No. 16-435

In the Supreme Court of the United States

IOWA, PETITIONER

v.

JUSTIN ALEXANDER MARSHALL

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Iowa Supreme Court erred in holding that jailhouse informants who had cooperation agreements with the government and who sought information from respondent as a result of law-enforcement officers' inquiries were state agents for Sixth Amendment purposes.

2. Whether the Iowa Supreme Court erred in holding that a jailhouse informant had deliberately elicited incriminating information in violation of the Sixth Amendment by asking respondent to tell his side of the story and write his statement down.

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OPINIONS BELOW

The opinion of the Iowa Supreme Court (Pet. App. 1–121) is reported at 882 N.W.2d 68. The opinion of the Iowa Court of Appeals (Pet. App. 122–174) is unpublished, but available at 2015 WL 3613310. The Iowa District Court's oral ruling on respondent's mid-trial motion to suppress (Pet. App. 175–181) and its opinion denying respondent's post-trial motion for a new trial (Pet. App. 182–196) are unreported.

JURISDICTION

The judgment of the Iowa Supreme Court was entered on June 30, 2016, and the petition for a writ of certiorari was filed on September 27, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

Having failed to secure a conviction in an initial murder prosecution of its primary suspect, Pet. App. 3, and with "little direct scientific evidence" linking respondent Justin Marshall to the crime, *id.* at 80, the State of Iowa sought to buttress its case by deploying three jailhouse informants to secure incriminating statements from respondent after his Sixth Amendment right to counsel had attached.[1] The informants were all veterans of the criminal justice system who had testified in the past to receive

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[1] The State's three informants were Antonio Martin, Carl Johnson, Jr., and Earl Freeman. The district court admitted Freeman's testimony, see Pet. App. 180, and neither the Iowa Court of Appeals, see *id.* at 149, nor the Iowa Supreme Court, see *id.* at 69, overturned that ruling. This brief refers to Martin and Johnson, collectively, as "the informants."

sentence reductions and were eager to do so again to receive further reductions. Trial Tr. 1442–1444, 1458, 1487–1491. They sought out respondent, their neighbor and friend, *id.* at 1439, 1485, probed him for information about his case, and promptly provided it to the State. In using these informants to obtain evidence on its behalf, the State violated respondent's Sixth Amendment right to counsel, depriving him of a fair trial.

After a careful and thorough analysis of this Court's Sixth Amendment jurisprudence and case law from lower courts, the Iowa Supreme Court suppressed the testimony of one informant but held that the testimony of two others was admissible. Pet. App. 80–81. Far from relying exclusively on the existence of "a generic cooperation agreement" (Pet. 26), the Iowa Supreme Court cited a range of factors, including a detective's "admission that he *may have* asked [the informant]" for information about the murder, the detective's contemporaneous expectation that his instructions targeting respondent would "*probably*" be passed to one informant by another, a "remarkable" series of coincidences suggesting the State had surreptitiously facilitated the collection of information, and the informant's use of a "classic police interrogation technique" in interacting with respondent. Pet. App. 70–71, 74. Because the State has never attempted to assert in this litigation that any error on this point was harmless, the Iowa Supreme Court vacated respondent's conviction and remanded for a new trial. *Id.* at 81. That decision represents a straightforward application of this Court's precedents to the particular facts of this case

and conflicts with no decision of any federal court of appeals or state court of last resort. Further review is not warranted.

A. Factual Background

On October 8, 2009, John Versypt was shot and killed in the Broadway Condominiums complex in Iowa City. Pet. App. 2. Iowa City Police Detective Smithey was one of the officers assigned to the case. *Id.* at 2–3. After a four-month investigation, Iowa charged Charles Thompson, a resident of the Broadway Condominiums, with Versypt's murder. *Id.* at 3. A year later, the State tried Thompson but the prosecution ended in a mistrial and the State declined to retry him. *Id.* at 3 n.1.

During their investigation, the police began to focus on respondent, another resident of the Broadway Condominiums. Pet. App. 3. On July 12, 2011, a complaint was sworn out against respondent. *Ibid.* Days later, the police arrested respondent and sent him to Muscatine County Jail.[2] *Ibid.* Two weeks later, the State charged respondent with Versypt's murder. *Ibid.* Respondent was then assigned counsel.

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[2] Iowa City is located in Johnson County, adjacent to Muscatine County. Respondent was placed in Muscatine "as an 'overflow' inmate." Pet. App. 161. The Iowa Supreme Court found respondent's detention at Muscatine suspicious. *Id.* at 68 ("We further note that Johnson, an inmate at the Muscatine County Jail, met with Detective[] Smithey and [another detective] a day prior to [respondent's] arrest. [Respondent] was then incarcerated in the same jail. The fact that Johnson obtained incriminating information from [respondent] *does not look like luck or happenstance*." (emphasis added)).

Among the other inmates housed at Muscatine were Carl Johnson and Antonio Martin, Pet. App. 3, fellow residents of the Broadway Condominiums who knew respondent prior to their detention, Trial Tr. 1438, 1484. Both Johnson and Martin were arrested in connection with a conspiracy to distribute cocaine in 2010. *Id.* at 1475, 1486. Both had pleaded guilty to federal charges and had entered into cooperation agreements with the federal government. *Id.* at 977, 981.[3] Both knew Detective Smithey and had previously had proffer sessions with him about drug trafficking. *Id.* at 1367–1368. Both testified against a co-defendant in the cocaine conspiracy prosecution, resulting in significant reductions in their prison sentences. *Id.* at 1445 (Johnson's sentence reduced from 240 months to 140 months), *id.* at 1490–1491 (Martin's sentence reduced from 27–32 years to 12 years). Over the next three months, the police took advantage of respondent's placement at Muscatine alongside his former neighbors Johnson and Martin, meeting twice with Johnson and once with Martin to collect information.

On July 12, 2011, the same day the complaint against respondent was sworn out, Detective Smithey met with Johnson at Muscatine. Pet. App. 3. Detective Smithey told Johnson that the police were

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[3] Although Johnson and Martin were federal inmates, they were held in Muscatine, a state jail. Johnson pleaded guilty in February 2011 and was originally scheduled to be sentenced, and, presumably, relocated to a long-term facility, in July 2011. Pet. App. 161. Nevertheless, he was not sentenced until March 2012. *Id.* Similarly, Martin pleaded guilty in February 2011 but was not sentenced until March 2012. Trial Tr. 1490.

interested in Versypt's killing and sought information about respondent and two others. *Ibid.* Detective Smithey did not request that Johnson gather additional information about respondent but did tell Johnson "to report back to [Detective Smithey] if [Johnson] learned something." *Id.* at 68. Smithey did not promise a sentence reduction for providing valuable information about respondent. *Id.* at 6. However, Johnson knew that the U.S. Attorney would be advised Johnson was "trying to provide information that would be used to determine what reduction [in sentence] he would receive." *Ibid.*

Given that both informants had cooperation agreements and had previously provided information to the State, Detective Smithey believed at the time (and later testified) "that Johnson would probably pass on to [his codefendant] Martin" the State's specific interest in respondent. Pet. App. 70. Detective Smithey also stated that he "'*may have asked* [Martin]' if [Martin] had any information about the Versypt murder during one of his [prior] proffer interviews." *Ibid.* (emphasis added).

The next month, Johnson and respondent were placed in disciplinary segregation together.[4] Pet. App. 162. Johnson recognized respondent from Broadway and asked him "what was [respondent] in there for." *Id.* at 71. Respondent and Johnson discussed the State's case against respondent,

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[4] Detective Smithey testified that he made no efforts to have respondent and Johnson placed in disciplinary segregation together. Trial Tr. 1365. At least one judge on the Iowa Court of Appeals was convinced, however, that the placement was "not luck or happenstance." Pet. App. 162.

respondent's account of the killing and respondent's options. *Id.* at 13–14. Johnson took notes on what respondent told him, Trial Tr. 1454, but the record does not indicate what "Johnson specifically said to Marshall." Pet. App. 72.[5]

Later that month, respondent was released from disciplinary segregation and placed in a "pod" (a group of cells around a common area). Pet. App. 16. Subsequently, Martin was moved into respondent's pod. *Ibid.*[6] Respondent and Martin began discussing the State's case against respondent and how respondent could best oppose it. *Id.* at 16–17. During his interactions with respondent, Martin repeatedly encouraged respondent to tell his side of the story. *Id.* at 73–74 (Martin "told [respondent], you know, you might have to tell your side of the story if you're going to get a lesser charge."); see also Trial Tr. 1500 ("I said that you might have to tell – tell your side of the story, you know, your involvement in it."). Martin also urged respondent to write down his story, *ibid.*, and took his own notes during his conversations with respondent, *id.* at 1503.

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[5] Despite the lack of evidence in the record concerning Johnson's role in his conversation with Marshall, the Iowa Supreme Court considered it "unlikely that [respondent] engaged in an extended Shakespearean soliloquy about the crime"—i.e., that Johnson likely asked questions about the events. Pet. App. 72.

[6] Detective Smithey testified that he "made no efforts to" place respondent and Martin in the same pod. Trial Tr. 1369. The Iowa Supreme Court, however, again concluded that "Martin's *timely* transfer into [respondent's] cellpod * * * suggests more than luck or happenstance occurred here." Pet. App. 71.

In September, Detective Smithey again met with Johnson at Muscatine. Pet. App. 8. During this meeting, Johnson relayed information that he had obtained from respondent about the Versypt killing. *Ibid.* Once again, Detective Smithey did not specifically instruct Johnson to gather further information about respondent, but did remind Johnson to "contact [Detective Smithey] if he learned anything." *Ibid.*

The next month, as he was leaving a meeting with another informant at Muscatine, Detective Smithey "happened to see" Martin. Pet. App. 8. Detective Smithey approached Martin, who happened to have respondent's written statement with him; the two discussed respondent's role in the Versypt killing. Pet. App. 70.[7] Detective Smithey copied the legal pad containing respondent's hand-written statement and returned the original to Martin. Trial Tr. 983–985. As with Johnson, Detective Smithey neither explicitly asked Martin to gather further information regarding the Versypt killing, *id.* at 1369, nor explicitly promised Martin a specific sentence reduction for providing valuable information about respondent, *id.*

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[7] The Iowa Supreme Court again found the coincidence troubling. See Pet. App. 70 ("*Curiously*, then, after Detective Smithey met with [another informant] on October 3 at the Muscatine County Jail, Detective Smithey then saw Martin in a room off the library, who *just happened* to be talking to his lawyer and *just happened* to have with him his notes and [respondent]'s notes about the Versypt murder.") (emphasis added); *id.* at 71 ("[Martin's] *remarkable coincidental* meeting with Detective Smithey on October 3 * * * suggests more than luck or happenstance occurred here." (emphasis added)).

at 1492. However, Martin hoped to receive one by doing so. *Ibid.*

B. Procedural History

1. At trial, respondent moved to suppress the testimony of Johnson and Martin. Pet. App. 6. Respondent argued that his Sixth Amendment right to counsel had been violated when the informants, agents of the state, had questioned him without his attorney present. *Id.* at 6–7. The district court held a hearing, outside the presence of the jury, to resolve the motion. *Id.* at 7. At the hearing, Detective Smithey testified about his interactions with the informants, Trial Tr. 1362–1379, but no evidence was presented about the informants' interactions with respondent, Pet. App. 9–10. After the hearing, the district court denied respondent's motion on the record before it. *Id.* at 10. Both informants testified at trial. *Ibid.*

The jury returned a guilty verdict, but could not agree on a theory of guilt. Pet. App. 19.[8] Respondent moved to set aside the verdict and for a new trial. *Id.* at 20. Among other things, respondent argued that the informants were government agents when they solicited incriminating information from him. *Ibid.* The district court denied respondent's motion, concluding that respondent had not established that the informants were government agents "at the time they solicited information." *Id.* at 195.

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[8] Seven jurors found respondent guilty of felony murder; eleven found respondent guilty under an aiding and abetting theory; and two found respondent guilty on the theory of joint criminal conduct. Pet. App. 19–20.

2. The Iowa Court of Appeals reversed in part, holding that Johnson was an agent of the State when he solicited information from respondent and that respondent's statements to Johnson should have been suppressed. Pet. App. 148.[9] The court emphasized that: the police had specifically told Johnson that they sought information about respondent; Johnson knew that if he provided valuable information about respondent, he could receive a sentence reduction; and the police had not instructed Johnson to act purely as a passive listener. *Id.* at 146–148. The State did not even argue that the error was harmless, *id.* at 149, and the court declined to engage in *sua sponte* harmless error review, *id.* at 152. Therefore, the court vacated respondent's conviction and remanded for a new trial, without Johnson's testimony. *Id.* at 160.

Judge Thomas Bower, a former prosecutor, concurred separately to emphasize that "[a]fter a review of the record, [he was] convinced the actions of law enforcement, and the subsequent information provided by Johnson, w[ere] not coincidental." Pet. App. 160. In particular, Judge Bower was skeptical about respondent's placement in Muscatine so soon after Johnson's July meeting with Detective Smithey, and of respondent's subsequent placement in disciplinary segregation with Johnson. *Id.* at 161–162. Judge McDonald dissented. He did not dispute that Johnson acted as a state agent, *id.* at 167, but believed that respondent had failed to establish that

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[9] The Court of Appeals found that Martin was not a State agent and that the district court properly admitted his testimony. Pet. App. 149.

Johnson deliberately elicited the information, *id.* at 168–172.

3. The Iowa Supreme Court agreed that respondent's conviction could not stand, holding that the district court erred in admitting Martin's testimony and remanding for a new trial. Pet. App. 81.

After exhaustively surveying this Court's precedents addressing the interaction between government informants and a criminal defendant's Sixth Amendment right to counsel, Pet. App. 32–33 (*Massiah*); *id.* at 33–37 (*Henry*); *id.* at 37 (*Moulton*); *id.* at 38–43 (*Kuhlmann*), and lower courts' application of those precedents to a host of situations, *id.* at 45–66, the court considered Johnson and Martin in turn.

The court reasoned that because the police had communicated to Johnson the State's specific interest in respondent and gave him "powerful incentives" to provide relevant information, Johnson had acted as a government agent. Pet. App. 68. But, because in the court's view, respondent had failed to demonstrate that Johnson had deliberately elicited respondent's statements, Johnson's testimony was admissible. *Id.* at 72–73. Notably, the court suggested that its decision rested more on defense counsel's failure to adequately develop a factual record than on any belief that Johnson had not deliberately elicited information from respondent. See *id.* at 73 ("It is remarkable, perhaps, that [respondent]'s counsel – both at the motion to suppress and at trial – did not ask any questions of Johnson regarding his degree of

participation in the communications with [respondent].").

With respect to Martin, the court concluded that he was far from "a classic jail-house entrepreneur" and listed a litany of factors suggesting that he was a state agent: Martin's cooperation agreement and previous testimony; "Detective Smithey's admission that he *may have* asked [Martin] if [Martin] had information about the Versypt murder"; Detective Smithey's admission "that Johnson * * * would *probably* advise [Martin] of the State's interest" in respondent; "Martin's timely transfer into [respondent's] cellpod"; and "the remarkable coincidental meeting with Detective Smithey on October 3." Pet. App. 70–71. The court viewed Martin's repeated suggestion that the respondent tell his side of the story as a "classic police interrogation technique," and found there was "no doubt" that Martin "deliberately elicited incriminating statements from [respondent]." *Id.* at 73–74.

Once again, the State failed even to argue harmless error. Like the Court of Appeals, the Iowa Supreme Court declined to hold *sua sponte* that admitting Martin's testimony had been harmless. Pet. App. 79. In so doing, the court emphasized that: the State had previously tried Charles Thompson for the same murder and at least some jurors in that case had voted to convict him; respondent's trial was 13 days long and relatively complex; and Martin's testimony played a major role in the prosecution's opening and closing statements. See *id.* at 80.

Justice Mansfield, joined by Justices Waterman and Zager, concurred in part and dissented in part,

largely disagreeing with the majority's interpretation of the facts. Based on his reading of the record, Justice Mansfield would have held that respondent failed to show either agency or deliberate elicitation. Pet. App. 100–120.

REASONS FOR DENYING THE PETITION

I. This Case Does Not Implicate Any Meaningful Split of Authority Warranting Further Review

A. The Petition Does Not Implicate Any Substantial Split of Authority On the Standard for Agency

As even the State would concede, the bedrock principles here are well-established: if an informant is acting as a government agent and "deliberately elicit[s]" statements from a defendant whose right to counsel has attached, the Sixth Amendment is violated. See *United States* v. *Henry*, 447 U.S. 264, 270–271 (1980). As to the agency prong, while "th[is] legal premise[] [is] clear," its "application to th[e] [facts of particular] case[s]" has unsurprisingly led to varying results. See *United States* v. *LaBare*, 191 F.3d 60, 64 (1st Cir. 1999). The petition's central contention is that courts have used different language to describe the agency prong of this analysis, and that such linguistic differences reflect disagreement about relevant legal principles. Pet. 9–13. But to the extent courts' differing articulations of the "agency" standard implicate any actual disagreement about legal principles—and, as explained below, the petition significantly overstates any such differences—this case is an inappropriate

vehicle because it does not implicate the supposed split. Johnson and Martin satisfy any of the various formulations that courts have used to determine agency.

1. The petition asserts a split of authority between courts that consider multiple factors in assessing agency and those that purportedly apply a "bright-line rule." Pet. 9–11. Courts in the former category, the petition alleges, follow *Henry* in considering various facts and circumstances that might indicate agency, including, for example, an existing agreement, some form of payment by the government, and whether the informant knew the defendant. *E.g.*, Pet. 8 (citing *Depree* v. *Thomas*, 946 F.2d 784, 793–794 (11th Cir. 1991)). By contrast, the petition asserts, other courts have adopted a "bright-line rule," asking only whether the government instructed an informant to obtain information about a specific defendant. *E.g., id.* at 9 (citing *United States* v. *Birbal*, 113 F.3d 342, 346 (2d Cir. 1997)).

However, any potential difference between courts is not implicated in this case, because Johnson and Martin qualify as "agents" under either of those articulations. As the Iowa Supreme Court found, Detective Smithey met with Johnson and told him the State "sought information" on "Justin Marshall in connection with Versypt's murder." Pet. App. 3. Moreover, Smithey testified that he expected Johnson would relay the state's interest to Martin. Pet. App. 70 ("Smithey conceded that Johnson would probably pass on to Martin that the State was interested in obtaining information about Marshall's involvement in the Versypt murder."); accord Trial Tr. 1003. In

fact, the Iowa Supreme Court found "it was *likely* that the State's informant, Johnson, would pass the State's interest in Marshall on to [Martin]." Pet. App. 70 (emphasis added). With telling understatement, the detective conceded at trial that he "may have" asked Martin directly for information about the murder. Pet. App. 70; Trial Tr. 1369. The Iowa Supreme Court also found that Martin's transfer into respondent's cellpod and Martin's "remarkable coincidental meeting" with Smithey "suggest[] [that] more than luck or happenstance occurred here." Pet. App. 71. Such evidence is more than enough to find agency where courts have analyzed government efforts to focus informants on particular suspects. See *Birbal*, 113 F.3d at 346 (an informant becomes an agent "when the informant has been instructed by the police to get information about the particular defendant.").

But even assuming a court would look to other factors beyond a state's express direction, the facts of this case readily satisfy a multi-factor approach as well. Both Martin and Johnson had cooperation agreements with the government, and had previously benefitted from cooperation. Pet. App. 13, 69; Trial Tr. 1367–1368, 1445, 1490–1491. See *Commonwealth* v. *Moose*, 602 A.2d 1265, 1270 (Pa. 1992) (treating previous cooperation as indicium of agency). Martin and Johnson also knew respondent socially before their incarceration. Pet. App. 95, 128; Trial Tr. 1439, 1485. See *Matteo* v. *Superintendent, SCI Albion*, 171 F.3d 877, 894–895 (3d Cir. 1999) (relying on preexisting social relationship as evidence of agency). Together with Smithey's statements focusing the

informants' attention on respondent, these facts satisfy courts that consider a broader set of factors. Cf. *Ayers* v. *Hudson*, 623 F.3d 301, 315–316 (6th Cir. 2010) ("[T]he 'combination of circumstances is sufficient to support the * * * determination' that the State intentionally created a situation likely to violate [the defendant's] Sixth Amendment rights when it returned [the informant] to [the defendant's] jail pod and [the informant] thereafter deliberately elicited statements from [the defendant] regarding the murder weapon and the amount of money allegedly taken from [the victim]'s apartment." (citation omitted)).

Thus, even if the State were correct in asserting a split of authority about standard for "agency" under the Sixth Amendment, this case presents no occasion for resolving it, because Johnson and Martin would be agents under either test.

2. In any event, the petition overstates the depth and degree of any disagreement.[10] Because this Court in *Henry* detailed the facts that established agency, but "did not attempt to generalize these factors into a rule defining government agency for

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[10] This Court has repeatedly denied certiorari in cases involving the "agency" issue, consistent with the proposition that any purported split reflects only linguistic differences, not substantive disagreement about the governing standard. *E.g.*, *Watson* v. *United States*, 134 S. Ct. 1772 (2014); *United States* v. *Birbal*, 522 U.S. 976 (1997); cf. also *Moore* v. *United States*, 528 U.S. 943 (1999); *Creel* v. *Johnson*, 526 U.S. 1148 (1999); *United States* v. *York*, 502 U.S. 916 (1991); *Lightbourne* v. *Dugger*, 488 U.S. 934 (1988); *United States* v. *Van Scoy*, 454 U.S. 1126 (1981).

future cases," *Matteo*, 171 F.3d at 893 (discussing *Henry*, 447 U.S. at 270), courts have unsurprisingly used differing language in analyzing the wide range of factual situations that have arisen. On careful examination, however, that language does not reflect the degree of disagreement that the petition suggests.

Whether implicitly or explicitly, the majority of federal circuits consider multiple factors in analyzing agency. The Third, Fourth, and Fifth Circuits have considered, *e.g.*, whether the informant was compensated, whether the government or the informant initiated the relationship, what degree of instructions the government gave, and whether there was a history of cooperation with the informant. See *Matteo*, 171 F.3d at 893–895; *United States* v. *Lentz*, 524 F.3d 501, 520 (4th Cir. 2008); *Creel* v. *Johnson*, 162 F.3d 385, 394 (5th Cir. 1998). The Sixth Circuit considers all "facts and circumstances," *Ayers*, 623 F.3d at 310–312, while the Seventh Circuit looks to "traditional principles of agency." *United States* v. *Li*, 55 F.3d 325, 328 (7th Cir. 1995). The Ninth, Tenth, and Eleventh Circuits have considered the "likely * * * result" of the government's actions, *Randolph* v. *California*, 380 F.3d 1133, 1144 (9th Cir. 2004), whether the informant was compensated, *United States* v. *Taylor*, 800 F.2d 1012, 1016 (10th Cir. 1986), and what instructions the government provided the informant, *Stano* v. *Butterworth*, 51 F.3d 942, 977–978 (11th Cir. 1995).

The petition halfheartedly categorizes some of these circuits as "not clearly fall[ing] into either camp [in its alleged split]." Pet. 11–12 (discussing the Fifth, Seventh, Ninth, and Tenth Circuits). But a fair

reading of the cited cases shows that the courts engage in analysis that can extend beyond whether an "informant has been instructed by the police to get information about the particular defendant"—and thus, even on petitioner's view of the cases, would not be categorized as following what it calls the "bright-line rule." Pet. 9.

Here, the Iowa Supreme Court looked to the government's instructions concerning respondent, the incentives facing the informants, the history of the informants' previous cooperation, and the existing relationship between the informants and respondent. See Pet. App. 67–71. Decisions from other state courts of last resort are to similar effect. The high courts of California, Texas, South Carolina, and Massachusetts have considered the government's instructions to the informant, whether the informant was compensated, and whether there was an existing agreement between the informant and the government. See *State* v. *Stahlnecker*, 690 S.E.2d 565, 572 (S.C. 2010); *Commonwealth* v. *Murphy*, 862 N.E.2d 30, 38–39 (Mass. 2007); *Manns* v. *State*, 122 S.W.3d 171, 183–184 (Tex. Crim. App. 2003); In re *Neely*, 864 P.2d 474, 481 (Cal. 1993). The high courts of Pennsylvania and Kentucky have also looked to the informant's history of cooperation with the government. See *McBeath* v. *Commonwealth*, 244 S.W.3d 22, 32–33 (Ky. 2007); *Moose*, 602 A.2d at 1270.

The heart of the State's alleged split is the contention that the decision here conflicts with cases from the First, Second, Eighth and D.C. Circuits,

which supposedly apply a "bright-line rule" for agency. Pet. 9–10 (citing cases).

But petitioner has not demonstrated any meaningful conflict between those cases, the decision here, and the other authorities discussed above. The First Circuit's discussion from *LaBare* on which the State heavily relies is dicta. There, the court stopped short of determining whether the principal informant's actions violated the Sixth Amendment, noting that the question "may be a close call," and instead held that admitting the "testimony—if error at all—would be harmless" in light of the testimony of a second informant who was "not even arguably a government agent" under any test. *LaBare*, 191 F.3d at 66. The most recent decision from that court does not purport to apply a "bright-line" rule, and instead analyzes agency by asking whether the government "deliberately created []or exploited circumstances that would lead to incriminating statements" in addition to asking whether the government focused the informant's attention on the defendant. *United States* v. *Wall*, 349 F.3d 18, 21 (1st Cir. 2003).

The Second Circuit expressly characterized itself as being *in agreement with* the Seventh and Ninth Circuits—two jurisdictions that petitioner portrays as considering multiple factors in analyzing agency. See *Birbal*, 113 F.3d at 346. The Second Circuit explicitly left open the possibility that the actions of a roving agent—that is, one who is not given the name of any particular defendant, but is paid to collect information from all defendants—could violate the Sixth Amendment. *Ibid.* (noting that the informant's "agreement did not render him a roving agent")

(citing Seventh Circuit discussion of roving agents in *United States* v. *York*, 933 F.2d 1343, 1357 (7th Cir. 1991)). For its part, the Eighth Circuit has incorporated the Second Circuit's test from *Birbal*. See *Moore* v. *United States*, 178 F.3d 994, 999 (8th Cir. 1999). Finally, the D.C. Circuit has recognized that an informant's conduct can violate the Sixth Amendment even when the government has *not* instructed the informant to focus on a specific defendant. *United States* v. *Sampol*, 636 F.2d 621, 630–642 (D.C. Cir. 1980) (per curiam), abrogation on other grounds recognized in *United States* v. *Bridges*, 717 F.2d 1444, 1450 (D.C. Cir. 1983).

Nor does the petition identify any conflict with the state high courts that purportedly apply a strict bright-line test. See, *e.g.*, *Watson* v. *United States*, 66 A.3d 542, 546 & n.12 (D.C. 2013) (considering government's instructions to informant, history of cooperation, government's arrangements, and presence of "open-ended fishing expedition" in addition to agreement with respect to particular defendant); In re *Benn*, 952 P.2d 116, 138 (Wash. 1998) (considering existing relationship with government, history of cooperation, and compensation in addition to agreement "with respect to the current undertaking"). All of these jurisdictions look to some factors beyond the supposed "bright-line rule." Different facts may make consideration of different factors more or less appropriate, but these small variations do not merit this Court's attention.

As this discussion suggests, there is good reason to conclude that the multi-factor approach and

"bright-line rule" are not conflicting or even competing approaches. Some cases from supposed "bright-line rule" jurisdictions analyze multiple factors in deciding whether the government focused the informant on a specific defendant. *United States* v. *Watson*, 894 F.2d 1345, 1348 (D.C. Cir. 1990), for instance, considered the nature of the informant's ongoing cooperation and the informant's lack of compensation in concluding that the government had not encouraged the informant to speak to the particular defendant. The two formulations can and do work in tandem.[11]

B. The Decision Below Implicates No Division Of Authority On The Standard For Deliberate Elicitation

The State does not even allege a square split of authority on what constitutes "deliberate elicitation." See Pet. 13–20. Instead, it halfheartedly suggests that lower courts "struggle to understand" this issue and need more guidance from this Court. *Id.* at 13. The State alleges that some courts require a showing that an informant's interaction with the defendant is "the equivalent of direct police interrogation," while,

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[11] While petitioner argues that some courts apply both tests, the courts in question simply analyze available facts. Compare *Brooks* v. *Kincheloe*, 848 F.2d 940, 945 (9th Cir. 1988) (holding that an informant was not an agent when he "was not instructed to ask [the defendant] any questions, and was not promised any 'deals' or rewards for any information he might provide"), with *Randolph* v. *California*, 380 F.3d 1133, 1144 (9th Cir. 2004) (considering multiple factors in finding agency after first looking to whether investigators had focused the informant on the defendant).

it maintains, other courts apply "a markedly different standard than functional interrogation." Pet. 17. But this case again does not implicate any such disagreement: Martin readily satisfies both standards, because he urged respondent to "tell [his] side of the story * * * to get a lesser charge" and to "write the story down." Pet. App. 73–74. The State's cited cases illustrate only that—as this Court long ago indicated—deliberate elicitation is a context-specific inquiry that turns on the particular facts before a court. See *Henry*, 447 U.S. at 270 (analyzing "whether under the facts of this case a Government agent 'deliberately elicited' incriminating statements").

Petitioner has not shown that courts look to different factors in analyzing deliberate elicitation, much less identified cases reaching different conclusions on similar facts. For example, petitioner claims that the Second Circuit reached the "opposite conclusion[]" to the Iowa Supreme Court on facts "identical" to those here, Pet. 20. But the cited decision contains no holding about deliberate elicitation at all. Instead, the court *assumed for sake of argument* that the informant had deliberately elicited information, and ruled that the informant "was not a government agent at that time." See *United States* v. *Whitten*, 610 F.3d 168, 193 (2d Cir. 2010).[12]

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[12] With respect to a later set of statements, the Second Circuit assumed "*arguendo*" that the informant had become a government agent, but found no evidence that the informant did anything beyond merely listening. *Whitten*, 610 F.3d at 194. Even that portion of Second Circuit's rationale was dicta, as the

The only other case the State identifies as supposedly conflicting with the decision here—an unpublished, decade-old district court decision—is readily distinguishable. While the court did hold that a jailhouse informant did not deliberately elicit statements despite having initiated contact with the defendant, *United States* v. *Booker*, No. 05-313 (JBS), 2006 WL 242509, at *8 (D.N.J. Feb. 2, 2006), the facts were hardly "identical" (Pet. 20) to those here. Although the defendant in *Booker* sought out the informant for legal assistance, the informant did not "actively induce[]" the defendant's incriminating statements. 2006 WL 242509, at *8. Martin, by contrast, was placed in respondent's specific pod, and repeatedly and affirmatively urged respondent to write down his "side of the story." Pet. App. 16–17.

The State complains of confusion about the standard for deliberate elicitation, but cannot show that any such uncertainty survived this Court's decision in *Fellers* v. *United States*, 540 U.S. 519 (2004). See Wayne R. LaFave, 2 Crim. Proc. § 6.4(g) (4th ed.) (Dec. 2015) (citing *Fellers* in support of the conclusion that "the Court has since made it perfectly clear that deliberately eliciting information is enough whether or not the police conduct constituted 'interrogation.'"). In *Fellers,* this Court had "no question that the officers * * * 'deliberately elicited' information" when they arrived at the defendant's home with an arrest warrant and stated that "they

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court explained that "in any event, the only damaging admission" for the defendant occurred earlier, at a time when the informant was not a government agent. *Id.* Here, neither Martin nor Johnson was purely passive.

had come to discuss his involvement in methamphetamine distribution." 540 U.S. at 524, 521. While acknowledging that Sixth Amendment precedents had sometimes used the term "interrogation," the Court explained that the Sixth Amendment is violated not only by custodial interrogations like those at issue in *Miranda*, but also by practices which do not even implicate the Fifth Amendment. *Id.* at 523. Indeed, petitioner here concedes that *Fellers* "arguably disentangled interrogation from deliberate elicitation." Pet. 18. Tellingly, virtually all of the cases cited to show supposed confusion on this issue *predate* this Court's clarifying decision in *Fellers*. See Pet. 17 (citing *Matteo*, 171 F.3d 877; *McDonald* v. *Blackburn*, 806 F.2d 613 (5th Cir. 1986); *United States* v. *Stewart*, 951 F.2d 351 (6th Cir. 1991) (unpublished); *State* v. *Smith*, 791 P.2d 383 (Or. 1990); *State* v. *Robinson*, 448 N.W.2d 386 (Neb. 1989); *State* v. *Bruneau*, 552 A.2d 585 (N.H. 1988)).[13] Absent evidence that any confusion persists after *Fellers*, this Court's review is not warranted.

Alternatively, the State contends that *Fellers* is inapplicable because it involved a police officer, not an informant. Pet. 18. But as this Court explained in *Ventris*, the underlying standard does not depend

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[13] *Kansas* v. *Ventris*, 556 U.S. 586 (2009), is not to the contrary. While this Court did state that "the *Massiah* right is a right to be free of uncounseled interrogation," it further cautioned that the Sixth Amendment protection is broader than formal interrogation, and protects against "the deliberate elicitation by law enforcement officers (and their agents) of statements pertaining to the charge." *Id.* at 592, 590.

on the identity of the person who "deliberately elicits" incriminating statements. See *Kansas* v. *Ventris*, 556 U.S. 486, 590 (2009); *Brewer* v. *Williams*, 420 U.S. 387, 400 (1977) (stating that the case is "constitutionally indistinguishable" from *Massiah* even though the government agent at issue was a police officer)

The State also errs in suggesting confusion about whether "[g]reetings, casual conversation and isolated questions" constitute deliberate elicitation. Pet. 17. The State's own case citations make clear that after *Kuhlmann* v. *Wilson*, 477 U.S. 436, 458 (1986), it is settled law that to qualify as prohibited "deliberate elicitation," an informant must take affirmative steps to "'stimulate' conversations about the crime charged." See Pet. 17–18 (quoting *Randolph* v. *California*, 380 F.3d 1133, 1144 (9th Cir. 2004)).[14] In other words, an informant need not remain mute to avoid "stimulating conversation." "Casual conversation" falls short of a Sixth Amendment violation; for instance, when an informant's "only remark" was that the defendant's story "didn't sound too good," this Court found no deliberate elicitation. See *Kuhlmann*, 477 U.S. at 460. Again, this case presents no opportunity to clarify the law in this regard, because the informant's conduct went far beyond "greetings, casual conversation and isolated questions." Martin affirmatively urged respondent to "tell [his] side of

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[14] *State* v. *Howell*, No. CR05222048, 2007 WL 610161 (Conn. Super. Ct. Jan. 30, 2007), which the State cites, is a decision of a state *trial* court, not a court of last resort. But see S. Ct. R. 10(b).

the story * * * to get a lesser charge" and to "write the story down." Pet. App. 73–74.

II. The Decision Below Is Correct

A. Martin and Johnson Were Agents Under the Sixth Amendment

1. The Iowa Supreme Court's decision faithfully applied this Court's precedents to conclude that Martin and Johnson were both acting as agents for Sixth Amendment purposes.

Martin's status as a government agent follows from this Court's decisions in *Henry* and *Moulton*. *Henry* held that an informant "acting under instructions as a paid informant for the Government" was an agent of the State. 447 U.S. at 270. The Court relied on several factors in reaching that conclusion, including that the informant had been paid by the government and that the FBI agent in touch with the informant "was aware that [the informant] had access to [the defendant] and would be able to engage him in conversations." *Ibid.* This Court noted, but did not treat as dispositive, the fact that "[t]he record [in that case] d[id] not disclose whether the [FBI] agent contacted [the informant] specifically to acquire information about [the defendant]." *Id.* at 266. In *Moulton*, this Court held that "[t]he Sixth Amendment * * * imposes on the State an affirmative obligation to respect and preserve the Accused's choice to seek [counsel]" and that "police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the

protection afforded by the right to counsel." *Maine* v. *Moulton*, 474 U.S. 159, 171 (1985).[15]

The State claims that the Iowa Supreme Court "veer[ed] off course" by "explicitly f[inding] that a generic cooperation agreement automatically converts an informant into 'a government agent.'" Pet. 26 (quoting *Commonwealth* v. *Murphy*, 862 N.E.2d 30, 41 (Mass. 2007)). But that argument mischaracterizes the Iowa Supreme Court's decision. In fact, the Iowa Supreme Court identified numerous factors confirming that Martin and Johnson were acting as agents. As in *Henry*, Martin "had a proffer agreement and had at least two interviews under his belt prior to providing information about Marshall." Pet. App. 70. Furthermore, the Court pointedly noted Detective Smithey's concession that he "*may have* asked [Martin] if he had information about the Versypt murder" and that Smithey knew that "Johnson * * * would *probably* advise [Martin] of the State's interest" in respondent. *Id.* at 70–71. The Iowa Supreme Court also found relevant "Martin's timely transfer into Marshall's cellpod, and the remarkable coincidental meeting with Detective Smithey" which "suggest[ed] more than luck or happenstance" and pointed to government targeting of respondent. *Id.* at 71. Each of these factors

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[15] This Court did not have occasion to analyze agency in *Massiah*, because the informant there was a co-defendant acting directly at the request of the government. *Massiah* v. *United States*, 377 U.S. 201, 202–203 (1964). In *Kuhlmann*, much like in *Henry*, the informant had entered into an arrangement with the detective to listen to the defendant's conversations. See *Kuhlmann*, 477 U.S. at 439.

supports the conclusion that Martin was acting at the direction of the government in an agency relationship.

The State correctly does not contest the holding that Johnson qualifies as an agent. Johnson was expressly instructed to gather information on three individuals, including respondent. As the Iowa Supreme Court noted, the "incentives for the informant remain precisely the same and the risks to the accused are no different than if there was just one target." Pet. App. 68.

2. Consistent with this Court's precedents, the Iowa Supreme Court was careful to avoid circumvention of the right to counsel. As that court recognized, this Court's cases require the government to respect the defendant's full enjoyment of counsel. *Moulton*, 474 U.S. at 171. The Iowa Supreme Court's careful analysis of all of the circumstances surrounding an informant's interaction with the defendant guard against police and prosecutors taking advantage of bright-line rules to game the system, so that "the state could accomplish 'with a wink and a nod' what it cannot overtly do." Pet. App. 50 (quoting *Ayers* v. *Hudson*, 623 F.3d 301, 312 (6th Cir. 2010)).[16]

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[16] While the State claims police need a clear rule, law enforcement officers have successfully navigated multi-factor tests in a number of contexts. *E.g.*, *Berkemer* v. *McCarty*, 468 US 420 (1984) (custody for *Miranda* purposes). Regardless, the petition's concerns about broad effects on law enforcement are overstated. The agency inquiry is relevant only to the limited set of circumstances where informants are used to report on individuals who have been indicted, retained counsel, and are

B. Respondent's Statements Were Deliberately Elicited

1. The Iowa Supreme Court's conclusion that Martin deliberately elicited incriminating statements from respondent again represents a straightforward application of this Court's precedents. The opinion below correctly focused on Martin's statement to respondent that, "you know, you might have to tell your side of the story if you're going to get a lesser charge," and the fact that as a result, "[respondent] went to write the story down." Pet. App. 73–74. As the Iowa Supreme Court recognized, Martin's statement and invitation to write down "your side of the story" was "a classic police interrogation technique," the use of which counted as "deliberate elicitation by any application of the *Kuhlmann* standard." *Id.* at 74.

As *Kuhlmann* explained, the *Massiah* line of cases addresses "secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Kuhlmann*, 477 U.S. at 459. While interrogating suspects, police frequently employ the same technique Martin did here—i.e., persuading criminal defendants that articulating and

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awaiting trial. The State's examples—such John Gotti or Timothy McVeigh—involved the assistance of co-conspirators, not jailhouse informants. Moreover, several of the State's own sources express skepticism about the use of informants and their contributions to crime control more generally. See Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. Cin. L. Rev. 645, 660 (2004); Ian Weinstein, *Regulating the Market for Snitches*, 47 Buff. L. Rev. 563, 595 (1999).

memorializing their side of the story will improve their legal position.[17] This case thus exemplifies the kind of direct police interrogation that *Kuhlmann* places at the heart of deliberate elicitation. Martin's coaxing of respondent was plainly "some action, beyond merely listening, that was designed to deliberately elicit incriminating remarks." *Kuhlmann*, 477 U.S. at 459.

This court's analysis of deliberate elicitation in *United States* v. *Henry*, 447 U.S. 264 (1980), supports the same conclusion. As in *Henry*, respondent was "in jail and under indictment" when Martin urged him to write his statements down. 447 U.S. at 270. Before encouraging him to tell his side of the story, Martin gained respondent's trust by providing him with legal information on robbery and manslaughter. Pet. App. 16–17. Martin thus facilitated incriminating conversations through his "conduct and apparent status as a person sharing a common plight," just like the informant in *Henry*. 447 U.S. at 274.

Likewise, Martin was "ostensibly no more than a fellow inmate" to respondent within the meaning of *Henry*, 447 U.S. at 270. Although respondent

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[17] In *Rhode Island* v. *Innis*, 446 U.S. 291, 300–301 (1980), this Court held that "interrogation * * * refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." It follows that telling a suspect to write down his story because doing so will supposedly serve his legal interests constitutes interrogation.

apparently understood that Martin would take respondent's written story to Martin's lawyer "to get [respondent's] story out," Pet. App. 18, there is no indication that Martin ever presented himself to respondent as something other than a fellow prisoner or stated that he would share respondent's information with police. Cf. *ibid.* (Martin refused to give Detective Smithey the legal pad with his handwritten notes, because "[respondent] didn't know [Martin] was talking to [Detective Smithey] about that").[18]

Petitioner argues at length that respondent initially approached Martin to ask for advice, and that respondent and Martin "plan[ned] that [respondent's] statement would be passed along to law enforcement." Pet. 30 (internal quotation marks omitted). But even if respondent did initiate the interaction—and the record is inconclusive on that question—this Court has ruled that "who instigated the meeting at which the Government obtained incriminating statements was not decisive or even important to [this Court's] decisions in *Massiah* and *Henry*." *Moulton*, 474 U.S. at 174. Moreover, there is

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[18] The Iowa Supreme Court dissenters (but not petitioner here) suggested that respondent knew that Martin was an undercover informant. See Pet. App. 120. But the record indicates only that respondent perceived Martin to be a fellow inmate, offering to disclose information to his lawyer to bolster respondent's legal defense. Martin told respondent, "use me [] as a jailhouse snitch and I can get your story out *and it might help both of us*," Pet. App. 17 (emphasis added), consistent with the conclusion that Martin presented himself as a fellow prisoner, sharing a common plight, who was personally invested in strengthening respondent's legal case.

a significant difference between allowing a fellow inmate to disclose information to his lawyer on the belief that doing so will facilitate one's legal defense, and being induced to make incriminating statements (and to disclose those statements to law enforcement) by a government informant masquerading as a friend. Martin's history, incentives, and actions ensured that respondent fell victim to the latter plot.

Even if respondent had known that Martin was a government informant, that fact is not dispositive under this Court's cases. In *Massiah*, this Court explained that for the Sixth Amendment to be effective "it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." 377 U.S. at 206. Similarly, *Henry* rejected the government's argument that this Court should be less protective of Sixth Amendment rights "where the accused is prompted by an undisclosed undercover informant than where the accused is speaking in the hearing of persons he knows to be Government officers." 447 U.S. at 272–273. Petitioner has not provided any justification for departing from this Court's precedents and applying a novel standard in the instant case.

2. Contrary to the petition's portrayal of the Iowa Supreme Court as an outlier, see Pet. 30, the decision here is broadly consistent with rulings of other courts. Courts have found deliberate elicitation based on a showing that the informant encouraged the suspect to discuss the crime. See, *e.g.*, *Randolph*, 380 F.3d at 1144 ("[T]o show that the state violated his Sixth Amendment rights by obtaining and using [the suspect's] testimony, [the suspect] must show

that [the informant] * * * made some effort to 'stimulate conversations about the crime charged.' Notably, 'stimulation' of conversation falls far short of 'interrogation.'") (quoting *Henry*, 447 U.S. at 271 n.9 and citing *Fellers*, 540 U.S. at 522–525); *State* v. *Everybodytalksabout*, 166 P.3d 693, 698 (Wash. 2007) ("the government agent need only 'stimulate conversations about the crime charged' to deliberately elicit incriminating statements"). Even courts finding that a particular informant did not deliberately elicit statements have examined whether the informant used techniques that police utilize in interrogations. See, *e.g.*, *Post* v. *Bradshaw*, 621 F.3d 406, 424 (6th Cir. 2010) (analyzing whether techniques were "the equivalent of direct police interrogation."); *State* v. *Robinson*, 448 N.W.2d 386, 396 (Neb. 1989) (same). By asking respondent to write down his story, Pet. App. 73–74, Martin made some effort to "stimulate conversation[] about the crime charged," *Randolph*, 380 F.3d at 1144, and used a technique that was "the equivalent of direct police interrogation," *Bradshaw*, 621 F.3d at 424.

Other courts have found deliberate elicitation on facts similar to those here. *Murphy*, 862 N.E.2d 30, found deliberate elicitation where the informant had a deal with the U.S. Attorney's Office to provide information in exchange for a reduction in his sentence, and where the informant hid a shank as a favor to the defendant, and talked to potential witnesses on the defendant's behalf, to gain the defendant's trust so the informant could ask about the defendant's crime. *Id.* at 41, 44. Martin likewise had a cooperation agreement and "got legal stuff" for

respondent, Pet. App. 73–74, to put himself in a position to urge respondent to write his story down. In each case, an informant took affirmative steps to assist the defendant to gain his trust in order to facilitate the deliberate elicitation of incriminating statements.

3. Further weighing against this Court's review, the judgment could be affirmed by finding that Johnson deliberately elicited incriminating statements from respondent, as the Iowa Court of Appeals concluded. See Pet. App. 148. In *Fellers*, 540 U.S. at 521, 524, this Court unanimously held that government agents had deliberately elicited information when a suspect made incriminating statements after the agents engaged him in limited questioning about the crime. Johnson behaved analogously in the instant case when Johnson asked respondent "what was he in [jail] for," and respondent made incriminating statements. Pet. App. 71.

The Iowa Supreme Court perceived a "failure of proof" in the record on this point. Pet. App. 73. But given Johnson's proffer agreement and long record of providing assistance to prosecutors, Pet. App. 13, even the Iowa Supreme Court conceded that the "extensive" disclosures that Martin made to Johnson made it "unlikely that respondent engaged in an extended Shakespearean soliloquy about the crime." Pet. App. 71–72. Thus, the record reasonably supports the conclusion that Johnson deliberately elicited respondent's testimony. See *United States* v. *Pannell*, 510 F. Supp. 2d 185, 192–193 (E.D.N.Y. 2007) (finding deliberate elicitation despite gaps in the record, based on the informant's detailed notes

and strong incentive to provide incriminating information about the defendant to the government); cf. David M. Nissman & Ed Hagen, Law of Confessions § 7:14 (2d ed.) ("The record is unclear on what [the informant's] role in these conversations was; it seems fair to conclude that the conversations were two-sided.") (discussing *Henry*, 447 U.S. 264). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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