CAPITAL CASE

No. 20-1389

IN THE

Supreme Court of the United States

KABONI SAVAGE,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The decision below upends decades of federal appellate practice and affirms a federal death sentence on a record riddled with substantive gaps. After spotting record materials referring to both untranscribed hearings and missing correspondence apparently relevant to their client's appeal, Kaboni Savage's appellate counsel moved repeatedly to reconstruct and complete the appellate record. At every turn, they explained that they lacked trial counsel's cooperation and could not reconstruct or describe these materials without help from the court, prosecution, or the trial lawyers for the defense.

Describing these record gaps as Savage's "most foundational claim of error," the Third Circuit *accepted all of this*, yet held that Federal Rule of Appellate Procedure 10 did not entitle Savage to assistance obtaining these materials for the sake of a complete appellate record. With respect to untranscribed proceedings, the court ruled, Savage had not properly invoked Rule 10(c) because he had not "submit[ted] a declaration saying he does not remember what happened." App. 22a. And with respect to missing correspondence, the Third Circuit held that Savage had failed to identify any "differences" between him and the government about what transpired at trial. App. 18a & n.9.

The government does not meaningfully dispute that these rulings lack any basis in Rule 10's text or the precedents interpreting it. Instead, it rewrites the Third Circuit's decision to insert a new rationale—that the record omissions were not "material" under Rule 10(e)(2)—and rewrites decades of

caselaw to add rules and distinctions that no court has ever recognized. Unable to defend the Third Circuit's innovations, the government asserts that this case is a poor vehicle to correct them because Savage's trial counsel did not contemporaneously object to the record gaps. But no such objection is required—that, too, is a novelty the government urges to salvage a plainly erroneous capital judgment.

Rule 10 does not dictate *how* federal courts ensure a complete appellate record; its hallmark is flexibility. But neither that rule nor due process allows courts to spring procedural traps on unwary litigants. The Third Circuit decided a direct appeal of a federal capital judgment based on unsupported procedural innovations, breaking from precedent and casting doubt on accepted practices in a core area of federal appellate practice. It is difficult to imagine a case that cries out more forcefully for this Court's review.

I. The government can defend the Third Circuit's judgment only by rewriting the decision below and ignoring the record.

The Third Circuit invented two extra-textual hurdles to Savage's requests for a complete appellate record under Rule 10. Realizing the error, the government does not try to defend those novel and unsupported requirements; it instead rewrites the decision to pretend the Third Circuit did not impose them.

A. The government brushes aside the crux of the Third Circuit's ruling as it relates to Rule 10(c). Rule 10(c) describes one way appellants can reconstruct untranscribed proceedings: They "may prepare a statement of the evidence or proceedings from the

best available means." Fed. R. App. Proc. 10(c). As Savage's Rule 10 motions explained, he could not submit such a statement because his appellate counsel was not present for the relevant conferences and trial counsel were uncooperative. A-1009, 2110-11. The Third Circuit held that Savage had to explain this dilemma not through his motions but by way of "a declaration saying he does not remember what happened"—in other words, it required a declaration of *non*evidence. App. 22a.

Rule 10(c) nowhere hints at "a declaration saying [the appellant] does not remember what happened," and the government's attempts to justify the Third Circuit's requirement do not withstand scrutiny.

First, rather than defend the Third Circuit's extra-textual holding, the government argues that Rule 10(c) required Savage to "make the first move." Opp. 20-21. But Savage *did* make the first move: He filed motions explaining appellate counsel's inability to reconstruct the proceedings without assistance from the district court, prosecutors, and the various defendants' trial attorneys. *See* Pet. 12, 14. The court of appeals found that he failed to invoke Rule 10 because he had not explained this problem by way of a declaration. Its actual holding, in other words, was that Savage failed to make the first move *properly* because he did not file a particular type of declaration mentioned nowhere in Rule 10. The government cites no support of any sort for *that* ruling. There is no legal basis for the Third Circuit's procedural bar.

Second, employing similarly faulty logic, the government argues that the district court's invitation for Savage "to submit a statement in accordance with

Rule 10(c)" gave him notice of the declaration requirement. Opp. 21. The government again misses the point. Savage has never disputed that Rule 10 requires the appellant to submit a statement of the evidence or proceedings. Rather, his contention—which the government does not dispute—is that nothing in the Rule suggests that a defendant who *lacks the means to craft such a statement* must inform the court by way of a declaration (as the Third Circuit held) rather than by way of a motion (as Savage did). Pet. 8-13. The district court's invitation to submit a Rule 10 statement gave no notice of the Third Circuit's atextual *declaration requirement*. It is undisputed that Savage and his counsel learned of that requirement for the first time when reading the decision affirming his death sentence.

Third, the government asserts that courts of appeals are entitled to develop their own procedural rules in addition to or in conflict with the Federal Rules of Appellate Procedure. Opp. 23. But the Third Circuit did not promulgate a specialized local version of Rule 10—it blindsided Savage with a new procedural requirement *in its opinion disposing of his capital appeal.* Such a procedural ambush would be improper in any case, but cannot remotely be squared with the rudiments of due process in a federal capital appeal. *See, e.g.*, *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (appellate court should not create new procedural rule to evade capital defendant's constitutional claim).

Finally, the government states that if Savage was not required to submit the declaration envisioned by the Third Circuit, "that would simply mean that Rule

10(c) does not apply at all in this scenario." Opp. 20. But the Third Circuit did not hold that Rule 10(c) was inapplicable—if it had, Savage would have remained free to seek reconstruction of the untranscribed proceedings under Rule 10(e)(2). *See* Pet. 29-30. Instead, the Third Circuit held that Rule 10(c) *did apply*, and that Savage's failure to comply with its unwritten declaration requirement categorically forfeited his right to reconstruct untranscribed proceedings. App. 23a. The government cannot defend this ruling and barely tries to do so.

B. After ignoring the inconvenient rationales for the Third Circuit's decision, the government concocts its own convenient ones. Its revisionism clashes with the Third Circuit's decision and mischaracterizes the record.

First, the government reverse engineers a new rationale for the Third Circuit: that the requested documents and hearing reconstructions were not "material" under Rule 10(e)(2). Opp. 5, 16-19, 22-23. But the Third Circuit never even mentioned Rule 10(e)(2), which allows the record to be supplemented "[i]f anything material to either party is omitted." The court instead applied *Rule 10(e)(1)* and faulted Savage for failing to identify "any difference … about whether the record truly discloses what occurred in the district court." App. 18a n.9 (quoting Rule 10(e)(1)). As Savage's petition explained (Pet. 5, 30-31), Rule 10(e)(1)'s requirement that a party identify some "difference" about the appellate record was inapposite because it governs *disputes* about the appellate record. Savage was not trying to settle a dispute about the historical

facts under Rule 10(e)(1), but to supplement the appellate record with missing materials under Rule 10(e)(2).

Effectively conceding that Rule 10(e)(2) governs, the government jury rigs a "materiality" holding by stitching together the Third Circuit's statements about different appellate contentions requiring showings of *prejudice*, not *materiality*. It points to the Third Circuit's finding that Savage had not "demonstrate[d] any non-speculative prejudice" from the record gaps, as would be required for *a new trial* under the Federal Death Penalty Act. *See* 18 U.S.C. § 3595(b); App. 18a n.9 (quoted at Opp. 11). It cites the court's assurance that it "kn[ew] what happened during the most critical stages," made in denying a *new trial* under the Court Reporter Act. App. 21a-22a n.10 (quoted at Opp. 18). And it cites the remark that Savage had not demonstrated "'any difference[s]" about the record's accuracy, Opp. 18, which, as just explained, concerned not *materiality* for purposes of Rule 10(e)(2), but the existence of a *dispute* for purposes of Rule 10(e)(1).

The government suggests these discussions of prejudice—which mention neither Rule 10(e)(2) nor materiality—somehow add up to a finding of non-materiality under Rule 10(e)(2). But materiality is a question of *relevance*, not *prejudice*. *See, e.g.*, *United States v. Ruff*, 472 F.3d 1044, 1047 & n.4 (8th Cir. 2007) ("This letter is material to the record because it fully describes the district court's actions in response to Chief Judge Loken's concerns."). The government cites no instance in which a court has ever conditioned

Rule 10(e)(2) reconstruction on a showing of prejudice. If such a showing were necessary, defendants in Savage's position—whose appellate counsel do not know the precise substance of missing record portions—would *never* be entitled to reconstruct the record under Rule 10(e)(2). Decades of precedent endorsing Rule 10 reconstruction in precisely these circumstances make clear that this is not the law. *See* Pet. 17-27.

That the government felt compelled to invent a new "materiality" rationale for the Third Circuit and a new prejudice standard for Rule 10(e)(2) speaks for itself: The government cannot reconcile the Third Circuit's decision with Rule 10's text.

Second, and again bypassing the decision below, the government tries to revive the district court's findings that the omitted materials all pertained to "'scheduling issues' and other nonsubstantive matters." Opp. 18. The government urged the same contention on the Third Circuit, *e.g.*, A-995.7, but the court of appeals did not accept it, and for good reason: The record refuted the district court's (and government's) characterization.

As Savage's petition explained, those materials pertained to substantive matters, such as Savage's motion to substitute counsel, jury instructions, and Savage's conditions of confinement. *See* Pet. 9-10. They related not only to issues Savage could have raised in his appeal but ones that he did—including his lead contention of error. *Id.*

The government does not try to take on that showing of materiality directly, and fails to undermine it

indirectly by citing a district court statement that the record refutes and the decision below did not adopt. It cannot avoid the conclusion that the Third Circuit prevented Savage from supplementing the record with materials relevant to his capital appeal.

II. This case is an ideal vehicle to bring the Third Circuit in line with uniform federal precedent interpreting Rule 10.

As Savage's petition details, the decision below veers from decades of federal precedent reading Rule 10 as a flexible and collaborative tool—not a rigid obstacle—for parties that need to fill holes in the appellate record. The government's attempts to square the decision with this body of precedent mischaracterize the relevant caselaw and the record below. And its halfhearted vehicle argument lacks any legal or logical support.

A. Certainty about how to secure a complete record on appeal is important for all appellate practitioners, and especially lawyers representing indigent criminal defendants, who frequently enter a case after trial and lack cooperation from trial counsel. For such attorneys—who handle the lion's share of federal criminal appeals—collaborative record reconstruction is an everyday necessity, not a luxury. It is crucial to ensure that courts review their clients' criminal convictions on a fulsome record.

Federal law has, until now, consistently taught that appellate counsel faced with an incomplete record need only exercise ordinary diligence in seeking help from the court and opposing parties. Pet. 17-27.

Contrary to that approach, the decision below conditions such assistance on unwritten procedural prerequisites, calling settled practices into question. The government's strained attempts to harmonize the decision with prior precedents only highlight that new uncertainty.

First, the government contends precedents endorsing collaborative record reconstruction are limited to situations where reconstruction was "necessary … to obtain a record of critical substantive material such as the wiretapped conversations introduced in evidence, a transcript of closing arguments, or the instructions read to the jury." Opp. 23. That is a novel proposition recognized nowhere in federal precedent. In reality, those precedents extend to so much more: missing "sealed affidavit[s]," *Convertino v. United States Dep't of Justice*, 795 F.3d 587, 591 n.1 (6th Cir. 2015); a form documenting the parties' consent to have magistrate judge preside, *Stevo v. Frasor*, 662 F.3d 880, 885 (7th Cir. 2011); letters to the court from dismissed parties, *Parker v. Della Rocco*, 252 F.3d 663, 665 n.2 (2d Cir. 2001); and a letter between judges on potential prosecutorial misconduct, *Ruff*, 472 F.3d at 1047 & n.4.

The broad sweep of these precedents accords with Rule 10(e)(2), which requires only materiality and is not limited to "critical substantive material," as the government suggests. Opp. 22-23. The government cites nothing in these precedents that would make the materials Savage requested unavailable under Rule 10. And even under its own invented standard, it fails to explain why untranscribed wiretap recordings would qualify as "critical," Opp. 22, while Savage's *pro*

se letters about his motion to substitute counsel—the lead issue in his appeal—would not. There is simply no basis for the "critical substantive material" distinction the government purports to draw.

***Second*,** the government fails to support its claim that Savage's case is distinct from this body of caselaw because Savage sought "discovery" of court and prosecutor notes. Opp. 23. The contention is especially disingenuous with respect to Savage's request for undocketed correspondence—there is no conceivable way for newly appointed appellate counsel to secure such correspondence without "discovering" it from a lawyer or court official who possesses it. Courts have thus routinely allowed "discovery" of undocketed correspondence where necessary to complete the appellate record. *See, e.g.*, *Ruff*, 472 F.3d at 1047 & n.4.

Further, with respect to the untranscribed proceedings, appellate counsel's request to review attorney notes was just one of several proposals for reconstruction: Counsel alternatively asked "that the district court and its staff should at least be directed to make reasonable efforts to assist, and have trial counsel assist, current counsel to reconstruct them." A-2111. Far from a demand for "discovery," that request falls squarely in the heartland of collaborative reconstruction that federal courts have endorsed for decades. *See* Pet. 17-22. In rejecting it based on novel procedural requirements, the decision below undeniably breaks with that precedent.

Even if its "discovery" characterization were correct, the government cites no authority rejecting ac-

cess to court or lawyer notes when, as here, a defendant would otherwise have no means of reconstructing material portions of the record in a criminal appeal. The government chiefly relies on *United States v. Honken*, 477 F. Supp. 2d 1004 (N.D. Iowa 2007) (cited at Opp. 16), where appellate counsel had more than a year to reconstruct proceedings *with* the help of trial counsel, who had shared their recollections and files. *Id.* at 1009-10. And *United States v. Casas*, 376 F.3d 20 (1st Cir. 2004), did not involve an effort to reconstruct trial proceedings at all—it sought internal court memoranda about a judge's case assignments. *Id.* at 22-23 (cited at Opp. 16). These are the *best* precedents the government can muster, and neither remotely supports the government's proferred distinction.

B. Seen for what they are, the government's strained arguments underscore how the decision below will confuse federal practice under Rule 10. The government cannot cite a single case at any level of the federal system suggesting that, for example, materiality analysis under Rule 10(e)(2) turns on prejudice (Opp. 11, 18), or that Rule 10(e)(2) is cabined to "critical substantive material," (Opp. 23). Yet it brazenly asks this Court accept new atextual requirements the Third Circuit did *not* impose on top of the new atextual requirements the court *did* impose. This slipperiness shows there is no logical stopping point to the Third Circuit's non-textual approach to Rule 10. Absent this Court's intervention, the confusion and uncertainty will only deepen.

C. Unable to reconcile the court of appeals' deci-

sion with federal precedent, the government half-heartedly suggests there is a vehicle issue because Savage's trial counsel did not object to the district court's failure to transcribe the missing proceedings and docket the missing correspondence. Opp. 23-24.

The government cites no authority requiring a contemporaneous objection to preserve the right to a complete appellate record, and such a requirement would make no sense: A full appellate record serves in large part to help identify plain error that trial counsel may have missed. *See, e.g.*, *Hardy v. United States*, 375 U.S. 277, 279-80 (1964). That promise would be meaningless if trial counsel's failure to lodge an objection could waive the right to a full and accurate appellate record. Indeed, Rule 10's text allows for the record to be supplemented when anything material is omitted from the record "by error or accident," Fed. R. App. Proc. 10(e)(2), confirming that a court does not attribute fault to any party when determining whether to supplement the record.

The government's confidence in advancing this atextual waiver argument further illustrates the muddle the Third Circuit has made of Rule 10. There is no barrier to this Court's review, and no denying that the Third Circuit strayed from Rule 10's text and decades of federal practice. This Court's intervention is needed to maintain uniformity of decision interpreting Rule 10 and correct a manifest error tainting a federal capital conviction.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

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October 26, 2021