No. ___-_____

In the
Supreme Court of the United States

BRADLEY ROSS FAIRBOURN,

Petitioner,

v.

NEICOLE MORDEN,
Warden of the Wyoming State Penitentiary, and the
WYOMING ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of this Court's decision in *Weaver v. Massachusetts*, __ U.S. __, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017), the actual-prejudice standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984) applies to a structural error in the form of an impliedly-biased juror that rendered a criminal trial fundamentally unfair.

PARTIES TO THE PROCEEDING

All parties to the habeas corpus proceeding before the United States District Court for the District of Wyoming, to the appeal before the United States Court of Appeals for the Tenth Circuit, and to this proceeding appear on the cover to this Petition.

RELATED CASES

- *Fairbourn v. Morden*, et al., United States Court of Appeals for the Tenth Circuit, Case No. 22-8005, judgment entered May 19, 2023.
- *Fairbourn v. Harlow*, United States District Court for the District of Wyoming, Case No. 21-CV-166-R, judgment entered December 20, 2021, and Order Issuing a Certificate of Appealability entered February 10, 2022.
- *Fairbourn v. State*, 2020 WY 73, 465 P.3d 413, Wyoming Supreme Court, Case Nos. S-18-0259 and S-19-0217, judgment entered June 11, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bradley Ross Fairbourn respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit and resolve the issue that this case presents.

OPINIONS BELOW

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit from which this Petition is being taken is reproduced at App. 1-19. The decision is not reported.

The Order of the United States District Court for the District of Wyoming granting the government's motion for summary judgment on Mr. Fairbourn's Petition for a Writ of Habeas Corpus is reproduced at App. 20-34. The decision is not reported. The Order of the District Court Issuing a Certificate of Appealability is reproduced at App. 35-37.

The decision of the Wyoming Supreme Court denying Mr. Fairbourn's direct appeal of his convictions is reproduced at App. 38-63. That decision is reported at *Fairbourn v. State*, 2020 WY 73, 465 P.3d 413.

JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1). The Tenth Circuit had jurisdiction over the underlying appeal pursuant to 28 U.S.C. §§ 1291, 2253(a), and 2253(c). The Tenth Circuit entered its judgment and opinion affirming the judgment of the District Court on May 19, 2023. (App. 1.) This Petition is being filed within 90 days of that date and, accordingly, was timely. See Sup. Ct. R. 13.1.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

A. 28 U.S.C. § 2254

This Petition implicates 28 U.S.C. § 2254. It states the following

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

> (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)
>
> > (i) there is an absence of available State corrective process; or
> >
> > (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted

with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

> (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> > (A) the claim relies on –
> >
> > > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> > >
> > > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> >
> > (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce

> such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.
>
> (g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.
>
> (h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.
>
> (i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

A. Introduction

This Petition presents an important and compelling issue that calls for a proper resolution by this Court. In particular, this Court should make clear that, applying the Court's decision in *Weaver*, the presence of an impliedly partial juror should be seen as structural error requiring automatic reversal, because a partial juror's participation in the jury room eviscerates any conception of impartiality. *E.g.*, *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (plurality opinion). In light of *Weaver*, the presence of an impliedly biased juror constitutes the third type of structural error

identified by the Court in *Weaver*, requiring automatic reversal, because a partial juror's participation in the jury room always result in fundamental unfairness. In reality, we cannot realistically conceive of a situation in which that structural error would not result in a situation in which Mr. Fairbourn would receive a fair trial. The Tenth Circuit's Order and Judgment below – which reached a contrary conclusion – is thus itself contrary to the clearly established law as set out by this Court. Accordingly, the Wyoming State Supreme Court's adjudication of Mr. Fairbourn's claim of ineffective assistance of counsel for failure to strike such a juror "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1).

B. Statement of Facts

Alleged Offense Conduct

On a June night in 2016, Mr. Fairbourn traveled from Denver toward his home in Utah. After stopping at a motel in Rawlins, Wyoming, Mr. Fairbourn saw an advertisement online for a "'2 girls' special" further west in Rock Springs, Wyoming. ROA at 108. Mr. Fairbourn contacted the number listed in the online posting and arranged a meeting, arriving in Rock Springs a little after 1 a.m. Mr. Fairbourn went to the motel room occupied by the two women, Naisha Story and Natalia Arce, met them, and said he would be back with some money. Rather than returning with money, Mr. Fairbourn returned with a knife. Upon reentering the

room, Mr. Fairbourn stabbed both women. While Ms. Arce was able to escape the hotel room and call her boyfriend, Christopher Crayton, for help, the wounds Mr. Fairbourn inflicted on Ms. Story proved fatal. (App. 3; and 39-40.)

In response to Ms. Arce's call, Mr. Crayton drove to the scene, spotted Mr. Fairbourn, accosted Mr. Fairbourn, beat Mr. Fairbourn, and detained Mr. Fairbourn until police arrived. Police transported Mr. Fairbourn to the hospital and collected evidence from his person. The evidence included Mr. Fairbourn's blood-stained clothing and a cell phone belonging to Ms. Story, recovered from Mr. Fairbourn's jeans pocket. Police also recovered a bloody knife and a scabbard from a nearby roof. Video surveillance showed Mr. Fairbourn walking up to the building shortly after the stabbings. DNA testing revealed blood from both victims on the blade of the knife and blood from Ms. Arce and from Mr. Fairbourn on the handle of the knife. (App. 4; and 40-41.)

The State Court Trial

The State of Wyoming charged Mr. Fairbourn with one count of murder in the first degree and one count of attempted murder in the first degree. A jury trial commenced. During voir dire, the prosecutor, Mr. Erramouspe, asked the prospective jurors if any of them knew him. Of the thirty-four prospective jurors, at least ten knew Mr. Erramouspe. One of those jurors was John Hartley, whom Mr. Erramouspe had represented in a criminal case "years and years ago." Mr. Erramouspe asked Mr. Hartley if the prior relationship was "going to have any impact on [his] decisions

in [Mr. Fairbourn's] case," to which Mr. Hartley responded "No." After Mr. Erramouspe passed the jury panel, Ms. Schoneberger did not pose any questions to Mr. Hartley about his relationship with Mr. Erramouspe. Ms. Schoneberger did, however, ask several of the other prospective jurors who knew Mr. Erramouspe about their potential biases in viewing the evidence. In doing so, Ms. Schoneberger succeeded in challenging several jurors for cause and identified several other jurors on whom she ultimately used peremptory challenges. Mr. Hartley was empaneled as a juror. (App. 4-5.)

During the six-day trial, the jury heard testimony from hotel guests, Ms. Arce, Mr. Crayton, and law enforcement officers who investigated the case. The jury also heard a recording of a jailhouse phone call between Mr. Fairbourn and a relative, on which Mr. Fairbourn admitted to meeting the women and stated details of the evening that contradicted his initial story to police. The jury further heard extensive testimony regarding the DNA evidence collected by authorities on the night of the stabbings and how the DNA recovered from the knife handle matched both Mr. Fairbourn and Ms. Arce. In defense of the charges, Mr. Fairbourn contended that, though he met the women, he did not return to their room after the initial interaction and someone else must have come and stabbed them while he was outside in the parking lot. (App. 5; and 43-46.)

The jury convicted Mr. Fairbourn of both charges. The trial court sentenced Mr. Fairbourn to two life terms without the possibility of parole. Mr. Fairbourn appealed. (App. 5; and 47.)

Mr. Fairbourn's Motion for a New Trial

During the pendency of his appeal, Mr. Fairbourn filed a motion for new trial under Rule 21 of the Wyoming Rules of Practice and Procedure based on ineffective assistance of trial counsel. In support of the motion, Mr. Fairbourn argued, in part, that "counsel failed to question or strike a juror [, Mr. Hartley, who] had been represented by one of the prosecuting attorneys twenty years earlier." The trial court held a hearing on Mr. Fairbourn's motion, at which Mr. Hartley and Ms. Schoneberger, among others, testified. (App. 6; and 54-55.)

Counsel for Mr. Fairbourn questioned Mr. Hartley about his attorney-client relationship with Mr. Erramouspe. Mr. Hartley could not recall how he had selected Mr. Erramouspe as his attorney other than that 'Erramouspe' was a well-known family name in Rock Springs. Mr. Hartley also could not recall where Mr. Erramouspe's law office was or if he ever met him there. Mr. Hartley, however, did reveal that his criminal case involved an underage drinking charge and that he believed he was happy with Mr. Erramouspe's representation in the case and that he had paid a fine and did not receive any jail time. Mr. Hartley, though contending it was not the job of jurors to "evaluate the lawyers," admitted it was fair to say that where a juror has "a prior attorney-client relationship with the lead prosecuting

attorney, you have some built-in trust already of Mr. Erramouspe." Nonetheless, Mr. Hartley indicated no reservations about having served on the jury or his ability to be impartial. Finally, during cross-examination, the State suggested Mr. Erramouspe had represented Mr. Hartley in two cases. (App. 6-7; and 55-56.)

Ms. Schoneberger also testified at the Rule 21 hearing. In response to a question from Mr. Fairbourn's counsel about why she did not ask Mr. Hartley any questions regarding his attorney-client relationship with Mr. Erramouspe, she responded: "I was satisfied based on my observations of him and his answers that he didn't feel any prejudice, that he would be fair and impartial. I felt like he was credible in that regard, and I didn't see a need to delve further into that." Ms. Schoneberger later added that "[i]n Mr. Hartley's case, I felt from his demeanor and all the questioning that he was being very forthcoming, not just about this issue. I think he was forthcoming about other things, and so we were satisfied with him and his answers at that point." Ms. Schoneberger also represented that in her work as an appellate attorney on contract for the public defender's office, it was not "uncommon for members of the jury panel to have been represented by one of the attorneys," especially in "small jurisdictions." Ms. Schoneberger further indicated she focused her attention during voir dire on the potential jurors that she, her co-counsel, and Mr. Fairbourn thought were most problematic and harbored prejudice. (App. 7-8.)

In a written order, the trial court denied Mr. Fairbourn's Rule 21 motion. The trial court found Mr. Hartley was "both thoughtful and honest," and took the duty of jury service seriously. The trial court also noted that Mr. Hartley had limited memory of his attorney-client relationship with Mr. Erramouspe. As a result, the trial court concluded that Mr. Fairbourn failed to demonstrate that Mr. Hartley should have been struck for cause or that he harbored actual bias or prejudice. The trial court also rejected the proposition that implied bias could be attributed to Mr. Hartley. (App. 8.)

C. Proceedings Before the Wyoming Supreme Court

Mr. Fairbourn appealed the trial court's adverse ruling on his Rule 21 motion and the Wyoming Supreme Court consolidated the appeal with his direct appeal. The Wyoming Supreme Court affirmed both the denial of Mr. Fairbourn's Rule 21 motion and his convictions. The Court understood Mr. Fairbourn to argue that his counsel was ineffective for "fail[ing] to strike a prospective juror [, Mr. Hartley], who later became the jury foreman." (App. 55.) And, as part of this argument, the Wyoming Supreme Court recognized that Mr. Fairbourn had argued for application of "a presumption of bias" by Mr. Hartley based on his prior attorney-client relationship with Mr. Erramouspe. (App. 8; and 55-67.)

The Wyoming Supreme Court declined to apply such a presumption, instead applying the traditional prejudice requirement for ineffective assistance claims that requires a defendant to demonstrate that "a reasonable probability exists that he

would have enjoyed a more favorable verdict." Concluding that Mr. Fairbourn had not made that showing, the Court stated:

> Assuming, without deciding, that all Mr. Fairbourn's claims demonstrate defense counsel's substandard representation, his arguments cannot overcome the overwhelming evidence of his guilt:
>
> • Text messages between Mr. Fairbourn and Ms. Arce beginning at 9:54 p.m. and continuing until Mr. Fairbourn received the room number at 1:04 a.m.
>
> • Traveling from Rawlins to Rock Springs without funds to pay for expected services.
>
> • Ms. Arce's eyewitness testimony that Mr. Fairbourn was the person who stabbed her and Ms. Story.
>
> • Video placing Mr. Fairbourn next to the building where the knife was found.
>
> • Mr. Fairbourn's evolving fabrications in statements to law enforcement and others.
>
> • Ms. Story's cell phone in Mr. Fairbourn's pocket.
>
> • Ms. Story's blood and DNA found on Mr. Fairbourn's pants which were "stained throughout."
>
> • Mr. Fairbourn's DNA on the handle of the knife.
>
> • Ms. Story's and Ms. Arce's DNA on the knife blade.
>
> Although defense counsel posed alternative explanations – transference of the DNA and the possibility of an unknown assailant – these required the jury to ignore the physical and testimonial evidence presented at trial. The text messages traced Mr. Fairbourn's movements prior to the crime; the JFC Engineers & Surveyors video placed Mr. Fairbourn at the location where the knife was discovered; the DNA evidence and Ms. Story's cell phone connected him to the victims; and the surviving victim identified him as the assailant. There

> is no reasonable probability that a jury would have reached a more favorable conclusion.

(App. 8-9; and 60.) (cleaned up). Because Mr. Fairbourn did not pursue a state post-conviction motion, the Wyoming Supreme Court's decision on direct appeal concluded state court proceedings. (App. 10.)

D. District Court Jurisdiction and Proceedings

Mr. Fairbourn, through counsel, filed a timely Petition, pursuant to 28 U.S.C. § 2254, with the United States District Court for the District of Wyoming. In his Petition, Mr. Fairbourn raised claims of ineffective assistance of counsel, including that counsel failed to preserve Mr. Fairbourn's right to an impartial jury by not striking Mr. Hartley because of his prior attorney-client relationship with Mr. Erramouspe. As part of this claim, Mr. Fairbourn contended the Wyoming Supreme Court contravened federal law by holding him to the second prong of *Strickland*, rather than treating the error underlying the ineffective assistance claim as a structural error that necessitated a presumption of implied juror bias and entitled Mr. Fairbourn to a new trial. (App. 10; and 23-24.)

The District Court granted the State's motion for summary judgment and denied § 2254 relief. The District Court concluded that Mr. Fairbourn failed to identify a Supreme Court decision establishing that a defendant need not show prejudice under *Strickland* when contending counsel rendered ineffective assistance by not striking a juror. Accordingly, the District Court held, the Wyoming Supreme

Court's rejection of Mr. Fairbourn's ineffective assistance of counsel claim on this ground was not contrary to clearly established federal law. (App. 10; and 28-32.)

The District Court's Order granting the State's motion for summary judgment and denying Mr. Fairbourn's § 2254 Petition neither granted nor denied a COA. In a subsequent order, the District Court granted a COA on two issues: (1) "whether the Strickland actual-prejudice standard applies to a structural error rendering a trial fundamentally unfair"; and (2) if Mr. Fairbourn prevailed on the first issue, "whether de novo review applies to [his] argument that [Mr. Hartley] was impliedly biased." (App. 37.) Mr. Fairbourn's appeal to the Tenth Circuit followed. (App. 11.)

E. The Tenth Circuit's Order and Judgment

In its Order and Judgment below, the Tenth Circuit recognized that "'errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the federal writ.'" (App. 12-13 (quoting *Williams*, 529 U.S. at 375; and citing *Strickland*, 466 U.S. at 697 (describing "fundamental fairness" as a "central concern of the writ of habeas corpus").)

The Tenth Circuit then referred to the familiar two-prong standard from *Strickland* that typically governs claims of ineffective assistance, which requires the defendant to show that (1) counsel's performance fell below an objective standard of reasonableness and (2) defendant was prejudiced as a result – which ordinarily requires a showing of "reasonable probability" of a more favorable outcome absent counsel's deficient performance. (App. 13).

The Tenth Circuit was not convinced that, by requiring a showing of actual prejudice, the Wyoming Supreme Court acted "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), in *Weaver v. Massachusetts* 137 S. Ct. 1899 (2017). As the Tenth Circuit noted, in *Weaver*, a state defendant pursed a direct appeal raising a claim of ineffective assistance of counsel based on counsel's failure to object to the trial court's closure of the courtroom during jury selection. (App. 14 (citing *Weaver*, 137 S. Ct. at 1905)). As the Tenth Circuit also noted, this Court grappled in *Weaver* with the conflict between a properly preserved objection to closure of the courtroom, which is a structural error that does not require a showing of prejudice, and an ineffective assistance of counsel claim that typically requires a showing of prejudice. (App. 14 (citing *Weaver*, 137 S. Ct. at 1907)). The Tenth Circuit, in turn, noted that, in *Weaver*, this Court subjected the defendant's claim of error to the traditional *Strickland* prejudice requirement, concluding he had not demonstrated that counsel's error resulted in a "fundamentally unfair" trial or that there was "a reasonable probability of a different outcome but for counsel's failure to object." (App. 16-17 (citing *Weaver*, 137 S. Ct. at 1913)). Accordingly, based on that reading of this Court's decision in *Weaver*, the Tenth Circuit concluded below that, because *Weaver* applied *Strickland*'s prejudice prong rather than relying on the structural nature of the underlying error to presume prejudice, *Weaver* supports the approach taken by the Wyoming Supreme Court rather

than demonstrating that the Wyoming Supreme Court acted "contrary to" federal law clearly established by this Court. (App. 17.)

For the reasons set out more fully below, we believe that the Tenth Circuit gave too-narrow of an interpretation to this Court's decision in *Weaver* and, in so doing, reached a decision, which, itself, is contrary to this Court's clearly established law.

REASONS FOR GRANTING THE PETITION

The *Strickland* Actual-Prejudice Standard Should Be Inapplicable, When, as Here, the Presence of an Impliedly Bias Juror Constituted a Structural Error That Rendered the Trial Fundamentally Unfair.

Discussing the prejudice inquiry of its analysis, the Supreme Court in *Strickland* explained that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. Typically, this standard requires that the defendant prove actual prejudice. *Meadows v. Lind*, 996 F.3d 1067, 1075 (10th Cir. 2021). Yet, defendants need not demonstrate actual prejudice for times when "prejudice is presumed." *Strickland*, 466 U.S. at 692; *accord United States v. Cronic*, 466 U.S. 648, 659 (1984). As we show below, however, the reasoning of the Wyoming Supreme Court (and, in turn, the Tenth Circuit below) that Mr. Fairbourn had to establish actual prejudice, even if the implied-bias doctrine applied, was contrary to clearly established law as enunciated by this Court.

Under § 2254(d)(1), the threshold question is whether there exists clearly established federal law, an inquiry that focuses exclusively on holdings of the Supreme Court. *E.g., House v. Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008) (calling Supreme

Court holdings "the exclusive touchstone for clearly established federal law"). "The absence of clearly established federal law is dispositive under § 2254(d)(1)." *Id*. at 1018 (citing and discussing *Carey v. Musladin*, 549 U.S. 70 (2006)).

If clearly established federal law exists, a state-court decision is "contrary to" it "if the state court applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002). A state-court decision is an "unreasonable application" of clearly established federal law when the state court "identifies the correct governing legal principle from th[e Supreme] Court's decisions but unreasonably applies that principle to the facts of petitioner's case." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (citation omitted).

In *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (plurality opinion), the United States Supreme Court addressed the interplay between structural errors and *Strickland*'s prejudice prong. The Court explained that usually, certain constitutional errors qualifying as "structural errors" require "'automatic reversal' regardless of the error's actual 'effect on the outcome,'" provided that "there is an objection at trial and the issue is raised on direct appeal[.]" *Id*. at 1910 (citation omitted). But what if, as here, the error is not preserved and challenged on direct appeal but raised through an ineffective-assistance-of-counsel claim?

Partially resolving this question, the Court concluded in *Weaver* that certain structural errors do not require automatic reversal when addressed through only an

ineffective-assistance-of-counsel claim. 137 S. Ct. at 1912-13. Important to the Court's reasoning were the three classes of structural errors and the criteria for classifying them: "(1) 'if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest'; (2) 'if the effects of the error are simply too hard to measure'; or (3) 'if the error always results in fundamental unfairness.'" *Meadows*, 996 F.3d at 1076 (quoting *Weaver*, 137 S. Ct. at 1911).

For errors within first and second classes, the Court in *Weaver* stated that a habeas petitioner must also show "a reasonable probability of a different outcome" to establish prejudice and receive a new trial, leaving the Strickland standard unscathed. *Weaver*, 137 S. Ct. at 1911. Yet when a defendant establishes structural error of the third sort, the Court "assume[d] ... that even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the defendant shows that attorney errors rendered the trial fundamentally unfair." *Id*. at 1903-04 (explaining that the Court's holding does not reverse "the Court's precedents deeming certain errors structural and requiring reversal because of fundamental unfairness") (citations omitted); *United States v. Thomas*, 750 F. App'x 120, 128 (3d Cir. 2018) (unpublished) ("The [*Weaver*] plurality suggested that only structural errors that 'always result[ ] in fundamental unfairness[,]' such as when an indigent defendant is denied an attorney, will result in the presumption of prejudice in a *Strickland* analysis") (citing *Weaver*, 137 S. Ct. at 1908, 1911)); E. Primus, Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional

Ineffectiveness, 72 Stan. L. Rev. 1581, 1648 (2020) ("In Weaver, the Court assumed that, even absent a showing of a reasonable probability of a different outcome, relief might still be available if the defendant could show that the attorney's errors were 'so serious as to render [the] trial fundamentally unfair.'") (quoting *Weaver*, 137 S. Ct. at 1911)).

The Sixth Amendment to the United States Constitution guarantees that all criminal defendants have the right to an impartial jury. *E.g., Duncan v. Louisiana*, 391 U.S. 145, 149, (1968); *Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963). As the Supreme Court has explained, "the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors," and "[t]he failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (citations omitted). Even if a trial court seats only one biased juror, "[t]he presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998) (en banc) (citation omitted); *accord Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam) ("[P]etitioner was entitled to be tried by 12 ... impartial and unprejudiced jurors.") (citation omitted).

Put another way, the presence of a partial juror is structural error requiring automatic reversal; a partial juror's participation in the jury room eviscerates any conception of impartiality. *E.g., Gray*, 481 U.S. at 668 ("We have recognized that some constitutional rights are so basic to a fair trial that their infraction can never be

treated as harmless error. The right to an impartial adjudicator, be it judge or jury, is such a right." *See also, e.g., United States v. French*, 904 F.3d 111, 120 (1st Cir. 2018) ("The presence of a juror whose revealed biases would require striking the juror for cause in a criminal case is structural error that, if preserved, requires vacatur."); *Sanders v. Norris*, 529 F.3d 787, 791 (8th Cir. 2008) ("We have held ... that some professional failures of counsel, including the failure to strike a biased juror, result in structural errors that are presumed prejudicial ...."); (internal citations omitted); *Thompson v. Altheimer & Gray*, 248 F.3d 621, 622 (7th Cir. 2001) (Posner, J.) (relying on *Gray*, 481 U.S. at 668, among other cases, for the proposition that if a juror "should have been struck for cause," the appellant was "entitled to a new trial without having to show that [the juror's] presence on the jury caused the jury to side with the defendant").

Bias comes in two forms: actual bias or implied bias. *E.g., Gonzales v. Thomas*, 99 F.3d 978, 986 (10th Cir. 1996). The question "[w]hether a juror was actually biased is a factual question," whereas "[w]hether a juror was impliedly biased is a legal question we review de novo." *Id.* (citations omitted). Mr. Fairbourn's Petition under Section 2254 focused on the latter question: was the jury foreman impliedly biased given his prior attorney-client relationships and admitted "built-in trust" with the lead prosecutor? *Id.* at 1643.

Because implied bias poses a legal question, not a factual question, courts analyzing implied-bias issues evaluate "the challenged juror's experiences and their

relation to the case being tried." *Gonzales*, 99 F.3d at 987. This analysis requires "an objective legal judgment made as a matter of law and is not controlled by sincere and credible assurances by the juror that he can be fair." *Brooks v. Dretke*, 418 F.3d 430, 434 (5th Cir. 2005) (citations omitted); *accord United States v. Wood*, 299 U.S. 123, 133 (1936) ("The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law."). When bias is implied, "rules for hearings into actual bias such as shifting burdens of proof are not in play[.]" *Brooks*, 418 F.3d at 434.

The objective test for implied bias is rooted in the common law; "[i]mplied bias may indeed be the single oldest rule in the history of judicial review[.]" *Dyer*, 151 F.3d at 984 (citation omitted). In 1807, for example, Chief Justice Marshall discussed the doctrine of implied bias while riding docket and presiding over Aaron Burr's treason trial:

> The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connexion with a party is such as to induce a suspicion of partiality. The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice.

United States v. Burr, 25 F. Cas. 49, 50 (C.C.C.D. Va. 1807).

When is the connection "with a party ... such as to induce a suspicion of partiality"? In her concurring opinion in *Smith v. Phillips*, 455 U.S. 209, 222 (1982), Justice O'Connor cited three examples: (1) when "the juror is an actual employee of the

prosecuting agency," (2) when "the juror is a close relative of one of the participants in the trial or the criminal transaction," and (3) when "the juror was a witness or somehow involved in the criminal transaction." These categories track the six common-law categories of associations that courts presumed carried "suspicion of bias or partiality": (1) "that [a juror] is of kin to either party within the ninth degree;" (2) "that he has an interest in the cause;" (3) "that there is an action pending between him and the party;" (4) "that he has taken money for his verdict;" (5) "that he has formerly been a juror in the same cause;" or (6) "that he is the party's master, servant, counselor, steward, or attorney, or of the same society or corporation with him." *Smith*, 455 U.S. at 232 (Marshall, J., dissenting) (internal quotation marks omitted).

Although all of these common-law relationships still "retain[] their vitality," to those categories "have been added others from which prejudice or bias may be implied." *United States v. Haynes*, 398 F.2d 980, 984 (2d Cir. 1968) (citation omitted). Consider some examples:

This Court has reasoned that a potential juror is impliedly biased if the defendant's circumstances mirror the potential juror's personal situation in a way that he or she could not be expected to maintain emotional stability needed to make a dispassionate decision. *E.g., Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991) (concluding that "the inherently prejudicial nature of [the juror's] own family situation deprived [the defendant] of her right to a fair trial by an impartial jury"). Fourth, the District of Columbia Circuit has explained that a juror who was involved in a love

triangle much like the one involving the murder of the defendant's wife could not maintain the partiality required by the Sixth Amendment. *E.g., Jackson v. United States*, 395 F.2d 615, 618 (D.C. Cir. 1968) ("We conclude that [the challenged juror's] presence on the jury which convicted appellant had such a strong tendency to deny [the defendant] a trial by twelve impartial jurors as guaranteed by the sixth amendment that we are constrained to order a new trial.").

The Fifth Circuit has determined that a potential juror who was arrested and faced prosecution by the same state agency prosecuting the defendant was "disqualified ... for jury service" under the implied-bias doctrine, because the state's power to prosecute the juror hung over his head like the sword of Damocles. *Brooks*, 418 F.3d at 435 ("That there is no evidence that the District Attorney did anything to exploit his power over juror Garcia is of no moment. That the power presents an intolerable risk of working its will without the raising of a hand or a nod is the vice here.").

The Ninth Circuit has concluded that a potential juror who lied during voir dire to avoid being struck for cause and to vindicate her own personal causes was impliedly biased. *E.g., Dyer*, 151 F.3d at 983 ("Just as we would presume bias if the brother of the prosecutor were on a jury, we presume bias where a juror lies in order to secure a seat on the jury.").

Thus, when deciding whether to add a category to the circumstances proscribed by the implied-bias doctrine, courts consider the personal connection between the

prospective juror and the parties or the circumstances of the case. *E.g., Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 517 (10th Cir. 1998) ("Implied bias can be proved by showing that the juror had a 'personal connection to the parties or circumstances of the trial.'" (quoting *Gonzales*, 99 F.3d at 987)). As the Fifth Circuit has stated, in those "cases embracing the implied bias doctrine, we find that most have done so because the juror had a close relationship with one of the important actors in the case or was otherwise emotionally involved in the case, usually because the juror was the victim of a similar crime." *Solis v. Cockrell*, 342 F.3d 392, 398-99 (5th Cir. 2003). Simply put, "[t]he test focuses on 'whether an average person in the position of the juror in controversy would be prejudiced.'" *United States v. Mitchell*, 690 F.3d 137, 142 (3d Cir. 2012) (citation omitted). Accordingly, to protect a criminal defendant's right to an impartial jury, courts have reasoned that "[d]oubts regarding bias must be resolved against the juror." *Burton*, 948 F.2d at 1158 (citation omitted).

The analysis by the Ninth Circuit in *Dyer*, 151 F.3d at 973, is persuasive. Like the situation presented here, *Dyer* involved a habeas petition under 28 U.S.C. § 2254. In spite of the fact that its ruling turned on a category of implied bias outside those that Justice O'Connor or William Blackstone had identified, the Ninth Circuit, sitting *en banc*, rejected the argument that it could not reverse the California Supreme Court just because the United States Reports included "no Supreme Court case" applying the implied-biased doctrine in factual circumstances identical to the facts before the Ninth Circuit. *Id*. at 984. The Ninth Circuit explained, "[w]hat we have here is ... a rule so

deeply embedded in the fabric of due process that everyone takes it for granted." *Id*. In other words, "that prejudice must sometimes be inferred from the juror's relationships, conduct or life experiences, without a finding of actual bias" was a clearly established rule of constitutional law. *Id*. Other circuits agree. *E.g., Conaway v. Polk*, 453 F.3d 567, 588 (4th Cir. 2006) (stating that "the implied bias principle constitutes clearly established federal law as determined by the Supreme Court."); *Brooks*, 418 F.3d at 435 (concluding that the Supreme Court has "long acknowledged" the doctrine of implied bias and that "it is a settled principle of law").

It follows from all of this that, under the Supreme Court's decision in *Weaver*, and contrary to the Wyoming Supreme Court's reasoning, Mr. Fairbourn did not need to establish "that a jury would have reached a more favorable conclusion," Vol. 1 at 129, if the structural error at issue – failure to strike an impliedly biased juror – rendered his trial fundamentally unfair. As the decisions noted above make clear, the presence of a biased juror on the jury does, in fact, render a trial fundamentally unfair, because deprives the defendant of his Sixth Amendment right to an impartial jury. *E.g., French*, 904 F.3d at 120; *Sanders*, 529 F.3d at 791; *Thompson*, 248 F.3d at 622. As the Court in *Dyer*, sitting *en banc*, stated, "[t]he presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." 151 F.3d at 973 n.2 (citations omitted); *E.g., Parker*, 385 U.S. at 366 ("[P]etitioner was entitled to be tried by 12 ... impartial and unprejudiced jurors.").

Thus, the Wyoming Supreme Court's analysis is contrary to clearly-established federal law – that the State of Wyoming could constitutionally try Mr. Fairbourn without a jury of twelve impartial jurors-cannot be reconciled with this clearly established law. *E.g., Wood*, 299 U.S. at 133; *Dyer*, 151 F.3d at 973 n.2; *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020) ("As Blackstone explained, no person could be found guilty of a serious crime unless 'the truth of every accusation ... should ... be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion.'") (omissions in original) (citation omitted).

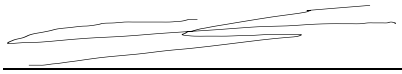
This conclusion is especially compelling when, as here, the biased juror is the jury foreman, a position from which a biased juror can exert influence. *See, e.g., United States v. Snell*, 152 F.3d 345, 347 (5th Cir. 1998) (affirming the district court's application of a sentencing enhancement for bribery of a government official in a "high-level decision-making or sensitive position" when the jury foreman solicited bribes in return for a not-guilty verdict because, among other things, "Snell's position as jury foreman may have increased his ability to influence jury deliberations"); *Von Jan. v. State*, 576 S.W.2d 43, 45 (Tex. Crim. App. 1978) (vacating the defendant's conviction when a jury foreman lied about his relationship with the victim because, considering his "position of influence," the foreman could have been instrumental in the jury's "assess[ment of] a punishment ... at fifty years"). Finally, the specter of improper influence was magnified in this case, considering that the other jurors

selected the jury foreman to be their leader given his past experience as a jury foreman and his leadership capabilities. E.g., Vol. 1 at 1644; and 1649.

CONCLUSION

For the foregoing reasons, Petitioner Bradley Ross Fairbourn respectfully requests that the Court grant certiorari to review the judgment of the United States Court of Appeals in this case.

Respectfully submitted this 19th day of July 2023:



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