CAPITAL CASE No. _____

IN THE

Supreme Court of the United States

ZACHARIAH MARCYNIUK,

Petitioner

v.

DEXTER PAYNE, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE: QUESTIONS PRESENTED

In this capital habeas case, the Eighth Circuit decided important questions of federal law in a way that conflicts with relevant decisions of this Court and decisions of other Circuits and undermines public confidence in the impartiality of the federal judicial system, necessitating review by this Court:

1. Whether cause to excuse procedural default exists when a state officials made statements that were merely misleading—rather than outright false—that nonetheless hindered counsel's compliance with state's procedural rule, and counsel did not know and had no reason to believe that the statements were misleading, rendering the factual basis of his claim not reasonably available.
2. Whether a capital trial is fundamentally unfair when a significant part of peremptory strikes is made in secret, outside of the presence of the public, and without knowledge or participation of the defendant; the strikes are made based on gender; and the record is concealed by the court from subsequent counsel.
3. Whether the Supreme Court should exercise its supervisory powers to end the pattern of sua sponte rulings by the Eighth Circuit denying capital petitioners notice and a meaningful opportunity to dispute the grounds on which the appellate court denies them habeas relief.

LIST OF PARTIES

The caption contains the names of all parties.

DIRECTLY RELATED CASES

- *State v. Marcyniuk*, No. CR2008-475-1, Circuit Court of Washington County, Arkansas, trial court proceedings, judgment entered December 12, 2008.
- *State v. Marcyniuk*, No. CR-09-634, 2010 Ark. 257, 373 S.W.3d 243 (2010), Arkansas Supreme Court, direct appeal from conviction and sentence. Judgment entered May 27, 2010, rehearing denied August 6, 2010.
- *State v. Marcyniuk*, No. CR2008-475-1, Circuit Court of Washington County, Arkansas, state postconviction, judgment entered July 31, 2012.
- *State v. Marcyniuk*, No. CR-12-1009, 2014 Ark. 268, 436 S.W.3d 122 (2014), Arkansas Supreme Court, appeal from denial of state postconviction, judgment entered June 5, 2014, rehearing denied July 31, 2014.
- *In* re *Zachariah Scott Marcyniuk*, No. 4:14-MC-13, United States District Court for the Eastern District of Arkansas Pine Bluff Division, granting motion to proceed *in forma pauperis* and for appointment of counsel in the 28 U.S.C. § 2254 proceedings. No final judgment entered.
- *Marcyniuk v. Kelley*, 5:15-CV-226, 2018 WL 10731204, United States District Court for the Eastern District of Arkansas Pine Bluff Division, federal habeas, judgment entered July 11, 2018.
- *Marcyniuk v. Payne*, No. 19-1943, 39 F.4th 988 (8th Cir. 2022), United States Court of Appeals for the Eighth Circuit, petitioner's appeal from order denying habeas relief, judgment entered July 8, 2022. Petition for rehearing and rehearing en banc, 2022 WL 4904137, denied October 4, 2022.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Zachariah Marcyniuk respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App. A) is published and cited as *Marcyniuk v. Payne*, 39 F.4th 988 (8th Cir. 2022).

The order denying rehearing and rehearing en banc (App. C) is unpublished, *Marcyniuk v. Payne*, No. 19-1943, 2022 WL 4904137 (8th Cir. Oct. 4, 2022).

The district court's order denying habeas (App. B) is unpublished, *Marcyniuk v. Kelley*, No. 5:15-CV-00226-JM, 2018 WL 10731204 (E.D. Ark. July 11, 2018).

JURISDICTION

The court of appeals entered judgment on July 8, 2022, and denied a timely-filed petition for rehearing on October 4, 2022. Justice Kavanaugh granted Marcyniuk's Application (22A547) on December 19, 2022, and extended the time to file the petition for writ of certiorari until and including March 3, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented in this petition concern judge-made doctrines of procedural default and waiver.

STATEMENT OF THE CASE

1. Introduction.

Zachariah Marcyniuk was tried and sentenced to death by a jury in the Washington County Circuit Court, Arkansas. (App. 22.) Despite the presumption that the entirety of the trial was open to the public, a significant part of jury selection was done in secret. At the judge's invitation, the prosecuting attorney and Marcyniuk's counsel removed 30 potential jurors from the venire based on responses to a mail-in jury questionnaire, making 15 off-the-record strikes each. (App. 104–05.) The prosecutor disproportionately removed women from the venire, while the defense attorney disproportionately removed men. (App. 104–05.) The defense attorney later confirmed during a hearing that he believes that women are more forgiving and that he used gender as a basis for his jury selection. (App. 209–210.) Neither attorney made any challenges to the process on obvious constitutional grounds.

Thus, without Marcyniuk's knowledge or input, the venire shrunk by 39%, from 77 to just 47 people. From the remaining 47 people in the venire, a jury of 11 white women and one white man was seated. The jury questionnaires on which the strikes were based were destroyed at the trial court's direction. Further, the judge kept records of these strikes separate from the case file, preventing review by the Arkansas Supreme Court and hobbling Marcyniuk's direct appeal and post-conviction claims. Even so, the court clerk certified the incomplete record as "true and complete." (App. 107.) Marcyniuk did not discover the off-the-record strikes until his federal habeas proceedings.

Marcyniuk raised several claims related to this off-the-record jury selection for the first time in his federal habeas petition. Marcyniuk sought discovery and a hearing on cause and prejudice. Without holding a hearing or allowing Marcyniuk to brief the issues, the district court dismissed the petition with prejudice. (App. 91.)

The Eighth Circuit granted a certificate of appealability regarding whether the district court prematurely dismissed Marcyniuk's claims that the off-the-record jury selection violated his right to be present, right to a public trial, and right to an appeal, and that his trial counsel was ineffective for participating in the procedure. Marcyniuk argued that he could demonstrate cause and prejudice to excuse default of his claims by showing that the factual basis for his claims was not reasonably available to his post-conviction counsel and that state officials' interference hindered compliance with the state procedural rule and caused the default. Rejecting these arguments, the Eighth Circuit affirmed denial of habeas relief (App. 19) and denied the petition for rehearing and rehearing en banc (App. 98.)

2. State proceedings.

Zachariah Marcyniuk has suffered from serious symptoms of mental illness and a developmental disability, Autism Spectrum Disorder, since he was a young child. (App. 35.) In March of 2008 Marcyniuk killed Katherine "Katie" Wood. (App. 20.) On the eve of jury trial, Marcyniuk was facing a capital-murder charge and the State was seeking the death penalty. As explained below, Marcyniuk played little part in selecting the jurors who would sentence him to die.

A. Trial.

Marcyniuk was tried by jury in the Washington County Circuit Court. (App. 22.) Despite the presumption that the entirety of the trial was open to the public, a significant part of jury selection was done in secret, as federal habeas counsel discovered much later. Without Marcyniuk's knowledge, the prosecuting attorney and Marcyniuk's counsel removed thirty potential jurors from the venire based on responses to a mail-in jury questionnaire. (App. 104–05.)

To put these strikes in context, they shrunk the jury venire in Marcyniuk's case by 39%. The venire was drawn from voter-registration rolls. Before the jurors reported for jury service, the court sent a 30-page questionnaire to 100 potential jurors. (App. 72.) The questionnaire asked questions about jurors' age and gender, religious beliefs, and death-penalty views. (*Id.*) At least 90 potential jurors completed and returned the questionnaires. (*Id.*) Using the questionnaires alone—without any voir dire, without making a public record, and without Marcyniuk's input or knowledge—the prosecution and the defense submitted to the clerk's office a list of 15 potential jurors each that they wanted struck from the venire. (App. 104–05.) After these 30 persons were removed, only 47 persons reported in person for jury duty. The off-the-record strikes thus removed 30 out of 77 veniremen, or 39% of the venire.

Despite the magnitude of their impact, the existence of these strikes was not discovered until federal habeas. There was no discussion of this procedure in the transcript. The official court record bore no mention of this event. The strike lists submitted to the court by counsel were not made part of the official court record for

appeal, even though the circuit court clerk and the court reporter certified that the record was "true and complete." (App. 106–07.)

It was only during the preparation of Marcyniuk's federal habeas petition that an investigator uncovered a 16-page file maintained by the Washington County jury coordinator. This "Jury Coordinator File" was kept separate and apart from the circuit clerk's case file. The file contained the lists made by the prosecutor and the defense attorney of the veniremen they wanted to strike. (App. 104–05.) The language used on these lists leaves no doubt that both the defense and the prosecutor treated these potential juror removals as strikes. The defense attorney titled his list "Defense list to strike from jury panel." (App. 105.) Prosecutor John Threet referred to his list of 15 veniremen as people he "would choose to strike before calling them as potential jurors." (App. 104.)

> This is my list of 15 that I would choose to strike before calling them as potential jurors.
>
> Thanks
>
> 

Habeas counsel then obtained declarations from two deputy clerks at the Washington County Clerk's office explaining how the separate file came to be and illuminating the jury-selection process during Marcyniuk's trial. (App. 99–103.) The declarations establish that off-the-record juror strikes was a practice specific to Judge Storey in death-penalty cases. Judge Storey would allow the prosecution and

the defense to strike a number of veniremen before they were summoned to appear in court. (App. 102.) Those struck veniremen were not called to appear for in-person jury selection and did not count towards the statutory limit of peremptory strikes for either side. Finally, the clerks' declarations explain that the file containing the lists submitted by counsel striking potential jurors was maintained separately from other court records that are part of the trial and appellate records. The public was not allowed to observe this jury-selection process or even to know that it existed.

The secrecy created incentives for neither attorney to object to its constitutionality. The review of the lists shows that out of 15 strikes, the State exercised 11 against women; the defense, 9 against men. (App. 104–05.) Trial counsel later admitted to using gender as a basis for his strikes because "women are a lot more forgiving than men are." (App. 209–10.) Neither counsel raised obvious constitutional challenges to their opponent's strikes or objections to apparent violations of state statutes governing the jury-selection process, such as limits on peremptory challenges.

The jury questionnaires were subsequently destroyed. (App. 70.) Defense counsel did not move to make them part of the record or to preserve them in any way. (App. 202–03, 218–19.)

From the remaining 47 people in the venire, a jury of 11 white women and one white man was seated. On-the-record jury selection took only two and a half hours. The jury found Marcyniuk guilty of all charges and, on December 12, 2008, sentenced him to death.

B. Direct Appeal.

Represented by new appellate counsel who had no reason to know about the off-the-record strikes, Marcyniuk appealed his capital-murder conviction and death sentence. He did not raise jury-selection claims because the official record did not mention any off-the-record strikes, even though the circuit clerk certified that the record was "true and complete." (App. 106–07.)

In death-penalty cases, the Arkansas Supreme Court is required by statute to "review all errors prejudicial to the rights of the appellant." Ark. Code § 16-91-113(a); Ark. Sup. Ct. R. 4-3. The incomplete record on appeal precluded meaningful appellate review of the jury selection's propriety broadly and the individual strikes specifically. The Arkansas Supreme Court affirmed the capital-murder conviction and the death sentence. *Marcyniuk v. State*, 373 S.W.3d 243 (Ark. 2010).

C. State post-conviction.

Marcyniuk then sought post-conviction (aka Rule 37) relief. State post-conviction counsel did not find the second court file with the strike lists. Despite extensive questioning during the hearing, the trial counsel never mentioned off-the-record strikes. Accordingly, post-conviction counsel did not know and had no reason to know about the off-the-record strikes and did not raise any issues related to this irregular jury-selection process.

During the post-conviction hearing before the same trial judge who initiated the off-the-record jury selection, the same prosecutor who also made off-the-record strikes asked Marcyniuk's trial counsel to confirm that he made seven strikes during jury selection. (App. 262.) The prosecutor obviously knew that there were

more than seven strikes. So did the defense attorney. Yet, under oath, Marcyniuk's trial counsel testified that there were only seven strikes, and the prosecutor didn't correct this false testimony.

Q Now, also some was brought out about the death penalty during voir dire. In fact, let me -- you struck seven jurors from the panel, do you recall that?
A I don't recall that number specifically but --
Q You don't have any dispute with the transcript if it reflects that --
A That's right. I don't have dispute.
Q Reflects the seven strikes?
A That's right.
Q You struck one for cause. You struck one of the alternates. I think voir dire, one of them, and this is no measurement of time, but about 108 pages of the transcript was devoted to voir dire. There was a 30-page or so questionnaire?
A Correct.

(App. 262.) Nonetheless, the judge, who also knew that Marcyniuk's trial counsel made more than seven strikes of potential jurors, found that "counsel actively participated in Voir Dire through use of the questionnaire and by questioning the potential jurors resulting in striking seven (7) potential jurors." (App. 269.) The judge did not mention of the defense attorney's additional 15 strikes also made "through the use of the questionnaire." (App. 268–76.)

Marcyniuk's post-conviction counsel interviewed trial counsel and extensively questioned him under oath about the jury-selection process. (App. 191–267.) Post-conviction counsel repeatedly asked Marcyniuk's trial attorney about the reasons

why on-the-record voir dire was so short, amounting to just over 100 pages in the transcript. Was the judge pushing it? (App. 212.) Did the court impose time limits? (App. 214.) The trial attorney claimed the voir dire was "shortened up because of this extensive questionnaire." (App. 195.) Although technically true, that statement suggests it was because of the information contained in the questionnaire and not because it was used to make 30 off-the-record strikes, which were not mentioned at all. In fact, when the prosecutor asked how he used the questionnaires, trial counsel said he "studied it intensively," (App. 251), again failing to mention that he used them in a secret voir dire.

Post-conviction counsel explicitly asked trial counsel if he compiled a list of people he did not want based on the questionnaires. (App. 224.) That is, of course, exactly what the trial attorney did: the list was submitted to the judge, and those jurors were eliminated. But at the hearing, trial counsel denied it. *Id.*

The trial counsel did admit that he used gender as a basis for selecting the jury because he believes that women are more forgiving. (App. 209–210.)

In the end, the Washington County Circuit Court denied Marcyniuk's Rule 37 petition. The Arkansas Supreme Court affirmed. *Marcyniuk v. State*, 436 S.W.3d 122 (Ark. 2014).

3. Federal District Court Proceedings.

Marcyniuk timely filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Arkansas. In light of the investigator's discovery of the strikes and hidden court files, Marcyniuk alleged that the flawed jury selection process denied him multiple constitutional protections.

Specifically, Marcyniuk alleged that off-the-record jury selection denied him the right to be present during all critical stages of a criminal proceeding, the right to a public trial, to appellate review, and to effective assistance of counsel.

Armed with the court clerk's declarations and the jury coordinator's file, Marcyniuk sought discovery. Marcyniuk asked to depose prosecuting attorney John Threet (who participated in the strikes), Judge Storey (who used this practice in capital cases), and Clerk Stamps (who received and acted on the strikes). Marcyniuk argued that discovery could uncover the basis for the strikes, the involvement of the trial judge in the process, and establish that state action caused the procedural default of his claims. The district court denied the request, holding that the requested discovery "would not advance Marcyniuk's claims" because it "would not resolve any factual disputes or assist the Court in deciding Marcyniuk's claims, or any issues related to procedural default." The court agreed to expand the record with the jury coordinator's file and two declarations from court clerks for the limited purpose of analyzing ineffective-assistance-of-counsel claims.

The district court ultimately dismissed the petition. (App. 91.) The court also denied Marcyniuk's "embedded request for a hearing." (App. 31.) It found that Marcyniuk waived his right to a public trial and that he "has not demonstrated cause and prejudice to excuse the default" of the jury-selection claims at issue here. (App. 30.) As to the related ineffectiveness claim, the court deemed it insubstantial and held that "the default is not excused under *Martinez-Trevino*." (App. 61.)

4. The Eighth Circuit proceedings.

On appeal to the Eighth Circuit, Marcyniuk argued that he could demonstrate cause and prejudice to excuse default of his claims by showing that the factual basis for his claims was not reasonably available to his post-conviction counsel and that state officials' interference hindered compliance with the state procedural rule and caused the default.

After the briefing was completed, the State filed two Fed. R. App. 28(j) letters, raising new arguments for the first time. In a letter filed the week before oral argument, the State mentioned Ark. Sup. Ct. R. 3-4(b) for the first time in this case, without elaborating further. (App. 129.) The Eighth Circuit denied Marcyniuk's motion to strike those improperly filed 28(j) letters or to postpone the oral argument and allow additional briefing on the issues raised for the first time by the State. (App. 137.) The court then went on to adopt in its opinion the government's arguments related to Rule 3-4(b) that it raised for the first time at oral argument. (App. 17.)

In its decision affirming denial of habeas relief, the Eighth Circuit held that Marcyniuk did not establish cause to excuse procedural default because the record certifications were not outright false and therefore did not interfere with counsel's compliance with the state's procedural rule; and, because the file with the strikes was kept at the courthouse, it was "reasonably available" to Marcyniuk's counsel. (App. 18.) Though a significant part of peremptory strikes was made in secret—out of the public eye, and without Marcyniuk's knowledge or participation—Marcyniuk's trial was not fundamentally unfair under *Weaver v. Massachusetts*, 137

S. Ct. 1899, 1910 (2017). It further held that Marcyniuk cannot establish prejudice to excuse procedural default of his ineffective-assistance-of-trial-counsel claim under *Martinez v. Ryan*, 566 U.S. 1 (2012). The Eighth Circuit refused to consider Marcyniuk's argument that he can show actual prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), because while Marcyniuk raised that argument in the district court, it was made in support of a different claim. And yet, when it decided the question of state interference, the court adopted the government's argument based on Rule 3-4 that was not raised in the district court at all, but made verbally for the first time at oral argument on appeal. This petition for writ of certiorari follows.

REASONS FOR GRANTING WRIT

I. The Eighth Circuit's decision on state interference conflicts with the decisions of this Court and decisions of other courts of appeals.

It is undisputed that Marcyniuk did not raise claims related to the off-the-record peremptory strikes in state court. Given the rule prohibiting successive Rule 37 petitions, Marcyniuk's habeas claims are procedurally defaulted and technically exhausted. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). A federal court can grant relief on a defaulted claim if the petitioner demonstrates cause for the default and actual prejudice from the violation of federal law. *Id.* at 750. Cause is established when some "objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S.478, 488 (1986). With its opinion in Marcyniuk's case, the Eighth Circuit decided an important question of whether cause to excuse procedural default exists when the

actions of the state, state courts, and other officials hinder petitioner's compliance with the procedural rule and make the factual basis for the claim not reasonably available to counsel. The Eighth Circuit now conflicts with the relevant decisions of this Court and other Circuits, such as *Amadeo v. Zant*, 486 U.S. 214 (1988), *Murray v. Carrier*, 477 U.S. 478, 488 (1986), *Ambrose v. Booker*, 684 F.3d 638, 645 (6th Cir. 2012), and *Johnson v. Champion*, 288 F.3d 1215, 1227–28 (10th Cir. 2002). Interference by state officials is thankfully rare, but because of its rarity, the Court does not often get a chance to speak on this issue. Marcyniuk's case is an opportunity for the Court to clarify this important question of federal law.

A. State interference constitutes cause even when it merely "hinders," "impedes," or simply "makes impractical" counsel's efforts to comply with a state procedural rule.

Marcyniuk argued that he demonstrated cause to excuse the procedural default of his right to be present, right to a public trial, right to appellate review, and ineffective-assistance-of-trial-counsel claims for two reasons.

First, state officials interfered with his ability to comply with the procedural rule and raise the claims in state court. Cause is present, for example, when relevant evidence "was concealed by county officials and therefore was not reasonably available to petitioner's lawyers." *Amadeo*, 486 U.S. at 222. In *Amadeo*, an attorney had uncovered among public records a district attorney's memorandum to the county jury commissioners that was intentionally designed to result in underrepresentation of black people and women on the juries. *Id.* at 218. The district court based its finding of concealment in part on the nature of the document itself, which was "handwritten, unsigned, unstamped, and undesignated—physical

characteristics that strongly belie the notion that the document was intended for public consumption." *Id.* at 224.

The Court has explained that cause exists when "some interference by officials . . . made compliance impracticable." *Murray*, 477 U.S. at 488. The Tenth Circuit found cause to excuse default when the court clerk failed to send the petitioner a certified copy of the order required to perfect an appeal within 30 days. The petitioner, incarcerated and dependent on the glacial pace of prison mail, lacked reasonable means to get a certified copy within that timeframe. *Johnson*, 288 F.3d at 1227–28. The court held that the court clerk's interference made compliance with the state's procedural rules "practically impossible." *Id.* at 1228. Moreover, the court found that the clerk's failure to timely transmit the record to the appellate court, as was his duty under the Rules of the Court of Criminal Appeals, also constitutes "cause" for the procedural default. *Id.*

Second, the factual basis of Marcyniuk's jury-selection claims was not "reasonably available" to his appellate or state post-conviction counsel. *Murray*, 477 U.S. at 488 (cause is present if the "factual . . . basis for a claim was not reasonably available to counsel"). In *Ambrose v. Booker*, 684 F.3d 638, 645 (6th Cir. 2012), the Sixth Circuit found that cause was established because the petitioners lacked actual knowledge of the factual basis for the defaulted fair-cross-section claim—a computer glitch causing systemic underrepresentation of minorities in the jury venire—they could not have reasonably discovered it, and they had no notice or reason to suspect it existed. The court emphasized that "the focus of the cause-and-prejudice test is

not on the intent of the officials but rather on petitioners' knowledge" of the factual basis. *Id.* at 647.

The Supreme Court's decisions and decisions of other circuit courts do not require that the interference by officials presents an absolute bar to discovery of the factual basis for the defaulted claim. These decisions hold that interference constitutes cause even when it merely "hinders," "impedes," or simply "makes impractical" counsel's efforts to comply with the state procedural rule or when a state official fails to fulfill her duty under the court rules. And the factual basis of the claim does not have to be entirely unavailable to counsel, but merely not *reasonably* available. As a corollary, a document can be filed in publicly accessible records, and yet not be reasonably available to counsel because it is not readily discoverable. *Amadeo*, 486 U.S. at 221.

B. In conflict with precedent, the Eighth Circuit limited its analysis of state interference to deciding whether clerks' certifications were false and held that documents were reasonably available to counsel simply because they were at the courthouse.

In denying Marcyniuk relief, the Eighth Circuit first narrowed his claim of interference to the argument that the court reporter and circuit clerk hindered Marcyniuk's compliance with the procedural rule by omitting the juror information file from the record transmitted to the Arkansas Supreme Court, which the court reporter certified as "true and correct" and the deputy circuit clerk certified as "true and complete." (App. 106–07.) The Eighth Circuit disregarded Marcyniuk's examples of other state interference, such as that of the judge, who initiated the off-the-record jury selection, and the clerk who sequestered the off-the-record strikes in

a separate portion of the file. (App. 16 n.9.) Even though these instances of state interference were included in the same section of the brief as the relevant legal authorities on point and accompanied by record citations, the Eighth Circuit did not find that Marcyniuk provided "a meaningful explanation of the argument." (*Id.*)

The Eighth Circuit also ignored the extensive state-court record showing that, during the state post-conviction hearing, the prosecutor elicited false testimony as to the number of the strikes made by the defense attorney (seven) and did not correct it, and that the trial-court judge—who also knew that the defense attorney made 15 peremptory strikes off-the-record—held that the defense attorney made seven strikes, not twenty-two. (App. 269.) These are actions by state officials designed to conceal the pertinent facts—and they succeeded.

Setting these allegations of state interference aside, the Eighth Circuit focused only on the certifications by the court reporter and the circuit clerk as to the correctness and completeness of the record. The court reporter certified that she recorded the proceedings in the Marcyniuk case by stenomask, reduced that recording to a transcription, and that "the foregoing pages numbered 236 through 1462 constitute a true and correct transcript of the proceedings." (App. 106.) The Eighth Circuit held that this certification "was not a warranty as to the completeness of the entire record" and therefore not false. (App. 16.)[1]

[1] The court, somewhat incongruously, noted that "pages [236 through 1462] contain only the transcripts and exhibits from the pretrial motion hearings and the trial transcript and exhibits." (App. 16.) To the extent that's an assertion that those pages do not contain jury-selection matters, it is incorrect. The court hears the Motion to Strike Jury Panel starting on page 358 (App. 169) and denies it on page

The Eighth Circuit then decided that the deputy circuit clerk also did not make a false statement when she certified the record as "true and complete" because—according to an erroneously invoked court rule that does not apply in death penalty cases, *see infra*, Section I.C.—the clerk was not required to send jury-selection records to the Arkansas Supreme Court. (App. 17.) Whatever the reason for the omission, such as the lack of obligation or a deliberate intent on the part of the clerk, it does not make the statement that the record is "complete" true. A true statement would have been, "the record is complete but for the jury-selection records." Thus, even if not outright false, this statement is still misleading. The clerk's failure to accurately describe what was included and excluded from the record when transmitting it to the Arkansas Supreme Court impeded counsel's compliance with the procedural rule on presenting claims in state court. Had the certification accurately described the materials held back, the direct-appeal counsel and the state post-conviction counsel would have known to request those records. Outright falsity of the statement should not be required here; under the controlling precedent, a misleading statement by the court clerk will suffice to constitute cause if it impeded counsel's efforts.

Finally, the Eighth Circuit held that because the jury-selection materials omitted from the record were maintained at the Washington County Circuit Clerk's Office, albeit separate from the other case files, they were nonetheless available for

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361 (App. 172). The jury selection begins on page 408 of the state-court record certified by the court reporter. (App. 173.) Jury is sworn in on pages 516–17. (App. 189–90.) The juror names are mentioned throughout, *see, e.g.*, App. 176.

attorneys to review, and therefore the factual basis for Marcyniuk's claim was "reasonably available" to his direct-appeal and post-conviction court lawyers. (App. 18.) But just as counsel in *Ambrose* did not know and had no reason to suspect that a computer glitch was causing jury-selection issues, Marcyniuk's direct-appeal and post-conviction counsel did not know about the off-the-record voir dire. Nothing in the record—or record certifications—would have alerted them to the existence of sequestered records. The record filed with the Arkansas Supreme Court, certified as "complete," appeared to contain typical jury-selection materials, motions related to the jury, voir dire, and swearing-in of the jury. The attorneys had no reason to go to the courthouse and ask for additional records. Even if they had, merely requesting the Marcyniuk files from the clerk's office still would not have uncovered the off-the-record strikes, since those were kept by the deputy clerk assigned to Judge Storey. (App. 101.)

As *Amadeo* teaches, a document located in public records is not necessarily "reasonably available." Without some clue to their existence, the record of strikes in this case was just as hidden as the memorandum in *Amadeo*. Undoubtedly, the attorney in *Amadeo* could have asked the court clerk for "instructions from the District Attorney's Office to the Jury Commissioners about the master jury lists" and be handed the "smoking gun," since the court clerk had no qualms sharing the information about the memorandum once it was found. 486 U.S. at 217–18. But as this Court recognized, requiring shibboleth for access does not make the information "reasonably available." The attorney in *Amadeo* had no reason to

suspect the memorandum existed; likewise, Marcyniuk's appellate and post-conviction attorneys had no reason to suspect that a separate file with secret strikes existed in Judge Storey's chambers and that uttering the magic phrase "give me the juror coordinator file" would deliver the records. In addition, the strike sheets here share many characteristics with the memorandum in *Amadeo*, where the district court based its finding of concealment in part on the nature of the document: "handwritten, unsigned, unstamped, and undesignated—physical characteristics that strongly belie the notion that the document was intended for public consumption." *Amadeo*, 486 U.S at 224. The prosecutor's sheet is signed, but it is undated, unstamped, and undesignated, and bears no markings that are typical of a court filing. (App. 104.) The defense's strike list has a case number, but it is unstamped and unsigned, and the only date on it is from a fax header. (App. 105.)

What makes Marcyniuk's case worse than *Amadeo*—and the denial of relief egregious—is that the post-conviction hearing should have uncovered the basis for Marcyniuk's claims. Instead, omission of the strikes from the record and the record index and certification by court clerks, as well as actions of the judge and the prosecutor, concealed their existence from appellate and post-conviction counsel, rendering the factual basis of the claims unavailable.

C. The Eighth Circuit's decision to adopt the government's argument raised for the first time at oral argument denied Marcyniuk an opportunity to brief the issue and led to an erroneous application of a state-court rule and erroneous findings on cause.

Even though the circuit clerk had a clear and unambiguous duty to transmit "the entire record" to the Arkansas Supreme Court and failed to do so, the Eighth

Circuit declined to find cause. (App. 17.) Instead, it faulted Marcyniuk for failing to make additional requests for transmittal of records (App. 17), even though Marcyniuk did not have an obligation to file anything under the Arkansas procedural rules. This decision conflicts with at least one other circuit court, *Johnson v. Champion*, 288 F.3d 1215, 1227–28 (10th Cir. 2002), and should be reviewed by this Court to clarify the contours of what degree of state interference constitutes cause sufficient to excuse procedural default.

What's more, the Eighth Circuit's decision to excuse the dereliction of duty by the clerk is grounded in misunderstanding of Arkansas's statutory scheme for bringing forth the appeal and securing the record in death-penalty cases.
The Eighth Circuit's error stems from its decision to allow the government to raise a new argument for the first time at oral argument and deny Marcyniuk the opportunity to brief the issue, resulting in unilateral adoption of the government's specious argument and the court's erroneous findings as to existence of cause.

1. Arkansas rules in death-penalty cases mandate filing the notice of appeal with the language designating "the entire record" as the record on appeal.

The Arkansas Supreme Court has a procedural rule, Rule 10, that governs effectuating an appeal and designating the record in death-sentence cases. In those cases this rule places the duty to file the notice of appeal on the circuit clerk. (App. 112.) The Arkansas Supreme Court has adopted and mandated the use of a standardized form for that notice, which designates "the entire record" as the record on appeal. (App. 113.) It removes all discretion from the petitioner as to which portions of the record are sent to the Arkansas Supreme Court, because the

Arkansas Supreme Court has decided that it must have everything, including jury-selection records, regardless of whether the petitioner designates them in the notice.

This decision to mandate a special procedure in death cases stems from the 1999 Arkansas Supreme Court opinion in *State v. Robbins*, 5 S.W.3d 51 (Ark. 1999). That decision held that in cases where a sentence of death is imposed, even if the defendant waives his personal right of appeal, the court has an independent and affirmative duty to conduct an automatic review of the entire record for egregious and prejudicial errors. *Id.* Due to the "unique severity" of the death penalty, and to reduce the risk that the death sentence will be imposed "randomly, arbitrarily, capriciously, wantonly or freakishly," the court acknowledged that the appellate review of capital cases must be more comprehensive than review in other cases. *Id.* at 55. The court also distinguished procedures for review of death-penalty cases from those in which the defendant has received a life sentence. *Id.* at 56. "When the defendant has received a sentence to life imprisonment it will continue to be his responsibility to bring forward an appeal." *Id.* In contrast, the court held that it was "required to perform an automatic review of the record in all cases in which the death penalty has been imposed." *Id.*

Two years later, after forming a committee to implement procedures announced in *Robbins* on effectuating a mandatory appeal and obtaining the entire record, studying the issue, and soliciting public comments, the Arkansas Supreme Court promulgated Rule 10. By mandating the clerk to file notice of appeal and using a standard form designating "the entire record," the Arkansas Supreme Court

removed any discretion from the defendant in whether he appeals a death sentence and what is subject to review. This procedure has been followed in Arkansas cases where a death sentence has been imposed since 2001, long before Marcyniuk's trial in 2008. *See, e.g.*, *Johnson v. State*, 489 S.W.3d 668, 670 (Ark. 2016) ("Because he was sentenced to death, the circuit court ordered the circuit clerk to file a notice of appeal on Johnson's behalf pursuant to Arkansas Rule of Appellate Procedure—Criminal 10(a)."); *Bradford v. State*, 94 S.W.3d 904, 908 (Ark. 2003) (same).

2. The circuit clerk's breach of duty to prepare "the entire record" also constitutes cause to excuse procedural default.

Consistent with Rule 10(a), when a death sentence was imposed in Marcyniuk's case, the court directed the circuit clerk to file a notice of appeal. (App. 108.) The circuit clerk then filed the notice of appeal (App. 109–10), which mirrors the form mandated by Rule 10(a) and directs the court reporter to prepare "the entire record." (App. 109.) From Marcyniuk's perspective, nothing more needed to be done: the designation of "the entire record," without belaboring further, is what the Arkansas Supreme Court decreed should be included in the notice, after research, deliberations, and public comments.

When Marcyniuk's record was prepared, it included jury voir dire, motions related to jury selection and corresponding orders, names of the jurors, and other jury-selection matters, as expected from "the entire record" in a death-penalty case. (*See, e.g.*, App. L, 165–190.) The court reporter certified that the transcript is "true and correct" (App. 106), and the circuit clerk certified that the record is "true and complete" (App. 107). Marcyniuk's direct-appeal and post-conviction counsel had

no reason to think that anything was amiss and no reason to file a separate designation of the record, which had not been required of capital defendants in Arkansas for most of the decade preceding Marcyniuk's trial.

Under similar circumstances, the Tenth Circuit found that the clerk's failure to timely transmit the record to the appellate court, as was his duty under the Rules of the Court of Criminal Appeals, constitutes "cause" to excuse procedural default. *Johnson*, 288 F.3d at 1228; c*f. Banks v. Dretke*, 540 U.S. 668, 696 (2004) (finding in the context of *Brady* that a petitioner may "presume that public officials have properly discharged their official duties"). This is what the Eighth Circuit should have found, as well. Instead, the court was led astray by the government's late argument.

3. The Eighth Circuit embraced the government's argument raised for the first time on appeal at oral argument while denying Marcyniuk an opportunity to respond.

In finding that the court clerk was not required to include juror information in the record, the Eighth Circuit relied on the Arkansas Supreme Court Rule 3-4(b). The government mentioned Rule 3-4(b) for the first time in this case in a Rule 28(j) letter filed after briefing and a week before the oral argument. The court denied Marcyniuk's motion to strike the letter, to limit the argument to the issues properly briefed, or to postpone the argument and order supplemental briefing. As a result, relying on inapposite cases supplied by the government that involved life sentences, the Eighth Circuit decided that the Arkansas Supreme Court did not actually mean "the entire record" when it designated the entire record on its notice of appeal.

At the time of Marcyniuk's appeal, Rule 3-4(b) provided that, in criminal cases, "[t]he record shall not include the impaneling or swearing of the jury, the names of the jurors, or any motion, affidavit, order, or ruling in reference thereto unless expressly called for by a party's designation of the record." However, in cases where the death sentence is imposed, "a party" does not file a designation of record, the circuit clerk does, and it can only be in the form mandated the Arkansas Supreme Court. (App. 112–14.) In cases where a sentence other than death is imposed, the application of Rule 10 is not triggered, the circuit court does not file the notice of appeal and the designation of record, the notice of appeal does not have to follow the form mandated by the Rule 10, the responsibility to bring forward the appeal and designate the record continues to be the defendant's, and the Arkansas Supreme Court's responsibility to review sentences of life imprisonment depends upon a record being brought forward on appeal. *Robbins*, 339 Ark. at 387. Those cases are inapplicable to a case where death has been imposed, as is Rule 3-4(b).

Moreover, applying Rule 3-4(b) to death penalty cases would defeat the purpose of Rule 10(a), which is to provide the court with the complete record so that it may conduct an exhaustive, independent review of the entire record for egregious and prejudicial errors. In death-penalty cases where the record is incomplete, the Arkansas Supreme Court remands. *See, e.g.*, *Robbins*, 5 S.W.3d at 57 (remanding death-penalty case for preparation of the record); *State v. Smith*, 12 S.W.3d 629, 630 (Ark. 2000) (remanding death penalty case with instructions for circuit clerk and court reporter to prepare and file the complete record).

The Eighth Circuit, citing two cases where sentences other than death were imposed and ignoring the distinction, found that Rule 3-4 applied to Marcyniuk's case. (App. 17.) The court then concluded that because that Rule did not require for the jury matters to be included in the record, the court clerk's certification that the record was complete was not false.

D. The Court should clarify issues related to state interference and "reasonable availability" of the factual basis of a claim.

This case is a perfect vehicle for the Court to clarify to what degree state official's actions must impede counsel's efforts to comply with procedural rules before they supply cause to excuse procedural default. The Eighth Circuit focused strictly on the falsity of record certifications; however, even a misleading statement by the court clerk should suffice to meet the standard. E.g., a statement that the record was "complete" without mentioning the omission of relevant materials, would have impeded—and did impede—counsel's efforts.

In addition, the Eighth Circuit based its holding that the files were "readily available" on whether counsel could have performed some further action to discover the records. The court would require counsel to file an additional, unnecessary notice of appeal with a different designation of record, or go to the courthouse to look for parts of the record that was already certified as complete and appeared as such. At least one circuit, however, considers the court clerk's failure to perform a duty imposed on him by the rules of the court sufficient to find cause, regardless of whether some other action could have been taken by the petitioner. *Johnson*, 288 at 1228. The Sixth Circuit holds that the focus should be on whether counsel knew or

had reason to know to look for evidence that would provide the factual basis for petitioner's claims. *See, e.g.*, *Ambrose*, 684 F.3d at 645. And if counsel did not know and nothing could have put him on notice to search, cause exists to excuse procedural default. Unlike the Eighth Circuit's approach, the inquiries undertaken by other circuits seems more practical and tied to the facts in the record. Speculating what else could have been done invites unreasonable expectation of heroism or clairvoyance on counsel's part.

II. The Eighth Circuit decision finding that Marcyniuk cannot show cause to excuse procedural default of his ineffective assistance of trial counsel claim under *Martinez v. Ryan*, 566 U.S. 1 (2012), conflicts with this Court's decisions in *Strickland* and *Weaver* as well as decisions of other courts.

A habeas petitioner may show cause to excuse the procedural default of a claim for ineffective assistance of trial counsel if he demonstrates:

(1) post-conviction counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), and

(2) the otherwise defaulted claim of ineffective assistance of trial counsel "is a substantial one," meaning that it has some merit. *Martinez v. Ryan*, 566 U.S. 1, 13 (2012). "Substantiality" review is not the same as the merits review; in *Martinez*, the Supreme Court compared the "substantiality" standard to the standard for issuance of a certificate of appealability as set forth in *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

To establish that the defaulted claim of ineffective assistance of trial counsel has some merit, Marcyniuk only needs to make a threshold showing of the deficient

performance of trial counsel and resulting prejudice. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. *Miller-El*, 537 U.S. at 336.

Marcyniuk argued that he can make the requisite showing and establish the prejudice prong for the underlying trial-counsel IAC claim because his trial was fundamentally unfair and because, but for counsel's unprofessional errors, the result on direct appeal or in Rule 37 would likely have been different. The Eighth Circuit disagreed and held that Marcyniuk's trial was not fundamentally unfair. It refused to consider his other arguments on prejudice because while Marcyniuk raised them in the district court, he raised them in support of a different claim than the one the Court granted a certificate of appealability on. (App. 12 n.6.)

This aspect of the Eighth Circuit's opinion conflicts with the decisions of this Court and the decisions of other courts. Given that this is a capital case where the defendant—through no fault of his own—was prevented from participating in selecting the jury who sentenced him to death, review by this Court is warranted.

A. Marcyniuk can show prejudice by establishing that his trial was fundamentally unfair.

This Court recently reminded litigants that *Strickland* had "cautioned that the prejudice inquiry is not meant to be applied in a 'mechanical' fashion" and emphasized that "the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.'" *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017) (quoting *Strickland*, 466 U.S. at 696)). The *Weaver* Court then held that "when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel

claim, *Strickland* prejudice is not shown automatically." *Id.* It assumed, without deciding, that petitioner could show prejudice under *Strickland* by showing that "the particular public-trial violation was so serious as to render his or her trial fundamentally unfair." *Id.* Since *Weaver* was decided, federal courts have held that a defendant may show *Strickland* prejudice by demonstrating that "'that the . . . violation was so serious as to render the trial fundamentally unfair.'" *See, e.g.*, *Williams v. Burt*, 949 F.3d 966, 978 (6th Cir. 2020) (*quoting Weaver*, 137 S. Ct. at 1911); *United States v. Aguiar*, 894 F.3d 351, 356 (D.C. Cir. 2018) (defendant could meet *Strickland* prejudice by showing that voir dire proceedings were "fundamentally unfair"); *Pirela v. Horn*, 710 F. App'x 66, 83 n.16 (3d Cir. 2017).

Under this "original" *Strickland* standard reinvigorated by *Weaver*, Marcyniuk's trial counsel's engagement in off-the-record jury selection—and the resulting violations of the right to public trial, the right to be present, and to appellate review—rendered Marcyniuk's trial fundamentally unfair. In evaluating whether a petitioner can make that showing, the Court considers the duration of the closure, whether it was initiated by the judge or by court officers, whether other members of the venire who did not become jurors could observe the proceedings, whether there was a record made of the proceedings and if it indicates "any basis for concern, other than the closure itself." *Weaver*, 137 S. Ct. at 1913.

Almost every factor here weighs in Marcyniuk's favor. While it is difficult to ascertain the duration of the "closure," it extended to a significant portion of the jury selection in Marcyniuk's case. Off-the-record-jury selection removed 39%

of the venire. While the jury-selection process that took place on the record is about 100 pages, the 30 people struck off the record each filled out a 30-page questionnaire, resulting in 900 pages of records that should have been preserved for appellate review but were shredded instead. Thirty total peremptory challenges were used off the record, while 14 were used on the record. The on-the-record jury selection took only two and a half hours—an exceptionally short period in which to choose a capital jury. The speed at which the jury was chosen supports a finding that most of the jury selection happened off the record.

The closure was initiated by the judge. No one else witnessed the process but the defense attorney, the prosecutor, and perhaps the judge (ascertaining the scope of judge's involvement requires discovery and a hearing). Even Marcyniuk himself did not know it was happening. No record of the proceeding was made, no jury questionnaires were preserved, no reasons for the strikes were given. The only record evidencing removal of nearly half of the venire for peremptory reasons are two sheets listing potential jurors' names. (App. 104–05.) These documents were not made part of the appellate record and were sequestered from other records and left undiscovered for years.

Even this meager record suggests that there is cause for concern other than the closure itself, as it appears that attorneys were making discriminatory strikes based on gender. The defense attorney later testified to what the pattern of his strikes suggested: that he was deliberately removing men from the jury based on the stereotype condemned in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994),

that women are more forgiving. (App. 117–18.) At least one Circuit, citing *Strickland*, concluded that "[i]ntentionally violating the Constitution by discriminating against jurors on account of their sex is not consistent with, or reasonable under, 'prevailing professional norms.'" *Winston v. Boatwright*, 649 F.3d 618, 630 (7th Cir. 2011). Therefore, that court had no trouble concluding that trial counsel's decision to strike jurors based solely upon their gender constituted deficient performance. *Id.* at 632. Moreover, "[p]rejudice . . . is automatically present when the selection of a petit jury has been infected with a violation of *Batson* or *J.E.B.*" *Id.* at 632. *Batson v. Kentucky*, 476 U.S. 79 (1986), and *J.E.B.* exist not only to protect the criminal defendant, "but also to protect the prosecutor's interests, the interests of the prospective jurors, and society's interest in an unbiased system of justice." 649 F.3d at 631.

Acting with no oversight and off the record, attorneys had little incentive to challenge each other's constitutional violations in jury selection, leading to a breakdown of the adversarial nature of the proceedings. Attorneys were willing to ignore a pattern of strikes that would have normally drawn challenges under *Georgia v. McCollum*, 505 U.S. 42 (1992), and *J.E.B.*, 511 U.S. at 138. They were also willing to ignore state statutes governing jury selection. *See, e.g.*, Ark. Code § 16-33-305 (limiting peremptory strikes); § 16-33-306 (establishing the order in which the challenges must be made). Because veniremen in this death-penalty case were struck on the basis of their answers to jury questionnaires alone, without voir dire, the state almost certainly excluded veniremen because they voiced general

objections to the death penalty, in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 (1968).

What's more, counsel's actions also prevented Marcyniuk from participating in the jury selection and exercising peremptory strikes, "one of the most important of the rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408 (1894). Ultimately, counsel's actions also prevented Marcyniuk from obtaining a meaningful appellate review of his claims, which likely would have resulted in a new trial.

Errors of this magnitude, precipitated by counsel's performance that fell below professional norms, rendered Marcyniuk's trial fundamentally unfair. With his life at stake, Marcyniuk was tried by a jury that was chosen by unlawful means, in violation of Constitutional constraints and statutes that govern jury selection. This showing is more than sufficient to meet the *Strickland* prejudice standard and to demonstrate prejudice sufficient to excuse procedural default of the ineffective-assistance-of-trial-counsel claim. And yet, the Eighth Circuit disagreed.

B. The Eighth Circuit did not find Marcyniuk's trial to be fundamentally unfair and refused to consider his other arguments.

Instead of conducting a threshold inquiry into whether Marcyniuk's underlying trial IAC claim has "some merit," the court engaged in legal analysis of the claim's merits. It concluded that "a record was, in fact, made of these strikes, and maintained by and available for review at the Washington County Circuit Court Clerk's Office; the written submission of strikes that occurred as part of the pretrial jury selection procedure was only a portion of voir dire; and the remainder

of voir dire, along with the evidentiary and sentencing phases of the trial, remained open to the public." (App. 10.) The problem here is that the record was not sent for review to the Arkansas Supreme Court, that the questionnaires that were used to make the juror strikes were destroyed and are not part of any record, and that being present for part of the voir dire does not make up for missing an opportunity to make decisions on striking nearly half the venire in a capital trial.

The Eighth Circuit also dismissed Marcyniuk's allegations that the prosecution and defense engaged in gender-based, discriminatory strikes as "speculative." However, it was supposed to assume those allegations to be true. The government has neither disputed the facts of Marcyniuk's claims nor provided any record citations that would contradict Marcyniuk's allegations. The district court held no hearing upon Marcyniuk's petition that would give Marcyniuk an opportunity to prove his allegations. Thus, it must be assumed upon appeal that the factual allegations of the petition are true. *Tomkins v. Missouri*, 323 U.S. 485, 487 (1945); *Simmons v. United States*, 253 F.2d 909, 911 (8th Cir. 1958).

In deciding whether Marcyniuk's trial was fair, the Eighth Circuit also considered whether counsel's actions resulted in some benefit to Marcyniuk. (App. 10.) But an attorney gaining an advantage by unlawful means—such as one who makes juror strikes based on gender (App. 209–10) or violates the state's statutory jury-selection scheme by exceeding peremptory strikes—is constitutionally ineffective. *Winston*, 649 F.3d at 632 ("[W]e would say the same

thing about a defense lawyer who tried to gain an advantage for her client by bribing the judge, or by suborning perjury, or in any other plainly unlawful way.")

Even the cases cited by the Eight Circuit in support have considered whether the closure had any effect on the judge, counsel, or jury, and whether it pervaded the whole trial. *Williams v. Burt*, 949 F.3d 966, 978 (6th Cir. 2020). The Sixth Circuit specifically said that the temporary closure would "lead to basic unfairness," when "jurors are excluded on the basis of race." *Id.* On these facts, the Sixth Circuit would have no trouble finding that Marcyniuk's trial was fundamentally unfair.

Most importantly, none of the decisions the Eighth Circuit relied on to determine that Marcyniuk's trial was fair involved cases where the defendant could not participate in the selection of his jury. There is a fundamental difference between briefly excluding a couple of witnesses versus excluding the defendant himself. Marcyniuk's right to "presence" is based upon the premise that the "defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself." *Faretta v. California*, 422 U.S. 806, 816 (1975). Marcyniuk's presence at jury selection was necessary so that he may assist his lawyer. As a defendant, he alone had peculiar knowledge about the facts of the alleged offense, which brought him before his peers for judgment, about himself, and possibly about participants or victims. During voir dire, for example, "what may be irrelevant when heard or seen by [defendant's] lawyer may tap a memory or association of the defendant's which

in turn may be of some use to his defense." *United States v. Gordon*, 829 F.2d 119, 124 (D.C. Cir. 1987).

Marcyniuk's presence at jury selection was also necessary so that he could effectively exercise his peremptory challenges. *Lewis v. United States*, 146 U.S. 370, 376 (1892); *United States v. Washington*, 705 F.2d 489, 497 (D.C. Cir. 1983). As this Court has explained, the defendant's presence during the exercise of peremptory challenges is necessary so that he may act on "sudden impressions and unaccountable prejudices" from the "bare looks and gestures of another." *Lewis*, 146 U.S. at 376. The Court also has repeatedly emphasized the importance of the right to exercise peremptory challenges, characterizing it as "one of the most important of the rights secured to the accused." *Pointer*, 151 U.S. at 408. Precluding Marcyniuk from participating in every aspect of selecting the jury that will decide his life or death rendered his trial fundamentally unfair.

Finally, the Eighth Circuit refused to consider Marcyniuk's arguments that even under the outcome-determinative view of *Strickland*, his trial counsel's deficient performance resulted in prejudice, because Marcyniuk raised this argument in the district court in support of a different claim than the one the Court granted a certificate of appealability on. (App. 11–12 & n.6.)

C. The Court review is warranted because the Eighth Circuit decision conflicts with the decisions of this Court and other circuit courts.

The Eighth Circuit also held that excluding a capital petitioner from participating in jury selection did not render his trial fundamentally unfair in a way that conflicts with this Court's decision in *Weaver*, 137 S. Ct. 1899. Whereas *Weaver*

instructed to look for harms flowing from the courtroom closure, 137 S.Ct. at 1913, the Eighth Circuit ignored the misbehavior by the prosecutor and the judge, erroneously dismissed the allegations of gender bias in off-the-record strikes, and held that Marcyniuk being unable to participate in selection of his jury in a capital trial did not render his trial fundamentally unfair because his counsel agreed to it and received 15 additional peremptory strikes. This puts the Eighth Circuit at odds with other circuits that consider exclusion of jurors on the basis of race or gender "fundamentally unfair." *See, e.g.*, *Williams*, 949 F.3d at 978. And it conflicts with the decisions of this Court and other Circuits that do not excuse defense attorneys violating their client's constitutional rights simply because it resulted in some questionable benefit to the defendant. *See, e.g.*, *Winston*, 649 F.3d at 630. In fact, this Court in *McCollum* held in a *Batson* case that "[d]efense counsel is limited to 'legitimate, lawful conduct.'" 505 U.S. at 58 ("[N]either the Sixth Amendment right [to effective assistance of counsel] nor the attorney-client privilege gives a criminal defendant the right to carry out through counsel an unlawful course of conduct.")

The Eighth Circuit now also conflicts with other decisions of this Court and other Circuits that repeatedly emphasize the importance of defendant's presence during the exercise of peremptory challenges. *See, e.g.*, *Pointer*, 151 U.S. at 408; *Lewis*, 146 U.S. at 376; *Gordon*, 829 F.2d at 124. Finally, the Eighth Circuit once again flouts *Miller-El* by engaging in review of the merits of the underlying IAC claim, instead of conducting a threshold inquiry and determining whether the claim has "some merit." For these reasons, the Court's review is necessary.

III. The Eighth Circuit's rulings sua sponte excluding Marcyniuk's arguments from consideration on appeal while adopting those belatedly raised by the government have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

It is axiomatic that to promote public confidence in the impartiality of the federal judicial system, cases must be decided by an impartial tribunal. This Court has held that a court must "continuously bear in mind that to perform its high function in the best way justice must satisfy the appearance of justice.' *In re Murchison*, 349 U.S. 133, 136 (1955) (internal quotation marks omitted). This case fits the Eighth Circuit's pattern of sua sponte decisions denying capital petitioners notice and an opportunity to be heard. By doing so, the Eighth Circuit does not just disregard this Court's mandate in *Day v. McDonough*, 547 U. S. 198, 210 (2006) ("Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions"), it also undermines public confidence in the fairness and impartiality of the federal judicial system. These circumstances invite the Court to invoke its supervisory power out of concern for the fair administration of justice. *Offutt v. United States*, 348 U.S. 11, 17 (1954).

In deciding this death-penalty case, the Eighth Circuit sua sponte disregarded various legal arguments made by Marcyniuk. The Eighth Circuit justified these rulings on the basis of equitable decisions that are normally applied to allow a litigant to have notice and an opportunity to respond, while excusing the government from the application of those same rules. In a perverse result, the government was heard, but Marcyniuk was silenced.

First, the Eighth Circuit sua sponte narrowed Marcyniuk's argument on state interference to the certification of record as "true and correct" and "true and complete." (App. 16, fn. 9.) The appellate court decided, in a footnote, that Marcyniuk's examples of interference by the deputy clerk and the trial judge advanced in the same section of the brief—complete with record citations—were not sufficiently developed and that Marcyniuk waived that issue. (*Id.*) But Marcyniuk has raised the argument on state interference throughout the proceedings, and he raised it again in the opening brief and cited the relevant Supreme Court and Eighth Circuit precedent. Interference by the deputy court clerk and the judge is not a new claim or an appealable issue; it is another example of state interference advanced by Marcyniuk in support of his duly raised claim that the actions (or inaction) of the state, state courts, or other officials that hinder compliance with a procedural rule or make it impracticable may constitute cause to excuse a petitioner's procedural default.

The Eighth Circuit also declined to consider Marcyniuk's arguments that he can demonstrate actual prejudice resulting from his counsel's performance because while Marcyniuk raised that precise argument below, he did so in support of a different claim than the one the Eighth Circuit granted the certificate of appealability on. (App. 11–12 & fn. 6.) The government did not make this assertion in its response; the Eighth Circuit made the decision to disregard Marcyniuk's argument sua sponte. The Eighth Circuit does not dispute that Marcyniuk raised this particular claim of ineffective assistance of counsel below; it only takes issue

with the legal arguments advanced in support of it on appeal. But under this Court's precedent, having properly presented his *claim* below, Marcyniuk can make any *argument* in support of that claim on appeal: "parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992).

On the other hand, the Eighth Circuit embraced the government's argument raised for the first time at oral argument. The government filed a letter a week before the oral argument that read, in relevant portion, "[u]nder Federal Rule of Appellate Procedure 28(j), I write to inform the Court that the appellee may refer at oral argument . . . to Ark. Sup. Ct. R. 3-4(b)'s exclusion of 'jury matters' from the record on appeal in criminal cases." (App. 129.) That Rule was not mentioned by the government in any district-court pleadings or on appeal. And yet the Eighth Circuit denied Marcyniuk's motion to strike this new argument and denied his request for further briefing. At oral argument, the Court let the government make new legal arguments in regard to the novel application of Rule 3-4. It then based its holding affirming the denial of habeas relief to Marcyniuk on this argument. (App. 17, 18.)

In the past three years, at least three capital cases have come before this Court having been decided by the Eighth Circuit without giving a death-sentenced petitioner notice and a meaningful opportunity to dispute the grounds on which the court made its decision. In *Thomas v. Payne*, 960 F.3d 465, 471 n.3 (8th Cir. 2020), the Eighth Circuit decided that even though the state did not press the procedural default issue on appeal, "the parties knew procedural default was in play and had

opportunity to present their positions." *Id.* It then reversed the district court's grant of habeas relief to Thomas on this ground. This Court denied the petition for writ of certiorari, with Justice Sotomayor acknowledging that the "lack of notice left Thomas without a meaningful opportunity to dispute the grounds on which the court reversed the District Court's decision to grant him habeas relief." *Thomas v. Payne*, 142 S. Ct. 1 (2021) (Sotomayor, J., respecting denial of certiorari).

A year later, in *Sasser v. Payne*, 999 F.3d 609, 615 (8th Cir. 2021), the Eighth Circuit sua sponte decided that the claims that it previously remanded to the district court for consideration were second or successive and were not properly before the district court. As in *Thomas*, the government did not raise that argument either in the district court or before the Eighth Circuit. Sasser raised this issue in his petition for writ of certiorari and again, this Court denied his petition. *Sasser v. Payne*, No. 21-7039, 142 S. Ct. 2742 (2022).

Once an accident, twice a coincidence, three times a pattern. While Thomas's claim may not have satisfied this Court's traditional criteria for granting certiorari, after both *Thomas* and *Sasser*, Marcyniuk's case warrants an intervention under the Court's supervisory power. The intervention is justified because this is a third opinion from the Eighth Circuit in three years denying a capital petitioner the opportunity to respond and be heard before adopting an argument on the State's behalf. Moreover, the Eighth Circuit's rulings declining to hear Marcyniuk's arguments that were raised below and in the appellant's brief—while adopting the government's argument raised for the first time at oral argument—jeopardize the

public's view of the federal judiciary as an impartial arbiter calling balls and strikes. The Court should invoke its supervisory power out of concern for the fair administration of justice and remand to the Eighth Circuit to allow Marcyniuk to have a meaningful opportunity to be heard.

CONCLUSION

Marcyniuk respectfully asks that the Court grant his petition for writ of certiorari or, in the alternative, issue a grant, vacate, remand order in light of *Amadeo v. Zant*, 486 U.S. 214 (1988), and *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017).

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Respectfully submitted,
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