No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER EMORY CRAMER,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. 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]

II. Whether the Eighth Amendment prohibits the Federal Government from sentencing a defendant to death on a finding of future dangerousness based in substantial part on graphic testimony and evidence about attacks on prison officials and prison inmates committed by other inmates at other times and having no connection to the defendant.

III. Whether a District Court's failure to answer a deliberating jury's question in open court, in a defendant's presence, violates the Fifth and Sixth Amendments, and Fed. R. Crim. P. 43.

[1] The petition for writ of certiorari in *Savage v. United States*, No. 20-1389, raises another 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."

PARTIES TO THE PROCEEDING

Petitioner is Christopher Emory Cramer, defendant-appellant below. Ricky Allen Fackrell was Petitioner's co-defendant-appellant below.

The United States of America is the respondent on review.

STATEMENT OF RELATED PROCEEDINGS

Petitioner Christopher Emory Cramer was tried with his co-defendant Ricky Allen Fackrell. The cases in the trial court and the court of appeals are listed below.

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*)

Ricky Allen Fackrell also has a *Petition for Writ of Certiorari* pending before this Court:

***Fackrell v. United States*, No._____**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL CONSTITUTION, STATUTES AND RULES

STATE STATUTES AND RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Christopher Emory Cramer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion for the court of appeals (App. 1A) is available at *United States v. Fackrell*, 991 F.3d 589 (5th Cir. 2021).

JURISDICTION

The court of appeals entered judgment on March 12, 2021, *see* App. 2A, and denied panel and *en banc* rehearing on May 17, 2021, *see* App. 28A-29A. On March 19, 2020, this Court extended the deadline to file a petition for writ of certiorari due on or after that date to 150 days from the date of the lower court's judgment. *See also* Sup. Ct. R. 13.1, 13.5. This petition is timely filed. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

This case involves the Fifth, Sixth and Eighth Amendments to the Constitution, and the Federal Death Penalty Act of 1994 (FDPA). The full texts of the Amendments and the relevant portions of the Act are reprinted in the Appendix to this petition. *See* App. 31A-35A.

The case also involves Federal Rule of Appellate Procedure 10, the full text of which is also reprinted in the Appendix to this petition. *See* App. 37A-39A. The provision at issue, Rule 10(c) states:

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 case also involves Federal Rule of Criminal Procedure 43, the full text of which is also reprinted in the Appendix to this petition. *See* App. 36A-37A. The relevant portion of the rule states:

> (a) **WHEN REQUIRED.** Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at…(2) every trial state, including jury impanelment and the return of the verdict.

INTRODUCTION

This Court has long recognized the importance of a "proper record on appeal." *Miller v. United States*, 317 U.S. 192, 199 (1942). In capital cases, a proper record is even more important where Congress has

charged the appellate Courts to "review the entire record in the case" when a capital defendant is sentenced to death. 18 U.S.C. § 3593(b). In this case, however, significant portions of the trial were unrecorded. In an effort to aid the reviewing courts, Petitioner moved to fill those gaps in the record, under Federal Rule of Appellate Procedure 10, which provides the mechanisms to supplement an incomplete record. Specifically, Petitioner sought record reconstruction under Fed. R. App. P. 10(c). The district court denied Petitioner's request, and the court of appeals affirmed the denial, concluding that the missing portions did not impair Petitioner's ability to have a full appeal. Because the Fifth Circuit's interpretation of Rule 10(c) is contrary to the plain language of the rule, and this interpretation conflicts with that by other courts of appeals, and such conflict interferes with the ability of the courts of appeals to provide meaningful appellate review, this Court should grant the petition.

Next, scholars have recognized that future dangerousness considerations influence capital sentencing decisions even when never explicitly mentioned in the courtroom, *see Deck v. Missouri*, 544 U.S. 622, 633 (2005); John H. Blume & Stephen P. Garvey, *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 Cornell L. Rev. 397 (2001). This Court has never addressed the issue of what role, if any,

third party conduct has in what is supposed to be an individualized determination by the jury whether to sentence a capital defendant to death, or to life without the possibility of parole.

Recently, in her statement respecting the denial of certiorari in *Calvert v. Texas*, 593 U.S. ____, 141 S.Ct. 1605 (2021), Justice Sotomayor noted that the prosecution's use of third-party conduct to prove a defendant's likelihood of engaging in future acts of danger is a "weighty question." That issue is present here, too, where, over defense objection, the government introduced evidence of violent acts by two other inmates unconnected to the case to rebut Petitioner's mitigating evidence that because the BOP could house him in a secure facility, he was unlikely to engage in future acts of violence. This was in violation of the Eighth Amendment, which this Court has repeatedly held requires individualized sentencing, the purpose of which is to reduce arbitrariness in the use of the death penalty. *See Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978). Further, the Fifth Circuit's decision that third party conduct is admissible stands in contrast with other courts of appeals that have suggested that there should be limits to such prosecution evidence in seeking the death penalty. Because this issue has broad implications in

the administration of death penalty sentencing statutes, this Court should grant review.

Finally, this Court has previously said that the right to personal presence at all critical stages of a trial is "a fundamental right[] of each criminal defendant" guaranteed by the Constitution. *Rushen v. Spain*, 464 U.S. 114, 117-18 (1983) (*per curiam*). This right is rooted in both the Sixth Amendment Confrontation Clause, *see Illinois v. Allen*, 397 U.S. 337, 338 (1970), and the Fifth Amendment Due Process Clause, *see Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge."). The right has also been codified in Fed. R. Crim. Proc. 43(a) which provides that a defendant "shall be present…at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence." Because responding to a substantive note from a deliberating jury is a stage of the trial, *see Shields v. United States*, 273 U.S. 583, 588-89, (1927), any jury request for further instruction must be "answered in open court," in the defendant's presence. *Rogers v. United States*, 422 U.S. 35, 39 (1975).

In Petitioner's case, when, after nearly a full day of deliberations, the jury sent out a note suggesting they were deadlocked on whether Petitioner should be sentenced to death or life, the trial court sent an *Allen*[2]-type response in writing to the jury. The Fifth Circuit found no error with the district court's written *Allen*-charge type response, directing them to continue deliberations, even though other courts of appeals have said that trial courts should respond to a jury's question in open court, rather than in writing. Because the Fifth Circuit's ruling conflicts with this Court's precedent, and rulings from other courts of appeal, this Court should grant review.

STATEMENT OF THE CASE[3]

Petitioner Christopher Emory Cramer, along with his co-defendant Ricky Allen Fackrell, was convicted and sentenced to death for the prison murder of Leo Johns, a fellow inmate. The government sought the death penalty, and the jury sentenced Petitioner to death.

A. The Government's rebuttal evidence regarding Petitioner's likelihood of engaging in future acts of violence relies in substantial part on third party conduct.

[2] *See Allen v. United States*, 164 U.S. 492 (1896)

[3] The facts set forth below are drawn from the court of appeals' decision in this case. Additional record citations are preceded by ROA., which refer to the official record on appeal, as required by Fifth Circuit Rule 28.2.2.

At the penalty phase, both Petitioner and the government called on experts who testified about any likelihood that Petitioner would engage in future acts of violence if sentenced to life without the possibility of parole. Petitioner's expert, Dr. Timothy Gravette, testified that the Federal Bureau of Prisons (BOP) would be able to securely house him at the BOP's Administrative Maximum Facility (ADX) thereby negating any likelihood of him engaging in future acts of violence. *See* ROA.10183, 10186-88. The Fifth Circuit opinion noted that the prosecutor asked both Petitioner's and the government's future danger expert about two inmates with no relation to the case. The first, David Hammer, was originally sentenced to death, a court vacated his death sentence, and he was resentenced to life in a maximum-security prison where he killed another inmate. The second inmate, Ishmael Petty, was housed at ADX when, in 2003, he assaulted three staff members. Over defense objection that it was "more prejudicial that it is probative" to "offer somebody else's extraneous offense video," the government introduced video footage of the Petty assault.

The court of appeals recognized that the government used the experts' testimony about Hammer and Petty to suggest that even maximum-security prisons could not contain some inmates, and that Petitioner could one day be released from a maximum-security prison

and pose a danger to others. The Fifth Circuit affirmed the introduction of this graphic evidence of third-party conduct, holding that the FDPA's "broad…evidentiary standard" permitted the government's arguments.

B. The District Court's response to a deliberating jury's request for supplemental instructions.

During their penalty phase deliberations, after discussing the appropriate penalty for nearly a full day, the jurors sent a note suggesting that they were deadlocked. They asked, "What is the process if we are not unanimous with our verdict?" Instead of calling the jurors back into the courtroom to answer the jurors' question in open court, in the presence of Petitioner, the district court sent an *Allen*[4]-charge type note back instructing the jurors to "[p]lease continue your deliberations."

On appeal, Petitioner argued that it was "error for the court merely to scribble its answer to the jurors' question on the bottom of their question and send the paper back into the jury room," because this was a request for further instruction that constituted a stage in the trial. Therefore, under *Rogers v. United States*, 422 U.S. 35, 39 (1975), the request for further instruction should have been answered in open in Petitioner's presence. Failure to do so violated the Fifth Amendment's

[4] *See Allen v. United States*, 164 U.S. 492 (1896)

Due Process Clause, the Sixth Amendment right to presence, and Rule 43 of the Federal Rules of Criminal Procedure. The Fifth Circuit did not agree, holding that it could not "conclude that the district court erred by responding to the jurors' question in writing." App. 25A.

C. Record reconstruction under Fed. R. App. P. 10

After his trial, Petitioner discovered that numerous proceedings were unrecorded. Those proceedings involved conferences inside and outside the courtroom, including in chambers and concerned substantial and significant issues such as excluded testimony and evidence and the penalty-phase jury instructions. Counsel compiled a list of the known unrecorded proceedings, giving as much detail as possible on the date, type of proceeding, subject, and reference in the record.

Counsel prepared statements of four proceedings, pursuant to Federal Rule of Appellate Procedure 10(c). The government did not dispute that unrecorded conferences occurred. However, 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 government, through a prosecutor who was present at the unrecorded conference, stated that it could not verify the statement's accuracy and did not remember a request to place any discussion on the

record. The government also argued that the "informal meetings" were not covered under Rule 10(c).

Counsel then asked the district court to settle and approve the three other statements and to direct the district clerk to include them in the record. Counsel also requested a hearing to resolve any government objections to, contested changes to, or court disagreements with the statements. Because counsel could not prepare statements of the other unrecorded proceedings, counsel requested that the court make available notes or other records of the proceedings to assist with their reconstruction.

The district court denied counsel's requests to settle and approve the statements and to hold a hearing, stating that "the court is unable to remember the specifics of the conference with sufficient clarity to settle and approve Defendants' proposed statement." The court also denied counsel's request for notes or other records of the unrecorded conferences, stating that it had no such records. The court expressed doubt that Rule 10(c) applied to chambers conferences, and implied that the trial attorneys had not requested the chambers conferences be recorded and had the opportunity to make a record in the courtroom.

On appeal, the court of appeals concluded that an unrecorded chambers "discussion," in which the district court heard arguments on

a defense motion to exclude a government witness's testimony, was not a "hearing or trial" within the meaning of Federal Rule of Appellate Procedure 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 of appeals held that Fackrell had not shown the missing portions of the record to be substantial and significant.

REASONS FOR GRANTING THE PETITION

Whether or not to grant a writ is within the court's discretion. Rule 10 states that the Court may grant a writ where a United States court of appeals "entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or "has decided an important question of federal law that has not been but should be settled by this Court[.]" Sup. Ct. R. 10(a), (c). This petition presents three issues, each of which meets at least one of those requirements.

First, the Fifth Circuit's determination 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) conflicts with that of other courts of appeals,

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 the provision of meaningful appellate review, the Court should grant this petition for certiorari

Second, this Court should grant the petition to decide whether the government is permitted to introduce evidence of third-party conduct to rebut a capital defendant's argument that he is unlikely to engage in future acts of violence if sentenced to a sentence of life without a possibility of parole and is housed in the Bureau of Prisons' Administrative Facility (ADX). This is not the first time the Court has been presented with this issue. Recently, Justice Sotomayor, in a statement respecting the denial of certiorari in *Calvert v. Texas*, noted that *Calvert* "raises a serious argument that the State'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." 593 U.S. ___, 141 S.Ct. 1605, 1606 (2021) (Sotomayor, J., statement respecting the denial of certiorari).

Petitioner's question concerns the same "weighty" topic, *id.*: can the government introduce evidence of violent conduct by a third-party inmate to rebut Petitioner's claim that he was not likely to engage in

future acts of violence, without violating the Eighth Amendment's individualized sentencing requirement. Petitioner's claim meets this Court's criteria for granting the writ. It is an important issue, one which a Justice of this Court has previously recognized. Second, this issue is not limited to the States. Though the defendant in *Calvert* was tried by the State of Texas, Petitioner here was convicted and sentenced by a Federal jury, and his conviction and sentence were affirmed by a Federal court of appeals, further evidence that a defendant's likelihood of engaging in future acts of violence is always at issue in a capital case. Further, the Fifth Circuit, along with the Seventh Circuit, have ruled that such third-party evidence is admissible, in conflict with the Fourth and Eleventh Circuits, which have suggested that it is not. Given the split among the circuits, and the fact that this question implicates the Eighth Amendment's requirement of an individualized sentencing determination and has broad implications for the administration of the Federal death penalty, the only national death penalty scheme in the country, as well as the death penalty in State courts, this Court should grant the petition.

Third, Petitioner respectfully asks the Court to decide whether a trial court's failure to answer a deliberating jury's question in open court in the presence of the defendant violates the Fifth and Sixth

Amendments, as well as Fed. R. Crim. Pr. 43(a). In *Rogers v. United States*, 422 U.S. 35 (1975), the Court suggested that a violation of the "rule of orderly conduct of trial by jury" which is essential to the "right to be heard" and which was later codified in Fed. R. Crim. P. 43, may be subject to harmless error analysis. Other courts of appeals have agreed, holding that trial courts should respond to juror questions in open court, in the presence of the defendant, and not in writing. The Fifth Circuit, however, has gone the opposite way, finding no error with the trial court's written response to a deliberating jury's question. Because this issue implicates Fifth Amendment's Due Process Clause, the Sixth Amendment's right to presence, and Fed. R. Crim. P. 43, this Court should grant review to resolve the circuit split.

I. The Fifth Circuit's interpretation of Federal Rule of Appellate Procedure 10(c) conflicts with that of other courts of appeals.

The interpretation of the court of appeals conflicts with that of other courts of appeals, which have found that unrecorded chambers conferences can, and should be, reconstructed under Federal Rule of Appellate Procedure 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 with regard to an "in-chambers discussion" that "[w]here an untranscribed proceeding is to be at issue on appeal, Federal Rule of Appellate Procedure 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, with regard to 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) of the Federal Rule of Appellate Procedure should be followed.").[5]

The court of appeals' 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 courts 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) of the Federal Rules of Appellate Procedure."); *United States v. Hammerman*, 528 F.2d 326,

[5] *See also In re Cambridge Literary Properties, Ltd.*, 271 F.3d 348, 348 (1st Cir. 2001) ("To the extent that the district court declined to approve the Rule 10(c) Statement on the ground that, as a general principle, Rule 10(c) does not apply to an informal pretrial conference, that contention appears incorrect.").

329 n.7 (4th Cir. 1975) ("No record of [the chambers conference of three judges and the parties] was made. However, appellants offered under Rule 10(c) of the Federal Rules of Appellate Procedure a 'Statement of Proceedings When no [sic] Report Was Made.'"). Appellate 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.").

In addition, the Fifth Circuit's determination 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" under Rule 10(c) is contrary to the rule's plain language and thwarts the rule's purpose. Rule 10(c) is titled "Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable." Fed. R. App. P. 10(c). The rule states 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." *Id.*

Interpreting this rule, 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," without providing analysis or citations. *See* App. 26A. The court was wrong for two reasons. First, these conferences were "hearings." And, second, the rule applies to both "hearings" and "proceedings"—if the conferences were not the former, they certainly were the latter.

First, the "discussion" that the district court held in chambers was a "hearing." Although it, and the other chambers "discussions," were not open to the public, the district 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 district court denied an extension motion); *United States v. Sherman*, 821 F.2d 1337, 1339 (9th Cir. 1987) (referring to a chambers conference in which the district court heard argument from defense and government counsel as "a hearing outside the presence of the jury"). Regardless of whether

"discussion" is held in the courtroom or in the court's chambers to decide issues, it is a "hearing" within the meaning of Rule 10(c).

Second, and perhaps more significantly, the court of appeals quoted only part of Rule 10(c), 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. The chambers conferences here were also "proceedings" within the meaning of 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 prosecutor and defense counsel 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 the district court's meeting in chambers with the government and defense counsel to discuss a juror note). Whether a chambers conference is labeled a hearing, proceeding, or discussion, it is covered under Rule 10(c).

In addition, the court of appeals' interpretation thwarts Rule 10's purpose. Rule 10 of the Federal Rules of Appellate Procedure 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) ("The purpose of Rule 10 is to ensure that each of the opposing parties has the opportunity to place before the appellate court those portions of the record which it deems relevant to the appeal.").[6] Denying parties the opportunity to place statements of unrecorded chambers proceedings before the appellate courts thwarts Rule 10's purpose, as the D.C. Circuit has found. *See Athridge v. Rivas*, 141 F.3d 357, 362 (D.C. Cir. 1998) ("We are not persuaded by the appellees' argument that Fed. R. App. P. 10(c) is inapplicable because the [pretrial chambers] proceeding cannot be characterized as a 'hearing or trial.' The purpose of Fed. R. App. P. 10(c) would be thwarted by such a narrow reading.").

[6] Without those relevant portions of the record, errors such as ones involving Federal Rule of Criminal Procedure 43(a), which guarantees defendants' right to be present at every trial stage, may not be harmless. *See, e.g.*, *United States v. Brown*, 571 F.2d 980, 987 (6th Cir. 1978) (finding that any Rule 43(a) error from the defendants not being present at an in-chambers conference was 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.

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. 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 court of appeals' holding, which prevents statements of unrecorded chambers proceedings from being included in the record.

Unrecorded conferences are commonly used also to litigate and decide substantive issues important to the outcome of federal and state cases. *See, e.g.*, *United States v. Savage*, 970 F.3d 217, 237 (3d Cir. 2020) ("[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 the

issue of untranscribed off-the-record proceedings before, directing court reporters to preserve chambers and bench conferences for the record, and stating that trial judges have the responsibility of enforcing the court's directive).

When conferences or other proceedings are not preserved for the record, Federal Rule of Appellate Procedure 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.[7] 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.[8]

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[7] *See* Alaska R. App. P. 210(b)(8); Ala. R. App. P. 10(d); Ariz. R. Civ. App. P. 11(d); Ariz. R. Crim. P. 31.8(e); Ark. R. App. P.-Civ. 6(c); Cal. App. R. 8.137; Colo. R. App. P. 10; Del. Sup. Ct. R. 9(g); D.C. Ct. App. R. 10(c); Fla. R. App. P. 9.200(b)(4); Haw. R. App. P. 10(c); Ill. Sup. Ct. R. 323(c); Ind. R. App. P. 29; Iowa R. App. P. 6.806; Kan. Sup. Ct. R. 3.04; Me. R. App. P. 5(d); Md. R. App. P. 8(c); Mich. Ct. R. 7.210(B)(2); Minn. R. Civ. App. P. 110.03; Miss. R. App. P. 10(c); Mont. R. App. P. 8(7); Nev. R. App. P. 9(d); N.J. Ct. R. 2:5-3(f); N.M. R. App. P. 12-211(H); N.Y. C.P.L.R. 5525(d); N.D. R. App. P. 10(g); Ohio R. App. P. 9(C); Okla. R. Crim. P. 2.2(C); Pa. R. App. P. 1923; R.I. Sup. Ct. R. art. 1, R. 10(d); S.D. Codified Laws § 15-26A-54; Tenn. R. App. P. 24(c); Utah R. App. P. 11(g); W. Va. R. Civ. P. 80(e); Wyo. R. App. P. 3.03.

[8] *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 Federal Rules of Appellate Procedure 10(c) and that the state court has looked to federal court authority to decide questions about the procedural rule); *State v. Bates*, 933 P.2d 48, 54 (Haw. 1997) (same as to Hawaii Rule of Appellate Procedure 10(c)); *State v. Martinez*, 3 P.3d 1042, 1058 (N.M. 2002) (Cerna, C.J., dissenting) (same as to New Mexico's Rule 12-211(H)); *State v. Pope*, 936 N.W.2d 606, 617 (Wis. 2019) (noting that the state court of appeals had discussed Rule 10(c) before it concluded that the state courts should use a similar procedure).

Without complete records on appeal, which includes statements of unreported or untranscribed proceedings, counsel cannot fulfill their obligations or duties. 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). And 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 of the issue 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 at issue); *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).

The problem of incomplete records is particularly concerning in capital appeals such as this one, for two reasons. First, the Federal Death Penalty Act 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) (reversing the court of appeals' judgment and remanding the case because the court refused to consider the full transcript of the capital sentencing hearing) (quoting *Gregg v. Georgia*, 428 U.S. 153, 167 (1976)). 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) (*quoting Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). Because of the incomplete record in this capital appeal, the court of appeals could not review an entire record or act as a constitutional safeguard. This undermines the reliability of the determination that death is the appropriate punishment in this case.

Finally, 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 failure to do so, and to allow statements of them to be included in the record, are structural errors.

Before trial, the attorneys asked the district court, through a motion, 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 but did not enforce that instruction. The incomplete record does not show whether the trial attorneys objected to the court's failure to enforce the instruction. If the Court finds that the trial attorneys 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 statements of them 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 statements of them 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 of the day. Furthermore, the trial court's failures cannot be quantitatively assessed for harmlessness. The incomplete appellate record hinders counsel's ability to assert all available claims and to show "other evidence presented" on raised legal claims. This, in turn, hinders the appellate court's ability to assess the record as a whole and to provide meaningful harmless-error review.

The Court should therefore grant certiorari to review these issues.

II. The Court should grant review to determine whether the Eighth Amendment allows the Federal Government to rebut a defendant's mitigation presentation that he is not likely to engage in future acts of violence if sentenced to life in prison, with evidence of violent acts committed by other inmates in unrelated prison incidents.

In her statement respecting the denial of certiorari in *Calvert v. Texas,* 593 U.S. ___, 141 S.Ct. 1605 (2021), Justice Sotomayor recognized this Court's longstanding precedent that the Eighth Amendment requires an individualized sentencing determination. The question presented in *Calvert* was whether the Eighth Amendment prevents a state from sentencing a criminal defendant to death "on a finding of

future dangerousness based in substantial part on graphic testimony and evidence about an attack on a prison official committed by another inmate in another prison at another time, having no connection to [the defendant]." *Calvert v. Texas*, Petition for Writ of Certiorari, No. 20-701. Justice Sotomayor noted that Calvert "raise[d] a serious argument that the State'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." Citing *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), she added that:

> 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. The Constitution and basic principles of justice require nothing less.

Calvert, 593 U.S. ___ (internal citations omitted).

Petitioner's case raises the same "weighty" question, *id.*: Can the government introduce evidence of violent conduct by a third-party inmate to rebut Petitioner's claim that he was not likely to engage in future acts of violence, without violating the Eighth Amendment's individualized sentencing requirement? Because the Fifth Circuit's ruling directly conflicts with the Constitution, the FDPA, other courts of

appeals, and this Court's decisions, and Petitioner's case presents an appropriate vehicle for review, this Court should grant the petition.

At the outset, the court of appeals expressed uncertainty about whether the issue was preserved, *see* App. 14A, though counsel objected to the admission of this evidence and the trial court's ruling preserved the issue for review. ROA.10234. *See generally Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988). In any event, the court of appeals set aside any concerns it may have had about preservation and addressed Petitioner's claim, holding that 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," the government "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." App. 14A. This Court is therefore free to review the court of appeals' decision.

This Court's death penalty jurisprudence has long emphasized that "in capital cases 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 inflicting

the penalty of death." *Woodson*, 428 U.S. at 304. (emphasis added). *See also Tuilaepa v. California*, 512 U.S. 967, 972-73 (1994) (in determining whether a defendant eligible for the death penalty should in fact receive that sentence, "[w]hat is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime" (internal quotation marks omitted); *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (citing approvingly procedures that "require as a prerequisite to the imposition of the death penalty specific jury findings as to the circumstances of the crime or the character of the defendant" (internal quotation marks omitted)); *Jurek v. Texas*, 428 U.S. 262, 273-74 (1976) (proper capital-sentencing procedures must focus the jury's consideration on "the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death").

Consistent with this Court's decisions in *Woodson* and *Lockett v. Ohio*, 438 U.S. 586 (1978), Petitioner introduced, as mitigating evidence, expert testimony that the BOP had the ability to house him for the rest of his life at ADX, the BOP's Administrative Maximum Facility in Florence, Colorado. Petitioner's experts told the jurors that such housing was exceptionally secure and, consequently, Petitioner was unlikely to engage in future acts of violence. Thus, a sentence of life without the

possibility of parole was appropriate. To rebut Petitioner's mitigation presentation, the government questioned Petitioner's expert witnesses, and the government's own rebuttal experts in detail about the violent conduct of other third-party inmates and introduced graphic video evidence of an attack on three ADX staff members by an ADX inmate. Petitioner objected, noting that the government's introduction of and reliance on this evidence was "just an excuse on [the government's] part to try to show somebody else's conduct that has nothing to do with our case." ROA.10234. The trial court sustained the objection but denied the request for a mistrial. ROA.10234.

In finding that the government "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," the Fifth Circuit ignored the fact that the government's argument was based on third party conduct, sidestepping the requirement that the jury must render an individualized sentencing determination. *See Kansas v. Marsh*, 548 U.S. 163, 174 (2006) (holding that a "capital sentencing system must…permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime."

As Justice Sotomayor noted, this issue merits attention.[9] *Calvert*, 141 S.Ct. at 1606-07. The fact that the government introduced this evidence to rebut Petitioner's mitigating evidence makes no difference for Eighth Amendment purposes. Whether via direct testimony, or rebuttal, such third-party evidence negates the requirement that the sentence be considered on the individual's characteristics and circumstances of the crime. In addition, to allow this evidence would have the effect of chilling capital defendants' ability to offer mitigating evidence that would show that they are unlikely to engage in future acts of violence, in violation of the Eighth Amendment. *See Marsh*, 548 U.S. at 174 ("The use of mitigation evidence is a product of the requirement of individualized sentencing.").

Finally, though the Fifth Circuit and the Seventh Circuit have held that such third-party evidence is admissible, *see 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. Johnson*, 223 F.3d 665, 674 (7th Cir. 2000) (allowing government

[9] Petitioner also argued that the admission of this evidence violated the Due Process Clause of the Fifth Amendment, *see* Pet. Op. Br. at 74. Justice Sotomayor's statement in *Calvert* suggests that she may agree. As she wrote, such conduct "may implicate due process" because "[t]he introduction of irrelevant evidence 'can so infec[t] the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process.'" *Calvert*, 141 S.Ct. at 1606 n.3 (*quoting Romano v. Oklahoma*, 512 U. S. 1, 12 (1994)).

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"), other federal courts of appeals have suggested that this kind of third-party evidence may be inadmissible. *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 v. Kemp*, 762 F.2d 1496, 1508 (11th Cir. 1985) (*en banc*) (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). Indeed, this Court held that such argument at the guilt/innocence stage was improper. *See Darden v. Wainwright*, 477 U.S. 168, 179–80 (1986). Because this issue, though narrow, has broad ramifications for both state and federal capital sentencing schemes, and the courts of appeals seem to disagree about this question, the Court should grant the petition.

III. The Fifth Circuit's ruling that it can find no error with the trial court's delivery of a supplemental *Allen*-type charge in writing conflicts with the decisions of other courts of appeals.

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 which was later codified in Fed. R. Crim. P. 43, when it did not respond to the jury's question in open court with both the defendant and the jurors present. The Court relied on its prior decision in *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919), where it had reversed a civil judgment because the trial court "'erred in giving a supplementary instruction to the jury in the absence of the parties.'" *Rogers*, 422 U.S. at 38 (*quoting Fillippon*, 250 U.S. at 81).

This right is of ancient lineage, having evolved in Anglo-Saxon law simultaneously with the right to trial itself, a*ccord* Gullie B. Goldin, *Presence of the Defendant at Rendition of Verdict in Felony Cases*, 16 Colum. L. Rev. 18, 18-20 (1916), and is embodied in the Sixth Amendment, which is widely thought to express the broader common law right to be present at every stage of trial. *See Diaz v. United States*, 223 U.S. 442, 454-55 (1912); *cf. Salinger v. United States*, 272 U.S. 542, 548 (1926). Thus, at common law, the right to presence was considered unwaivable in felony cases because "[i]t was thought 'contrary to the dictates of humanity to let a prisoner waive that advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence.'" *Crosby v. United States*, 506 U.S. 255, 259 (1993), *quoting Prine v. Commonwealth*, 18 Pa. 103, 104 (1851).

A decade after *Rogers*, in *United States v. Gagnon*, this Court observed that although many of the modern cases involving the constitutional right to presence are rooted in the Confrontation Clause of the Sixth Amendment, the right is also "protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him." 470 U.S. 522, 526 (1985) (per curiam). *See also Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure"); *Faretta v. California*, 422 U.S. 806, 819 n. 15 (1975) (defendant "has a constitutional right to be present at all stages of the trial when his absence might frustrate the fairness of the proceedings").

In this case, the supplemental instruction delivered in writing deprived Petitioner of the right to see and be seen by the jury. "The purpose of insisting on defendant's presence" is not only "to ensure that [Petitioner] can assist his counsel," but also so "that he, by his presence in front of the jury, can act as a psychological brake on deliberations." *United States v. Brika*, 416 F.3d 514, 527 (6th Cir. 2005).

"This is especially so when . . . a deadlocked jury is . . . given an *Allen* charge." *United States v. Fontanez*, 878 F.2d 33, 37 (2d Cir. 1989)

(conviction reversed because defendant was absent during *Allen* charge); *Larson v. Tansy*, 911 F.2d 392, 395-96 (10th Cir. 1990) (same); *Wade v. United States*, 441 F.2d 1046, 1050 (D.C. Cir. 1971) (same). Indeed, for this very reason, the defendant's absence from an *Allen*-type charge during ordinary guilt-innocence deliberations has been held not to be harmless and to require reversal. *See, e.g., Fontanez*, 878 F.2d at 37-38 ("Fontanez was deprived of the 'psychological function' of his presence on the jury during a crucial phase of his trial"); *Wade*, 441 F.2d at 1051 ("To hold his absence harmless would be too speculative"); *Bradshaw v. State*, 806 A.2d 131, 140 (Del. 2002) (defendant's absence from *Allen* charge was prejudicial, as jurors were deprived of "'a view of his sad plight' at this critical phase of their deliberations"), *quoting Crosby*, 506 U.S. at 259. *See also United States v. Benavides*, 549 F.2d 392, 393 (5th Cir. 1977) (court's error in telling deadlocked jury, outside defendant's presence, to "[c]onsider the offense further," held not harmless).

It cannot be said that Petitioner waived his right to be present during the supplemental instruction. This right is non-waivable in a capital case, according to longstanding precedent from this Court. *See Crosby*, 506 U.S. at 259, 260 (noting that "limited exception" allowing defendant to waive presence applied only "'where the offense is not capital'"), *quoting Diaz*, 223 U.S. at 455. And Rule 43 does not permit a

waiver of presence at a death-sentencing proceeding. While it no longer excepts capital trials from the provision allowing a defendant to voluntarily absent himself "after the trial has begun," Fed. R. Crim. P. 43(c)(1)(A), still, a different provision allows a waiver "in a noncapital case, when the defendant is voluntarily absent during sentencing." Fed. R. Crim. P. 43(c)(1)(B) (emphasis added). The obvious implication is that, in a capital case, the defendant may not voluntarily absent himself "during sentencing."

Because of the importance of an *Allen*-type charge to a divided jury, particularly under the circumstances here; the capital nature of the proceeding; and the prejudicial effect of communicating with the jury in writing, the court not only violated Rule 43, it also deprived each defendant of his Fifth Amendment "due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge'"—in other words, if his presence would not be "'useless, or the benefit but a shadow.'" *Stincer*, 482 U.S. at 745, *quoting Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934).

This case is an appropriate vehicle for the Court to resolve this split. The Fifth Circuit's conclusion that the district court did not err in responding to the jury's question in writing is in conflict with other

federal courts of appeals that have followed *Rogers* and its progeny, and determined that it is wrong for a district judge to respond to a jury's question in writing rather than in open court. *See e.g., United States v. Combs*, 33 F.3d 667, 670 (6th Cir. 1994) ("it is settled law that the district court is required to follow the same procedure in giving supplemental instructions as in giving original instructions"); *United States v. Patterson*, 23 F.3d 1239, 1254 (7th Cir. 1994) (citing *Rogers* and Rule 43 court holds that "the defendant has a right to be present at all stages of his trial" and that inquiry from a deliberating jury "should be answered in open court"); *United States v. Harris*, 814 F.2d 155, 157 (4th Cir. 1987) (district court committed "technical violation" when it responded to jury question when defendant was not in courtroom). *See also United States v. Gordon*, 829 F.2d 119, 123 (D.C. Cir. 1987) (noting that Rule 43 "embodies the protections afforded by the sixth amendment confrontation clause, the due process guarantee of the fifth and fourteenth amendments, and the common law right of presence.") The Fifth Circuit's decision effectively creates a two-tier federal criminal system—those defendants tried in that circuit are deprived of protections under the Fifth and Sixth Amendments, and Rule 43, while criminal defendants in other circuits are afforded those protections.

Because of the importance of the rights involved, and the circuit split, this Court should grant review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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