No. 23-1313

IN THE

Supreme Court of the United States

NATIN PAUL,

Petitioner,

v.

THE ROY F. AND JOANN COLE MITTE FOUNDATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

The Texas trial court did not appoint a financially interested civil party's lawyer to prosecute Petitioner nor sentence him by email without opportunity to address the court. And in any event, this case is not the vehicle to address Petitioner's questions presented. No court below opined on those questions. There is no material split in authority for the Court to resolve. And Petitioner did not timely raise his complaints below.

The questions presented are:

1. Does the Due Process Clause require a state court to always appoint an independent prosecutor for any petty criminal contempt proceeding?

2. When a contemnor participates and is represented by counsel in contempt hearings, does the Due Process Clause or the Sixth Amendment require an additional statutory allocution, where such allocution could not affect the contempt order?

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Respondent states that it is a non-profit 501(c)(3) corporation incorporated in the State of Texas, with its principal place of business in Austin, Texas. It has no corporate parents, subsidiaries, or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in The Roy F. & Joann Cole Mitte Foundation.

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INTRODUCTION

Petitioner Natin Paul repeatedly disobeyed the trial court's direct orders and lied in open court. Here he contends that the court could not impose a 10-day jail sentence for his contempt because an independent prosecutor was not appointed to prosecute him, and further that he was entitled to allocution. In sum, he claims Texas's (and any state's) contempt-of-court procedures that do not explicitly require an independent prosecutor and allocution, regardless of the state's comprehensive protections afforded to contemnors, are unconstitutional. As has been his practice, Mr. Paul misstates and obfuscates Texas law and the facts. The Court should decline review.

First, this case is a poor vehicle to address the questions presented because there is no decision below on those questions. The trial court and the intermediate appellate court did not rule on them. And the Texas Supreme Court denied review. Therefore, even if there were a split of authority on the questions presented, Texas courts have not added to any conflict.

Second, Paul's suggested split over a due process right to an independent prosecutor is illusory. The handful of divergent state court opinions on this issue reflect constitutionally permissible variation in state contempt procedures.

Third, an opinion on the allocution question would be advisory in this case because it would not alter the outcome below. Paul has never identified or argued that he has the statutory grounds for allocution under Texas law, so the trial court would have no legal basis to change Paul's sentence were he permitted to allocute.

Fourth, Paul forfeited his right to review of the questions presented by failing to timely raise those issues in the trial court and obtain a ruling.

The petition should be denied.

STATEMENT

1. Paul created a real estate empire by establishing a network of wholly owned or controlled corporate entities to make acquisitions and by soliciting investors to fund those acquisitions. But as Paul's empire collapsed and bankruptcies multiplied, evidence mounted that he had been committing fraud, including converting and fraudulently transferring investor funds. That included the funds of Respondent, the Roy F. and Joann Cole Mitte Foundation ("the Foundation"), a nonprofit organization that invested part of its endowment with Paul in two properties in Austin, Texas.

The Foundation prevailed in an arbitration against Paul on claims for breach of contract, breach of fiduciary duty, conversion, alter ego, and fraud, obtaining a monetary award of over $1.9 million, including punitive damages and attorney's fees. TSC Brief, Ex. B at 1.[1] The trial court confirmed the award and rendered judgment against Paul. *Id.*

1. Record citations are to the proceedings in the Texas Supreme Court which can be accessed here. https://search.txcourts.gov/Case.aspx?cn=23-0253&coa=cossup. Most of the citations will be to Exhibits to Paul's Brief on the Merits to the Texas Supreme Court, and will be designated as TSC Brief, Ex. __, at ___.

Paul posted cash to supersede the judgment while he appealed, but he did not "secure the full amount." Pet. 4. Texas law requires a debtor to supersede only actual damages, not punitive damages and attorney's fees. Tex. R. App. P. 24.2(a)(1). Paul was thereby able to forestall execution on the entire $1.9 million judgment by posting only $329,000.

The trial court thus entered a post-judgment injunction to prevent Paul from dissipating assets while appealing the confirmed arbitration award. In cases of financial malfeasance (particularly involving real estate or other nonmonetary assets), Texas law permits a court to grant injunctive relief to stop a judgment debtor from shedding assets. *See Emeritus Corp. v. Ofczarzak*, 198 S.W.3d 222, 226 (Tex. App.—San Antonio 2006, no writ); Tex. R. App. P. 24.2(d). The trial court enjoined Paul from making any monetary transfers over $25,000 when there was no exchange for fair value. TSC Brief, Ex. C at 1-2. The court further required Paul to submit monthly sworn reports of all transfers over $25,000, regardless of any value exchange. *Id.* at 2.

2. During the appeal—which Paul ultimately lost[2]—Paul ignored the injunction and filed no reports, so the Foundation moved for contempt. *Id.* Ex. M. As required by Texas procedure, the trial court issued a show cause order—personally served on Paul—that assigned a date and time for the hearing. *Id.* Ex. F. Paul was represented

2. The intermediate appellate court affirmed, and the Texas Supreme Court declined review. *See Paul v. The Roy F. & JoAnn Cole Mitte Found.*, No. 03-21-00502, 2023 WL 1806101 (Tex. App.—Austin Feb. 8, 2023, pet. denied) (mem. op.).

by counsel before, during, and after the hearing. On the eve of the hearing, Paul finally filed sworn "reports," but claimed no reportable transfers.

At the hearing, the Foundation offered evidence that Paul had violated the injunction, including Paul's live testimony. TSC Brief, Ex. E. Paul's attorney made numerous objections, examined Paul, offered rebuttal testimony, and argued against any contempt finding. *Id.* Evidence at this hearing strongly suggested that Paul's sworn reports were false, and he exacerbated his contempt of court by lying on the stand. In response to questions from the Foundation's attorney and the trial court, Paul repeatedly denied violating the injunction. *Id.* at 20, 21–22. Then, when confronted with his own bank records showing he personally made a $100,000 payment not for fair value to an NBA player, Paul was evasive—primarily claiming he did not remember or even recognize his own bank records. *Id.* at 26, 27, 33–34. Paul's counsel asked for a recess, ostensibly so Paul could have more time to review those records. *Id.* at 62, 64. The trial court granted Paul's request and recessed the hearing for eight days. *Id.* at 78–79.

Before the recess, the Foundation filed a new contempt motion, this time seeking a criminal contempt finding because Paul had violated the injunction and lied about it to the court. TSC Brief, Ex. N. The trial court thus issued a second show cause order that was immediately served on Paul and his counsel in open court. TSC Brief, Ex. G. Paul complains that the order "did not indicate" that criminal contempt was on the table, Pet. 5, but the Foundation's motion indisputably did, and that is sufficient notice under

Texas law.[3] *See*, *e.g.*, *In re Pursuit of Excellence, Inc.*, No. 05-18-00672-CV, 2018 WL 6566644, at *4 (Tex. App.—Dallas Dec. 13, 2018, no pet.); *Ex parte Gray*, 654 S.W.2d 68, 70 (Tex. App.—Eastland 1983, orig. proceeding).

The evidence of Paul's contempt only grew at the reconvened hearing. Again represented by counsel, Paul changed his testimony and admitted to the $100,000 transfer. But he claimed the injunction neither prohibited nor required reporting of a "wire" cash transfer, TSC Brief, Ex. H at 8–9, though the terms of the injunction expressly prohibited "cash transfers." *Id.* Ex. C at 2. Not done, Paul then claimed his attorney advised him that transfers of money need not be reported.[4] TSC Brief, Ex. H at 9. Further, the evidence revealed another unreported transfer of $960,000, made the day the injunction issued (up to that point, a temporary restraining order with the same terms was in place). *Id*. at 47–50 & P-13. It also emerged that Paul, contrary to the trial court's direct order, had not disclosed all of the bank accounts he controlled. TSC Brief. Ex. K at 5.

With dysphemistic fervor, Paul asserts that the trial court "appointed" the Foundation's counsel to "prosecute"

3. Paul's complaint about the second show cause order is additionally perplexing because his counsel participated with the trial court in drafting it. TSC Brief, Ex. E at 93.

4. Paul's attorney belatedly filed a declaration that he thought only transfers "not for value" must be reported. TSC Brief, Ex. H at 15 and P-12. Yet this too was false. Two months earlier this attorney had filed Paul's brief in the court of appeals (also submitted to the trial court at the show-cause hearing), arguing the injunction was improper precisely because ***all transfers*** over $25,000 were required to be reported, regardless of a transfer for value. *Id*. at 16 and P-8.

him for criminal contempt and that the Foundation's counsel would be paid from Paul's assets. Pet. 3. Neither statement is true. The trial court made no such appointment and never granted the Foundation's counsel any particular prosecutorial power; the Foundation's counsel solely represented the Foundation's interest in enforcing the injunction. Further, the Foundation's counsel was paid under a standard hourly arrangement, not contingent on any case outcome.

Paul also complains that the Foundation did not tell Paul he had a Fifth Amendment right against self-incrimination. Pet. 5. But nothing required the Foundation's counsel to admonish an adverse witness, represented by counsel, regarding his Fifth Amendment rights. Either Paul or his counsel could have invoked the Fifth Amendment but did not; instead, Paul chose to lie to the court.

After the reconvened hearing, the trial court took the matter under advisement. Paul claims that on March 3, 2023, the trial court found him guilty and sentenced him to jail via email, Pet. 3, 12, but that is false. That email was a communication from the court's *staff attorney* informing the parties that a contempt sanction would issue and, as is customary in Texas, directing counsel for the prevailing party to prepare a *draft* of a *proposed* order for the court's use. TSC Brief, Ex. I. Notably, though Paul's counsel was given the opportunity to approve the form of the order, he declined to participate in the process. TSC Brief, Ex. J. The staff attorney's email did not and could not adjudicate anything or order Paul to jail. *Id*. That happened on March 10, 2023, when the trial court issued its order, substantially changed from counsel's draft, that

found Paul in contempt and sentenced him to ten days' confinement. Pet. App. 50a.

3. The trial court never ruled on the independent prosecutor and allocution questions that Paul now asks this Court to decide. During the contempt proceedings, Paul never raised those complaints. As he concedes, Paul first complained about the need for a special prosecutor in an "objection" filed on March 9, 2023, the day before the trial court's order and six days after what Paul now refers to as the sentencing email.[5] TSC Brief, Ex. S; Pet. 3. He also complained that he was entitled to an in-person sentencing hearing, mentioning in passing that at such a hearing he "may exercise the right to allocution." *Id.* After the trial court's order, Paul then filed a "supplemental objection" asserting for the first time "his statutory right to allocution." TSC Brief, Ex. T. But Paul did not (i) include a prayer or other request for relief in either of these objections, (ii) attach a proposed order, (iii) set his objections for hearing or otherwise seek a ruling, (iv) obtain a ruling on his objections, or (v) object to the lack of ruling.

The intermediate appellate court and Texas Supreme Court did not address the questions presented either. Paul sought habeas corpus and mandamus relief from the trial court's contempt order in the intermediate court of appeals. That court granted relief on two counts of

5. All of Paul's objections are untimely, and would each be even ***more*** untimely if the March 3, 2023 email announcing the court's findings and the contempt sanction functioned as a sentencing, as his petition incorrectly claims. *See* Pet. 3, 12. Paul waited until a week after this event to raise any of the arguments set forth in his petition.

contempt and denied relief as to the other six, but did not address Paul's independent prosecutor or allocution complaints. Pet. App. 15a. Paul then sought habeas corpus and mandamus relief from the Texas Supreme Court. Over a dissent, that court declined to exercise discretionary review. *Id.* at 1a.

ARGUMENT

I

This case is a poor vehicle to consider whether absence of an independent prosecutor or allocution in state criminal contempt proceedings violates due process, because there is no decision below on those questions to review.[6]

This Court does not "decide in the first instance issues not decided below," because the Court is one of "final review not first view." *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012); *see also U.S. v. Bestfoods*, 524 U.S. 51, 72–73 (1998); *accord NCAA v. Smith*, 525 U.S. 459, 470 (1999). The Court relies on the "benefit of thorough lower court opinions to guide [its] analysis," *Zitovsky*, 566 U.S. at 201, and a "sufficiently developed record." *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253–54 (1999)

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6. Paul writes, generally, that the trial court's failure to appoint an independent prosecutor and to grant allocution (or an in-person sentencing hearing) violated the Fifth Amendment. With respect to allocution, Paul offers a separate question, suggesting his rights to counsel and a sentencing hearing under the Sixth Amendment were violated. But, primarily, Paul's argument is that he was deprived of due process, suggesting his right to counsel and the opportunity to be heard were subsumed in due process.

Here, no court below considered or ruled on Paul's questions presented. Paul seeks review of the Texas Supreme Court's judgment because it purportedly "endorse[d]" denial of an independent prosecutor and allocution, Pet. 1, 7, but that court's judgment was merely a denial of review. The Texas Supreme Court's "failure to grant a petition for writ of mandamus is not an adjudication of, nor even a comment on, the merits of a case in any respect." *In re AIU Ins. Co.*, 148 S.W.3d 109, 119 (Tex. 2004). So, regardless of four dissenting justices' desire to entertain Paul's petition, the state court of last resort (like the courts before it) did not address the merits of Paul's independent prosecutor or allocution issues.

Paul is thus wrong to insist that this case presents a cleaner vehicle to decide those questions than *Robertson v. U.S. ex rel. Watson*, 560 U.S. 272 (2010). There, the Court dismissed the certiorari petition as improvidently granted, but it at least had the benefit of a fully developed record, with analysis of the issues by the District of Columbia's highest court. *See generally In re Robertson*, 940 A.2d 1050 (D.C. 2008), *on reh'g*, 19 A.3d 751 (D.C. 2011). The Court would not even have that here.

II

Were Paul correct that there is a split of authority over whether due process requires an independent prosecutor for criminal contempt, certainly the decision below did not "deepe[n]" it. Pet. 10. There is no decision below from any court, at any level, on that question. But there is no meaningful split in authority on the constitutional necessity of an independent prosecutor.

The federal circuits that have required an independent prosecutor were self-consciously bound by *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), which imposed the requirement for federal courts alone under the Court's supervisory power, not as a due process dictate. *See U.S. ex rel. SEC v. Carter*, 907 F.2d 484, 486 (5th Cir. 1990); *F.J. Hanshaw Enterprises, Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1139 (9th Cir. 2001); *Bradley v. Am. Household Inc.*, 378 F.3d 373, 379 (4th Cir. 2004). *Young* did not disturb states' authority to determine procedures for adjudicating criminal contempt in state courts, expressly declining to find an overarching constitutional right to an independent prosecutor during contempt proceedings. *Id.* at 800–02.

There is a shallow divergence among state courts as to whether due process requires a disinterested prosecutor for criminal contempt, but this is a product of procedural variations in contempt proceedings across different states. Paul identifies two intermediate state courts and one state high court that permit a litigant's counsel to pursue criminal contempt. Pet. 10. Yet each concluded that an independent prosecutor was not necessary to protect the contemnor's right to due process in light of state-specific procedural protections that mitigated the concerns undergirding *Young*.

The Tennessee Supreme Court found "many practical differences between the federal judicial system and the courts of Tennessee" that "ameliorate" any concern over the lack of an independent prosecutor, including the fact that "private attorneys prosecuting criminal contempt actions in Tennessee are not ordinarily clothed with all the powers of a public prosecutor." *Wilson v. Wilson*,

984 S.W.2d 898, 904 (Tenn. 1998). "The potential for abuse and overreaching about which the *Young* Court expressed concern therefore does not exist in Tennessee." *Id.* Similarly, a Florida appellate court observed that Florida's rules had various safeguards to "protect against the abuse of the contempt sanction" and that private contempt "prosecution" in Florida only allowed counsel to "'assist' the court . . . by calling witnesses at the contempt hearing." *Gordon v. State*, 960 So. 2d 31, 37, 38–39 (Fla. Dist. Ct. App.), *decision clarified on denial of reh'g*, 967 So. 2d 357 (Fla. Dist. Ct. App. 2007). Likewise, a Michigan court of appeals, in an unpublished opinion, examined specific Michigan statutes and procedures, as well as the state's resources, in rejecting a disinterested-prosecutor requirement. It emphasized that due process requirements are flexible and are satisfied when state procedures, like Michigan's, are fundamentally fair. *See In re Mitan*, No. 222230, No. 222231, 2002 WL 31082190, at *9-11 (Mich. Ct. App. Sept. 17, 2002).

These procedural variations in contempt proceedings across states are a hallmark of federalism. "Beyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status." *Oregon v. Ice*, 555 U.S. 160, 170 (2009). The same is true for state administration of criminal contempt proceedings within their civil court systems. This Court has "long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Spencer v. Texas*, 385 U.S. 554, 563–64 (1967) (citations omitted); *accord Medina v. California*, 505 U.S.

437, 443–44, 447–48 (1992). The specific requirements of due process are "flexible," because "not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Indeed, our "federal system warns of converting desirable practice into constitutional commandment. It recognizes in plural and diverse state activities one key to national innovation and vitality. States are entitled to some flexibility and leeway." *North v. Russell*, 427 U.S. 328, 338 n.6 (1976) (quoting *Shadwick v. City of Tampa*, 407 U.S. 345, 353–54 (1972)).[7]

Paul does not reconcile these precedents with his invitation to mandate an independent prosecutor procedure for every state court criminal contempt proceeding. Nor does he acknowledge that doing so would require the Court to evaluate the contempt procedures of every state jurisdiction to determine that a state's nuanced procedural protections are insufficient to afford due process absent an independent prosecutor.

That states, uniformly mindful of due process, impose different procedural requirements on criminal contempt proceedings does not reflect a true conflict for the Court to resolve.

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7. *See also*, *e.g.*, *Pounders v. Watson*, 521 U.S. 982, 991, (1997) ("While the Due Process Clause no doubt imposes limits on the authority to issue a summary contempt order, the States must have latitude in determining what conduct so infects orderly judicial proceedings that contempt is permitted."); *Medina*, 505 U.S. at 447–48) (state procedures regarding the burden of proof to establish a defendant's competence may diverge); *Patterson v. New York*, 432 U.S. 197, 202 (1977) (due process controls on state criminal procedures should be applied sparingly).

III

A

Just as the Texas Supreme Court's denial of discretionary review did not deepen any split over the independent-prosecutor question, it likewise does not "implicat[e]" a split over whether due process requires allocution. Pet. 13. Again, there is no decision below from any Texas court on that question (or on the related question whether Paul was due an in-person sentencing hearing assisted by counsel).

Further, on this case's record, a decision from this Court on the allocution question would not alter the outcome below. This Court does not grant certiorari to "decide abstract questions of law . . . which, if decided either way, affect no right" of the parties. *Albany Cnty. Sup'rs v. Stanley*, 105 U.S. 305, 311 (1882); *see The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function . . . is judicial, not simply administrative or managerial.").

Before the trial court, Paul belatedly demanded his "statutory right" to allocution under Texas law. TSC Brief, Ex. S. The relevant statute is Texas Code of Criminal Procedure § 42.07, which permits a party to allocute only to present evidence of a pardon, incompetence, or mistaken identity:

> Art. 42.07. REASONS TO PREVENT SENTENCE. Before pronouncing sentence,

> the defendant shall be asked whether he has anything to say why the sentence should not be pronounced against him. **The only reasons which can be shown, on account of which sentence cannot be pronounced, are**:
>
> > 1. That the defendant has received a pardon from the proper authority, on the presentation of which, legally authenticated, he shall be discharged.
> >
> > 2. That the defendant is incompetent to stand trial; and if evidence be shown to support a finding of incompetency to stand trial, no sentence shall be pronounced, and the court shall proceed under Chapter 46B; and
> >
> > 3. When a person who has been convicted escapes after conviction and before sentence and an individual supposed to be the same has been arrested he may before sentence is pronounced, deny that he is the person convicted, and an issue be accordingly tried before a jury, or before the court if a jury is waived, as to his identity.

(emphasis added). At no point—before the trial court, in briefing to the Texas appellate courts, or in his petition—has Paul even suggested that any of these limited statutory reasons for altering a sentence apply. *See*, *e.g.*, TSC Brief, Ex. P. Nor has he challenged the allocution statute's limitations on constitutional or any other grounds. *See Beck v. Washington*, 369 U.S. 541, 554 (1962) (the Court

will not consider an issue not within scope of question of writ of certiorari); *see also Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (the Court will limit review to question as framed by petition).

Failure to provide a party with an opportunity to give statutory allocution is harmless under Texas law when the party does not contend that any of the statutory grounds to alter the sentence apply. *See Reyes v. State*, 774 S.W.2d 670, 672 (Tex. App.—Houston [14th Dist.] 1989, no pet.); *Hernandez v. State*, 628 S.W.2d 145, 147 (Tex. App.—Beaumont 1982, no pet.). As the Texas Court of Criminal Appeals has emphasized, "[s]urely appellant would not have this court reverse this cause and order a new sentencing so that when the court asks her if she has anything to say why sentence should not be pronounced against her she can then answer 'Nothing.'" *Tenon v. State*, 563 S.W.2d 622, 624 (Tex. Crim. App. 1978).

So even were this Court to order resentencing to give Paul an opportunity to give the statutory allocution he has requested, the trial court would have no basis under Texas law to alter Paul's sentence. Any decision regarding allocution requirements by this Court would be essentially advisory: it would have no impact on the underlying contempt order or the sentence it imposes. For this reason, too, this case is an inappropriate vehicle to resolve the second question presented.

B

Paul briefly expands his allocution complaint to argue that this Court's caselaw at least entitled him to an in-person sentencing hearing with the assistance of counsel.

Pet. 16. As an initial matter, Paul's myopic contention that he was denied the opportunity to physically appear before the trial court with counsel rests on the false premise that he was sentenced by the staff attorney's March 3 email, which was neither sent nor signed by the trial court. *Compare* TSC Brief, Ex. I *with* TSC Brief, Ex. K. Before the trial court sentenced him on March 10, Paul personally appeared at two contempt hearings, was vigorously represented by counsel at all times, filed numerous motions and objections before and after the hearings, and had (and declined) the opportunity to review and comment on the trial court's proposed order before the court entered final judgment.

Moreover, Paul is wrong to suggest that because criminal contempt is a crime, criminal procedures like rights to an in-person sentencing hearing with assistance of counsel necessarily apply. Pet. 16. *Young* recognized that not all criminal procedural protections must apply to criminal contempt proceedings. 481 U.S. at 800; *see also United States v. Nunn*, 622 F.2d 802, 803 (5th Cir. 1980) (grand-jury procedure inapplicable); *United States v. Martinez*, 686 F.2d 334, 343 (5th Cir. 1982) (arraignment and discovery inapplicable). To take an especially apt and well-known example, *direct* criminal contempt proceedings do not require a separate prosecutor. *United States v. Wilson*, 421 U.S. 309, 310 n.1 (1975) (citing Fed. R. Crim. P. 42(a)).

But even had the trial court erred as Paul claims, that would not make his petition more worthy of certiorari. This Court typically does not correct erroneous applications of settled law: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous

factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. If, as Paul contends, the trial court "flouted" this Court's "crystal clear" precedents requiring an in-person sentencing hearing with assistance of counsel, Pet. 16, then Paul merely seeks fact-bound error correction.

IV

Finally, Paul forfeited his questions presented by failing to timely present them to or obtain a ruling from the Texas trial court. This is yet another reason to deny review. *Stern v. Marshall*, 564 U.S. 462, 481–82 (2011).

To preserve questions for appeal under Texas law, the issue must be timely "brought to the trial court's attention." *Bryant v. Jeter*, 341 S.W.3d 447, 450–51 (Tex. App—Dallas 2011, no pet.); *see also Seim v. Allstate Texas Lloyds*, 551 S.W.3d 161, 164 (Tex. 2018). A litigant may not "sandbag[ ] the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Stern*, 564 U.S. at 481–82 (quoting *Puckett v. United States*, 556 U.S. 129, 134 (2009)). But that is what Paul did here. Before the conclusion of the first civil contempt hearing, Paul and his counsel knew that the Foundation was moving for criminal contempt, which could result in jail time. Yet Paul did not then, during the recess, or at the reconvened criminal contempt hearing, object to what he (wrongly) characterizes as the trial court's "appointment" of the Foundation's attorney as "prosecutor," demand a separate in-person sentencing hearing, or request allocution. Rather, he raised the independent prosecutor and in-person sentencing hearing issues for the first time a week

after the court's staff attorney requested the Foundation draft a proposed order finding contempt. TSC Brief, Ex. S. And he did not purport to invoke his right to statutory allocution under Texas law until *after* the trial court issued its final order. TSC Brief, Ex. T. Paul was not entitled to see how the contempt process would play out and then, only after receiving an unfavorable result, complain about the procedure.

Further, preservation requires a showing that the court either denied relief or "refused to rule" and "the complaining party objected to the refusal." *Bryant*, 341 S.W.3d at 450–51. The trial court never addressed Paul's belated independent prosecutor, in-person sentencing hearing, or allocution complaints. And Paul never sought a ruling on those objections or objected to the trial court's lack of ruling.

It is therefore unsurprising that neither the intermediate Texas appellate court nor the Texas Supreme Court addressed the merits of Paul's objections. "When 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, (1987) (quoting *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n.3 (1983)). Paul has not done so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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