No. _____

In The

Supreme Court of the United States

STEPHEN ALEXANDER,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

BRIAN STEEL
Counsel of Record
THE STEEL LAW FIRM, P.C.
1800 Peachtree Street NW
Suite 300
Atlanta, Ga 30309
thesteellawfirm@msn.com
(404) 605-0023
Counsel for Petitioner

TYLER CONKLIN
CONKLIN LAW FIRM
1800 Peachtree Street NW
Suite 300
Atlanta, Ga 30309
tyler@conklinlaw.com
(404) 254-3194
Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

When Defense Counsel errs by not objecting to an improper courtroom closure, should reviewing courts apply a "fundamental unfairness" test, or the traditional test (reasonable probability of a different outcome) when analyzing prejudice under the second prong of *Strickland v. Washington*, 466 U.S. 668 (1984)?

PARTIES TO PROCEEDING AND RELATED CASES

There is no parent or publicly held company owning 10% or more of the corporation's stock involved in this case. Rules 14.1(b)(ii) and 29.6.

A list of all proceedings in other courts that are directly related to the case appear below. Rule 14.1(b)(iii).

- *State v. Alexander*, No. 14-CR-487 (Ga.Super. June 25, 2019).
- *Alexander v. State*, 356 Ga. App. 392 (2020).
- *Alexander v. State*, 313 Ga. 521 (2022).

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

FEDERAL CASES

STATE CASES

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

Stephen Alexander respectfully petitions for a writ of certiorari to the Supreme Court of Georgia.

OPINIONS BELOW

The published opinion of the Supreme Court of Georgia can be found at 870 S.E.2d 729. The published opinion of the Georgia Court of Appeals can be found at 356 Ga.App. 392. The relevant trial court proceeding and order are unpublished.

JURISDICTION

The Supreme Court of Georgia affirmed Alexander's convictions on March 15, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and *public* trial[.]

STATEMENT OF THE CASE

Petitioner was charged and tried in Banks County, Georgia on multiple sexual offenses against his two (2) stepdaughters. (Appendix A page 3 (hereinafter App. A. 3); App. C. 1). At the time of trial, Petitioner's stepdaughters were both under 16 years of age. (App. A. 3).

Prior to trial, the prosecution moved to close the courtroom while the two (2) victims testified. (App. C. 2). Without any objection and, in fact, with the consent of Petitioner's trial counsel, the trial court cleared the courtroom of all spectators, except the alleged victims' uncle and the prosecution called, as its first witness, Petitioner's stepdaughter M.A. (App. C. 2).

In a closed courtroom, M.A. testified to the incidents with, and acts of, Petitioner that took place. (T. 71–99). M.A. testified to the sexual abuse she first experienced in Habersham County, Georgia and the abuse that continued after they moved to Banks County, Georgia. (App. C. 2).

While the Courtroom was still closed to the public, Director of Forensic Services for Treehouse, Jason Simpson, without objection, was accepted as an expert in forensic interviewing and child sexual abuse and testified to a forensic interview he conducted with the victims. (App. C. 2–3). Simpson testified that he detected signs that M.A. was coached and attributed same to Petitioner's comments not to tell anyone about this abuse. (App. C. 2–3). Mr. Simpson testified that

M.A.'s disclosure was consistent with a child who has experienced sexual abuse. (App. C. 2–3).

With the courtroom still closed, M.A. then testified to the Petitioner's sexual abuse that she experienced (App. C. 3). At the conclusion of M.A.'s testimony, the trial court then opened the Courtroom and the trial continued (App. C. 3).

The record is devoid of any indication that the trial judge made any findings of fact, much less adequate findings of fact, pursuant to the closure of the courtroom.

At the close of trial, Petitioner was convicted of multiple counts of rape, aggravated child molestation, aggravated sexual battery, incest, and false imprisonment. (App. B. 1). Petitioner made a timely motion for new trial, enumerating multiple errors including ineffective assistance of counsel based on the failure to object to the courtroom closure. (App. C. 8–9). Hearings commenced pursuant thereto on August 10, 2018, and November 15, 2018. (App. C. 8). Motion for new trial was denied on June 25, 2019. (App. C. 1).

The Honorable Georgia Court of Appeals denied petitioner's request for relief based upon trial counsel's ineffective assistance, among other enumerated errors. (App. B. 1–9). The Honorable Supreme Court of Georgia granted certiorari to determine the question of whether trial counsel's failure to object to an improper closure of the courtroom, a structural error, requires a showing of actual prejudice, or some lesser standard, to succeed on an ineffective assistance of counsel claim.

(App. A. 1–2). Specifically, the Honorable Supreme Court of Georgia would review whether its prior decision in *Reid v. State*, 286 Ga. 484, 690 S.E.2d 177 (2010), which states that a defendant claiming structural error must still show prejudice where that error was not objected to, is sound considering the U.S. Supreme Court's opinion in *Weaver v. Massachusetts*, 137 S. Ct. 1899, 198 L.Ed.2d 420 (2017). (App. A. 1–2).

The Honorable Supreme Court of Georgia, determining the language of the opinion in *Weaver v. Massachusetts*, supra, regarding fundamental unfairness as it relates to the prejudice inquiry of ineffective assistance to be "merely dicta," denied petitioner's request for relief based on his ineffective assistance claim because he failed to make a showing of prejudice. (App. A. 27–28).

REASONS FOR GRANTING THE WRIT

In *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907–1913 (2017), this Court held that when defense counsel fails to object to an improper courtroom closure, a defendant must establish some form of prejudice under *Strickland* to obtain a new trial. Under the facts in *Weaver*, the petitioner could not demonstrate prejudice, through either the traditional test or by a showing of fundamental unfairness. *Weaver*, 137 S. Ct. at 1913. The Court went on to state that when a courtroom is closed under different circumstances than those present in *Weaver*, such as where closure occurs

during the presentation of evidence, "the remaining question [would be] whether petitioner has shown that counsel's failure to object rendered the trial fundamentally unfair." *Id.*

This open question of which test to apply under the prejudice prong of *Strickland* in courtroom closure cases – and some other categories of cases involving structural error – has sowed confusion amongst courts across the country. The difficulty that courts have had interpreting *Weaver* has led to inconsistent results for criminal defendants in our court system. Because the Sixth Amendment should be applied uniformly across all jurisdictions, this Court should take the opportunity presented here to clarify its holdings in *Weaver.*

Courts across the country have interpreted *Weaver* in vastly disparate ways.

In *Weaver*, this Court explained that "[f]or the analytical purposes of this case, [it] will assume that petitioner's interpretation of *Strickland* [that relief can be granted if the errors made the trial fundamentally unfair, even if there was no reasonable probability of a different outcome] is the correct one." But, the Court went on to write that, "in light of the Court's ultimate holding, however, the Court need not decide that question here." Because this Court left this question unresolved, courts across the country rendered substantially different interpretations of *Weaver*.

The dissenting opinion in *Canfield v. Lumpkin*, 998 F.3d 242, 257 (5th Cir. 2021), concluded that

Weaver itself left open the issue of which test for prejudice governs a "fundamental unfairness" structural error when viewed through the lens of *Strickland*. The dissent in *Canfield* also recognized, however, that circuit courts differ on whether this is the correct interpretation of *Weaver*. See *Canfield*, 998 F.3d at 258 n.57.

As noted in *Canfield*, several circuits have considered how to interpret the meaning of prejudice in the wake of *Weaver*. The Tenth Circuit holds that *Weaver* left the issue open when it "expressly withheld judgment on this issue." *Meadows v. Lind*, 996 F.3d 1067, 1080 (10th Cir. 2021). See also *Johnson v. Raemisch*, 779 F. App'x 507, 513 n.5 (10th Cir. 2019) (determining that *Weaver* did not alter the prejudice prong under *Strickland*). Other circuits, however, have construed *Weaver* to hold that a showing of prejudice is met where there has been a structural violation that rendered the "trial fundamentally unfair." *Williams v. Burt*, 949 F.3d 966, 978 (6th Cir. 2020); *United States v. Aguiar*, 894 F.3d 351, 356 (D.C. Cir. 2018); *United States v. Thomas*, 750 F. App'x 120, 128 (3d Cir. 2018); *Pirela v. Horn*, 710 F. App'x 66, 83 n.16 (3d Cir. 2017) (unpublished).

Likewise, State courts also remain split on how to interpret *Weaver*. Many conclude that *Weaver* permits a defendant to show prejudice by ("either a reasonable probability of a different outcome in his or her case *or* . . . that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.") *State v. Garcia*, 424 P.3d 171, 180 (Utah 2017).

See also *Newton v. State*, 168 A.3d 1, 10 (Md. Ct. Spec. App. 2017). Others have expressed uncertainty as to *Weaver's* meaning. *Commonwealth v. Diaz*, 183 A.3d 417, 431 (2018), *aff'd,* 226 A.3d 995 (Pa. 2020) ("[T]he Court did not clearly set forth how prejudice was to be applied when reviewing a claim of structural error in the collateral context."). See also *Khalil-Alsalaami v. State*, 486 P.3d 1216, 1238 (2021) (under Weaver, "we must look to the circumstances of each case to determine whether counsel's deficient performance . . . rendered the proceedings fundamentally unfair or otherwise affected the outcome of the verdict").

And yet, at least one state, Georgia, where this case arises, has held that the "fundamental unfairness" test espoused in *Weaver* constitutes dicta. *Alexander v. State*, 313 Ga. 521, 531 (2022). Georgia rejected the "fundamental unfairness" test altogether and applied the traditional "reasonable probability of a different outcome" test. Id.; *Cabrera v. State*, 173 A.3d 1012, 1022–1023 (Del. 2017) (apparently using the traditional prejudice test in a case where "the same factors at play in *Weaver*" were present).

Given the discord among courts' interpretations of *Weaver*, this Court should now answer the question left open in *Weaver.* By granting certiorari in this case, the Court can not only answer the unresolved question, but also provide guidance to lower courts on the proper application of prejudice under the Sixth Amendment in structural error cases.

This is the ideal case to answer the unresolved question in *Weaver*.

When this Court found that the petitioner in *Weaver* could not meet his burden of showing prejudice, it specifically noted that "[i]n other circumstances a different result might obtain. If for instance, defense counsel errs in failing to object when the government's main witness testifies in secret, then the defendant might be able to show prejudice with little more detail." Here, the petitioner was charged with several sexual offenses against his stepdaughters. The stepdaughters, who were the State's two main witnesses, testified while the courtroom was improperly closed. Considering that this Court explicitly stated that a different result may be obtained under these facts, it makes this case ideally positioned to clarify any ambiguities in the *Weaver* decision that have plagued the lower courts.

This question must be resolved in order to ensure an evenhanded and uniform application of the Sixth Amendment.

The circuit and state splits on the interpretation of *Weaver* make clear that, depending on the jurisdiction in which a criminal defendant asserts a Sixth Amendment claim under *Strickland* that their right to a public trial was violated, the outcomes may differ. One court may impose the more stringent standard of prejudice that the closure caused a different outcome, while others may allow for a lower showing of

prejudice by simply showing a fundamental unfairness based on the type of closure.

Weaver discussed a "fundamental unfairness" test as a potential alternative to demonstrating prejudice arising from counsel's failure to object to a courtroom closure, but some circuits have held that the United States Supreme Court did not adopt that test, while others have held that *Weaver* adopts the fundamental unfairness test. *Alexander*, 313 Ga. 521; *Aguiar*, 436 U.S. App. D.C. 409; *Williams*, 949 F.3d 966. Which test for prejudice to apply is an important question that this Court should address to ensure consistency in the administration of individual rights under the Sixth Amendment.

CONCLUSION

This Court should grant certiorari to resolve conflicts among circuits and states on this question. States and lower federal courts are not at liberty to apply *Strickland* – which is rooted in the Sixth Amendment – in whatever manner they choose. Instead, they must apply the Sixth Amendment as directed and interpreted by this Court. The various interpretations of *Weaver* call for this Court's clarification. See *Danforth v. Minnesota*, 552 U.S. 264, 291–292 (2008) ("State courts are the final arbiters of their own state law; this Court is the final arbiter of federal law.").

Respectfully submitted this 13th day of June, 2022 by:

BRIAN STEEL
Counsel of Record
THE STEEL LAW FIRM, P.C.
1800 Peachtree Street NW
Suite 300
Atlanta, Ga 30309
thesteellawfirm@msn.com
(404) 605-0023
Counsel for Petitioner

TYLER CONKLIN
CONKLIN LAW FIRM
1800 Peachtree Street NW
Suite 300
Atlanta, Ga 30309
tyler@conklinlaw.com
(404) 254-3194
Counsel for Petitioner