No. 21-5995

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

PETITIONER'S REPLY TO RESPONDENT' S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes and Rules

INTRODUCTION

A "proper record on appeal" is an essential part of all criminal proceedings. *Miller v. United States*, 317 U.S. 192, 199 (1942). The Federal Death Penalty Act (FDPA), too, requires it, instructing that "[t]he court of appeals shall review the *entire* record in the case." 18 U.S.C. 3595(b) (emphasis added). That requirement is frustrated when criminal proceedings are not recorded. In this capital case, the Court of Appeals for the Fifth Circuit endorsed the district court's refusal to settle the record under Fed. R. App. P. 10, in conflict with other courts of appeals, and leaving itself unable to review the entire record in the case.

The Fifth Circuit further sanctioned the admission of third party conduct to prove petitioner's likelihood of engaging in future acts of violence, an issue a justice of this Court has highlighted as a "weighty" one, and which is in conflict with other courts of appeals. Finally, the Fifth Circuit held, contrary to controlling case law from this Court, and the opinions of other courts of appeal, that when the capital jurors indicated that they were deadlocked as to sentencing, the district court does not err, in providing a supplemental *Allen*-type instruction, in writing, and outside petitioner's presence.

Petitioner's case is an appropriate vehicle for the Court to address these errors, which have divided the lower courts, and will resurface in other cases.

REASONS FOR GRANTING THE WRIT

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, Cramer argued that a new trial was required because the prosecutor and the trial court were unable to assist reconstructing, under Fed. R. App. P. 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] Cramer 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 Cramer did not show prejudice under the modified "substantial and

[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).

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 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 Cramer's claim and misstates the record.

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

1. Substantial portions of the record are missing.

Cramer's argument is not confined to two proceedings. *See* BIO 13–14. He identified over 20 unrecorded "conferences." Fackrell Br. 138 n.54[2]. He obtained contemporaneous notes—made by nonparties—of some of these proceedings and disclosed the substance of those notes. Fackrell Br. 126 nn.49-50, 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

[2] Petitioner Cramer and his co-defendant Fackrell were tried together, and their cases consolidated for appeal. Both Cramer and Fackrell filed separate briefs in the court of appeals and filed separate petitions in this Court. In the court of appeals, however, Cramer incorporated by reference the portion of Fackrell's opening and reply briefs that challenged the district court's denial of the motion to reconstruct the record, which he was permitted to do under Fed. R. App. P. 28(i).

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.[3]

In this petition, Cramer 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 Cramer's trial. That Cramer 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. 20-22.

2. The appellate court's decision squarely presents this 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

[3] 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 Cramer requested, but the district court refused.

that, for any conference not held in open court, no recording was required. *United States v. Fackrell*, 991 F.3d 589, 613 (5th Cir. 2000).

The court of appeals relied on *United States v. Jenkins*, 422 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. § 753(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, Cramer contests that conclusion.[4]

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. This case exposes that reality. While Cramer 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

[4] Cramer 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. 9, 16-17. 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).

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

Cramer has amply demonstrated that the circuits are divided on whether out-of-court conferences must be recorded. *See* Pet. 14-16. 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. Pet. 14-15 (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 Cramer'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. *See* 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

[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 Cramer presents for review is whether a chambers conference must ever be recorded.

Cramer supplied to reconstruct the conference suggest that the court denied the motions in chambers.

Rules 10(d) and 10(e) do not provide an alternate method of repairing the gaps in the record such as Cramer'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). Cramer'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.

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

[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] Cramer 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.

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, Cramer 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 v. Texas*, 428 U.S. 262, 276 (1976). 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. Cramer'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 Court should grant review to determine whether the Eighth Amendment prohibits a death sentence based in substantial part on third party conduct, an issue where there is conflict among lower courts, and which a Justice of the Court has recently stated deserves the Court's attention.

At Cramer's trial, in order to show he would be danger to other inmates or staff in the future if not executed, the government introduced detailed and graphic evidence of acts of violence by other prisoners, unconnected to Cramer 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, who had no connection to this case, committed violent acts is irrelevant to the determination of whether Cramer 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 in *Calvert* denied a writ of certiorari, as the government notes, *see* BIO 26, Cramer's case, unlike *Calvert*, arises under the FDPA, 18 U.S.C. § 3591, and does not implicate a state's own administration of the death penalty. This, along with the government's continuing use of the tactic in the time since *Calvert*, as the

law continues to percolate, offers additional support for granting the writ that was not present in that case.

Contrary to the government's argument, the Fifth Circuit's approval of the admission of third-party conduct to prove Cramer's likelihood of committing future acts of violence conflicts with decisions by other courts of appeals. *See* BIO 22, 25-25. 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), *cert. denied*, 565 U.S. 1110 (2012), and the Eleventh Circuit's in *Tucker v. Kemp*, 762 F.2d 1496, 1508 (11th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1022 (1986), merely involved improper prosecutorial argument, as opposed to the improper admission of evidence in petitioner's case.

This is a distinction without a difference. Whether by argument or evidence, use of graphic acts of violence by third parties unconnected to Cramer or his case trenched on his right to individualized sentencing. In any event, the government's actions in this case were not limited just to the admission of the evidence. Once the evidence about Ishmael Petty and David Hammer had been admitted, the government relied on them extensively in its summation argument. *See* ROA.11584-85

Finally, the government's reliance on invited error is misplaced. *See* BIO 23-24. The government argues that "[t]he evidence regarding [] Petty's assault of prison employees at [ADX] contradicted testimony by petitioner Cramer's defense expert that inmates at the prison had previously been unable to escape their cells." BIO 24.

But the expert's fleeting reference, which made up only two lines in the defense presentation, *see* ROA.10204-05, did not warrant the barrage of third-party evidence the government then unleashed, *see* ROA.10234-35, 10271-72, 11207-08 (evidence about Petty's assault on ADX staff). Nor did it warrant the prosecution's summation argument emphasizing this impermissible evidence. *See* ROA.11584-85 (prosecutor argues that jurors "saw the video of []Petty," engaged in violence, strongly suggesting that Cramer would do the same).

This Court has put limits on evidence that the government may introduce in the sentencing phase of a capital trial, namely that it must be individualized. *See Woodson*, 428 U.S. at 304 ("in capital cases the fundamental respect for humanity underlying the Eighth Amendment, requires consideration of the character and record of the individual offender") (cleaned up); *Lockett*, 438 U.S. at 605 ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.").

Accordingly, the Fourth Circuit was correct to find that this kind of third-party evidence, and the resulting argument, is "troubling" because it "implicates policy and resource considerations that are quite different" from the "individualized determination on the basis of the character of the individual and the circumstances of the crime." *Caro*, 597 F.3d at 625-26. Because the Fifth Circuit's decision conflicts with those of the courts of appeals for the Fourth and Eleventh Circuits, this Court should grant the petition to resolve this "weighty" issue.

III. Contrary to the government's position, this Court's precedence, the Constitution, and the Federal Rules of Criminal Procedure require that the district court's *Allen*-type response to a jury note suggesting deadlock, must be given in the capital defendant's presence, an issue about which the lower courts have issued conflicting decisions.

The jurors at the sentencing phase of Cramer's trial sent a note suggesting they were deadlocked as to punishment. *See* ROA.11674. The district court responded with a written supplemental *Allen*-type instruction, sent back to the jurors outside of Cramer's and his attorneys' presence. *See* ROA.19289. The Fifth Circuit affirmed, holding that it was not error, even at this critical stage of the proceeding, to instruct the jurors in writing and not in open court. As set out in his petition, the Fifth Circuit's holding runs contrary to this Court's decision in *Rogers v. United States*, 422 U.S. 35 (1975) and the plain requirements of Fed. R. Crim. P. 43(a)(2). Pet. 31-33., and what other courts of appeals have done. Pet. 31-34.

The Fifth Circuit's holding conflicts with lower court decisions from the Fourth, Sixth, and Seventh Circuits, requiring that supplemental instructions be given in open court and in the presence of the defendant. Pet. 36 (citing cases). The government does not address these cases. The Fifth Circuit's opinion also conflicts with cases from other circuits that reversed convictions, because the defendant was absent during *Allen*-type instructions. Pet. 33-34 (citing cases). The government, in a footnote, attempts to distinguish those cases from Cramer's, noting that in Cramer's case the district court sent a note back to the jury room, while in the other cases, the jurors were brought back into court and orally instructed outside of the defendant's presence. The distinction the government tries to draw is difficult to understand and,

in any event, one without a difference. The essential feature in each was the defendant's absence at the critical stage of providing supplemental instructions to jurors who had signaled they were at an impasse.

The importance of affording the defendant an opportunity to see and be seen by the jury at the critical moment when the court responds to a note suggesting deliberations are deadlocked also distinguishes Cramer's case from those cited by the government declining, generally, to reverse when the district court employed written supplemental instructions. *See* BIO 28. In any event, those cases highlight the conflict among the lower courts and, thus, support the need for this Court's review and resolution.

Finally, Cramer did not invite this error. The government urges invited error, noting that the defense proposed an instruction, informing the jurors that if they had a question, the court would respond either in open court or in writing. *See* BIO30. But that request did not wed the defense to a particular approach to any particular juror note, and certainly not to one to address possible deadlock via a written response.

Cramer's case is not a matter of mere error correction, *see* Rule 10. Rather it concerns a decision by the lower court on "weighty" and "important federal question[s]…that conflict[] with relevant decisions of this Court," and with decisions by other courts of appeal, Sup. Ct. R. 10 (a), (c). This Court should review them.

CONCLUSION

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

Respectfully submitted,

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