No. 22-5487

IN THE

Supreme Court of the United States

GABRIEL PAUL HALL,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent says that no conflict of authority warranting this Court's intervention exists with respect to the rationale on which the Court of Criminal Appeals of Texas (TCCA) rejected Petitioner's Sixth Amendment claim. *See* Brief in Opposition (BIO) at 14-18. Respondent further maintains that any Sixth Amendment error was harmless and complains that Petitioner's case is "a poor vehicle" for considering such a question. *Id*. at 24-25, 26-32. Each of those claims is mistaken or distorts the issue on which Petitioner's seeks plenary review.

1. In disputing the cert-worthiness of Petitioner's Sixth Amendment right-to-counsel issue, Respondent undertakes an elaborate exercise in begging the question.

Respondent spends pages insisting that this Court's Sixth Amendment right-to-counsel jurisprudence is not implicated here because insult comic Jeff Ross had no preexisting agreement with State authorities to elicit information that might be used against Petitioner and thus does not fit the traditional contours of a "state agent." *See*, *e.g*., BIO at 12 (Ross "not a state agent"), 13 (no Sixth Amendment violation if Ross not "a government agent"), 14 ("Ross was not a state agent"). But by narrowing the analysis to that single question, Respondent misses the big picture. Focusing solely on the term "state agent" and ignoring other relevant circumstances obscures the real question under the Sixth Amendment, which is, "When is it reasonable to hold the State responsible for harmful intrusions on the accused's right to counsel?"

Framing the question in that fashion shows the relevance of *Estelle v. Smith* and its progeny, which Respondent urgently seeks to hand-wave away.

This Court has solemnly observed that the State has an "affirmative obligation" not to frustrate the protections of counsel afforded to an accused by the Sixth Amendment. *Maine v. Moulton*, 474 U.S. 159, 176 (1985). The State surely violated that affirmative obligation by actively supporting and participating in Ross's filmed interrogation of Petitioner, even as state officials failed to give notice to Petitioner's counsel that the interview was taking place and then that it had been recorded and turned over solely to the prosecution to use against Petitioner. Where the State obtains evidence through violating that affirmative obligation and without giving notice to counsel, introducing that evidence at sentencing should be held to violate the Sixth Amendment. In Petitioner's case, this is true regardless of whether Ross knew at the time of the interview that he was creating evidence that might be used against Petitioner to secure a death sentence or was motivated in doing so by some desire to assist the prosecution.

The line of cases beginning with *Estelle v. Smith*[1] addresses punishment-phase "future dangerousness" testimony from mental health experts who conducted court-ordered pretrial psychiatric evaluations of in-custody capital defendants and defense counsel had no notice of the scope of the evaluation. In those cases, this Court concluded that the State violates the Sixth Amendment if it fails to provide defense

[1] 451 U.S. 454 (1981); *see also Powell v. Texas*, 492 U.S. 680 (1989); *Satterwhite v. Texas*, 486 U.S. 249 (1988).

counsel notice of the fact or scope of the interview and the State thereafter uses its fruits at punishment.[2] In *Estelle* itself, the Court reasoned that the State's punishment-phase use of such evidence to prove the "crucial issue" of future dangerousness rendered the third party who obtained the statements "essentially … an agent of the State" for Sixth Amendment purposes. *Estelle*, 451 U.S. at 467. Respondent cannot explain why this Court found Sixth Amendment violations arising from the interviews in *Estelle*, *Satterwhite*, and *Powell*—even though in each of those cases, *no* agreement existed between the State and the expert to obtain specific information from the defendant. What's more, at the time of the pretrial evaluation in *Estelle,* the court-appointed expert and the State had no relationship at all. *Estelle*, 451 U.S. at 465, 469-71 (only when the psychiatrist was called by the State to testify at punishment did he become "essentially like … an agent of the State"). None of the *Estelle* cases involves any evidence of a quid pro quo between the expert and the State at the time the defendant's statements were elicited, much less requires such evidence as a prerequisite to finding a Sixth Amendment violation.

Depriving Petitioner of the assistance of counsel in deciding *whether* to participate in the filmed interview, particularly after Petitioner had invoked that right regarding *all* forms of communication via the "no contact" letter from his lawyers to the Sheriff, is the core of the Sixth Amendment violation here. Here,

[2] *See, e.g., Estelle*, 451 U.S. at 471 (Sixth Amendment violated where defendant was denied counsel's assistance "in making the significant decision … whether to submit to [psychiatric] examination and to what end the psychiatrist's findings could be employed."); *Satterwhite*, 486 U.S. at 256 (same). Notably absent in these Sixth Amendment cases is any agreement between the State and the third party (expert), or any instructions to the third party from the State.

Petitioner's statements were obtained in a way that closely resembles the *Estelle* cases. The State (i) granted Ross, a third-party civilian, unprecedented physical access to Petitioner which Ross could only obtain with the State's direct involvement, (ii) did so without notice to Petitioner's attorneys, (iii) literally stood by and watched Ross elicit statements from Petitioner, (iv) immediately moved to obtain copies of those recorded statements upon conclusion of the interview, (v) turned the recording over to the State (and only the State), and, finally, (vi) introduced those statements against Petitioner at punishment.

Respondent errs in suggesting that features common to inmate-informant scenarios are prerequisites for establishing Sixth Amendment violations in any other scenario. Secret interrogation tantamount to direct police questioning is a concern specific to inmate-informant cases, and helpfully distinguishes an inmate-informant who acts at the State's behest from one who acts on his own initiative. But in one critically important sense, Ross's questioning of Petitioner *was* secret: because it occurred without notice to Petitioner's counsel. Here, too, this Court's decisions in *Estelle* and its progeny provide a more pertinent framework for the Sixth Amendment violation in this case: Because Petitioner's Sixth Amendment right had attached and his counsel were not notified in advance of Comedy Central's visit, Petitioner "was denied the assistance of his attorneys in making the significant decision" about whether to participate on camera with Ross. *Estelle*, 451 U.S. at 471.

The Court should take this case to hold that, in analyzing when contact between a third party and a counseled defendant violates the defendant's Sixth

Amendment rights, the critical fact is whether the third party truly acted independently of the State. Here, Ross did not—because without the State's active intervention in giving him access to Petitioner, no interview would have been possible. Ross was allowed to enter the jail's restricted area pursuant to a signed contract between Brazos County and Viacom that gave Ross and his film crew unusual access to jail inmates that even other media representatives do not ordinarily enjoy.

One other contention deserves brief comment: Respondent's denial that Ross "deliberately elicit[ed]" statements from Petitioner. BIO at 22. A Sixth Amendment violation results only when statements are admitted that were "deliberately elicited" from the accused after indictment and in the absence of counsel, *Massiah v. United States*, 377 U.S. 201, 203-04 (1964), and "deliberate elicitation" turns on whether Ross actively attempted to elicit statements from Petitioner or instead listened passively. *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986) ("some action [to elicit statements], beyond merely listening," is required). Respondent's claim that Ross did not deliberately elicit Petitioner's statements is subreption. The video itself demonstrates that Ross plainly took "some action, beyond merely listening," that was intended to encourage Petitioner to talk. Ross is shown repeatedly directing questions to Petitioner to solicit information about the charges against him, and lobbing provocations to prompt Petitioner to make otherwise damaging statements. Because

Petitioner's statements were "the product of this conversation," *United States v. Henry*, 447 U.S. 264, 271 (1980), the deliberate elicitation requirement is met.[3]

Respondent relies on the fact that Ross had "no intent to elicit information" and engaged in "no deceit." BIO at 22. But "*Henry* makes clear that it is not the government's intent or overt acts that are important," but the "likely … result of the government's acts." *Randolph v. California*, 380 F.3d 1133, 1144 (9th Cir. 2004). Here, the "likely result" of allowing someone like Jeff Ross into jail to record his interactions with inmates awaiting trial was that Ross would elicit statements from the inmates that the State could use against them. Finally, Respondent accuses Petitioner of arguing that "the State had a duty to prohibit [P]etitioner from speaking with Ross." BIO at 24. Not so: as the *Estelle* cases make plain, the State's duty is to *inform defense counsel* so they can advise their client whether to participate.

2. The State's intentional circumvention of Petitioner's Sixth Amendment right to counsel was harmful.

Respondent maintains that exposing jurors to the Comedy Central video was harmless "given the overwhelming evidence of petitioner's future dangerousness."

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[3] Moreover, the video shows that Petitioner was singled out in his interactions with Ross. Ross entered the dorm and walked directly to a table where Petitioner was already seated. The camera was placed directly facing Petitioner and remained there, with Petitioner centered in the frame, for the duration of the seventeen-and-half-minute interaction. AB:37, n.11. In fact, for nearly a third of the entire video (and at least fourteen separate times), the camera zooms in and focuses exclusively on Petitioner. AB:36-37. What's more, while two other inmates were seated at the same table—and several others lingered around it, periodically making interjections into the conversation—Petitioner was the only inmate to whom Ross directed questions about his charged offense. 102 RR (State's Exh. MTS 5) at 2 ("You must've done something crazy"); *id.* at 23 ("What are you in here for?"). In short, from the moment the film crew entered the dorm and throughout the interaction, Ross singled out Petitioner and engaged in "action[] beyond merely listening." *Kuhlmann*, *supra.*

BIO at 25, citing *Milton v. Wainwright*, 407 U.S. 371 (1972); *see also id.* (no reason to believe jurors "decided [petitioner] was a future danger" because of his statements on the video); *id.* at 24 (any Sixth Amendment error was harmless given the "robust evidence" of future dangerousness, citing the Texas statute that bars a death sentence absent an affirmative dangerousness finding).[4] But Respondent is wrong on both the law and the facts.

First, Respondent implies that a Texas capital jury's sentencing decision begins and ends with judging the defendant's potential future dangerousness. *See supra.* In fact, under the Texas scheme, jurors who return an affirmative answer to the "continuing threat" inquiry must then thoroughly consider all potentially mitigating circumstances in the case.[5] Most important, jurors are free to reject a death sentence based on mitigation even after concluding that a defendant poses a threat of future dangerousness. Thus, contrary to Respondent's suggestion, "robust" or even "overwhelming" evidence of future dangerousness, BIO at 24 and 25, cannot and does not dictate the punishment verdict. Every Texas jury that chooses life imprisonment based on a capital defendant's mitigating circumstances does so *after*

[4] The TCCA, finding no Sixth Amendment error, undertook no harmless error review.

[5] Specifically, jurors must answer "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." TEX. CODE CRIM. PROC. art. 37.071 § 2(e)(1). Nothing in Texas's capital sentencing scheme requires the jury to find that mitigation "outweighs" dangerousness before choosing to spare the defendant's life based on his mitigating circumstances.

finding beyond any reasonable doubt that he poses a continuing threat to society.[6] And as this Court has acknowledged, a capital sentencing jury may well withhold death based on evidence of the defendant's reduced moral culpability even in the face of extensive evidence of future dangerousness.[7] *(Terry) Williams v. Taylor*, 529 U.S. 362, 370-71, 415 (2000) (finding reasonable likelihood that jury would have sentenced Williams to life, notwithstanding extensive evidence of his future dangerousness, if it had heard mitigating evidence of "mistreatment, abuse, and neglect during [Williams's] early childhood," as well as evidence that Williams "might have mental impairments organic in origin"—circumstances that closely parallel the mitigating evidence presented by Petitioner).[8]

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[6] *See* TEX. CODE CRIM. PROC. art. § 2(e)(1) (a jury proceeds to answer the mitigation issue only if it first returns an affirmative finding on the future dangerousness question).

[7] This Court has acknowledged that capital jurors are entrusted with a "range of discretion" in making the "difficult, individualized judgment" whether a particular defendant should live or die. *Turner v. Murray*, 476 U.S. 28, 35 (1986). The very nature of that decision makes Respondent's citation to *Milton*, *see* BIO at 25-26, especially inapposite. *Milton* involved the harm resulting from a guilt-phase error. The impact of an error on the guilt-or-innocence determination, which presents exclusively questions of *fact*, is much more straightforward to assess than the impact of an error on the punishment determination. The latter involves preliminary factual premises (e.g., about the presence of aggravating and mitigating circumstances) but ultimately turns on the jurors' moral judgment about the *appropriateness* of a particular sentence.

[8] Williams's capital crime was brutal, and he had an extensive and violent criminal history. In the capital case, Williams was convicted of murder for beating a drunken, helpless elderly man in the chest with a stump-digging tool (apparently rendering him unable to breathe, which caused his death), and then taking three dollars from the man's wallet and walking out of the house as the victim lay dying, gasping for breath. *Williams*, 529 U.S. at 368 n.1. The blows Williams rained on the victim's chest broke two of his ribs, puncturing one lung. *Williams v. Warden*, 487 S.E.2d 194, 196 (Va. 1997). The capital murder took place while Williams was on parole, having been released from prison just seven months earlier. *Williams*, 487 S.E.2d at 199. Moreover, Williams's capital crime took place in the middle of a crime spree in which Williams "prey[ed] on defenseless individuals" including the elderly. *Id.* In the months following the capital murder, Williams "savagely beat an elderly woman, stole

Respondent concedes that jurors heard a wealth of mitigation about Petitioner. BIO at 25 (the defense presented "an extensive case in mitigation, filling 10 volumes of the trial record"); *id*. at 8-9 (describing testimony). The case for life included detailed accounts of the deprivations Petitioner endured as a child born into a squalid Philippine slum, and the extensive verbal and physical mistreatment he suffered at the hands of his adoptive parents after coming to America as an adolescent. *See* Appellant's Brief below (AB) at 12-17, 17-18. The jury also heard expert testimony that Petitioner suffers from organic brain damage and was psychologically scarred by trauma he experienced during the developmental period. *Id*. at 19-21 (citing test results showing Petitioner's post-traumatic stress disorder and debilitating anxiety).[9] Given this extraordinary case in mitigation, the jury might well have spared Petitioner's life but for the way the Comedy Central video depicted him. Indeed, despite the horror of Petitioner's crime, the jury spent *more than seven hours* deliberating what sentence to impose. 100 RR 37, 131. No more is necessary to

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two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail [while incarcerated there], and confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw." *Williams v. Taylor*, 163 F.3d 860, 868 (4th Cir. 1998). The elderly woman he assaulted barely survived, and at the time of Williams's capital sentencing was in a "vegetative state" and not expected to recover. *Williams*, 529 U.S. at 368. Williams also had prior convictions for armed robbery, burglary, and grand larceny. *Id* His criminal record dated from age 11. *Williams*, 487 S.E.2d at 196. Finally, at Williams's capital trial two forensic psychologists who had examined him testified to a "high probability" that Williams would commit future criminal acts of violence and constituted a continuing threat to society. *Williams*, 487 S.E.2d at 199; *Williams*, 529 U.S. at 368. In short, the Court found that a life sentence was reasonably possible notwithstanding conclusive evidence of future dangerousness.

[9] In addition, the State's mental health expert—while disagreeing with the defense experts on numerous points—did *not* diagnose Petitioner with sociopathy or psychopathy. *See* 99 RR 71.

foreclose Respondent's harmlessness argument as a basis for denying plenary review here.

Second, beyond exaggerating and distorting the significance of the "future dangerousness" finding in the current Texas capital sentencing framework, Respondent implies that the presence of "overwhelming" evidence of dangerousness means that the admission of the Comedy Central video could not have contributed to the jury's dangerousness determination itself. This Court rejected precisely that view in *Satterwhite v. Texas*, 486 U.S. 249 (1988). There, the Court held that the relevant constitutional test for harm in these circumstances "is not whether the legally admitted evidence was sufficient to support the death sentence," but "whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *Satterwhite*, 486 U.S. at 258-59 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). That test makes it irrelevant whether other properly admitted evidence was sufficient to support the verdict, because the question is not one of sufficiency but one of impact—namely, whether the State can show beyond a reasonable doubt that *this* improperly admitted evidence did not contribute to the verdict.

Satterwhite held that the erroneous admission of expert future dangerousness testimony obtained via a Sixth Amendment violation was not harmless because the experts appeared credible and their testimony was both unequivocal and emphasized by the prosecutors at closing argument. 486 U.S. at 260. Even though Satterwhite's jury *also* heard that he had four prior convictions for violent offenses, the Court found

it "impossible" to conclude beyond a reasonable doubt that the improperly admitted evidence of dangerousness did not influence the jury. *Id*. The same is true here. The Comedy Central video formed a memorable and unique part of the State's presentation and was given special emphasis by being played *twice* during the punishment hearing, once during the State's case-in-chief and again during closing argument.[10]

Finally, Respondent's harm argument presumes that the impact of admitting the Comedy Central video may be "quantitatively [assessed] in the context of other evidence presented" at trial. BIO at 26 (citing *Fulminante v. Arizona*, 499 U.S. 279, 308 (1991). While that might ordinarily be true, the Comedy Central video disparaged Petitioner on account of his Asian ethnic heritage, effectively inviting jurors to share that negative view. *See* Petition at 11. As the Court has emphasized, in the context of racial discrimination "[s]ome toxins can be deadly in small doses." *Buck v. Davis*, 137 S. Ct. 749, 777 (2017). Such appeals to irrational prejudice arguably fall outside the *Fulminante* framework and call for reversal even in the absence of "quantitatively" demonstrable harm. Moreover, the Eighth Amendment requires States to conduct capital proceedings with a minimum of dignity that cannot be reconciled with using the Comedy Central video, even in part, to decide Petitioner's fate. The judicial process in a capital case must be "dignified," *Deck v. Missouri*, 544

[10] Respondent overstates the evidentiary case for Petitioner's future dangerousness, at least if that inquiry is to have any meaning beyond the defendant's having committed the crime itself. Petitioner was young, physically unthreatening, and had no history of violence nor any criminal record; several jail guards testified that he kept to himself, followed orders, and caused no trouble. *See* Petition at 8-9.

U.S. 622, 631 (2005), and relying on such evidence affronts that obligation. *See also Wellons v. Hall*, 558 U.S. 220 (2010) ("From beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect"). A death verdict returned by jurors who were asked to condemn an emotionally isolated, mentally fragile teenager based on his awkward responses to mockery and provocations from a paid insult comic fails to "reflect[] a seriousness of purpose," and warrants reversal for that reason alone. *Deck*, 544 U.S. at 631.

3. The purported "vehicle problems" asserted by Respondent are illusory or insubstantial.

Respondent serves up a farrago of claimed "vehicle problems," insisting that hidden complications would block the Court from reaching and deciding the Sixth Amendment question at the heart of this case. BIO at 26-31. Most of these supposed problems are a function of Respondent's mischaracterization of the legal issue presented. For example, Respondent calls Petitioner's case "a poor vehicle to address questions involving surreptitious interviews." BIO at 26. As the Petition itself makes clear from its first page, the Sixth Amendment problem here arose not because the interview was "surreptitious" in the sense familiar from inmate-informant cases, but because the State failed to inform Petitioner's counsel about it (both before and after it took place). Thus, any claimed "vehicle problem" relating to the "surreptitiousness" of the interview is irrelevant.

Respondent asserts that "additional complications" would arise from the fact that the "disputed evidence [was used] at the punishment phase of Petitioner's trial."

BIO at 27-28. That's just wrong—the *Estelle* cases dealt squarely with the admission of evidence at punishment (in Texas trials, no less) that was obtained in violation of the Sixth Amendment right to counsel. So no "complications" there. Respondent bemoans the fact that the interaction between Ross and Petitioner "hardly resembl[es] law-enforcement interactions that typically implicate the Sixth Amendment." BIO at 29; *see also id.* at 30 (calling this case "factually distinct from" the usual informant-witness context in which such issues arise). Again, that dissimilarity simply shows why the "state agent" frame of reference is inadequate to resolve this case—a reason for *granting* cert, not denying it.

Finally, Respondent warns that redressing the violation of Petitioner's Sixth Amendment rights will call into question the universal practice of monitoring inmates' non-legal phone calls from jails and prisons. BIO at 31. The extraordinary degree of active State participation in creating the Comedy Central video readily distinguishes the circumstances here from routine monitoring of jail phone calls, not least because defense attorneys (who are aware of that practice) can counsel their clients about the risks of making calls on a monitored line. Here, of course, Petitioner's lawyers were kept entirely in the dark about the State's collaboration with Ross to produce the filmed interview that was ultimately used against Petitioner.

In short, the aspects of cases that constitute legitimate "vehicle problems"—such as uncertainty about whether a particular legal challenge was preserved for review, squarely addressed by the court below, and could affect the outcome of the

case—are utterly absent here. Petitioner raised his Sixth Amendment right-to-counsel objection prior to trial as a basis for excluding the Comedy Central video, renewed the objection at trial when the tainted evidence was offered, and raised the same issue on appeal below. The TCCA addressed the Sixth Amendment claim on the merits and rejected it. No genuine "vehicle problems" stand in the way of reaching the question Petitioner presents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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