No. A._____

In the Supreme Court of the United States

CARL WELLBORN,

***Applicant*,**

v.

MARY BURGHUIS, Warden,

***Respondent*.**

APPLICATION FOR A CERTIFICATE OF APPEALABILITY TO ASSOCIATE JUSTICE SONIA SOTOMAYOR

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STATEMENT OF JURISDICTION

Supreme Court Rule 22 permits applications to a circuit justice for a certificate of appealability under 28 U.S.C. § 2253(c). Section 2253(c)(1)(A) grants a circuit justice the power to issue a certificate of appealability to appeal "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court."

Mr. Wellborn intends to file a petition for certiorari. For that petition, he invokes this Court's jurisdiction 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. His petition for certiorari is currently due on November 14, 2018, but he has applied for an extension.

QUESTIONS TO BE CERTIFIED

Pursuant to 28 U.S.C. § 2253(c) and Rule 22 of the Rules of this Court, applicant Carl Wellborn, a 28 U.S.C. § 2254 petitioner, respectfully requests a certificate of appealability to litigate two questions:

(1) Habeas petitioners whose constitutional claims were procedurally defaulted must show cause and prejudice to obtain federal review. A fair cross-section violation is a structural error. Where Mr. Wellborn has shown cause to excuse the default and that the underlying Sixth Amendment claim is meritorious, may he obtain federal review if he shows that a fair cross-section violation is the type of structural error that always renders a trial fundamentally unfair?

(2) Mr. Wellborn was tried and acquitted in a different county by jury selected from a properly constituted venire. The allegations were nearly identical and one of the victims was the same. Has Mr. Wellborn shown that there is a reasonable probability that the outcome of his jury trial would have been different had he been tried before a petit jury selected from a venire drawn from a fair cross-section of the community?

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The Sixth Circuit's unpublished order denying Mr.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. In 2001, Kent County updated its system for summoning jurors for jury duty. During the upgrade, the contractors made an input error that limited the number of people summoned for jury service. As a result, the people who live in the zip codes in and around Grand Rapids were not called for jury duty. Most of Kent County's black and Latino residents live in those zip codes. Consequently, black and Latino jurors were systematically excluded from jury service.

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. In this case, there is ample cause to believe a fairly constructed jury would have been less likely to convict Mr. Wellborn: a different—but properly constituted—jury in a different county acquitted him of charges of sexual assault of the same complaining witness. The evidence in this case was based on testimony of two minors whose stories changed significantly, and Mr. Wellborn's defense theory was plausible.

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. 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. 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 A CERTIFICATE OF APPEALABILITY

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. This application presents two questions reasonable jurists can debate:

(1) Can a petitioner asserting a procedurally defaulted fair cross-section claim show prejudice by demonstrating that a fair cross-section violation always renders a trial fundamentally unfair?
(2) Has Mr. Wellborn shown a reasonable probability that had his venire been constituted properly, the outcome of the proceeding would have been different, where jury selected from a representative venire in a different county acquitted him of the alleged conduct?

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 certificate of appealability, 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 v. Davis*, 137 S. Ct. 759, 773 (2017) (internal quotation marks omitted). "The COA inquiry . . . is not coextensive with a merits analysis." *Id.*

A. 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").

In addition to these district courts, the D.C. Circuit Court of Appeals has also 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 sample 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.

Judge Donald's dissent from the denial of a rehearing for a Certificate of Appealability shows there is debate among reasonable jurists about whether *Weaver* abrogated Sixth Circuit precedent. Judge Donald's dissent is bolstered by both state and federal courts' disparate application of *Weaver* when finding prejudice. 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).

B. 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.

There are good reasons to treat ineffective-assistance claims and procedurally-defaulted claims similarly. In both standards, "fundamental fairness is the central concern of the writ of habeas corpus." *Strickland*, 466 U.S. at 697. "An ineffectiveness claim . . . is an attack on the fundamental fairness of the proceeding whose result is challenged." *Id.* *Strickland* itself 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.

466 U.S. at 697 (citing *United States v. Frady*, 456 U.S. 152, 162–69 (1982); *Engle v. Isaac*, 456 U.S. 107, 126–29 (1982)).

In order to ensure fundamental fairness, the right to effective assistance of counsel is thus not limited to the trial, 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, 382 (1986); sentencing hearings, *Glover v. United States*, 531 U.S. 198, 203–04 (2001); and direct appeals, *Halbert v. Michigan*, 545 U.S. 605 (2005). Federal habeas proceedings likewise extend such that "errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of federal writ." *Williams v. Taylor*, 529 U.S. 362, 375 (2000). In these proceedings, the cause-and-prejudice standard ensures the fundamental fairness of

the trial and subsequent proceedings. *See Murray v. Carrier*, 477 U.S. 478, 496 (1986). Each standard also balances the "necessity for fair and just trials" with "the importance of finality of judgments" by considering the costs of both direct and collateral appeals and potential reversals. *Weaver*, 137 S. Ct. at 1912–13.

Ineffective assistance of counsel is often cause to excuse a procedural default. *Murray*, 477 U.S. at 488. The doctrines of ineffective assistance of counsel and procedural default often overlap and subsume one another. *See Reeves v. Campbell*, 708 F. App'x 230, 238 (6th Cir. 2017) ("[W]hether Petitioner can satisfy the prejudice element of his ineffective-assistance-of-counsel claim (and in turn, show cause to excuse his procedurally defaulted double jeopardy claim) turns entirely on whether that double jeopardy claim has merit."); *id.* at 19 ("Petitioner's procedural default does not preclude us from granting Petitioner relief because his state appellate counsel's failure to raise the claim amounted to ineffective assistance of counsel sufficient to excuse the default."); *Detrich v. Ryan*, 740 F.3d 1237, 1246 (9th Cir. 2013) ("[N]o showing of prejudice from counsel's deficient performance is required, over and above a showing that . . . counsel defaulted a 'substantial' claim of trial-counsel IAC, in order to establish 'cause' for the procedural default."); *Thompkins v. Berghuis*, 547 F.3d 572, 588–90 (6th Cir. 2008), *rev'd on other grounds by* 560 U.S. 370 (2010) (noting the "overlapping analysis" of procedural-default analysis and the merits of a petitioner's claim of ineffective assistance of counsel); *Guilmette v. Howes*, 624 F.3d 286, 294 & n.2 (6th Cir. 2010) (en banc) (Boggs, J., concurring in part) (collecting cases).

Significantly for this case, the Sixth Circuit has explicitly extended the *Strickland* prejudice standard's use to require that a procedurally defaulted claim result in "actual prejudice." *Ambrose II*, 801 F.3d at 578 ("The 'actual prejudice' inquiry outlined in [*Ambrose I*] was intended to mirror the inquiry required by *Strickland* . . . ." (citations omitted)); *Ambrose I*, 684 F.3d at 652 ("Although the instant petitions do not involve a *Strickland* claim, this standard is appropriate because it balances the competing demands of constitutionally protected equal protection interests and comity toward the state courts.") Thus, *Weaver*'s *Strickland* analysis should apply equally to procedurally defaulted claims.

C. 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 v. United States*, 527 U.S. 1, 30 (1999) (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.

D. Reasonable jurists could debate whether Mr. Wellborn has demonstrated there is a reasonable probability of a different outcome at trial where he was acquitted in a different county by jury selected from a properly constituted venire.

Even if *Weaver* did not abrogate *Ambrose I*, reasonable jurists could debate whether the fair cross-section violation tainted Mr. Wellborn's trial and affected the outcome. The Sixth Circuit itself has split on whether actual prejudice was found in two cases. *Ambrose II*, 801 F.3d at 580–82 (finding no actual prejudice); *Garcia-Dorantes*, 801 F.3d at 597–98 (finding actual prejudice). In applying the actual-prejudice standard, the court excluded all scientific studies showing that the diversity of the venire and petit juries has an impact on the outcome at trial. *See Ambrose II*, 801 F.3d at 579–80; *Garcia-Dorantes*, 801 F.3d at 597–98.

Nevertheless, it is clear that a differently—properly—constituted jury was less likely to convict Mr. Wellborn. We know this because a different, properly constituted jury in a neighboring county *did not* convict Mr. Wellborn of sexual assault, acquitting him of those charges. Because there were two differing jury verdicts, and the one with an improper constitution was the one that convicted Mr. Wellborn, Mr. Wellborn should have the opportunity to brief the issues of prejudice and the benefits of representative juries in the court of appeals.

CONCLUSION

For the foregoing reasons, Mr. Wellborn's application for a certificate of appealability should be granted.

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Respectfully submitted,

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