No. _____

In the Supreme Court of the United States

CARL WELLBORN,

***Petitioner*,**

v.

MARY BURGHUIS, Warden,

***Respondent*.**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case involves the intersection of structural errors and procedural-default doctrine. Typically, when a state court declines to adjudicate a claim for failure to follow a procedural rule, federal habeas petitioners must show cause and prejudice before the federal court can review the merits of the claim. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). But when the defaulted claim is structural, petitioners will struggle to obtain federal review of the claim because structural errors "affect[] the framework within which the trial proceeds," and therefore "defy analysis by harmless-error standards." *Arizona v. Fulimante*, 499 U.S. 279, 309–10 (1991) (internal quotation marks omitted). Although some structural errors do not always render the criminal proceedings fundamentally unfair, others do. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017).

This petition presents two issues warranting this Court's review:

(1) Can reasonable jurists debate whether habeas petitioners asserting procedurally defaulted fair cross-section claims must show actual prejudice or that the trial was fundamentally unfair to obtain federal review?

(2) Can habeas petitioners asserting a procedurally defaulted fair cross-section claim demonstrate prejudice by showing that the error rendered their trials fundamentally unfair?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

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STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The Sixth Circuit Court of Appeals denied rehearing of Mr. Wellborn's motion for a certificate of appealability on May 16, 2018. A Sixth Circuit panel denied Mr. Wellborn's petition for rehearing over a dissent on August 16, 2018. Justice Sotomayor granted Mr. Wellborn's application for an extension, and his petition for certiorari is due on January 14, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a criminal defendant's right to trial by an impartial jury, which includes the right to a jury drawn from a fair cross-section of the community. The Sixth Amendment provides, in pertinent part:

> 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 . . . .

This case also involves the application of 28 U.S.C. § 2253 (2012), which provides:

> **(c)(1)** Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> **(A)** the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> **(B)** the final order in a proceeding under section 2255.
>
> **(2)** A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> **(3)** The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Mr. Wellborn requests that this Court grant, reverse, and remand with instructions to issue a certificate of appealability. This Court has such authority pursuant to 28 U.S.C. §2106, which states:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree,

or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

OPINIONS BELOW

The Sixth Circuit's unpublished order denying Mr. Wellborn's motion for panel rehearing is included in the Appendix at A-1. The Sixth Circuit's unpublished order denying the motion for a certificate of appealability is included at A-2. The District Court's opinion denying Mr. Wellborn's motion to amend the judgment is included at A-3. The District Court's judgment is included at A-4. The District Court's order approving and adopting the magistrate judge's report and recommendation to deny Mr. Wellborn's § 2254 petition and denying a certificate of appealability is included at A-5. The magistrate judge's report and recommendation to deny Mr. Wellborn's § 2254 petition in light of *Ambrose v. Booker* is included at A-6. The Sixth Circuit's opinion and judgment remanding three consolidated cases, including Mr. Wellborn's, is included at A-7.

The District Court's order approving and adopting the magistrate judge's report and recommendation to deny Mr. Wellborn's § 2254 petition in light of *Smith v. Berghuis* and granting a certificate of appealability as to the jury venire composition claim is included at A-8. The magistrate judge's report and recommendation to deny Mr. Wellborn's § 2254 petition in light of *Smith v. Berghuis* is included at A-9. The District Court's order to dismiss the report and recommendation as moot and to consider the case in light of new Sixth Circuit precedent in *Smith v. Berghuis* is included at A-10. The magistrate judge's initial report and recommendation to deny Mr. Wellborn's § 2254 petition is included at A-11.

The Michigan Supreme Court order denying Mr. Wellborn's application for leave to appeal is included at A-12. The Michigan Court of Appeals order denying leave to appeal Mr. Wellborn's conviction and sentence is included at A-13.

STATEMENT OF THE CASE

This case involves the systematic exclusion of black and Latino citizens from the jury pool in Kent County, Michigan.

A. The Systemic Exclusion of Kent County Citizens

In April 2001, court employees in Kent County, Michigan, made a programming error while converting to a new automated jury selection system that excluded seventy-five percent of eligible Kent County jurors from service. (APP 050) Programmers designed the new system to select names randomly from a database of the county's 453,981 eligible jurors, but erroneously entered the figure 118,169 into the relevant parameter. (APP 050–51) As a result, the system randomly selected jurors from only the first 118,169 names in the database. (APP050) Because the names of eligible jurors were organized in ascending zip code order, virtually all jurors from higher-numbered zip codes were excluded. (*See* APP 050–51) Those zip codes are concentrated in the city of Grand Rapids, and are home to most of Kent County's black and Latino citizens. (*See id.*)

Before long, regular court observers began noticing something wrong with the jury pool. Subsequent analysis shed further light on minority underrepresentation in the jury pool. (APP 050) That analysis confirmed that there was a striking change in black representation in the jury pool from April 2001 through August 2002, and that statistical evidence revealed that the process of selection of African-American jurors for inclusion on the roll had changed. (APP 051)

Professor Edward Rothman, Ph.D., found that during the relevant time frame, only 4.79% of potential jurors in the jury pool were black, rather than the expected 8.24%; only 4.32% of potential jurors were Latino, instead of the expected 5.98%; and the combined black/Latino minority group made up only 10.02% of the jury pool rather than the expected 14.02%. The difference between the expected percentage of a group in the jury pool and the actual percentage, or the "absolute disparity," were 3.45% for blacks, 1.66% for Latinos, and 4% for the combined black/Latino population. (APP 052). The decreased likelihood that minorities would appear in jury venires, termed the "comparative disparities," were 42% for blacks, 28% for Latinos, and 29% for the combined black/Latino population. (*Id.*).

B. Mr. Wellborn's Jury Trial and State Appeals

After the system update and before the error was discovered, in November 2001, a jury that did not represent a fair cross-section of Kent County convicted Carl Wellborn of first-degree criminal sexual conduct and second-degree criminal sexual conduct. Mr. Wellborn did not object to the composition of the venire before his petit jury was empaneled because he did not know and could not have known that the system sending jury summonses to citizens in Kent County was systematically excluding black and Latino citizens. (APP 056–62)

As soon as he learned about the flawed system, Mr. Wellborn sought relief in Michigan courts. The Michigan courts refused to review his Sixth Amendment claim because he did not object to the composition of his venire at trial. (APP 158)

C. Federal Habeas Proceedings

In federal habeas proceedings, Respondent invoked the procedural-default doctrine. The Sixth Circuit determined that Mr. Wellborn and similarly situated habeas petitioners have shown cause to excuse the default, *Ambrose v. Booker* (*Ambrose I*), 684 F.3d 638, 645–49 (6th Cir. 2012), and that the claim is meritorious, *Garcia-Dorantes v. Warren*, 801 F.3d 584, 600–04 (6th Cir. 2015). Although a fair cross-section violation is a structural error, the Sixth Circuit held that, for every type of structural error, petitioners must show actual prejudice to overcome a procedural-default bar, which means petitioners must present evidence that there is "a reasonable probability that a properly selected jury [would] have been less likely to convict." *Ambrose I*, 684 F.3d at 652 (internal quotation marks omitted). The Sixth Circuit adopted the standards of prejudice outlined in *Strickland v. Washington*, 466 U.S. 668, 694 (1984) to assess claims of ineffective assistance of counsel. *Ambrose v. Booker* (*Ambrose II*), 801 F.3d 567, 578–79 (6th Cir. 2015).

On remand, Mr. Wellborn argued that he could show there was a reasonable probability that a properly constituted jury would be less likely to convict. The magistrate judge and district court rejected these arguments and denied Mr. Wellborn a certificate of appealability. (APP 014–44)

After this Court granted certiorari in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), Mr. Wellborn moved to amend the judgment to grant the certificate of appealability. The district court denied the motion to amend the judgment, finding

that nothing in *Weaver* suggests the Sixth Circuit's approach to Mr. Wellborn's case must change. (APP 011–12)

Mr. Wellborn appealed to the Sixth Circuit Court of Appeals, requesting a COA to address the question of actual prejudice and the proper application of *Weaver* in cases involving a fair cross-section violation. One judge denied Mr. Wellborn's request, providing the following reason: "The Court in *Weaver* assumed, for analytical purposes only, that the petitioner could show *Strickland* prejudice by establishing that counsel's errors rendered his trial fundamentally unfair. *Weaver*, 137 S. Ct. at 1911. The Court did not, however, decide whether this interpretation was correct." (APP 007) Further, the court concluded that the prosecution's evidence was strong, while Wellborn's defense was "tenuous," and therefore "reasonable jurists could not debate the district court's conclusion that he failed to establish actual prejudice." (APP 008)

Mr. Wellborn petitioned for panel rehearing, and a two-judge majority denied his petition over dissenting Judge Donald, who pointed out that other jurists have adopted Mr. Wellborn's proposed interpretation of *Weaver*, and that thus reasonable jurists do in fact disagree with the district court's procedural ruling. (APP 001–02)

REASONS TO GRANT CERTIORARI

This case involves the application of two doctrines that often confuse the lower courts: the procedural-default doctrine and the structural-error doctrine. On the one hand, this Court requires habeas petitioners to show cause and prejudice to obtain federal review of a constitutional claim that state courts have not adjudicated because the defendant failed to follow and independent and adequate state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

On the other hand, this Court has recognized "that some errors"—structural errors—"should not be deemed harmless beyond a reasonable doubt." *Weaver*, 137 S. Ct. at 1907. "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Id.* An error is structural if it "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence," *Neder v. United States*, 527 U.S. 1, 9 (1999) (emphasis omitted), if it "def[ies] analysis by harmless-error standards," and "affect[s] the entire adjudicatory framework," *Puckett v. United States*, 556 U.S. 129, 141 (2009) (citation and internal quotation marks omitted).

The Sixth Circuit employs a categorical rule: procedurally defaulted structural errors of any kind are unreviewable unless the petitioner can show a reasonable probability that the outcome of trial would have been different had the error not occurred. *Ambrose I*, 684 F.3d at 651; *see also Jones v. Bell*, 801 F.3d 556, 563–64 (6th Cir. 2015) (applying the categorical rule to a procedurally defaulted claim that the

defendant was denied the right to self-representation under *Faretta v. California*, 422 U.S. 806 (1975)).

Yet this Court has since rejected application of such a categorical rule in the context of a *Strickland* claim, and instead adopted a nuanced approach to assess prejudice when a structural error comes to light after a verdict has been rendered. This Court identified subcategories of structural error—the most important of which is those structural errors that always undermine the fundamental fairness of the proceedings. *See Weaver*, 137 S. Ct. at 1908 (describing the three categories). In the context of a post-conviction motion for a new trial based on a claim of ineffective assistance of counsel, "the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or . . . to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair." *Id.* at 1911 (citation omitted). This Court left open the possibility that the type of prejudice that must be shown depends on the type of structural error alleged. If the error always renders a trial fundamentally unfair, then courts may address the merits of the claim regardless of the error's impact on the outcome of the trial.

Despite this significant new guidance, the district court and the Sixth Circuit rejected Mr. Wellborn's request for a COA so he can show prejudice by showing that a fair cross-section violation always renders a trial fundamentally unfair.

Further review is imperative. This Court should grant, reverse, and remand (GVR) this matter to the Sixth Circuit with instructions to grant a COA because that court did not properly apply 28 U.S.C. § 2253(c)(2), where "the only question is

whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (internal quotation marks omitted).

In the alternative, this Court should grant plenary review to address whether a 28 U.S.C. § 2254 habeas petitioner asserting that he was deprived an impartial jury in violation of the Sixth Amendment can show prejudice by demonstrating that the defaulted structural error always renders a trial fundamentally unfair.

I. This Court should grant certiorari, reverse, and remand with instructions to issue a COA.

Mr. Wellborn cannot litigate the remaining questions his 28 U.S.C. § 2254 petition presents "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1). To obtain a COA, he must make "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). "At the COA stage, the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck*, 137 S. Ct. at 773 (internal quotation marks omitted). "The COA inquiry . . . is not coextensive with a merits analysis." *Id.*

Mr. Wellborn has already made a substantial showing that Kent County's system of summoning jurors violated the Sixth Amendment's guarantee of a fair and impartial jury. Under current Sixth Circuit precedent, if Mr. Wellborn can obtain federal court review, he will be entitled to a writ of habeas corpus. *See Garcia-*

Dorantes, 801 F.3d at 600–04 (holding that Kent County's system of summoning jurors in 2001 resulted in a fair cross-section violation). Nobody disputes that this meritorious claim was never adjudicated because Michigan courts invoked a procedural rule. And the Sixth Circuit has already concluded that Mr. Wellborn is not to blame for the default. *See Ambrose I*, 684 F.3d at 645–49 (finding cause external to the defense for Mr. Wellborn's procedural default). The only remaining issue is whether federal courts may grant him the relief he seeks. This turns on a question that reasonable jurists could debate: Must he show that the outcome of his trial would have been different?

A. The Sixth Circuit resolved the merits of Mr. Wellborn's legal arguments without jurisdiction.

When the Sixth Circuit denied Mr. Wellborn's application for a COA, it made a merits determination without jurisdiction. Mr. Wellborn's primary contention is that federal courts can review his claim and grant a writ if he "show[s] *either* a reasonable probability of a different outcome in his or her case *or* . . . that the particular . . . violation was so serious as to render his or her trial fundamentally unfair." *Weaver*, 137 S. Ct. at 1911 (emphasis added). He claims that a fair cross-section violation always renders a trial fundamentally unfair.

Like the Fifth Circuit's COA denial in *Buck*, the Sixth Circuit "phrased its determination in proper terms—that jurists of reason would not debate that [Mr. Wellborn] should be denied relief—but it reached that conclusion only after essentially deciding the case on the merits." *Buck*, 137 S. Ct. at 773. In denying Mr. Wellborn's request, the court analyzed *Weaver* and concluded that nothing in the

case suggested there are two approaches to prejudice because this court "assumed, for analytical purposes only, that the petitioner could show *Strickland* prejudice by establishing that counsel's errors rendered his trial fundamentally unfair." (*See* APP 007)

B. Reasonable jurists can debate whether a habeas petitioner can show prejudice by demonstrating that a structural error rendered his trial fundamentally unfair.

The Sixth Circuit has defined prejudice narrowly regardless of the type of structural error: whether there is "a reasonable probability that a properly selected jury [would] have been less likely to convict." *Ambrose I*, 684 F.3d at 652 (internal quotation marks omitted). But, in *Weaver*, this Court took a more nuanced approach to structural errors. Before settling on how to show prejudice, this Court considered the reasons why the public-trial error at issue was structural before concluding that a limited public-trial violation does not undermine the fundamental unfairness of the proceedings. *See* 137 S. Ct. at 1908–10. In short, this Court suggested that "the nature of the [structural] error" is a critical factor courts must consider when analyzing prejudice. *Id.* at 1911–12.

This context-specific approach has caused various federal, state, trial, and appellate judges to believe that prejudice can be shown in one of two ways—prejudice to the outcome and fundamental unfairness.

In the Eastern District of Michigan, one court denied habeas relief after considering whether the petitioner had shown either a reasonable probability of a different result had the courtroom not been partially closed or whether the closure

rendered the trial fundamentally unfair. *Hayes v. Burt*, No. CV 15-10081, 2018 WL 339720, at *8 (E.D. Mich. Jan. 9, 2018). Another judge in the Eastern District of Michigan also interpreted this Court's instructions to mean that "in *most* cases, the defendant must show 'a reasonable probability that . . . the result of the proceeding would have been different but for attorney error,'" thereby leaving open the possibility that a different standard is appropriate in some cases. *Maxey v. Rivard*, No. 2:14-CV-12979, 2017 WL 4251787, at *7 (E.D. Mich. Sept. 26, 2017) (quoting *Strickland*, 466 U.S. at 694) (emphasis added).

Courts in the Eastern District of New York are similarly inconsistent in their application of *Weaver*. In *Pierotti v. Harris*, the Second Circuit remanded the case after finding that the state procedural bar was inadequate to prevent review, the district court considered whether the petitioner was prejudiced by his counsel's failure to inform the court that both of the defendant's hearing aids were broken. No. 03-CV-3958 (DRH), 2018 WL 4954094, at *6 (E.D.N.Y. Oct. 11, 2018). In considering prejudice, the district court asked whether the structural error was presumptively prejudicial. *Id.* at *7. Because the defendant's inability to hear functionally rendered him absent from the proceedings and unable to communicate with his counsel, the district court presumed prejudice because both constitutional errors render trials fundamentally unfair. *See id.* at *8–10. Consequently, the district court never addressed whether the outcome of the trial would have been different. *See id.*

Similarly, as in *Weaver*, a district judge in the Western District of Washington examined an unpreserved public-trial claim where the attorney failed to object. *See*

McKee v. Key, No. 2:16-CV-1670-JCC-BAT, 2018 WL 3353004, at *1 (W.D. Wash. Apr. 23, 2018), report and recommendation adopted, No. C16-1670-JCC, 2018 WL 3344774 (W.D. Wash. July 9, 2018). Rather than restrict the prejudice to the outcome of the trial, the court explored whether the nature of the temporary closure and whether it rendered the trial fundamentally unfair. *Id.* at *11.

The District of Puerto Rico also considered the two different approaches to finding prejudice. *See Rodriguez-Rodriguez v. United States*, No. CR 07-290 (PG), 2018 WL 1441219, at *5 (D.P.R. Mar. 21, 2018) (finding no Sixth Amendment violation because the petitioner had not demonstrated that, absent the courtroom closure, there was a reasonable probability of a different outcome or that the error "was so serious as to render his trial fundamentally unfair"); *see also Guzman-Correa v. United States*, No. CR 07-290 (PG), 2018 WL 1725221, at *6 (D.P.R. Mar. 29, 2018) (denying an ineffective-assistance-of-counsel claim because the defendant was not actually prejudiced by the courtroom closure and the error "did not pervade the whole trial or lead to basic unfairness").

Garcia v. Davis, No. 7:16-CV-632, 2018 WL 5921018 (S.D. Tex. Nov. 9, 2018), provides further evidence that the question presented is debatable. Mr. Garcia contended that his Due Process and Sixth Amendment right to effective counsel were violated because he did not have an interpreter during trial. *Id.* at *1. The state court of appeals rejected this claim on the basis that Mr. Garcia waived his right to have a qualified interpreter assist him during trial, and so it never reached the merits of the claim. *Id.* at *3. The federal district court found that the record did not support this

finding. *Id.* at *12. Reviewing the Sixth Amendment claim *de novo*, the district court ultimately denied relief after analyzing the prejudice framework of *Weaver*. *See id.* at *12–15. Nonetheless, the court granted Mr. Garcia a COA to resolve the issue whether "the denial of the fundamental right to be present and to participate in a defendant's own trial by the failure to provide an interpreter require a showing of prejudice before a defendant may be granted habeas relief?" *Id.* at *17.

In addition to these district courts, the D.C. Circuit Court of Appeals has looked at both types of prejudice—actual and fundamental unfairness—when examining whether counsel rendered ineffective assistance by failing to object to a closure of the courtroom during voir dire. *See United States v. Aguiar*, 894 F.3d 351, 356–57 (D.C. Cir. 2018). The court denied relief because the petitioner had not "proffered [any] evidence that had the district court conducted *voir dire* in open court, there was a reasonable probability the result of the proceeding would have been different, or that the *voir dire* proceedings were fundamentally unfair." *Id.* at 356. As to the second point, the court found significant that the most significant moments in jury selection—the exercise of peremptory strikes and resolution of pretrial motions—occurred on the record, and that all significant matters discussed were later addressed on the record in open court. *Id.* at 357. This meant that the effects of the courtroom closure did not affect the entire trial. *See id.*

These are just a few examples of how federal courts have implemented *Weaver*'s holdings and analytical framework. But all demonstrate that most courts

have begun to acknowledge a second type of prejudice—whether the error pervaded the whole trial such that the proceedings were fundamentally unfair.

State courts have similarly begun to analyze prejudice in one of two ways—prejudice to the outcome and whether the error rendered the trial fundamentally unfair. The Illinois Court of Appeals recently held that *Strickland* prejudice could be established by either a probability of a different outcome or fundamental unfairness, and actually applied "factors used in *Weaver*" to decide whether a courtroom closure resulted in fundamental unfairness. *People v. Henderson*, 2018 IL App (1st) 160237-U, ¶ 41 (2018) ("Second, we conclude that defendant's trial was not fundamentally unfair under the factors used in *Weaver*.").

The Supreme Court of Kentucky has held that under the *Weaver* standard for structural error, a "juror's realization that he was [the defendant's] former victim [in a prior bank robbery] made the penalty phase *fundamentally unfair*." *Commonwealth v. Douglas*, 553 S.W.3d 795, 801 (Ky. 2018) (emphasis added). As a result, the defendant did not need to show that there was a reasonable probability that he would be designated a persistent felony offender had the juror been excused. *Id.* The Texas Court of Appeals similarly considered both types of prejudice when considering whether the counsel's failure to object to the partial closure of the courtroom during voir dire prejudiced the defendant. *See Monreal v. State*, 546 S.W.3d 718, 728 (Tex. App. 2018). When addressing whether the proceeding on the whole was fundamentally fair, the court observed that the defendant's family members were

allowed into the courtroom during the defense voir dire, voir dire was not conducted in secret, and the courtroom was open during the trial. *See id.*

The Supreme Court of Pennsylvania also considered the two approaches to analyzing prejudice when confronted with a question of whether a defendant's counsel was ineffective by failing to object to a technical deficiency in the waiver-of-counsel colloquy. *See Commonwealth v. Pou*, 2018 WL 4925254, at *7 (Pa. 2018). The question came down to whether the defendant had been denied his right to counsel, which the court acknowledged is a structural error because it is impossible to quantify prejudice. *Id.* Then, the court asked whether the technical deficiency in the waiver-of-counsel colloquy always renders the proceeding fundamentally unfair. After looking at the technical requirements of a plea under state law, which is more protective of the right to counsel than the federal colloquy, *id.* at *8–9, the court found that the failure to object to a technical error did not render the waiver of counsel constitutionally deficient, *id.* at *9, and so the burden is on the petitioner to show prejudice to the outcome of the proceeding, *id.* at *10.

These are just a sampling of state courts, which have considered both types of prejudice after *Weaver*. *See also Commonwealth v. Fernandez*, 104 N.E.3d 651, 662 (Mass. 2018) ("The defendant has failed to advance any grounds supporting his contention that the individual voir dire procedure used in his case created a substantial likelihood of a miscarriage of justice or otherwise resulted in a fundamentally unfair empanelment procedure."); *Newton v. State*, No. 86, 2017 WL 3614030, at *6 (Md. Ct. App. Aug. 23, 2017) (interpreting *Weaver* to mean that the

Strickland prejudice prong is satisfied "[i]f the error is structural because it is fundamentally unfair.").

Finally, there is no need to look any further than the record in this case to show that reasonable jurists could debate whether the prejudice showing can be shown by demonstrating that a fair cross-section violation always results in a fundamentally unfair proceeding. When Mr. Wellborn sought panel rehearing on the question whether he should receive a certificate of appealability, Judge Donald dissented from the denial of that motion. She noted that " other jurists have adopted [Mr. Wellborn's] proposed interpretation of *Weaver*—that he can meet the *Strickland* standard by establishing fundamental unfairness. APP 001 (citing *Ledet v. Davis*, No. 4:15-cv-882, 2017 WL 2819839, at *14 (N.D. Tex. June 28, 2017) ("The burden is on the defendant to show either a reasonable probability of a different outcome in his case or that the particular public-trial violation was so serious as to render his trial fundamentally unfair."); *In re Salinas*, 408 P.3d 344, 353 (Wash. 2018) (McCloud, J., concurring) ("[*Weaver*] listed a showing of 'fundamental unfairness' as an alternative to proof of 'prejudice' as a means of gaining relief.")). She also believed "[r]easonable jurists could debate whether Mr. Wellborn's petition "states a valid claim of the denial of a constitutional right." APP 002 (quoting *Dufresne v. Palmer*, 876 F.3d 248, 252 (6th Cir. 2017)).

These respectable, reasonable judges all believe *Weaver* suggests a two-dimensional approach to the prejudice inquiry when assessing whether to grant relief for a defaulted error. These opinions provide evidence that jurists of reason could

debate whether Mr. Wellborn can also show prejudice by demonstrating that a violation of the Sixth Amendment's impartial jury guarantee always renders a trial fundamentally unfair. Mr. Wellborn should therefore receive a certificate of appealability. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

C. Reasonable jurists can debate whether the analytical framework used in *Weaver* to assess prejudice applies to procedurally defaulted structural errors.

Although no federal court has had the opportunity to address whether *Weaver* announced a new analytical framework that applies to procedurally-defaulted structural errors, some jurists in state courts believe that the prejudice standards for ineffective-assistance claims and procedurally-defaulted claims are the same.

Two justices of the Supreme Court of Connecticut have expressly disagreed with *Ambrose I*'s approach to analyzing prejudice for all procedurally defaulted errors. *See Newland v. Comm'r of Corr.*, 142 A.3d 1095, 1116–18 (2016) (McDonald, J., dissenting). In *Newland*, the denial-of-counsel claim was procedurally defaulted because the "self-represented defendant who ha[d] not chosen self-representation voluntarily" did not have counsel advising him about whether he had "a legally tenable basis to appeal." *Id.* at 1117. These justices believed prejudice must be presumed because of the nature of the error, and the fact that claims such as his will nearly always be procedurally defaulted. *See id.* at 1117–18. Under those circumstances, the justices would presume prejudice for the purposes of overcoming the procedural-default doctrine. *Id.*

In slightly different circumstances, the Supreme Court of Kentucky relied on *Weaver* to determine whether to grant relief to a petitioner in post-conviction proceedings based on a claim that his sentencing jury was not impartial because one of the jurors was a victim of the defendant's prior robbery. *Douglas*, 553 S.W.3d at 801. The claim was unpreserved. *Id.* Nonetheless, after discussing *Weaver*, the court presumed the impartial-jury violation was presumptively prejudicial because the presence of the biased juror undermined the fundamental fairness of the sentencing hearing. *Id.* These cases demonstrate that reasonable jurists believe there are some errors that are so egregious that prejudice must be presumed even if the claim is procedurally defaulted.

D. Reasonable jurists could debate whether a Sixth Amendment fair cross-section violation is the type of structural error that renders a trial fundamentally unfair.

Whether a fair cross-section violation is the type of structural error that always renders trials fundamentally unfair is also a debatable question. *Weaver* did not "call[] into question . . . precedents determining that certain errors are deemed structural and require reversal because they cause fundamental unfairness either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process." 137 S. Ct. at 1911. These structural errors resulting in fundamental unfairness include a judge's failure to give a reasonable-doubt instruction, a biased judge, and the exclusion of grand jurors on the basis of race. *Id.*

The structural constitutional right at issue in this case—to be tried by a jury drawn from a fair cross-section of the community—implicates all three categories discussed in *Weaver*. When any court deals with the content of the Sixth Amendment's guarantee that the accused be tried by an impartial jury "it is operating upon the spinal column of American democracy." *Neder*, 527 U.S. at 30 (Scalia, J., dissenting). An impartial jury has always been "a vital check against the wrongful exercise of power by the State and its prosecutors." *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *see also Duncan v. Louisiana*, 391 U.S. 145, 151–53 (1968). "The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system." *Powers*, 499 U.S. at 406 (citing *Duncan*, 391 U.S. at 147–58). Thus, there is little question that the claims at issue in this case fall within *Weaver*'s first category of rights that "protect[] some other interest" besides an accurate adjudicative process. *Weaver*, 137 S. Ct. at 1908.

The right also falls within the second category; the impact of a fair cross-section violation is "simply too hard to measure." *Id.* at 1908. This Court has explained that the impact of discrimination is impossible to ascertain "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense." *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). The flaws in the summoning system here had a quantifiable effect on the composition of jury venires. But divining the final composition of the petit jury is an impossible task because it necessarily requires speculation about the lawyers' use of peremptory challenges.

Even more difficult is a case-specific inquiry into whether a different jury would have delivered a different verdict. In short, any "[h]armless-error analysis . . . would be a speculative inquiry into what might have occurred in an alternative universe." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

What matters most, however, is whether an error "counts as structural because it always leads to fundamental unfairness . . . ." *Weaver*, 137 S. Ct. at 1908. And a fair cross-section violation fall into this category, too. This Court has explained that a fundamentally fair trial is one in which the defendant is tried "before an impartial judge, under the correct standard of proof and with the assistance of counsel; [where] *a fairly selected, impartial jury* was instructed to consider all of the evidence and argument in respect to [the charges]." *Neder*, 527 U.S. at 9 (emphasis added). Racially-engineered jury venires, which do not represent a fair cross-section of the community, do not lead to "a fairly selected, impartial jury." *Id.* "[T]he American concept of the jury trial contemplates a jury drawn from a fair cross section of the community," and therefore it is a fundamental component of an impartial jury. *Taylor v. Louisiana*, 419 U.S. 522, 527, 530 (1975). Juries are "instruments of public justice," and thus must be "'a body truly representative of the community.'" *Id.* (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)). For one thing, the requirement that venires be drawn from a fair cross-section of the community "is a means of assuring" an impartial jury—exactly what the Sixth Amendment guarantees. *Holland v. Illinois*, 493 U.S. 474, 480 (1990). It "deprives the State of the ability to 'stack the deck' in its favor" or to "draw up jury lists in a such a manner as to produce a pool of prospective

jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition." *Id.* at 480–81. While the focus of the jury-trial right is to protect the accused against oppressive state action, the goal of the fair cross-section requirement "is jury impartiality with respect to both contestants: neither the defendant nor the State should be favored." *Id.* at 483. Thus, "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial," and is also an essential ingredient of a fundamentally fair trial. *Taylor*, 419 U.S. at 528.

For those reasons, "the Court has repeatedly rejected all arguments that a conviction may stand despite racial discrimination in the selection of the *grand* jury." *Vasquez*, 474 U.S. at 261 (collecting cases) (emphasis added). "[D]iscrimination on the basis of race in the selection of grand jurors strikes at the fundamental values of our judicial system and our society as a whole . . . ." *Id.* at 262 (internal quotation marks omitted). Such discrimination is not only "a grave constitutional trespass," but also "wholly within the power of the State to prevent." *Id.* The Court has therefore rejected the notion that "discrimination in the grand jury has no effect on the fairness of the criminal trials that result from the grand jury's actions." *Id.* at 263. Because discrimination in the selection of grand jurors renders a trial fundamentally unfair, the Court concluded that "[t]he overriding imperative to eliminate this systemic flaw," "the necessity for vindicating Fourteenth Amendment rights, and the "difficulty of assessing its effect on any given defendant, requires . . . continued

adherence to the rule of mandatory reversal," even in federal habeas proceedings. *Id.* at 264–65.

Automatic reversal has also been required in federal habeas cases—regardless of prejudice to the petitioner—when racial discrimination occurred in the selection of the *grand* jury's foreman. *Mitchell*, 443 U.S. at 547. The Court explained that such discrimination "casts doubt on the integrity of the judicial process," violates "our basic concepts of a democratic society and representative government," and "strikes at the fundamental values of our judicial system." *Id.* at 556. Moreover, any claim "that the court has discriminated on the basis of race in a given case brings the integrity of the judicial system into direct question." *Id.* at 563. Thus, even if the defendant is guilty, issuance of the writ is required because "our constitutional system['s] . . . safeguards extend to all—the least deserving as well as the most virtuous, *id.* at 557 (internal quotation marks and footnote omitted), even when the state's interests in finality and comity are greatest, *id.* at 558, 562.

The logic underlying *Vasquez* and *Mitchell* has even greater force when the differentiation on the basis of race tainted the *venire* and the *petit jury*. *Batson* errors, for example, which affect the composition of the petit jury, "represent a violation of the right to equal protection of the laws, which itself does damage to the fairness, integrity, and public reputation of the judicial proceeding." *United States v. Atkins*, 843 F.3d 625, 639 n.2 (6th Cir. 2016) (internal quotation marks omitted). The "harm inherent in a discriminatorily chosen jury inures not only to the defendant, but also to the jurors not selected because of their race, and to the integrity of the judicial

system as a whole." *United States v. Harris*, 192 F.3d 580, 587–88 (6th Cir. 1999). These precedents teach that the right to a properly selected jury, i.e., one free from intentional racial discrimination, is fundamental to the fairness of a criminal trial.

At a minimum, reasonable jurists could debate whether a fair cross-section violation is also fundamentally unfair when discrimination happens in the petit jury proceedings.

E. A GVR order with instructions to grant a COA is appropriate in this case.

Section 2106 of Title 28 grants this Court authority to issue a GVR order under appropriate circumstances. 28 U.S.C. § 2106. A GVR order is proper when it

> [C]onserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before [ruling] on the merits, and alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues . . . .

Lawrence ex rel. Lawrence v. Chater, 516 U.S. 163, 167 (1996) (internal quotation marks, alterations, and citations omitted). In criminal cases, "[w]hen a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, [this Court's] legal traditions reflect a certain solicitude for his rights," and so when there is no prejudice to the prosecution a GVR order is an appropriate resolution. *Stutson v. United States*, 516 U.S. 193, 196 (1996).

A GVR order is the correct course in these circumstances in light of *Weaver* and *Buck*. Further review in the Sixth Circuit will conserve this Court's resources and benefit this Court if future review is necessary. The Supreme Court is "a court of review, not of first view." *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (internal quotation marks omitted) (quoting *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014)). Accordingly, if this Court decides whether a fair cross-section violation is presumptively prejudicial structural error, then it should do so in a case after a court of appeals has had the opportunity to consider that question. *Cf. Hernandez v. Mesa*, 137 S. Ct. 2003, 2006–08 (2017) (per curiam) (GVR'ing to permit the court of appeals to decide the question whether claims are cognizable in the first instance). A GVR order would also cure the unequal treatment of the six habeas petitioners who are litigating this very issue in the very same procedural posture.

Mr. Wellborn's request is simple: he would like the opportunity to litigate. He has never had the opportunity to file briefs on the merits of the arguments. After *Weaver*, the Sixth Circuit has not considered whether a fair cross-section violation is inherently prejudicial. Because the Sixth Circuit addressed the merits of Mr. Wellborn's debatable legal argument without jurisdiction, this Court should grant certiorari, reverse the Sixth Circuit's judgment, and remand with instructions to grant a COA.

II. This Court should grant plenary review to address whether habeas petitioners asserting procedurally defaulted structural errors must show a reasonable probability of a different outcome at trial no matter the nature of the structural error.

Although a GVR order is appropriate, this case is an ideal vehicle for this Court to consider the intersection of structural errors and the procedural-default doctrine. Typically, when a state court declines to adjudicate a claim for failure to follow a procedural rule, federal habeas petitioners must show cause and prejudice before the federal court can review the merits of the claim. *Coleman*, 501 U.S. at 750. But when the defaulted claim is structural, petitioners will struggle to obtain federal review of the claim because structural errors "affect[] the framework within which the trial proceeds," and therefore "defy analysis by harmless-error standards." *Arizona v. Fulimante*, 499 U.S. 279, 309–10 (1991) (internal quotation marks omitted).

Strictly applying these doctrines together creates an inescapable situation: "requiring a showing of prejudice to resurrect a procedurally defaulted [structural] claim is functionally equivalent to foreclosing the claim entirely," leading to the "absurd result of the theoretically available claim guarded by an always-insurmountable barrier." Amy Knight Burns, Note, *Insurmountable Obstacles: Structural Errors, Procedural Default, and Ineffective Assistance*, 64 Stan. L. Rev. 727, 730 (2012); *see also Vansickel v. White*, 166 F.3d 953, 960 (9th Cir. 1999) (Reinhardt, J., dissenting) (arguing that because "prejudice as to the result . . . cannot[] be shown in jury composition cases," an actual prejudice requirement "impos[es] an insurmountable barrier to the vindication of a right to due process [that] is incompatible with the Constitution").

The Sixth Circuit employs a categorical rule: procedurally defaulted errors of any kind are unreviewable unless the petitioner can show a reasonable probability that the outcome of trial would have been different had the error not occurred. *Ambrose I*, 684 F.3d at 651. It has applied that categorical rule no matter the nature of the structural error. *See Jones*, 801 F.3d at 563–64 (requiring proof that had the habeas prisoner represented himself at trial, the outcome would have been different to overcome a procedural bar).

A contextual approach is more appropriate than a categorical rule to deciding whether a federal petitioner asserting a procedurally defaulted structural error must show prejudice. This Court suggested as much in *Weaver*, which involved "the proper application[] of two doctrines: structural error and ineffective assistance of counsel." 137 S. Ct. at 1907. In concluding that Mr. Weaver had to show actual prejudice and could not do so, this Court took three analytical steps. First, it identified the reasons why the error is deemed structural, and there are three categories of structural errors. *See id.* at 1907–08. Next, it considered the costs of reversal in post-conviction proceedings. *See id.* at 1910–12. Last, it balanced the two competing interests to decide what type of prejudice showing is required by looking at the specific facts of the case and the nature of the error. *See id.* at 1912–13 ("In the criminal justice system, the constant, indeed unending, duty of the judiciary is to seek and to find the proper balance between the necessity for fair and just trials and the importance of finality of judgments. . . . [I]n light of the other circumstances present in this case, petitioner must show prejudice in order to obtain a new trial.").

The analytical framework used in *Weaver* applies equally to procedurally defaulted claims asserted by federal habeas petitioners. The *Strickland* standard evolved directly from the procedural default doctrine governing habeas corpus review. As the Court explained in *Strickland*,

> The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. As indicated by the "cause and prejudice" test for overcoming procedural waivers of claims of error, the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment.

Strickland, 466 U.S. at 697 (citing *United States v. Frady*, 456 U.S. 152, 162–169 (1982); *Engle v. Isaac*, 456 U.S. 107, 126–129 (1982)). The standards are the same because "[a]n ineffectiveness claim . . . is an attack on the fundamental fairness of the proceeding whose result is challenged," and "fundamental fairness is the central concern of the writ of habeas corpus." *Id.*

As this common origin suggests, both *Strickland* claims and procedural default analysis are focused on the same ultimate goal: ensuring fundamental fairness. "[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Id.* at 684. The right to the effective assistance of counsel is accordingly not limited to issues related to the defendant's guilt or innocence, but extends to plea negotiations, *Lafler v. Cooper*, 566 U.S. 156, 168 (2012); litigation of pretrial motions, *Kimmelman v. Morrison*, 477 U.S. 365, 383–84 (1986); sentencing hearings, *Glover v. United States*, 531 U.S. 198, 203–04 (2001); *Wiggins v. Smith*, 539 U.S. 510, 538 (2003); and direct appeals, *Halbert v. Michigan*, 545 U.S. 605 (2005).

In federal habeas corpus proceedings as well, "errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the federal writ." *Williams v. Taylor*, 529 U.S. 362, 375 (2000). Like *Strickland* claims, the cause-and-prejudice standard focuses on "ensuring the 'fundamental fairness [that] is the central concern of the writ of habeas corpus.'" *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (quoting *Strickland*, 466 U.S. at 697).

The prejudice requirements of *Strickland* and the procedural-default doctrine also reflect the same balance "between the necessity for fair and just trials and the importance of finality of judgments." *Weaver*, 137 S. Ct. at 1913. Both standards take into consideration the costs of reversal post-conviction and after direct review. *See id.* at 1912; *Francis v. Henderson*, 425 U.S. 536, 538–42 (1976).

This is an ideal vehicle to clarify whether the two prejudice standards are the same and whether, to overcome a procedural default, a petitioner can show that the structural error alleged resulted in a fundamentally unfair trial. Ultimately, that means that if Mr. Wellborn can show prejudice by demonstrating that the type of structural error he asserts always renders trials fundamentally unfair, he is entitled to habeas relief.

A. This case presents a clean vehicle.

Although this case has a number of procedural complexities, nearly all legal questions have already decided. Mr. Wellborn has already made a substantial showing that Kent County's jury pool selection system in October 2001 violated the Sixth Amendment's guarantee of a fair and impartial jury. Under current Sixth

Circuit precedent, if Mr. Wellborn can obtain federal court review, he will be entitled to a writ of habeas corpus. *See Garcia-Dorantes*, 801 F.3d at 600–04 (holding that Kent County's system of summoning jurors in 2001 resulted in a fair cross-section violation). All agree that the Michigan courts never adjudicated Mr. Wellborn's fair cross-section claim because his counsel did not object to the venire. To obtain federal review of the fair cross-section claim, Mr. Wellborn must demonstrate cause and prejudice. Mr. Wellborn has shown cause for the default. All that remains to be decided is whether Mr. Wellborn has shown prejudice and what the definition of prejudice is.

B. Structural errors that render a criminal trial fundamentally unfair are prejudicial

There are three categories of structural errors: (1) those which are "not designed to protect the defendant from erroneous conviction but instead protect[] some other interest"; (2) errors the effects of which "are simply too hard to measure"; and (3) errors that "always result[] in fundamental unfairness." *Weaver*, 137 S. Ct. at 1908. The last category is the most important: unless the structural error is the type that renders trials fundamentally unfair, petitioners must show a reasonable probability of a different outcome to prevail on an ineffective-assistance claim. *See id.* at 1911.

This Court assumed that a petitioner could show prejudice if the structural error undermined the fundamental fairness of the proceeding. *Id.* ("Petitioner therefore argues that under a proper interpretation of *Strickland,* even if there is no showing of a reasonable probability of a different outcome, relief still must be granted

if the convicted person shows that attorney errors rendered the trial fundamentally unfair. For the analytical purposes of this case, the Court will assume that petitioner's interpretation of *Strickland* is the correct one."). But this Court left open the possibility that prejudice may be presumed when "the violation . . . pervade[s] the whole trial or lead[s] to basic unfairness." *Id.* at 1913. Although a partial closure of the courtroom during voir dire is not be such a structural error, a fair cross-section may be. This case is an ideal vehicle to answer that question because Mr. Wellborn has already shown that he is not to blame for the default and that Kent County violated his right to an impartial jury.

C. A fair cross-section violation always renders a trial fundamentally unfair

A fundamentally fair trial is one in which the defendant is tried "before an impartial judge, under the correct standard of proof and with the assistance of counsel; [where] *a fairly selected, impartial jury* was instructed to consider all of the evidence and argument in respect to [the charges]." *Neder*, 527 U.S. at 9 (emphasis added). This Court has identified four rights as fundamental to the fairness of the proceedings: the right to counsel, the right to an accurate reasonable-doubt instruction, the right to a trial before an unbiased judge, and the right to have a grand jury free of racial exclusion screen the charges. *See Weaver*, 137 S. Ct. at 1908 (citing *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963); *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)); *id.* at 1911 (citing *Tumey v. Ohio*, 273 U.S. 510, 535 (1927); *Vasquez v. Hillery*, 474 U.S. 254, 261–64 (1986)). The common thread running through each

of these rights is their protection of the credibility and integrity of the adjudicatory process.

Venires that do not represent a fair cross-section of the community, do not lead to "a fairly selected, impartial jury," *Neder*, 527 U.S. at 9, and therefore undermine the integrity of the adjudicatory process. "[T]he American concept of the jury trial contemplates a jury drawn from a fair cross section of the community," and therefore it is a fundamental component of an impartial jury. *Taylor v. Louisiana*, 419 U.S. 522, 527, 530 (1975). Juries are "instruments of public justice," and thus must be "'a body truly representative of the community.'" *Id.* (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)). For one thing, the requirement that venires be drawn from a fair cross-section of the community "is a means of assuring" an impartial jury—exactly what the Sixth Amendment guarantees. *Holland v. Illinois*, 493 U.S. 474, 480 (1990). The fair cross-section requirement "deprives the State of the ability to 'stack the deck' in its favor" or to "draw up jury lists in a such a manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition." *Id.* at 480–81. While the focus of the jury-trial right is to protect the accused against oppressive state action, the goal of the fair cross-section requirement "is jury impartiality with respect to both contestants: neither the defendant nor the State should be favored." *Id.* at 483. Thus, "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment

right to a jury trial," and is also an essential ingredient of a fundamentally fair trial. *Taylor*, 419 U.S. at 528.

CONCLUSION

The petition for certiorari should be granted.

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Respectfully submitted,

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