No. 19-_____

In The
SUPREME COURT OF THE UNITED STATES

GARY PATRICK LEWIS,
***Petitioner*,**

v.

MICHIGAN,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Michigan

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the complete absence of counsel at a critical stage pre-trial a structural error requiring the grant of a new trial?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gary Patrick Lewis respectfully petitions for a writ of certiorari to review the judgment of the Michigan Supreme Court.

OPINIONS BELOW

The final order of the Michigan Supreme Court after remand is published at 503 Mich 1028, 926 NW2d 579. The final opinion of the Michigan Court of Appeals on remand is published at 322 Mich App 22, 910 NW2d 404. The previous opinion from the Supreme Court for this case is published at 501 Mich 1, 903 NW2d 816. The previous opinion from the Court of Appeals was unpublished. (See Appendix, filed under separate cover).

JURISDICTION

The Michigan Supreme Court issued its final order on May 17, 2019. Justice Sotomayor extended the time within which to file this petition to and including October 14, 2019. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution states in relevant part: "In all criminal prosecutions, the accused shall…have the assistance of counsel for his defence." "The Sixth Amendment right to counsel is applicable to the states through the Due Process Clause of the Fourteenth Amendment." *People v Williams*, 470 Mich 634, 641; 638 NW2d 597 (2004) (citing *Gideon v Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963)).

STATEMENT OF THE CASE

A. Factual background and trial court proceedings

Mr. Lewis appeared for the preliminary examination with appointed attorney Brian Scherer. A disagreement arose between Mr. Lewis and Mr. Scherer making his continued representation inappropriate, and the district court concluded from this that Mr. Lewis had elected not to have counsel represent him. Defendant protested that "I never said that." (PET 4).[1] The court stated that the hearing would proceed without representation for Mr. Lewis, but that Mr. Scherer would act as stand-by counsel. In response to the prosecutor's concerns, the judge said, "There is nothing else I can do." (PET 5). Mr. Lewis became upset and told the judge he was violating his rights. He also accused Mr. Scherer of harassing him and disrespecting his deceased mother. (PET 7-9). The judge had Mr. Lewis removed from the courtroom. Since there was no defendant to "stand by," the court dismissed Mr. Scherer, and the preliminary examination was conducted with only the prosecutor. There was no cross-examination of the witnesses. Mr. Lewis was bound over to the circuit court for trial on six counts of second- and third-degree arson.

B. Michigan's preliminary examination is a "critical stage" where a defendant has a right to counsel.

In Michigan, a preliminary examination is held before a magistrate judge who "shall examine the complainant and the witnesses in support of the

[1] "PET" refers to the preliminary examination transcript. (Appendix E).

prosecution, on oath and, except as provided in sections 11a and 11b of this chapter, in the presence of the defendant, concerning the offense charged and in regard to any other matters connected with the charge that the magistrate considers pertinent." Mich.Comp. Laws § 766.4(6). The rules of evidence apply with few exceptions. Mich.Comp. Laws § 766.11b; Mich. Ct. Rule 6.110(D). At the close of a preliminary examination, "[i]f it appears that a felony has been committed and that there is probable cause to believe that the accused is guilty thereof," then bail is determined and the defendant is bound over to circuit court for trial. Mich.Comp. Laws § 766.5, Mich. Ct. Rule 6.110(E). Alternatively, "[i]f the magistrate determines that he conclusion of the preliminary examination that a felony has not been committed or that there is not probable cause for charging the defendant with committing a felony, the magistrate shall either discharge the defendant or reduce the charge to an offense that is not a felony." Mich.Comp. Laws § 766.13, Mich. Ct. Rule 6.110(F).

In many respects, Michigan's preliminary examination is a more critical stage than Alabama's preliminary hearing which this Court described as having "the sole purpose" of determining "whether there is sufficient evidence against the accused to warrant presenting his case to a grand jury and, if so, to fix bail if the offense is bailable." *Coleman v Alabama*, 399 US 1, 9; 90 S Ct 1999; 26 LEd 2d 387 (1970). In Michigan, the preliminary examination takes the place of a grand jury. (Compare Mich. Ct. Rule 6.107 and Mich. Ct. Rule 6.110). If the district court judge finds that there is probable cause to believe a felony crime has been committed and

that the defendant is the one who committed it, then the defendant is bound over for trial in the circuit court. MCR 6.110(E). But like in Alabama, a preliminary examination in Michigan, "the guiding hand of counsel…is essential to protect the indigent accused against an erroneous or improper prosecution." *Id.* It follows that Michigan's preliminary examination, like Alabama's, is a critical stage of the proceedings at which defendant is entitled to counsel. *Coleman v Alabama,* 399 US at 10; *People v Carter*, 412 Mich 214, 217; 313 NW2d 896 (1981) (citing *Coleman* for its holding that preliminary hearing is a critical stage during which a Sixth Amendment right to counsel attached).

C. Michigan Supreme Court Proceedings

In its initial review of this case, the Michigan Supreme Court held that deprivation of counsel at a preliminary examination was subject to harmless error review. *People v Lewis*, 501 Mich 1; 903 NW2d 816 (2017). In so doing, the Michigan Supreme Court relied on *Coleman v Alabama*, 399 US 1; 90 S Ct 1999, 26 L Ed2d 398 (1970), noting that it's review for harmless error is "obviously incompatible with the automatic reversal suggested by *Cronic*[2]." *Lewis*, 501 Mich at 7. The Michigan Supreme Court chose to rely on *Coleman* rather than *Cronic* because "*Cronic* was a case about the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.…The *Coleman* decision, by contrast, is directly on point." *Lewis*, 501 Mich at 8-9. That Court remanded for the Court of Appeals to apply harmless error analysis.

[2] *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039, 2047; 80 L Ed 2d 657 (1984).

In a published opinion after remand, the Michigan Court of Appeals applied the harmless-error standard and found that "any error resulting from the denial of counsel at [Mr. Lewis'] preliminary examination was harmless." *People v Lewis*, 322 Mich App 22, 30; 910 NW2d 404 (2017). The Michigan Supreme Court denied leave to appeal with a concurring opinion from Chief Justice Bridget McCormack wherein she stated she "reluctantly agree[d] with the order denying leave to appeal" but observed two errors in the Court of Appeals application of *Coleman v Alabama*, 399 US 1, 90 S Ct 1999, 26 Led2d 387 (1970):

(1) "I think the Court of Appeals' analysis of the first factor that *Coleman* [] identifies as important to the role for counsel at a preliminary examination is flawed. The first *Coleman* factor is 'the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over.' *Id.* at 9, 90 S Ct 1999….the panel then said that the defendant's conviction made this fact *moot*. That is, the Court of Appeals seemingly made the fact of the conviction at trial dispositive to its analysis of the first factor, which this Court said is not permissible." *People v Lewis*, 503 Mich 1028; 926 NW2d 579, 580 (2019).

(2) "The panel's analysis of the second *Coleman* factor is also flawed. That factor is 'the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for us in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at trial.' *Coleman*, 399 US at 9, 90 S Ct 1999. The Court of Appeals relied heavily on the fact that trial counsel was given a transcript of the preliminary examination conducted without the benefit of defense counsel…preparing a transcript isn't the problem; it's that the transcript is unhelpful." *Lewis*, 926 NW2d at 580.

The Chief Justice argued that the misapplication of the *Coleman* factors can be attributed, at least in part, to the lack of guidance from this Court. *Lewis*, 926 NW2d at 580. She asked for this Court to either "provide such guidance or clarify

'whether the *Coleman* harmless error review remains a sustainable rule when a defendant is denied counsel at a preliminary examination.' *Lewis*, 501 Mich 1, 16; 903 NW2d 816 (2017) (MCCORMACK, J, concurring). The Chief's concurrence was joined by Justices Bernstein and Clement.

REASONS FOR GRANTING THE PETITION

I. This Court's holdings on cases involving deprivation of a right to counsel at a critical stage are inconsistent.

The Michigan Supreme Court correctly stated that *Coleman* and *Cronic* are "obviously incompatible." *People v Lewis*, 501 Mich 1, 7 (2017).

In *Coleman v Alabama*, this Court relied on *Chapman v California*, 386 US 18, 22; 87 S Ct 824, 827; 17 L Ed 2d 705 (1967) in holding that the denial of counsel at a preliminary examination was subject to harmless error. *Coleman*, 399 US at 11.

However, 13 years later, and without any reference to *Coleman* or *Chapman*, this Court stated that "[t]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039, 2047; 80 L Ed 2d 657 (1984). Although in *Cronic* this Court ultimately remanded for the state courts to apply a *Strickland* analysis because there was no per se denial of counsel at a critical stage, this Court did highlight previous cases where it had applied structural error to the denial of counsel at a critical stage. This Court observed that it has "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent or prevented from assisting the

accused during a critical stage of the proceeding." *Cronic*, 466 US at 659 n 25. To illustrate this observation, this Court cited, among other cases, *Hamilton v State of Alabama*, 368 US 52; 82 S Ct 157; 7 L Ed2d 114 (1961), wherein an Alabama defendant was denied counsel at the time of arraignment. Deeming arraignment a "critical stage", this Court concluded that "the degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently." *Hamilton*, 368 US at 55.

This Court has followed *Cronic* in numerous subsequent cases and has not backed off from its holding that total deprivation of counsel at a critical stage is a structural error. As Michigan's Chief Justice McCormack emphasized in her concurring opinion:

> [S]everal subsequent cases have cited *Cronic* for the proposition that courts should presume prejudice if a defendant suffers complete denial of counsel at a critical stage. See, e.g., *Roe v Flores-Ortega*, 528 US 470, 483; 120 S Ct 1029; 145 LEd 2d 985 (2000); *Mickens v Taylor*, 535 US 162, 166; 122 S Ct 1237; 152 L Ed 2d 291 (2002); *Woods v Donald*, 575 US , ; 135 S Ct 1372, 1375-1376; 191 L Ed 2d 464 (2015). Indeed, in *Woods*, 575 US at ; 135 S Ct 1375-1376, the Supreme Court reiterated the *Cronic* dictum as a holding that the complete denial of counsel at a critical stage allows a presumption of unconstitutional prejudice. And the preliminary examination is a critical stage in criminal proceedings. *Coleman*, 399 US at 9. Thus, it seems *Cronic's* reasoning would apply with equal force to a preliminary examination, but for *Coleman's* holding to the contrary.

501 Mich at 15 (MCCORMACK, CJ, concurring.)

This Court in *Satterwhite v Texas*, 486 US 249 (1988), did not dilute the *Cronic* rule. In *Satterwhite*, defense counsel was not given advance notice that that a psychiatric examination, encompassing the issue of the defendant's future

dangerousness, would take place. The psychiatrist was later allowed to testify at the sentencing hearing. The question in that case was framed as follows:

> In *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), we recognized that defendants formally charged with capital crimes have a Sixth Amendment right to consult with counsel before submitting to psychiatric examinations designed to determine their future dangerousness. The question in this case is whether it was harmless error to introduce psychiatric testimony obtained in violation of that safeguard in a capital sentencing proceeding.

Id. at 251.

This Court concluded that the error in *Satterwhite* was a constitutional error but it was not a structural error, and the Supreme Court applied the harmless beyond a reasonable doubt standard. The issue in *Satterwhite* did *not* involve the absence of counsel at a critical stage.[3] It involved the erroneous admission of evidence obtained through unconstitutional means, like the introduction of a confession obtained in violation of *Miranda*. As the Court pointed out in *Satterwhite*,

> We have permitted harmless error analysis in both capital and noncapital cases where the evil caused by a Sixth Amendment violation is limited to *the erroneous admission of particular evidence at trial.* In *Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972), for example, the Court held the admission of a confession obtained in violation of *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), to be harmless beyond a reasonable doubt. And we have held that harmless error analysis applies to the admission of identification testimony obtained in violation of the right to counsel at a postindictment lineup. *Moore v. Illinois*, 434 U.S. 220, 98

[3] Notably, *Satterwhite* did not address or even cite to *Cronic* in deciding the issue presented.

> S.Ct. 458, 54 L.Ed.2d 424 (1977); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) (capital case); *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

Those types of errors have always been subject to the harmless error test. The error in the instant case is, by contrast, one of those errors that can *never* be harmless. The Court in *Satterwhite* recognized this when it said that, "Some constitutional violations, however, by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. . . . (conflict of interest in representation throughout entire proceeding); (*total deprivation of counsel throughout entire proceeding*.)" *Id*. at 256. (Citations omitted) (emphasis added).

II. The denial of counsel at preliminary examinations should be structural error.

Coleman explained what made Alabama's preliminary examination a "critical stage":

> First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

Coleman v Alabama, 399 US 1, 9; 90 S Ct 1999, 2003; 26 L Ed 2d 387 (1970).

This Court, without much explanation, held that harmless error applies. However, it is the very factors that make a stage "critical" that also make it ripe for structural error review.

In this case, as with any uncounseled preliminary examination in Michigan, "it is impossible to know with certainty what questions counsel might have posed and what answers witnesses might have provided, what other benefits the defendant might have derived from having counsel available, and how all of those considerations would have affected the subsequent trial." *Lewis,* 501 Mich at 16 (MCCORMACK, J, concurring.) This Court has likewise recognized that "*[i]t is impossible to know* what different choices [] counsel would have made." *US v Gonzalez-Lopez*, 548 US 140; 126 S Ct 2557, 165 L Ed 2d 409 (2006). This Court has concluded that "[h]armless error analysis in such a context would be a speculative inquiry in to what might have occurred in an alternate universe." *Id*, *see also, Lewis*, 501 Mich at 16.

Simply put, structural error applies where assessment of an error is "exceptionally difficult." *United States v Marcus*, 560 US 258, 263; 130 5 Ct 2159; 176 L Ed 2d 1012 (2010). As Chief Justice McCormack observed in her concurrence, "[s]tructural errors are characterized by consequences that are necessarily unquantifiable and indeterminate. . . . *Sullivan v Louisiana*, 508 US 275, 282; 113 S Ct 2078, 124 L Ed 2d 182 (1993)." *Lewis,* 501 Mich at 16 (MCCORMACK, CJ, concurring.)

The federal circuits have recognized the applicability of structural error where "consequences of the error are necessarily unquantifiable and indeterminable." *Harris v Warden, Louisiana State Penitentiary*, 152 F3d 430, 436 (5th Cir, 1998). The Fifth Circuit cited as an example of such an "unquantifiable" error, a lack of counsel, where "a court cannot determine" if the defendant his or herself actually "put on a better defense and brought forth more evidence than a public defender might have." *Id*. The Eighth Circuit applied structural error to the absence of counsel at an evidentiary hearing, arguing it was different than a preliminary examination because an evidentiary hearing is "more analogous to a criminal trial than to a preliminary hearing.…[because] 'it is difficult to accurately assess whether it was harmless error…one can only speculate.'" *Green v US*, 262 F 3d 715, 718 (2001). Where prejudice is "almost certainly unavoidable" then the error may be structural. *Id*.

Nevertheless, "Every federal circuit court of appeals has stated, post-*Cronic*, that an absence of counsel at a critical stage may, under some circumstances, be reviewed for harmless error." *People v Murphy*, 481 Mich 919, 923; 750 NW2d 582 (2008) (MARKMAN, J, concurring) (citing *Ellis v. United States*, 313 F.3d 636, 643 (1st Cir, 2002) (absence of counsel at critical stage would require presumption of prejudice only if "pervasive in nature, permeating the entire proceeding"); *Yarborough v. Keane*, 101 F.3d 894, 897 (2nd Cir, 1996) ("a less significant denial of the right to counsel ... has been held to be subject to harmless error review"); *Ditch v. Grace*, 479 F.3d 249, 256 (3rd Cir, 2007) ("A denial of counsel at any critical stage

at which the right to counsel attaches does not require a presumption of prejudice. Rather, a presumption of prejudice applies only in cases where the denial of counsel would necessarily undermine the reliability of the entire criminal proceeding."); *United States v. Owen*, 407 F.3d 222, 226 (4th Cir, 2005) ("[H]armless-error analysis applies to the denial of the Sixth Amendment right to counsel at all stages of the criminal process, except for those where such denial affects and contaminates the entire subsequent proceeding."), cert. den. 546 U.S. 1098, 126 S.Ct. 1026, 163 L.Ed.2d 867 (2006); *United States v. Lampton*, 158 F.3d 251, 255 (5th Cir, 1998) (applying harmless-error review when counsel was absent during adverse testimony); *Mitzel v. Tate*, 267 F.3d 524, 534 (6th Cir, 2001) ("In 'cases where the evil caused by [denial of counsel at critical stage] is limited to the erroneous admission of particular evidence at trial[,] harmless error analysis applies.' ") (citation omitted); *Sanders v. Lane*, 861 F.2d 1033, 1040 (7th Cir, 1988) ("[I]n *Satterwhite* ..., the Supreme Court explained that not all violations of the right to counsel warrant per se reversal."); *Smith v. Lockhart*, 923 F.2d 1314, 1321–1322 (8th Cir, 1991) (noting that harmless-error review may apply under some circumstances when counsel is denied at a critical stage); *Hoffman v. Arave*, 236 F.3d 523, 540 (9th Cir, 2001) (after concluding that defendant had been denied counsel at a critical stage, "[t]he next step of our analysis is to ask whether this constitutional violation is 'harmless error' "); *United States v. Lott*, 433 F.3d 718, 722 (10th Cir, 2006) ("Some Sixth Amendment right to counsel violations are amenable to harmless error analysis, while others are not."); *Hammonds v.*

Newsome, 816 F.2d 611, 613 (11th Cir, 1987) (applying harmless-error review to a denial of counsel at a preliminary hearing); *United States v. Klat*, 156 F.3d 1258, 332 U.S.App.D.C. 230, 235 (DC Cir, 1998) (whether a denial of counsel at a critical stage "requires automatic reversal turns on the extent to which the violation pervades the entire criminal proceeding").) Of course, these courts are bound to follow Supreme Court decisions even when they believe them to be in error. *Jaffree v Bd of Sc Com'rs of Mobile Co*, 459 US 1314; 103 S Ct 842; 74 Led2d 924 (1983).

The end result is the exact "speculative inquiry" this Court sought to avoid. As the Court reiterated in *Mickens v Taylor*, 535 US 162, 166; 122 S Ct 1237, 1240–41; 152 L Ed 2d 291 (2002):

> We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary.

For example, the high court in Connecticut determined an error harmless where "a defendant *may be able to develop* and prove specific claims of trial prejudice…such as inadequate examination or cross-examination of witnesses at the probable cause hearing that resulted in unavailability of evidence of use at trial, loss of an opportunity to impeach witnesses at trial, or the hindrance of full preparation or presentation of defendant's case at trial." *State v Brown*, 279 Conn 493, 509-510; 903 A 2d 169 (2006) (emphasis added).

Essentially, a defendant must create an elaborate "alternative universe" for any court to find the deprivation of his right to counsel at a critical stage harmful.

This is both predictable and avoidable—structural error should apply "[E]valuating the actual effect the [constitutional] error had on the lower court proceedings…is particularly difficult…Constitutional rights are too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from their denial." Wicht, James Edward III, *There is no such thing as harmless constitutional error: returning to a rule of automatic reversal,* 12 BYU J.P.L. 73, 93 (1997); *See also,* Marceau, Justin, *Gideon's Shadow,* 122 Yale L.J. 2482, 2497 (2013) (observing the "precarious and untenable distinction between structural and harmless errors.")

III. If harmless error applies, state and federal courts need guidance for how it applies to a defendant who was ultimately convicted.

This Court has held that states may not disregard a controlling, constitutional command in their own courts. See *Martin v. Hunter's Lessee*, 1 Wheat. 304, 340–341, 344, 4 L.Ed. 97 (1816); see also *Yates v. Aiken*, 484 U.S. 211, 218, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). However, it appears that states may ignore the constitutional commands of the Sixth Amendment where, in the end, an uncounseled defendant is convicted beyond a reasonable doubt.

In this case, the prosecutor argued to the Michigan Supreme Court that "[a]n error that occurs at the preliminary examination stage, even a constitutional one, will generally be deemed harmless where, as here, there was sufficient evidence to support a bindover and the defendant was subsequently found guilty beyond a reasonable doubt." The position of the People, the Court of Appeals, and Michigan

Supreme Court, relying on this Court's case law, suggests a dangerous precedent, the logical result of which is doing away with the right to counsel, the right of confrontation, and the defendant's right to be present at the preliminary examination.

Chief Justice McCormack observed this in slightly less absolutist terms: "the fact of the conviction at trial dispositive to its analysis of the first [*Coleman*] factor." *Lewis*, 503 Mich 1028; 926 NW2d at 580; *See also,* Marceau, Justin, *Is Guilt Dispositive? Federal Habeas after Martinez,* 55 Wm. & Mary L. Rev. 2071, 2098 (2014) ("It is not the case that only 'truly trivial and technical failure to observe arcane procedural formalities' are ignored when evidence of guilt is overwhelming. Instead, harmless error has become something approaching a 'blanket rule' for upholding convictions even for the 'most obvious and indefensible violates of basic constitutional guarantees' when the evidence of guilt is strong.'") (internal citations omitted).

If harmless error is to apply here, then as Chief Justice McCormack appealed, this Court should provide guidance as to how courts might protect a defendant's right to "the guiding hand of counsel at the preliminary hearing" while determining whether the absence of that guiding hand is harmless. *Coleman*, 399 US 9.

A. Harmless error analysis should not consider a defendant's ultimate conviction.

To start, this Court should hold that the fact of a defendant's conviction is not dispositive for any *Coleman* factor. As this Court has previously noted, "[i]t is true enough that the purpose of the rights set forth in that Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *United States v Gonzalez-Lopez*, 548 US 140, 145–46 (2006). Harmless error should more closely resemble a "safeguard for fair procedure," rather than a focus on actual guilt or innocence. 55 Wm. & Mary L. Rev. at 2126 (discussing federal habeas review reform).

B. Harmless error analysis was not correctly applied by the Michigan Supreme Court or the Michigan Court of Appeals.

Here, Mr. Lewis' Sixth Amendment right to counsel was wholly discarded. Not only was Mr. Lewis totally denied counsel, he was also ejected from the courtroom[4], leaving the prosecutor free reign to conduct the examination.

As a result, there was no cross-examination of witnesses at all, hampering pretrial discovery and making impeachment of the witnesses at trial nearly impossible. Further, there was no attorney present to argue against the bindover on the six charges against Mr. Lewis, or to argue for bindover on lesser offenses. This is not speculative because the jury found Mr. Lewis not guilty of one of the

[4] And the district court never gave him an opportunity to return.

charges, and they found him not guilty of the charged offense as to another of the counts and instead found him guilty of a lesser offense.

Specifically, with regard to the total denial of cross-examination by a skilled attorney, neither "eyewitness" was asked to describe the man they saw near the buildings that were burned, nor were the police officers required to describe Mr. Lewis or what he was wearing at the time he was detained, obviously making effective impeachment at trial impossible. Officer Mayers merely made the conclusory statement that the descriptions matched Mr. Lewis (PET 22) when, in fact, they did not. Mr. Goward described the perpetrator as wearing a red hat. Mr. Lewis was wearing a black hat. 11/5/14 trial transcript, 186. Mr. Folson described the man as wearing an auto-repairman uniform. Mr. Lewis was wearing a windbreaker. 11/6/14 trial transcript, 17. Evidence that Mr. Folson identified someone other than Mr. Lewis in the photographic lineup was not revealed by the prosecutor at the preliminary examination. 11/5/14 trial transcript, 147-148. If an attorney had discovered this at the preliminary examination, he or she could (and should) have asked for a corporeal lineup. Mr. Lewis was therefore denied the defense of misidentification. Neither of the officers who detained Mr. Lewis was questioned about the items seized from Defendant (cigarette lighters and a marker). Because Defendant claimed that the lighters he had in his possession were incapable of starting a fire, had an attorney been present, he or she (or minimally Mr. Lewis himself had he been present) could have questioned the officers about the lighters and could have moved to suppress them if, at that point, the lighters had

been lost (as they were at the time of trial). There was no detailed information about the condition of the buildings, and no evidence that the house on Russell was a dwelling except for the conclusory statement by Officer Mayer (PET 19-22), making an objection to the bindover appropriate.

If met with the aforementioned cross-examination, it is impossible to determine whether the prosecution would have come back with a plea offer for Mr. Lewis, something that frequently occurs at this phase of pre-trial and is structural error if uncounseled. *Missouri v Frye*, 566 US 133, 143-144; 132 S Ct 1399, 1407; 182 L Ed2d 379 (2012).

Although Mr. Lewis should not be required to show prejudice (See Issues I and II), he has demonstrated prejudice. The Court of Appeals and Michigan Supreme Court clearly erred finding otherwise.

IV. Conclusion

Coleman is out of step with this Court's more recent jurisprudence on total deprivation of counsel. *See, Cronic*. Adhering to *Coleman*, rather than overturning it, appears to provide no workable standard for harmless error review for pre-trial deprivations of counsel. Should this Court see a workable version harmless error that still protects a defendant's Sixth Amendment right to counsel at all critical stages, then this Court should at least provide guidance in that regard.

RELIEF SOUGHT

For these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

/s/ Jacqueline J. McCann

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