No. 22-5487

In the Supreme Court of the United States

GABRIEL PAUL HALL, PETITIONER

v.

STATE OF TEXAS
(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner was sentenced to death after shooting and stabbing an elderly Navy veteran to death, then wounding his wheelchair-bound wife. On direct appeal, petitioner raised a Sixth Amendment claim concerning the punishment-phase admission of a video offered as evidence of future dangerousness. The video shows petitioner bantering with TV comedian Jeff Ross in jail. Petitioner's claim invokes the Sixth Amendment right announced in *Massiah v. United States*, 377 U.S. 201 (1964), which prohibits States from deliberately eliciting incriminating information from defendants via a state agent without access to an attorney after their right to counsel attached.

Petitioner argued that *Maine v. Moulton*, 474 U.S. 159 (1985), expanded *Massiah*, requiring the State to avoid placing petitioner in a position to make incriminating statements without counsel. Because the jail facilitated Ross's presence without notifying counsel, petitioner claimed the trial court erred in denying his pretrial motion to suppress the Ross video. Without reaching harmless error, the Texas Court of Criminal Appeals (CCA) rejected petitioner's claim because he lacked evidence Ross agreed or was instructed to gather information by the State, foreclosing petitioner's ability to meet the necessary state-agent element from *Massiah*. *See* Pet. App. 14a-15a. Petitioner now claims recording petitioner's conversation with Ross violated his Sixth Amendment right because Ross was a state agent. The question presented is:

> Did the CCA correctly determine a Sixth Amendment claim failed because the third party with whom petitioner voluntarily engaged in a filmed conversation was not instructed by the State and did not agree to gather information for the State and was thus not a state agent?

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INTRODUCTION

The Court should reject petitioner's attempt to create a novel Sixth Amendment violation out of a pre-trial inmate's voluntary jailhouse discussion with a visiting comedian he knowingly conversed with on film. This Court has never held that the accused's right to counsel requires the State to prevent an inmate from voluntarily communicating with a disinterested third party. Nor has this Court ever held that whenever a State facilitates a disinterested third party's access to a willing inmate, the third party automatically becomes the State's informant. As the CCA correctly held, a Sixth Amendment violation of an accused's right to counsel from interactions with a third party occurs only when that individual is a state agent, which requires proof the third party acted under at least some State

instruction to obtain information. The CCA correctly determined petitioner's Sixth Amendment claim necessarily failed because he had no evidence of an agency relationship between Ross and the State.

Because petitioner asserts no other basis for certiorari, all that remains is a bare request for error correction that does not warrant review. *See* Sup. Ct. R. 10. There is no conflict of authority and the CCA did not misapply the relevant rule of law. Furthermore, petitioner cannot benefit from the novel Sixth Amendment principles he advances because the harmless-error doctrine independently bars relief. And this case presents numerous vehicle problems. There are complex threshold questions about petitioner's Sixth Amendment claim, fact-bound impediments to construing the nature of government agency, and consequences of accepting petitioner's argument that would throw the law surrounding recorded jailhouse conversations into confusion. This Court should deny the petition for a writ of certiorari.

STATEMENT

I. Hall Stabbed Ed and Linda Shaar, Killing Ed and Wounding Linda

On October 20, 2011, petitioner Gabriel Hall entered the Shaar home through their garage. 126 RR 17.[1] Petitioner attacked a half-naked Ed Shaar, who had just exited an adjacent bathroom, and stabbed him nearly to death. 126 RR 23. Though Ed, a Navy veteran who suffered from Parkinson's disease (100 RR 27, 78 RR 103) fought back, petitioner subdued him enough that petitioner felt comfortable moving on to Ed's wheelchair-bound wife

[1] The Reporter's Record is cited as "[volume number] RR [page number]." The amended clerk's record uses "ACR" ("Amended Clerk's Record"). Petitioner's appellate brief is cited as "AB [page number]."

Linda. 78 RR 102; 126 RR 17. When petitioner attempted to kill Linda, however, Ed tried to get up. 126 RR 17. Petitioner walked over to Ed, picked up a Glock pistol he had staged nearby, aimed it at Ed's face at point-blank range, and pulled the trigger. 126 RR 16-17. Petitioner returned to Linda, who had called the police and was now begging for her life, and tried to shoot her. 126 RR 18, 20. The Glock jammed, but petitioner was undeterred—as petitioner said later, he preferred stabbing to shooting. 126 RR 20, 30. Petitioner positioned himself behind Linda in her wheelchair and began stabbing his blade into her throat. 126 RR 18. Believing Linda was dead, petitioner left for a nearby wooded area where he changed into clothes he had left in a "bug-out bag" before the attack. 126 RR 24, 36. Petitioner then returned to his adoptive parents' home. 126 RR 24.

Linda was not dead.[2] As the ambulance took her to the hospital, she provided police with a description of her assailant, which matched petitioner. 79 RR 67. The police quickly identified petitioner and took him into custody. 79 RR 85; 126 RR 34.

When they attempted to take his fingerprints, they saw a glue-like substance on his fingertips he claimed was a skin condition. 79 RR 43. Upon closer examination, the police discovered he had super-glued his fingers to evade fingerprint identification. 79 RR 48. As police worked on the glue, petitioner told police he was smiling when he stabbed Ed and that he particularly enjoyed it because Ed fought back, making it more challenging. 126 RR 16-17. He also related how, after shooting Ed, he heard Linda's pleas for mercy, and de-

[2] Though petitioner broke Linda's trachea into two pieces, he missed her jugular and carotid by millimeters, which left her grievously wounded but alive. 82 RR 159-62.

scribed how it was of no concern to him. 126 RR 17-18. Further, petitioner admitted planning the murder for about a year, and that he attacked the Shaars, total strangers, for how their house looked. 126 RR 16. After his recorded confession, the police arrested and placed petitioner into pre-trial confinement.[3] 126 RR 38.

When police searched petitioner's residence, they found the Glock, numerous knives, a hacksaw, machete, crowbar, and drawings of knives. 79 RR 210-220; 82 RR 222-228. Petitioner's possessions also included his blood-stained clothes, the "bug-out bag," and a hit list that included his adoptive mother's name. 79 RR 210-220; 82 RR 222-228; 124 RR 254.

II. A TV Crew Visits the Brazos County Detention Center

In 2015 Comedy Central contacted the American Jail Association asking if any jails would host Jeff Ross and a film crew for an episode of Ross's show.[4] 65 RR 37. The Brazos County jail, where petitioner awaited trial, volunteered. 65 RR 37. Brazos County and Comedy Central entered a written agreement permitting Comedy Central to "photograph or record any inmate in the jail" who signed a Comedy Central-provided release form. 10 ACR 2383.

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[3] Soon after, his counsel filed a self-described "no contact letter." 114 RR 143-44. The relevant text from the letter is as follows:

> "Dear Sheriff Kirk: As you may know, the Regional Public Defender for Capital Cases is now representing Gabriel Hall in a Capital Murder charge against him in Brazos County. I am writing to advise you that all future communication with Gabriel Hall must first be approved by my office. Please make no further contact via phone, writing, or in person with Gabriel Hall, without the express written approval of my office." 114 RR 143-44.

[4] Ross is a comedian known for "roasts." His TV show is dedicated to "roasting" people. 114 RR 142. A roast in this context is "severe banter, ridicule, or criticism; as [in], he endured many *roasts.*" Roast, *Webster's New International Dictionary*, (2d ed. 1961).

The jail posted Comedy Central flyers advertising Ross's show. Pet. App. 38a. The flyers informed prisoners that, with their consent, Ross would "tape" their interactions, and these might appear on TV. *Id.* On February 26, 2015, petitioner signed the release form. 101 RR 88-89. That same day, Ross and his crew began their three-day recording session in the jail. 65 RR 56-57, 78-79, 94-95. At all times, prison personnel accompanied Ross's team. 65 RR 78.

Ross encountered petitioner seated with two other inmates and engaged the three of them in conversation. Upon finding out petitioner had resided in jail for four years awaiting trial, Ross said, "[y]ou must've done something crazy . . . [o]r they think you did something crazy." 125 RR State's Exhibit 356 at time stamp 00:44-49. Petitioner responded that "legally" he could not discuss his case. 125 RR State's Exhibit 356 at time stamp 00:34. Ross then "roasted" the inmates sitting at the table, including petitioner. 125 RR State's Exhibit 356 at time stamp 00:51. Regarding petitioner, he commented on his haircut (00:51), seriousness, and "scary" look. 125 RR State's Exhibit 356 at time stamp 00:51, 06:59. Ross also called petitioner "Slim Sushi" (07:20) and asked petitioner if he was "Harold or Kumar" (02:14), referring to a movie trilogy about Asian-Americans. 125 RR State's Exhibit 356. And when Ross was asking everyone what they were in jail for, when speaking with petitioner he asked if he was in jail for hacking somebody's computer. 125 RR State's Exhibit 356 at time stamp 06:50. Petitioner replied, "Used a machete on someone, someone's screen, so." 125 RR State's Exhibit 356 at time stamp 06:54.

In the recorded exchange, petitioner also indicates he does not like being touched (06:27), describes himself as a "yellow neck" (08:22), mentions how schoolmates called him "the Asian with the cowboy hat" (07:36), asks Ross to "get [the blonde woman in Ross's

entourage] over here" (01:45) expresses interest in "blond jokes" (01:46), and claims his favorite comedian is himself. 125 RR State's Exhibit 356 at time stamp 04:22. Petitioner also complains about boredom in jail (02:28), describes the State as imposing the death penalty for "petty" crimes (03:37), and says other people are "annoying." 125 RR State's Exhibit 356 at time stamp 07:09.

As petitioner concedes, it was "news" to the State that petitioner was voluntarily speaking with Ross on camera. Pet. at 5; *see also* 65 RR 92. Upon learning petitioner voluntarily spoke with Ross, the jail supervisor told Ross's crew they could not use the footage, needed to maintain a copy, and provide him a copy. 65 RR 46-47. The jail supervisor then repeated this request via e-mail to Comedy Central. 65 RR 47. Comedy Central refused to give the jail supervisor a copy of the video voluntarily and, in response, told him that he would need a subpoena to obtain the video. 65 RR 47. The State subpoenaed the video in April (101 RR 86), and gave copies to petitioner. Pet. at 6.

III. Petitioner's Pre-Trial Motions, Trial, and Sentencing

Prior to trial, petitioner moved to suppress the Ross video under the Fifth, Sixth, Eighth, and Fourteenth Amendments. 10 ACR 2331. After argument, the trial court denied petitioner's motion. 71 RR 252-53.

Trial began on September 8, 2015. 78 RR 77. On the second day, Detective Webb testified. 79 RR 53. Webb was the lead detective who first evaluated the crime scene. 79 RR 62. After Webb described the crime scene and steps taken to track down petitioner, the State admitted the audio recording of petitioner's confession. 79 RR 61, 68, 84-85; *see also* State's Exhibit Number 262. When the State moved to admit the recording, the defense said "[w]e

have no objection." 79 RR 85. The prosecution handed transcripts to the jurors and the video was played. 79 RR 85, 87.

During another detective's testimony, the State admitted video of an interview with police wherein petitioner demonstrates what he did in the Shaar house. 85 RR 78; *see also* State Exhibits 357, 358. In the interview, petitioner nonchalantly demonstrates stabbing Linda in the neck. State Exhibit 358 at timestamp 27:34. When asked to describe how he shot Ed, he calmly grabs a sheet of paper, places it on the floor, says it represents Ed's head, and then he points a pen at it and describes how he shot Ed "in the forehead area." State Exhibit 358 at timestamp 30:05-19. The recordings of this interview were also played for the jury. 85 RR 80. After both parties rested, the jury found petitioner guilty of capital murder and the trial moved into its punishment phase. 81 RR 50.

The State's case during the punishment phase, which sought to show petitioner's future dangerousness and how the evidence militated for the death penalty rather than life imprisonment, was extensive. 82-89 RR; *see* Tex. Code of Crim. Pro. art. 37.071 § 2(d)(1). It relied on dozens of witnesses, two experts, several exhibits demonstrating petitioner's interest in committing other murders, petitioner's pre-trial behavior in jail, and the Ross video. 82-89 RR.

Regarding petitioner's behavior in jail, jail officials and several current and former Brazos County Jail inmates testified petitioner hid weapons, expressed an interest in committing more murders, and appeared aroused while discussing his crime. *See, e.g.*, 82 RR 240; 85 RR 52-53. The jury heard testimony about a February 2013 search of petitioner's cell that revealed a shank hidden in petitioner's mattress and two unauthorized razor blades hidden between the pages of a legal pad. 88 RR 119-22, 133. They heard how a follow-up

search two months later revealed additional unauthorized razor blades hidden under petitioner's bunk. 88 RR 159-61.

One inmate testified petitioner said the Shaar murder was "practice for his foster parents . . . [b]ecause he was plotting to murder his foster parents." 82 RR 240. Another testified petitioner said he would "fucking kill someone," specifically "[t]hat old man that's snoring underneath me, Bones." 85 RR 13-14. A third said petitioner bragged about dulling the knife used to attack the Shaars. The inmate claimed petitioner said that "he made sure [the knife] was dull so that they would feel it and it wouldn't cut them like butter." 88 RR 178-79. A fourth inmate said he heard petitioner say he would "kill one of these guards." 85 RR 50. And a guard related how petitioner said to her "he hopes when I go to sleep when I wake up he's standing over me." 88 RR 164.

The Ross video was admitted toward the end of the State's punishment case. 89 RR 45. It was played for the jury, 89 RR 45, after they heard testimony from Ross's jail escort, who discussed details of Ross's visit, such as how some prisoners signed release forms and others did not. 89 RR 39-45. The video was admitted over the defense's objection. 89 RR 45. Though redacted, it contained the comments detailed above at 5-6. Once the video ended, the State had the Shaars' daughter testify about the effects of petitioner's actions on the family. 89 RR 46.

The defense's case was equally extensive. The defense's presentation described petitioner's pre-adoptive life in the Philippines where he allegedly experienced poverty, violence, and drug abuse. 83 RR 219-20. The defense provided testimony of how petitioner was allegedly abused by his father (83 RR 32; 84 RR 82), and psychologically abused by his adoptive mother, who called him names like "stupid." 90 RR 264; 91 RR 19; 92 RR 61-64,

195-200. The defense also presented four experts, who opined on petitioner's mental health. 93 RR 25-27, 77; 94 RR 12, 81-82, 97; 97 RR 66, 87. Lastly, the defense had jail officials testify that petitioner was non-violent in jail (90 RR 157), easily managed (91 RR 79), and obtained his GED without incident. 91 RR 177.

The State's rebuttal case followed. The State presented two experts who rebutted petitioner's experts' claims of brain injury (98 RR 166-67), and mental illness (99 RR 71-74). And it put on additional evidence of the impact of petitioner's actions on the Shaars. 99 RR 147-153, 154-161.

Following the State's rebuttal case, both sides presented argument. The State's argument focused first on who the Shaars were and the petitioner's extensive preparation before committing his crime. 100 RR 26-33. The State recounted the testimony of its witnesses (100 RR 34-39); and petitioner's most shocking comments in his confession. 100 RR 43-44. The State mentioned the Ross video once, referring to petitioner's comment about "petty" crime. 100 RR 44. The State ended by declaring the defense's mitigation case unpersuasive (100 RR 46-51), and comparing the parties' expert testimony. 100 RR 52-53.

The defense's argument began by discussing the finality of petitioner's punishment, the difference between life without parole and death, and the standard to decide petitioner's future dangerousness and the sufficiency of the defense's mitigation case. 100 RR 54-67. Petitioner's counsel spoke briefly about his compliance in jail (100 RR 68-70), summarized the details of his early life (100 RR 72-77), discussed allegations of abuse against petitioner's adoptive mother (100 RR 78-94), discussed his experts' evidence (100 RR 95), and finished with general statements about how the jury should consider petitioner's hard life as sufficient mitigation to avoid a death sentence. 100 RR 95-105.

The State's rebuttal was the last thing the jury heard before deliberation. The rebuttal began with Linda Shaar's 911 call. 100 RR 105. Interspersed through the rest were clips from petitioner's recorded confession. These clips included petitioner saying how he enjoyed stabbing more than shooting (100 RR 110), how he killed Ed with a smile (100 RR 123), how he exploited the Shaar's open garage door (100 RR 123), how he felt when he killed Ed and stabbed Linda (100 RR 123), and the amount of time he spent planning the attack (100 RR 122). The State also replayed the video of petitioner's matter-of-fact reenactment of how he shot Ed Shaar at point-blank range. 100 RR 124.

The State referred to the Ross video, replayed it, and emphasized petitioner's statement about how capital punishment is given for "petty" stuff. 100 RR 125. It was not the rebuttal's focus. Once the government's rebuttal ended, the jury began deliberations with recordings of petitioner's confession, reenactments, and conversation with Ross. 100 RR 17.

The jury found beyond a reasonable doubt that petitioner was a continuing threat to society, and the mitigating circumstances were insufficient to warrant a non-capital sentence. 100 RR 132- 134; *see also* Tex. Code Crim. Proc. 37.071, §§ 2(b)(1), (e)(1). The court sentenced petitioner to death. 100 RR 134.

IV. Petitioner's Appeal

Petitioner appealed the trial court's denial of his motion to suppress the Ross video. AB 29, 63. He claimed the State violated his Sixth Amendment right to counsel by creating "a situation likely to induce [him] to make inculpatory statements without the assistance of counsel, thereby violating its 'affirmative obligation not to act in a manner that circumvent[ed]' [his] Sixth Amendment rights." AB 50. Petitioner primarily based this claim on

this Court's decision in *Massiah* and its follow-on decision in *Moulton*. He argued that the video's admission and the State's reliance on it during the punishment phase was not harmless. AB 61-62.

In *Massiah*, this Court explained that the government is prohibited from deliberately eliciting incriminating information from a defendant via a government agent when the defendant does not have access to counsel and his right to counsel has attached. *Massiah*, 377 U.S. at 207. According to petitioner, this Court's subsequent application of *Massiah* in *Moulton* imposed an affirmative duty on petitioner's jailers to prevent him from speaking with non-government third parties whose presence in jail they facilitated unless counsel was notified first. AB 49 (citing *Moulton*, 474 U.S. at 487). The CCA rejected this argument. *Hall v. State*, No. AP-77,062, 2021 WL 5823345 (Tex. Crim. App. Dec. 8, 2021), *reh'g denied* (Mar. 30, 2022).

The CCA held the State could not have violated petitioner's Sixth Amendment rights unless Ross was a "government agent." *Id.* at *6-7. The CCA relied on its opinion in *Manns v. State*, 122 S.W.3d 171 (Tex. Crim. App. 2003), which surveyed *Massiah*, its progeny, and 26 State Supreme Court decisions evaluating similar facts. *Manns*, 122 S.W.3d at 182-183. *Manns* concluded there is "at least one common principle: to qualify as a government agent, the informant must at least have some sort of agreement with, or act under instructions from, a government official." *Id.* at 183-84. Therefore, because no agreement existed between Ross and the State, the CCA held "Ross was not an agent of the State when he spoke with Appellant." *Hall*, 2021 WL 5823345 at *7. Comparing Ross's interaction with petitioner to a news reporter's telephone conversation with an inmate, both of which were facilitated by the jail, the CCA ruled that Hall had no viable Sixth Amendment complaint.

2021 WL 5823345 at *7 (*citing State v. Hernandez*, 842 S.W.2d 306, 316 (Tex. App.—San Antonio 1992, pet. ref'd). The CCA thus rejected petitioner's argument that the State "violat[ed] its 'affirmative obligation not to act in a manner that circumvent[ed]' Hall's Sixth Amendment rights" by creating "a situation likely to induce Hall to make inculpatory statements without the assistance of counsel." AB 64. The CCA denied relief on petitioner's suppression motion issue, and did not reach the question of harmless error. *Hall*, 2021 WL 5823345 at *7

Petitioner then petitioned for a writ of certiorari from this Court.

REASONS FOR DENYING THE PETITION

I. No Conflict of Authority Warrants Review.

This case presents no conflict of authority, let alone one warranting review. Petitioner argues any State use of a pre-trial inmate's voluntary communications with non-government disinterested third parties violates the Sixth Amendment, provided the State facilitated the communication without notifying counsel ahead of time. Pet. at 16-18. As the CCA properly explained, under this Court's seminal *Massiah* decision, the Sixth Amendment is not implicated because Ross—the comedian to whom petitioner voluntarily spoke on camera—was not a state agent. *Hall*, 2021 WL 5823345 at *7. Consistent with *Massiah* and *United States v. Henry*, 474 U.S. 264 (1980), the CCA correctly understood petitioner's complaint could not rise to the level of a Sixth Amendment violation where Ross had no agency relationship with the State. *Hall*, 2021 WL 5823345 at *7. Petitioner identifies no conflict of authority on this fundamental requirement that petitioner first establish the third party was indeed a government agent. *See id.* The CCA's correct application of well-established Sixth Amendment doctrine presents no conflict with this Court's precedent.

This Court should not credit petitioner's misunderstanding of a State's "obligations" under the Sixth Amendment. On direct appeal, petitioner argued this Court's precedent requires the State to avoid creating any "situation likely to induce Hall to make inculpatory statements without the assistance of counsel, thereby violating its 'affirmative obligation not to act in a manner that circumvent[s]' Hall's Sixth Amendment rights." AB 50. Nothing supports petitioner's proposition that a Sixth Amendment violation could arise irrespective of whether Ross was a government agent. This is because, as this Court explained, "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached." *Moulton*, 474 U.S. at 176.

Petitioner identifies no conflict of authority on this issue or even a court that accepts it, let alone error in the CCA's rejection of this argument based on this Court's Sixth Amendment precedent. That alone is reason enough to deny review. Nevertheless, petitioner fundamentally misunderstands this Court's precedent. Petitioner mistakenly relies on *Moulton*, an inapposite case about government informants recording defendants out on bail without their knowledge. *See* 474 U.S. at 176. Petitioner's reliance on *Estelle v. Smith*, 451 U.S. 454 (1981), and its progeny is also mistaken because that inapposite precedent concerns obtaining information from a defendant via court-ordered examination without the defendant's awareness he is being recorded or examined for the State's purposes.

Finally, insofar as petitioner relies on courts' disagreements over the contours of the government agency test, that question is not fairly presented. Courts agree government agency requires at least *some* agreement with or instruction from the government to gather

information, which the State did not do here. And the circumstances surrounding petitioner's specific interaction with Ross do not otherwise implicate the Sixth Amendment.

A. The CCA's correct application of *Massiah* presents no conflict of authority.

1. The CCA correctly rejected petitioner's Sixth Amendment claim under *Massiah* because Ross was not a state agent. *Hall*, 2021 WL 5823345 at *7. Petitioner argues the CCA misapplied *Massiah* because petitioner believes the CCA required "an 'express agreement to gather evidence' . . . to establish agency for purposes of a Sixth Amendment violation under *Massiah*." Pet. at 19 (quoting *Hall*, WL 5823345 at *7). This misquotes the CCA. What the CCA actually said was, "[Petitioner] responds that the lack of an express agreement between Ross and the State for Ross to elicit incriminating [evidence] is not dispositive . . . [Petitioner's] premise is correct." *Hall*, 2021 WL 5823345 at *7.

The CCA agreed with petitioner that an agreement creating a principal-agent relationship could be either express or implied. *Id.* This correct statement of law tracks federal authority applying *Massiah*. *See, e.g.*, *Ayers v. Hudson*, 623 F.3d 301 (6th Cir. 2010); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir. 1999) (en banc); *Depree v. Thomas*, 946 F.2d 784 (11th Cir. 1991); *United States v. Taylor*, 800 F.2d 1012 (10th Cir. 1986). Indeed, the concept of "agency" requires a principal's control. *See* Restatement (Third) of Agency § 1.01; *see, e.g.*, *United States v. Birbal*, 113 F.3d 342, 346 (2d Cir. 1997); *United States v. Watson*, 894 F.2d 1345, 1348 (D.C. Cir. 1990). Merely expecting to benefit from information does not make one an "agent." *Massiah*, 377 U.S. at 206. This Court has never endorsed an agency-by-accident theory and should decline to do so here.

The CCA also correctly rejected petitioner's arguments consistent with *Henry*. 447 U.S. 264. In *Henry*, this court ruled that a State violates the Sixth Amendment by creating a situation that encourages a defendant to make incriminating statements to an "undisclosed undercover agent," even though the agent was told to not elicit information. *Id.* at 273-74. Before the CCA, petitioner argued allowing Ross into the jail was like placing the paid undercover informant in Henry's cell in *Henry* because it "created a situation likely to induce Hall to make damaging statements without the assistance of counsel." AB 64. Deliberate elicitation can consist of creating circumstances that encourage unguarded statements to an undercover agent. *Henry*, 447 U.S. at 273-74. This includes placing someone the inmate knows, but who he does not know is a paid informant, in the inmate's cell to lower his guard. *Id.* Even when the State instructs the informant to not verbally elicit statements, this Court determined those circumstances can constitute deliberate elicitation. *Id.* at 270-71. But the CCA dispensed with Hall's argument by relying on its prior holding in *Manns*, which was "not in tension" with *Henry* because the *Henry* Court focused on the "deliberate elicitation" prong of a *Massiah* claim, and not the agency prong requiring an agreement or instruction to gather evidence. *Hall*, 2021 WL 5823345 at *7.

Critically, petitioner concedes there was no agreement, express or implied, between the State and Ross to elicit anything incriminating from petitioner. Pet. at 5. That concession dooms petitioner's Sixth Amendment claim under *Massiah* and every case interpreting it. Consistent with that authority, the CCA correctly determined no agency relationship existed, and petitioner's Sixth Amendment rights were not violated. *Hall,* 2021 WL5823345 at *7. At a minimum, the lack of any agreement with or instruction from the State concerning information gathering makes this case a poor vehicle to review the question presented.

2. Petitioner identifies no conflict between the CCA's ruling and this Court's precedent. Petitioner relies on two bodies of law concerning the Sixth Amendment: first, he analogizes Ross's interview to a line of undercover-informant cases beginning with *Massiah*. Pet. at 19. Second, he analogizes the Ross encounter to one with a court-appointed expert the State has access to without the defendant's knowledge. *Id.* at 23 (citing *Estelle*, 451 U.S. at 465). Those authorities are inapposite.

Massiah and the cases following it involve an individual who knowingly entered a principal-agent relationship with the government and participated in a deliberate elicitation of incriminating statements from someone whose right to counsel had attached. *Massiah*, 377 U.S. at 202-03. For example, after Massiah was arrested and retained counsel, a federal agent convinced his co-defendant to install a wire in Massiah's car so they could listen to Massiah's conversations. *Id.* In *Henry*, the government placed a paid informant in Henry's cell to obtain incriminating statements. 447 U.S. at 270-71. And in *Moulton*, Moulton was arrested, retained counsel, let out on bail, and then had his conversations recorded by a co-defendant wearing a wire for the government. 474 U.S. at 164-65. Such an express or implied agreement to act on the State's behalf is absent here.

Petitioner fares no better under this Court's precedent governing court-appointed examinations. *See* Pet. at 21 (citing *Estelle*, 451 U.S. 454; *Satterwhite v. Texas*, 486 U.S. 249 (1988); *Powell v. Texas*, 492 U.S. 680, 685 (1989)). In *Estelle*, *Satterwhite*, and *Powell*, a trial court ordered, without notice to defense counsel, a psychiatric examination of each defendant. *See Estelle*, 451 U.S. at 466; *Satterwhite*, 486 U.S. at 252; *Powell*, 492 U.S. at 681-82. The exams included an analysis of "future dangerousness," the defendants were not told they could remain silent during these exams, the results were given to the State, and the

State relied on the results to obtain the death penalty. *Id.* The doctors in *Estelle*, *Satterwhite*, and *Powell* examined the defendants for the State in a context where the defendants were entirely unaware of the State's immediate access to the doctors' results, arguably like the surreptitious recordings in *Massiah*, *Moulton*, and *Henry*. These cases are inapposite where, as here, no State actor appointed Ross to speak with petitioner and nobody required petitioner to speak with Ross. At a minimum, petitioner's argument requires extending *Massiah*'s principles beyond court-appointed examinations, which makes this case an exceedingly poor vehicle to address the scope of state agency.

Petitioner's other authorities include obvious government agents or find no Sixth Amendment violation because no agreement existed. In *Montejo v. Louisiana*, 556 U.S. 778 (2009), and *Patterson v. Illinois*, 487 U.S. 285 (1988), the Sixth Amendment violation was perpetrated by State employees. In *Kansas v. Ventris*, 556 U.S. 586 (2009); *Ayers*, 623 F.3d 301; *Randolph v. California*, 380 F.3d 1133 (9th Cir. 2004); and *United States v. Brink*, 39 F.3d 419, 421-23 (3d Cir. 1994), courts held that the government violated the accused's Sixth Amendment rights by using informants directed by or planted by the government to gather evidence like in *Henry*. On the other hand, in petitioner's remaining cases, *Thomas v. Cox*, 708 F.2d 132, 136 (4th Cir. 1983); *Taylor*, 800 F.2d at 1015; and *Depree*, 946 F.2d at 798, the courts found no Sixth Amendment violation where an informant informed on another inmate where no direction or agreement existed prior to the informant gathering incriminating evidence. In other words, petitioner's own authorities foreclose the argument that a Sixth Amendment violation could occur without some information-gathering instruction or agreement between Ross and the State.

B. Petitioner's misunderstanding of *Moulton* and *Estelle* does not warrant review.

1. Faced with the CCA's straightforward application of well-settled law, petitioner takes a different tack. He argues that in *Moulton*, this Court created an "affirmative obligation not to act in a manner circumventing the protection afforded by" the Sixth Amendment right to counsel, even when there is no covert state agent and attempt to elicit information. Pet. at 16. Not so. *Moulton* merely restrains the State from obtaining incriminating information via an undercover agent from a defendant whose right to counsel has attached. *Moulton*, 474 U.S. at 176. Because *Moulton* does not change the definition of agency, petitioner cannot show any conflict of authority warranting review.

Petitioner misunderstands *Moulton*. Petitioner (at 16-18), relies primarily on the following quotation in *Moulton*, which he takes out of context: "Knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." *Moulton*, 474 U.S. at 176. That quotation in *Moulton* is preceded by a discussion of *Henry* and is immediately followed by an assertion that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present *in a confrontation between the accused and a state agent*." *Id.* (emphasis added). The quotation does not involve an obligation on the State to prevent defendants from participating in any situation where they may make incriminating statements to non-government third parties. Nonethe-

less, petitioner argues the first quotation imposes an affirmative obligation on the government to notify counsel before a pre-trial inmate speaks in front of a recording device with a non-government third party. Pet. at 16-18. This argument fails.

In *Moulton*, police equipped Moulton's co-defendant with a wire to obtain information from Moulton, who was out on bail, about uncharged crimes. 474 U.S. at 164-65. The recording included incriminating statements about crimes for which Moulton was already charged. *State v. Moulton*, 481 A.2d 155, 159 (Maine 1984). The State used those statements to convict Moulton, but Maine's Supreme Court vacated his conviction under the Sixth Amendment. *Id.* at 166. This Court affirmed and held that "[b]y concealing the fact that Colson was an agent of the State, the police denied Moulton the opportunity to consult with counsel and thus denied him the assistance of counsel guaranteed by the Sixth Amendment." *Moulton*, 474 U.S. at 177.

In context, petitioner's quotation from *Moulton* on a State's obligations implicates two key facts missing here. First, Moulton did not know the State was recording, and second, the State "obtain[ed] incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a [S]tate agent." *Id.* at 176. Here, petitioner knew he was on camera, he was aware of his right to counsel and need to not self-incriminate, there was no knowing circumvention, and there was no confrontation between a government agent and the accused. And if there is any question of whether Ross was a government agent, petitioner concedes it was "news" to the jail Ross was speaking with petitioner, and no subpoena or other action would have been necessary for the State to obtain Ross's recordings had he been an actual state agent. Pet. at 5. If anything, petitioner's concession poses an additional vehicle problem.

2. Petitioner also argues (at 21-23) that his novel Sixth Amendment claim flows from *Estelle* and its successors. Petitioner asserts this case is like *Estelle* because the interaction with Ross was impossible without State involvement, and therefore the State needed to contact counsel in advance. Pet. at 17, 22. Petitioner says further (at 22) that the "no contact" letter petitioner's counsel filed with the jail confirms "the central Sixth Amendment violation here." Of course, petitioner's analogy fails because, as noted at 16 above, *Estelle* and its successors involve court-ordered expert examinations where the defendant is unknowingly examined for future dangerousness without notice to their counsel. That factor was not present here given that Ross was neither a State court appointed expert nor did he deliberately elicit any information about petitioner's future dangerousness. But this parallel with *Estelle* fails for several additional reasons.

First, the Court in *Michigan v. Harvey*, expressly rejected the "contention that a defendant cannot execute a valid waiver of the right to counsel without first speaking to an attorney. 494 U.S. 344, 353 (1990). Even if petitioner were correct that his counsel's "no contact" letter had efficacy beyond the Constitution's typical protections, simply facilitating a conversation would not establish a Sixth Amendment violation. *See, e.g.*, *Lanza v. New York*, 370 U.S. 139, 142 (1962) (recording a prisoner's conversation with a visitor the jail had to let in did not violate the Sixth Amendment).

Second, jailhouse interactions analogous to petitioner's are not understood to violate the Constitution. Thus, petitioner seeks a new constitutional rule that would upset jurisprudence on such interactions. For instance, phone calls between pre-trial inmates and non-government third parties cannot occur without jail involvement. Yet these calls are regularly recorded and admitted at trial, so long as the inmate had notice the State recorded his

calls. This Court has not yet decided the admissibility of jailhouse phone calls. *See Garcia v. Sec'y, Dep't of Corr.*, No. 20-11028-C, 2021 WL 1056765, at *2 (11th Cir. Jan. 6, 2021) (order denying certificate of appealability and noting this Court has not addressed jailhouse phone calls). But the Circuits have overwhelmingly found such evidence admissible. *See, e.g.*, *United States v. Johnson*, 943 F.3d 214, 220 (5th Cir. 2019) (jailhouse phone calls admissible); *United States v. Jones*, 716 F.3d 851, 855 (4th Cir. 2013) (same); *United States v. Jones*, 689 F.3d 12, 20-21 (1st Cir. 2012) (same); *United States v. Van Poyck*, 77 F.3d 285, 291 (9th Cir. 1996) (same); *United States v. Sababu*, 891 F.2d 1308, 1328-30 (7th Cir. 1989) (same); *United States v. Willoughby*, 860 F.2d 15, 20 (2d Cir. 1988) (same); *United States v. Paul*, 614 F.2d 115, 117 (6th Cir. 1980) (same). The recording of a pre-trial inmate who has an in-person non-privileged conversation with a jail visitor has also been found admissible. *See, e.g.*, *Lanza*, 370 U.S. at 142. Given that this evidence generally is not understood to raise constitutional concerns, petitioner's argument fails for similar reasons.

C. Any dispute over the contours of government agency is not fairly presented and petitioner cannot benefit from it.

1. Petitioner relies (at 19-20) on a consensus of federal circuit precedent, with which the CCA agreed, that an express agreement is unnecessary to establish agency for Sixth Amendment purposes. He uses those cases to assert that mere facilitation of contact with an accused by the State creates an agency relationship. Pet. at 19-20. This Court has never formally defined the term "state agent" for Sixth Amendment purposes. *Matteo*, 171 F.3d at 893. But courts agree a third party must act under some form of agreement with or instruction from the State to be a government agent, a factor absent here. *See infra* at 16. Occasionally, courts have found an agency relationship based on a standing agreement to

collect information for the government in exchange for a benefit. *See, e.g.*, *Henry*, 447 U.S. at 276-77. But that factor is also absent here. The dispute about the *type* of agreement or instruction necessary to trigger State agency is thus not fairly presented. Consequently, any subsidiary dispute over whether agency requires instructions to gather information from a specific prisoner is not fairly presented either. *See, e.g.*, *United States v. LaBare*, 191 F.3d 60, 65-66 (1st Cir. 1999). In all events, petitioner failed to show the "bare minimum" of a *Massiah* violation: "that the person with whom he conversed had previously been enlisted for that purpose by the authorities." *United States v. Ocean*, 904 F.3d 25, 33 (1st Cir. 2018); *see also Moore v. United States*, 178 F.3d 994, 999 (8th Cir. 1999).

2. Regardless, even if the explicit-instruction issue were fairly presented, petitioner cannot benefit from it for at least two reasons. *First*, regardless of whether Ross was an "agent" of the government, he does not meet the other *Massiah* elements. Ross did not deliberately elicit incriminating statements from Hall within the Sixth Amendment's meaning. To show deliberate elicitation, a "defendant must demonstrate that the police and their informant took some action . . . that was designed deliberately to elicit incriminating remarks." *Kuhlman v. Wilson*, 477 U.S. 436, 459 (1986). Here, the purpose of Ross filming in the jail dorms was not to question inmates about crimes but to talk with inmates about his comedy show. 65 RR 102. Ross visited every dorm in the jail toward that end; petitioner was not singled out. 65 RR 102. And flyers displayed throughout the jail gave notice that interactions with Ross would be recorded. 114 RR 142. Ross's team was also visibly recording with their cameras and microphones. 65 RR 57. Thus, as the CCA found, there was no intent to elicit information and no deceit concerning Ross's intent to document his inter-

views with willing inmates, elements that might possibly indicate a Sixth Amendment violation has occurred. *Henry*, 474 U.S. at 276-77. Thus, petitioner could not prevail even if he had some proof Ross was a government agent. This independent barrier to relief under the Sixth Amendment makes this case a poor vehicle to review the question presented.

Second, petitioner's actions waived a Sixth Amendment claim. As this Court has confirmed, no one needs counsel's permission to waive their right to legal advice. *See Michigan*, 494 U.S. at 352 ("[n]othing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney"). And under *Patterson v. Illinois*, a defendant can knowingly and intelligently waive his right to counsel—even in the middle of police-initiated interrogations—so long as he knew his rights when doing so. 487 U.S. 285 (1988). Petitioner voluntarily chose to speak with Ross, and "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Miranda v. Arizona*, 384 U.S. 436, 478 (1966).

Indeed, petitioner was already in the open area of his dorm when Ross and his camera crew approached him and asked to sit down. *See* State's Exhibit MTS 5 at line 5. Instead of saying "no" or walking away, petitioner introduced himself and voluntarily spoke with Ross. State's Exhibit MTS 5 at line 25. Based on the voluntariness of his interaction with Ross, petitioner cannot benefit from the rule petitioner seeks.

Petitioner argues his "no contact" letter applied to bar any social interaction facilitated by the jail, functioning as a blanket waiver exemption. Pet. at 6-7, 22. Petitioner, however, identifies no precedent recognizing such a power, let alone a split of authority. And in any event, the language in the letter is not so absolute, as the petitioner himself admits when

describing the letter as encompassing "any 'future communication with [Petitioner]' on the part of Brazos County jail officials or its agents." Pet. at 25 (quoting 114 RR 143-44). The referent throughout the letter is the Sheriff and his staff, not any person in any context. *See* 114 RR 143-44. Regardless, even if Ross were a government agent, there was no subterfuge and petitioner consented to the recording, and the "no contact" letter does not overturn the holdings in *Massiah*, *Moulton*, *Henry*, *Michigan*, *Patterson*, and *Miranda*. At a minimum, petitioner's reliance on a vague, fact-bound "no contact" request in the face of an otherwise-apparently voluntary encounter makes this case a poor vehicle to address State agency more broadly.

II. This Court Should Deny Review Because the Harmless-Error Rule Independently Bars Relief.

If the court decides the State had a duty to prohibit petitioner from speaking with Ross, any violation of that duty was harmless beyond a reasonable doubt given the robust evidence of petitioner's callous killings and future dangerousness. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279 (1991); *see also* Tex. Code Crim. Proc. art. 37.071 § 2(b)(1) (permitting a court to impose the death penalty only if a jury finds unanimously and beyond a reasonable doubt "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"). To put it bluntly, petitioner was not sentenced to death for, as petitioner puts it, looking like a "self-centered oddball." Pet. at 11. Gabriel Paul Hall was sentenced to death because he murdered Ed Shaar with a smile (126 RR 16-17), felt nothing while Linda begged for her life as he broke her trachea with a bowie knife (126 RR 18), threatened prison guards while awaiting trial (88 RR 164), and continued to collect deadly weapons in jail (88 RR 119-22) while repeatedly expressing murderous

intentions to his fellow inmates. 85 RR 13. Given that evidence, petitioner cannot plausibly contend the jury decided he was a future danger because he referred to himself as a "yellow neck," or because a comedian said prison was "like summer camp." Pet. at 11-12, 27.

The petitioner concedes he was guilty of "a terrible crime," but he argues the case for death was not "open-and-shut" because he is physically small, was eighteen when he committed the murder, and had no history of violence. *Id.* at 8. This argument does no justice to the punishment-phase performance by petitioner's trial counsel who put on an extensive case in mitigation, filling 10 volumes of the trial record. That mitigation failed, not for 8 minutes of video, but because of the nature of the crime and the consistent character of petitioner. Given all the evidence before the jury, the argument jurors ignored petitioner's mitigation case because of the Ross video cannot stand. Petitioner may reply the prosecution relied on quotations from the video during its sentencing argument, like petitioner saying Texas gives out the death penalty for "petty" conduct. *See* 100 RR 125-26. But that argument ignores the weight of the other evidence—such as petitioner confessing to killing Ed with a smile and to feeling no remorse over stabbing Linda while she begged for her life. 79 RR 85.

If there were a constitutional violation, it would be the State's burden to prove the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). In that situation, this Court's "general custom" is to remand and "allow[] state courts initially to assess the effect of erroneously admitted evidence in light of substantive state criminal law." *Hemphill v. New York*, 142 S. Ct. 681, 693 n.5 (2022) (quoting *Lilly v. Virginia*, 527 U.S. 116, 139 (1999)). But remand would be unnecessary here under *Milton v. Wainwright*, given the overwhelming evidence of petitioner's future dangerousness. 407 U.S. 371,

377 (1972) ("we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court"). The overwhelming evidence here provides ample proof any alleged error was harmless and overcomes need for remand. As the Court pointed out in *Fulminante*, the Court may "quantitatively [assess the error] in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." 499 U.S. at 308. And that context weighs dispositively against petitioner.

III. This Case Presents Multiple Vehicle Problems.

This case is also a poor vehicle for this Court to review whether and to what extent lack of State instruction precludes deeming a third party a state agent. Though petitioner has construed the facts as raising a Sixth Amendment problem, this Court could not reach that issue without first resolving multiple, complex threshold questions. Even then, the unique facts surrounding petitioner's conversation with Ross—involving banter petitioner voluntarily and knowingly engaged in before a filming camera crew—make this case a poor vehicle to address questions involving surreptitious interviews. Although the vehicle problems are reason enough to deny review, this Court could not embrace the rule petitioner seeks without also causing significant confusion in jurisprudence governing other jailhouse recordings.

A. Petitioner could not obtain relief without encountering multiple threshold obstacles to review of petitioner's Sixth Amendment question.

1. To grant relief for petitioner, this Court would first have to confront whether petitioner's Sixth Amendment rights attached to the interaction with Ross. The right attaches only "at or after the time that judicial proceedings have been initiated . . . 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Fellers v.*

United States, 540 U.S. 519, 523 (2004) (citations omitted). But no Sixth Amendment right to counsel attaches to uncharged crimes merely "factually related" to the charged offense. *Texas v. Cobb*, 532 U.S. 162, 167-68 (2001). The Sixth Amendment right is "offense specific." *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991).

The fact that petitioner's conversation with Ross discussed uncharged matters, and the conversation undisputedly spanned topics beyond the offense with which Hall was charged, poses an obstacle to reaching the question presented. Petitioner admitted nothing to Ross about murdering Mr. Shaar or attempting to kill Ms. Shaar; instead, he indicated he couldn't "[l]egally . . . discuss those events." 125 RR State's Exhibit 356 at time stamp 00:34. He disclosed neither his charges nor case facts, nor did he point to such statements in his CCA brief—instead, he briefed his complaints in the CCA as "potentially inculpatory information from Hall on camera." AB 63. Petitioner may reply he alluded to his crime or charge when he stated he "hacked someone's computer with a machete" and Texas pursues the death penalty for "petty" crimes. 125 RR State's Exhibit 356 at time stamp 03:37, 06:50. But this Court has not established such oblique references constitute "deliberately elicited" incriminating statements for Sixth Amendment purposes. *Massiah*, 377 U.S. at 206. This threshold issue thus poses an additional obstacle to review.

2. The use of the disputed evidence at the punishment phase of petitioner's trial poses additional complications. In particular, *Ventris* recognized a *Massiah* offense violates a prophylactic right when incriminating evidence is elicited, not upon admission at trial. *See* 556 U.S. at 591-92. Thus, an exclusionary rule "balancing test" applies to determine whether evidence must be suppressed. *Id.* at 591. Here, the state trial court determined petitioner's

statements need not be suppressed at the guilt-innocence phase. 71 RR 252-53. Petitioner does not address that ruling under the applicable balancing test.

And even if he did, this Court would *still* have to determine whether the evidence raised any Sixth Amendment concern through its use at the punishment phase rather than guilt/innocence. This Court's precedent suggests that similar evidence inadmissible at guilt/innocence is admissible at punishment. *See Williams v. New York*, 337 U.S. 241, 252 (1949) (probation officer and psychiatrist reports admissible at sentencing without affording cross-examination rights); *see also United States v. Nichols*, 438 F.3d 437, 442 (4th Cir. 2006) (*Miranda* rights); *Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363, 1388 (7th Cir. 1994) (en banc) (same). For other rights, there is no distinction between guilt/innocence and punishment phases in a capital-murder trial, such as the Fifth Amendment right against self-incrimination. *Estelle*, 451 U.S. at 465-66. But that right is not offense-specific, unlike the Sixth Amendment. *See Moulton*, 474 U.S. at 180 n.16. Whether petitioner could overcome this precedent suggesting the video could have been offered at the punishment phase of trial poses an additional vehicle problem.

3. Petitioner's case is also a poor vehicle to review this issue because his issue before the CCA was trial court error—an improper denial of his pretrial suppression motion. AB 29. Here, petitioner has abandoned that challenge. Instead, petitioner focuses entirely on a jailhouse Sixth Amendment violation, asserting the State wrongly created an opportunity to circumvent petitioner's right to counsel. Pet. at i. The CCA did analyze petitioner's claim as a violation of his Sixth Amendment right, addressing how one is only a government agent due to an existing agreement or instruction to gather evidence, but it did so while refusing to reverse the trial court's denial of petitioner's suppression motion. *Hall*, 2021 WL 5823345

at *7. Hall's shifting claim makes this case a poor vehicle to review Hall's alleged Sixth Amendment violation when Hall himself challenged the trial court's suppression ruling below.

B. The facts surrounding petitioner's statements make this case a poor vehicle to address state agency.

Several facts make this case a poor vehicle to address the government-agent question. Petitioner participated in banter and discussion with Ross hardly resembling law-enforcement interactions that typically implicate the Sixth Amendment. *Massiah* prohibits "secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Kuhlman,* 477 U.S. at 459. Here, petitioner voluntarily spoke with Ross in front of Ross's cameras, which were hardly secret. Petitioner agreed to appear on video. 101 RR 88-89. Nor does he dispute flyers appeared around the jail informing inmates of Ross's upcoming visit for purposes of generating televised entertainment. Pet. App. 38a. Petitioner cannot dispute he signed a waiver agreeing to participate. 101 RR 88-89.

A discussion like the one petitioner had with Ross is hardly the equivalent of *direct police interrogation*. The video shows petitioner and other inmates engaged in dark humor, off-color commentary, and self-deprecation. To be sure, some of these statements, including some made by petitioner himself, could cast petitioner in a negative light. The jury could see and hear for itself this evidence and draw its own conclusions. But the difference between entertainment and interrogation presents a serious vehicle problem for this Court's review.

Ultimately, this case is factually distinct from typical cases presenting Sixth Amendment issues. The *Massiah* Court held the government violated a defendant's Sixth Amendment right to counsel because "federal agents had deliberately elicited" incriminating statements after Massiah was indicted, and in the absence of counsel. 377 U.S. at 206. *Massiah*, however, "does not prohibit the introduction of spontaneous statements that are not elicited by State action. Thus, the Sixth Amendment is not violated when a passive listening device collects, but does not induce, incriminating comments." *Henry*, 447 U.S. at 276 (Powell, J., concurring) (citation omitted). The Court in *Moulton* held "it [was] clear that the State violated Moulton's Sixth Amendment right when it arranged to record conversations between Moulton and its undercover informant. . . . By concealing the fact that [the informant] was an agent of the State, the police denied Moulton the opportunity to consult with counsel and thus denied him the assistance of counsel guaranteed by the Sixth Amendment." 474 U.S. at 176-77. Ross, by contrast, visited petitioner's jail to record comedic material. As recognized by the CCA in this case, there was no evidence of a State instruction or encouragement to elicit incriminating information from petitioner, nor an agreement to "gather evidence," nor concealment by the State. These factual distinctions make this case a poor vehicle for review.

Buck v. Davis, which petitioner mentions in passing (at 28), does not bolster his argument. 137 S. Ct. 759 (2017). *Buck* involved the effect of a court-appointed psychologist's race-based statements in the context of granting a COA, not a claim on direct appeal like petitioner's. *Id.* at 768-69, 776-77. This court focused on the "powerful racial stereotype" the expert offered on future dangerousness. *Id.* at 776. The Court rejected the idea that the expert's discussion of race was de minimis. *Id.* at 777. Buck is thus understood as rejecting

a "particularly noxious strain of racial prejudice" from expert assessment of future dangerousness, which is absent here. *Id.* at 776.

C. Granting the relief petitioner seeks would upend precedent concerning jailhouse recordings.

This Court should also reject petitioner's argument because, if accepted, it would cause significant and unnecessary confusion concerning jailhouse recordings. Jails regularly facilitate communications between inmates and others via telephone, letter, or in person, as they did with Ross. Jails monitor these types of communications and, in the case of phones and in-person visitors, often record these conversations. *See, e.g.*, *Lanza*, 370 U.S. at 142. Recorded calls in particular are commonly used in prosecutions, as discussed *supra* at 20-21, in spite of there typically being no notice given to counsel before an inmate voluntarily and knowingly speaks on a recorded line. Because of the fact-bound circumstances of petitioners' knowingly taped interactions, this case is a poor vehicle for evaluating a Sixth Amendment violation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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