CAPITAL CASE

No. 21-____

IN THE

Supreme Court of the United States

KABONI SAVAGE,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Appellate Procedure 10 affords litigants multiple tools to ensure a complete appellate record. Rule 10(c) states that if a hearing transcript is unavailable, "the appellant may prepare a statement of the … proceedings from the best available means," which must then be served on the appellee for objection and presented to the district court for settlement. Under Rule 10(e)(2), material omissions from the record "may be corrected and a supplemental record may be certified" on "stipulation of the parties," by "the district court," or "by the court of appeals."

In this federal capital case, the Third Circuit held that when an appellant lacks any "means" to "prepare a statement of" untranscribed "proceedings" under Rule 10(c), the district court has no obligation to assist in reconstructing those proceedings unless the appellant first files a declaration "saying he does not remember what happened." The court of appeals further held that when an appellant wishes to review and supplement the record with undocketed trial correspondence in the district court's possession, he must first show how the correspondence would "give rise to 'any difference[s]' about whether the record truly discloses what occurred in the district court."

The question this case presents is:

Whether the Third Circuit properly held—in conflict with decades of federal practice endorsing flexible procedures to assemble a complete record on appeal—that an appellant seeking a complete appellate record must overcome procedural impediments lacking any basis in Rule 10's text.

PARTIES TO THE PROCEEDING

Petitioner is Kaboni Savage, defendant-appellant below.

The United States is the respondent on review.

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings in this case.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

RULES

PETITION FOR A WRIT OF CERTIORARI

Kaboni Savage respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is available at *United States v. Savage*, 970 F.3d 217 (3d Cir. 2020). The district court's denial of Savage's Motion for a Complete and Accurate Record for Appeal is unreported and available at 2017 WL 4273617. (App. 214a).

JURISDICTION

The court of appeals entered judgment on August 11, 2020, App. 1a, and denied rehearing *en banc* on October 30, 2020, App. 215a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISION

The rule involved is Federal Rule of Appellate Procedure 10. It is reproduced in full in Appendix F to this brief. The relevant portions of Rule 10 read:

Rule 10. The Record on Appeal

* * *

(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable. If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appel-

lee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

* * *

(e) Correction or Modification of the Record.

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded; or

(C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

INTRODUCTION

For eight decades, this Court has recognized the importance of a "proper record on appeal," especially in "criminal proceedings against poor persons in federal courts." *Miller v. United States*, 317 U.S. 192,

193, 199 (1942). In indigent criminal appeals, a complete and accurate record allows court-appointed appellate counsel—who typically do not attend trials and often lack trial counsel's assistance—to understand what occurred at trial and identify reversible errors. That function, this Court has observed, holds particular significance in capital appeals such as this case, where a complete appellate record stands as a crucial "safeguard against arbitrariness and caprice." *Gregg v. Georgia*, 428 U.S. 153, 167, 198 (1976).

After reviewing the record materials available to them, the newly appointed appellate counsel representing Kaboni Savage in his federal capital appeal identified sizable and potentially material gaps in the record. Trial transcripts referenced a trove of correspondence—including emails, letters, and other submissions between the district court and various trial participants—that the district court had not docketed and Savage's appellate attorneys could not locate. The transcripts also referred to an array of untranscribed proceedings, including sidebars, in-chamber conferences, and other oral communications. Clues in the record suggested that many of the missing materials pertained to substantive issues directly relevant to Savage's appeal. His attorneys therefore moved to fill those gaps—once in the district court, and twice in the Third Circuit—under Federal Rule of Appellate Procedure 10, which prescribes multiple mechanisms to supplement an incomplete appellate record.

For as long as Rule 10 and its predecessors have existed, federal courts have applied them flexibly and pragmatically to ensure comprehensive and accurate records in both criminal and civil appeals. They have

never required litigants to utter magic words or jump through arcane procedural hoops to secure a complete record on appeal. Indeed, courts of appeals frequently order supplementation of the record sua sponte and enlist all trial participants—including the district court and the government—in a collaborative effort to plug holes when appointed appellate counsel is unable to do so on its own.

In this case, the opposite occurred. Rather than accommodate Savage's attempts to obtain a complete appellate record, the district court and then the Third Circuit turned their backs on longstanding federal practice, requiring Savage to appeal on a record that did not provide a full account of the proceedings that produced his death sentence. The Third Circuit did not deny that the missing materials had potential to relevance to Savage's appeal. Instead, it justified its decision by inventing two novel procedural hurdles present nowhere in Rule 10's text.

First, in refusing to order the district court and trial participants to aid in the reconstruction of untranscribed conferences, the Third Circuit grafted an atextual procedural requirement onto Federal Rule of Appellate Procedure 10(c). That provision instructs that when a transcript for a trial proceeding is unavailable, the appellant "may prepare a statement of the evidence or proceedings from the best available means," which "must be served on the appellee" for objections and amendments, with any disagreements to be settled by the district court. Savage's appointed appellate counsel repeatedly explained that they lacked any basis to create a statement summarizing sidebars, bench conferences, and other conversations

from a nearly seven-month trial that they did not attend, especially since Savage's various trial counsel could not or would not help them. The Third Circuit nevertheless held that Savage had forfeited the right to reconstruct those proceedings by failing to "submit a declaration saying he does not remember what happened." App. 22a. But nothing in Rule 10(c) suggests that when an appellant lacks the "means" to "prepare a statement of the evidence," he must let the court know by way of declaration, rather than, as Savage's counsel did here, in a motion under Rule 10. And no authority in any jurisdiction has ever previously hinted at such a requirement.

Second, the Third Circuit refused to order the district court to give Savage the court's copies of undocketed trial correspondence on the view that Savage had an "obligation" to first explain "how the purportedly missing items could or would give rise to 'any difference[s] … about whether the record truly discloses what occurred in the district court'" and to then have the district court resolve "any such differences." App. 18a (quoting Fed. R. App. P. 10(e)(1).) That ruling erroneously rested on a portion of Rule 10 addressing disputes among the parties about the appellate record's accuracy. *See* Fed. R. App. P. 10(e)(1). But the correspondence omitted from the record was not disputed; it was simply missing. A different provision—Rule 10(e)(2)—speaks to "omission[s] or misstatement[s]" by "error or accident." Rule 10(e)(2) neither requires the requesting party to identify disagreements about the record's accuracy nor to present such differences to the district court. Instead, it gives both the district court and the court of appeals carte

blanche to correct any omissions and certify a supplemental record.

The manifest errors that led the Third Circuit to deny a capital defendant a full appellate record would merit this Court's review on their own—but the damage goes further. "As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law." *Hardy v. United States*, 375 U.S. 277, 287-88 (1964) (Goldberg, J., concurring). Access to a complete record is especially crucial in the indigent criminal appeals that make up a large portion of the federal appellate caseload. In such cases, courts frequently appoint dedicated appellate counsel who did not participate at trial and may lack assistance from the defendant's trial lawyers. For decades, federal courts have served as resources—not obstacles—when such new counsel seek to secure a complete appellate record. That flexible and collaborative practice has long backstopped appointed appellate attorneys' ability to fulfill their constitutional function.

The decision below throws these settled practices and understandings into doubt. The Third Circuit's reasoning not only licenses courts and opposing parties to resist record reconstruction rather than assist it but also threatens litigants attempting to compile a complete record with hidden procedural traps with no basis in Rule 10's text. This Court should grant review

to reaffirm the vitality of time-honored norms encouraging the flexible and pragmatic construction of complete appellate records. That the court of appeals sprung its novel innovations on the defendant in a federal capital appeal only confirms the necessity of this Court's intervention.

STATEMENT

A. The district court denies Savage's request for missing record materials with potential significance to his appeal.

In April 2009, the government indicted Savage and three codefendants, charging Savage with twelve counts of murder in aid of racketeering, among other serious charges. App. 10a-11a. The government noted its intent to seek the death penalty. *Id.*

The trial of Savage and his codefendants spanned nearly 100 court days, A-861, and resulted in a massive record reflecting the complexities of the case: over 30,000 pages in court transcripts, nearly 1,700 docket entries, more than 400 government recordings that were played for the jury, over 1,000 other admitted government exhibits, and hundreds of defense exhibits. *See* A-2087-2088.[1] The jury found Savage guilty on all counts. Following penalty-phase proceedings, it voted to sentence him to death on each eligible count.

After Savage's conviction, his trial counsel moved to withdraw. The Third Circuit granted the motion

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[1] Citations to the Record Appendix are formatted "A-##" to correspond to the page number in the electronic version of the Appendix filed in the Third Circuit. *See* Record Appendix, Case No. 14-9003 (Oct. 28, 2018).

and appointed new counsel to represent Savage on appeal. (Order, Case No. 14-9003 (Oct. 23, 2014)).

As the newly appointed appellate counsel began reviewing the trial record, they spotted references to a large number of materials they could not locate. Those materials included many pretrial, trial, and sentencing-related proceedings for which no transcript was available, and large amounts of non-transcript materials that were not mentioned or could not be accessed on the district court's docket. A-862-63. To plug those holes, appellate counsel obtained, indexed, and reviewed massive paper and electronic files from all four defendants' trial counsel. Enlisting the help of the district court clerk, appellate counsel shared descriptions of hundreds of missing materials and traveled to Philadelphia to review record materials at the clerk's office. A-863. Through those efforts, they succeeded in securing many additional portions of the record, including electronic recordings of dozens of untranscribed proceedings and a large number of sealed pleadings and orders. A-863-64.

Still, substantial portions of the trial record remained missing. Savage's trial lawyers were unable or unwilling to provide further assistance in the record-completion process and had lost or destroyed their copies of many of the record materials appellate counsel sought. (Savage's Petition for Rehearing En Banc, Case No. 14-9003 (Oct. 5, 2020), ECF No. 430 at 5, 14). Savage therefore moved, "under Federal Rule of Appellate Procedure 10, for the relief required to obtain a complete and accurate record of what occurred in th[e] [district] [c]ourt." A-859. The motion sought several categories of missing materials referenced

elsewhere in the record, many of which appeared to have a direct bearing on key issues in Savage's appeal.

Undocketed written communications. Savage's motion explained that the trial record was "replete with references" to "scores if not hundreds" of letters, courtroom submissions, e-mails, and other written communications between the district court and trial participants such as counsel and the jury. A-864; A-873-74. Appellate counsel demonstrated that, based on references elsewhere in the record, much of that missing material appeared to relate to potential issues in Savage's appeal:

- *Jury instructions.* The trial transcript contained references by the court and the government to various missing materials about jury instructions, including sets of proposed and revised instructions exchanged between the parties and the court and instructions the court sent to the jury room during both its guilt and penalty-phase deliberations. A-874, A-2136-39; A-16843 (prosecutor explaining that "we had a lot of revised instructions going back and forth"). Savage's appeal ultimately advanced two different claims of instructional error. *See* Opening Appellate Brief, Case No. 14-9003 (Oct. 28, 2018) ("AB"), at 166, 192.

- *Substitution of counsel.* The trial transcript documented many *pro se* exchanges between Savage and the district court that appeared to discuss Savage's request for substitution of counsel. A-2132-34. It also referenced letters

from one of Savage's trial counsel about his motion to withdraw. *Id.* The district court's handling of Savage's and his counsel's motions was ultimately the lead issue in Savage's opening merits brief on appeal.

- *Communications restrictions.* Many other exchanges referenced in the trial transcript related to the communication and visitation restrictions the government imposed on Savage. A-2360. Savage's appellate brief ultimately challenged how those restrictions allowed the government to make prejudicial statements about his limited contact with his children while incarcerated. AB 302.

On top of these issues that Savage raised on appeal, the record reveals the existence of missing materials bearing on other substantive issues with appellate significance, including: evidentiary objections, proffers, and related submissions at both the guilt and sentencing phases, A-876 n.11, A-2135-39; motions, memoranda, and exhibits about unspecified subjects, A-2134-39; and discovery disputes, A-2135-36.

Savage's Rule 10 motion emphasized that this list of missing materials was necessarily "fragmentary and incomplete," since it could not encompass similar materials not referenced elsewhere in the record. A-875-76. It further explained that while "some" of the missing materials appeared to be located in files trial counsel had shared, those materials could not produce a complete record and would also raise authenticity concerns. A-877 n.13. Among other things, trial counsel had failed to make available to appellate counsel

most of their emails with the court and apparently had not kept copies of much of the paper correspondence from trial. A-877. Savage thus requested that the district court "simply mak[e] available its file of all such communications in the case," A-875, specifically seeking "copies of all non-ECF written communications (including e-mail communications) that the Court or its staff had with any counsel for the government or any defendant, with any defendant directly, or with the jury or any prospective or seated jurors." A-877-78.

Untranscribed proceedings. The available record also referenced a host of "unrecorded sidebars, conferences and other such proceedings," such as bench conferences, in-chambers conferences, and telephone conferences. A-878. The motion explained that those communications, too, touched on "substantive matters potentially relevant to Mr. Savage's appeal," A-878, including:

- The charge conference at the close of Savage's trial, *see* A-878;
- The charge conference at Savage's capital-sentencing hearing, *see* A-878;
- Chambers conferences about Savage's conditions of confinement, *see* A-983;
- Off-the-record communications with jurors, including communications about photos of deceased victims in this case, *see* AB 353 (citing A.11665); and
- Savage's motions for substitution of counsel. AB 348 (citing A.983-95; A.2360-63).

The motion listed unrecorded conferences that appellate counsel had been able to identify, but emphasized that "there were no doubt many such instances that counsel is unaware of and cannot determine." A-878.

Savage thus asked the district court to "share with appellate counsel any notes or other records memorializing, summarizing, or otherwise documenting these, or any other, sidebars, conferences, and other such unrecorded proceedings" and to "direct all trial counsel for all parties to do the same." A-879. Savage explained that "[h]opefully such notes and other records will enable appellate counsel to pursue reconstructions of any potentially unrecorded proceedings, pursuant to Federal Rule of Appellate Procedure 10(c)." A-879. His appointed appellate counsel, Savage noted, "cannot … reasonably be expected to submit a statement of what occurred" in conferences they did not attend "without … assistance from the Court and its staff, the prosecutors, and the various trial attorneys, all of whom (unlike Mr. Savage's appellate counsel) were present for those proceedings." A-1009.

Other Materials. The motion identified an array of additional missing record materials, including government documentary exhibits, government physical exhibits, defense exhibits, ECF materials that the clerk's office had failed to provide, and jury lists the court created during voir dire. A-869-80.

The district court denied all of Savage's requests save for the court's jury lists and certain defense exhibits. Ruling that the missing correspondence between the parties and the court was not substantive and did not constitute a part of the record on appeal under Rule 10, the court described Savage's request

for the materials as an "extraordinary discovery request," App. 206a, that "would impose an extraordinary burden on the District Court and the parties," App. 200a. The court did not explain its conclusion that the communications were non-substantive and did not acknowledge Savage's demonstration that many of those communications pertained to substantive matters important to his appeal.

The court characterized Savage's request for help reconstructing the substance of untranscribed proceedings as a request for "the personal notes and files of the District Court Judge, and of every attorney involved in the case." App. 207a. Again overlooking Savage's demonstration of relevance, the court stated that "[m]ost" of these proceedings "dealt with scheduling issues." App. 208a. It held that "[e]ven if the unrecorded 'proceedings' were substantive," Savage was obligated to proceed by "submit[ting] a statement in accordance with Rule 10(c)"—an impossible task for appellate counsel not present for the trial proceedings. App. 208a-209a. The court did not acknowledge that Savage himself was absent from many of the missing proceedings or his counsel's explanation that they lacked the means to prepare a Rule 10(c) statement without assistance from the court, the government, and trial counsel. *See supra* at 12, 14.

B. The Third Circuit denies Savage's motion to supplement and reconstruct the record under Rule 10.

After Savage informed the court of appeals about the district court's denial of his Rule 10 motion, it invited him to file "an application regarding those portions of the record … that he contends have not been

previously made available yet [and] are required to proceed." (Order, Case No. 14-9003 (Sept. 27, 2017)). Appellate counsel then filed another Rule 10 motion, this time with the Third Circuit, seeking the same material. *See* A-2085-2377, 2394-2408. Among other arguments, Savage explained that the district court's requirement that he seek reconstruction of untranscribed proceedings by submitting a "statement of the evidence" under Rule 10(c) "ignores the facts that Savage's current counsel did not represent him at trial and that they can neither make his trial attorneys spend the substantial time necessary to identify and convey what happened at each of the many unrecorded proceedings … nor arrange to compensate them for that work." A-2110.

Savage also requested an order "deeming all of the undocketed written communications" his counsel had identified "to be part of the record on appeal" and "directing the district court to provide Savage's counsel with copies of additional undocketed written communications between the court and counsel in the case." A-2126-27. Finally, Savage asked to obtain and supplement the record with the various government and defense exhibits his appellate counsel had been unable to secure.

A Third Circuit panel directed the government and Savage's trial counsel to identify the exhibits submitted at trial and provide them to Savage's appellate counsel. *See* A-2410-2411. But, without explanation, the Third Circuit denied the motion as to the untranscribed proceedings and the undocketed communications. A-2410-2411.

The court of appeals assured appellate counsel

that Savage would not be foreclosed from challenging the adequacy of the record in his merits briefing. AB 340 n.1. Savage accepted that invitation. His merits briefs on appeal reiterated his Rule 10 requests a third time, asking the panel to remand for recovery and reconstruction of the missing material. AB 360-61; Reply Brief at 117, Case No. 14-9003 (Sept. 9, 2019).

In its decision on the merits, the Third Circuit denied Savage's request for help identifying undocketed communications and reconstructing the untranscribed proceedings. Unlike the district court, the Third Circuit did not dispute that the requested materials ***could*** constitute part of the appellate record if they had been properly added to the record under Rule 10. App. 17a-18a. Also unlike the district court, the Third Circuit did not question that the requested materials had potential relevance to issues Savage raised or could have raised on appeal. But, as the court of appeals saw it, for those "communications (or their reconstructions) to have become part of the 'record on appeal,' Savage needed to have moved to supplement the record" under Rule 10—which, in the court's view, he had not done. App. 18a & n.9.

Like the district court, the Third Circuit held that to supplement the record with untranscribed proceedings Savage was required to pursue reconstruction under Rule 10(c). App. 16a. But whereas the district court had ignored appointed appellate counsel's inability to submit a "statement of the evidence" about proceedings in which neither they nor their client had participated, the Third Circuit imposed an unprece-

dented requirement: To initiate reconstruction, Savage himself was required to "submit a declaration saying he does not remember what happened, passing the ball to the government to document its recollection and giving the defendant a chance to object before allowing the District Judge to resolve any remaining discrepancies in accordance with the provided documentation and with any notes he has retained and his own recollections." App. 22a.

The court likewise cited a perceived procedural failure as grounds to reject Savage's request for copies of written exchanges between the district court and other trial participants. *See* App. 18a n.9. Federal Rule of Appellate Procedure 10(e)(1) states that where "any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly." The Third Circuit held that this provision foreclosed Savage's request for undocketed communications because Savage "ha[d] not articulated how the purportedly missing items could or would give rise to 'any differences … about whether the record truly discloses what occurred in the district court,' and, indeed, failed to have any such differences settled by the District Court, as was his obligation." App. 18a. The court did not address Savage's request under Rule 10(e)(2), App. 206a, which separately authorizes the parties, the district court, or the court of appeals to supplement or correct the record when "anything material to either party is omitted from …. the record by error or accident."

The Third Circuit thus held that, despite Savage's

multiple formal requests for help in reconstructing untranscribed exchanges and securing the written communications he was missing, Savage had "fail[ed] to pursue Rule 10 reconstruction." App. 16a. On that basis, it affirmed Savage's conviction and death sentence despite the missing record materials.

Savage petitioned for rehearing *en banc* and the court of appeals denied his petition on October 30, 2020. App. 215a.

REASONS FOR GRANTING THE PETITION

I. The Third Circuit's extra-textual limitations on Rule 10 break with decades of precedent permitting flexible record reconstruction in federal criminal appeals.

The Third Circuit applied unwritten procedural barriers of its own invention to deny Savage's repeated motions to complete the appellate record. In doing so, the court departed from—and cast doubt on—well-established federal practice embracing flexible procedures to reconstruct and supplement missing record portions in criminal appeals.

1. a. The off-record conferences and court correspondence from Savage's trial belonged in the record of his appeal, and the Federal Rules of Appellate Procedure gave both the district court and court of appeals broad authority to include it in the record "in the interest of seeing that substantial justice is done." *United States v. Sheridan*, 329 U.S. 379, 393 (1946).

As the Third Circuit correctly observed, the Federal Rules of Appellate Procedure define the record on appeal as "the original papers and exhibits filed in the

district court," the "transcript of proceedings, if any," and "a certified copy of the docket entries prepared by the district clerk." Fed. R. App. P. 10(a). The Advisory Committee Notes on Rule 10's substantially similar predecessor explain that the rule safeguards the "right to have incorporated in the record anything which actually occurred in the trial court which [appellate counsel] thinks necessary to make his points on appeal." Advisory Committee Notes to Rule 75, 1964 (emphasis added). To that end, the courts of appeals have consistently understood the appellate record to encompass a wide array of communications that "occurred in the district court," *id.*, such as a law clerk's email to counsel, *United States v. Moreno*, 857 F.3d 723, 727 (5th Cir 2017), letters describing off-the-record meetings in chambers, *United States v. Ruff*, 472 F.3d 1044, 1047 & n.4 (8th Cir. 2007), and correspondence between counsel on which the district court is copied, *see Parker v. Della Rocco*, 252 F.3d 663, 665 n.2 (2d Cir. 2001); *see also, e.g.*, *United States v. Coleman*, 767 F. App'x 881, 885 n.* (11th Cir. 2019) (copy of U.S. Probation Office letter assessing defendant's eligibility for sentence reduction).

Consistent with its aim to provide an accurate representation of what happened at trial, Rule 10 prescribes two mechanisms to address omissions in the appellate record. When a hearing or trial transcript is unavailable for any reason, Rule 10(c) states that an appellant "may" prepare a "statement of the evidence or proceedings from the best available means, including the appellant's recollection," which must be served on the appellee, "who may serve objections or proposed amendments" that are then "submitted to

the district court for settlement and approval." Meanwhile, Rule 10(e)(2) instructs that if "anything material to either party is omitted from … the record," the "omission … may be corrected" by stipulation of the parties, by the district court, or by the court of appeals. Rule 10 thus "empowers" the parties, the district court, or "the court of appeals to correct material omissions … in the record." Wright & Miller, Federal Practice & Procedure § 3956.4.

b. Rule 10 has special importance in indigent criminal appeals, where defendants commonly depend on appellate counsel appointed after trial proceedings have concluded. *See* Criminal Justice Act Plan, United States Court of Appeals for the Tenth Circuit (Dec. 15, 2015) (establishing specialized Criminal Justice Act panel of appellate attorneys) ("While the Court recognizes there may be benefits to maintaining continuity of counsel … trial counsel may not have the requisite skills, or the desire, to represent an individual on appeal."). Such counsel—who lack firsthand knowledge of trial proceedings and may be unable to call on trial counsel for assistance—face difficult practical challenges in attempting to fill record gaps. In those circumstances, the courts of appeals have long safeguarded criminal defendants' right to complete appellate record by endorsing flexible procedures to collaboratively reconstruct the record—including enlisting the help of the district court and the government when necessary.

Consider just a few examples. In *United States v. Graham*, 711 F.3d 445 (4th Cir. 2013), appellate counsel appointed by the Fourth Circuit discovered that the court reporter had failed to record or transcribe

wiretap recordings played for the jury. *Id.* at 450. "Concerned that, as he had not been present for trial, his incomplete knowledge of the trial record might impede his representation," counsel asked—and the Fourth Circuit agreed—to stay the appellate briefing schedule to allow the defendant to return to the district court to pursue reconstruction under Rule 10. *Id.* The government then produced a compact disc of the recordings and transcripts it had prepared before trial and provided attestations from a prosecutor and DEA agent that those materials accurately reflected what the jury heard. *Id.* The district court, in turn, conducted an evidentiary hearing at which the lead prosecutor and a DEA agent testified about their recollections of the trial and their pretrial preparation of the government's transcripts. *Id.* Based on that evidence, the district court "made findings as to which calls, and which portions of the calls were heard by the jury," thus "enabl[ing] [the defendant] to perfect his appeal." *Id.* at 451–52 (quotations omitted).

In *United States v. Preciado-Cordobas*, 981 F.2d 1206 (11th Cir. 1993), despite learning before their appeal that the court reporter had failed to transcribe closing arguments, the defendants affirmatively "declined to prepare their own statement of the missing evidence as permitted by Rule 10(c)." *Id.* at 1209. On appeal, their appointed appellate counsel argued that the transcription error required reversal. *Id.* at 1209, 1213. Rather than reverse outright, the Eleventh Circuit remanded under Rule 10(e), "directing the district court to attempt to reconstruct the closing arguments." *Id.* at 1210. On remand, the district court held

an evidentiary hearing at which the government produced its own partial transcript of closing arguments, the notes the lead prosecutor prepared for his closing argument, the prosecutor's written effort to reconstruct his argument, and his notes of the defendants' closing statements. *Id.* at 1211. The various defendants' trial attorneys likewise testified about their recollections of the closing arguments and produced their trial notes. *Id.* The district court found that "the closing arguments" had "been reconstructed as much as possible under the circumstances," *id.* at 1211 (quotation omitted), and the Eleventh Circuit agreed that the reconstruction painted "a sufficiently complete picture of what transpired during the closing arguments" to enable appellate review. *Id.* at 1216.

Similarly, in *United States v. Perkins*, 498 F.2d 1054 (D.C. Cir. 1974), the court reporter failed to provide a full transcript and a substitute reporter was retained to transcribe her predecessor's stenographic notes. *Id.* at 1056. On appeal, "the underlying correspondence strongly suggested that with respect to some of the jury instructions, the reporter did not take down what the judge actually said in the courtroom." *Id.* at 1056. The D.C. Circuit remanded the case to determine "the extent to which the reporter failed to make a verbatim account of the trial proceedings, and the means used to correct or reconstruct … the record under Rule 10(e)." *Id.* Because neither court reporter was available to testify on remand, the district court "filed a memorandum which relied on the judge's own recollection and the testimony of another court reporter," who was "expert in the reading of a reporter's

notes." *Id.* The court included in the record "a transcript of its charge as transcribed" by the new reporter from the original reporter's notes … 'to a reasonable stenographic certainty,'" *id.* at 1056-57, which the court of appeals found to be "an accurate transcription of what the judge told the jury." *Id.* at 1058.

c. These three decisions—spanning five decades and decided by different courts of appeals—exemplify a host of similar cases applying flexible procedures to remedy record omissions in federal criminal appeals. From that chorus of precedent, two key principles emerge.

First, the courts of appeals have never imposed rigid procedural hurdles on a litigant's ability to supplement the record under Rule 10. That flexible approach accords with the text of Rule 10(e), which places no procedural preconditions on record supplementation. It also accords with Rule 10's predecessor, which permitted a court of appeals to correct record omissions "on a proper suggestion or its own initiative." Fed. R. Civ. P. 75(d) (as amended, 1966). As this Court has put it, that broad authorization gives the courts of appeals the power to supplement the record "in the interest of seeing that substantial justice is done." *Sheridan*, 329 U.S. at 393. Consistent with that instruction, no court has previously suggested, for example, that an appellant who lacks the means to prepare a "statement of the evidence or proceedings" under Rule 10(c) must say so via a declaration, let alone has any court announced such a requirement without first giving the appellant an opportunity to submit a declaration.

Under that flexible approach, the courts of appeals

have regularly exercised their broad power over the appellate record to correct significant record omissions even in the absence of formal requests from the litigants. *See, e.g.*, *Preciado-Cordobas*, 981 F.2d at 1210 (ordering sua sponte remand to supplement record); *United States v. Brand*, 80 F.3d 560, 562 (1st Cir. 1996) (similar); *Convertino v. United States Dep't of Justice*, 795 F.3d 587, 591 n.1 (6th Cir. 2015) (supplementing record sua sponte); *Yarrington v. Davies*, 992 F.2d 1077, 1081 (10th Cir. 1993) ("Petitioner has not provided a sufficient record for us to review this argument. Nonetheless, because of the seriousness of a conviction of first degree murder, we sua sponte obtained the trial transcript.").

By contrast, courts have held that a defendant has defaulted on a request for record supplementation mainly where he willfully failed to avail himself of readily available avenues to secure the omitted material. *See, e.g.*, *United States v. Sierra*, 981 F.2d 123, 127 (3d Cir. 1992) (declining to remand for reconstruction due to "absence of … minimal effort" to secure missing evidence by appellate counsel); *Stevo v. Frasor*, 662 F.3d 880, 885 (7th Cir. 2011) ("Where we have previously declined to exercise our authority to supplement the record, our purpose has often been to avoid rewarding parties for failing to correct known deficiencies.").

Second, federal courts have consistently embraced a flexible and pragmatic approach to reconstructing unavailable record materials. District courts frequently refer to their own notes and files to reconstruct trial proceedings. *See, e.g.*, *United States v. Huggins*, 191 F.3d 532, 538 (4th Cir. 1999) ("the

district court supplemented the transcript with copies of documents and trial notes retained by the court"); *United States v. Pace*, 10 F.3d 1106 (5th Cir. 1993) ("[T]he trial court issued an order stating that the missing jury instruction was a pattern *Allen* charge. The trial court also ordered the clerk to prepare and certify a supplemental record containing a pattern *Allen* charge."); *Preciado-Cordobas*, 981 F.2d at 1210 ("We advised the district judge that in attempting to reconstruct the record, he may use his notes…."); *Perkins*, 498 F.2d at 1056 ("the Court's recollection of the Charge as given and trial notes were also utilized").

District courts likewise do not hesitate to secure the assistance and records of trial participants, including the government and defense counsel, to piece together what happened at trial. *See, e.g.*, *United States v. LaSpesa*, 956 F.2d 1027, 1034-35 (11th Cir. 1992) ("the district court called upon former defense counsel, prosecutors, and court reporters to assist in the reconstruction effort"); *Brand*, 80 F.3d at 562 ("The government filed what the parties agreed is a 'reasonable recreation' of its main closing argument, as well as a recreation of its rebuttal…."); *United States v. Sevilla*, 174 F.2d 879, 880 (2d Cir. 1949) (explaining that district court reconstructing missing trial evidence "may … interrogate the witnesses, the counsel who appeared at trial for the government and for the defendant, and any other person having reliable information").

2. The Third Circuit's decision breaks with this long chain of precedent—a departure with especially grave consequences for a federal capital appellant.

Savage clearly and repeatedly requested reconstruction of the record. In the district court, he moved for a "Complete and Accurate Record for Appeal," asking the court to "supplement[] the record" with the missing undocketed correspondence, Reply In Support of Motion, 2:07-cr-00550 (July 5, 2017), ECF No. 1671 at 11, and to help "reconstruct[]" the unrecorded proceedings," *id.* at 13. After the district court denied his motion, Savage asked the Third Circuit to "make available, or direct the district court to make available, those portions of the record that counsel are still missing" and to "direct[] the district court to make all reasonable efforts to help Savage's counsel identify and reconstruct unrecorded proceedings in this case." A-2086, A-2126. He then reiterated that request in his merits brief, saying that "the Court should, at the very least, remand to the district court and direct it to make a reasonable effort to recover and reconstruct the missing record material." AB360.

Dismissing these explicit requests to reconstruct and supplement the record, the Third Circuit ruled that Savage had "fail[ed] to pursue Rule 10 reconstruction." App. 16a. Although Savage's district court motion explained that his appointed appellate counsel "cannot ... reasonably be expected to submit a statement of what occurred" in off-record conferences they did not attend, A-1009, the appellate court foisted a strict and unfounded prerequisite on Savage, holding that Rule 10(c) required Savage himself to submit a declaration stating that he could not recall what occurred in sidebars and in-chambers conversations for which he was not present (and in which criminal defendants typically do not participate). App. 22a.

And although Savage repeatedly requested the missing correspondence between the parties and the district court and identified specific appellate issues to which such material could pertain, the Third Circuit faulted him for failing to "articulate[] how the purportedly missing items could or would give rise to 'any difference[s] … about whether the record truly discloses what occurred in the district court'" and to "have any such differences settled by the District Court," App. 18a n.9. The Third Circuit described Savage's request for a remand to secure the missing correspondence and reconstruct the untranscribed proceedings as a "stunning request for discovery of the District Court's files, the District Judge's personal notes, and the work-product of every lawyer involved in the case." App. 23a.

As explained below, those unprecedented rulings have no basis in Rule 10's plain text. More fundamentally, they flout longstanding federal precedent allowing defendants to supplement the record as appropriate, using all manner of available procedures and recognizing the government's and court's obligation to assist in that effort. As those precedents demonstrate, the door to relief under Rule 10 is not a secret portal—to be cracked open only if newly appointed appellate counsel recites some magic phrase qualifying for the district court's help in reconstructing missing portions of the record. And those precedents also make clear that requests for assistance from the government and district court are not, as the Third Circuit held, "stunning request[s] for discovery," App. 23a, but pragmatic and reasonable means that courts routinely use to fill in a record when appellate counsel

has no other means to do so.

The Third Circuit's decision thus throws unbroken federal appellate practice into doubt. Its imposition of rigid atextual preconditions on the invocation of Rule 10 threatens court-appointed appellate counsel with procedural traps as they endeavor to ensure that the appeals of their indigent clients are heard on a complete record. And in holding that the government and district court have no affirmative obligation to assist appointed appellate counsel with record reconstruction, the Third Circuit's Rule disturbs longstanding precedents endorsing precisely such assistance.

This sharp departure from prior practice would merit this Court's review under any circumstances. But review is especially warranted because the Third Circuit's imposition of unprecedented procedural obligations had the deleterious effect of limiting the appellate record in a capital appeal. The Court should grant certiorari to remove the uncertainty generated by the Third Circuit's decision and reaffirm settled practice allowing flexible reconstruction of the record in federal criminal appeals.

II. The Third Circuit misread Rule 10.

The Third Circuit's decision misconstrues Rule 10, larding with it procedural requirements nowhere present in the rule's text. The imposition of atextual procedural hurdles in a federal capital appeal further merits this Court's review.

1. Contrary to the Third Circuit's ruling, nothing in Rule 10(c) requires an appellant to declare what he cannot remember before he is entitled to relief.

The Third Circuit appeared to rest its refusal to order reconstruction of off-record conferences at Savage's trial on its conclusion "that Savage has never formally sought to reconstruct any untranscribed conversation" under Rule 10(c). App. 22a. The court rejected Savage's explanation that his appellate counsel lacked the means to prepare a Rule 10(c) statement because they did not participate in the trial and trial counsel could not or would not assist them, *see supra* at 12, 14, holding that in such a circumstance the "defendant may submit a declaration saying he does not remember what happened." App. 22a. That holding lacks any legal basis.

Rule 10(c) merely states that when a transcript of a hearing is unavailable, an appellant "may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection." Fed. R. App. P. 10(c). When a defendant prepares such a statement, it "must be served on the appellee, who may serve objections or proposed amendments," before the statement, objections, and amendments are "submitted to the district court for settlement and approval." *Id.*

By its terms, Rule 10(c) assumes that the appellant has some "means" to "prepare a statement of the evidence or proceedings." It says nothing about how to proceed where, as here, the appellant has no such means because he did not participate in relevant off-the-record sidebars and in-chambers conferences (of which there were scores during this months-long trial), his appellate counsel did not participate in trial at all, and his trial counsel were unable or unwilling

to assist. Nothing in the rule suggests that a defendant in such circumstances must submit a "declaration saying he does not remember what happened." App. 22a. A declaration saying nothing about the evidence or proceedings plainly does not constitute a "statement of the evidence or proceedings" within Rule 10(c)'s meaning. And Rule 10(c) cannot reasonably be read to require an appellant to explain his inability to prepare such a statement by way of declaration, rather than as Savage did here: in a motion—indeed, multiple motions—describing the missing material to the best of his appellate counsel's knowledge and explaining appellate counsel's inability to reconstruct the proceedings without assistance from the district court, prosecutors, and the various defendants' trial attorneys. *See supra* at 12, 14.

In support of its novel declaration requirement, the Third Circuit cited *United States v. Wilson*, 16 F.3d 1027 (9th Cir. 1994). But *Wilson* did not endorse—let alone mandate—a declaration from the defendant. It merely noted in its factual discussion that the defendant there *had* "submitted to the district court a declaration that neither he nor his attorney could recall the details of … missing testimony." *Id.* at 1029.

Nor does any other authority support such a requirement. To the contrary, prior precedent consistently recognizes that where new appellate counsel represents a defendant on appeal, both trial courts and courts of appeals can initiate reconstruction of missing transcripts under Rule 10(e)(2), which broadly authorizes courts to correct any "omission or misstatement" and create a "supplemental record."

See LaSpesa, 956 F.2d at 1035 (endorsing "careful reconstruction" of untranscribed proceedings "in accordance with" Rule 10(e)); *United States v. Selva*, 559 F.2d 1303, 1304 (5th Cir. 1977) (citing Rule 10(e) as basis for remand to reconstruct untranscribed proceedings); *Perkins*, 498 F.2d at 1056 (noting that "errors in recording and transcribing verbatim accounts of the trial proceedings" were corrected under Rule 10(e)). The Third Circuit's declaration requirement lacks any legal basis.

Making matters worse, Savage had no notice of this extra-textual requirement. It is especially unfair to announce and retroactively apply such a requirement for the first time in a capital case where appellate counsel made clear that they did not know what occurred even after spending years diligently trying to fill the gaps in the record. *See Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (appellate court should not create new procedural rule to evade capital defendant's constitutional claim).

2. The Third Circuit also erred by refusing to order the district court to supplement the appellate record with written trial exchanges between the court and other trial participants.

The court of appeals grounded that decision in its conclusion that Savage failed to abide by Rule 10(e)(1)'s procedural requirements:

> Savage has not articulated how the purportedly missing items could or would give rise to "any difference[s] ... about whether the record truly discloses what occurred in the district court," and, indeed, failed to have any such differences

> settled by the District Court, as is his obligation.

App. 18a n.9 (quoting Fed. R. App. P. 10(e)(1)). But Rule 10(e)(1) governs only "difference[s]" among the parties about the record. *Id.* It is a mechanism for "resolution of *a dispute* concerning the contents of the record," Moore, 20 Moore's Federal Practice § 310.40 (emphasis added), such as "whether what is in the record is correct, or whether what is in the file was actually before the district court." Griffin, 1 Federal Criminal Appeals § 6:29.

A different provision, Rule 10(e)(2), ensures that the record is *complete*. It instructs that if "anything material to either party is omitted … in the record by error or accident, the omission … may be corrected and a supplemental record may be certified and forwarded … on stipulation of the parties," "by the district court" or "by the court of appeals." Fed. R. App. P. 10(e)(2); *see also* Wright & Miller, 16A Fed. Prac. & Proc. Juris. § 3956.4 (5th ed.) ("For litigants seeking to remedy omissions … in the record there are three possible avenues.").

Again, Rule 10(e)(2) places no procedural prerequisites on a party's ability to seek record supplementation, nor does it limit the district court of court of appeals' ability to add missing materials to the appellate record. And the courts of appeals have regularly employed Rule 10(e)(2) themselves to supplement the appellate record with missing materials from the district court's files—the exact relief Savage seeks here. *See, e.g.*, *United States v. Greco*, 938 F.3d 891, 896 (7th Cir. 2019) (supplementing record under Rule 10(e)(2) with Probation Office report that the district

court considered but did not docket until after appeal was pending); *Stevo*, 662 F.3d at 885 (supplementing record under Rule 10(e)(2) to include undocketed form reflecting parties' consentto have magistrate judge preside); *Ruff*, 472 F.3d at 1047 & n.4 (supplementing record under Rule 10(e)(2) to include correspondence between judges on potential prosecutorial misconduct).

Here, Savage attempted to supplement the record to include the omitted written communications through all three means authorized by Rule 10(e)(2). First, appellate counsel sought to correct the record by seeking the government's help to identify omitted material. *See* Fed. R. App. P. 10(e)(2)(A); AB 345 (counsel undertook "informal outreach to the district court, the government, and defendants' trial counsel"). When that effort was rebuffed, Savage next filed a Rule 10 motion with the district court, seeking "the relief required to obtain a complete and accurate record." A-859; *see* Fed. R. App. P. 10(e)(2)(B). And when that effort failed, Savage's counsel filed another Rule 10 motion, this time with the Third Circuit. *See* A-2085-2377.

The Third Circuit's contention that Savage failed to fulfill his "obligation" to seek undocketed record material before the district court is therefore wrong twice over. First, under Rule 10(e)(2)—the appropriate standard here—there is no particular procedure to be followed in seeking a record correction. Savage's Rule 10 motion before the district court, explicitly seeking that the appellate record be supplemented with omitted material in the district court's files, was plainly sufficient. Second, Rule 10(e)(2) also permits

a litigant to seek relief from the court of appeals even where they did not seek such relief in the district court: Rule 10(e)(2) independently allows the court of appeals to act where material information is missing from the appellate record. *See* Fed. R. App. P. 10(e)(2)(C); *Greco*, 938 F.3d at 896 ("Even if the district court hadn't already considered the issue, we have the authority to independently correct the record in cases like this.").

The court of appeals misinterpreted the requirements of Rule 10(e) in denying Savage's request based on an inapposite provision addressing disputes about the appellate record's accuracy.

3. The Third Circuit's errors in addressing what it recognized as the "most foundational claim of error" in a federal capital appeal, App. 14a, call out for this Court's review.

This Court has long emphasized that "direct appeal is the primary avenue for review of a conviction or sentence" in death-penalty cases. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). But that admonition assumes that a direct appeal affords the condemned prisoner the complete record necessary for full appellate review. Appellate review of capital sentences on such a "complete record of the trial" serves as a "safeguard against arbitrariness and caprice." *Gregg v. Georgia*, 428 U.S. 153, 167, 198 (1976) (Op. of Stewart, Powell, Stevens, JJ.). This Court has thus reversed the appellate courts where they have "refused to consider" key portions of the record, and has "emphasized … the importance of reviewing capital sentences on a complete record." *Dobbs v. Zant*, 506 U.S.

357, 358 (1993). Congress has reaffirmed the importance of a complete record in the Federal Death Penalty Act, which requires the appellate courts to "review the entire record" in a capital appeal and provides specific protections for defendants in capital cases. 18 U.S.C. § 3595(b).

The Third Circuit's choice to deny a federal capital defendant that vital protection based on a plainly erroneous reading of Rule 10 undermines a key premise of the federal capital punishment system and requires this Court's intervention.

III. The question presented holds exceptional importance for federal appellate practice.

The Third Circuit's erroneous interpretation of Rule 10 raises the specter of hidden procedural traps and calls into question the responsibility of district and appellate courts to ensure a complete and accurate record in federal appeals. Although it has the potential to adversely affect any litigant in the courts of appeals, the decision poses especially acute hazards for the appointed appellate counsel who handle thousands of indigent criminal appeals each year in federal courts.

For almost eighty years, this Court has recognized the particular importance of a "proper record on appeal" in "criminal proceedings against poor persons in federal court," encouraging appellate courts, when appropriate, "to remand [criminal] cause[s] for the settlement" of the record. *Miller v. United States*, 317 U.S. 192, 193, 199 (1942). The federal courts of appeals decide nearly 10,000 criminal appeals every

year, the lion's share of which involve indigent criminal defendants.[2]

It is common practice for courts to appoint specialized appellate counsel—who do not participate in trial proceedings and lack firsthand knowledge of what transpired in the district court—to handle such appeals. A fundamental duty of appointed appellate counsel is to obtain and review the entire district-court record. *See* American Bar Association, Criminal Justice Standards for the Defense Function 4-9.3(d) (4th ed. 2017). A complete record is critical to appellate counsel's ability not only to identify objections, *id.*, but also to raise a "plain error that affects substantial rights," which may be considered on appeal "even though it was not brought to the court's attention" at trial. Fed. R. Crim. P. 52(b). As this Court has put it, "when … new counsel represents the indigent on appeal, how can he faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript? His duty may possibly not be discharged if he is allowed less than that." *Hardy v. United States*, 375 U.S. 277, 279-80 (1964).

Unless it is reversed, the Third Circuit's unprecedented decision will cast a shadow over appellate counsel's ability to discharge that critical duty. The

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[2] *See* United States Courts, Federal Judicial Caseload Statistics 2019, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019 ("Criminal appeals held steady, increasing less than 1 percent to 9,697"); Bureau of Justice Assistance, Contracting for Indigent Defense Services: A Special Report at 3 n.1 (April 2000), https://www.ncjrs.gov/pdffiles1/bja/181160.pdf ("It is widely estimated that 60 to 90 percent of all criminal cases involve indigent defendants.").

decision replaces the longstanding assurance of flexible collaboration to secure missing portions of the record with the threat of unwritten waiver risks and judicial obstruction in matters as simple as securing trial correspondence. Without any basis in Rule 10's text, it stands to upset decades-old practices in the cases that make up a sizable portion of the federal appellate docket. The Court should grant review to remove that cloud and reaffirm well-established principles of federal appellate procedure.

CONCLUSION

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

Respectfully submitted,

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