No._____

IN THE SUPREME COURT OF THE UNITED STATES

RALPH LEROY MENZIES, Petitioner,

vs.

ROBERT POWELL, Warden, Utah State Correctional Facility, Respondent.

****CAPITAL CASE****

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JON M. SANDS
FEDERAL PUBLIC DEFENDER
District of Arizona

LINDSEY LAYER
Counsel of Record
ERIC ZUCKERMAN
ASSISTANT FEDERAL PUBLIC DEFENDERS
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 (voice)
(602) 889-3960 (facsimile)
Lindsey_Layer@fd.org
Eric_Zuckerman@fd.org

Counsel for Petitioner Ralph Menzies

****CAPITAL CASE****

QUESTIONS PRESENTED

In *Griffin v. Illinois*, 351 U.S. 12 (1956), this Court held that the State must provide a record of trial sufficient to ensure an "adequate and effective" appeal. *Id.* at 20. Any alternative to a complete transcript must "place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise." *Draper v. Washington*, 372 U.S. 487, 495 (1963); *see also Parker v. Dugger*, 498 U.S. 308, 321 (1991). Furthermore, "where the grounds of appeal . . . make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an 'alternative' will suffice for an effective appeal on those grounds." *Mayer v. Chicago*, 404 U.S. 189, 195 (1971).

In Mr. Menzies's capital murder case, key portions of the trial were not recorded, and the record was then fabricated after the fact. The parts of the trial the State failed to record included portions of voir dire and the time surrounding an incident in which a juror fainted and Mr. Menzies was forcibly shackled in front of the jurors. The court reporter tasked with taking shorthand notes of the trial failed to record all of the proceedings. A note reader, who was never in the court room during trial, then fabricated testimony, including answers to voir dire questions from prospective jurors, and included it in the transcript. Myriad other errors were also discovered in the transcript including the court reporter consistently mixing up numbers and names, and the note reader adding information from police reports as witness testimony.

The court below found that the state court's disposition of this issue was not an unreasonable application of this Court's precedent. The court concluded that it was not unreasonable for the state court to require Mr. Menzies to establish prejudice for the errors in the transcript, and that Mr. Menzies had failed to do so.

This case presents the following questions:

1. Does the petitioner's Due Process right to an adequate and effective appeal in a capital case require a new trial where critical portions of the proceedings, including voir dire of potential jurors, are missing and cannot be reconstructed?

2. Where some or all of a transcript is unavailable and cannot be reconstructed, is a petitioner required to show that he was prejudiced as to his ability to raise a particular claim?

PARTIES TO THE PROCEEDINGS

In the proceedings below, Ralph Menzies was the petitioner/appellant and Robert Powell, Warden of the Utah State Correctional Facility, was the respondent/appellee.

RELATED PROCEEDINGS

State v. Menzies, 845 P.2d 220 (Utah 1992) (No. 880101)

State v. Menzies, 889 P.2d 393 (Utah 1994) (No. 880161)

Menzies v. Utah, 513 U.S. 1115 (1995) (No. 94-6471)

Menzies v. Galetka, 150 P.3d 480 (Utah 2006) (No. 20040289)

Menzies v. State, 344 P.3d 581 (Utah 2014) (No. 20120290)

Menzies v. Crowther, No. 2:03-cv-00902-CVE-FHM, 2019 WL 181359 (D. Utah Jan. 11, 2019)

Menzies v. Powell, 52 F.4th 1178 (10th Cir. Nov. 7, 2022) (No. 19-4042)

TABLES OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

State Statutes

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI

Petitioner Ralph Leroy Menzies, an indigent prisoner sentenced to death in Utah, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, which affirmed the dismissal of his petition for writ of habeas corpus.

OPINIONS BELOW

The United States Court of Appeals for the Tenth Circuit affirmed the district court's denial of Mr. Menzies's Petition for Writ of Habeas Corpus in a published opinion on November 7, 2022. *Menzies v. Powell*, 52 F.4th 1178 (10th Cir. 2022). (Appendix ("App.") 1a.)

STATEMENT OF JURISDICTION

The Tenth Circuit issued its opinion on November 7, 2022. Mr. Menzies's petition for rehearing or rehearing en banc was denied on January 3, 2023. On March 27, 2023, Justice Neil Gorsuch granted Petitioner's application for an extension of time with which to file his petition for writ of certiorari, extending the time to and including May 3, 2023. *See Menzies v. Powell*, Application No. 22A840. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

U.S. Const. amend. VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

U.S. Const. amend. XIV:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

No reliable transcript exists of Mr. Menzies's capital murder trial. The court reporter for Mr. Menzies's trial was unlicensed and did not accurately transcribe the proceedings. She did not transcribe the trial proceedings verbatim, but rather, took shorthand notes. She then used a note reader, to whom she provided her shorthand notes, as well as police reports which had not been entered into evidence, autopsy reports, and the trial judge's notes. The note reader created a transcript using those sources, but also included statements in the transcript that were entirely made up.

While preparing Mr. Menzies's direct appeal, appellate counsel discovered numerous errors in the transcripts. (Trial ROA 1256–62.) Counsel initially identified errors including portions of the transcript that did not make sense, places where

portions of transcript were missing entirely, and where earlier statements had been copied into later transcripts. Counsel filed a motion to set aside Mr. Menzies's conviction and sentence. (Trial ROA 1222–1444.) The Utah Supreme Court remanded the case to the trial court to resolve the transcript issues. *Menzies v. State* (*Menzies I*), 845 P.2d 220, 223 (Utah 1992), App. 68a.

The trial court subsequently ordered a representative from each side to go to California, where the court reporter Tauni Lee lived, to review the transcript with her. App. 770a. The process of reviewing the transcript was itself problematic. The first two weeks of work in California were conducted in the living room of Ms. Lee's apartment. App. 774a. As trial counsel Brooke Wells described, "[Ms. Lee] basically sat on the floor, I sat on a love seat, Miss Stubbs [the State's representative] lay down on the floor, and we worked under those conditions for that entire two weeks of time." App. 774a. During that time there were generally "anywhere from one to four children present in the household who were otherwise unattended, except by each other, and Ms. Lee's husband was in and out at various times during the entire period of time." App. 774a–775a. Ms. Wells further described:

> There were several days where we were unable to complete work because of the problems with the children, or with the problems with Ms. Lee's husband. It became known to us that they were incurring continual marital problems, and that sometimes there was a high degree of tension which made the work unable to proceed.

App. 775a. Ultimately counsel felt there was "danger potentially to Miss Lee and her

children, and also [] concern for our own safety" and so they "assisted her in packing up her children and her immediately necessary items" and "moved her with a police escort out of her home." App. 776a–777a. "And the next two days were spent with Miss Lee and her children, without the benefit of any child care, in our two hotel rooms." App. 777a. In short, the process for reviewing the transcript was chaotic and not conducive to a focused and thorough review of both the notes and the transcript.

The process nonetheless revealed several problems which showed the record to be incomplete and unreliable for appellate review. Of particular concern, Ms. Lee had failed to take notes of all the proceedings. This was particularly notable regarding the lack of a record of the voir dire of potential jurors. The voir dire lasted a week and encompassed two volumes of transcript. App. 782a. Although the parties had stipulated to a particular script on one issue, at some point "Ms. Lee, or the note reader, stopped taking down other remarks that were generally given by the court, and apparently added in . . . into the word processor [in] a standardized format." App. 782a. In other words, the note reader attributed statements in the transcript to the trial judge that appear nowhere in Ms. Lee's notes. App. 783a.

In addition, throughout the transcript Ms. Lee used asterisks to indicate "that something was occurring," but she never indicated exactly *what* was happening. App. 783a. Despite the lack of notation of what any given event was, the note reader would insert a statement of what supposedly occurred, such as the jury leaving the room, or

the court taking a recess. App. 784a. In one instance the note reader indicated in the transcript that the court took a recess, even though there were no asterisks in Ms. Lee's notes. App. 853a–854a; *see also* App. 854a. (indicating dialogue and the swearing in of a witness, despite none of it being included in Ms. Lee's notes), 862a, 863a–864a.

Most troublingly, asterisks were used in place of questions *and juror answers* throughout portions of the voir dire. The note reader then substituted in text from the voir dire of a previous juror. App. 785a. For one prospective juror, the transcript indicates a series of questions and answers between the court and the prospective juror, however in her notes, Ms. Lee had written down only the letters "BLRB." App. 787; *see also* 867a (transcript includes dialogue with prospective juror that was not in Ms. Lee's notes); *cf.* App. 811a (Ms. Lee could not read her notes for testimony regarding saliva left on a cigarette butt, yet there was transcript of the testimony, making it impossible to know "whether or not the inserted portion is correct, or whether it has been made up and added by the note reader"). The note reader simply fabricated the voir dire transcription of the juror in question.

Ms. Lee also used asterisks in her notes in place of admonitions from the court. Initially, Ms. Lee took down the admonitions from the court, however "after a period of time Ms. Lee stopped taking down those admonitions, and began to indicate only that an asterisk appeared." App. 784a. Sometimes the word "admonition" would

appear in her notes, and sometimes it would not. App. 784a; *see also* App. 867a–868a.

The note reader also substituted in other testimony that does not appear in Ms. Lee's notes. For instance, where a witness was testifying to a description of the person seen with the victim, the description in the typed transcript was longer and more detailed than that contained in Ms. Lee's notes. App. 825a. Upon further investigation, it turned out that the police reports were with Ms. Lee's notes and the description in the typed transcript "was verbatim from the police report." App. 826a. This happened on at least two occasions, both of them relating to descriptions of the man seen with the victim. App. 826a. In both instances the typed transcript matched the police report, not Ms. Lee's notes of the testimony. In addition to the police reports, Ms. Lee had supplied the note reader with a copy of the autopsy report, the trial judge's notes, and jury lists. App. 802a–803a, 827a.

In addition, during the testimony of the medical examiner, one of the jurors fainted. (App. 1059a–1060a; Trial ROA at 814–15.) In response, Mr. Menzies was abruptly shackled and forcibly removed from the courtroom in view of the jurors. (PCR ROA at 12208, 13301.) Also during the medical examiner's testimony, the court reporter became visibly upset by the testimony. App. 1061a. It has never been disputed that these events and related arguments are missing from the transcript. App. 78a*; see also* App. 819a–823a.

In another example, regarding the medical examiner's testimony, the note

reader's transcript indicated the testimony was that "wounds extended as 30 centimeters," however Ms. Lee's notes indicated it was three centimeters. App. 790a. As Ms. Wells indicated, these discrepancies are particularly problematic because by the time the court was attempting to correct the transcript, those who were present at the trial no longer had a specific recollection of what was actually said. App. 790a.

The incorrect portions of the transcript also impacted critical dates, including the date on which witness Tim Larrabee assisted in creating a composite drawing of the person he saw near the crime scene. App. 792a. The timing and validity of Mr. Larrabee's identifications of Mr. Menzies was a central concern in the case, particularly because Mr. Larrabee was the only person who placed Mr. Menzies near the crime scene. When Ms. Wells was asked if *any* number in the transcript could be relied on as being accurate, she stated, "I don't believe so." App. 805a.

Names, too, were frequently incorrect, including "consistent[] mix-ups between, for instance, prospective jurors' names." App. 781a; *see also* App. 804a (juror names and numbers were mixed up such that it is impossible to determine which juror was actually called when, or whether juror numbers had been associated with the wrong names), App. 865a. There were also problems throughout the transcript identifying who was speaking. App. 855a. For some of these instances, Ms. Lee was not able to read her own notes in order to reconstruct the transcript. App. 812a.

Many issues with the transcript were never reconciled. *See Menzies I*, 845 P.2d

at 224, App. 68a ("[I]n many instances, the parties were unable to agree on what had occurred at trial, and therefore, the record could not be corrected through the procedures of rule 11(h)."); *see also* App. 830a–831a; Trial ROA 1192–93. The trial court ultimately decided to certify both the original transcript that was prepared by the note reader, despite all parties agreeing it contained "numerous errors," and the "California" version of the transcript, which contained notations by trial counsel Brooke Wells.[1] *Menzies I*, 845 P.2d at 224, App. 68a; (Trial ROA 1192–93, 1929.)

The Utah Supreme Court found "it is not necessary to examine the voir dire of every prospective juror. In order for mistakes in the transcript to prejudice Menzies' appeal, the error must occur in the voir dire of a juror who either sat on the case or was challenged for cause and not dismissed." *Menzies I*, 845 P.2d at 229, App. 71a. This missed the gravity of the errors in the voir dire transcript. For significant portions of voir dire there is *no record* of what was said. Both the questions and the answers given by prospective jurors were simply invented or copied from another prospective juror's voir dire and inserted by the note reader. It is impossible for the court to know, for example, that these jurors were not challenged for cause because it is not possible to know what Ms. Lee omitted when she stopped taking notes or at what point she began taking notes again. The court further found that "individual

[1] For most portions of the transcript, it appears three versions were sent to the Utah Supreme Court: the original typed transcript prepared by the note reader, the "California version," and a third version that appears to contain notations from a representative of the State.

voir dire questions were read from a prepared list; therefore, it is likely that these questions were asked but not recorded." *Id.* at 232, App. 73a. However, even if a question was "likely" asked, it does not account for the fact that the *answers* are indisputably missing.

The state court also repeatedly relied on "context" to determine what was most likely in the transcript. *See, e.g.*, *Menzies I*, 845 P.2d at 229, 230, 234, App. 71a, 72a, 74a. However, the transcript contained errors, omissions, *and additions*, many of which were fabricated by the note reader, in an attempt to create a transcript that made sense. It is therefore impossible to know whether the "context" is accurate. *See, e.g.*, App. 813a ("In many cases where Tauni was unable to read, or was unsure of the words, they appear in a certain type of fashion within the typed transcript which indicated to me that the note reader attempted to clarify and fix areas problematic with Ms. Lee's notes."), App. 830a, 831a–832a, 835a (Ms. Lee's notes were partially illegible, and the note reader deleted Ms. Lee's words and substituted a sentence of her own), App. 868a ("The problem, as I see it, with creating an admonishment, is that people do not necessarily speak the same way twice. And a failure to give an admonishment in a, let's say a correct or complete or accurate fashion, could not be discerned from looking at this, where the note reader has added them on her own."). That the original transcript seems to provide reasonable context is a testament to the note reader's ability to construct a coherent narrative, but the evidence that was

presented in the trial court about how the transcript was created indicates that the note reader's narrative does not represent what was actually said at trial.

The court similarly discounted the myriad errors relating to numbers that appeared throughout the transcript. There were several issues related to numbers that were important at Mr. Menzies's trial. In particular, a central issue at trial was the timing of Mr. Menzies's booking in the jail compared to when the victim's I.D. card was found in the jail. The court acknowledged, "Throughout the transcript, it appears that the court reporter had particular difficulty in transcribing numbers. Therefore, there is often confusion concerning addresses, distances, and dates." *Menzies I*, 845 P.2d at 236, App. 75a. The Utah Supreme Court addressed the issue of the date on which the cards were found and held that the error was harmless. *Menzies I*, 845 P.2d at 237, App. 75a–76a. However, it was not just the date but also the time that the I.D. cards were found that was relevant. *See, e.g.*, App. 794a. A prison employee told police that he found the victim's I.D. cards near the booking area of the county jail at around 6:30 pm on February 24, 1988. App. at 1053a–1054a. Mr. Menzies was arrested on an unrelated matter at around 6:40 pm, that same evening, ten minutes after the I.D. cards were found. App. 1048a. But the State's theory was that Mr. Menzies discarded the I.D. cards after he was booked into the county jail. App. 1067a–1068a. Because the transcript is riddled with inaccuracies concerning numbers, it is impossible to know whether witnesses testified consistent with their

prior statements to police.

The court's decision is unreasonable because it ignores that several issues related to the inaccurate transcription of numbers were of vital importance in Mr. Menzies's trial. For example, the distance at which Mr. Larrabee saw the man near the scene was important because Mr. Larrabee's later identifications of Mr. Menzies were given under highly suggestive circumstances and the reliability of those identifications was at issue. The court found that the discrepancy was immaterial because "on cross-examination, Larabee stated that the distance was fifty yards." *Id*. at 237, App. 75a–78a. This finding ignores that the problems with numbers pertained not just to the note reader's transcription, but to Ms. Lee's notes themselves. The issue was not just that the transcript did not match Ms. Lee's notes, but that Ms. Lee's notes themselves were unreliable. App. 805a. Furthermore, the court ignored the possibility that Mr. Larabee testified differently on direct and cross-examination, an issue which certainly would have been relevant to Mr. Menzies's claims regarding the identification.

Furthermore, the state court neglected to address the related issue that in several instances it was discovered that rather than transcribe Ms. Lee's notes, the note reader copied information directly from police reports and inserted it as trial testimony. *See* App. 825a–827a. Witnesses do not always testify consistently with their own prior statements or with information that is otherwise contained in a police

report. However, because the note reader simply inserted this information, it is impossible to know what was actually said at trial and if there were inconsistencies on which a witness could have been impeached or the reliability of their testimony could have been questioned.

With respect to Mr. Menzies's argument that persistent errors and omissions throughout the transcript prevented appellate counsel or the court from adequately reviewing for plain error, the state court found that "[s]ince transcription errors of such a magnitude that might render significant portions of the record inarticulate would be obvious in nature, it is clear that the condition of the record does not prevent review for plain error." *Menzies I*, 845 P.2d at 240, App. 78a. But the court itself recognized that there was at least one area of the transcript, encompassing an event during the trial where a juror fainted during the testimony of the medical examiner, where a critical and potentially large section of transcript was missing. *Id*. at 242, App. 79a; *see also* App. 819a–823a. Because of the omission, the court stated it would "review any claim that conceivably could have been raised at that point as though it was properly preserved." *Menzies I*, 845 P.2d at 242, App. 79a–80a. This accommodation was meaningless and inconsistent with this Court's law. Without an accurate record of the proceedings, there is no indication of what those claims might be and there can be no safe assumption that no prejudicial errors occurred.

The federal district court found that Mr. Menzies had failed to establish that

he was entitled to relief on this claim. The court stated:

> After reviewing the transcripts of petitioner's trial, this Court finds a sufficient record was made to allow appellate review of petitioner's trial. Moreover, petitioner has not, after extensive and thorough reviews of the transcript and the reporter's notes, shown that the findings of the Utah Supreme Court were unreasonable in light of the evidence presented on this issue.

App. 218a. The district court did not explain on what basis the transcripts themselves could demonstrate that they are of "sufficient completeness."

The court further stated that Mr. Menzies's rights were not violated "simply because there were some errors which were identified in subsequent review of the transcript." App. 218a. This missed the point. The constitutional violation is not simply that there were discrepancies between the note reader's transcript and the notes taken by the court reporter. There are whole sections of transcript that are not representative of what happened at Mr. Menzies's trial. During voir dire, for example, at points the court reporter simply stopped taking notes and the note reader subsequently inserted both questions to and answers from a prospective juror that were copied from a previous voir dire. In other words, the note reader *entirely made up* the voir dire transcription of the juror in question. In other instances, whole sections of transcript are missing. It is not possible for Mr. Menzies to receive an "adequate and effective" appeal of his capital murder conviction and death sentence on the basis of such a record. *Evitts v. Lucey*, 469 U.S. 387, 392 (1985) ("[W]e have held that the Fourteenth Amendment guarantees a criminal appellant pursuing a

first appeal as of right certain minimum safeguards necessary to make that appeal 'adequate and effective[.]" (citing *Griffin v. Illinois*, 351 U.S. 12, 20 (1956))); *Mayer v. Chicago*, 404 U.S. 189, 195 (1971) (finding the State "must provide a full verbatim record" where it is necessary to ensure as effective an appeal as would otherwise be available to the defendant).

The Tenth Circuit Court of Appeals found Mr. Menzies was required to establish prejudice from the transcription errors in order to obtain relief, and concluded that he had not done so. The court further found that *Mayer v. Chicago* did not constitute clearly established federal law on the issue because in that case "the Supreme Court addressed the failure to provide a criminal defendant with *any* transcript," and Mr. Menzies's claim did not involve the failure to provide any transcript at all. *Menzies v. Powell*, 52 F.4th 1178, 1234 (10th Cir. 2022), App. 47a.

Regarding the transcript of voir dire, the Tenth Circuit, like the Utah Supreme Court, focused only on the omission of voir dire questions, ignoring the fact that prospective jurors' answers were also missing or invented by the note reader. The court stated that the Utah Supreme Court reasonably found: (1) errors could be reconciled when viewed in context; (2) most of the errors concerned questions about capital punishment and Menzies was sentenced by the judge; (3) there were only one to four errors per prospective juror and many questions were redundant (presumably suggesting there would likely be an answer to a similar question that did not contain

an error); and (4) voir dire questions were read from a list so it is likely the same questions were asked of each juror even if not recorded. *Id*. at 1235–36, App.48a–49a (citing *Menzies I*, 845 P.2d at 229–31, App.71a–72a).

Regarding the missing portion of the transcript, the court found that Mr. Menzies was not prejudiced by the lack of transcript, relying on the Utah Supreme Court's findings that "the trial court did not make any rulings" during the omitted portion of the transcript and that "the attorneys later reargued the points discussed off the record." *Id*. at 1237, App. 49a (citing *Menzies I*, 845 P.2d at 240, App. 78a). The court further found that because one of Mr. Menzies's trial attorneys was also counsel on appeal, "[h]er presence at the bench conference could bear on the inquiry as to prejudice."[2] *Id*.

REASONS FOR GRANTING THE WRIT

I. It is well established under this Court's precedents that a petitioner, particularly in a capital case, is entitled to a record of sufficient completeness to allow for "adequate and effective" appellate review

In *Griffin v. Illinois*, 351 U.S. 12 (1956), this Court held that the State must provide a record sufficient to ensure an "adequate and effective" appeal. *Id*. at 20; *see also Evitts*, 469 U.S. at 393. "[A] State need not purchase a stenographer's transcript

[2] Nearly three years passed between Menzies's trial and when the parties attempted to reconstruct the transcript. As a result, on many issues none of the parties recalled with any specificity what had occurred at trial. *See, e.g.*, App. 784a–785a, 790a, 812a, 816a, 817a–820a, 822a–823a, 882a.

in every case," however any alternative method must "place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise." *Draper v. Washington*, 372 U.S. 487, 495 (1963); *see also Parker v. Dugger*, 498 U.S. 308, 321 (1991). "[T]he State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available" to a defendant with a full record. *Mayer*, 404 U.S. at 195. Furthermore, "where the grounds of appeal . . . make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an 'alternative' will suffice for an effective appeal on those grounds." *Id.*; *see also Draper*, 372 U.S. at 498.

The right to meaningful appellate review is all the more important in a capital case. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); *see also Gregg v. Georgia*, 428 U.S. 153, 198 (1976); *Zant v. Stephens*, 462 U.S. 862, 874 (1983); *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *Pulley v. Harris*, 465 U.S. 37, 54 (1984) (Stevens, J., concurring) ("[T]he case law does establish that appellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by *Furman v. Georgia*, and hence that some form of meaningful appellate review is constitutionally

required." (citation omitted)). As Justice Sotomayor recently explained:

> The Constitution guarantees certain procedural protections when the government seeks to prove that a person should pay irreparably for a crime. A reliable, credible record is essential to ensure that a reviewing court—not to mention the defendant and the public at large—can say with confidence whether those fundamental rights have been respected.

Townes v. Alabama, 139 S. Ct. 18, 20 (2018) (Sotomayor, J., statement respecting the denial of certiorari).

Further, "if a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,'" the appellate process must satisfy due process.[3] *Evitts*, 469 U.S. at 393 (quoting *Griffin*, 351 U.S. at 18).

In focusing only on the omission or insertion in the transcript of the questions asked of potential jurors, both the Utah Supreme Court and the Tenth Circuit failed to reasonably apply these clearly established precedents, in addition to making an unreasonable determination of the facts. Even if the questions can be determined from context or presumed to have been repeated the same way each time, the prospective jurors' *answers* cannot. And it is the answers that are the most important component of a determination of whether a juror should be struck for cause.

The lower courts found that these errors could be reconciled based on context. For example, the Tenth Circuit noted the instance where the court reporter's notes

[3] In Utah, appellate review by the Utah Supreme Court is automatic in death penalty cases and not subject to waiver. *See* Utah Code Ann. § 76-3-206(2)(a).

said only "BLRB," finding it was "presumably short for 'blurb.'" *Menzies v. Powell*, 52 F.4th at 1236, App. 49a. This would be a reasonable assumption if what appeared in the transcript were an admonition or an often-repeated question. What appears, however, is not a "blurb," but a series of questions *and answers* from a prospective juror. *See* App. 1042a–1043a. The text in the transcript, which purports to represent what was said in the courtroom, is a fabrication. There is no way of knowing what was said during that portion of voir dire or for how long the court reporter stopped taking notes. It is the same as if these sections of the transcript were missing entirely. The finding that any errors can be reconciled based on context is thus belied by the record. *See Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (state court's "partial reliance on an erroneous factual finding" produced unreasonable decision); *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003) (state "had before it, and apparently ignored," testimony supporting petitioner's claim).

The Tenth Circuit further concluded that the state court reasonably found errors in the transcript "hadn't prevented a meaningful appellate challenge like an erroneous denial of a challenge for cause." *Menzies v. Powell*, 52 F.4th at 1237, App. 49a. Even if one were to accept the state court's opinion that it was possible to accurately determine which jurors were challenged for cause, *but see* App. 804a (juror names and numbers were mixed up such that impossible to determine which juror was called when, or whether juror numbers were associated with wrong names), App.

865a), the court's finding does not account for the fact that there may have been jurors who *should* have been challenged for cause but were not. Although not objected to at trial, the failure to strike such jurors could nonetheless have been reviewed as plain error. But because the transcript does not accurately reflect what was said by prospective jurors, it is simply not possible to make that determination.

Similarly, in the portion of missing transcript where a juror fainted and Mr. Menzies was forcibly shackled and removed from the court room in view of the jurors, the Utah Supreme Court found, and the Tenth Circuit affirmed, that Mr. Menzies "suffered no prejudice" because "the statements of the prosecutor indicate that no ruling was made and the issues discussed were reargued later in the proceedings." *Menzies I*, 845 P.2d at 240, App. 78a. But the state court's findings are again refuted by the record. Immediately preceding the missing transcript, the prosecutor stated, "Dr. Sweeney, did you find anything else during your internal examination?" The court then says "Let's call a recess here. Just a minute. Have them take the jury out. (One juror fainted.)" App. 1059a–1060a. The transcript resumes with the prosecutor discussing a ruling on a defense objection to introduction of the victim's identification, which is unrelated to what occurred in the courtroom. App. 1060a. It is *this* issue on which the transcript indicates the court had not ruled. App. 1060a; *see also* App. 818a. And contrary to the state court's finding, no re-argument of anything related to Mr. Menzies being shackled in front of the jury ever appears in the transcript.

II. Clearly established precedent from this Court does not require a showing of prejudice where the transcript is insufficient to allow for an "adequate and effective" appeal

This Court has been clear that "the State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available" to a defendant with a full record. *Mayer*, 404 U.S. *at* 195. The Court has placed the burden on the State to show that something less than a full transcript would ensure meaningful appellate review. *Id.*; *Draper*, 372 U.S. at 495 ("Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise."). In contrast to these holdings, the court below found that "habeas petitioners challenging transcription errors must show prejudice to their ability to pursue an appeal in state court." *Menzies v. Powell*, 52 F.4th at 1233, App. 47a.

The Court of Appeals relied on prior cases from the Tenth Circuit requiring petitioners show prejudice. Those cases, however, were in entirely different contexts and it was improper, especially in light of this Court's precedents, to conclude from them that a court may require a defendant to shoulder the burden of proving prejudice without the very record of which the State deprived him. For example, in *Capps v. Cowley*, 63 F.3d 982 (10th Cir. 1995), the petitioner made bare assertions that his transcript was missing portions but had not attempted to locate them. *Id.* at 984. In *United States v. Clark*, 596 F. App'x 696 (10th Cir. 2014) (unpublished), the

incomplete transcript was from a change of plea hearing and the testimony marked as "inaudible" was the defendant's own testimony. *Id.* at 699. Again, the court found the petitioner had not attempted to correct any error, which the court noted could be corrected by stipulation. *Id.* at 700. *See also Harden v. Maxwell*, No. 00-7032, 2000 WL 1208320, at *1 (10th Cir. Aug. 25, 2000) (unpublished) (finding no error where transcript did not include reading of jury instructions that were separately filed in the case). Unlike these cases in which the petitioner has made no showing there was any error, once a petitioner like Mr. Menzies has identified the error and attempted to have it corrected, the State should bear the burden of demonstrating the lack of a record in a capital case is not prejudicial.

Mr. Menzies's claim is far from a "single statement." Mr. Menzies undertook every effort reasonably available to him to remedy the transcript, however, as the Utah Supreme Court acknowledged, in several areas it was simply not possible to reconstruct an accurate record of what occurred at trial. In such circumstances, as this Court's decisions indicate, the burden is on the State to show that an incomplete transcript can nonetheless guarantee meaningful appellate review.

Even if Mr. Menzies were required to demonstrate prejudice, he provided several examples of how his appeal was impacted by the absence of an accurate transcript. First, the state court stated it would review any claim related to the juror-fainting incident as though it were properly preserved. This "alternative" failed to

account for the fact that without a transcript, appellate counsel was left to speculate as to what conceivably could have occurred during the omitted portion, and therefore did not fulfill the guarantee of *Mayer*. And Mr. Menzies did raise claims related to prejudicial incidents that occurred at the unrecorded or mis-record portions of trial, including where a juror fainted during the testimony of the medical examiner and the court reporter was visibly crying. (Br. Of Appellant, *State v. Menzies*, No. 880161 (Utah Sept. 14, 1992), at 78–83; *see also* App. 384a–388a. The state court summarily dissed the claim without discussion. *State v. Menzies* (*Menzies II*), 889 P.2d 393, 406 (Utah 1994), App. 103a. There is no basis on which to conclude the state court did review the claim as though it were properly preserved.

Second, throughout its opinion, the federal district court erroneously relied on the original transcript rather than the corrected transcript. *See, e.g.*, App. 228a (citing to "J.T. Tr. of March 4, 1988, at 2367 (Dkt. # 110, Disk # 1, Trial/Transcripts (ROA 1159) at 153)," an original (uncorrected) transcript). The distinction is important because, for example, in assessing Mr. Menzies's claim that his Constitutional rights were violated when the trial court failed to declare a mistrial after the jury was exposed to prejudicial incidents during trial, the record does indicate that at least one juror did not believe she could be impartial following the incidents. In conducting the individual voir dire, the trial court asked a juror, "If you were a juror in your present frame of mind, would you be willing to have yourself sitting on this jury trying this

case if you were either the prosecution or the defense?" App. 1074a. In the original transcript, the juror is quoted as saying "I believe so." *See* App. 1086a. However, both corrected versions of the transcript indicate the jurors' response was "I *don't* believe so." App. 1074a; App. 1080a (emphasis added). The state court also summarily dismissed this claim. *Menzies II*, 889 P.2d at 406, App. 103a.

Contrary to the Tenth Circuit's findings, Mr. Menzies did provide concrete examples of how the lack of an accurate transcript prejudiced him and prevented him from receiving and adequate and effective appeal. It is true that Mr. Menzies did not provide concrete examples of how he was prejudiced by the omissions and additions in the voir dire transcript, but it would be impossible for Mr. Menzies to prove an error exists where an accurate record of the proceedings does not exist and cannot be reconstructed. In these circumstances, and particularly in light of the fact that this is a capital case, prejudice should be presumed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted this 3rd day of May, 2023.

JON M. SANDS
FEDERAL PUBLIC DEFENDER
DISTRICT OF ARIZONA

LINDSEY LAYER
Counsel of Record
ERIC ZUCKERMAN
ASSISTANT FEDERAL PUBLIC DEFENDERS
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 (voice)
(602) 889-3960 (facsimile)

Lindsey_Layer@fd.org
Eric_Zuckerman@fd.org

s/ Lindsey Layer
LINDSEY LAYER
ASSISTANT FEDERAL PUBLIC DEFENDER
Counsel for Petitioner