CAPITAL CASE NO. 22-6951

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

PETITIONER'S REPLY BRIEF

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Respondent urges this Court to deny review because the Eighth Circuit's "handling of this case was entirely appropriate and does not merit criticism," a contention which continues the court of appeals' misinterpretation and misapplication of the applicable law. Br. Opp. 25. In this case, the Eighth Circuit departed from the precedent of this Court and that of other circuits, and in the process reached a manifestly erroneous result.

Respondent's BIO contains some crucial errors. One of the most notable is its repeated reference to the "record" made of the pretrial jury strikes in this case, which Respondent declares analogous to the type of record which not only documents, but transcribes, the nature of proceedings. Br. Opp. 2. This type of record it was not. The "record" made of the pretrial jury strikes in this case was a bare list of strikes. The actual record—the one that would have been the closest equivalent to a transcript of the essential voir-dire proceedings that were held in secret—was lost when the trial judge in this case ordered the destruction of the juror questionnaires upon which the pretrial strikes were based.

Another error is contained in Respondent's statement that "[t]he Arkansas Supreme Court unanimously affirmed" Marcyniuk's conviction on appeal "after a mandatory review of the *entire* record." Br. Opp. 3 (emphasis added). Although Respondent is correct in noting that the Arkansas Supreme Court was obligated to conduct a review of the entire record, the Court's obligation to do so was impeded because a portion of the record was never submitted.

I. The first question presented merits review.

Despite Respondent's contention that "[t]here is no conflict on whether 'merely misleading' statements by state officials are cause to excuse procedural default[,]" such conflict does indeed exist. Br. Opp. 8. Respondent mistakenly focuses only on misleading "statements" and avoids addressing whether state officials acting to mislead the Petitioner in any way hindered his compliance with state procedural rules. A state official stating, doing, or acting in any misleading manner is nonetheless state interference. And in this case, the state interference was a misleading statement—one analogous to the facts of the cases cited.

In *Amadeo v. Zant*, state officials interfered with the petitioner's compliance with the state procedural rule by *misleading* petitioner's lawyers to believe that the state had complied with the laws concerning jury composition by concealing the evidence that would have prompted a constitutional challenge. 486 U.S. 214 (1988). Additionally, any case finding a *Brady* violation is one in which state officials have misled a defendant to believe there is no further exculpatory evidence to be shared. *Brady v. Maryland*, 373 U.S. 83 (1963).

Take, for example, *Banks v. Dretke*, where this Court held that a petitioner "cannot be faulted for relying on" the State's representation that it has disclosed all material information. *Banks v. Dretke*, 540 U.S. 668, 693 (2004). Just as the State in *Banks* "knew of, but kept back," material information, the clerk in Marcyniuk's case knew of, but kept back, the jury-selection records that contained the factual basis for Marcyniuk's claims. *Id.* at 693. The clerk in this case asserted that the record

was "true and complete," just as the State in *Banks* asserted it had disclosed all *Brady* material. *Id*. Marcyniuk cannot be faulted for relying on the clerk's misleading representation, just as the petitioner was not faulted in *Banks*.

This Court's decisions "lend no support to the notion that defendants must scavenge for hints of undisclosed…material" when the state has represented that all material has been disclosed. *Banks*, 540 U.S. at 695. To assert otherwise is to effectively urge that the state can lie, conceal, mislead, or otherwise hinder compliance with procedural rules, and it is still the prisoner's burden to discover the evidence, "so long as the "potential existence" of a state misconduct claim may have been detected. *Id*. at 696. However, a rule which declares that "the state may hide, defendant must seek" "is not tenable in a system constitutionally bound to accord defendants due process." *Id*. The cause inquiry turns on events or circumstances "external to the defense." *Id*., citing *Amadeo*, 486 U.S. at 222. To find that it is the prisoner's duty to locate evidence concealed by the state is contrary to that rule.

To conceal any evidence, records, or any other critical information in a case is to *mislead* an opposing party to believe that the concealed materials do not exist. Concealment constitutes state interference. Misleading statements and/or behavior constitute state interference.

Respondent is correct to state that a record is "complete" so long as it contains everything required by the applicable rules. Br. Opp. 9-10. However, just as the Eighth Circuit cited the wrong law to determine that the record in this case was "complete," so too does Respondent. *Marcyniuk v. Payne*, 39 F.4th 988, 1001 (8th

Cir. 2022); Br. Opp. 10. Although a bare observation of the applicable Arkansas Supreme Court Rules may lead one to believe that jury-selection materials need not be included in the record for an appeal involving a death sentence, a closer look at both the statutes and at Arkansas case law indicates otherwise. Contrary to Respondents' averment that in this case, "the applicable rules said the record should *not* include jury-selection materials[,]" Br. Opp. 10, it is important to note the phrasing that distinguishes Arkansas Supreme Court Rule 3-4 from Rule 10 of the Arkansas Rules of Appellate Procedure – Criminal. Rule 3-4 refers only to "[t]he record,"—nowhere within the rule is there any reference to what constitutes the "entire" record. Ark. Sup. Ct. R. 3-4.

In contrast, the language of Rule 10 does indeed specify that the "ENTIRE RECORD" shall be immediately prepared for review. Ark. R. App. P. Crim. 10. The plain language of these separate, but related, rules indicates the intent underlying them. Despite Respondent's reliance upon Rule 10's admonition that the record be compiled "consistent with Article III," Rule 10 did not stop there—the form provided by the rule went on to indicate that the *entire* record should be prepared. Ark. R. App. P. Crim. 10. There would have been no need to include this phrasing if the rule were meant to rely in full on the guidance of Article III. It is also important to note that Rule 3-4 is not the only applicable Supreme Court Rule—Rule 4-3 requires that "the Court must review all errors prejudicial to the appellant in accordance with Ark. Code. Ann. Sec. 16-91-113(a)" when the sentence is death or life imprisonment. Ark. Sup. Ct. R. 4-3.

The Arkansas Supreme Court has acknowledged that it cannot properly conduct a meaningful review as required when a complete record is not provided. For this reason, even when a notice of appeal excludes a request for jury selection or other portions of the record, in the event that these records are not provided, the court has ordered the completion of the record and declared that those materials must be sent up, as the court "cannot say that [it has] reviewed the record for adverse rulings unless [it is] provided with a complete record." *Huff v. State*, 2012 Ark. 182, 1 (2012). In fact, "the omission of the complete jury selection and *voir dire* is particularly troubling" in cases where issues on appeal are related to jury-selection procedure. *Romes v. State*, 139 S.W.3d 519 (Ark. 2003).

In *Howell v. State*, the Arkansas Supreme Court observed that even if the appellant *had not* specifically designated that voir dire and jury selection be included as part of the entire record on appeal, those materials would have nonetheless been necessary to conduct a review in accordance with the Supreme Court rules mandating a complete review of the entire record in cases resulting in a sentence of death or life imprisonment. *Howell v. State*, 84 S.W.3d 442, 443 (Ark. 2002) (per curiam). Again in *Scott v. State*, the court explained that in cases requiring a complete review of the true and complete transcript of the record, "[t]here is no question that prejudicial errors may occur during jury selection and *voir dire*[,]" and "[t]herefore, this court had to review that portion of the record." *Scott v. State*, 139 S.W.3d 511, 515 (Ark. 2003). In reviewing the entire record, the court is also required to determine whether fundamental safeguards were followed;

this test mandates reviewing "any irregularity in procedure that would call into question the essential fairness of the process afforded" to the defendant. *State v. Robbins*, 5 S.W.3d 51, 55 (Ark. 1999); *see also, e.g.*, *Roberts v. State*, 102 S.W.3d 482, 495 (Ark. 2003). But that review cannot be performed when a complete record is not provided, and when the portion of the records held back contain the irregularity that would have exposed due-process violations.

In short, it is incorrect that jury-selection records should not be included as part of the "entire record" dictated by Rule 10. Petitioner has not found a single Arkansas capital case in which jury-selection and voir-dire records, with or without their designation in the notice of appeal, were not included as part of the entire record as dictated by Rule 10 and Rule 4-3. *See, e.g.*, *Gay v. State*, 2022 Ark. 23, 4 (2022); *Holland v. State*, 645 S.W.3d 318, 322-23 (Ark. 2022); *Woods v. State*, 527 S.W.3d 706, 707 (Ark. 2017); *Decay v. State*, 352 S.W.3d 319, 326 (Ark. 2009); *Williams v. State*, 373 S.W.3d 237, 239 (Ark. 2009); *Weston v. State*, 234 S.W.3d 848 (Ark. 2006); *Anderson v. State*, 163 S.W.3d 333, 345-46 (Ark. 2004); *Smith v. State*, 39 S.W.3d 739, 749 (Ark. 2001).

The decision below finds the Eighth Circuit in conflict with this Court's decisions and with the decisions of other courts of appeals relating to state interference. The clerk did not transmit the entire record in accordance with Arkansas law, and the clerk's indication that the record was "true and complete" was a misleading statement constituting state interference. The Petitioner in this case has squarely

presented this first question, and the necessary resolution merits review. The Court should so grant.

II. The second question presented merits review.

To answer the second question, the Court need not first decide whether fundamental unfairness always amount to *Strickland* prejudice, contrary to Respondent's argument. Br. Opp. 16. The Eighth Circuit already made the same assumption below that this Court made in *Weaver v. Massachusetts*, 582 U.S. 286, 300 (2017), but in doing so, it emerged with a decision that conflicts with this Court and other courts of appeals' holdings by finding that Marcyniuk's trial was not fundamentally unfair. *Marcyniuk*, 39 F.4th at 997. The Court may likewise make the *Weaver* assumption and address fundamental unfairness. In doing so, this Court should find prejudice under *Strickland v. Washington,* 466 U.S. 668, 687 (1984), given the especially odious public-trial violation in this case.

Respondent understates the influence of *Weaver* in the lower courts. Br. Opp. 18. In addition to the three circuits Respondent identifies as making *Weaver*'s assumption, Br. Opp. 18, the Tenth Circuit has also followed this Court's *Weaver* assumption. *See Meadows v. Lind*, 996 F.3d 1067, 1081 (10th Cir. 2021). Several other lower courts have as well. *See, e.g., Gaines v. Brittain*, CV 19-1160, 2021 WL 1124938, at *14 (W.D. Pa. Mar. 23, 2021); *Njonge v. Gilbert*, C17-1035 RSM, 2018 WL 1737779, at *12 (W.D. Wash. Apr. 11, 2018), *aff'd*, 773 Fed. Appx. 1005 (9th Cir. 2019) (unpublished). And contrary to Respondent's premise that no court has found *Weaver*'s assumption to be correct, the Maryland Court of Appeals did just that. *See*

Newton v. State, 168 A.3d 1 (Md. 2017). So too did the Supreme Court of Washington, in a case (preceding *Weaver* and bearing similar facts to that in Marcyniuk) that presumed prejudice when jurors were removed from the venire via an email exchange between the judge and each side's counsel. *State v. Irby*, 246 P.3d 796, 802-03 (Wash. 2011).

In *Irby*, just as in Marcyniuk's case, the pretrial strikes were based solely upon juror questionnaires. *Id*. However, in contrast to the strikes that occurred in this case, the strikes in *Irby* were at least accompanied by some semblance of reasoning, and there was no allegation that the juror questionnaires were subsequently destroyed. *Id*. For these reasons, the violations of the rights to public trial and presence in Marcyniuk's case were more egregious—and consequently, more prejudicial—than those in *Irby*.

Respondent mistakenly analogizes Marcyniuk's pretrial off-the-record jury selection as "much like the closed voir dire in *Weaver*," citing the sole difference between the cases as Marcyniuk having received a "benefit" from the closure: "an additional fifteen strikes." Br. Opp. 17. It is too facile to suggest that the additional strikes could be considered a benefit to Marcyniuk. It is impossible to know whether these strikes were a benefit to Marcyniuk because nothing is known about these jurors. The juror questionnaires they filled out, akin to a voir-dire transcript, were destroyed. There was no formal voir dire to determine whether the stricken members of the venire would have made satisfactory jurors. The fact that Marcyniuk's own counsel excluded him from the process and kept it a secret from

him both during and after the trial lends grave doubt to whether counsel would have exercised good judgment in making the strikes; for all anyone knows, Marcyniuk's trial counsel threw darts at a wall to determine which potential jurors to strike.

That said, the secret jury selection that occurred prior to Marcyniuk's trial is not "much like" the closure that occurred in *Weaver*. In *Weaver*, the closure "was not conducted in secret or in a remote place." *Weaver*, 582 U.S. at 304. The closure that occurred in this case was conducted in secret. The procedure occurred entirely off the record, out of the presence of Marcyniuk himself, with not a single witness. In *Weaver*, the closure was decided "by court officers rather than the judge[.]" *Id.* Again, such is not the case here. Marcyniuk's trial judge made the decision to conduct this secret, off-the-record jury-selection procedure. In *Weaver*, "there were many members of the venire who did not become jurors but who did observe the proceedings[.]" *Id.* Not one member of the venire, nor any other member of the public, nor Marcyniuk, was permitted to observe the pretrial jury-selection procedure that occurred in this case. In *Weaver*, "there was a record made of the proceedings that does not indicate any basis for concern, other than the closure itself." *Id.* The record *Weaver* presumably refers to is the transcript of the voir-dire proceedings; no such record was made in this case. Indeed, the requisite records in this case—the juror questionnaires—were destroyed, negating any opportunity for future claims to be brought based upon them. Numerous, and obvious, concerns are raised by the lack of record in this case. It would be impossible to discern the

number of objections that may have been raised to either side's pretrial strikes, and the ultimate effect upon Marcyniuk's trial will never be known.

Moreover, in *Weaver*, there was "no showing…that the potential harms flowing from a courtroom closure came to pass[.]" *Id*. There is certainly such a showing here. As an example, *Weaver* offered that there was "no suggestion that any juror lied during *voir dire*[,]" a suggestion we are unable to address in this case because there is no record to refer to that would expose any lies told by potential jurors who were stricken. *Id*. Nor was there any "suggestion of misbehavior by the prosecutor, judge, or any other party" in *Weaver*—this was another conclusion the Court was capable of coming to in *Weaver* because there was a record of the proceeding and because the judge was not involved in the decision to close the courtroom. *Id*. Once again, this is not the case here. There is a clear suggestion of misbehavior in this case by both the prosecutor and Marcyniuk's trial counsel for participating in the secret jury-selection procedure, and by the judge for so ordering it. Because there is no record of the proceedings, it is impossible to know if there was further misbehavior that occurred with respect to the pretrial strikes. In *Weaver*, there was "no suggestion that any of the participants failed to approach their duties with the neutrality and serious purpose that our system demands." *Id*. Once more, this is not a conclusion that can be drawn in this case, because the participation in the procedure, combined with the failure to make a record of its existence, inescapably suggests a lack of neutrality by the parties, as well as a lack of respect for the seriousness of constitutional safeguards.

The same "laundry list of factual reasons that the closure in *Weaver* was not fundamentally unfair," as stated by Respondent, is precisely the laundry list of reasons that the closure in this case rendered Marcyniuk's trial fundamentally unfair. Br. Opp. 20. The Court should grant review.

III. The third question presented merits review.

Petitioner has sufficiently briefed his arguments regarding the third question presented in his initial filing, thus he does not readdress them here. The fair administration of justice necessitates the supervisory power of this Court to reassure public confidence in the integrity of the federal justice system—a significant responsibility that is especially imperative in this capital case. The court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

MAY 22, 2023

Respectfully submitted,

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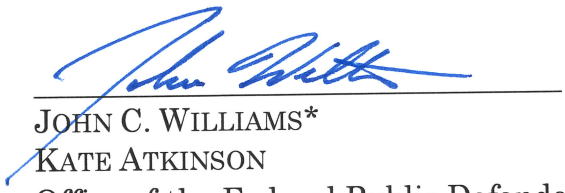

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