourt to reverse, the missing portion of the record must be substantial and significant."); Cramer C.A. Br. 178.

Although petitioners acknowledge (21-5991 Pet. 8; 21-5995 Pet. 9, 11) the court of appeals' determination that any omissions

were not substantial or significant, they make no meaningful attempt to rebut that case-specific determination.[2] Nor could they do so successfully, given the nature of the discussions that petitioners themselves contend occurred during the in-chambers meetings and the district court's diligence in ensuring those matters could be subsequently addressed on the record with an opportunity for objections. See, e.g., C.A. ROA 8431-8438 (hearing on testimony by Rose).

Instead, petitioners contend that a "district court's failure to ensure that the court reporters record all proceedings, * * * and to allow statements of them to be included in the record, are structural errors." 21-5991 Pet. 21; see 21-5995 Pet. 24 (similar). Petitioners did not argue structural error below, and identify no reason that this Court should consider in the first instance whether their claims should bear that label. See Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001) (per curiam)

[2] Petitioner Fackrell contends (Pet. 21), without elaboration, that "[t]he 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." As to the first issue, parties are not ordinarily required to provide explanations for peremptory strikes, and petitioners -- high-ranking leaders of a white-supremacist prison gang -- have never contended that the government intentionally excluded black jurors on the basis of their race. As to the second issue, the district court addressed on the record Fackrell's refusal to come to court for one day of the sentencing hearing, see C.A. ROA 11129-11137, and Fackrell does not argue that his voluntary absence provided a basis for overturning his conviction or sentence.

("[T]his is a court of final review and not first view.") (citation omitted). In any event, the argument lacks merit. This Court has found structural errors "only in a very limited class of cases," Neder v. United States, 527 U.S. 1, 8 (1999) (citation and internal quotation marks omitted), and it has applied a "strong presumption" that errors are not structural when "the defendant had counsel and was tried by an impartial adjudicator," United States v. Marcus, 560 U.S. 258, 265 (2010) (citation omitted). Petitioners provide no sound basis to expand the narrow class of errors deemed so grave as to be structural to include the failure to record all proceedings in a federal criminal case, no matter how inconsequential. The right to appeal in criminal cases derives from statute, not the Constitution, as does the requirement to record proceedings in federal cases. See Jones v. Barnes, 463 U.S. 745, 751 (1983) ("There is, of course, no constitutional right to an appeal."); 28 U.S.C. 753 (Court Reporter's Act). And the standards applied by the courts of appeals -- which generally require, at a minimum, a showing that any omissions in the transcripts are substantial and significant -- provide ample protection of those statutory rights. See pp. 19-21, infra (describing courts of appeals' approach).[3]

[3] Moreover, petitioners' own submissions illustrate that it would sometimes be contrary to a defendant's best interests to require on-the-record transcription of all in-chambers discussions. According to petitioners' proposed statement recounting a June 7, 2018 in-chambers discussion about petitioners' reasons for being

b. The court of appeals' separate determinations that the in-chambers discussion about testimony by Rose was not a "hearing or trial" covered by Federal Rule of Appellate Procedure 10(c), and that relief was in any event unwarranted because none of the purported omissions were "substantial or significant," Pet. App. 33a, do not implicate any conflicts among the courts of appeals that warrant this Court's review in this case.

Petitioners contend (21-5991 Pet. 12-14; 21-5995 Pet. 14-16) that the court of appeals' interpretation of "hearing or trial," Fed. R. App. P. 10(c), conflicts with interpretations adopted by other circuits. That contention is incorrect. While the court determined that the in-chambers conversation regarding Rose's testimony was not a "hearing or trial," it made no such determination with respect to the other in-chambers discussions petitioners had sought to address under Rule 10(c), and the court did not otherwise indicate that in-chambers discussions are categorically excluded. Pet. App. 33a. Accordingly, no conflict exists between the decision below and the decisions petitioners identify (21-5991 Pet. 12-14; 21-5995 Pet. 14-16) in which other courts indicated that Rule 10(c) would apply to certain in-chambers discussions of, for example, jury instructions, see United States

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absent from court, Cramer's attorney told the district court that he could not discuss some of Cramer's reasons "on the record" because it related to "prison politics * * * and would cause Cramer problems if this information were in [a] transcript." Pet. App. 107a.

v. Savage, 970 F.3d 217, 240 (3d Cir. 2020), cert. denied, 142 S. Ct. 481 (2021), or a defendant's potential plea bargain, see United States v. Mills, 597 F.2d 693, 698 (9th Cir. 1979). Petitioners identify no decision in which a court of appeals held that an in-chambers discussion like the one involving Rose's testimony, which focused largely on the logistics of her guilty plea in a separate case, was a "hearing or trial" under Federal Rule of Appellate Procedure 10(c), and the court of appeals' fact-specific determination here does not warrant this Court's review.

The court of appeals' requirement that any omission be "substantial or significant" in order to merit relief, Pet. App. 33a, also does not implicate any division of authority warranting the Court's review in this case. The courts of appeals have generally held that the failure of a court reporter to record all trial proceedings does not automatically require reversal of a conviction. See United States v. Brand, 80 F.3d 560, 563 (1st Cir. 1996), cert. denied, 510 U.S. 1077 (1997); Savage, 970 F.3d at 240 n.10; United States v. Gillis, 773 F.2d 549, 554 (4th Cir. 1985); United States v. Gieger, 190 F.3d 661, 667 (5th Cir. 1999); United States v. Gallo, 763 F.2d 1504, 1530 (6th Cir. 1985), cert. denied, 474 U.S. 1068, 474 U.S. 1069, and 475 U.S. 1017 (1986); United States v. Nolan, 910 F.2d 1553, 1560 (7th Cir. 1990), cert. denied, 499 U.S. 942 (1991); United States v. Kelly, 167 F.3d 436, 438 (8th Cir. 1999); United States v. Antoine, 906 F.2d 1379, 1381

(9th Cir.), cert. denied, 498 U.S. 963 (1990); United States v. Preciado-Cordobas, 981 F.2d 1206, 1212 (11th Cir. 1993). Rather, where trial counsel also represents the defendant on appeal, the defendant must demonstrate specific prejudice to his ability to present his claims on appeal in order to obtain relief. Gieger, 190 F.3d at 667; see Kelly, 167 F.3d at 438; Brand, 80 F.3d at 563; Preciado-Cordobas, 981 F.2d at 1212-1213; United States v. Sierra, 981 F.2d 123, 125 (3d Cir. 1992), cert. denied, 508 U.S. 967 (1993); Nolan, 910 F.2d at 1560; Antoine, 906 F.2d at 1381; Gillis, 773 F.2d at 554; Gallo, 763 F.2d at 1530-1531. "Prejudice is present when the district court's failure to comply with [the Court Reporter Act] makes it impossible for the appellate court to determine if the district court has committed reversible error." Nolan, 910 F.2d at 1560.

The majority of the courts of appeals require the defendant to demonstrate specific prejudice even when the defendant is represented by new counsel on appeal. See Kelly, 167 F.3d at 438; Brand, 88 F.3d at 563; Sierra, 981 F.2d at 125; Nolan, 910 F.2d at 1557, 1560; Antoine, 906 F.2d at 1381; Gillis, 773 F.2d. at 555; Gallo, 763 F.2d at 1530-1531. The Fifth and Eleventh Circuits, like the court of appeals here, apply a potentially more defendant-favorable standard and will reverse a conviction where there has been a substitution of counsel on appeal if the omissions or inaccuracies in the transcript are "substantial and significant,"

rather than requiring a defendant to demonstrate specific prejudice. Preciado-Cordobas, 981 F.2d at 1212; United States v. Selva, 559 F.2d 1303, 1306 (5th Cir. 1977). As already discussed, the court of appeals evaluated petitioners' claims under that potentially more lenient standard and determined that petitioners still were not entitled to relief. See Pet. App. 33a. Any disagreement among the courts of appeals about whether to require a potentially stricter standard than the defendant-favorable one the court of appeals applied here accordingly has no bearing on the proper outcome in this case.

c. The court of appeals' case-specific application of Rule 10(c) also does not present an issue of prospective importance warranting this Court's review. Rule 10(c) is not the exclusive mechanism to reconstruct missing parts of the record. While Rule 10(c) permits appellants to use a "statement" to reconstruct what transpired at a "hearing or trial" when a transcript of such proceedings is "unavailable," Fed. R. App. P. 10(c), Rule 10(e) separately provides that an "omission" from the record "may be corrected and a supplemental record may be certified and forwarded" through stipulation of the parties, by the district court, or by the court of appeals, Fed. R. App. P. 10(e)(2). Indeed, courts have used Rule 10(e) to supplement the record to reflect court conferences and other proceedings that were not transcribed by a court reporter. See, e.g., United States v. Cashwell, 950 F.2d

699, 703-704 (11th Cir. 1992); Hanson v. Parkside Surgery Center, 872 F.2d 745, 747-748 & n.4 (6th Cir.), cert. denied, 493 U.S. 944 (1989); United States v. Page, 661 F.2d 1080, 1081-1082 (5th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); see also 16A Charles Alan Wright et al., Federal Practice and Procedure § 3956.4, at 765-766 (2019) (explaining that a litigant may "use Rule 10(e) -- and/or Rule 10(c) if necessary -- to repair the key gaps" in the record). The availability of Rule 10(e) when Rule 10(c) is otherwise inapplicable, or unproductive, limits the significance of the court of appeals' determination that one specific in-chamber discussion here did not qualify as a hearing or trial for purposes of Rule 10(c).

2. Petitioners also contend (21-5991 Pet. 25-34; 21-5995 Pet. 25-31) that the evidence about violence by other federal inmates, introduced in rebuttal to petitioners' own evidence that incarceration prevents violence, required reversal of their death sentences. That contention lacks merit, and the court of appeals' decision rejecting it does not conflict with any decision of this Court or another court of appeals.

a. Neither petitioner disputes that the jury was entitled to consider his future dangerousness in deciding whether to recommend a sentence of death, and that the government was accordingly entitled to present evidence on that topic. In addition to listing certain specific aggravating factors that the

sentencing jury "shall consider," the Federal Death Penalty Act provides that the sentencing jury "may consider whether any other aggravating factor for which notice has been given exists," and authorizes "information [to] be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592." 18 U.S.C. 3593(c). And "federal courts 'have uniformly upheld future dangerousness as a non-statutory aggravating factor in capital cases.'" United States v. Wilson, 923 F. Supp. 2d 481, 485 (E.D.N.Y. 2013) (quoting United States v. Basciano, 763 F. Supp. 2d 303, 352 (E.D.N.Y. 2011), aff'd, 634 Fed. Appx. 832 (2d Cir. 2015), cert. denied, 136 S. Ct. 2529 (2016)); see Simmons v. South Carolina, 512 U.S. 154, 165 n.5 (1994) ("The State is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff.").

Here, the government proved petitioners' future dangerousness in its case-in-chief through evidence of violent conduct by petitioners themselves. See C.A. ROA 8948-8953, 9273-9275 (government's opening statements); see also, e.g., id. at 10249-10250 (evidence that petitioner Cramer stabbed and attempted to kill another federal inmate in February 2008); id. at 9354-9359 (evidence that petitioner Fackrell attacked another federal inmate with a blade in December 2007). Petitioners then responded to

that evidence with expert opinion testimony suggesting that despite their past violence, neither petitioner would be a danger to others in the future if he were confined at the maximum-security federal prison in Florence, Colorado. See id. at 10159-10229 (direct testimony by expert witness for petitioner Cramer); id. at 10773-10861 (direct testimony by expert witness for petitioner Fackrell). Petitioners also independently alleged as mitigating factors that they could be housed safely or reformed if incarcerated at that prison. See id. at 11453-11456, 11518-11523.

The government elicited evidence on cross-examination and rebuttal that was directly responsive to petitioners' evidence and argument that they could be safely housed at a maximum-security federal prison, and the district court appropriately admitted it. The evidence regarding Ishmael Petty's assault of prison employees at the maximum-security prison, for example, contradicted testimony by petitioner Cramer's defense expert that inmates at that prison had previously been unable to escape their cells. See C.A. ROA 10204-10205, 10232-10236. Indeed, when presented with the evidence about Petty, the defense expert acknowledged that his testimony on direct examination had been mistaken. See id. at 10235-10236. And counsel for petitioner Fackrell himself questioned Fackrell's defense expert about violence by other inmates at the maximum-security prison (Ishmael Petty and Tommy Silverstein), rendering those topics plainly relevant on cross-

examination or rebuttal. See id. at 10823-10836, 10839-10840. Neither the broad standard for the admission of evidence at federal capital sentencing hearings, see 18 U.S.C. 3593(c), nor the Eighth Amendment deprived the district court of its discretion to permit such cross-examination and rebuttal, rather than allow the contestable testimony submitted by petitioners to go unchecked.

b. Petitioners err in asserting (21-5991 Pet. 25-34; 21-5995 Pet. 25-31) that the decision below is inconsistent with United States v. Caro, 597 F.3d 608, 625 (4th Cir. 2010), cert. denied, 565 U.S. 1110 (2012), and Tucker v. Kemp, 762 F.2d 1496, 1508 (11th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986). The cited portions of those decisions involved claims of improper closing arguments at capital sentencing hearings; neither one of them concerned the admissibility of evidence under the Federal Death Penalty Act. See Caro, 597 F.3d at 624-627; Tucker, 762 F.2d at 1505-1508. Indeed, Tucker involved a state-law statutory limitation on "arguments about parole." 762 F.2d at 1508. And Caro, to the extent it is relevant, supports the court of appeals' decision in this case. There, the Fourth Circuit determined that the defendant had "opened the door" to "comments about whether the BOP would adequately secure [the defendant] to prevent future dangerousness." Caro, 597 F.3d at 626. The defendant's expert "acknowledged that [the defendant] remained dangerous, but testified that [the defendant] would not endanger

anyone because the BOP would incapacitate him at Florence ADMAX," which "plainly invited the government to respond that, actually, the BOP would not secure [the defendant] adequately to prevent future violence." Ibid. The government was similarly entitled to respond to petitioners' evidence in this case that they could be safely housed at the maximum-security prison in Florence.

Petitioners also contend (21-5991 Pet. 33-34; 21-5995 Pet. 12-13, 25-27) that this case is comparable to Calvert v. Texas, 141 S. Ct. 1605 (2021). Unlike in Calvert, however, the challenged evidence in this case did not pertain to violence by prisoners generally, but instead responded to specific testimony from defense experts about the security procedures at a particular prison; the ability of those procedures to prevent violence by inmates; and the defense experts' opinions that those procedures would prevent violence by petitioners -- both of whom had committed multiple violent acts in prison -- if they were housed at that particular prison. See pp. 23-25, supra. Moreover, this Court denied a writ of certiorari in Calvert, and petitioners identify no sound reason to follow a different course here. See Calvert, 141 S. Ct. at 1606 (Sotomayor, J., respecting the denial of certiorari) (agreeing that Calvert's "claim does not meet the Court's traditional criteria for granting certiorari").

3. Finally, petitioners contend (21-5991 Pet. 40; 21-5995 Pet. 31-37) that they are entitled to vacatur of their death

sentences because the district court responded to a juror note in writing rather than orally in open court. Petitioner Fackrell also contends (21-5991 Pet. 35-40) that the court was required to provide a supplemental instruction to the jury in response to the note explaining the consequences of a non-unanimous jury. Neither contention warrants this Court's review.

a. Rule 43(a)(2) of the Federal Rules of Criminal Procedure provides that "the defendant must be present at * * * every trial stage, including jury impanelment and the return of the verdict." Fed. R. Crim. P. 43(a)(2). In Rogers v. United States, 422 U.S. 35 (1975), the district court responded to a jury inquiry in writing without notifying the defendant or his counsel, and this Court concluded "that the jury's message should have been answered in open court and that [defendant's] counsel should have been given an opportunity to be heard before the trial judge responded." Id. at 39. The Court made clear, however, that "a violation of Rule 43 may in some circumstances be harmless error." Id. at 40.

Since Rogers, the courts of appeals have generally recognized that the substantive requirements of Rule 43 are satisfied if the district court, in the defendant's presence, discloses a juror inquiry to counsel and gives counsel an opportunity to be heard before the court responds to the inquiry, either orally or in writing. See United States v. Smith, 31 F.3d 469, 471 & n.2 (7th Cir. 1994); see also United States v. Parr, 716 F.2d 796, 810 n.15

(11th Cir. 1983) (concluding that it is preferrable to provide supplemental instructions orally, but that it was within the district court's discretion to submit them to the jury in writing); United States v. Solomon, 565 F.2d 364, 366 (5th Cir. 1978) (per curiam) (same); United States v. Basciano, 634 Fed. Appx. 832, 839-840 & n.5 (2d Cir. 2015) (finding no violation of Rule 43(a)(2) where the "the district court disclosed the content of the jury note to [defendant's] counsel, elicited counsel's views, and indicated that its response would be communicated in writing -- all in the presence of" the defendant), cert. denied, 136 S. Ct. 2529 (2016). Courts have additionally observed that "it is commonplace for district court judges to send written answers to jury questions, after proper consultation with counsel in the presence of the defendant, rather than wasting 20 minutes of the time of nearly 20 people for a stately courtroom delivery." United States v. Grant, 52 F.3d 448, 449-450 (2d Cir. 1995) (footnote omitted); see Smith, 31 F.3d at 471 ("Judges routinely tell jurors (as was done in this case) that the court's response to jury inquiries will be given 'either in writing or orally in open court.'"); see also United States v. Vega, 398 F.3d 149, 151 (1st Cir.) (case in which the district court "responded to the jury in writing"), cert. denied, 546 U.S. 864 (2005); United States v. Melhuish, 6 F.4th 380, 390 (2d Cir. 2021) (same).

The Fourth and Sixth Circuits have indicated in unpublished decisions that a district court may violate Rule 43 by providing a supplemental instruction to the jury in writing in response to a juror inquiry. See United States v. Yu, 411 Fed. Appx. 559, 567–568 (4th Cir. 2010); United States v. Stapleton, 297 Fed. Appx. 413, 429–430 (6th Cir. 2008). But those courts went on to find that the error is "technical" and harmless where the district court had disclosed the juror inquiry to counsel in the defendant's presence and allowed counsel to be heard before responding to the inquiry. Yu, 411 Fed. Appx. at 567–568 (finding any Rule 43 error harmless because "[n]either [the defendant] nor his attorney were excluded from any part of the district court's consideration of the jury's question or the preparation of the court's reply"); Stapleton, 297 Fed. Appx. at 429–430 (finding a "technical," non-prejudicial, violation where "the defendant and all counsel were present in the courtroom after the jury's note was received by the court," "the court heard arguments from counsel in the presence of the defendant concerning what response should be given," and "[c]ounsel were informed of the contents of the judge's note before it was given to the jury and had the opportunity to raise objections").[4]

[4] Cramer cites (21-5995 Pet. 33-34) cases in which courts reversed convictions because the district court provided a supplemental jury instruction without the defendant's presence, but in those cases, the court brought the jury back into the courtroom yet delivered the instruction while the defendant

This Court's review is accordingly not warranted to determine whether a district court's use of a written response to a jury inquiry -- after disclosing the inquiry to counsel in the defendant's presence and permitting counsel to be heard regarding the court's response -- is permitted by Rule 43 or instead a technical-but-harmless violation. In any event, this case would be a poor vehicle to address any shallow distinction between courts of appeals because petitioners invited the very error of which they now complain. See United States v. Wells, 519 U.S. 482, 487-488 (1997) (describing as "valuable" the "'invited error' doctrine 'that a party may not complain on appeal of errors that he himself invited or provoked the [district] court . . . to commit'") (citation omitted; brackets in original). Petitioners proposed that the district court instruct the jury, during the sentencing phase of the case, that "[i]f you need to communicate with me during your deliberations the foreperson should write the message and give it to the courtroom security officer. I will either reply in writing or bring you back into the courtroom to respond to your inquiry." D. Ct. Doc. 309, at 21 (emphasis added). The court instructed the jury accordingly. See C.A. ROA 11460, 11527-11528.

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himself was absent, with the jurors able to observe as much and the defendant unable to monitor the proceeding or any unforeseen expansion of it. See, e.g., United States v. Fontanez, 878 F.2d 33, 37 (2d Cir. 1989). Those cases do not address whether a district court may submit a written supplemental instruction in response to a jury inquiry after disclosing the inquiry to counsel in the defendant's presence and permitting counsel to be heard.

And petitioners raised no objection when the court, consistent with petitioners' proposed instruction, determined to respond to the jury in writing after consulting with their counsel about the response. See Pet. App. 52a-54a.

Even if petitioners had not affirmatively invited the putative error, their failure to raise an objection in the district court means they could obtain relief only by satisfying the requirements of plain-error review. See Fed. R. Crim. P. 52(b); Greer v. United States, 141 S. Ct. 2090, 2096 (2021). Thus, petitioners must, at a minimum, demonstrate (1) error; (2) that is plain, which means it is clear or obvious rather than subject to reasonable dispute; (3) that affected substantial rights, which ordinarily means it affected the outcome of the proceedings; and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. United States v. Olano, 507 U.S. 725, 732-736 (1993); see, e.g., Puckett v. United States, 556 U.S. 129, 135 (2009). Petitioners cannot make that showing here. As already discussed, the court's use of a written response to the jury inquiry after consulting with defense counsel in petitioners' presence is a "commonplace" practice approved of by multiple courts of appeals, Grant, 52 F.3d at 449, and petitioners cannot show that it affected their substantial rights here or that allowing their sentences to stand notwithstanding the court's employment of such a commonplace procedure, which their own proposed

instructions embraced, would seriously affect the fairness, integrity, or public reputation of judicial proceedings.

b. This Court's decision in Jones v. United States, 527 U.S. 373 (1999), forecloses Fackrell's contention (21-5991 Pet. 35-40) that the district court was required to respond to the jury's inquiry by explaining that the court would sentence petitioners to life in prison without the possibility of release if the jury was unable to reach a unanimous verdict. Jones held that a jury instruction as to the effect of jury deadlock at the penalty phase in federal capital cases is not constitutionally required because it has no bearing on the jury's role in the sentencing process, and may actually undermine the strong interest in having the jury express the conscience of the community on the ultimate question of life or death. Jones, 527 U.S. at 381-382.

Fackrell's efforts to distinguish Jones are unsound. His principal contention (21-5991 Pet. 35-36) is that this case differs from Jones because the jury here asked about the effect of a failure to agree, whereas in Jones the petitioner wanted the jury to be instructed preemptively on the consequences of an inability to agree in a capital sentencing proceeding. But those circumstances are not functionally different; in both, the end result would be an instruction to the jury about the legal effect of its failure to agree, with the same unrequired and potentially deleterious effect identified in Jones.

To the extent that Fackrell suggests (21-5991 Pet. 38) that the district court's response stating "[p]lease continue your deliberations," Pet. App. 31a (brackets in original), was an incorrect or misleading supplemental instruction, he is incorrect. As the Court observed in Jones, this Court has "long been of the view that '[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.'" 527 U.S. at 382 (quoting Allen v. United States, 164 U.S. 492, 501 (1896)) (brackets in original). In contexts in which a jury has "report[ed] itself as deadlocked," the Court has accordingly "approved of the use of a supplemental charge to encourage [the] jury * * * to engage in further deliberations, even capital sentencing juries." Id. at 382 n.5 (citing Allen, 164 U.S. at 501; Lowenfield v. Phelps, 484 U.S. 231, 237-241 (1988)). In Allen, for instance, the Court approved a supplemental charge that urged the minority members of a deadlocked capital jury to consider the views of the majority and "ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority." 164 U.S. at 501. And this Court's determination that jurors in "capital sentencing proceeding[s]" must carefully consider the contrary views of others in light of the jury system's object of "'secur[ing] unanimity by a comparison of views'" applies "with even greater force" where "the charge given" -- in contrast

to a traditional Allen charge -- "does not speak specifically to the minority jurors." Lowenfield, 484 U.S. at 237-238 (citation omitted).

In light of those principles, the question whether a trial court has "improperly coerced" jurors by giving a supplemental charge regarding ongoing deliberations is evaluated in "'context and under all the circumstances.'" Lowenfield, 484 U.S. at 237 (citation omitted). As a threshold matter, it is far from clear that the response here was a true supplemental instruction on the preferability of jury unanimity, rather than simply a way of telling the jury that it should not await a substantive response to its question. In any event, "even in capital cases," this Court has made clear that a trial court "incontestably" has "authority to insist that [a jury] deliberate further" if the jury, after deliberating for only a short period, informs the court of its failure to reach unanimity. Id. at 238. Thus, at a minimum, the district court's response here did not exceed permissible boundaries.

After the lengthy penalty-phase proceedings in this case, the jury deliberated on the sentences for two defendants for less than one full day before the jury submitted the note asking about the process if the jury was not unanimous with its verdict. See Pet. App. 52a-54a. The jury did not disclose whether it had yet voted on petitioners' sentences, and as the district court noted, the

jury did not "say[] they are hopelessly deadlocked" or "anything like that." Id. at 52a. In those circumstances, the district court permissibly responded that the jury should continue its deliberations. The court's response did not tell jurors to reconsider their positions or suggest that they must be unanimous in the end. As the court explained to counsel, if at some point the jurors indicated they were "hopelessly deadlocked," the court was prepared to "deal with" that situation "when that comes about." Id. at 54a. The court's response simply -- and appropriately in that context -- reflected the court's determination that it was reasonable under the circumstances to inform the jury that it should continue its deliberations. See id. at 52a ("I want them to continue their deliberations in hopes of reaching a unanimous verdict.").

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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