No. ____________

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Officials at a Texas jail admitted a nine-person film crew led by actor and professional insult comic Jeff Ross to the high-security areas of their facility for the purpose of interviewing inmates. Ross interviewed Petitioner, who was awaiting trial after being indicted on a high-profile capital murder charge. Petitioner's counsel were not advised of the interview, despite having previously sent the Sheriff a "no contact" letter instructing him to give no one access to Petitioner without their consent. The filmed interview, which included numerous vulgar provocations by Ross and damaging responses from Petitioner, was later introduced against Petitioner at the penalty phase of his trial, and he was sentenced to death.

The Court of Criminal Appeals of Texas (TCCA) found no violation of Petitioner's Sixth Amendment right to counsel. Under its decisions, absent some explicit agreement between the State and Ross for Ross to gather evidence against Petitioner, Ross was not a "State agent" and thus the protections of the Sixth Amendment were not triggered. In the TCCA's view, the Sixth Amendment's guarantees were not implicated by the affirmative steps State officials took to grant Ross special access to Petitioner and their failure to notify Petitioner's counsel of the planned filming even though they had received a "no contact" letter requiring counsel's approval for any communication with Petitioner.

The question presented is:

Did the TCCA err in holding that the State upheld its "affirmative obligation to not act in a manner that circumvents the [Sixth Amendment] protections afforded the accused," *Maine v. Moulton*, 474 U.S. 159, 176 (1985), when, without notice to Petitioner's counsel and despite a "no contact" letter barring uncounseled access to Petitioner, the State gave a third-party civilian otherwise unobtainable physical access to Petitioner and then used the statements that civilian elicited from Petitioner as evidence against Petitioner at the penalty phase of his capital murder trial?

LIST OF DIRECTLY RELATED PROCEEDINGS

State of Texas v. Gabriel Paul Hall, Cause No. 11-06185-CRF-272 (272nd Dist. Ct., Brazos Co., Texas); judgment entered Oct. 7, 2015.

Gabriel Paul Hall v. State of Texas, No. AP-77,062 (Court of Criminal Appeals of Texas); judgment entered Dec. 8, 2021; rehearing denied March 30, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Gabriel Paul Hall petitions this Court to issue a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas (TCCA) in his case.

OPINIONS AND ORDERS BELOW

The TCCA's published decision affirming Petitioner's conviction and death sentence on direct appeal, *Hall v. State*, ___ S.W.3d ___, 2021 WL 5823345 (Tex. Crim. App. 2021), appears in the Petition Appendix at pages 1a-28a.

JURISDICTION

The TCCA entered judgment on December 8, 2021. *See* Petition Appendix at 1a. It denied a timely motion for rehearing on March 30, 2022. *Id*. at 29a. On June 16, 2022, Justice Alito extended the time for filing this Petition to July 28; on July 20, he further extended the time for filing to August 27. *See Hall v. Texas*, No. 21A822 (U.S. Jul. 20, 2022). This petition is timely pursuant to Supreme Court Rules 13.3 and 30.1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defense." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "[no] State shall … deprive any person of life, liberty, or property without due process of law...." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Convicted of capital murder and sentenced to death in Texas, Petitioner seeks review of the TCCA's decision affirming that judgment. The question presented arises from the State's introduction of certain video evidence at Petitioner's sentencing hearing. That evidence was obtained prior to trial, after Petitioner had been indicted and without notice to his counsel, when State officials gave professional actor and insult comic Jeff Ross[1] special access to their detention facility to interview inmates, including Petitioner, on camera.[2]

Ross interviewed Petitioner inside the high-security dorm at the Brazos County (Texas) Detention Center ("Brazos County Jail"), where Petitioner was incarcerated from October 2011 until after his trial ended in October 2015. The events surrounding the video recording took place prior to trial, in early 2015.

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[1] Ross rose to prominence in the "comedy roast" format, which places a premium on the host's ability to deliver "outrageous" jabs that provoke a subject into responding. He has been described as "the new millennium Don Rickles." *See Jeff Ross*, Wikipedia (last visited August 29, 2022), https://en.wikipedia.org/wiki/Jeff_Ross.

[2] Petitioner was arrested and jailed in October 2011, was appointed counsel in November 2011, and was indicted for capital murder in December 2011. CR 1:21-22, 28. The day they were appointed, Petitioner's trial counsel sent the Brazos County Sheriff a "no contact" letter advising that any "future communication" with Petitioner, including any contact "via phone, writing, or in person," would require counsel's express and advance written approval. 1 CR 21; 114 RR, Defendant's Pretrial Exhibit No. 12; 65 RR 65.

A. Brazos County officials solicited Comedy Central to film inside their detention facility, and when selected for the program, actively encouraged inmates to take part.

In response to outreach from the Comedy Central cable TV network, the Brazos County Jail applied to have a program starring Ross filmed inside the jail for later broadcast. 65 RR 36-37. [3]

The program would include both a performance by Ross before an inmate audience and footage of inmates interacting informally with him beforehand. The agreement to allow filming inside the jail was finalized on February 16, 2015. 10 CR 2380-2389. Brazos County agreed to allow inmates attend the live show, to transport for that purpose the number of inmates requested by Comedy Central, and to secure releases from anyone whose image might be filmed. 10 CR 2352.

Prior to the Comedy Central crew's arrival at the jail, Brazos County Sheriff's Department employees encouraged inmate participation by posting flyers throughout the jail with Ross's personal greeting to inmates. 65 RR 38, 56. Petition Appendix at 38a. The posters announced that Ross's performance in the jail would be taped and broadcast on Comedy Central and solicited on-camera interviews. 65 RR 65; 114 RR 142. Interested inmates were required to "sign up" by executing a release drafted by

[3] We cite to the transcribed testimony from Petitioner's trial as "RR" ("Reporter's Record") and to the motions, court orders, and other documents filed with the trial court clerk as "CR" ("Clerk's Record"). *See* Tex. R. App. Proc. 34 and notes and commentary (defining "Clerk's Record" and "Reporter's Record"). In each instance, the citation form is as follows: [volume number] RR/CR [pages]. We cite Petitioner's appellate brief in the TCCA as "AB," with page number.

Comedy Central's attorneys. 65 RR 38, 43.[4]

B. Given free run of the facility and supervised by jail staff, Comedy Central filmed Jeff Ross's interview with Petitioner as jail staff stood by watching.

For three days in late February 2015, the Sheriff's Department gave Comedy Central's nine-person film crew (including Ross, the principal producer, and several camera and sound operators), essentially unfettered access to all areas of the jail. 65 RR 56-57, 78-79, 94-95. "[T]he whole time" they were in the jail (February 26-28), they were escorted, and their actions monitored, by Officer Courtney Waller. 65 RR 41, 78-79, 95.

Early sign-ups fell short of Comedy Central's expectations. Upon his arrival Ross worked to recruit more participants, assisted by jail employees who provided the necessary forms and let Ross "mingle" with inmates to overcome their reluctance to attend and participate in the show. 65 RR 80-81, 102-107.

During the first two days of their visit, the Comedy Central crew filmed Ross talking with inmates in each of the jail's dorms. 65 RR 94-95. Sheriff's Department employees closely supervised all those interactions. They did not caution any inmates, including those whose Sixth Amendment rights had attached, about their rights or any potential adverse legal consequences of participating. 65 RR 43-44, 84, 90-91. Nor were the attorneys for any inmates, like Petitioner's, notified about the interviews.

The first day Ross and his film crew were allowed inside the jail, they headed

[4] The document did not release Brazos County or its agents from liability and said nothing about whether inmates should consult their counsel about participating. *See* 102 RR (State's MTS Exh. 3).

straight to the wing of the jail where Petitioner was housed. 65 RR 94. Comedy Central video footage shows Ross entering the high-security dorm and walking directly to a table where Petitioner was already seated with two other inmates. 102 RR (State's MTS Exh. 5).[5] Other inmates loitered close at hand, listening in. *Id*. As Ross sat down, the camera operator moved from behind him to take up a position directly facing Petitioner. *Id*. For most of the next 17 and a half minutes, Petitioner is centered in the frame of the recording, with the camera repeatedly zooming in on him, as he conversed with Ross.[6]

We describe the content of the recording as admitted at Petitioner's sentencing hearing below. *See infra*.

C. As soon as Ross completed his interview with Petitioner, State officials panicked about having facilitated it.

"[W]ithin … minutes" after Ross finished filming his interview with Petitioner, Officer Waller reported Petitioner's involvement to the jail supervisor. 65 RR 46, 88-89. The supervisor "was immediately uncomfortable" with the news, telling the film crew that they could not use any footage of Petitioner and needed to maintain a copy. 65 RR 46. In the following days, the supervisor spoke and emailed with producers for Comedy Central, demanding a copy of the footage and requesting that it not be used "in any … manner" due to the "high-profile" nature of Petitioner's case, warning that

[5] The video transcript identified one of the pair as "McQueen;" the second inmate is unidentified.

[6] The entire recording is 17 minutes, 42 seconds long. Petitioner is the exclusive focus of the shot for about 31 percent of the total run time and is on camera alongside others for another 44 percent of the total run time. He is off camera altogether for only about 25 percent of the total run time. The camera zooms in on Petitioner fourteen times during the 17-minute recording for a cumulative total of 300 seconds, or five minutes.

doing so "could have an adverse impact on the criminal proceedings." 101 RR 91 (State's MTS Exh. 4). The Brazos County District Attorney eventually subpoenaed a copy of the video from Comedy Central, and then provided it to Petitioner's counsel, advising them that the State intended to offer it at punishment.[7]

HOW THE ISSUES WERE RAISED AND DECIDED BELOW

A. Prior to trial, Petitioner unsuccessfully moved to suppress the Comedy Central video on Sixth Amendment grounds.

Prior to trial, Petitioner moved to suppress all evidence derived from the Comedy Central filming as obtained in violation of his Sixth Amendment right to counsel.[8] At the motions hearing, Petitioner's counsel stressed that the Sixth Amendment was violated because State officials' failure to notify counsel concerning the presence and intentions of the film crew inside the jail had foreclosed Petitioner from obtaining counsel's advice about whether to participate. 65 RR 7-8. Petitioner's counsel argued that significant evidence indicated that the State was fully aware of the risk that Petitioner would make incriminating statements in his filmed interactions with Ross. AB 47; 9 CR 2112. Petitioner's counsel pointed out that jail officers monitored the interviews and filming as they unfolded and chose not to intervene despite being on notice via a "no-contact letter" that no one should seek to

[7] Ross ultimately performed two shows for (male) inmate audiences at the Brazos County Jail on February 28, 2015. 65 RR 63. After the video at issue was filmed and before the shows took place, jail officials revoked Petitioner's permission to attend, concluding that his presence would not be in "[a]nyone's best interest," given the "high-profile" nature of his case. 65 RR 44, 46, 54, 64. Those officials had voiced no such concerns about the "high-profile" nature of Petitioner's case two days earlier when they welcomed Ross and his film crew into the high-security dorm where Petitioner was housed.

[8] *See* 9 CR 2107-2115; *see also* 10 CR 2331-2356.

approach Petitioner except through his lawyers. 65 RR 20. Such actions, Petitioner's counsel argued, amounted to an attempt by the State to "exploit" the situation by obtaining and then admitting the damaging evidence against Petitioner. *Id.*

Ultimately, the trial court entered an order denying Petitioner's motions to suppress. Its only specific finding was that the Sheriff's Department had turned over the footage to the local prosecutor to keep any dispute over the propriety of the filming from "disrupting … and delaying the trial," and "not for the purposes of gathering evidence." *See* 71 RR 254.

B. At trial, the Comedy Central video formed an important part of the prosecution's case for the death penalty.

The Comedy Central video was important to the State's case for death at trial. A summary of the evidence helps show why.

Acting alone, Petitioner invaded the College Station, Texas, home of Ed and Linda Shaar, an elderly couple with serious physical disabilities, on the evening of October 20, 2011, the day before Mr. Shaar's 69th birthday. 78 RR 102, 105, 109. Mr. Shaar was a 31-year Navy veteran and suffered from Parkinson's disease; his wife was "wheelchair bound," having lost a leg to illness. 78 RR 102-04, 79 RR 21, 80 RR 171-172. The physical evidence and Mrs. Shaar's testimony showed that Petitioner entered the home's garage and attacked Mr. Shaar, and that a violent and bloody struggle followed, ending in the den. 79 RR 180-185. Mr. Shaar was brutally assaulted—scraped, bruised, repeatedly stabbed, and cut, 79 RR 167-76—and ultimately died from a gunshot to the head at very close range, likely inflicted as he lay on the floor. 79 RR 158-159, 186. At some point, Petitioner entered the kitchen

and assaulted Mrs. Shaar with a knife. 80 RR 179. Although grievously injured, she survived and was able to provide a partial description of the assailant, which led to Petitioner's being identified as a suspect.

The following afternoon, Petitioner went voluntarily to the local police department. There, he was questioned and ultimately confessed to the attack on the Shaars. Petitioner did not know, and had no connection to, the victims. 79 RR 92; 79 RR 96. He simply saw their house as being the right location. 79 RR 92, 97. He planned for months, including time spent watching the Shaars' comings and goings. 79 RR 97, 114. He brought his weapons with him. 79 RR 97. Based on Petitioner's account, the investigating detective described the crime as totally random and lacking any motive. 79 RR 96. According to police, Petitioner expressed no disgust with his actions; he stared blankly and seemed happy to explain what he had done. 79 RR 98-100. After he confessed, Petitioner was arrested. Further investigation led police to the weapons used in the crime and the clothing Petitioner had worn, corroborating his confession. 79 RR 208-220.

Although it was evident that Petitioner was guilty of a terrible crime, the State's case for death was not open-and-shut. At the time of the offenses, Petitioner was a slightly-built eighteen-year-old with no history of violence or criminal record. If he were spared, he would spend the rest of his natural life in a maximum-security prison, and no strong evidence indicated he would pose a danger there. While the State presented evidence that a homemade weapon was discovered in Petitioner's cell prior to trial, several jail guards testified for the defense that Petitioner kept to

himself, followed orders, and caused no trouble; none of them said that the weapon changed their opinions about Petitioner's compliant behavior, and one even suggested that Petitioner might have possessed it because he feared other inmates. *See* 91 RR 80. Jail authorities did not treat the incident as warranting any dramatic increase in Petitioner's security level, *see* 92 RR 187, and a former Texas prison administrator predicted Petitioner would be easily controlled in prison. *See* AB 22-23.[9]

Moreover, the jury heard detailed accounts of Petitioner's desperately impoverished childhood in a squalid Philippine slum, followed by adolescence in the United States as one of numerous children adopted into a home marked by dramatic verbal and physical abuse at the hands of his adoptive parents. *See* AB 12-17 (describing testimony about Petitioner's upbringing in the Philippines), AB 17-18 (same, regarding the mistreatment Petitioner suffered after coming to America). The jury also heard extensive expert testimony that Petitioner suffered from organic brain damage and developmental trauma (scoring "off the charts" for anxiety and PTSD, 93 RR 228). *Id*. at 19-21.

Against this evidentiary background, the Comedy Central video assumed special importance, because the State could present it as providing special insight into Petitioner's state of mind about the crime four years after the fact, i.e., whether he was reflective and remorseful. *See* 100 RR 125-27 (prosecutor's closing argument

[9] Notably, the State's mental health expert who evaluated Petitioner did *not* diagnose him as suffering from psychopathy or anti-social personality disorder, conditions which would have substantially increased the prospects of his future dangerousness in prison. *See* 99 RR 71.

at punishment). Framed as such, the video was highly prejudicial to the defense.[10] While the video can only be fully appreciated by watching it,[11] a few excerpts from the transcript make clear how damaging its curated portrayal of Petitioner was.

Ross began by repeatedly directing questions and statements to Petitioner about his case. At the very outset of the conversation, after learning that Petitioner has spent four years in jail awaiting trial, Ross said, "You must've done something crazy … [o]r they think you did something crazy." State's MTS Exh. 5 at 2 (ln. 61, 67).

Ross repeatedly made critical references to (what he interprets as) Petitioner's demeanor. *See* State's MTS Exh. 5 at 2 (ln. 73) (mocking Petitioner's haircut); *Id.* at 4 (ln. 155) ("You ever laugh?"); *id.* (ln. 163) ("Are you having fun?"); *id.* at 6 (ln. 248) ("You always this intense, dude?"); *id.* at 11 (ln. 478) ("You haven't laughed since fucking God knows when. Look at you"); *id.* (ln. 495) ("You seem very fucking Zen right now"); *id.* at 23 (ln. 1016) ("Dude, ya gotta lighten up, dude, life's too long to be this serious"); *id.* (ln. 1056) (Petitioner "seems like fuckin' scary dude, I don't know what it is, man"). These interjections painted Petitioner as a humorless, "fuckin' scary

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[10] The video, of course, in no way represents Petitioner's innermost feelings. Instead, it shows a professional comic consciously working to provoke a response from an unwary subject—aggressively pushing Petitioner to make "outrageous" statements to which Ross offered "wild" or scandalous rejoinders—to maximize the video's commercial value as entertainment. Had Petitioner's trial counsel been alerted that the jail intended to give Ross access to Petitioner, this is precisely the kind of advice they could have provided him about the risks involved in talking to Ross.

[11] The trial court ordered redactions that shortened the video to 8 minutes, 53 seconds, but failed to eliminate its extraordinarily prejudicial character. *See* text *infra*. The redacted video was admitted as State's Exh. 356. *See* 89 RR 45. The record does not contain a redacted transcript; our citations are to the transcript of the complete video, which was admitted during the pretrial suppression hearing as State's MTS Exh. 5 (*see* 102 RR).

dude" and set him apart from the other, livelier inmates who were able and willing to "lighten up" and trade jokes with Ross.[12]

Beyond mocking Petitioner's appearance, several of Ross's comments gestured critically at Petitioner's ethnic (Asian) heritage. At one point Ross suggested the nickname "Slim Sushi" for Petitioner, and at another demanded to know whether Petitioner is "Harold or Kumar," adding, "I can't remember." *See* State's MTS Exh. 5 at 6 (ln. 272). Ross also referenced Eastern religion (Buddhism) in describing Petitioner as seeming "very fucking Zen right now." *Id.* at 11 (ln. 495). Petitioner's game attempts to play along (*e.g.*, *id.* at 7 (ln. 274)) cannot disguise the fact that Ross's belittling comments directed attention to Petitioner's ethnic background in a negative way, implicitly inviting jurors to do likewise.[13]

Some statements on the video lack context, but nevertheless do not present Petitioner in a favorable light, if only because he comes off as a self-centered oddball. For example, there are two opaque and confusing references to Petitioner's not wanting or liking to be touched. State's MTS Exh. 5 at 23 (ln. 1018, 1020, 1022); *see also id.* at 12-13 (ln. 551, 553, 557). Petitioner made a couple of weird comments

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[12] Ironically, when Ross eventually succeeded in drawing Petitioner into the conversation, the State pointed at Petitioner's participation to pillory him as someone who could "brutally murder and attack people and then joke about that in any context." 71 RR 257.

[13] The "Harold or Kumar?" remark references a series of "American stoner comedy films" that follow the misadventures of two Asian-Americans, hard-working Harold (John Cho) and his feckless slacker friend Kumar (Kal Penn). *See Harold and Kumar,* Wikipedia (last visited Aug. 29, 2022), https://en.wikipedia.org/wiki/Harold_%26_Kumar. The films largely avoid anti-Asian stereotypes, but in commenting that he "c[ouldn't] remember" whether Petitioner was "Harold or Kumar," Ross evoked the racist trope that to white people all Asians look alike. The risk that jurors heard Ross's remarks as an invitation to indulge anti-Asian prejudice is greater because two other State's witnesses attributed similarly borderline-racist nicknames to Petitioner ("Bamboo Wooly" and "Chopsticks"). *See* 82 RR 238, 85 RR 20.

referencing his own Asian heritage. *Id*. at 25 (ln. 1130) (describing himself as a "yellowneck" after another inmate calls him "a yellow man with a redneck [sic]"); *id*. at 25 (ln. 1105-1114) (describing how he was called "the Asian with the cowboy hat" for wearing a Western getup to high school on Fridays). At one point, Petitioner focused on the presence of a blonde woman in Ross's entourage and several times asked Ross to "get her over here," adding, "tell us some blond jokes." *Id*. at 4 (ln. 173, 177, 181). Another time, Petitioner responded to Ross's implicit encouragement to perform for the camera; asked by Ross to name his favorite comedian, Petitioner responded, "Myself." State's MTS Exh. 5 at 12 (ln. 519-527).

The video also includes hostile and dehumanizing statements about inmates and confinement generally. For example, in the very last exchange on the video, after asking the inmates to raise their hands to signify whether they were innocent or guilty, Ross barked, "How many [of you] guys have lied so much they don't know the difference [any]more?" State's MTS Exh. 5 at 26 (ln. 1168). Ross elicited from Petitioner the comment that "the boredom" is "the worst part about being here [in jail] for so long." *Id*. at 7 (ln. 286, 290). Ross also described incarceration as "like being [in] summer camp," since the inmates "get to hang out," "have some laughs [and] [t]alk about pussy." *Id*. at 7 (ln. 295, 299). Another inmate bolstered this description, commenting that he copes with solitary confinement by being "heavily medicated" (to which Petitioner responds, "Yeah")," which lets him spend most of the time "asleep [and] dreaming" of favorite free-world pastimes like fishing and sex. *Id*. at 8 (ln. 329, 339-340). This portrayal of prison as "like … summer camp" both traded on popular

misconceptions about prison and played directly into the prosecutors' later argument that giving Petitioner a life sentence was the equivalent of imposing no punishment at all. *See* 100 RR 119.

Finally, on two different occasions Petitioner made statements in response to Ross's encouragement that made him seem especially cold. First, when Ross brought up the subject of the death penalty in Texas, seemingly criticizing the state for being too aggressive ("This is a scary state"), Petitioner agreed: "Well … they'll basically screw you over, over the most … ah, petty shit." State's MTS Exh. 5 at 9 (ln. 381, 393-98). Later, Ross pressed Petitioner for details about his case, and Petitioner jokily tried to play along, to damaging effect:

> Ross: Yeah. What are you in here for?
>
> Petitioner: Ah …
>
> Ross: Hacking somebody's computer?
>
> Petitioner: Something like that, yes.
>
> [Another inmate]: Tax evasion.
>
> [Another inmate]: Hacking being the, hacking being the operative word.
>
> Petitioner: Yeah. Yeah, used a machete on someone['s] screen, so.
>
> Ross: What's that?
>
> Petitioner: Used a machete on someone, someone's screen, so.
>
> Ross: Oh boy, Jesus.
>
> Petitioner: Yep. Stole a lot …
>
> Ross: He seems like a fuckin' scary dude, I don't know what it is, man.

[Another inmate]: He is.

Petitioner: Oh come on, I wouldn't hurt a fly.

Ross: What's that?

Petitioner: I wouldn't hurt a fly.

Ross: Really, what about a human?

Petitioner: Ah, they're annoying.

Id. at 23-24 (ln. 1034-1070).

Despite the barrage of abuse directed at Petitioner in the video, and the negative impression of him that emerges from much of the conversation, the jury deliberated for more than seven hours before returning its death verdict. 100 RR 127, 131.

C. Petitioner's Sixth Amendment challenge was rejected on appeal.

Petitioner argued on appeal that his Sixth Amendment right to counsel was violated when the State arranged for Ross to interview him on camera, without providing notice to his attorneys, and then used his statements against him at punishment. AB 29-64. Petitioner asserted that at the time of the interview, his Sixth Amendment right to counsel had both attached and been invoked by defense counsel's "no contact" letter respecting Petitioner. AB 50. Given those circumstances, he maintained, the State had unique affirmative obligations to Petitioner that it did not have with respect to other inmates in the jail whose Sixth Amendment rights had not attached or who had not similarly placed the jail on notice that they wished to be contacted solely through their lawyers. Moreover, Petitioner pointed out, jail personnel stood close by during the interview and monitored Ross's conversation with Petitioner. AB 55-56; *see also* 65 RR 43-44, 84, 90-91. Under these circumstances, Petitioner argued, the State entirely failed to comply with its "affirmative obligation to respect and preserve [Petitioner's]'s choice to seek [counsel's] assistance." AB 64 (quoting *Maine v. Moulton*, 474 U.S. 159, 171 (1985)).

The Texas Court of Criminal Appeals found no Sixth Amendment violation. It acknowledged that neither it nor this Court has defined precisely when a person becomes a State agent for Sixth Amendment purposes. *Hall*, -- S.W.3d --, 2021 WL 5823345 at *6. Nonetheless, it noted that it had previously "surveyed the approaches of various jurisdictions" and discerned "at least one common principle," namely, to qualify as a "government agent," one must at a minimum "have some sort of

agreement with, or act under instructions from, a government official." *Id.* (citing and quoting *Manns v. State*, 122 S.W.3d 171, 183-84 (Tex. Crim. App. 2003) (internal quotation marks omitted)). As noted, the trial court had concluded that no agreement for Ross to "gather evidence" existed between the State and Ross before the interview. Finding that determination to be supported by the record, the TCCA concluded accordingly that under *Manns* "Ross was not an agent of the State when he spoke with Appellant," and rejected Hall's Sixth Amendment complaint on that basis. *Id.* at *7.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Review to Determine Whether the Texas Court of Criminal Appeals' Requirement of an Express Agreement to Gather Evidence Between the Government and Non-Law Enforcement Personnel to Establish Agency is Inconsistent with This Court Sixth Amendment Precedent.

Once formal adversarial proceedings have been initiated, "a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *Patterson v. Illinois*, 487 U.S. 285, 290, n.3 (1988). In a line of decisions dating back nearly 60 years, this Court has consistently held that once the Sixth Amendment right to counsel has attached, prosecutors and law enforcement have an affirmative obligation not to act in a manner that circumvents the protection afforded by that right.[14] Equally important, this Court has recognized that the State need not even engineer the circumstances that lead to the violation of the right to

[14] *See Montejo v. Louisiana*, 556 U.S. 778 (2009); *Kansas v. Ventris*, 556 U.S. 586 (2009); *Patterson v. Illinois*, 447 U.S. 285 (1988); *United States v. Henry*, 447 U.S. 264 (1980); *Massiah v. United States*, 377 U.S. 201 (1964).

counsel to be held accountable for it; thus, the "[k]nowing 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." *Maine v. Moulton*, 474 U.S. 159, 176 (1985).

In this case, Petitioner maintains, that is precisely what happened: The State knowingly exploited an opportunity to confront him without counsel by arranging for Comedy Central comedian Jeff Ross to interview him on camera without providing notice to his attorneys, subpoenaing the videotape, and using his recorded statements against him to obtain a death sentence at the penalty phase.

In rejecting this point of error below, the Texas Court of Criminal Appeals acknowledged that this Court has never defined precisely when a person becomes a State agent for Sixth Amendment purposes. *Hall*, 2021 WL 5823345 at *6. However, the TCCA observed that it had "previously surveyed the approaches of various jurisdictions in making that determination," and had then "discerned '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*. (quoting *Manns*, 122 S.W.3d at 183-84). Finding that the record supported the trial court's determination "that there was no 'agreement between the State and Jeff Ross' for Ross 'to gather evidence," the TCCA concluded that this finding foreclosed any Sixth Amendment claim. *See id*.

This Court should grant review to make clear that the TCCA's rule—that an "express agreement to gather evidence" is necessary to establish agency for Sixth Amendment right-to-counsel purposes—runs contrary to both this Court's precedents and the weight of authority in the lower federal courts. The TCCA's claim that such an "express agreement" is required further disregards this Court's precedent in *Estelle v. Smith*[15] and its progeny, in which this Court has recognized that the Sixth Amendment right to counsel can be violated even where there was no relationship whatsoever between the State and the third-party witness.

Petitioner's case presents an excellent vehicle for addressing this important, recurring, and undecided Sixth Amendment question. Petitioner properly presented his constitutional challenge both in the trial court and on direct appeal, and the facts of this case present a straightforward and harmful violation of Petitioner's Sixth Amendment right to counsel. In light of the evidence presented at trial and the surrounding circumstances, the State cannot show that the admission of the video evidence was harmless beyond a reasonable doubt, and the outcome of the case therefore turns on this Court's resolution of the question presented. For the reasons explained in detail below, Petitioner respectfully requests that certiorari be granted.

[15] 451 U.S. 454 (1981).

A. The TCCA's claim that an "express agreement to gather evidence" is necessary to establish agency for purposes of a Sixth Amendment violation under *Massiah* is contrary to this Court's decision in *United States v. Henry* and the weight of authority in the lower federal courts applying *Henry*.

The TCCA's assertion that an "express agreement to gather evidence" is necessary to establish agency for Sixth Amendment right-to-counsel purposes is contrary to both this Court's precedents and the weight of authority in the lower federal courts.

In *United States v. Henry*, for example, this Court found a *Massiah* violation even where the State had specifically instructed its informant "*not* to initiate any conversation with or question [a defendant] regarding the [offense]." 447 U.S. 264, 266 (1980) (emphasis supplied). Rather than impose a rigid test, this Court said that a "combination of circumstances was sufficient to support" a finding of agency in that case. *Henry*, 447 U.S. at 271. The Court reasoned that, notwithstanding the absence of any agreement to gather evidence, the government was presumed to have known that placing an informant in a cell with pretrial detainee would lead to the informant taking affirmative steps to create incriminating evidence even without direction. *Id.* at 271.

A majority of lower federal courts—specifically, the Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits—have followed *Henry* and rejected the notion that an express agreement to gather evidence is necessary to establish agency for

Sixth Amendment purposes.[16] These courts have recognized that while direct written or oral instructions by the State to a jailhouse informant or private citizen to obtain evidence from a defendant "would be sufficient to demonstrate agency, it is not the only relevant factor." *Ayers v. Hudson*, 623 F.3d 301, 311 (6th Cir. 2010). "[I]t is not the government's intent or overt acts that are important; rather, it is the 'likely result' of the government's acts." *Randolph v. California*, 380 F.3d 1133, 1144 (9th Cir. 2004) (quoting *Henry*, 447 U.S. at 271). "To hold otherwise would allow the State to accomplish 'with a wink and a nod' what it cannot do overtly." *Ayers*, 623 F.3d at 312.

In holding that the right to counsel is not implicated absent an "express agreement to gather evidence," the TCCA has created a test that makes the government's intent an essential element of such a Sixth Amendment violation. In so doing, it has erased from the law this Court's statement that "[k]nowing exploitation … of an opportunity to confront the accused without counsel being present" breaches the State's duty "not to circumvent the right to the assistance of counsel" just as much as intentionally creating such an opportunity. *Moulton*, 474

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[16] *See, e.g., United States v. Brink,* 39 F.3d 419, 421-23 (3d Cir. 1994) (placing informant in a cell with defendant was evidence of government's "tacit agreement" with informant to obtain information, even though informant denied receiving any promises or rewards for the information); *Thomas v. Cox*, 708 F.2d 132, 136 (4th Cir. 1983) ("The point at which agency—hence proper attribution—for this purpose arises out of a government-citizen relationship is not subject to any bright-line test."); *Ayers v. Hudson*, 623 F.3d 301, 310-12 (6th Cir. 2010) ("agency in the *Massiah* context [is not limited] to cases where the State gave the informant instructions to obtain evidence from a defendant."); *Randolph v. California*, 380 F.3d 1133, 1144 (9th Cir. 2004) (rejecting the suggestion that an "explicit agreement" is necessary to establish agency for Sixth Amendment purposes); *United States v. Taylor*, 800 F.2d 1012, 1015 (10th Cir. 1986) (no "bright line test for determining whether an individual is a Government agent for purposes of the Sixth Amendment"); *Depree v. Thomas*, 946 F.2d 784, 793-94 (11th Cir. 1991) ("There is, by necessity, no bright-line rule" for determining whether the law should treat an individual as a government agent; the answer "depends on the 'facts and circumstances' of each case").

U.S. at 176. The TCCA's approach conflicts with this Court's precedent and the majority view in the lower federal courts.

B. The TCCA's claim that an "express agreement to gather evidence" is necessary to establish agency for purposes of a Sixth Amendment violation is impossible to reconcile with *Estelle v. Smith* and its progeny, where this Court has found Sixth Amendment violations even in the absence of any relationship whatsoever between the State and its eventual third-party witness.

Further, while the inmate-informant scenario may be the most common situation where third-party questioning of a charged criminal defendant may implicate the Sixth Amendment, it is not the only one, as illustrated by the line of this Court's jurisprudence beginning with *Estelle v. Smith*, 451 U.S. 454 (1981).[17] These decisions address punishment-phase "future dangerousness" testimony from mental health experts who conducted court-ordered pretrial psychiatric evaluations of in-custody capital defendants without notice to defense counsel of the scope of the evaluation. In this context, this Court has held that where defense counsel lacks notice of the fact or scope of the interview, and the State thereafter uses its fruits at punishment, the Sixth Amendment is violated.[18] According to this Court, the State's use of evidence created in this manner to prove the "crucial issue" of future dangerousness at the punishment phase renders the third party who obtained the statements "essentially … an agent of the State" for Sixth Amendment purposes. *Estelle*, 451 U.S. at 467.

[17] *See also Powell v. Texas*, 492 U.S. 680 (1989); *Satterwhite v. Texas*, 486 U.S. 249 (1988).

[18] *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).

Noticeably absent in the *Estelle/Powell/Satterwhite* line of cases is the existence of *any* agreement between the State and the mental health expert, or any indication that the third party was "acting under instructions from" the State in obtaining the information that was ultimately used to secure a death verdict. *See id.* But as this Court made clear, if and when the State uses evidence developed in this manner "at the penalty phase on the crucial issue of [a defendant]'s future dangerousness," the formerly independent third party who obtained the statements must be treated as "essentially … an agent of the State" for Sixth Amendment purposes. *Estelle*, 451 U.S. at 467.

The statements in the case at bar were obtained in a way that closely resembles the Sixth Amendment violations in the *Estelle/Powell/Satterwhite* cases. The State gave a third-party civilian (Ross) physical access to Petitioner which Ross could only obtain with the State's direct involvement. It did so without notice to Petitioner's attorneys, and then used Petitioner's resulting statements against him at punishment. Depriving Petitioner of counsel's assistance in *deciding whether* to participate in the interview with Ross, particularly after Petitioner had invoked that right with regard to *all* forms of communication facilitated by jail officials via the "no contact" letter, is the central Sixth Amendment violation here.

The TCCA's conclusion that "an express agreement to gather evidence" is necessary to implicate the Sixth Amendment right to counsel directly conflicts with this Court's reasoning in finding Sixth Amendment violations in *Estelle*, *Powell*, and *Satterwhite*, none of which involved any agreement between the State and the expert

to "gather incriminating evidence" from the defendant, express or otherwise. Indeed, 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 psychiatrist was called by the State at punishment did he become "essentially like … an agent of the State").

Here, as in *Estelle*, the Sixth Amendment was violated by the lack of prior notice to defense counsel, which in turn deprived Petitioner of "the assistance of his attorneys in making the significant decision of whether to submit to [Ross's interview] and to what end [his statements] could be employed." *Estelle*, 451 U.S. at 471. As in *Estelle*, the State here provided a third-party exclusive access to an incarcerated defendant whose Sixth Amendment right to counsel had attached, while simultaneously failing to give notice to defense counsel of the fact or scope of the interview, and then used the defendant's own statements from the interview to carry its burden of proof on the issue of future dangerousness at punishment. These circumstances made Ross "essentially … an agent of the State." *Id*. at 467.

II. This Case Presents an Ideal Vehicle for Addressing this Important Constitutional Question.

Petitioner's case presents an excellent vehicle for addressing this important, recurring, and undecided Sixth Amendment question, for several reasons.

First, Petitioner properly presented his constitutional challenge both in the trial court and on direct appeal. *See* AB 46-48 (detailing the arguments and objections made by Petitioner's trial counsel to preserve the issue for further review); *see also generally* Petition Appendix at 13a-18a (showing that the TCCA addressed Petitioner's Sixth Amendment challenge squarely and exclusively on the merits).[19] Thus, no procedural hurdles will interfere with the Court's ability to reach and decide the Sixth Amendment issue. And this case arises on direct review, rather than from federal habeas proceedings, so the question may be confronted directly rather than via the intricacies of AEDPA.

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[19] In fact, trial counsel objected specifically to numerous problematic aspects of the video, citing particular comments that remained even in the redacted version. *See generally* 87 RR 11-31. Many of those objections related to features of the redacted video Petitioner challenged in his appeal to the CCA. *See*, *e.g.*, 87 RR 16 (specifically objecting to Ross's mocking reference to "Harold and Kumar"); *id*. at 17 (specifically objecting to the comment that inmates are locked up for "petty shit"); *id*. at 19-20 (objecting to Ross's needling Petitioner for lacking a sense of humor); *id*. at 21 (same, re: Ross's remark to Petitioner, "You seem very fucking Zen right now"); *id*. at 21-22 (commenting on the racial implications of Petitioner's attempted joke about "yellow fever"); *id*. at 26 (objecting to Ross's remarks to Petitioner that he has "gotta lighten up" and not be "this serious"); *id*. at 27 (objecting to Ross's question to Petitioner, "What are you in here for?" and Petitioner's response, noting that the "computer hacking" reference could remind jurors of a then-recent crime by Chinese computer hackers); *id*. at 28 (objecting to Ross's comment that Petitioner "seems like [a] fuckin' scary dude"); *id*. at 29 (mentioning the "implication of racism" involved in describing how Petitioner dressed in cowboy attire); *id*. (noting that Ross throughout the video was "trying to provoke people by saying outrageous things"). And after this lengthy colloquy, trial counsel *also* lodged a broad objection to the redacted video as a whole, citing the relevant constitutional protections. *See* 87 RR 37-38. At that point, the trial court granted a running objection to make it unnecessary for defense counsel, in their words, to "stand up with every syllable that's on this videotape." *Id*. at 38.

Second, the facts of this case present a clear and harmful violation of Petitioner's Sixth Amendment right to counsel. At the time of the Comedy Central interview, Petitioner's Sixth Amendment right to counsel had not only attached, but had been *invoked* when defense counsel sent a "no contact" letter to the Brazos County jail with respect to any "future communication with [Petitioner]" on the part of Brazos County jail officials or its agents.[20] As a result, the State had unique affirmative obligations to Petitioner that it did not have with respect to other inmates in the jail who had not similarly placed the State on notice of their desire to interact with jail officials and their agents solely through their lawyers. Further, at the very outset of the nearly eighteen-minute interaction with Ross, Petitioner said: "Legally, I can't discuss [anything] about the case."[21] Even though a Brazos County jail employee accompanying Ross and his camera crew stood by during the entire interaction, the State made no effort whatsoever to uphold its "affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right." *Moulton*, 474 U.S. at 176.

Finally, the State cannot show that the violation of Petitioner's Sixth Amendment rights was harmless beyond a reasonable doubt, so the outcome of the case turns on the Court's resolution of the question presented. As this Court has made plain, *see Satterwhite v. Texas*, 486 U.S. 249 (1988), the harm issue is not whether sufficient evidence apart from the Comedy Central video supported the jury's

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[20] *See* 102 RR (Defendant's MTS Exh. 12 ["no contact letter"]) and 65 RR 65.

[21] 102 RR (State's MTS Exh. 5) at 1-2.

“future dangerousness” finding. Instead, the question is whether and to what extent the improperly obtained and admitted evidence *itself* likely figured in the jury’s decision.

And here, it unquestionably did. For one thing, the State placed great emphasis on the video of Ross’s interview with Petitioner, playing it for the jury *twice* at punishment – first during its case-in-chief, and again during closing argument. On the latter occasion, the State played the video and then repeatedly quoted Petitioner’s statements to argue that he was dangerous because “he doesn’t care,” and that nothing could be done to change him:

> PROSECUTOR: And we want to know what he feels about it in 2015 [when Petitioner was in the Brazos County jail]. We want to know that. I think as we’re talking to you in voir dire. You wanted to know: Is there somebody – can we change the person? That’s part of it. Is there something? Is there something? How does he feel about this in 2015?
>
> [plays Comedy Central videotape]
>
> *[“]They will screw you over the most petty shit.[”] Ed’s life is petty*. Linda lost her voice. That’s important here. That’s her life. Her life ended that day…. She can no longer sing. She no longer gets to go home. *He took everything from her; and when he is sitting there [in the Brazos County jail] four years later, his thought is: This is some petty stuff, guys*.

100 RR 125-27 (emphases supplied). Replaying the video during argument only amplified its impact.

Below, the State insisted that the Comedy Central video was harmless because Petitioner “confessed to planning and committing the offense,” the facts of which were undisputed. *See* State’s Brief at 62-63. But that view misapprehends the value of the video to the prosecution’s case for death. The video of Ross’s interview with Petitioner

was not used to establish the facts of the offense or Petitioner's responsibility for it, but instead to paint Petitioner as deserving of death. Notwithstanding the gravity of Petitioner's crimes, the jury spent *more than seven hours* deliberating whether to spare his life. 100 RR 37, 131. Given the extensive mitigating evidence, including specifically the jail officers' testimony that any threat of violence posed by Petitioner could be safely controlled in prison, the Comedy Central video very likely influenced the jury's determination that Petitioner posed an unacceptable and continuing threat to society.

Finally, the harmful aspects of the video were not limited to Petitioner's potential dangerousness, but likely also affected jurors' view of whether the extensive mitigation in Petitioner's background was sufficient to warrant withholding death. The video dehumanized Petitioner as a funny-looking, weird-acting foreigner; it contained comments mocking Petitioner's demeanor and appearance, and it included oblique but hostile or belittling reference to Petitioner's ethnic (Asian) heritage. And the video emphasized many false, unfair, and damaging stereotypes about inmates and prison (*e.g.*, that prison is "like … summer camp," a place inmates can "have some laughs [and] [t]alk about [sex]"). *See* AB 79-80. Each of these improper factors could easily have affected the jury's view of whether the circumstances of Petitioner's background justified leniency.

In particular, the jabs at Petitioner's ethnicity may well have liberated any juror who harbored latent prejudices against people of Asian descent to give play to those feelings in imposing sentence. As Chief Justice Roberts has rightly pointed out,

when jurors are allowed to treat a defendant's racial or ethnic background as "pertinent on the question of life or death," "the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record," because "[s]ome toxins can be deadly in small doses." *Buck v. Davis*, 137 S. Ct. 759, 777 (2017).

CONCLUSION

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

Respectfully submitted,

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