No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FRANK D. LAZZERINI,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

J. MICHAEL MURRAY
Counsel of Record
WILLIAM C. LIVINGSTON
BERKMAN, GORDON, MURRAY
& DEVAN
55 Public Square, Suite 2200
Cleveland, Ohio 44113
(216) 781-5245
jmmurray@bgmdlaw.com

Counsel for Petitioner

QUESTIONS PRESENTED

Over objection that it violated his constitutional right to be present at all critical stages of his trial on two hundred seventy-two felony charges, arising out of his prescribing opioids and other controlled substances to patients in his medical practice, Petitioner was excluded from individual *voir dire* of fifty-three prospective jurors on sensitive topics, conducted in the jury room, spanning parts of two days. Some courts have held it to be structural error requiring automatic reversal to exclude the accused from significant portions of *voir dire* proceedings. Many other courts have held it to be a constitutional violation that is subject to the harmless error standard, but those courts do not agree on how to make that calculation in this context. The court below held it was not structural error and, though error, it was harmless. This case, therefore, presents the following questions:

I. Is the exclusion of a criminal defendant from individual *voir dire* proceedings, in violation of his constitutional right to be present at all critical stages of his trial, a structural error which requires automatic reversal?

II. If the exclusion of a criminal defendant from individual *voir dire* proceedings is not a structural error, how should the harmless error standard be applied in this context and was the error harmless in this case?

PROCEEDINGS BELOW

On September 28, 2021, the Ohio Supreme Court, in *State of Ohio v. Frank D. Lazzerini*, Case No. 2021-0918, declined to accept jurisdiction of the appeal pursuant to Ohio Supreme Court Rule 7.08(B)(4)(a), constituting a determination that the appeal did not involve a substantial constitutional question and should be dismissed. App. at 1-2. On December 22, 2021, the Ohio Supreme Court denied reconsideration of that decision. App. at 3-4.

On June 11, 2021, the Court of Appeals for Stark County, Ohio, Fifth Appellate District in *State of Ohio v. Frank D. Lazzerini*, No. 2019CA000142, 173 N.E. 3d 907 (Ohio Ct. App. 5th Dist. 2021) issued its judgment entry and opinion affirming Petitioner's convictions and sentence. App at 6-105.

On August 22, 2019 the Stark County, Ohio, Court of Common Pleas issued its Judgment Entry of Conviction and Sentence in *State of Ohio v. Frank D. Lazzerini*, Stark County Court of Common Pleas Case No. 2018CR00282. App at 106-151.

On May 2, 2018, the Court of Appeals for Stark County, Ohio, Fifth Appellate District issued a judgment entry and opinion dismissing Petitioner's writ of *habeas corpus* alleging unlawful detention due to excessive bail in *Lazzerini v. Maier*, No. 2018 CA 00025, 111 N.E.3d 727 (5th 2018). Pursuant to Supreme Court Rule 14(1)(b)(iii), *Lazzerini v. Maier* is directly related to this matter as it arises from the same trial court case. That opinion is not included in the appendix as it is not relevant to the judgment sought to be reviewed.

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PETITION FOR A WRIT OF CERTIORARI

Frank D. Lazzerini, Petitioner, petitions for a Writ of Certiorari to review the judgment of the Ohio Supreme Court.

CITATIONS OF OPINIONS AND ORDERS BELOW

State v. Lazzerini, 173 N.E.3d 907, 2021-Ohio-1998 (Ohio Ct. App. 5th Dist. 2021) *appeal not allowed*, 164 Ohio St.3d 1448, 173 N.E.3d 1247 (2021), *reconsideration denied* 165 Ohio St.3d 1490, 178 N.E.3d 513 (2021).

JURISDICTION

The judgment entry and case announcement of the Ohio Supreme Court declining to accept jurisdiction and dismissing Petitioner's appeal was entered on September 28, 2021. App at 1-2. The Ohio Supreme Court's judgment and case announcement denying petitioner's motion for reconsideration was entered on December 22, 2021. App at 3-4. This Court has jurisdiction pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Sixth and Fourteenth Amendments to the United States Constitution are reprinted in the Appendix at 152-153.

The sections of the Ohio Revised Code involved in this case are as follows: R.C. 2923.32(A)(1) (Engaging in a Pattern of Corrupt Activity); R.C. 2913.05(A) (Telecommunications Fraud); R.C.

2913.02(A)(1)(2)(3) (Grand Theft); R.C. 2913.40(B) (Medicaid Fraud); R.C. 2913.42(A)(1)(2)(B)(4) (Tampering with Records); R.C. 2925.03(A)(1)(C)(1)(f) and R.C. 2941.1419 (Aggravated Trafficking in Drugs with Major Drug Offender Specifications); R.C. 2925.03(A)(1)(C)(1)(a) (Aggravated Trafficking in Drugs); R.C. 2925.03(A)(1)(C)(1)(c) (Aggravated Trafficking in Drugs); R.C. 2925.03(A)(1)(C)(1)(d) (Aggravated Trafficking in Drugs); R.C. 2925.03(A)(1)(C)(1)(e) (Aggravated Trafficking in Drugs); R.C. 2925.03(A)(1)(C)(2)(a) (Trafficking in Drugs); R.C. 2925.03(A)(1)(C)(2)(c) (Trafficking in Drugs); R.C. 2925.03(A)(1)(C)(2)(d) (Trafficking in Drugs); R.C. 2925.03(A)(1)(C)(2)(e) (Trafficking in Drugs); R.C. 2925.03(B)(1) (Exemption from Drug Trafficking for Licensed Health Care Professionals); R.C. 2925.23(A),(B)(1)(f)(1) (Illegal Processing of Drug Documents); R.C. 2925.23(A),(B)(1)(f)(2) (Illegal Processing of Drug Documents); and, R.C. 2903.04(A) (Involuntary Manslaughter). The pertinent text of those statutes are reprinted in the Appendix at 155-173.

STATEMENT OF THE CASE

Petitioner, a licensed physician board certified in family medicine, was found guilty by a jury on 187 counts of a 272 count indictment returned after a two year investigation of prescription drugs he wrote for patients in his medical practice. Eight counts were dismissed prior to the trial. Petitioner was sentenced to 113 years in prison.

The charges were all predicated on the allegation that he dispensed prescriptions for opioids and other controlled substances, to patients without a

legitimate medical purpose and inconsistent with the usual course of medical practice and treatment of patients.

The charges on which Petitioner was tried can be grouped into three categories, which were strung together by a single charge of engaging in a pattern of corrupt activities as set forth in Count 1 of the Indictment.

The first category consisted of charges related to Medicaid Fraud. The State's theory was that Petitioner had fraudulently overbilled the Medicaid program by submitting bills that had been "upcoded" for his services, resulting in higher reimbursement than he was entitled to receive. The Medicaid fraud claims were contained in Count 2 (Telecommunications Fraud), Count 3 (Grand Theft), Count 4 (Medicaid Fraud), and Count 5 (Tampering With Records).

The second category of charges related to drug trafficking which comprised 258 counts of the indictment. After the seizure of thousands of patients' medical records during the execution of a search warrant, the State sent approximately fifty patient files to a medical expert, Dr. Theodore Parran, to review. Tr. Vol. VIII at p. 155. He concluded that in connection with forty-five of those patients, Petitioner illegally trafficked in controlled substances by writing prescriptions for them without a legitimate medical purpose and inconsistent with the usual course of medical practice and treatment of patients. The specific charges consisted of 86 counts of aggravated trafficking in drugs, 86 counts of trafficking in drugs and 86 counts of illegal processing of drug documents.

Finally, one count charged Petitioner with involuntary manslaughter. That charge, set forth in Count 162, alleged that one of Petitioner's patients, who he had recently dismissed from his practice for noncompliance with her prescription regimen, died of an overdose with prescription drugs written by Petitioner in her system.

Jury selection began on May 6, 2018. Due to the complex nature of the case, the substantial pretrial publicity that it had generated, the publicity about the opioid epidemic then constantly in the news, and the anticipated length of the trial, 139 jurors were summoned and 122 appeared. When they arrived on the morning of trial, each juror was given a 12 page questionnaire to complete. Among other questions, jurors were asked to provide information regarding their attitudes about the prescribing of opiates, whether they knew anyone who used prescribed opiates, whether they knew anyone who was addicted to opiates, whether they knew anyone who had died as a result of opiates, and whether they had read or heard about the case.

After the parties were given time to review the questionnaires, the trial court conducted a brief general *voir dire* of the entire jury panel. The court began by outlining the charges and stated that Petitioner was accused of prescribing opioids to his patients without a legitimate medical purpose and that he caused the death of one of his patients. Tr. Vol I at 85. In response, various jurors expressed general concerns over the opioid problem and their belief that doctors are overprescribing opioid medications. Tr. Vol I at 99.

The Court then explained that, given the nature of the case, individual *voir dire* of those jurors would be conducted in the jury deliberation room:

> I understand that this case involves some sensitive issues, it involves some sensitive feelings, and I don't want – really want to put anybody on the spot, making you have to talk about it in front of a roomful of strangers.
>
> So what we are going to do is the attorneys and myself, along with [the court reporter], are going to go back in this room back here, which is the jury deliberating room. We're going to call you back one by one, for those of you who have an answer that we'd like to explore a little bit further, and just ask you some questions.
>
> It's not like being called into the principal's office, you're not in any trouble. Actually, we appreciate the fact that you have explained that to us. I do want to say, though, that this will take some time and we will need to go through this. You are free to stand and stretch, talk to your neighbor, talk about the Indians, whatever you want to talk about, make a new friend. Again, you will be permitted to leave the courtroom to use the restroom on this floor, if you need to. Just I do ask for your patience. I understand that this is a little bit

> frustrating and it is long, but it is necessary. Okay.

Tr. Vol. I at 100-01.

Before individual *voir dire* proceedings began in the jury deliberation room, the court informed counsel that Petitioner would be excluded from those proceedings. Petitioner's counsel immediately objected on grounds that Dr. Lazzerini had a right to be present during individual *voir dire* because it was a critical stage in the proceedings. App at 178-179 The court overruled the objection for no other reason than its characterization of individual *voir dire* proceedings as being "no different" from a sidebar conference. App at 179-180.

The Judge, bailiff, court reporter, three prosecutors, and Petitioner's two attorneys were present in the jury deliberation room while jurors were called in one by one for questioning. Petitioner, who since his arrest had been in custody due to his inability to post the $5,000,000 cash or surety bond that had been set, was left seated in the courtroom under the watchful eyes of the courtroom bailiffs and in the presence of the other jurors who chose to remain.

On this first day, thirty-six jurors were questioned individually over the course of two-and-a-half hours. The individual questioning of the jurors delved into numerous substantive areas but often centered on issues surrounding pretrial publicity, knowledge of witnesses, potential biases, predispositions, hardships, and opiate abuse. The following examples are illustrative.

Juror Number 385 disclosed that some of the pharmacy technicians that were named as witnesses in the case were patients of the dental office in which she worked. Tr. Vol I at 112-113. Juror Number 385 returned to the general pool and was ultimately seated as a juror in the trial.

Juror Number 403 was summoned into the jury deliberation room for individual questioning after responding in her questionnaire that she learned about the case in the newspapers and that she thought that opiates may be overprescribed based on what she had seen in the media. Upon questioning, she explained that while she thought it was not polite to form an opinion based on something you read in the newspapers, she thought that the story about the allegations against Petitioner did not sound good. Juror Number 403 returned to the general pool and was ultimately seated as a juror in the trial. Tr. Vol. I at 125-129.

Juror Number 409 disclosed that his wife started to take pain killers after surgery and that his grandson went to prison for addiction after he conned his doctor into giving him prescriptions. Tr. Vol. I at 134-136. When defense counsel asked whether his knowledge of his grandson's experience would affect his ability to be impartial, he responded that he highly doubted that it would because "people are going to lie to get what they want." Tr. Vol. I at 138. Juror Number 409 returned to the general pool and was ultimately seated as a juror in the trial.

Juror Number 445 raised concern about knowing a potential witness from years ago. Tr. Vol. I at 162-

163. Juror Number 464 stated during individual questioning that his father-in-law takes opiates for chronic pain and that he had previously served on a grand jury for three months and was familiar with the prosecutor. Tr. Vol. I. at 178-183. Both Jurors returned to the general pool and were ultimately seated as jurors in the trial.

Juror Number 471 explained that he had heard about the case in the newspaper and his mother takes opiates in her nursing home to deal with the pain associated with neck surgery. Tr. Vol. I. at 183-187. Juror Number 541 discussed the fact that he was unsure of whether he would get paid by his employer but still expressed a strong willingness to serve for the experience. Tr. Vol I. at 258-260. Both Jurors returned to the general pool and were ultimately seated as jurors in the trial.

Juror Number 437 was a nurse for over thirty years. In that role, she explained that she had seen first-hand people become addicted to pain medication and she had problems with doctors violating their Hippocratic oath. She also stated that her brother died of a drug overdose but, although she had no proof, she suspected that foul play was involved and that someone had managed to overdose him. Defense counsel also questioned her about her role in dispensing medication and she discussed the fact that if she makes one mistake she can lose her license because the controls are so tight. Tr. Vol I at 153-157. She concluded the questioning by stating that this would be a very hard case for her but that she wanted "to do the right thing really." Tr. Vol I at 158. She was removed for cause on motion of the defense. *Id.*

Juror Number 519 had stated on her questionnaire that she had family members who took opioids for pain management. Upon individual questioning, she stated that she could see potential bias "on either side of the case" because she was familiar with the fact that doctors have a very difficult job in treating people with chronic pain and yet there are cases of opioid abuse where patients became addicted to the medication and died. Tr. Vol. I at 200-203. Defense counsel asked her "who do you think is to blame for the problem with opiates?" She responded:

> Again, I think most cases it comes down to the individual that is taking it, you know. I think sometimes the doctor is trying to do what's in the best interest but every case is different, but I think sometimes in the hands of people that are in pain or desperate, they can misuse those to try help get out of the pain, I guess is the best I can say.

Tr. Vol I at 204-05.

She further stated that her son had a chronic condition and that it would be difficult to be away from him but it would not be impossible and would only be somewhat of a distraction if she were seated. Tr. Vol I at 207-08. Juror Number 519 was then removed for cause on defense counsel's motion. *Id.*

Juror Number 525 was also individually questioned after disclosing that she had read an article about the case on Facebook as well as some general information about opioid addiction. Defense counsel asked who she thought was to blame for the opioid

problem. She responded, "The people themselves – I don't blame the doctor because I had heart surgery and I refused to take what I didn't need. I would take Tylenol before I would take a strong pain pill. So I believe the people themselves are getting addicted to it too easily." Tr. Vol. I at 239. Defense counsel proceeded to ask if she had to vote right now whether the defendant was guilty or innocent she would say guilty based on what she read and then the defense moved to remove her for cause. Tr. Vol. I at 240. The court denied the motion and she returned to the jury pool. *Id.*

Juror Number 523 brought up during individual questioning that he was a high school teacher and saw first-hand that prescription pills are a problem. He indicated he was bothered by the sheer number of counts in the case because "my kids are getting this from somewhere." Tr. Vol. I at 216-217. The judge denied the defense's motion to remove Juror Number 523 for cause. Tr. Vol. I at 222. Juror Number 540 echoed Juror Number 523's concern over the number of counts involved in the case and felt that with that many charges the Petitioner's "guilty of something." Tr. Vol. I at 256. Juror Number 540 was removed for cause. Tr. Vol. I at 258.

Juror Number 525 stated during her individual questioning that she read about the case in the news and that she "knew [Petitioner] was giving out too many drugs." Tr. Vol I at 236. She thought overprescribing of prescription medications was a significant problem in the community. Tr. Vol I at 239. When asked whether she had any preconceived notions about whether the Petitioner's committed the crimes for which he had been charged, she stated that she

would try and keep an open mind throughout the trial but right now she would say he's guilty. Tr. Vol. I. at 240. The judge denied the defense's motion to remove her for cause. Tr. Vol I at 241.

The next morning, prior to the resumption of the individual *voir dire* questioning, defense counsel moved for a mistrial. App. at 181-192. Counsel cited case law for the proposition that a criminal defendant has a constitutional right to be present during this critical stage of the case and then identified several reasons why Petitioner's absence was prejudicial. First, some of the individuals questioned knew some of the witnesses who were going to testify at trial, including witnesses Dr. Lazzerini knew well, and it was important for him to hear firsthand the potential jurors' perceptions of those witnesses. App. at 186-188. Second, several prospective jurors had family members or friends who struggled with opiate addiction, and it was important for Dr. Lazzerini to hear their opinions about prescribing opioids. App. at 188-189. Third, some of the prospective jurors had experience in the medical field and described how they were affected by the rules, regulations, and protocols, regarding prescriptive opiate practices. Counsel further noted that as a physician, Dr. Lazzerini possessed specific knowledge, training and experience that could have significantly contributed to his counsel's ability to inquire into jurors who had experience with opioids as well as with those who had backgrounds in medicine. App. at 189-190. Fourth, Dr. Lazzerini's seclusion from the process sent a prejudicial message to the jurors in the courtroom present with him that he could not be trusted hearing what the jurors had to say and that he was not actively participating in his defense. App. at 191-192.

In response, the State argued that the defense had requested that the individual proceedings be conducted in the jury room and thus Petitioner invited any error. It contended that had the proceedings not been conducted in the jury room, they would have been conducted at the side-bar of the court and the defendant still would not have been permitted to participate. App. at 192-193.

Defense counsel responded that it was always their expectation that the defendant would be permitted to be present during individual juror questioning and they had immediately objected upon learning that he would be excluded. App. at 195-196. The State's argument that the defendant would not have been permitted to be present had the questioning occurred at side bar was based on the false premise that a defendant's right to be present during *voir dire* depends upon *where* the questioning is conducted.

Finally, defense counsel noted that the opportunity for Dr. Lazzerini to observe the demeanor of jurors and hearing their precise answers during individual questioning was lost forever and no amount of questioning during the general *voir dire* could recreate what happened in his absence. App. at 198-200.

Nevertheless, the trial court denied the motion for mistrial. App. at 206. Counsel then requested that moving forward with the remaining individual *voir dire*, Petitioner be permitted to be present and participate with his counsel. The trial court denied that request as well. *Id.*

An additional seventeen jurors were examined

individually on day two. The nature of the questioning was similar to what had occurred on day one. While the court and counsel questioned potential jurors, Petitioner sat alone at the defense table in the courtroom in front of the rest of the jury pool.

In total, the record reveals that fifty-three potential jurors were called into the jury room and questioned outside of Dr. Lazzerini's presence for nearly four hours, over a two-day period. The transcript from those proceedings constitutes 226 pages of the record. (Tr. Vol. 1 pages 105-260; Tr. Vol. II pages 32-103).

Thereafter, the court and the parties conducted a general *voir dire* in open court in the presence of Dr. Lazzerini. The court explained to the jury "we are going to now move along a little bit more quickly." Tr. Vol. II at 121. Indeed, the general *voir dire* conducted after the individual *voir dire* took approximately three hours to complete before the jury was sworn-in and covered 161 pages of transcript (Tr. Vol. II at 121-282). The general voir dire that took place on day one before the individual *voir dire* proceedings constituted 46 pages of transcript (Tr. Vol. I. at 54-100).

Of the fifty-three jurors who were questioned outside of Petitioner's presence, six were selected as jurors and two more were selected as alternates. One of those alternates eventually took the seat of a juror who had also been questioned individually and needed to be excused. Thus, eight jurors who were questioned outside of Petitioner's presence were empaneled and six of those jurors decided his case. One of those jurors was the foreperson.

The evidentiary portion of the trial commenced on May 9, 2019 and the case was submitted to the jury on June 16, 2019. The central theme advanced by the prosecution was that Petitioner was running a "pill mill" out of his medical office. The State produced 38 witnesses, including its experts, and thousands of pages of records. The State's expert witnesses opined that Petitioner often did not have a legitimate medical purpose for writing prescription drugs to his patients and did so in a manner inconsistent with the usual course of practice, that he was engaging in fraudulent billing and that drugs that he had prescribed one of his patients were the but-for cause of her death. The defense presented 14 witnesses, including 11 former patients, 6 of whom the state claimed were not properly treated and were over prescribed medication by Petitioner. Those patients insisted that Petitioner was a kind and effective physician and all had appointments at his office and were examined by Petitioner. Petitioner also presented expert witnesses of his own. Dr. Adam Carinci, a pain management specialist, reviewed the same records that were sent to the State's expert, Dr. Parran, and concluded that all of the prescriptions written by Petitioner could be justified as meeting the legal standard. Petitioner also presented the expert testimony of Dr. Carvey, an expert in pharmacology, who disputed the claim that Petitioner's patient had died of a foreseeable overdose caused by his prescriptive practices.

Of the 264 charges that went to the jury, Petitioner was found guilty of 187 counts and not guilty of 76 counts. App at 12-13, 67. One count was ultimately dismissed by the state after the verdict. The jury also found for the State as to forfeiture specifications contained in the indictment. App. at 14.

On July 12, 2019, the trial court sentenced Petitioner to an aggregate term of 113 years in prison. App at 146. The aggregate sentence was a result of the trial court ordering that many of the individual sentences be served consecutively.

On appeal, the Petitioner raised seven assignments of error. The first assignment of error set forth that excluding him from individual *voir dire* violated his constitutional right to be present at every critical stage of the proceedings. App at 14-16. Petitioner argued that this violation was structural error and, in the alternative, that it was not harmless error. App at 19-25.

The court of appeals agreed it was error to exclude Petitioner from the deliberation room during the individual *voir dire*. However, it concluded that it did not amount to structural error and was subject to harmless error analysis. App at 22. It then found that the error was harmless. App at 25.

Petitioner then filed a notice of appeal and a memorandum in support of jurisdiction in the Ohio Supreme Court. In his first of five propositions of law that were submitted, Petitioner asserted that a criminal defendant's Due Process rights under the Ohio and United States Constitutions are violated when the defendant is denied the right to be present and meaningfully participate in critical portions of *voir dire* and that violation is structural error and reversible error per se. App at 174. Petitioner also argued, in the alternative, that the denial of that right was not harmless error. App at 174-177. On September 28, 2021, pursuant to Ohio Supreme Court

Rule 7.08(B)(4), the Ohio Supreme Court declined to accept the appeal. App. at 1. While four of the seven justices dissented and voted to accept the case, they did not agree on which of the five propositions of law to accept for review. App. at 2. Three of the justices (Fischer, J., Stewart, J., Brunner, J.) voted to accept the case on the first proposition of law. *Id.* On December 22, 2021, the Ohio Supreme Court denied reconsideration of its decision dismissing the appeal, over the dissent of three justices, (Donnelly, J., Stewart, J., Brunner, J.), who voted to accept jurisdiction to review the first proposition of law. App. at 3-4.

INTRODUCTION

For over 130 years, this Court has repeatedly recognized that a criminal defendant's right to be present during *voir dire* is one of the accused's most fundamental and important constitutional rights. Indeed, at times this Court has equated it to be as fundamental as the right to trial itself and as an essential concomitant of a defendant's right to effective assistance of counsel. The first question raised in this petition is whether, given that long history, and this Court's statements regarding the importance of that particular right, the substantial denial of a defendant's right to be present during *voir dire* amounts to structural error. Some courts have concluded that it does. Many others conclude it does not. Yet, for all the reasons this Court has assigned structural error to other basic constitutional rights, this Court should take the final step and conclude that the denial of a criminal defendant's right to be present during substantial portions of *voir dire* is structural error.

However, if the Court concludes a criminal defendant's constitutional right to be present during *voir dire* is not a structural error requiring automatic reversal, this case presents a perfect example of why courts need guidance on how to apply the harmless error standard where calculating prejudice is difficult. Moreover, this case is an ideal vehicle for review of this issue, because defense counsel interposed a timely objection upon Petitioner's exclusion from individual *voir dire* and pointed out numerous reasons demonstrating why his exclusion resulted in prejudice. Thus, this case does not include additional complex issues surrounding the waiver of constitutional rights, forfeiture of errors, or claims of ineffective assistance of counsel that often infect cases dealing with the denial of a criminal defendant's right to be present during *voir dire.*

REASONS FOR ALLOWING THE WRIT

I. An Important Question Is Presented As To Whether The Exclusion Of A Criminal Defendant From Individual *Voir Dire* Proceedings, In Violation Of His Constitutional Right To Be Present At All Critical Stages Of His Trial, Is A Structural Error Which Requires Automatic Reversal.

There are some constitutional rights "so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 23 (1967). The denial of those rights is considered structural error because it affects the framework within which the entire trial proceeds. *Arizona v. Fulminante*, 499 U.S. 297, 310 (1991).

This Court has identified "three broad rationales" for structural errors. *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017).[1] First, an error may be structural where it is based on a fundamental right or legal principle, even if it is not designed to protect the defendant from an erroneous conviction. *Id.* Thus, for example, even if a defendant's right to conduct his own defense increases the likelihood of his conviction, the denial of that right is still a structural error because the harm is irrelevant to the basis underlying the right. *Id.*

Second, an error may be deemed structural if the effects of the error are too hard to measure. For example, if the defendant is denied the right to select his or her own attorney, "the effect of the violation cannot be ascertained." *Id. quoting Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). *See also Waller v. Georgia*, 467 U.S. 39, 49 (1984) (finding a violation of the guarantee of a public trial required reversal without any showing of prejudice and even though the values of a public trial may be intangible and unprovable in any particular case).

In such cases, "the government will, as a result, find it almost impossible to show that the error was 'harmless beyond a reasonable doubt.'" *Weaver* 137 S.Ct. at 1908, *quoting Chapman, supra*, at 24. That is because "[h]armless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, n. 4 (2006).

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[1] These categories are not rigid and more than one of these rationales may explain why an error is deemed to be structural. *Weaver,* 137 S.Ct. at 1908.

Third, an error may be deemed structural if it results in fundamental unfairness. Thus, if an indigent defendant is denied his right to counsel or the trial court fails to give a proper reasonable doubt instruction, the resulting trial is always fundamentally unfair. *Weaver*, 137 S.Ct. at 1908 *citing Gideon v. Wainwright*, 372 U.S. 335, 343-345 (1963) and *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

Under this same logic, the denial of a criminal defendant's right to be to be present during *voir dire* should be deemed structural error by this Court.

Beginning in *Hopt v. Utah*, 110 U.S. 574, 578 (1884), this Court has recognized that the right to be present during *voir dire* is a basic right guaranteed to a criminal defendant. In that case, a defendant on trial for murder challenged six potential jurors on grounds of bias. Under the Utah procedure in effect at that time, other jurors were appointed "to try the challenge," (to determine whether the six were biased) and proceeded to do so out of the presence of the defendant. *Id.* at 576. Two of the six jurors were subsequently sworn as trial jurors. The defendant was convicted of the charged crime. This Court held the defendant's exclusion was error that "vitiated the verdict and judgment." *Id.* at 579. It explained:

> The prisoner is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors. The necessities of the

> defense may not be met by the presence of his counsel only. For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of impaneling the jury begins.

Id. at 578.

This Court later addressed the issue in *Lewis v. United States*, 146 U.S. 370 (1892). There, the Court reversed the conviction of a defendant who had not seen the jurors until after the challenges had been made and the jurors selected, holding that the "making of challenges was an essential part of the trial, and that it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time when the challenges were made." *Id.* at 376. It agreed with the *Hopt* decision that "the trial commences at least from the time when the work of empaneling the jury begins." *Id.* at 378. The Court also stated:

> As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his

> dislike.

Id. quoting 4 W. Blackstone, Commentaries at 353.

Diaz v. United States, 223 U.S. 442 (1912) was a case involving a defendant who voluntarily absented himself during the examination and cross-examination of two witnesses. Before addressing the issue of the defendant's voluntary withdrawal from the courtroom the Court first noted:

> In cases of felony our courts, with substantial accord, have regarded it [the right to be present during trial] as extending to every stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself.

Id. at 455.

Only after acknowledging this basic right, did the Court go on to explain that in certain cases the right could be inoperative, to ensure that a defendant could not purposefully withdraw himself and then claim that he was wrongfully convicted based on his absence. *Id.* at 458.

This Court next addressed the issue of a defendant's presence at trial proceedings in *Snyder v. Massachusetts*, 291 U.S. 97 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964). *Snyder* involved a defendant's claim of error based on his absence from a jury view of the crime scene. The Court held that, "[s]o far as the Fourteenth

Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Id.* at 107-108. The defendant's presence must "bear[ ], or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend." *Id.* at 106. It then concluded that the defendant's presence at a jury view would be useless. *Id.* at 108. However, the Court went on to expressly recognize that a defendant's presence at jury selection "bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend" because "it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether." *Id.*

It is, of course, a "privilege [which] may be lost by consent or at times even by misconduct." *Id. See also Illinois v. Allen*, 397 U.S. 337, 338 (1970) (reiterating that "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial" before concluding that an accused's right to be present at jury selection may be lost through his own misconduct); *cf. United States v. Gagnon*, 470 U.S. 522, 526-27 (1985) (defendant's presence was not required during brief conference during trial between defense counsel, the judge and a juror because he "could have done nothing" had he been present); *Rushen v. Spain*, 464 U.S. 114 (1983) (unrecorded *ex parte* communication between judge and juror may be amenable to harmless error analysis due to the "day-to-day realities of courtroom life.").

This Court has also recognized that the harm that flows from the denial of this right is extremely

difficult to measure.

In *Gomez v. United States,* 490 U.S. 858 (1989) the Court considered a case where a federal magistrate conducted the *voir dire*, instead of the district court judge. It began by reaffirming that "*voir dire* is a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present." *Id.* at 873 *citing Lewis*, *supra*, 146 U.S. at 347 and *Hopt, supra,* 110 U.S. at 578. The Court found that the magistrate exceeded his scope of authority and rejected the government's argument that the harmless error standard should apply and that the defendants could not point to any specific prejudice they suffered. *Id.* at 876. After concluding that the error was structural, the Court explained that the prejudice that flowed from errors in the *voir dire* process cannot be ascertained by merely reviewing a transcript of the questions:

> In any event, we harbor serious doubts that a district judge could review this function meaningfully. Far from an administrative empanelment process, *voir dire* represents jurors' first introduction to the substantive factual and legal issues in a case. To detect prejudices, the examiner – often, in the federal system, the court – must elicit from prospective jurors candid answers about intimate details of their lives. The court further must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality. *See, e.g., Wainwright v. Witt*, 469 U.S. 412, 428, n. 9, 105 S.Ct. 844, 854, n. 9, 83 L.Ed.2d 841 (1985)

> (*quoting Reynolds v. United States*, 98 U.S. 145, 156-157, 25 L.Ed 244 (1879)). But only words can be preserved for review; no transcript can recapture the atmosphere of the *voir dire*, which may persist throughout the trial...

Id. at 875.

For all of these reasons, a defendant's exclusion from individual *voir dire* proceedings, over his objection and without any evidence that his appearance would be disruptive to those proceedings, should be assigned structural error by this Court. Some state high courts have found this to be the case. *See e.g., State v. Bird*, 308 Mont. 75, 83, 43 P.3d 266, 272 (2002) (Montana Supreme Court concluding that the defendant's exclusion from the in-chambers individual *voir dire* proceedings was structural error because his exclusion from jury selection "undermined the integrity of the entire trial"); *State v. Berosik*, 352 Mont. 16, 214 P.3d 776 (2009) (same); *State v. Garcia-Contreras*, 191 Ariz. 144, 149, 953 P.2d 536, 541 (1998) (Arizona Supreme Court found that because it was unable to meaningfully quantify the harm that resulted from the defendant's involuntary absence during *voir dire*, the denial of his right to be present was structural error); *see also People v. Antommarchi*, 80 N.Y. 2d 247, 604 N.E.2d 95 (1992) (New York Court of Appeals requiring new trial after individual *voir dire* was conducted at the bench outside presence of defendant in violation of statute, without having to determine if there was prejudice).

A number of other courts, however, have disagreed. *See e.g., United States v. Riddle*, 249 F.3d

529, 535 (6th Cir. 2001) *cert. denied* 534 U.S. 930 (2001) ("[T]he right to be present at *voir dire* is not one of those structural rights whose violation constitutes per se error."); *United States v. Feliciano*, 223 F.3d 102, 111 (2d Cir. 2000) *cert. denied* 532 U.S. 943 (2001) (finding any error in district court's conducting a portion of *voir dire* outside hearing of defendants, due to security concerns, was not "structural error" requiring reversal of conviction); *United States v. Rivera–Rodriguez*, 617 F.3d 581, 601–04 (1st Cir.2010) *cert. denied* 562 U.S. 1161 (2011). (holding no structural error where the district court questioned fifteen prospective jurors outside of the presence of the defendants and their attorneys).

These cases and others around the nation demonstrate that this Court should resolve this conflict. The issue arises with surprising frequency and there is considerable disagreement, particularly among state courts, as to whether the constitutional violation is a structural one, requiring automatic reversal. And, as demonstrated below, the numerous courts that hold it to be a constitutional violation subject to the harmless error standard struggle with how to make that calculation and employ a wide range of disparate rubrics in deciding the issue.

II. If The Exclusion Of A Criminal Defendant From Individual *Voir Dire* Proceedings Is Not A Structural Error, An Important Question Is Presented As To How The Harmless Error Standard Should Be Applied In This Context And Whether The Error Was Harmless In This Case.

Before a federal constitutional error can be held harmless, it is the state's burden to prove the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 23 (1967). The question of how the state may prove that a defendant's exclusion from significant portions of jury *voir dire* was harmless beyond a reasonable doubt has never been answered by this Court, and lower courts have applied differing and inconsistent standards.

In the context of *plain error* review, because the defendant failed to object, the Fourth Circuit explained the unique challenges that are presented in attempting to analyze the prejudice involved when a defendant is excluded from portions of *voir dire*. "Just how one shows that his absence during portions of a jury selection process actually 'affected the outcome of [trial,]' or 'probably influenced the verdict' against him has apparently never been definitively explored." *United States v. Tipton*, 90 F.3d 861, 876 (4th Cir. 1996) *cert. denied* 520 U.S. 1253 (1997) (citations omitted). The court pondered whether a defendant would have to prove he would have selected a different jury. Or, maybe the defendant would have to prove that the jury he had was somehow biased. Perhaps the defendant would have to go even further and prove that the verdict would have been different with a different jury. *Id.* "Fortunately" the court did not have to answer these questions as the defendant in that case only argued that prejudice should be presumed, and while "there may be circumstances of involuntary absence from jury *voir dire* where prejudice should be presumed" the court did not think they would apply to the defendant's partial absence. *Id.* at 875-76.

Numerous courts have explained that a lawyer's

presence alone cannot make up for the defendant's absence during *voir dire* because it is necessary for the defendant himself to hear the juror's responses and observe their demeanor and attitude. As a corollary, a defendant's presence during later portions of *voir dire* does not cure the harm that was suffered from his absence. *See e.g., United States v. Alikpo,* 944 F.2d 206, 210 (5th Cir. 1991) (rejecting the contention that a defendant's presence during the peremptory phase ameliorates the harm from his absence during most of *voir dire* because the defendant "is sorely handicapped and can be of little assistance to counsel when he has not had the opportunity to hear the venire's responses to questions and observe their reactions to the proceedings."); *Boone v. United States,* 483 A.2d. 1135, 1139 (D.C. Cir. 1984) ("Surely, just as it is difficult to articulate what induces the exercise of a peremptory challenge, it is improbable to expect a lawyer to be able to relate those impressions gained at the bench to his client); *Truss v. Commonwealth*, 560 S.W.3d 865, 871 (2018) (Supreme Court of Kentucky ordering a new trial for a defendant who was absent from the first day of *voir dire* where 31 jurors were questioned on limited subjects but was present during the remainder of *voir dire* because the court "cannot speculate as to whether a juror's body language or mannerisms would have led him to ask for a juror to be stricken for cause, or to have used a peremptory strike.").

However, other courts have found that the harm from the defendant's absence during certain portions of *voir dire* may be cured by his participation in other portions and through consultation with his attorney. For example, in concluding that the error was harmless in this case, the Ohio Court of Appeals noted that Petitioner's counsel was "present and actively

participated" in the individual *voir dire* and Petitioner was present during the general *voir dire*. App at 22. *See also United States v. Alessandrello*, 637 F.2d 131, 151 (3rd Cir. 1980) *cert. denied* 451 U.S. 949 (1981) (finding error was harmless where defendants were excluded from individual questioning of 16 potential jurors because *voir dire* concerned only one topic, counsel were present and were encouraged to confer with their clients as frequently and fully as desired, and defendants were able to observe jurors and hear their answers during general *voir dire*); *United States v. Washington*, 705 F.2d 489 (D.C. Cir. 1983) (*per curiam*) (finding harmless error in part because during bench *voir dire* of 7 jurors defendant had sufficient time to confer with counsel regarding juror's responses).

Some courts look primarily to the duration of the absence to decide whether the government can meet its burden. Under this quantitative approach, the D.C. Circuit has stated that the question generally turns on "how much of the *voir dire* the defendant was excluded unconstitutionally from hearing and observing" and "does not focus on the juror's answers to the questions." *Hager v. United States*, 79 A.3d 296, 303-304, n. 8 (D.C. Cir. 2013). Where a defendant has been excluded from a majority of *voir dire,* "the government has struggled to show harmlessness." *Id.* at 304.

However, other courts have engaged in a qualitative approach and have attempted to determine how the accused might have contributed to his attorney's efforts if he had been permitted to participate, regardless of how brief his absence during *voir dire*.

Under this approach, courts generally require the government to prove that there is nothing in the record to show that the defendant might have challenged any of the jurors who were questioned in his absence. *See e.g, State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991) (Supreme Court of North Carolina stating "whether this kind of error is harmless depends, we conclude, on whether the questioning of prospective jurors in defendant's absence might have resulted in a jury composed differently from one which defendant might have obtained had he been present and participated in the process."); *State v. Irby*, 170 Wash. 2d 874, 886-877, 246 P.3d 796 (2011) (Supreme Court of Washington concluding defendant's exclusion from portion of *voir dire* done over email was not harmless because the state could not prove that three of the seven jurors that were excused for cause had no chance to sit on the jury); *State v. Yancey*, 442 Md. 616, 629 (2015) (high court of Maryland finding defendant's absence from bench *voir dire* for brief period of time was not harmless because the juror questioned in his absence discussed the fact that her brothers had been charged with serious crimes and the state's arguments that the juror's presence was not prejudicial were largely speculative); *State v. W.A.*, 184 N.J. 45, 67 (2005) (Supreme Court of New Jersey concluding defendant's absence during questioning of juror who described she was a child victims' advocate was prejudicial because he may well have peremptorily challenged her had he heard the responses); *People v. Bennett*, 669 N.E. 2d 717, 722 (Ill. Ct. App. 1996) (Illinois court of appeals concluding exclusion from individual *voir dire* was not harmless error where jurors responded to questions concerning their ability

to be impartial with phrases including "I believe so," "I guess I could" and "I would hope so" and defendant's presence and assistance could have influenced whether or not they became jurors).

Other courts engaging in this same general analysis have improperly shifted the burden to the defendant to point to specific portions of the record to demonstrate the harm that he suffered from his absence. For example, the Ohio Court of Appeals in Petitioner's case concluded that the error was harmless because he failed to point to a "specific juror or line of questioning in the proceedings for whom his presence might have made a difference as to the final composition of the jury." App. at 25. *See also Wright v. State,* 124 Nev. 1520 (2008) (Nevada Supreme Court finding harmless error because defendant "failed to demonstrate that he was prejudiced by not being present during" questioning of juror who was ultimately seated on his jury); *United States v. Alessandrello*, *supra*, 637 F.2d at 153 (Higginbotham, J., dissenting) (concluding the majority improperly placed the burden on the defendant who was absent during individual *voir dire* to prove that the transcript revealed that jurors were biased).

If a defendant's exclusion from individual *voir dire* does not amount to structural error, guidance is needed from this Court on how to determine the harm that results from the defendant's absence and what the government must prove to meet its burden under a harmless error analysis.

CONCLUSION AND PRAYER FOR RELIEF

Based upon all of the foregoing, Petitioner respectfully urges this Court to grant certiorari.

Respectfully submitted,

J. MICHAEL MURRAY
Counsel of Record
WILLIAM C. LIVINGSTON
Berkman, Gordon, Murray & DeVan
55 Public Square, Suite 2200
Cleveland, Ohio 44113
jmmurray@bgmdlaw.com
(216) 781-5245

Counsel for Petitioner