No. 20-1389

In the Supreme Court of the United States

KABONI SAVAGE, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether an appellant who seeks to enlarge the appellate record under Federal Rule of Appellate Procedure 10 is entitled to review correspondence, private notes, and other trial materials prepared by the district court, district court staff, and opposing party during his jury trial, where the appellant has not established that any gap or discrepancy in the existing record is "material," Fed. R. App. P. 10(e)(2), or followed the procedures established in Rule 10(c) for reconstructing an unrecorded proceeding.

RELATED PROCEEDINGS

United States District Court (E.D. Pa.):

United States v. *Savage*, No. 07-cr-550 (Sept. 26, 2017)

United States Court of Appeals (3d Cir.):

United States v. *Savage*, No. 14-9003 (Aug. 11, 2020)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and rules:

Rules—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-193a) is reported at 970 F.3d 217. The opinion of the district court (Pet. App. 194a-213a) is unreported but is available at 2017 WL 4273617. A prior opinion of the district court is not published in the Federal Supplement but is available at 2017 WL 4631976.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2020. A petition for rehearing was denied on October 30, 2020 (Pet. App. 215a-216a). The petition for a writ of certiorari was filed on March 29, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of conspiring to commit racketeering, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d); 12 counts of murder in aid of racketeering, in violation of the Violent Crimes in Aid of Racketeering statute (VICAR), 18 U.S.C. 1959(a)(1); one count of VICAR conspiracy to commit murder, in violation of 18 U.S.C. 1959(a)(5); one count of retaliating against a witness, in violation of 18 U.S.C. 1513; and one count of using fire to commit a felony, in violation of 18 U.S.C. 844(h)(1). Judgment 1-2; Pet. App. 13a. The jury unanimously recommended a capital sentence on each death-eligible count (12 VICAR murders and witness retaliation). Pet. App. 13a. The district court imposed a capital sentence on each of those counts, as well as sentences of imprisonment on the remaining counts. *Id.* at 13a-14a. The court of appeals affirmed. *Id.* at 1a-193a.

1. a. Petitioner was the head of a large and violent drug-trafficking organization. Pet. App. 3a. In that role, and often from prison, he orchestrated the murder of at least 12 victims. *Ibid.*

After beginning his "career in illegal drug trafficking" in the early 1990s, Pet. App. 4a, petitioner by the end of that decade "led a regional drug trafficking operation in North Philadelphia referred to at trial as the Kaboni Savage Organization (KSO)," *id.* at 3a. "The KSO distributed large quantities of controlled substances" including phencyclidine (PCP), cocaine, and marijuana, and "fiercely protected its network and territory through the use of guns and violence." *Id.* at 3a-4a. "Early in the KSO's operation, [petitioner] took

care of" threats to his organization "himself," including through murder, "but as his power grew, his enforcers did his bidding without question," including the commission of murders at his direction. *Id.* at 3a; see *id.* at 5a-10a.

Starting in 2004, petitioner primarily conducted his activities from behind bars. Pet. App. 8a. In 2006, he was sentenced to a 30-year term of imprisonment following his conviction on federal charges (not directly at issue here) of conspiracy to distribute cocaine, money laundering, firearm offenses, and threatening to retaliate against witnesses. *Id.* at 8a n.2; see 392 Fed. Appx. 919. Nonetheless, he "continued to manage the affairs of the KSO from his prison cell," including through threats, violence, and murder directed at drug rivals, informants, and other perceived enemies, as well as their families. Pet. App. 3a; see *id.* at 7a-8a & n.2. Petitioner particularly focused on "retaliating against those who dared to cooperate with government agents and prosecutors." *Id.* at 3a.

Petitioner "not only arranged for the murder of the prosecution's main witness in a murder case" against him, but later "orchestrated the firebombing of the family home of another cooperating witness in a fashion that ensured no one would survive," killing six people, including an infant and three other children. Pet. App. 3a, 9a-10a. All told, petitioner was responsible for at least 12 murders related to his drug trafficking and racketeering organization. *Id.* at 3a. He has also engaged in numerous plots and threats to brutally attack, torture, and kill additional witnesses and other perceived enemies—as well as their families—and has vowed to continue to pursue such revenge as long as he is alive.

See Gov't C.A. Br. 20, 28-67 (summarizing trial evidence).

b. In May 2012, a federal grand jury in the Eastern District of Pennsylvania returned a fourth superseding indictment charging petitioner and some of his associates with various offenses related to the KSO. Pet. App. 11a. After one count of witness tampering in violation of 18 U.S.C. 1512(a)(1)(A) was dismissed, petitioner proceeded to trial on charges of one count of conspiring to commit racketeering (RICO conspiracy), in violation of 18 U.S.C. 1962(d); 12 counts of VICAR murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1); one count of VICAR conspiracy to commit murder, in violation of 18 U.S.C. 1959(a)(5); one count of retaliating against a witness, in violation of 18 U.S.C. 1513; and one count of using fire to commit a felony, in violation of 18 U.S.C. 844(h)(1). Pet. App. 11a & n.3. The government provided notice of its intent to seek the death penalty for the 12 VICAR murder counts and the witness retaliation count. *Id.* at 12a.

Petitioner was tried before a jury along with three co-defendants. Pet. App. 194a. The guilt phase of the trial lasted approximately 14 weeks, *id.* at 195a, and the government's case "featured more than seventy witnesses, over a thousand exhibits[,] and many recordings of intercepted conversations," *id.* at 13a. In May 2013, the jury found petitioner guilty on all charges. *Ibid.*

At a separate penalty-phase proceeding before the same jury pursuant to the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 *et seq.*, the jury recommended a capital sentence on each of the 13 death-eligible charges. Pet. App. 13a. In June 2013, the district court imposed a capital sentence on each of those 13 counts; imposed a sentence of life imprisonment on the RICO

conspiracy conviction; and imposed ten-year terms of imprisonment for each of the offenses of VICAR conspiracy and use of fire to commit a felony. *Id.* at 13a-14a.

2. Petitioner filed a notice of appeal. Pet. App. 195a. In October 2014, the court of appeals appointed new counsel to represent petitioner on appeal. *Ibid.* Over the next 18 months, petitioner sought and received ten extensions of time in order to file transcript purchase orders and compile the appellate record. *Id.* at 195a-196a.

a. Federal Rule of Appellate Procedure 10(a) specifies that the record on appeal consists of: (1) "the original papers and exhibits filed in the district court"; (2) "the transcript of proceedings, if any"; and (3) "a certified copy of the docket entries prepared by the district clerk." Under Rule 10(c), if a transcript is unavailable, "the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection." Fed. R. App. P. 10(c). That statement, along with any objections or proposed amendments by the appellee, is then "submitted to the district court for settlement and approval," after which the approved final statement is included in the record on appeal. *Ibid.* Under Rule 10(e)(1), "[i]f any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly." Fed. R. App. P. 10(e)(1). And under Rule 10(e)(2), "[i]f anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected" and a supplemental record created "on

stipulation of the parties," "by the district court," or "by the court of appeals." Fed. R. App. P. 10(e)(2).

Starting in December 2014, the district court and its staff "allocated countless hours and resources" (Pet. App. 199a) responding to "numerous requests" from appellate counsel for "information, documents, and transcripts" that appellate counsel was considering for inclusion in the record on appeal (*id.* at 197a). See *id.* at 197a-199a (describing the extensive efforts undertaken by the court and its staff in "collecting, copying, and producing documents" for appellate counsel). The materials that the court and its staff collected and copied at appellate counsel's request included many documents or transcripts that related only to petitioner's co-defendants and that "appear[ed] to be wholly irrelevant to any appeal issues [petitioner] could raise with respect to his conviction and sentence." *Id.* at 199a; see *id.* at 197a-199a.

b. On June 26, 2017, petitioner filed a motion in the district court under Federal Rule of Appellate Procedure 10 seeking, *inter alia*, an expansive set of materials from the trial judge and government counsel. C.A. App. 859-882. The motion claimed that appellate counsel was "still missing a substantial amount of case material that should be part of the record." *Id.* at 859. Petitioner asserted that appellate counsel needed that material in order to "identify and present all viable appellate issues." *Ibid.* Among other things, the motion claimed that the record was incomplete because it did not contain: (1) undocketed written communications, such as emails between the court and the parties, *id.* at 873; and (2) at least 50 "[u]nrecorded sidebars, conferences, and other such proceedings," including jury charge conferences conducted in chambers and "re-

marks" the court made to the jurors "ostensibly about scheduling," *id.* at 878 (emphasis omitted). The motion acknowledged that "some of the non-ECF [written] communications can be identified in [petitioner's] trial counsel's files," but asserted that "trying to locate and cull them" would be "fragmentary and incomplete" and argued that the court needed to "mak[e] available its file of all such communications in this case," *id.* at 875, and to "direct the government to do likewise" for any communications not available from the court, *id.* at 878. The motion similarly argued that the court should produce all notes or other records documenting any unrecorded sidebars or conferences, and direct both parties' trial counsel to do the same. *Id.* at 878-879.

The government opposed petitioner's motion, C.A. App. 995.1-995.12, explaining that court reporters had prepared transcripts of all the hearings and trial proceedings and that all substantive filings had been placed on the docket. *Id.* at 995.7. The government represented that for the most part, only brief discussions regarding scheduling matters had been unrecorded and that "[o]n those rare occasions where substantive matters may have arisen, or arguments made, all of those were covered in pleadings and later set forth on the record in open court." *Ibid.* And the government observed that, if appellate counsel could "identify specific proceedings in which substantive matters were discussed, whether in chambers or at sidebar, then he should do so, and should then endeavor to avail himself of the procedures" in Rule 10(c). *Id.* at 995.9.

c. The district court granted petitioner's motion in part and denied it in part. Pet. App. 194a-213a. The court explained that the motion was "essentially an unprecedented attempt to conduct a discovery fishing

expedition on a district court" and that compiling petitioner's requested information "would impose an extraordinary burden on the District Court and the parties." *Id.* at 200a. The court further observed that "the continued and increasing demands of Appellate Counsel, when viewed in juxtaposition with his repeated continuance requests to the Third Circuit, suggest that this Motion may simply be a tactic to further delay [petitioner's] appeal." *Id.* at 199a-200a.

Addressing requests that petitioner had made for access to certain trial exhibits, the district court agreed to provide appellate counsel with access to the few defense exhibits that trial counsel had lodged with the court. See Pet. App. 204a. The court declined, however, petitioner's further request to order the government to create a complete binder for appellate counsel, years after the trial, containing copies of all of the government's trial exhibits. *Id.* at 201a-202a. The court observed that the government had offered to make all of its exhibits available to appellate counsel and that appellate counsel had "refused the Government's offer, contending it was too burdensome in light of the fact [appellate counsel] is not based in Philadelphia." *Ibid.* The court found that contention "disingenuous" in light of appellate counsel's numerous past and future trips to Philadelphia in connection with the appeal, and declined to require the government to undertake the copying and mailing of its trial exhibits. See *id.* at 202a.

The district court also denied petitioner's request for copies of all written communications between counsel and the court not filed on the docket. It explained that "any substantive matters that involved any aspect of this case are reflected on the docket," observing that petitioner's suggestion "that these communications in-

volved substantive legal issues * * * is simply incorrect." Pet. App. 205a; see *id.* at 206a n.6 ("[E]very substantive aspect of this case is transcribed and reflected on the docket: the pretrial hearings, the jury *voir dire*, the trial, including all substantive sidebar conferences, and each Defendant's sentencing."). The court also observed that the non-substantive "emails and correspondence at issue do not constitute the record on appeal," because they do not appear among the items listed as part of the appellate record in Rule 10(a). *Id.* at 205a.

The district court likewise denied petitioner's request for "the personal notes and files of the District Court Judge, and of every attorney involved in the case," which petitioner had requested for the asserted purpose of reconstructing "nearly fifty 'sidebars, conferences, and other unrecorded proceedings' that [petitioner] believes should have been transcribed." Pet. App. 207a. The court explained that "[m]ost of the Chambers conferences or telephone conferences dealt with scheduling issues" and that, "[c]ontrary to Appellate Counsel's representation, sidebar conferences that involved substantive matters such as evidentiary objections were transcribed and are reflected in the trial transcripts that are published on the docket." *Id.* at 208a. The court emphasized that, as to "any sidebar conference [that] may have touched on substantive matters, the Court and the parties were diligent in assuring that the record reflected those matters." *Ibid.* And the court added that "[i]n the event that [petitioner] believes that any of the fifty 'unrecorded proceedings and conferences' involved substantive matters, he may submit a statement in accordance with Rule 10(c)." *Id.* at 209a.

d. Petitioner thereafter sought to have the court of appeals compel the district court and counsel for both parties to comply with the various requests that he had made. See C.A. App. 2085. He filed a Rule 10 motion asking the court of appeals to order the government and defense trial counsel to provide copies of documentary exhibits and other materials introduced at trial. *Id.* at 2126-2127. He also continued to seek materials from the trial judge's or counsel's files that might be related to undocketed written communications and untranscribed sidebars or other proceedings. *Ibid.* The court of appeals granted the motion in part, ordering the government and defense trial counsel to provide petitioner with all documentary exhibits admitted at the trial and penalty phases; in all other respects, the court denied the motion. *Id.* at 2410-2411. Petitioner then filed his opening brief on appeal on October 28, 2018, more than four years after filing his notice of appeal. See Pet. C.A. Br.

3. The court of appeals affirmed. Pet. App. 1a-193a.

Of most direct relevance here, the court of appeals rejected petitioner's contentions that the district court and court of appeals had violated Rule 10, the Due Process Clause, the FDPA, and the Court Reporters Act (28 U.S.C. 753(b)) by declining to provide all of the assistance petitioner had sought in his efforts to enlarge the existing appellate record. See Pet. App. 14a-23a. The court of appeals found that "the vast appellate record before us"—over 18,000 pages—"in its existing form enables us to decide his appeal consistent with precepts of fundamental fairness" and any other obligations to review the record. *Id.* at 14a-15a. It accordingly declined to order a new trial, presume that petitioner had preserved all possible appellate issues with

contemporaneous objections, or compel "wide-ranging discovery" from the district court and the government. *Id.* at 15a.

The court of appeals observed that "neither the Supreme Court, nor our Court, has held that due process requires a verbatim transcript of the entire proceedings or that an incomplete record confers automatic entitlement to relief." Pet. App. 16a (quoting *Fahy* v. *Horn*, 516 F.3d 169, 190 (3d Cir. 2008)). The court likewise found no violation of the FDPA's requirement that the court "review the entire record," 18 U.S.C. 3595(b), observing that the items petitioner claimed were missing did not lie within the FDPA's specification of the "minimum set of contents the 'record' must include." Pet. App. 17a (citation omitted); see 18 U.S.C. 3595(b)(2)-(4) (defining the record to include the trial evidence, "the information submitted during the sentencing hearing," "the procedures employed in the sentencing hearing," and the "special findings returned" as to aggravating and mitigating factors).

The court of appeals also explained that "the untranscribed conversations and many of the unfiled writings [petitioner] claims are missing here" would not fall within the "'record on appeal'" as defined by Rule 10, particularly given that petitioner did not "move to supplement the record" with claimed omissions. Pet. App. 17a-18a (footnote omitted). The court additionally found that, "[i]nsofar as any of the writings [petitioner] identifies could be considered 'original papers and exhibits filed in the district court'" within the meaning of Rule 10, petitioner had "failed to adequately demonstrate any non-speculative prejudice from the absence of those writings on appeal." *Id.* at 18a n.9; see Fed. R. App. P. 10(a). It observed that petitioner had "not

articulated how the purportedly missing items could or would give rise to 'any difference[s] . . . about whether the record truly discloses what occurred in the district court,'" and had "failed to have any such differences settled by the District Court, as is his obligation." Pet. App. 18a n.9 (quoting Fed. R. App. P. 10(e)(1)).

The court of appeals further noted that petitioner may have failed to preserve his claim of a violation of the Court Reporters Act, which requires "all proceedings in criminal cases had in open court" to be "recorded verbatim," 28 U.S.C. 753(b), because "[h]is trial counsel apparently knew the un-transcribed conversations were not being recorded." Pet. App. 20a. The court found, in any event, that the claim lacked merit. The court explained that to obtain Court Reporters Act relief, "a defendant must make 'a specific showing of prejudice'" and also "explain why Rule 10(c)'s record-reconstruction procedure cannot cure the prejudice." *Id.* at 20a-21a (quoting *United States* v. *Sierra*, 981 F.2d 123, 125 (3d Cir. 1992), cert. denied, 508 U.S. 967 (1993)). And it found that in this case, it "cannot excuse [petitioner's] failure to pursue Rule 10 reconstruction." *Id.* at 20a.

The court of appeals stated that "Rule [10] and our caselaw require a collaborative reconstruction effort that includes opposing counsel and the District Judge," but that "it starts with the appellant." Pet. App. 23a. "Otherwise," the court observed, "an appellant could 'manufacture his own disputes, attribute legal significance to them, and then claim that they only can be resolved by an examination of testimony that is unavailable,'" which the court stated "appears to be what [petitioner] attempts here." *Ibid.* (quoting *United States* v. *Sussman*, 709 F.3d 155, 172 (3d Cir. 2013)). The court acknowledged petitioner's argument that "it would be

futile to pursue Rule 10 reconstruction since his attorneys on appeal did not participate in his trial and therefore cannot be expected to know what went on in the untranscribed conferences." *Id.* at 22a. The court observed, however, that "Rule 10 provides for that eventuality," because "a defendant may submit a declaration saying he does not remember what happened, passing the ball to the government to document its recollection and giving the defendant a chance to object before allowing the District Judge to resolve any remaining discrepancies" using "the provided documentation," "any notes he has retained[,] and his own recollections." *Ibid.*; see *id.* at 22a-23a (noting that the Ninth Circuit had "approved that very procedure under similar circumstances" in *United States* v. *Wilson*, 16 F.3d 1027, 1029 (1994)).

The court of appeals explained that petitioner had never "formally sought to reconstruct any untranscribed conversation" under Rule 10, Pet. App. 22a, but had instead relied on a "stunning request for discovery of the District Court's files, the District Judge's personal notes, and the work-product of every lawyer involved in the case." *Id.* at 23a. The court observed that petitioner had "cite[d] no rule entitling him to such discovery," and declined to establish such a procedure itself, especially in light of "the thorny privilege questions and perverse incentives that such a rule would surely precipitate." *Ibid.*

The court of appeals noted that two circuits have granted new trials based on the Court Reporters Act even absent a showing of prejudice "when an appellant has new counsel on appeal" and identifies "'substantial and significant'" omissions from the record. Pet. App. 21a n.10 (quoting *United States* v. *Selva*, 559 F.2d 1303,

1306 (5th Cir. 1977)). The court determined that petitioner "would not obtain relief" even in those circuits, however, because petitioner's claim that error may have occurred during an unrecorded part of the trial was "'[m]ere speculation.'" *Ibid.* (quoting *United States* v. *Preciado-Cordobas*, 981 F.2d 1206, 1214 (11th Cir. 1993)) (brackets in original).

Having found the appellate record sufficient and appropriate for its review, the court of appeals turned to petitioner's claims on the merits. See Pet. App. 26a-193a. It found that petitioner was not entitled to relief, rejecting his claims related to (among other things) substitution of trial counsel, *id.* at 26a-45a; the fair cross-section requirement for a jury pool, *id.* at 49a-70a; alleged racial discrimination in the use of peremptory challenges, *id.* at 71a-94a; the jury instructions addressing transferred intent for purposes of six of the VICAR murder charges, *id.* at 94a-118a; the jury instructions about lay-opinion evidence, *id.* at 118a-129a; and the arguments and evidence presented by the government during the penalty phase of the trial, including disputes related to restrictions the Bureau of Prisons had imposed in light of petitioner's "extraordinary history of initiating violent crime" while incarcerated, *id.* at 181a; see *id.* at 135a-189a.

ARGUMENT

Petitioner contends (Pet. 17-36) that Federal Rule of Appellate Procedure 10 required the court of appeals to compel discovery of the files and notes of the district court, the government, and his own trial counsel for purposes of supplementing the materials submitted on appeal. That contention lacks merit. The court of appeals' fact-specific application of Rule 10 in the unusual circumstances of this case accords with the Rule's text

and does not conflict with any decision of this Court or another court of appeals. Indeed, petitioner does not cite any decision, by any court, granting the sort of broad-ranging discovery he sought here. No further review is warranted.

1. Federal Rule of Appellate Procedure 10 governs the preparation of the record on appeal. Under Rule 10(a), "the following items constitute the record on appeal": (1) "the original papers and exhibits filed in the district court"; (2) "the transcript of proceedings, if any"; and (3) "a certified copy of the docket entries prepared by the district clerk." Fed. R. App. P. 10(a). Rule 10(c) establishes a process by which an appellant may address any perceived omissions in the appellate record. As an initial step, "[i]f the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection." Fed. R. App. P. 10(c). Once the appellant has prepared that statement and served it on the appellee, the appellee "may serve objections or proposed amendments," and "[t]he statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval." *Ibid.* The result of that process is then included "in the record on appeal." *Ibid.*

Rule 10(e) provides a similar mechanism for "correction or modification of the record." Fed. R. App. P. 10(e) (capitalization and emphasis omitted). Under Rule 10(e), "[i]f any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly." Fed. R. App. P. 10(e)(1). Rule 10(e) additionally

provides that "[i]f anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected" and a supplemental record created "on stipulation of the parties," "by the district court," or "by the court of appeals." Fed. R. App. P. 10(e)(2).

2. The court of appeals correctly rejected petitioner's claim (Pet. 25-27) that Rule 10 entitled him to discovery from the district court judge, the government, and his trial counsel as part of an effort to expand the appellate record. See Pet. App. 23a.

Nothing in the text of Rule 10(c) authorizes an appellant to take discovery from the district court and appellee for purposes of supplementing the appellate record. See *United States* v. *Casas*, 376 F.3d 20, 22-23 (1st Cir. 2004) (finding that internal court memoranda were not part of the record on appeal under Rule 10 and that appellants had no right to copies); see also *United States* v. *Honken*, 477 F. Supp. 2d 1004, 1006-1007 (N.D. Iowa 2007) (capital case) (observing that "nothing in the procedure specified in Rule 10(c) remotely suggests that the appellant is entitled to discovery of any materials in the appellee's possession in order to complete the appellant's initial statement"). Instead, Rule 10(c) establishes a process in which "[t]he appellee's input concerning [any] unrecorded proceedings" is "obtained via the appellee's 'objections and proposed amendments'" to a statement of the evidence or proceedings prepared by the appellant. *Honken*, 477 F. Supp. 2d at 1006; see Fed. R. App. P. 10(c). The district court then provides input of its own by adjudicating the objections and amendments, and any "settled and approved" statement is "included by the district clerk in the record on appeal." Fed. R. App. P. 10(c). Although the district

court and appellee would presumably rely on their notes, memoranda, correspondence, and recollections in preparing or adjudicating the objections, amendments, or additional proceedings relating to the "approval" of a statement, Rule 10(c) gives no indication that they are required to turn those materials over to the appellant—let alone do so before an appellant has even prepared the initial statement. See *ibid.*

Rule 10(e)(2), on which petitioner primarily relies (Pet. 18-19, 29-33), likewise contains no requirement that the district court or appellee produce materials based on an appellant's assertion of omissions from the appellate record. That provision applies to "material" omissions or misstatements, and states only that such material omissions or misstatements can be corrected "on stipulation of the parties," "by the district court," or "by the court of appeals." Fed. R. App. P. 10(e)(2). Nothing in Rule 10(e) entitles an appellant to obtain affirmative discovery from the district court or opposing party if the district court and opposing party disagree with the appellant's suggestion that the record contains material omissions or misstatements.

3. In this case, petitioner received everything to which he was entitled, and additional materials as well, in connection with his attempts to expand the appellate record.

As the district court found, "every substantive aspect of this case is transcribed and reflected on the docket: the pretrial hearings, the jury *voir dire*, the trial, including all substantive sidebar conferences, and each Defendant's sentencing." Pet. App. 206a n.6. Likewise, pleadings and other important documents such as proposed jury instructions were filed on the district court docket, which stretches to over 1700 docket

entries. *E.g.*, D. Ct. Doc. 1195 (Mar. 25, 2013); D. Ct. Doc. 1202 (Mar. 26, 2013); D. Ct. Doc. 1208 (Mar. 29, 2013); D. Ct. Doc. 1212 (Apr. 1, 2013); D. Ct. Doc. 1324 (May 13, 2013); D. Ct. Doc. 1336 (May 15, 2013); D. Ct. Doc. 1410 (May 27, 2013). And for more than four years after the trial, the district court and the government devoted "countless hours and resources" to appellate counsel's requests for assistance in identifying additional materials for possible inclusion in the appellate record. Pet. App. 199a.

The court of appeals correctly recognized that "we know what happened during the most critical trial stages" from the existing voluminous record, Pet. App. 21a-22a n.10, and that petitioner had failed to establish how any "purportedly missing items could or would give rise to 'any difference[s] . . . about whether the record truly discloses what occurred in the district court,'" *id.* at 18a n.9 (quoting Fed. R. App. P. 10(e)(1)) (brackets in original). Unlike the other cases on which petitioner relies, this is not an instance in which materials of obvious substantive significance are missing. See Pet. 19-22 (describing other cases in which wiretap evidence played for the jury, closing arguments, or jury instructions had been omitted from the record by mistake); see also pp. 21-23, *infra*.

The district court, which was itself involved in all of the relevant events, did not view the sidebar discussions and correspondence on which petitioner now focuses to contain anything necessary for the proper disposition of petitioner's appeal. To the contrary, the court explained that those discussions and writings concerned "scheduling issues" and other nonsubstantive matters, and that any substantive matters discussed off the record were "restated on the record and transcribed." Pet.

App. 208a; see *id.* at 205a. And as the court of appeals observed (*id.* at 18a n.9), petitioner provided no "non-speculative" basis for concluding they could have affected the outcome of the appeal. Accordingly, he has not identified "anything material to either party" that has been "omitted from or misstated in the record," as required for supplementation under Rule 10(e). Fed. R. App. P. 10(e)(2).

In the court of appeals, petitioner particularly emphasized the unrecorded, in-chambers jury charge conferences in claiming error, speculating that supplementing the record might show that he preserved apparently forfeited objections. See Pet. App. 24a; see also Pet. 11. Petitioner raised challenges only to two aspects of the jury instructions, however, and he makes no effort to show that either of them would have been resolved differently under a different standard of review. See Pet. App. 94a-129a. In any event, an in-chambers charge conference is commonplace and consistent with Federal Rule of Criminal Procedure 30. It is a party's responsibility to subsequently place on the record any matters, such as objections, that the party wishes to preserve. See Fed. R. Crim. P. 30; see also *Cox* v. *United States*, 284 F.2d 704, 710 (8th Cir.), cert. denied, 365 U.S. 863 (1961). And here, the record appropriately reflected the parties' arguments: the parties filed proposed instructions, the district court's jury charge was transcribed, and the court both reminded counsel that the in-chamber discussions were not recorded and had the parties place any objections on the record. See C.A. App. 15,225-15,227.

Petitioner is also not entitled to further relief under Rule 10(c). As the court of appeals recognized (Pet. App. 22a-23a), Rule 10(c)'s reconstruction process

"starts with the appellant," who must at the very least "submit a declaration saying he does not remember what happened." Petitioner never took that first step here, and therefore was not entitled to the additional steps that Rule 10(c) calls for—the filing of any objections or amendments by the government, and settlement and approval by the district court. See *ibid.*; Fed. R. App. P. 10(c).

Petitioner asserts (Pet. 28) that "Rule 10(c) assumes that the appellant has some 'means' to 'prepare a statement of the evidence or proceedings,'" and that it "says nothing about how to proceed where, as here," an appellant assertedly lacks materials that would help him do so. But an appellant always has his own "recollection," Fed. R. App. P. 10(c), as does trial counsel, and nothing in Rule 10 authorizes burdening the court or the opposing party with discovery-like demands as a substitute for internal consultation among counsel and client. In any event, even assuming that petitioner's understanding of Rule 10(c) is correct, that would simply mean that Rule 10(c) does not apply at all in this scenario—not that it would provide him with an unspoken entitlement to discovery or other relief.

Petitioner also contends (Pet. 30) that he had "no notice" that he needed to submit a statement of his own in order to start the Rule 10(c) process, and that the court of appeals erred by "retroactively apply[ing] such a requirement for the first time in a capital case." But Rule 10(c) itself directs the appellant to "prepare a statement of the evidence" as the first step in its reconstruction process. Fed. R. App. P. 10(c). Based on that clear text, "courts have consistently expected the appellant to make the first move with the Rule 10(c) statement." *United States* v. *Locust*, 95 Fed. Appx. 507, 512-513 (4th

Cir.) (per curiam) (collecting cases), cert. denied, 543 U.S. 916 (2004); see *Roberts* v. *Ferman*, 826 F.3d 117, 124 (3d Cir. 2016) (appellant "must have at least attempted to recreate the record in compliance with Rule 10(c)—an effort he has failed to undertake in the slightest") (emphasis omitted), cert. denied, 137 S. Ct. 1330 (2017); *United States* v. *Kelly*, 535 F.3d 1229, 1243 (10th Cir. 2008) ("[E]ven if [appellant] were able to articulate an adequate claim of prejudice from the purported omissions * * * , that claim would be significantly undermined (if not defeated) by [appellant's] failure to avail himself of established procedures—specifically, the procedures of [Rule] 10(c)—for reconstructing the gaps in the record."), cert. denied, 555 U.S. 1203 (2009); *Herndon* v. *City of Massillon*, 638 F.2d 963, 965 (6th Cir. 1981) (per curiam) (appellants' "failure to avail themselves of the procedure designed to reconstruct unrecorded proceedings left them with no objection based on the missing record"). Moreover, the district court here specifically invited petitioner, "[i]n the event that [he] believe[d] that any of the fifty 'unrecorded proceedings and conferences' involved substantive matters," to "submit a statement in accordance with Rule 10(c)." Pet. App. 209a. There is accordingly no basis for petitioner's claim that he could not have known he needed to submit a statement of his own to start the Rule 10(c) process.

4. No conflict exists between the decision below and the decisions of this Court or another court of appeals.

The decisions of this Court on which petitioner relies involved the omission from the appellate record of key substantive materials, such as the "instructions given [to the jury] and all pertinent rulings in connection therewith," *United States* v. *Sheridan*, 329 U.S. 379, 392

(1946), or "a transcript of the testimony and evidence presented" to the jury, *Hardy* v. *United States*, 375 U.S. 277, 282 (1964). See *Miller* v. *United States*, 317 U.S. 192, 196 (1942) (discussing counsel's failure to obtain "a transcript of the evidence"). Petitioner does not dispute that all of those materials are already contained in the appellate record here. See Pet. App. 21a-22a n.10. And he identifies no case in which this Court has held that the appellate record must also include sidebar discussions and undocketed correspondence where the district court viewed them as immaterial and the defendant has not shown otherwise.

The decision below is also consistent with the decisions of other courts of appeals cited by petitioner. See Pet. 19-24, 31-32. Petitioner observes (Pet. 19, 22) that other courts have "appl[ied] flexible procedures to remedy record omissions in federal criminal appeals," "including enlisting the help of the district court and the government when necessary." But the lower courts did just that here, with the district court and the government providing extensive assistance during petitioner's years-long effort to expand the appellate record. See pp. 6-8, 10, *supra*.

By the time that effort was finished, the district court was satisfied that "every substantive aspect of this case" was reflected in the appellate record, Pet. App. 206a n.6, and the court of appeals saw no reason to doubt that "the record truly discloses what occurred in the district court," *id.* at 18a n.9 (quoting Fed. R. App. P. 10(e)(1)). This is accordingly not a case in which further reconstruction efforts were necessary in order to obtain a record of critical substantive material such as the wiretapped conversations introduced in evidence, see *United States* v. *Graham*, 711 F.3d 445, 450 (4th

Cir.), cert. denied, 571 U.S. 963 (2013), a transcript of closing arguments, see *United States* v. *Preciado-Cordobas*, 981 F.2d 1206, 1210 (11th Cir. 1993), or the instructions read to the jury, see *United States* v. *Perkins*, 498 F.2d 1054, 1056 (D.C. Cir. 1974). And petitioner identifies no case in which another court of appeals, having determined that the appellate record already fairly disclosed everything material that occurred in the district court, nevertheless granted a defendant a broad right to discovery of the notes and files of the district court or the government based on a speculative claim that untranscribed or undocketed communications might contain matters of substance not otherwise reflected on the docket.

Moreover, even if petitioner had identified some variation in courts' approaches under Rule 10, this Court has recognized that the "courts of appeals have significant authority to fashion rules to govern their own procedures." *Cardinal Chem. Co.* v. *Morton Int'l, Inc.*, 508 U.S. 83, 99 (1993). And here, where both the district court and the court of appeals found the voluminous record to contain all of the materials necessary to review petitioner's convictions and capital sentences, further review would not be warranted.

5. Finally, even if the question presented otherwise warranted this Court's review, petitioner's failure to properly preserve his current claims would make this a poor vehicle for addressing that question. As the court of appeals observed, petitioner's trial counsel was aware that certain sidebars and conferences were not being recorded, but failed to raise a contemporaneous objection, thereby "'arguably waiv[ing] an objection'" to the omission of those discussions from the transcript. Pet. App. 20a (citation omitted). Petitioner likewise failed to

raise any contemporaneous objection when correspondence between trial counsel and the district court was not added to the district court docket.

The court of appeals determined that petitioner's claims failed on the merits regardless, and thus chose not to decide whether it would be otherwise appropriate to overlook petitioner's forfeiture. See Pet. App. 20a. But if this Court granted the petition for a writ of certiorari, it likely would need to decide the preservation question in the first instance, and would have no occasion to resolve the question presented unless it found some reason to overlook petitioner's forfeiture.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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