No. 22-6951

In the Supreme Court of the United States

ZACHARIAH MARCYNIUK,
Petitioner,

v.

DEXTER PAYNE, Director,
Arkansas Division of Correction
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a state trial court clerk's following a rule that required her to exclude certain materials from an appellate record absent a request by the parties is cause to excuse procedural default of claims based on those materials.

2. Whether, assuming that fundamental unfairness satisfies the prejudice prong of an ineffective-assistance-of-counsel claim, an out-of-court pretrial jury-selection procedure that gave Petitioner fifteen additional peremptory challenges rendered Petitioner's trial fundamentally unfair.

3. Whether this Court should summarily reverse the court of appeals for not allowing Petitioner to raise new arguments on appeal for reversing the district court's judgment, but allowing the State to raise new arguments for affirming the district court's judgment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT

1. On March 9, 2008, Petitioner Zachariah Marcyniuk murdered Katherine Wood. Pet. App. 2. Marcyniuk and Wood had dated for nearly a year and a half after meeting as students at the University of Arkansas. *Id.*; *Marcyniuk v. State*, 373 S.W.3d 243, 248 (Ark. 2010). But when Wood broke off the relationship, Marcyniuk harassed her, "ke[eping] after her to recommit," *id.*, and showing up at her apartment unannounced at all hours of the night, Pet. App. 20. On one of these visits, he stole her phone to read her text messages. *Id.*; *Marcyniuk*, 373 S.W.3d at 248.

The night of the murder, Marcyniuk went to Wood's apartment at 3:00 a.m. He testified he came to return her stolen cellphone, but he did not have the phone with him; he testified that he forgot to bring it. Pet. App. 20.; *Marcyniuk*, 373 S.W.3d at 248-49. After he entered Wood's apartment through a bedroom window, he used her laptop several times, searching for evidence that she had a new boyfriend. Pet. App. 2. He then fell asleep. *Id.*

Wood returned home at 7:00 a.m. Pet. App. 20. Marcyniuk met her at the front door, dragged her into her apartment, and killed her, stabbing her six times with a knife—as he admitted. Pet. App. 2, 21. Marcyniuk then went home and placed his bloody clothes and knife in a bag before driving to his mother's house with his dog. Pet. App. 2-3. There, he told his mother he had "hurt Katie real bad." Pet. App. 22. Alarmed, his parents called the police, who obtained an arrest warrant for first-degree murder. *Id.* Marcyniuk left and fled to Oklahoma, disposing of the knife and bloody clothes along the way before he was stopped by an Oklahoma state trooper for speeding. *Id.*

2. Later that year, Marcyniuk was charged in Arkansas with capital murder and residential burglary. Pet. App. 3. Before the trial, his trial counsel requested that potential jurors receive juror questionnaires. *Id.* The court then sent 100 potential jurors a lengthy questionnaire containing a variety of questions, including ones about their views on the death penalty. *Id.* Ninety potential jurors responded. Then—under a practice the presiding judge employed in capital cases, Pet. App. 102—both the defense and prosecution were allowed to strike fifteen venire members based on those responses before they were summoned, Pet. App. 4. These strikes were not submitted in open court, and, according to Marcyniuk, he was not present. *Id.* Marcyniuk's counsel participated in this procedure and submitted a list of fifteen strikes; there is no evidence he objected to the procedure. *Id.* A record was kept of both sides' strikes in the court's juror information file. *Id.*

After those strikes, forty-seven venire members reported for jury duty, and the parties selected a jury in open court. Pet. App. 3. Marcyniuk's only defense was that he did not premeditate killing Wood and thus was only guilty of second-degree murder. *See Marcyniuk v. State*, 436 S.W.3d 122, 127-29 (Ark. 2014). The jury disagreed, found him guilty of capital murder, and sentenced him to death after finding two aggravating circumstances—that the murder was committed in an especially cruel or depraved manner and that he had previously committed a violent felony, specifically the aggravated assault of another ex-girlfriend. *Marcyniuk*, 373 S.W.3d at 246, 249, 255.

Marcyniuk appealed his conviction, not raising any issue with the pretrial jury-selection procedure. The Arkansas Supreme Court unanimously affirmed after a mandatory review of the entire record. *Id.* at 256. Marcyniuk then sought postconviction relief in state court, claiming his counsel was ineffective. *Marcyniuk*, 436 S.W.3d at 125. Here too, he raised no issue concerning his counsel's participation in the pretrial jury-selection procedure. *See id.* The circuit court denied relief, and the Arkansas Supreme Court unanimously affirmed. *Id.*

3. Marcyniuk then turned to federal habeas. While preparing to file his petition, his new habeas counsel learned of the pretrial jury-selection procedure after counsel's investigator talked to a circuit court clerk, who produced the records of the parties' pretrial strikes. Pet. App. 4, 29. Marcyniuk's habeas petition claimed the procedure gave rise to several different constitutional claims: a denial of his right to a public trial, a denial of his right to be present, and ineffective assistance of trial counsel, premised on counsel's failure to object to the procedure. Pet. App. 4.

However couched, Marcyniuk did not allege in district court that the pretrial jury-selection procedure actually prejudiced him. As the district court observed, the record contained "overwhelming evidence against Marcyniuk on the elements of capital murder and on the aggravating factors supporting the death sentence." Pet. App. 27. Instead, Marcyniuk argued that structural-error claims do not require a showing of prejudice, even in habeas, Pet. App. 28, and that when counsel fails to object to a structural error, prejudice is presumed automatically, Pet. App. 75. Marcyniuk also did not claim that the pretrial jury-selection procedure fostered any impropriety on

the part of the parties. Instead, he alleged that the prosecution discriminated against men in the ordinary voir dire process at trial, resulting, he claimed, in an overwhelmingly female jury. Dist. Ct. Doc. 1 at 60-62. He then fleetingly suggested in a footnote that, "to the extent" the venire was disproportionately female, that too was the result of prosecutorial discrimination against men in the pretrial process. *Id.* at 60 n.1. Yet he now claims that the prosecution used eleven of its fifteen pretrial strikes on women. Pet. 6 (citing Pet. App. 104).[1]

The district court dismissed Marcyniuk's petition in its entirety. Pet. App. 91. As relevant here, it first held that Marcyniuk's jury-selection-related claims were procedurally defaulted. Pet. App. 74. His public-trial and right-to-be-present claims were, at the latest, procedurally defaulted when he failed to raise them on direct appeal, and his ineffective-assistance claim was defaulted when he failed to raise it in postconviction review. Pet. App. 24.

It then held Marcyniuk could not show cause and prejudice to excuse the claims' default. Beginning with Marcyniuk's underlying public-trial and right-to-be-present claims, the district court rejected the argument that the circuit court had concealed the pretrial jury-selection procedure from Marcyniuk's appellate counsel by not including it in his trial record; after all, the district court noted, Marcyniuk's counsel participated in the procedure. Pet. App. 29. And rejecting Marcyniuk's argument that he did not need to show prejudice to excuse his default because some of his claims

[1] As Marcyniuk never developed a claim about gender discrimination in the pretrial process, no court has ever made a finding on the gender of the potential jurors the parties struck, and the gender of several is not obvious. *See* Pet. App. 104 (enumerating prosecution's strikes of a Lyle, Jean, Lee, and Uli).

were "structural," it held Marcyniuk could not show prejudice either given the overwhelming evidence of his guilt and the aggravating factors supporting his sentence. Pet. App. 27. In the alternative, the district court held, for the same reason, that these claims failed on the merits; Marcyniuk could only prevail on those claims if he could show actual prejudice, and he had not done so. Pet. App. 73.

The district court next analyzed Marcyniuk's ineffective-assistance claim under *Martinez v. Ryan*, 556 U.S. 1 (2012). Under *Martinez*, a habeas petitioner may excuse the procedural default of an ineffective-assistance claim if he shows that his postconviction counsel acted ineffectively in failing to raise a substantial claim. Applying that standard, the district court explained that the defaulted claim was insubstantial, because, as with Marcyniuk's other claims, he could not show prejudice from the pretrial jury-selection procedure. Pet. App. 56-57. Assuming without deciding, as this Court has, that attorney performance that renders a trial "fundamentally unfair" leads to *Strickland* prejudice, the district court found Marcyniuk had shown no unfairness flowing from the jury-selection procedure; there was no evidence that it resulted in the seating of any biased or unqualified jurors. Pet. App. 56.

4. Marcyniuk appealed, and the Eighth Circuit unanimously affirmed. Pet. App. 19. Before argument, new counsel for Arkansas submitted two brief supplemental letters under Fed. R. App. P. 28(j), advising the Court of authorities that had come to counsel's attention in preparation for argument. Pet. App. 115-16, 129-30. Rather than respond to these letters, as Rule 28(j) allowed, Marcyniuk filed lengthy motions to strike both letters, Pet. App. 118-22, 131-36; the second motion largely

consisted of a substantive response in excess of Rule 28(j)'s word limits. The Eighth Circuit denied these motions. Pet. App. 137. Marcyniuk then filed a responsive letter two days before argument, Pet. App. 138-39, and then another one month later, Pet. App. 140.

The Eighth Circuit affirmed without reaching the merits, solely on grounds of procedural default. It addressed Marcyniuk's ineffective-assistance claim first. Assuming without deciding that Marcyniuk only had to show his counsel's failure to object to the pretrial jury-selection procedure resulted in fundamental unfairness, not that it affected the outcome, Pet. App. 9-10, it held that procedure did not render Marcyniuk's trial fundamentally unfair, Pet. App. 10-11. That procedure, the court noted, was much like the courtroom closure during voir dire that this Court held did not result in fundamental unfairness in *Weaver v. Massachusetts*, *see id.*, and Marcyniuk had not shown that "any potential harm flowing from the closure came to pass," Pet. App. 10. In particular, it deemed "speculative" Marcyniuk's "suggestion" on appeal that both sides engaged in gender-based strikes during the procedure. *Id.* It therefore concluded that Marcyniuk's ineffective-assistance claim was not substantial and that its default could not be excused under *Martinez*. Pet. App. 12.

Turning to Marcyniuk's public-trial and right-to-be-present claims, the Eighth Circuit held that the circuit clerk's omission of the parties' pretrial jury strikes from the record of Marcyniuk's trial on appeal did not excuse his default of those claims on appeal, Pet. App. 15-18—assuming they were defaulted on appeal rather than at trial, Pet. App. 8 (noting agreement of the parties that they were defaulted at least at that

stage).[2] First, it explained that the state rule governing the compilation of the record required the clerk to exclude jury-selection records from the record on appeal unless Marcyniuk asked to add them, which he did not do. Pet. App. 17. So the clerk's statement that the record was "true and complete" was accurate. *Id.* Second, even setting aside that the State did nothing to cause Marcyniuk's default, the court of appeals held that the basis for the jury-selection claims was reasonably available to Marcyniuk's appellate counsel. The records of the pretrial jury selection were kept in the circuit court's juror information file, were "available for attorneys to review," Pet. App. 18, and were turned over to Marcyniuk's habeas counsel upon a simple document request by his investigator, Pet. App. 17. Further, there were "multiple references in the record to the expanded questionnaire" sent to potential jurors, Pet. App. 15, putting Marcyniuk's appellate counsel on notice that there may have been more to the jury-selection process than the usual voir dire.

The Eighth Circuit denied Marcyniuk's petition for rehearing without dissent. Pet. App. 98.

[2] Arkansas argued in its first supplemental letter that under state law, a contemporaneous objection is needed to preserve both public-trial and right-to-be-present claims. Pet. App. 115-16. After unsuccessfully moving to strike that letter, Marcyniuk responded that there is an exception to that rule for right-to-be-present claims in capital cases, and that unpreserved public-trial claims, though noncognizable on direct appeal in Arkansas, can be raised in postconviction review. Pet. App. 138-39. Arkansas replied that the supposed exception in capital cases was stated only in dicta and subsequently repudiated in several capital appeals, and that forfeited public-trial claims do not spring back to life in postconviction. Pet. App. 142-43.

DISCUSSION

I. The first question presented does not merit review.

Marcyniuk's first question asks the Court to decide "[w]hether cause to excuse procedural default exists when a state officials [sic] made statements that were merely misleading—rather than outright false—that nonetheless hindered counsel's compliance with [the] state's procedural rule." Pet. i. More particularly, it asks whether the circuit court clerk's certification that the record of Marcyniuk's trial was "true and complete," though it did not contain documentation of a pretrial jury-selection procedure, excuses Marcyniuk's procedural default of his jury-selection claims. As Marcyniuk's lengthy attack (Pet. 19-25) on the Eighth Circuit's interpretation of Arkansas's procedural rules suggests, this case only presents a question about misleading statements if that interpretation was wrong. But if, as the Eighth Circuit held, Arkansas's procedural rules required the clerk to exclude jury-selection records from the appellate record, then there was nothing misleading about her statement; the record contained all it was supposed to. That antecedent question, however, does not merit review, and on its merits the Eighth Circuit correctly interpreted Arkansas law.

Further, even if the first question were presented, it would not merit review. There is no conflict on whether "merely misleading" statements by state officials are cause to excuse procedural default; Marcyniuk does not cite a single case that holds they are. Instead, he only cites the general standard for cause and argues that properly applied, misleading statements meet the standard. That's a purely merits argument about the Eighth Circuit's supposed misapplication of the standard for

cause, which it correctly stated, not a genuine claim of conflict. The Court should deny review.

A. This case does not present Marcyniuk's first question.

Marcyniuk claims that this case presents a question about a misleading statement.[3] In his view, even if the circuit court clerk was required to omit jury-selection materials from the record, her statement that the record was "true and complete" was misleading. A non-misleading statement, he claims, "would have been, 'the record is complete but for the jury-selection records.'" Pet. 17.

What that argument misses is that some set of rules always define what makes up a record, and that a record is "complete" so long as it contains everything required by those rules. For example, this Court does not call an administrative record incomplete because it excludes inter-agency deliberations; it calls such materials "extra-record" documents because the rules about what belongs in an administrative record say those materials stay out. *Dep't. of Com. v. New York*, 139 S. Ct. 2551, 2574 (2019). On the other hand, it does call an administrative record "incomplete," *id.* at 2564, if it does not contain all the materials it *is* supposed to contain—"the materials that [the agency] considered in making [its] decision," *id.* Here too, whether the omission of pretrial jury-selection materials made Marcyniuk's record incomplete turns on

[3] Marcyniuk also raises several other "examples of other state interference," such as the manner in which the record of the pretrial strikes was kept. Pet. 15. These are outside the scope of the first question presented, which is limited to whether "statements" that were "misleading" are cause to excuse procedural default, Pet. i. Marcyniuk makes no argument that whether these "examples" are cause to excuse procedural default merits review. Most importantly, the Eighth Circuit correctly held these "examples" were waived. Pet. App. 16 n.9. That holding is addressed in response to Marcyniuk's third question presented below.

whether the applicable rules said the record should contain those materials. If not, the record was "complete" without them. And here, the applicable rules said the record should *not* include jury-selection materials.

As the Eighth Circuit explained, Pet. App. 17, at the time of Marcyniuk's direct appeal, Arkansas Supreme Court Rule 3-4 said that "[i]n all criminal cases," Ark. R. Sup. Ct. 3-4(a) (2009), "[t]he record shall *not* include" materials concerning jury selection "unless expressly called for by a party's designation of the record," *id.*, 3.4(b) (emphasis added). And Arkansas Supreme Court Rule 3-2(d) provided that in all appeals to the Arkansas Supreme Court, criminal and civil, "[c]lerks shall *not* insert in the record any matter concerning . . . the impaneling or swearing of the jury [or] the names of jurors . . . unless it is expressly called for by a party's designation of the record." Ark. R. Sup. Ct. 3-2(d) (2009) (emphasis added). So under Arkansas law, the circuit clerk was not only not permitted, but required, to exclude jury-selection materials from the record.

Despite that, Marcyniuk claims that a different rule required including the pretrial jury-selection materials. That rule, Arkansas Rule of Appellate Procedure — Criminal 10, provided that when a circuit court imposed a death sentence, the circuit clerk, not the defendant, must automatically prepare a form notice of appeal. Ark. R. App. P. — Crim. 10(a) (2009). And that form notice directed the clerk to "prepare the entire record and transmit it in accordance with" that rule. Marcyniuk asserts that the use of the word "entire" means that the Arkansas Supreme Court "must have everything, including jury-selection records." Pet. 21.

But like Marcyniuk's argument about the word "complete," that argument begs the question of what the record is. And it ignores the text of Rule 10, which told circuit clerks what to include in a Rule 10 record. That rule—which the Rule 10 form notice said the record should be transmitted "in accordance with"—said that "The court reporter shall transcribe all portions of the criminal proceedings *consistent with Article III of the Rules of the Supreme Court* . . . [and] the circuit clerk shall compile the record *consistent with Article III*[.]" Ark. R. App. P. — Crim. 10(a) (2009) (emphasis added). And Arkansas Supreme Court Rules 3-2 and 3-4 are part of Article III (entitled "The Record") of the Arkansas Supreme Court Rules. So Rule 10 merely leads back to Rules 3-2 and 3-4 and the requirement that jury-selection materials be excluded from criminal records on appeal.[4] The decisions Marcyniuk cites (Pet. 24) about automatic review in death-penalty cases do not suggest otherwise. They merely provide that when a defendant in a death-penalty case waives his appeal, the Arkansas Supreme Court nevertheless must receive the trial record, not just the record of his waiver and related competency hearings. *See State v. Smith*, 12 S.W.3d 629, 630 (Ark. 2000); *State v. Robbins*, 5 S.W.3d 51, 52, 57 (Ark. 1999).

In sum, then, the rules governing the preparation of the record in Marcyniuk's direct appeal required the circuit clerk to exclude the pretrial jury-selection materials. Therefore, the circuit clerk's statement that the record was "true and complete"

[4] Inasmuch as Marcyniuk suggests that because the circuit clerk, not the defendant, prepares the notice of appeal in capital cases, there was no mechanism for him to designate jury-selection records, that is incorrect. Arkansas Rule of Appellate Procedure — Civil 6(e) (2009), made applicable in criminal appeals by Arkansas Rule of Appellate Procedure — Criminal 4(a) (2009), allowed Marcyniuk to move to expand the record beyond what was authorized under Rule 3-4.

was neither false, nor misleading. For there is nothing misleading about certifying that a record that contains everything that the rules governing its preparation require is complete. So this case does not pose Marcyniuk's first question.

B. There is no conflict on the first question presented.

Even if this case presented Marcyniuk's first question, it would not warrant review because there is no conflict on that question. None of the decisions Marcyniuk cites to support a conflict in authorities concerns a misleading statement. Instead, they all involve applications of the general standard for cause to excuse procedural default in different contexts: either some concealment of unlawful action by the trial court from trial and appellate counsel alike, or a trial court clerk's illicit failure to transmit a trial record to an appeals court at all. Rather than really claim the decision below conflicts with those decisions, Marcyniuk merely argues that they illustrate the general standard and that the decision below, though stating that standard, misapplied it. But the supposed misapplication of a properly stated rule of law does not amount to a conflict or a basis for review.

1. Marcyniuk cites several decisions that he claims conflict with the decision below: this Court's decisions in *Amadeo v. Zant*, 486 U.S. 214 (1988), and *Murray v. Carrier*, 477 U.S. 478 (1986), and the Sixth and Tenth Circuits' decisions in *Ambrose v. Booker*, 684 F.3d 638 (6th Cir. 2012), and *Johnson v. Champion*, 288 F.3d 1215 (10th Cir. 2002). But he does not claim they demonstrate a conflict on whether statements by state officials that are only misleading rather than false can amount to cause to excuse procedural default. That is because—as his own recounting of those cases shows, Pet. 13-15—none involved a misleading statement, or any statement at

all. Indeed, Marcyniuk cites no case holding that a misleading statement like the one he claims occurred below excuses procedural default.

Rather than claim that direct sort of conflict, Marcyniuk says they illustrate the general rule that "cause to excuse procedural default exists when the actions of the state . . . hinder petitioner's compliance with the procedural rule and make the factual basis for the claim not reasonably available to counsel." Pet. 12-13. That is indeed the law; this Court has said so. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). But so did the court of appeals below, citing this Court's opinion in *Coleman*. Pet. App. 7 (citing *Coleman*, 501 U.S. at 753). Applying that standard, it held that "Marcyniuk fail[ed] to show *either* that interference by state officials made compliance with the procedural rule impracticable *or* that the factual or legal basis for his claims was not reasonably available to his . . . counsel"—stating the rule more generously to Marcyniuk than he does himself. Pet. App. 18 (emphasis added). Marcyniuk claims that standard was misapplied here, but misapplication is not a conflict.

2. At most, Marcyniuk argues the decisions he cites show the standard for finding cause to excuse procedural default is more lenient than the Eighth Circuit understood it to be. That is not correct either. The decisions he cites found cause on far more extreme facts than are presented here.

a. Marcyniuk relies on two kinds of cases. One group, represented by *Amadeo* and *Ambrose*, involve racial bias in jury-pool composition that was concealed from counsel. But those cases differ from this one in two critical ways. First, in those

cases—unlike this one—the defendants' trial counsel, not just their appellate or post-conviction counsel, were unaware of the bias. *See Amadeo*, 486 U.S. at 223-24; *Ambrose*, 648 F.3d at 645. In stark contrast to those cases, Marcyniuk's trial counsel participated in the very jury-selection procedure he now seeks to attack—making his argument that the factual basis for his claims wasn't reasonably available to his counsel a contradiction in terms.

Second, the alleged defect in the jury-selection process in those cases was far less discoverable. In *Ambrose*, the defect was a computer glitch "buried in a mountain of computer code" that "was only discovered after a broad statistical analysis" of jury pools across many cases led a county to conduct an internal study of its own jury-selection computer program. *Ambrose*, 648 F.3d at 645; *id.* at 641. In *Amadeo*, the evidence of the defect took the form of a concealed memorandum, documenting an ongoing scheme to intentionally underrepresent black people and women, that was only discovered "as part of a sweeping investigation of 20 to 30 years' worth of jury lists." *Amadeo*, 486 U.S. at 224. Neither the glitch nor the memorandum was a part of the record of the defendants' own cases. Here, by contrast, Marcyniuk rediscovered the pretrial jury-selection process through a standard habeas investigation of the courthouse records of his own case. And his appellate and postconviction counsel could have learned of the process even more easily—simply by interviewing trial counsel. Thus, if anything, *Amadeo* and *Ambrose* underscore that this case does not involve the kind of facts that lead courts to excuse default.

b. The other kind of case Marcyniuk cites stands for the unremarkable proposition that when a state court dismisses an appeal for lack of a timely filed record, and a state official failed to file the record, that failure excuses the defendant's default of his claims. *See Johnson*, 288 F.3d at 1228. Of course, that is nothing like what happened here. The clerk timely filed the record in Marcyniuk's appeal; she simply did not include materials that Arkansas appellate rules excluded. Accordingly, the Eighth Circuit did not hold that failure to transmit a record isn't cause, but only that, under Arkansas law, the clerk did transmit the complete record. So there is no conflict between the decision below and *Johnson*. Rather, the question Marcyniuk really presents is whether the Eighth Circuit correctly interpreted an Arkansas rule of appellate procedure, absent any conflict between the Eighth Circuit and decisions of Arkansas state courts on the rule's interpretation. Review on the first question should be denied.

II. Marcyniuk's second question presented does not merit review.

Marcyniuk's second question asks whether a "trial is fundamentally unfair" if a court conducts the sort of pretrial jury-selection procedure that occurred here. Pet. i. Understanding that question requires some unpacking. Below, Marcyniuk raised a defaulted ineffective-assistance claim: that trial counsel was ineffective for failing to object to the pretrial jury-selection procedure. To excuse that claim's default under *Martinez*, Marcyniuk had to show the claim had at least some merit. Yet Marcyniuk did not claim the pretrial jury-selection procedure affected his trial's outcome. Instead, he argued that he could show prejudice so long as his "counsel's participation in the pretrial jury selection procedure rendered his trial 'fundamentally unfair,'" Pet.

App. 9, relying on *Weaver v. Massachusetts*, where this Court assumed without deciding that fundamental unfairness amounts to *Strickland* prejudice. 582 U.S. 286, 300 (2017). Marcyniuk apparently asks this Court to again assume that proposition without deciding it, then hold that the pretrial jury-selection procedure rendered his trial fundamentally unfair, and thus conclude that his ineffective-assistance claim has merit and may evade default.

The problems with this proposal are obvious. The Court, after granting certiorari on the standard for prejudice in *Weaver*, was able to assume without deciding that fundamental unfairness satisfies the *Strickland* prejudice requirement because it held that the public-trial violation there did not make Weaver's trial fundamentally unfair. But to rule for Marcyniuk here, the Court would have to first decide that antecedent question. Yet Marcyniuk has not sought review on that question, or suggested it would be cert-worthy. To the contrary, he suggests that lower courts are unanimously assuming without deciding what *Weaver* assumed.

Even if Marcyniuk could surmount that hurdle, there is no conflict on the subsequent question of whether the unique jury-selection procedure here renders trials fundamentally unfair. To begin with, lower courts have, on Marcyniuk's telling, merely assumed *Weaver*'s framework without finding fundamental unfairness in *any* setting, so there is no body of lower-court holdings on what if any procedures cause fundamental unfairness. Marcyniuk audaciously asserts a conflict with the assumed rule in *Weaver* itself, but like the standard for cause to excuse a default, the Eighth Circuit correctly stated that assumed rule and simply reached a different result than

Marcyniuk would prefer in applying it. And on the merits, the pretrial jury-selection procedure did not make Marcyniuk's trial fundamentally unfair. The closed jury-selection procedure here was much like the closed voir dire in *Weaver*, except in this case the defendant obtained a benefit from the closed procedure: an additional fifteen strikes. And Marcyniuk's claims that the procedure led to gender discrimination are pure speculation and were first raised on appeal.

A. Answering the question presented would require first answering an unpresented and un-certworthy question.

In *Weaver v. Massachusetts*, this Court granted certiorari on whether a defendant asserting ineffective assistance that results in a structural error must prove actual prejudice, or whether prejudice in such cases is presumed on a theory of fundamental unfairness. *See* Pet. for Writ of Certiorari at i, *Weaver*, 582 U.S. 286 (No. 16-240). This Court "assume[d] that [the defendant's] interpretation of *Strickland* is the correct one," *Weaver*, 582 U.S. at 300, but it held that the structural error in his case did not result in fundamental unfairness, *see id.* at 303-05.

The Court there was able to avoid deciding the correct standard because it held the defendant lost under either one. But here, Marcyniuk proposes the Court assume, at the certiorari stage, the standard the Court assumed in *Weaver* and only address whether he meets it. Assuming Marcyniuk is wrong about whether he meets that standard, that would not present a problem. But if he were right, whether his preferred standard is correct in the first place would be "predicate to an intelligent resolution of the question presented." *Ohio v. Robinette*, 519 U.S. 33, 38 (1996). The

Court could not hold that Marcyniuk had shown *Strickland* prejudice on a fundamental-unfairness theory without first holding that is the proper prejudice test.

Marcyniuk's reluctance to present that predicate question is understandable, because it is not worthy of review. Marcyniuk claims that lower courts have unanimously "held" since *Weaver* that fundamental unfairness satisfies *Strickland*. Pet. 28. That is not a claim of conflict, and in any event, it overstates matters. Rather than holding what *Weaver* assumed, a mere two circuits have made the same assumption as *Weaver* and found that standard was not met. *See Williams v. Burt*, 949 F.3d 966, 978 (6th Cir. 2020); *United States v. Aguiar*, 894 F.3d 351, 356-57 (D.C. Cir. 2018); *see also Pirela v. Horn*, 710 F. App'x 66, 83 n.16 (3d Cir. 2017). There has, then, been no lower-court percolation on whether the assumption in *Weaver* was correct, and Marcyniuk offers no argument on that score.

Conversely, though *Weaver*'s assumption has yet to generate lower-court conflicts, the Court cannot take this case on the presupposition that it would likely adopt *Weaver*'s assumed rule. In *Weaver* itself, more Justices who opined on the fundamental-fairness standard rejected it than approved of it. *Compare Weaver*, 582 U.S. at 306 (Thomas, J., concurring, joined by Gorsuch, J.) (rejecting the standard); *id.* at 307-09 (Alito, J., concurring in the judgment, joined by Gorsuch, J.) (rejecting the standard); *with id.* at 310 (Breyer, J., joined by Kagan, J., dissenting) (arguing fundamental unfairness satisfies *Strickland*, but calling for an even broader and more administrable standard). And perhaps the only court to decide whether *Weaver*'s assumption was correct has rejected it. *See Alexander v. State*, 870 S.E.2d 729, 735-39

(Ga. 2022). In sum, whether *Weaver*'s assumption was correct is a necessary predicate to the question presented. But that antecedent, unpresented question is neither independently worthy of review, nor an uncontroversial background question on which the Court could assume Marcyniuk would prevail.

B. There is no conflict on the second question presented.

Given that no decision holds that fundamental unfairness amounts to *Strickland* prejudice, there is unsurprisingly no conflict on whether a jury-selection procedure like the one here amounts to fundamental unfairness. Marcyniuk's only real argument that there is one is that the decision below somehow conflicts with the assumption in *Weaver* itself. But that is not a conflict.

Marcyniuk barely attempts to argue that the decision below conflicts with other lower-court decisions. His only attempt to assert a conflict consists of a quote of dictum from *Williams v. Burt*. Pet. 33. There the Sixth Circuit observed that a courtroom closure did not lead to "basic unfairness" in the way other structural errors "have been deemed to," giving the example of juror exclusion "on the basis of race." 949 F.3d at 978. The Sixth Circuit did not hold such an exclusion would be fundamentally unfair or that a showing of fundamental unfairness would satisfy *Strickland*. Marcyniuk does not allege racial bias here. And the Eighth Circuit correctly determined "his suggestion" that the parties engaged in *gender*-based strikes was "speculative." Pet. App. 10. Apart from his quote of the *Williams* dictum, Marcyniuk cites various direct-review cases "emphasiz[ing] the importance" of the rights his trial counsel waived. Pet. 35. No one disputes the importance of those rights, or that their

denial leads to automatic reversal on direct review. But that does not answer the question of whether their denial renders a trial fundamentally unfair, as *Weaver* held.

The weight of Marcyniuk's argument instead falls on a supposed conflict between the decision below and *Weaver* itself. According to Marcyniuk, *Weaver* announced certain "factor[s]" for determining whether a courtroom closure makes a trial fundamentally unfair and thereby prejudicial, Pet. 28, and the court of appeals misapplied those "factors" here. But it is nonsensical to claim a conflict with the application of a merely assumed rule; no decision of this Court holds that fundamental unfairness amounts to *Strickland* prejudice. Moreover, *Weaver* did not announce a multi-factor test for assessing fundamental unfairness. It merely gave a laundry list of factual reasons that the closure in *Weaver* was not fundamentally unfair, never stating that if any or all of the facts were different the closure would have been unfair. *See Weaver*, 582 U.S. at 304. If anything, what is notable about that laundry list of facts is their striking similarity to the facts here. Just as in *Weaver*, "[t]he closure was limited to the jury *voir dire*," *id.*, and "only a portion of voir dire" at that, Pet. App. 10. And as in *Weaver*, "there was a record made of the proceedings," *Weaver*, 582 U.S. at 304, which here consisted of a purely written submission of strikes. There is no conflict with *Weaver*'s assumption.

C. The pretrial jury-selection procedure did not render Marcyniuk's trial fundamentally unfair.

Ultimately, Marcyniuk merely re-airs his merits arguments from below that his counsel's failure to object to the pretrial jury-selection procedure rendered his trial

fundamentally unfair. That argument for pure error correction—under a merely assumed standard—does not merit review. But taking the argument for what it is worth, Marcyniuk's trial was not fundamentally unfair.

The starting point for any fundamental unfairness claim is *Weaver*. *Weaver*'s actual holding was that a two-day courtroom closure during the duration of voir dire did not render the trial in that case fundamentally unfair. *Weaver*, 582 U.S. at 304-05 The question here is whether the facts of this jury-selection courtroom closure somehow distinguish it from *Weaver*. The most salient difference between the two cuts against Marcyniuk: he benefited from the out-of-court jury-selection procedure, "which effectively gave [him] an additional 15 peremptory strikes," Pet. App. 10, more than doubling the number he otherwise would have received, *see* Ark. Code Ann. 16-33-305(b). In a case where Marcyniuk admitted viciously stabbing his ex-girlfriend to death, any additional opportunity to shape the composition of the jury was a boon.

Marcyniuk, nevertheless, claims this courtroom closure was *more* prejudicial than the one in *Weaver*. He gives essentially two reasons. The first is that he was not present during the pretrial jury selection, preventing him from "assist[ing] his lawyer" in the process. Pet. 33. Yet *Weaver* itself indicates that preventing the defendant from assisting his counsel does not make a trial fundamentally unfair. In addressing which structural errors "result[] in fundamental unfairness," *Weaver*, 582 U.S. at 296, the Court distinguished rights that are "not designed to protect the defendant from erroneous conviction but instead protect[] some other interest," *id.* at 295. It specifically described "the defendant's right to conduct his own defense" as

such a right, *id.*, noting that when exercised it "usually increases the likelihood of a trial outcome unfavorable to the defendant," *id.* (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984)). *Weaver*, then, already tells us that Marcyniuk's inability to "assist his lawyer" (Pet. 33) would not satisfy *Weaver*'s assumed fundamental-unfairness standard.

Marcyniuk also alleges that the pretrial jury-selection procedure facilitated gender-discriminatory strikes. That allegation doesn't help Marcyniuk show fundamental unfairness. As the court of appeals found, it "is speculative" at best. Pet. App. 10. The only reason Marcyniuk gives to suggest the procedure facilitated gender discrimination is that each side used between 60 to 70 percent of its strikes on one or the other gender. Pet. 6. Marcyniuk offers no information about the gender composition of the underlying pool, so there is no way of knowing whether that pattern was proportionate or disproportionate.

Recognizing he has no evidence of gender discrimination, Marcyniuk falls back on the rule that "it must be assumed" at this stage "that the factual allegations of the petition are true." Pet. 32. Yet he omits one key fact—his petition did not allege gender discrimination in the *pretrial* procedure. Instead, he alleged that the prosecution disproportionately used its peremptory strikes *at trial* to exclude men, Dist. Ct. Doc. 1 at 60-62, and merely suggested in a footnote that the prosecution *might* have used its pretrial strikes to exclude men, *id.* at 60 n.1. After the district court rejected this claim, Pet. App. 69, Marcyniuk abandoned it on appeal. He then flipped

his argument, claiming for the first time on appeal that: 1) the prosecution had discriminated not against men but against *women* in the pretrial procedure; and 2) the defense discriminated against men in exercising its pretrial strikes. There was simply no allegation in the petition to take as true.[5] The Court should deny the second question presented.

III. Marcyniuk's third question presented does not merit review.

Marcyniuk's third question asks this Court to exercise its supervisory authority to summarily reverse the Eighth Circuit for failing to excuse his waivers of new arguments on appeal. According to Marcyniuk, because Arkansas did not flag his waivers in its briefing, the Eighth Circuit was obliged to give him notice and an opportunity to supplementally brief whether he had waived his new arguments. That is not the law. And contrary to what he says, there is no inconsistency between the Eighth Circuit's barring Marcyniuk from raising new arguments as an appellant and permitting Arkansas to raise alternative grounds on which to affirm.

In addressing Marcyniuk's welter of arguments for reversal, the Eighth Circuit deemed one inadequately developed "in a mere two sentences," Pet. App. 16 n.9, and said another argument was not raised below, Pet. App. 12 n.6.[6] Marcyniuk claims

[5] Moreover, even if credited, Marcyniuk's allegations would not satisfy the fundamental-unfairness standard. As already mentioned, *Weaver* indicates that denials of rights that are "not designed to protect the defendant from erroneous conviction but instead protect[] some other interest" do not make a trial fundamentally unfair, 582 U.S. at 295 and the right against gender-discriminatory strikes is a paradigmatic case of such a right. It belongs to "individual jurors," not the defendant, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994), who only has third-party standing to assert their rights.

[6] More specifically, that court said that Marcyniuk did not raise one of his arguments for excusing his procedural defaults with respect to the claims actually before the Eighth Circuit on appeal, but only with respect to a claim on which a certificate of appealability wasn't granted. That does not make the argument any less waived; Marcyniuk was obliged to preserve his arguments for excusing the default of each of his claims.

this unremarkable decision not to entertain unpreserved arguments merits the harsh medicine of summary reversal. That is because, he argues, *Arkansas* did not flag these waivers in its brief; instead, the Eighth Circuit did "sua sponte." Pet. 36. Though Marcyniuk does not suggest anything prohibited it from doing so, he claims the court was required to give him "notice and an opportunity to be heard" on the issue of waiver before deciding it. *Id.*

That novel argument confuses garden-variety waiver with a state's affirmative habeas defenses. When a court of appeals raises a state's affirmative habeas defense—like AEDPA's statute of limitations or non-exhaustion—sua sponte, which it may do in some circumstances, it is required to give the parties notice and an opportunity to brief the defense. *See Day v. McDonough*, 547 U.S. 198, 210 (2006).

But whether Marcyniuk waived an issue by only dedicating two sentences to it in his brief, or not raising it below, is not a waivable defense. Rather, it is a matter of the integrity of the court's own adjudicative process. Indeed, courts of appeals widely recognize that "it is beyond cavil" that they may "raise the issue of waiver *sua sponte*." *United States v. Gimbel*, 782 F.2d 89, 91 n.5 (7th Cir. 1986); *see also United States v. Filker*, 972 F.2d 240, 241 (8th Cir. 1992). Of course, waiver is not jurisdictional, so courts of appeals have no obligation to raise waiver and may decline to in their discretion. *See United States v. Rodebaugh*, 798 F.3d 1281, 1314-15 (10th Cir. 2015). But they also have discretion to raise it. *See id.* And like this Court, nothing requires them to give a party notice that they think an argument might be waived before they determine that it is. The appellate process would grind to a halt if every time a court

of appeals thought an argument was waived for lack of preservation or adequate briefing, it had to give the waiving party "notice and an opportunity to be heard" (Pet. 36) on whether it had really waived its argument.

Marcyniuk also claims the Eighth Circuit exercised its discretion to excuse waiver inconsistently because it entertained an argument Arkansas raised for the first time in a supplemental letter before oral argument. Pet. 38. But there is no inconsistency. Marcyniuk was seeking reversal; Arkansas was seeking affirmance. And courts of appeals "treat arguments for *affirming* the district court differently than arguments for *reversing* it." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) (Gorsuch, J.). They generally cannot reverse on grounds that were not raised below, but they may affirm on grounds that were "not . . . even presented to [them] on appeal," *id.* A fortiori, then, they may affirm on grounds that were presented in a supplemental letter. And Arkansas's supplemental letter gave Marcyniuk the opportunity to both respond at oral argument, and in a responsive letter of his own, Pet. App. 140—as well as in a motion to strike Arkansas's letter that he essentially used as an overlength response, Pet. App. 131-36. The court of appeals' handling of this case was entirely appropriate and does not merit criticism, much less summary reversal.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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