CAPITAL CASE

No. 21-5991

In the Supreme Court of the United States
October Term, 2021

RICKY ALLEN FACKRELL, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*

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

PETITIONER'S REPLY TO BRIEF FOR UNITED STATES IN OPPOSTION

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

CAPITAL CASE 1

INTRODUCTION 1

ARGUMENTS AND AUTHORITIES 1

I. Trial courts' role in ensuring a complete record is a question worthy of this Court's review, and this case is a good vehicle for that review..1

A. The government understates the scope and significance of Fackrell's claim and misstates the record. 3

B. The government understates the significance of the only out-of-court conference it addresses. 6

C. Given the interests at stake, and the failure of trial counsel to request that a record be made, this Court may wish to consider whether a court's failure to ensure that proceedings outside the courtroom are recorded is structural error..8

II. The Fifth Circuit's decision allowing use of third party misconduct to prove a capital defendant's future dangerousness conflicts with the decisions other circuits...9

III. The question whether a court must answer the deliberating jury's question about unanimity in the capital sentencing phase is not foreclosed by *Jones v. United States*, 527 U.S. 373 (1999), and is worthy of this Court's review. 11

CONCLUSION.. 14

TABLE OF AUTHORITIES

Cases

Allen v. United States,
164 U.S. 492 (1896) 12

Bollenbach v. United States,
326 U.S. 607 (1946) 12, 13

Burger v. Kemp,
483 U.S. 776 (1987) 9

Calvert v. Texas,
141 S. Ct. 1605 (2021) 10

Eddings v. Oklahoma,
455 U.S. 104 (1982) 5

Jenkins v. United States,
380 U.S. 445 (1965) (per curiam) 13

Jones v. United States,
527 U.S. 373 (1999) 11, 12, 13

Jurek v. Texas,
428 U.S. 262 (1976) 8

Kyles v. Whitley,
514 U.S. 419 (1995) 9

Lockett v. Ohio,
438 U.S. 586 (1978) 9

Lowenfield v. Phelps,
484 U.S. 231 (1988) 13

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980) 8

Tucker v. Kemp,
762 F.2d 1496 (11th Cir. 1985) (en banc) 10

United States v. Addonizio,
442 U.S. 178 (1979) 5

United States v. Caro,
597 F.3d 608 (4th Cir. 2010) 10

United States v. Fackrell,
991 F.3d 589 (5th Cir. 2021) 4, 6

United States v. Jenkins,
442 F.2d 429 (5th Cir. 1971) 4

United States v. Pace,
10 F.3d 1106 (5th Cir. 1993) 2

Woodson v. North Carolina,
428 U.S. 280 (1976) 9

Constitutional Provisions

U.S. Const. amend. V 1, 7

U.S. Const. amend. VIII .... *passim*

Statute

28 U.S.C. § 738(b) 4

Rules

Fed. R. App. P. 10 .... 2, 4, 8

Fed. R. App. P. 10(c) .... *passim*

Fed. R. App. P. 10(d) 7

Fed. R. App. P. 10(e) 7

CAPITAL CASE

INTRODUCTION

Petitioner Ricky Fackrell asks the Court to grant a writ of certiorari to resolve three issues of significance: first, whether Federal Rule of Appellate Procedure 10(c) requires that some in-chambers conferences be recorded; second, whether the government's use of third-party misconduct to prove a capital defendant's future dangerousness violates the Fifth and Eighth Amendments; and third, 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.

The Government attempts to obscure the importance of these questions by minimizing the scope of the court of appeals' decision and disagreement in the circuits and by creating or exaggerating factual issues. It also argues that the Fifth Circuit's decision is correct. Fackrell replies to explain why the questions raised here are important to the non-arbitrary application of the death penalty and the integrity of the judicial system.

ARGUMENTS AND AUTHORITIES

I. Trial courts' role in ensuring a complete record is a question worthy of this Court's review, and this case is a good vehicle for that review.

The issues here are both more far-reaching and clearer than the government suggests. On appeal, Fackrell argued that a new trial was required because the prosecutor and the trial court were unable to assist reconstructing,

under Federal Rule of Appellate Procedure 10(c), over 20 off-the-record "conferences" held by the court. The Fifth Circuit rejected that claim, finding that one conference was not a "proceeding" under Rule 10 and that any proceeding not held in open court did not fall within the Federal Court Reporters Act (FCRA). It also concluded that none of the conferences were "substantial or significant."[1] Fackrell seeks review of whether, contrary to the court of appeals' ruling, some out-of-court conferences must be recorded. If the Court declines to consider that issue because trial counsel did not object when the conferences were not recorded, the Court should consider whether a trial court's failure to, consistent with its original order, direct that proceedings be preserved is structural error.

The government argues that this case is a poor vehicle for considering these questions, because: (1) it essentially involves only two proceedings, (2) the court of appeals found Fackrell did not show prejudice under the modified "substantial and significant" standard, and (3) there is no circuit split regarding the proper application of Rule 10.

The government has manufactured factual disputes to create obstacles to review. The issue—whether Rule 10(c) requires that some out-of-court proceedings be recorded—is cleanly presented. The issue is important, given the

---

[1] When the defendant is represented by new counsel on appeal, the Fifth Circuit will reverse error under Rule 10(c) if in relevant part, the missing portion of the record is "substantial and significant." *United States v. Pace*, 10 F.3d 1106, 1124–25 (5th Cir. 1993).

Eighth Amendment requirement that capital proceedings be reliable and rational and the defendant's and the public's right to access the criminal courts.

A. The government understates the scope and significance of Fackrell's claim and misstates the record.

The government challenges the factual premises upon which Fackrell's request is based. Those premises, however, are well-grounded, and review is warranted.

1. *Substantial portions of the record are missing.*

Fackrell's argument is not confined to two proceedings. *See* BIO 13–14. He identified over 20 unrecorded "conferences." Fackrell Br. 138 n.54. Fackrell had obtained contemporaneous notes—made by nonparties—of some of these proceedings, and he disclosed the substance of those notes. Fackrell Br. 126 nn.49–50; *id.* at 140. Focusing on the two proceedings he knew most about—the conference regarding last-minute government witness Elizabeth Rose and the conference at which defense counsel objected to the sentencing charge—he argued that a new trial was required because, despite his best efforts, the record could not be reconstructed. *Id.* at 143–44.[2]

In this petition, Fackrell focuses on the same conferences, for the same reason. But the remaining 18 or more conferences demonstrate that conducting business off the record was the practice of the trial court throughout Fackrell's

---

[2] Alternatively, the Court could grant certiorari, vacate the conviction and sentence, and reverse so that the district court could attempt to resolve factual differences about the conferences by a hearing, which Fackrell requested, but the district court refused.

trial. That Fackrell cannot provide the substance of all those proceedings merely highlights the problem requiring this Court's intervention. Both the government and the trial court either refused to, or could not, assist in reconstructing them. Appellate counsel then could not fulfill their role in identifying and asserting possible errors, and the courts of review, including this Court, cannot fulfill their institutional roles. Pet. 23–24.

2. The appellate court's decision squarely presents the issue.

Attempting to whittle the case down, the government asserts the court of appeals found that only the conference regarding witness Rose was not a "proceeding." BIO 15. Since the court found that the other missing conferences were not "substantial and significant" and, in the government's view, neither that finding nor that standard are at issue, it asserts this case presents a poor vehicle for review.

This restatement of the issue is inaccurate. The court of appeals implicitly recognized that a charge conference is a "proceeding" under Rule 10. The court did not avoid deciding whether the other conferences should have been transcribed; rather, it held that, for *any conference not held in open court*, no recording was required. *United States v. Fackrell,* 991 F.3d 589, 613 (5th Cir. 2021).

The court of appeals relied on *United States v. Jenkins*, 442 F.2d 429 (5th Cir. 1971). There, it held that only open-court proceedings need be recorded under the FCRA. *Id.* at 438. This ignores the plain language of the FCRA that a proceeding must be recorded when doing so is required by court order or "rule." 28 U.S.C. § 738(b). The question presented here asks what that rule, Rule 10(c), requires.

The court of appeals' holding that the conferences were not "substantial and significant" does not cut against review. As an initial matter, contrary to the government's assertion, Fackrell contests that conclusion.[3]

As important, however, are the institutional implications of permitting a trial court to avoid making a record by simply removing its public business to chambers. In such cases, while appellate counsel may suspect or even have information about potential error, there is no record of it to present to the reviewing court.[4] This case exposes that reality. While Fackrell has demonstrated that the unreported conferences were substantial and significant, any failure to provide the proof demanded by the court of appeals and the government results directly from the incomplete record. This implicates the court of appeals' prejudice finding—how can an appellant satisfy the requirement that the missing portions of the record are "substantial and significant" if there is no actual or reconstructed record, and attempts to reconstruct are unsuccessful?

---

[3] Fackrell argued in the court of appeals that the two conferences satisfied the "substantial and significant standard," and he emphasized their importance in his petition before this Court. *See* Fackrell Br. 137–43; Pet. at 5–7. Those two proceedings alone involved the resolution of a potential conflict regarding a devastating last-minute witness, possible judicial bias, the substance of objections defense counsel made to the sentencing charge, and whether the trial court applied an overly narrow view of mitigation evidence in denying those objections. *See Eddings v. Oklahoma,* 455 U.S. 104, 114 (1982) (jury cannot be precluded from hearing any relevant mitigating evidence).

[4] Evidence regarding unrecorded proceedings may—or may not—be uncovered by counsel on collateral review, but at that stage, successfully litigating them is significantly more difficult. *See United States v. Addonizio*, 442 U.S. 178, 185 (1979).

3. The circuits are divided over the correct application of Rule 10(c).

Fackrell has amply demonstrated that the circuits are divided on whether out-of-court conferences must be recorded. *See* Pet. 12–14. The Fifth Circuit here held that *no* out-of-court conference need be recorded. *Fackrell,* 991 F.3d at 613. This holding is flatly in conflict with the Third, Eighth, and Ninth Circuits, which hold that some proceedings must be recorded. *See* Pet. 12–14 (citing cases). And such a rule would permit courts to conduct business that evades both the public eye and judicial review.[5]

B. The government understates the significance of the only out-of-court conference it addresses.

In responding to Fackrell's arguments on the merits, the government focuses on the Elizabeth Rose chambers conference. It asserts that it was unnecessary to transcribe the back-and-forth about Rose between the parties and trial court, because the court ruled and permitted the parties to make their objections in open court. BIO 14–15. This ignores the trial judge's failure to rule on, much less explain, in open court the objections to Rose's testimony and a motion by Cramer's attorney to withdraw, which were based on the conflict created by that testimony. The notes Fackrell supplied to reconstruct the conference suggest that the court denied the motions in chambers.

---

[5] The government also claims there is no division regarding the Fifth Circuit's "substantial and significant" standard. BIO 18–21. This is curious, since its own brief describes a split between courts that apply the "substantial and significant" inquiry and those that do not. BIO 19–20. Regardless, the question Fackrell presents for review is whether a chambers conference must ever be recorded.

More importantly, the discussion of the timing of Rose's plea was not repeated in open court. The timing was important to Fackrell's appeal, because a similarly-situated defense witness, Erik Rekonen, was treated differently. *See* Fackrell Br. 157 n.52. Rekonen, who was expected to enter a plea of guilty, asserted his Fifth Amendment right not to testify. A plea hearing was not arranged for him as it had been for Rose. Appellate counsel believed that the disparate treatment of Rekonen and Rose may have indicated judicial bias for the government. But there was no record on which to make that determination or argument.

Rules 10(d) and 10(e) do not provide an alternate method of repairing the gaps in the record such as Fackrell's. Like subsection (c), both subsections (d) and (e) require the cooperation of the parties and rely on their memory. *See* Fed. R. App. P. 10(d) ("parties" may submit a statement of the case); *id.* at 10(e) (in the case of a disagreement, the parties must submit the difference to the court for resolution). Fackrell's good-faith efforts to involve the government and the court in ensuring a complete record under Rule 10(c) were unsuccessful. They would have been no more successful had he invoked other subsections.

Requiring the district court to ensure recording of chambers conferences at which the court's public business is conducted guarantees an accurate, contemporaneous record. To be sure, chambers conferences may be appealing to a court. And trial attorneys may have their own reasons for acceding to the

practice.[6] But these reasons undermine the goals of Rule 10 and the FCRA.[7] Indeed, they may be the very reasons that a record should be made.

These reasons do not justify compromising a capital defendant's right to review of the proceedings that produced a death sentence, the public's interest in open proceedings in cases of such consequence, or the systemic interests in ensuring that the results of capital proceedings are not arbitrary or disproportionate. *See Jurek v. Texas*, 428 U.S. 262, 276 (1976); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 578, 581 (1980).

C. Given the interests at stake, and the failure of trial counsel to request that a record be made, this Court may wish to consider whether a court's failure to ensure that proceedings outside the courtroom are recorded is structural error.

Because the parties may not be motivated to protect the record and because, without a record, appellate counsel cannot bring errors to the attention of reviewing courts, Fackrell suggests the Court should consider whether failure to make a record, especially in capital cases, is structural error.

This Court has recognized that, in capital cases, appellate review has a constitutional dimension. A state's death penalty scheme *must* provide for some sentencing review or risk violating the Eighth Amendment. *Jurek*, 428

---

[6] Trial judges may welcome the opportunity to speak frankly or to make statements that might attract public attention or draw an appeal off the record. Attorneys may believe they get better rulings behind closed doors. Or, they may fail to object because the conferences are part of a court culture that they are afraid to disturb.

[7] Fackrell disagrees with the government's suggestion that requiring all proceedings to be recorded would prevent either party from employing mechanisms such as sealing documents or redacting information to protect the safety of litigants or witnesses. *See* BIO 17, n.3. Those mechanisms are available in open-court proceedings.

U.S. at 276. The Court has stressed the importance of appellate review to the guilt-innocence phase of capital proceedings as well. The Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (quoting *Burger v. Kemp*, 483 U.S. 776 (1987)).

The Court cannot ensure "exacting" Eighth Amendment post-trial review if trial courts can circumscribe or shape the record by conducting unrecorded proceedings outside of the courtroom. Fackrell's case provides the Court the opportunity to review this issue in its starkest iteration: proceedings were held outside the courtroom on matters that would become important to appellate review; the defendants invited the other parties to recreate the record—and were unsuccessful at every turn; the court of appeals squarely held that out-of-court proceedings need not be recorded; and the court of appeals applied a prejudice standard that faulted the defendants for being unable to prove the unrecorded proceedings were substantial or significant.

II. The Fifth Circuit's decision allowing use of third party misconduct to prove a capital defendant's future dangerousness conflicts with the decisions other circuits.

To show that Fackrell would be a future danger in prison if not executed, the government introduced detailed and graphic evidence of other inmates' violent conduct, unconnected to Fackrell or his case. But the Eighth Amendment requires jurors to make an individualized sentencing determination. *See Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978). The fact that other inmates committed violent acts is irrelevant to the determination of whether Fackrell should be sentenced to death based on his own

actions. This issue—the "serious question" of whether the government's "reliance on a graphic instance of violence by an unrelated inmate to prove that he posed a future danger deprived him of his right to an individualized sentencing"—is the same one that Justice Sotomayor recently highlighted as "weighty" in *Calvert v. Texas*, 141 S. Ct. 1605, 1606 (2021) (Sotomayor, J., statement respecting the denial of certiorari). Although the Court denied Calvert a writ of certiorari, as the government notes, BIO 26, Fackrell's case, unlike Calvert's, arises under the Federal Death Penalty Act, and does not implicate a state's own administration of the death penalty. This, along with the government's continuing use of this tactic, offers additional support, not present in *Calvert*, for granting the writ here.

Contrary to the government's argument, the Fifth Circuit's approval of the admission of third party conduct to prove Fackrell's likelihood of committing future acts of violence conflicts with decisions by other courts of appeals. See BIO 22, 25. The government attempts to minimize the conflict between the Circuits, claiming that the Fourth Circuit's decision in *United States v. Caro*, 597 F.3d 608, 625 (4th Cir. 2010) and the Eleventh Circuit's in *Tucker v. Kemp*, 762 F.2d 1496, 1508 (11th Cir. 1985) (en banc) merely involved claims of improper argument as opposed to Fackrell's claim concerning the improper admission of evidence.

This is a distinction without a difference. Whether by argument or evidence, use of graphic acts of violence by third parties unconnected to Fackrell

or his case trenched on his right to individualized sentencing. In any event, the government's actions were not limited just to the admission of the evidence. Once the evidence about these other inmates had been admitted, the government relied on them extensively in its summation argument.

III. The question whether a court must answer the deliberating jury's question about unanimity in the capital sentencing phase is not foreclosed by *Jones v. United States*, 527 U.S. 373 (1999), and is worthy of this Court's review.

This case raises the question of whether a district court should respond to a deliberating capital jury's question asking—"What is the process if we are not unanimous with our verdict?"—with an accurate explanation.[8] Contrary to the Government's claim, this Court's decision in *Jones v. United* States, 527 U.S. 373 (1999), does not foreclose this important question. BIO 32.

In *Jones*, the capital defendant argued that, under the Eighth Amendment, a court must preemptively instruct the jury about the consequences of their failure to be unanimous on a sentence of death or life imprisonment. 527 U.S. at 379–80. The Supreme Court, recognizing society's interest in encouraging unanimous verdicts, refused to require that the instructions preemptively inform the jury about the consequences of non-unanimity. *Id.* at 381–82.

---

[8] In the petition for writ of certiorari, Fackrell fully briefed the district court's failure to instruct the jury in his presence. The government's arguments do not minimize the significance of this question, and Fackrell does not waive it by not addressing it in reply.

There is a functional difference between preemptively instructing the jury on the consequences of non-unanimity and answering the jury's question on the impact of their potential non-unanimity when they explicitly ask. Preemptively instructing the jury may plant, from the beginning of deliberations, the idea that unanimity is not required. *Id.* at 382 ("'[t]he very object of the jury system is to secure unanimity'") (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896)). Thus, it could have the deleterious effects discussed in *Jones*. *Id.* However, when the jury has already been instructed that it is required to be unanimous, has been deliberating all day, and then asks about the impact of non-unanimity, a correct instruction will not have that same effect. That is so because the jury has already, on its own, raised the issue of non-unanimity. When the court fails to answer the question, the jury is left to speculate wrongly about the consequences of non-unanimity. Such speculation may prompt any life-leaning jurors to change their vote for fear that non-unanimity might have some unpalatable effects, such as requiring a new trial.

This is a cert-worthy issue because the district court's and court of appeals' interpretation of *Jones* conflicts with this Court's requirement that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612–13 (1946). Indeed, here, the district court's supplemental instruction to the jury was improper.

In determining whether a supplemental instruction is improper or misleading, it must be considered "in its context and under all the circumstances." *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988) (quoting *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (per curiam)). Here, the jurors had been instructed that each must make their own individual findings of mitigating factors and then weigh those against the aggravating ones. They had also been instructed not to give up their honest beliefs even if doing so prevented unanimous agreement on the verdict. The jury had not been instructed on the consequences of a failure to be unanimous. *Cf. id.* at 234. And they had not been informed that, should they be unable to agree on a sentence of death or life imprisonment, they should inform the court. *Cf. Jones*, 527 U.S. at 394. Then, after deliberating for almost seven hours, the jurors did not tell the court that they were deadlocked. Instead, the jury asked the court about the consequences of non-unanimity.

In light of the context and these circumstances, the district court's instruction to continue deliberating was improper. The instruction did not accurately answer the jury's question. *Bollenbach*, 326 U.S. at 612–13. The jury was not saying that it had stopped deliberating, so instructing it to continue deliberating added nothing. The jurors' apparent confusion could have been remedied had the court simply answered the question directly and truthfully by telling the jurors that if they ultimately came back "not unanimous in our verdict,"

the court would accept that result and would be required, by law, to sentence Fackrell to life imprisonment without release.

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.

CONCLUSION

FOR THESE REASONS, and the reasons in the petition for writ of certiorari, this Court should grant certiorai.

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: March 3, 2022