No. _____

In the Supreme Court of the United States

CURTIS PARKS,

***Petitioner*,**

v.

WILLIS CHAPMAN, Warden,

***Respondent*.**

PETITION FOR WRIT OF CERTIORARI

FEDERAL COMMUNITY DEFENDER
Colleen P. Fitzharris
James Gerometta
Counsel for Petitioner

613 Abbott St., 5th Floor
Detroit, Michigan 48226
Telephone No. (313) 967-5542
colleen_fitzharris@fd.org
james_gerometta@fd.org

QUESTIONS PRESENTED FOR REVIEW

This case involves 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 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 the following question warranting this Court's review:

(1) After *Weaver*, can a petitioner in post-conviction proceedings asserting a procedurally defaulted structural error 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

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 Mr. Parks's petition for rehearing en banc on July 22, 2020. Therefore, under the Court's March 19, 2020 Order, this petition is timely because it was filed on the first business day 150 days after the denial of discretionary review in the Sixth Circuit Court of Appeals.

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 . . . .

OPINIONS BELOW

The Sixth Circuit's unpublished order denying Mr. Parks's motion for rehearing en banc is included in the Appendix at A-1. The Sixth Circuit's unpublished opinion affirming the order denying the writ of habeas corpus is included at A-2. The District Court's order denying Mr. Parks's motion for reconsideration is included at A-3. The District Court's opinion and order denying Mr. Parks's petition for a writ of habeas corpus is included at A-4. The District Court's order granting a certificate of appealability is included at A-5. The District Court's judgment is included at A-6. The Sixth Circuit Order remanding the case for further consideration is included at A-7.

The Michigan Supreme Court order denying Mr. Parks's application for leave to appeal is included at A-8. The Michigan Court of Appeals order denying leave to appeal Mr. Parks's conviction and sentence is included at A-9.

STATEMENT OF THE CASE

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

A. An all-white jury convicted Curtis Parks.

In April 2001, court employees in Kent County, Michigan, made a programming error while converting to a new automated jury selection system. As a result of the error, the new system randomly selected jurors from only the first 118,169 names in its database, excluding nearly 75% percent of eligible jurors from service. Because jurors were organized in ascending zip code order, jurors from higher-numbered zip codes, where the majority of Kent County's Black and Latino citizens reside, were excluded.

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%. For months, nobody remedied or objected to the exclusion of Kent County's Black and Latino citizens because the process occurred out of public view. During this period, Mr. Parks was tried and convicted by an all-white jury. His attorney did not object to the system of summoning jurors because the attorney was unaware of the programming error causing Black and Latino citizens to be underrepresented.

B. Michigan courts refused to consider the fair cross-section claim, citing procedural default.

Mr. Parks appealed his conviction and raised the fair cross-section claim as soon as he could. He asked the Michigan Court of Appeals to remand for an evidentiary hearing pursuant to *People v. Ginther*, 212 N.W.2d 922 (Mich. 1975), to show that the systematic exclusion of minorities from the jury pool violated *Duren v. Missouri*, 439 U.S. 357 (1979). The court of appeals denied Mr. Parks a chance to develop the factual record, and rejected the fair-cross section claim because counsel did not object at trial. (A-9, APP_064) The Michigan Supreme Court summarily denied Mr. Parks's application for leave to appeal. (A-8, APP_068)

C. Federal courts found that Mr. Parks had demonstrated cause to excuse the default, but not prejudice.

Mr. Parks filed a pro se habeas petition, asserting the fair cross-section claim, among others. The district court denied the petition, and Mr. Parks appealed.

While Mr. Parks's appeal was pending, the Sixth Circuit decided *Ambrose v. Booker* (*Ambrose I*), 684 F.3d 638, 645–49 (6th Cir. 2012), which involved the same systematic underrepresentation of Black and Latino citizens in Kent County jury venires. The court found cause to excuse the default, *id.* at 645–49, but held that the petitioners must nonetheless demonstrate "actual prejudice" by showing "what would have happened" had the venire reflected a fair cross-section of the community, *id.* at 652. In light of *Ambrose I*, the Sixth Circuit remanded this case for application of the new actual-prejudice standard. (A-7, APP_062–63)

On remand, the district court held that there was not a reasonable probability that the outcome of the trial would have been different had the jury been properly selected and denied the petition. (A-4, APP_045) After this Court's decision in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), Mr. Parks filed a motion to reconsider in light of that decision. The district court rejected the request. (A-3, APP_029–34)

On appeal, Mr. Parks argued that *Weaver* constitutes intervening precedent that warrants revisiting the approach to prejudice because a fair cross-section violation always results in a fundamentally fair trial. The majority claimed "*Weaver* stands for the idea that finality and judicial economy can trump even structural error; so, when a defendant raises a structural error on collateral review rather than on direct review, he must prove actual prejudice, even though he would not have had to prove actual prejudice if he had raised it on direct review." (A-2, APP_012) The majority suggested that a fair cross-section is not one of the structural errors that always results in fundamental unfairness, but it did not offer an explanation as to why. (*Id.*) Because the panel believed Mr. Parks could not show actual prejudice, it affirmed the denial of the writ of habeas corpus. (*Id.*)

In dissent, Judge Donald agreed that the panel was bound to apply the actual-prejudice standard of *Ambrose I*. (*Id.*, APP_028) She acknowledged, however, that *Weaver* "left open the possibility that there may be situations in which a more egregious error requires automatic reversal, or, at least, a minimal showing of actual prejudice despite being procedurally defaulted." (*Id.* at n.13 (citing *Weaver*, 137 S. Ct. at 1913).) And she acknowledged "that the circumstances surrounding the procedural

default and error in *Weaver* do not implicate the same level of unfairness [Mr. Parks] face[ed]" because "[a] jury drawn from only certain segments of the community fails to provide the impartiality necessary to sustain a judicial system based on trial by jury." (*Id.*) For that reason, Judge Donald acknowledged "[t]here may be substantial merit to the application of *Weaver*'s fundamental error analysis to Parks' fair cross-section claim." (*Id.*)

Mr. Parks filed a petition for rehearing en banc. That petition was denied. (A-1, APP_001)

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).

In *Weaver*, 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* 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 that counsel was ineffective for failing to object to a public-trial violation, "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. *See id.* at 1911–12. 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. *See id.* at 1913.

After *Weaver*, federal and state courts in post-conviction proceedings have inconsistently applied this Court's teachings about how to assess prejudice caused by a structural error. 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. (A-2, APP_011–12) *See also Williams v. Burt*, 949 F.3d 966, 978 (6th Cir. 2020) (applying the *Weaver* framework to a procedurally defaulted open-

court claim where the courtroom was closed during some testimony); *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)). Some state and federal courts share that approach. *United States v. Asmer*, No. 3:16-423-CMC, 2020 WL 6827829, at *10 (D.S.C. Nov. 20, 2020) (holding that the habeas petitioner must show that the trial court and counsel's failure to inform him of the element of the offense likely altered his decision to plead guilty despite the Fourth Circuit's conclusion that the error is structural and satisfies the third and fourth prongs of plain-error review); *Yannai v. United States*, 346 F. Supp. 3d 336, 346–47 (E.D.N.Y. 2018) (holding that the right to testify is a fundamental right, but requiring a habeas petitioner to show that the deprivation of that right affected the outcome of the trial in order to prevail on his *Strickland* claim).

Other courts take an error-by-error approach and ask whether the procedurally defaulted structural error always renders a trial fundamentally unfair in addition to asking whether the error affected the outcome of the trial. *See, e.g.*, *United States v. Thomas*, 750 F. App'x 120, 128 (3d Cir. 2018), *cert. denied,* 139 S. Ct. 1218 (2019) (holding that counsel's failure to object to the denial of the defendant's right to counsel of choice was not presumptively prejudicial because that right is "not the type that necessarily 'results in fundamental unfairness'"); *Reed v. State*, 472 P.3d 192 (Nev. 2020) (assessing *Strickland* prejudice by looking at whether counsel's failure to object to the trial court's failure to administer the juror oath affected the

outcome or whether the error resulted in a fundamentally unfair trial); *Meadows v. Lind*, No. 16-CV-02604-RBJ, 2019 WL 3802110, at *9–10 (D. Colo. Aug. 13, 2019) (consulting *Weaver* to assess *Strickland* prejudice before deciding whether "the dismissal of the hard-of-hearing . . . without pausing the proceedings to obtain assistive hearing devices resulted in a trial that was fundamentally unfair").

Even on the question whether a fair cross-section violation always results in a fundamentally unfair trial, a split has emerged. The Sixth Circuit holds that a petitioner must show that the fair cross-section violation affected the outcome of the trial. *Ambrose I*, 684 F.3d at 651. But the Arkansas Supreme Court, concluded that "a fair-cross-section violation necessarily renders one's trial fundamentally unfair," and therefore prejudice is presumed in post-conviction proceedings. *Reams v. State*, 560 S.W.3d 441, 454–55 (Ark. 2018).

Confusion will persist without this Court's intervention. This Court should grant certiorari to address whether a petitioner in post-conviction proceedings can establish prejudice by showing that the unpreserved structural error always renders a trial fundamentally unfair.

ARGUMENT

A. This Case Presents a Clean Vehicle to Address the Question Presented

This petition is an ideal vehicle to address the question presented. The Sixth Circuit has resolved most issues. The remaining issue is whether Mr. Parks can show prejudice. If he can, then he is entitled to habeas relief.

1. There is no dispute about exhaustion

Mr. Parks appealed his conviction and, as soon as the fair cross-section violation came to light, he moved the Michigan Court of Appeals to remand for an evidentiary hearing. The court refused to consider the merits of Mr. Parks's fair cross-section claim because trial counsel did not object to the venire. Mr. Parks sought discretionary leave to appeal in the Michigan Supreme Court. But leave was denied.

2. There is no dispute about whether the Michigan courts adjudicated the fair cross-section claim

The record is clear that the Michigan courts treated the claim as procedurally defaulted. Mr. Parks therefore must show cause and prejudice to get relief from a federal court. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

3. Mr. Parks would be entitled to relief if he can show prejudice

The Sixth Circuit has recognized that Mr. Parks's fair cross-section claim is meritorious because the underrepresentation of Black and Latino citizens in the Kent County jury pool resulted in venires that were not a fair cross-section of the community. *Garcia-Dorantes v. Warren*, 801 F.3d 584, 600–03 (6th Cir. 2015) (holding that Kent County's system for summoning jurors resulted in a fair cross-section violation). The Sixth Circuit also found cause to excuse the default. *See Ambrose I*, 684 F.3d at 645–47. The only issue in dispute is prejudice.

4. A fair cross-section violation is a structural error that always renders a trial fundamentally unfair

A violation of the Sixth Amendment's fair cross-section requirement is a structural error. 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). Although jurors do "not have a right to sit on any particular petit jury," they "possess the right not to be excluded from one on account of race." *Powers*, 499 U.S. at 409. Thus, the fair cross-section requirement "protects some other interest" besides an accurate adjudicative process. *Weaver*, 137 S. Ct. at 1908.

A fair cross-section violation is also "simply too hard to measure." *Id.* at 1908. Divining the final composition of the petit jury is an impossible task that necessarily requires speculation about the lawyers' use of peremptory challenges. Even more difficult to assess is how a different jury would view the evidence. 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).

A fair cross-section violation also "counts as structural because it always leads to fundamental unfairness." *Weaver*, 137 S. Ct. at 1908. 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 v. United States*, 527 U.S. 1, 9 (1999) (emphasis added). There are few rights more central to the fundamental fairness of a trial than the right to an impartial jury. *See United States v. Haymond*, 139 S. Ct. 2369, 2375 (2019) (plurality) (discussing how the Founders wrote about the right to a jury trial). This right is so

important, the Founders included it in the Constitution twice. U.S. Const. Art. III § 2; U.S. Const. amend. VI; *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020).

This Court has expressly identified four structural errors as the types of errors that always undermine the fundamental fairness of a trial: 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. But this Court left open the question whether racial discrimination in the composition of venires is "fundamentally unfair" in a manner that necessitates automatic reversal even in a collateral proceeding such as this. *See id.* at 1911–12 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986), and clarifying that it was "not address[ing] whether the result should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review.").

A fair cross-section violation shares the same features as the other fundamental structural errors. "[W]hen the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and [courts] must presume that the process was impaired." *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (describing *Tumey v. Ohio*, 273 U.S. 510, 535 (1927)). Proceedings led by biased judges are always fundamentally unfair because the objectivity of the judge—a critical decision-maker—is questionable.

The right to have a grand jury untainted by racial discrimination issue a true bill is also about the impartiality of the decision-maker. If Black citizens are systematically excluded from grand jury service, then a conviction must be reversed

even in habeas proceedings and even if an impartial petit jury found the defendant guilty beyond a reasonable doubt. *Hillery,* 474 U.S. at 261–64. That is so because the constitutional error "calls into question the objectivity of those charged with bringing a defendant to judgment," and courts may not "indulge a presumption of regularity nor evaluate the resulting harm." *Id.* at 263.

By this measure, a fair cross-section violation always makes a trial fundamentally unfair because jurors are the most critical decision-makers at a trial. Juries are so critical to the criminal legal system because they "preserve the people's authority over its judicial functions." *Haymond*, 139 S. Ct. at 2375. They are "instruments of public justice," and thus must be "a body truly representative of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527, 530 (1975) (cleaned up). And jury diversity matters in all criminal trials, regardless of one judge's perception of the strength of the evidence. As Justice Thurgood Marshall explained,

> Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process.
>
> . . .
>
> [T]he exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases. . . . [T]he effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.

Kiff v. Peters, 407 U.S. 493, 502–03 (1972) (plurality) (rejecting application of harmless-error review in a federal habeas proceeding where a white man was convicted by a jury from which Black people were systematically excluded).

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 is essential because 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. 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. By any measure, a fair cross-section violation always renders a trial fundamentally unfair.

* * *

Most of the issues underlying Curtis Parks's claim have been decided. Resolution of the question presented is outcome determinative. And courts will continue to take different approaches to prejudice in post-conviction proceedings involving structural errors without this Court's intervention. This is a question that must be answered and is of manifest importance.

B. *Weaver* Suggested Two Approaches to Prejudice When a Defaulted Error is Structural.

In *Weaver*, this Court "assumed for the analytical purposes of [the] case" that a person can show prejudice under *Strickland* "even if there is no showing of a reasonable probability of a different outcome . . . if the convicted person shows that attorney errors rendered the trial fundamentally unfair." 137 S. Ct. at 1911. Both

concurrences took issue with this assumption. *See id.* at 1914 (Thomas, J., concurring in the result); *Id.* at 1915 (Alito, J., concurring in the judgment) The dissenting justices "agree[d] that a showing of fundamental unfairness is sufficient to satisfy *Strickland*." *Id.* at 1916 (Breyer, J., dissenting). This petition confronts that assumption head on.

In *Weaver*, this Court addressed "the proper application of two doctrines: structural error and ineffective assistance of counsel" premised on the failure to object to the error. *Id.* at 1907. Although *Weaver* involved the prejudice showing required in the context of an ineffective-assistance claim, its analytical framework applies equally to procedurally defaulted structural errors asserted in federal habeas petitions. *Williams*, 949 F.3d at 978 (applying the *Weaver* framework to a procedurally defaulted open-court claim). 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." *Strickland v. Washington*, 466 U.S. 668, 697 (1984) (citing *United States v. Frady*, 456 U.S. 152, 162–169 (1982); *Engle v. Isaac*, 456 U.S. 107, 126–129 (1982)).

As here, the claim in *Weaver* involved an unpreserved error raised in post-conviction proceedings. Weaver alleged ineffective assistance of counsel premised on his attorney's failure to object to the closure of the courtroom during voir dire. *Weaver*, 137 S. Ct. at 1906. He raised this claim five years after his trial in state post-conviction proceedings. *Id.* His case arrived at the Supreme Court after Weaver filed

a post-conviction motion for a new trial premised on the courtroom closure and ineffective assistance of counsel. *See id.* at 1906. After the trial court denied the motion, Weaver appealed to the Supreme Judicial Court of Massachusetts, and then to the U.S. Supreme Court. *See id.* at 1907.

1. Weaver suggested that the type of structural error informs the prejudice inquiry

Before *Weaver*, courts were split on the question of how to assess prejudice when the error missed by trial counsel was structural: some held that prejudice should be presumed in this context, while others required petitioners to demonstrate a reasonable probability that the structural error affected the verdict. *Id.* at 1907. Rather than selecting one of these two approaches, this Court adopted an error-by-error approach to deciding whether a particular structural error is presumptively prejudicial in post-conviction proceedings. When deciding what type of prejudice must be shown, this Court examined the reasons why the error is structural because "the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffective-assistance claim premised on the failure to object to that error." *Id.* at 1907.

This Court identified three categories of structural error. Errors are structural if they fall into one (or all) of three categories. The first category includes errors which are "not designed to protect the defendant from erroneous conviction but instead protect[] some other interest," like the right to self-representation. *Id.* at 1908. The second category includes errors the effects of which "are simply too hard to measure," like the right to counsel of choice. *Id.* The third group includes errors that "always

result[] in fundamental unfairness," like the right to counsel. *Id.* This third 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. *Id.* at 1911.

This Court acknowledged that the chance of acquittal is not the only focus of prejudice analysis in post-conviction proceedings. "[T]he concept of prejudice is defined in different ways depending on the context in which it appears." *Id.* at 1911. For example, this Court has rejected the contention that "the sole purpose of the Sixth Amendment is to protect the right to a fair trial." *Lafler v. Cooper*, 566 U.S. 156, 164–65 (2012). Instead, the prejudice question focuses on "whether the trial cured the particular error at issue." *Id.* That is why, when an attorney error results in the rejection of a plea offer, the prejudice inquiry turns on whether the defendant and court would have accepted the plea offer absent the attorney's incorrect advice. *See id.* at 170–72.

This tailored approach explains why some proceedings must begin anew when the error involves the exclusion of African-Americans and women from a grand jury. *Id.* at 165–66 (discussing *Vasquez v. Hillery*, 474 U.S. 254 (1986), and *Ballard v. United States*, 329 U.S. 187, 195 (1946)). When the structural error occurs in the context of a grand jury proceeding, the remedy must be dismissal of the indictment because the grand jury proceeding—not the trial—was fundamentally unfair. *Id.* As these cases illustrate, and as this Court explained in *Weaver*, there remain "certain errors [which] 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.

2. Weaver suggests that sometimes the defendant's interest in a fundamentally fair trial outweighs the state's interest in finality

In *Weaver*, this Court acknowledged that finality is not always so weighty as to outweigh concern about a fundamentally unfair trial. Indeed, this Court explained there are "certain errors [that] 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": failure to give a reasonable doubt instruction, biased judge, and the exclusion of grand jurors on the basis of race. 137 S. Ct. at 1911.

Two cases—one before and one after *Weaver*—illustrate that some structural errors are presumptively prejudicial even in post-conviction proceedings. In *Hillery*, a state prisoner filed a habeas petition alleging discrimination in the selection of grand jurors. 474 U.S. at 256. This Court held that reversal was required even though a petit jury had found him guilty. *Id.* at 264. It did so over the objection of Justice O'Connor, who argued that considerations of federalism and finality weighed against intervention when the state courts had an opportunity to consider and reject the challenged discrimination. *Id.* at 267 (O'Connor, J., concurring). And this Court expressly rejected the dissenters' proposed rule that courts should not grant habeas corpus relief unless the state can obtain a second conviction and reversal would deter official conduct. *See id.* at 277–82 (Powell, J., dissenting). One of *Hillery*'s core

teachings is that, when a structural error renders a trial fundamentally unfair, interests of comity, federalism, and finality must cede.

Since *Weaver*, this Court has put into practice *Weaver*'s approach to assessing prejudice. In *McCoy v. Louisiana*, 138 S. Ct. 1500, 1507, 1509 (2018), this Court held that prejudice must be presumed when an attorney concedes guilt over the defendant's objection. The case arrived at the Supreme Court after the defendant filed a post-conviction motion for a new trial. *Id.* at 1507. Yet, this Court held that the defendant did not need to show that the error affected the outcome at trial. *Id.* at 1511. Relying on *Weaver*, the Court identified the three categories of structural error, including, "where the error will inevitably signal fundamental unfairness." *Id.* (citing *Weaver*, 137 S. Ct. at 1908). Prejudice had to be presumed because the Sixth Amendment right was structural "[u]nder *at least* the first two rationales." *Id.* (emphasis added). *Weaver* and *McCoy* thus suggest that courts must take an error-by-error approach to prejudice in post-conviction proceedings.

C. After *Weaver*, Courts Have Taken Divergent Approaches to Prejudice in Post-Conviction Proceedings When the Error is Structural

After *Weaver*, various federal and state courts have interpreted differently this Court's teachings about how to assess prejudice in post-conviction proceedings when a structural error has not been preserved. Courts analyze the two types of prejudice in federal habeas proceedings, state post-conviction proceedings, and when analyzing *Strickland* claims. Providing an answer to the question presented will therefore assist courts in a variety of contexts. Many courts read *Weaver* as acknowledging that

prejudice can be shown in one of two ways—prejudice to the outcome at trial or prejudice to the fundamental fairness of the proceedings. Others, like the Sixth Circuit, do not ask whether the structural error always results in a fundamentally unfair trial. The confusion will not end without this Court's guidance.

1. Courts often confront how to analyze prejudice when an unpreserved error is structural

Federal courts apply a cause-and-prejudice standard in federal habeas proceedings when a petitioner has procedurally defaulted a constitutional claim. *Bousley v. United States*, 523 U.S. 614, 622 (1998) (citing *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)). Habeas petitioners seeking relief in federal court must therefore prove prejudice before a district court may review their defaulted constitutional claims. *See id.* (requiring proof of cause and prejudice when a federal prisoner filed a motion for relief under 28 U.S.C. § 2255); *see also Sykes*, 433 U.S. at 87 (requiring proof of cause and prejudice for a state prisoner to obtain federal review under 28 U.S.C. § 2254).

Petitioners in state post-conviction proceedings are similarly required to prove cause and prejudice before defaulted claims may be considered. *See, e.g.*, *People v. Jackson*, 633 N.W.2d 825, 829–30 (Mich. 2001) (requiring "good cause" and "actual prejudice" for post-conviction relief under MCR 6.508(D)); *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999) (requiring "sufficient reason or cause" and "actual prejudice" for post-conviction relief); *Turpin v. Todd*, 493 S.E.2d 900, 905 (Ga. 1997) (requiring "adequate cause" and "actual prejudice" for post-conviction relief under O.C.G.A. § 9-14- 48(d)).

The same cause-and-prejudice standard applies in the context of Federal Rule of Criminal Procedure 12, which requires parties to file pretrial motions addressing certain defects, some of which may be structural errors. *See United States v. Resendiz-Ponce*, 549 U.S. 102, 116–17 (2007) (Scalia, J., dissenting) (contending that defects in an indictment are structural errors even though the majority declined to address the question); *United States v. Du Bo*, 186 F.3d 1177, 1179–80 (9th Cir. 1999) (holding that the failure to allege an element or critical facts in an indictment requires automatic reversal of a conviction). Defendants who fail to file motions before the deadline must establish "good cause" before a district court may consider a late motion. Fed. R. Crim. P. 12(c)(3). The good-cause standard requires the tardy movant to show cause and prejudice. *See Davis v. United States*, 411 U.S. 233, 243–45 (1973); *United States v. Edmond*, 815 F.3d 1032, 1044 (6th Cir. 2016).

The prejudice analysis required to obtain review of a procedurally defaulted claim or an untimely Rule 12 motion is similar, if not identical, to the prejudice inquiry for demonstrating ineffective assistance of counsel. The *Strickland* standard evolved directly from the procedural default doctrine governing habeas corpus review. As this 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 . . . ." 466 U.S. at 697. 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.*

The prejudice requirements of *Strickland* and the procedural-default doctrine 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). And so, it should come as no surprise that these doctrines evolved so closely, given that attorney ineffectiveness is cause to excuse a procedural default, *Murray*, 477 U.S. at 488—and likely the most common cause.

By granting the petition and resolving the question presented, this Court can clarify how to show prejudice in various contexts.

2. The Sixth Circuit requires petitioners in post-conviction proceedings to show that the error affected the outcome of the trial regardless of the structural error

Before *Weaver*, the Sixth Circuit held that a habeas "petitioner must show that he was actually prejudiced regardless of the nature of the underlying constitutional claim." *Ambrose I*, 684 F.3d at 651. This was the case even though the fair cross-section claim at issue was both structural and meritorious. *Garcia-Dorantes*, 801 F.3d at 603 (holding that the exclusion of Black and Latino jurors in Kent County violated the fair cross-section requirement of the Sixth Amendment). Since then, it has required habeas petitioners to show that the trial outcome would have been different

had the court not violated the petitioner's right to represent himself. *Jones v. Bell*, 801 F.3d 556, 564 (6th Cir. 2015).

Since *Weaver*, the Sixth Circuit expanded that holding to public-trial claims where the courtroom was closed to the public during the guilt phase. *Williams*, 949 F.3d at 978 (6th Cir. 2020), *cert. denied,* No. 19-8388, 2020 WL 5882505 (U.S. Oct. 5, 2020) (alterations in original). Although the *Williams* Court went on to say that the temporary closure did not "lead to basic unfairness . . . in the way other structural errors have been deemed to do, for instance, where a judge is improperly biased, or where jurors are excluded on the basis of race." *Id.* But the court did not offer an explanation for that conclusion. *See id.* And the panel below did not address *Williams* at all. (*See* A-2, APP_011–12)

At least two district courts have followed the Sixth Circuit's direction by requiring outcome-based prejudice without considering whether the structural error renders trials fundamentally unfair. In *United States v. Asmer*, No. 3:16-423-CMC, 2020 WL 6827829, at *10 (D.S.C. Nov. 20, 2020), the district court held that a petition in post-conviction proceedings must show that the trial court and counsel's failure to inform him of the element of the offense caused actual prejudice at his guilty plea despite the Fourth Circuit's conclusion that the error is structural and satisfies the third and fourth prongs of plain-error review. And in *Yannai v. United States*, 346 F. Supp. 3d 336, 346–47 (E.D.N.Y. 2018), the district court found that the right to testify is a fundamental right, but still required the habeas petitioner to show that the

deprivation of that right affected the outcome of the trial to satisfy the prejudice prong of *Strickland*.

3. Since *Weaver*, most federal courts look at the type of structural error at issue, whereas the Sixth Circuit requires showing prejudice to the outcome of trial regardless of the type of error

The federal courts are confused as to whether there are two types of prejudice to consider in post-conviction proceedings.

Most federal courts understand *Weaver* to require consideration of two types of prejudice—the effect of the error on the outcome of trial and whether the error renders a trial fundamentally unfair. For example, 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).

Similarly, in the Eastern District of New York a district court considered whether a habeas petitioner was prejudiced by his counsel's failure to inform the

court that both of the defendant's hearing aids were broken. *Pierotti v. Harris*, 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, concluding that the defendant's inability to hear functionally rendered him absent from the proceedings and unable to communicate with his counsel, see *id.* at *8–10. For that reason, the court found that the error rendered the proceeding fundamentally unfair and accordingly never addressed whether the outcome of the trial would have been different. *See id.*

Taking a similar approach to prejudice, a district court in the District of Colorado consulted *Weaver* and considered whether the structural error was the type that always rendered a trial fundamentally unfair. *See Meadows v. Lind*, No. 16-CV-02604-RBJ, 2019 WL 3802110, at *9–10 (D. Colo. Aug. 13, 2019). Specifically, the court asked whether "the dismissal of the hard-of-hearing . . . without pausing the proceedings to obtain assistive hearing devices resulted in a trial that was fundamentally unfair." *Id.* at *10.

In addition to these district courts, the D.C. Circuit Court of Appeals has looked at both types of prejudice—outcome prejudice 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. Significant to the court's analysis was the fact 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, and therefore the trial was not fundamentally unfair. *See id.*

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

Some district courts have acknowledged the confusion. *Garcia v. Davis*, No. 7:16-CV-632, 2018 WL 5921018 (S.D. Tex. Nov. 9, 2018), highlights the lack of clarity. 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?"[1] *Id.* at *17.

The confusion created by *Weaver* was also on display in *Shields v. Smith*, No. 18-CV-00750-JD, 2020 WL 6929097, at *9–13 (E.D. Pa. Oct. 5, 2020), *report and recommendation adopted sub nom.*, *Shields v. Smith*, No. CV 18-750, 2020 WL 6888466 (E.D. Pa. Nov. 24, 2020), where the petitioner alleged his attorney was ineffective for failing to object to an erroneous reasonable-doubt instruction, which was one of the errors this Court specifically identified as rendering a trial fundamentally unfair. *Weaver*, 137 S. Ct. at 1911. In *Shields*, however, the magistrate judge "decline[d] to find . . . that the opinion in *Weaver*, carved out an exception for certain categories of ineffective assistance claims, and reaffirmed rather than supplanted the rule in *Sullivan* when it comes to an error involving an instruction on reasonable doubt." 2020 WL 6929097, at *11 (quotation marks, alterations, and citation omitted). Ultimately, the district court struggled to figure out whether to presume prejudice because "an underlying *Sullivan* claim presents a more forceful argument for dispensing with a finding of prejudice on collateral review of an ineffective assistance of counsel claim than did the underlying public-trial claim in *Weaver*." *Id.* at *13. In the end, the court sidestepped this "difficult issue." *Id.*

The confusion in the federal courts about how to assess whether a structural error prejudiced a petitioner in post-conviction proceedings will persist without this

[1] On appeal, the Fifth Circuit did not address prejudice because it found no cause to excuse the procedural default. *Garcia v. Lumpkin*, 824 F. App'x 252, 257 (5th Cir. 2020).

Court's intervention. Few courts understand if the list of structural errors undermining the fundamental fairness of a trial is exclusive. And few courts know what the criteria to apply to decide if a structural error belongs on that list.

4. Since *Weaver*, state courts have considered two types of prejudice in post-conviction proceedings when the structural error is unpreserved

State courts have also started considering two types of prejudice in post-conviction proceedings. Most courts understand *Weaver* as holding that a petitioner can show prejudice by demonstrating that the error rendered the trial fundamentally unfair.

Indeed, there is a split between the Sixth Circuit and the Supreme Court of Arkansas as to whether a defendant must show that the outcome of his trial would have been different absent the fair cross-section violation. In *Reams v. State*, 560 S.W.3d 441 (Ark. 2018), the court "clarif[ied] that the prejudice prong of *Strickland* is demonstrated through the existence of a fair-cross-section violation." *Id.* at 455. Before reaching that conclusion, the court reviewed *Weaver*. *See id.* at 454. The Arkansas Supreme Court interpreted this Court's explanation in *Weaver* to mean that to prevail on an ineffective-assistance-of-counsel claim involving a structural error "a defendant must demonstrate either a reasonable probability of a different outcome in his or her case or that the structural error was so serious as to render his or her trial fundamentally unfair." *Id.* at 454. Because the court concluded that a "fair-cross-section claim is analogous to the structural error of excluding African Americans from

grand juries[,] . . . a fair-cross-section violation necessarily renders one's trial fundamentally unfair." *Id.* at 455.

Other state courts have read *Weaver* to allow defendants raising ineffective-assistance-of-counsel claims to show prejudice by demonstrating that the error made the trial fundamentally unfair. The Illinois Court of Appeals held that *Strickland* prejudice could be established by either a probability of a different outcome or fundamental unfairness, applying "factors used in *Weaver*." *People v. Henderson*, 2018 IL App (1st) 160237-U, ¶ 41 (2018). The Texas Court of Appeals also considered whether the counsel's failure to object to the partial closure of the courtroom during voir dire rendered the trial fundamentally unfair. *See Monreal v. State*, 546 S.W.3d 718, 728 (Tex. App. 2018). And the Supreme Court of Pennsylvania addressed the two approaches to analyzing prejudice when trial counsel failed to object to a structural error. *See Commonwealth v. Pou*, 2018 WL 4925254, at *7 (Pa. 2018). Other examples abound. *See, e.g.*, *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.")); *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.").

In a post-conviction proceeding involving an unpreserved structural error, states consider whether the structural error always renders a trial fundamentally unfair. The Supreme Court of Kentucky held that 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) In light of *Weaver*, even though the claim was unpreserved, the court presumed the impartial-jury violation was prejudicial per se because the presence of the biased juror undermined the fundamental fairness of the sentencing hearing. *See id.*

State supreme court justices have been debating how to assess prejudice in post-conviction proceedings. Justices on the Massachusetts Supreme Judicial Court have disagreed about *Weaver*'s impact on how courts should analyze prejudice in post-conviction proceedings. In a case involving a claim that the defendant's right to counsel of choice had been denied, the majority addressed whether the denial of the defendant's counsel of choice affected the outcome or resulted in a fundamentally unfair trial. *Commonwealth v. Francis*, 147 N.E.3d 491, 511 (Mass. 2020) (majority). Although the majority mentioned fundamental fairness, it did provide a robust explanation as to why the error did not result in a fundamentally unfair trial. *See id.* Dissenting in part, Justice Lenk argued that the majority's focus on the outcome of the trial "stops short of assessing the full impact of the violation of the right to counsel on the fundamental fairness of the defendant's trial." *Commonwealth v. Francis*, 147 N.E.3d 491, 525 (2020) (Lenk, J., concurring in part and dissenting in part). She argued that "[t]o strike the proper balance that *Weaver* and our own decisions require, our analysis of waived claims of structural error must take into account not only the impact that the error had on the outcome of the trial, but also its impact on the administration of justice itself." *Id.* at 526. In addition, the justices of the Supreme

Court of Connecticut have expressly disagreed with the Sixth Circuit'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). Two justices believed prejudice must be presumed for a defaulted denial-of-counsel claim 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.

This is a sampling of state courts relying on *Weaver* to decide whether a defaulted structural error warrants relief in post-conviction proceedings. They reveal disagreement and confusion about how to assess prejudice when the defaulted error is structural. This Court should grant certiorari and provide additional guidance to federal and state courts.

CONCLUSION

The petition for certiorari should be granted.

December 21, 2020

Respectfully submitted,

s/Colleen P. Fitzharris
s/James Gerometta
FEDERAL COMMUNITY DEFENDER
613 Abbott St., 5th Floor
Detroit, Michigan 48226
Telephone No. (313) 967-5542