No.22-7482

IN THE SUPREME COURT OF THE UNITED STATES

RALPH LEROY MENZIES, Petitioner,

vs.

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

****CAPITAL CASE****

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

At issue in this case is whether a capital defendant's Due Process rights are violated where portions of the transcript of his capital murder trial are fabricated, missing, and riddled with errors. This Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308, 321 (1991). And "meaningful appellate review requires that the appellate court consider the defendant's actual record." *Id*. Any alternative to a complete transcript must provide "an equivalent report of the events at trial from which the appellant's contentions arise." *Draper v. Washington*, 372 U.S. 487, 495 (1963). It is undisputed in this case that for significant portions of the trial there is no "equivalent report." Three versions of the transcript were sent to the Utah Supreme Court on direct appeal, and all parties acknowledged that many of the errors could not be reconciled. In portions of voir dire, the court reporter simply stopped taking notes, and the note reader tasked with creating the transcript fabricated testimony and included it in the transcript. This Court has placed the burden on the State to show that something less than a full transcript would nonetheless ensure meaningful appellate review. *Mayer v. Chicago*, 404 U.S. 189, 195 (1971); *Draper*, 372 U.S. at 495. The State has failed to meet that burden in this case.

This Court should grant the petition.

ARGUMENT

I. The record in Mr. Menzies's case is not "adequate and effective," as required under this Court's precedent

Respondent argues that the state court decision is not based on an unreasonable determination of the facts, but does so by merely repeating the state court's findings. Br. in Opp. 13. Respondent does not contend with the instances in which Mr. Menzies demonstrates that the state court's findings are belied by the record. For example, the state court found that there were not "any instances where the note reader 'made up' actual juror answers." App. 72a. But as Mr. Menzies explained in his petition, the record directly contradicts the state court's finding. App. 787a (transcript indicates series of questions and answers between court and prospective juror, where notes contained only the letters "BLRB"), 788a (Q: "[I]t appears that the note reader made up those questions and answers? A: "Inserted them from - - Yes."), 867a (noting "approximately four lines which are included in this transcript that were not included in Ms. Lee's notes. And that is the exchange between the court and an apparent juror."). *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) (noting state "had before it, and apparently ignored," testimony that supported petitioner's claim).

Respondent further argues that even if the state court's findings are refuted by the record, Mr. Menzies cannot tie them to a juror that was challenged for cause.

Br. in Opp. 14, 16. This argument ignores the extent of the problems with the transcript in this case. One of the problems throughout voir dire is confusion regarding juror names and numbers. App. 781a ("[T]here appeared to be consistently mix-ups between, for instance, prospective jurors' names."), App. 804a (juror names and numbers mixed up such that it is impossible to determine which juror was actually called when, or whether juror numbers were associated with incorrect names). Further, there were multiple instances where it appeared to those tasked with reviewing the transcript that the court reporter had simply stopped taking notes. *See* App. 787a–789a. In these instances it is not possible for Mr. Menzies to determine which jurors were speaking because there is no record of what was said or by whom.

Regarding the incident in which a juror fainted and Mr. Menzies was forcibly shackled in front of jurors and removed from the courtroom, Respondent contends that Mr. Menzies cannot demonstrate prejudice because he did not raise the issue in the Tenth Circuit, the state court found that no ruling was made, and because one of his trial attorneys was also counsel on direct appeal and so "was . . . able to raise any claim from her own memory." Br. in Opp. 14, 17. First, Mr. Menzies did attempt to appeal the shackling issue in the Tenth Circuit, but was denied a certificate of appealability, which prevented him from raising the issue in his merits briefing. (*See* Appl. for Certificate of Appealability at 68–74, *Menzies v. Benzon*, No. 19-4042 (10th

Cir. July 3, 2019).) Second, as Mr. Menzies explained in his petition for certiorari, and as trial counsel explained in the hearing regarding the transcript, the evidentiary ruling is unrelated to what is missing from the transcript. App. 818a. Trial counsel further stated there was no record in the transcript of "what actually occurred when the juror fainted" and that she "would have expected that I would … have made some sort of objection." App. 819a–820a. Contrary to the state court's finding, no re-argument of these issues ever appears in the transcript. Third, as trial counsel noted at the hearing on the transcript, by the time the direct appeal proceeded, it had already been four-and-a-half years since the trial took place and trial counsel could not recall the substance of arguments she made at the trial. App. 820a ("I have no specific recollection of whether I did or did not [make an objection after the fainting incident]."), 882a ("But it's impossible, after almost three years, to recall the substance of comments and/or testimony. Or arguments."). Finally, Respondent fails to explain how trial counsel's memory of an argument, over four years after the fact, constitutes an "equivalent report of the events at trial" as compared to a transcript. *Draper*, 372 U.S. at 495.

Respondent argues that this case is distinguishable from cases like *Draper*, *Mayer*, 404 U.S. 189, and *Griffin v. Illinois*, 351 U.S. 12 (1956), because this case concerns only "transcription error," not a lack of a transcript. Br. in Opp. 15. Respondent dramatically mischaracterizes the errors at issue in this case. This is not

an instance where the transcript is missing a line or two, or where a few words were erroneously transcribed. Here, the entire record is permeated with errors, omissions, and fabrications. In many instances the issue is with the notes themselves, meaning there is no reliable record of the actual trial proceedings. In these instances, the note reader did not merely fix a word in the notes, she inserted language from a different, and sometimes unidentifiable, source. *See, e.g.*, App. 802a–803a (court reporter could not read own notes, gave trial judge's notes to note reader), App. 811a (court reporter could not read 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"), App. 813a (where court reporter unable to decipher her own notes, note reader substituted language into transcript), App. 825a–827a (note reader inserted information from police report as testimony) App. 830a–832a, 835a (where court reporter's notes partially illegible, note reader substituted sentence of her own), App. 868a. These are not transcription errors. These are places where there exists no reliable record of what was said at trial. What is more, the presence of such significant errors in the reporter's notes themselves calls into question the accuracy of the entire record.

Respondent notes that several circuits have required petitioners to prove prejudice for transcription errors. Br. in Opp. 16. These cases, however, involved

discrete transcript errors and are distinguishable from the case at bar. In *Higginbotham v. Louisiana*, 817 F.3d 217 (5th Cir. 2016) (per curiam), the recording equipment malfunctioned during the testimony of two witnesses, however the unrecorded testimony related only to one count against Mr. Higginbotham, which was ultimately dismissed. *See* Br. of Appellee, *Higginbotham v. Louisiana*, No. 14-30753 (5th Cir. April 20, 2015). *See also White v. State of Florida, Dept. of Corrections*, 939 F.2d 912 (11th Cir. 1991) (defect in transcript of suppression hearing, not trial); *Mitchell v. Wyrick*, 698 F.2d 940, 941–42 (8th Cir. 1983) (defendant and attorney participated in transcript correction proceeding, seven of nine requested corrections were made, and defendant's attorney agreed to proposed remedy for other errors). In *Bransford v. Brown*, the Sixth Circuit reasonably noted that "[a]ny time a page is missing from a transcript we cannot assume that reversible error may have been reflected on that page." *Bransford v. Brown*, 806 F.2d 83, 86 (6th Cir. 1986). But two factors counsel against reliance on that reasoning in this case. First, as discussed above, this is not a circumstance where errors were confined to a single page. Errors permeated the entire transcript and, particularly in voir dire, there were several instances where the court reporter stopped taking notes and the note-reader, who was never present in the courtroom, fabricated transcript. In contrast to a case where an identifiable amount of transcript has been omitted, in Mr. Menzies's case, it is impossible to determine how much transcript is missing. Second, this is a capital case

and as such reliability is even more important than in a general criminal trial because the defendant's life hangs in the balance. *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *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).

Even if Mr. Menzies were required to prove prejudice, as he argued in his petition, he has done so. Pet. for Cert. 21–23. For example, Mr. Menzies argued that errors in the transcript resulted in an unreasonable determination by the state court and the federal district court of his 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, and one juror stated she could not be partial. *See* Pet. for Cert. at 22–23. Respondent contends that Mr. Menzies "does not show that this prospective juror sat on his case," and therefore cannot show prejudice. Br. in Opp. 17. The juror at issue, however, was not a prospective juror. The colloquy between the court and the juror occurred after one juror fainted, the court reporter became noticeably upset in front of jurors, another juror received an anonymous phone call saying that Mr. Menzies had committed another murder, and yet another juror had an emotional breakdown in the jury room. It was at this point that the court decided to voir dire the jurors, and the juror in question stated she could not be impartial. *See* App. 384a–388a; *see also* Appl. for Certificate of Appealability at 60–66, *Menzies v. Benzon*, No. 19-4042 (10th Cir. July 3, 2019). The juror in question was

not removed. The related claim was summarily dismissed by the state court and denied by the federal district court, which relied on the uncorrected transcripts. *See* App. 103a–104a; App. 228a–229a. Thus Mr. Menzies was prejudiced.

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."). Here, there is not an "equivalent report" because in multiple places there is *no* report of the events at trial.

II. This issue was properly preserved in the courts below

Respondent argues that the Tenth Circuit found this issue was not preserved, and that therefore this Court should not grant review. Br. in Opp. 10–11. The Tenth Circuit's finding, however, was erroneous. Menzies addressed the application of clearly established Supreme Court precedent to this claim in his reply to his habeas petition in federal district court. *See* App. 632a–634a (citing, among others, *Mayer v*, 404 U.S. 189, *Draper*, 372 U.S. 487). Indeed, the federal district court treated the claim as being based on these same Supreme Court cases. App. 217a. Thus, the

federal district court's decision demonstrates that it was "fairly put on notice as to the substance of the issue." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174–175 (1988)).

CONCLUSION

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

Respectfully submitted this 21st day of June, 2023.

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