NO:

IN THE
SUPREME COURT OF THE UNITED STATES

PHILLIP GIBBS,

***Petitioner*,**

v.

BECKY CARL,

***Respondent*.**

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), is shown by an attorney's failure to preserve a claim that would result in an automatic reversal on appeal because of an unconstitutional state practice?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

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Phillip Gibbs respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion affirming the denial of Gibbs's 28 U.S.C. § 2254 petition is included in the Appendix at A-1. The District Court's opinion denying Gibbs's § 2254 petition is included at A-2. The decision of the Michigan Court of Appeals affirming Gibbs's conviction on direct appeal is included at A-3.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of this Court's rules. The decision of the court of appeals affirming the denial Gibbs's petition for habeas corpus was entered on June 1, 2023. This Court extended the time to petition for a writ of certiorari until October 27, 2023. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, in pertinent part:

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

Section 2254(d) of Title 28 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) states, in pertinent part:

> (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.

INTRODUCTION

For structural defects in criminal proceedings, criminal defendants are entitled to automatic reversal on direct appeal. *Weaver v. Massachusetts*, 582 U.S. 286, 299 (2017). But what if trial defense counsel misses such structural error (or was complicit in it), by failing to object, and leading to procedural default of the claim on appeal? That is the important question, left open in *Weaver*, that this petition squarely addresses.

Traditionally, ineffective assistance of counsel can serve as a cause to excuse a procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *see Martinez v. Ryan*, 566 U.S. 1, 9 (2012) ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."). Here, however, the federal courts held that petitioner Phillip Gibbs could not show "prejudice" because he failed to show that his lawyer's failure to object to error at his trial—the unlawful closure of the courtroom—affected the outcome of his *trial* as opposed to affecting the outcome of his *appeal*. That holding extends this Court's jurisprudence in a way that conflicts with language in *Weaver* and *Strickland v. Washington*, 466 U.S. 668 (1984), which recognizes that "prejudice means 'a reasonable probability that, but for counsel's unprofessional errors, the result of *the proceeding* would have been different.'" *Weaver*, 582 U.S. at 300 (quoting

Strickland, 466 U.S. at 694) (emphasis added). This Court should take this case to clarify the scope of this important doctrine.

STATEMENT OF THE CASE

1. Phillip Gibbs is serving a 17½ to 30 year sentence in the Michigan Department of Corrections for a robbery committed at age 16. At age 17, Gibbs was on trial in this case. During voir dire in his state trial, the state trial judge closed the courtroom to spectators. Court staff denied entry to Gibbs's mother, sister, and brother-in-law. The courtroom closure's problematic nature and exclusion of the public is even more troubling because the trial judge, before voir dire, stated that "if any spectators would like to come in they're welcome but they do have to sit over here by the law clerk, not in the middle of the pool." App.002.

2. On direct appeal, and with different counsel, Gibbs argued that the courtroom closure violated his right to a public trial, and the state appellate court remanded for an evidentiary hearing. But instead of holding an evidentiary hearing, the trial judge refused to take testimony and explained that she knew about the courtroom closure in Gibbs's case and that closing the courtroom during voir dire was her standard practice. The judge made clear that she had no intention of allowing entry during voir dire: "I'm telling you, after we start, when the panel is in the room, you're absolutely right no one would be coming or going. I agree with that. If that's a violation, then I violated." App.013. When Gibbs then returned to the Michigan Court

of Appeals, the court held that his trial-court lawyer defaulted the public-trial claim by failing to make a contemporaneous objection to the courtroom closure, and the court thus denied the claim on plain-error review. App.037-038.

3. Gibbs then sought habeas relief in federal court, and the district court initially denied relief because it concluded that Gibbs defaulted his claim by not objecting during voir dire. App.003. Gibbs appealed to the Sixth Circuit, which reversed for further review by the district court of whether Gibbs knew about the courtroom closure at the time it occurred and whether, if Gibbs did default the claim, he had cause and prejudice to excuse the default. App.004.

4. On remand, the district court held an evidentiary hearing where Gibbs's trial attorney testified that it was courthouse "policy" for deputies to bar the public from entry to the courtroom during voir dire. App.018-019. This policy was unconstitutional: Under *Waller v. Georgia*, 467 U.S. 39 (1984), and *Presley v. Georgia*, 558 U.S. 209, 214 (2010), trial courts may not exclude the public during voir dire unless and until the court makes a series of findings as to why the closure is required.

5. The district court found, however, that because Gibbs's trial attorney knew about the practice of closing the courtroom, he had defaulted the claim. App.020. The court also found that Gibbs's attorney did not render ineffective assistance in failing to object. App.032.

6. Gibbs again appealed to the Sixth Circuit, which affirmed the denial of habeas relief. Reviewing Gibbs's arguments de novo, the Sixth Circuit held that Gibbs failed to show that his trial attorney's failure to object, even if it represented deficient performance, prejudiced him. App.006. Gibbs pointed out that, if his lawyer had objected, then he would have prevailed on appeal because he would have been entitled to an automatic reversal under this Court's precedent regarding courtroom closures. App.006-007. But the Sixth Circuit held that the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 688 (1984), applies only when there is "a reasonable probability that the outcome of his *trial* would have been different." App.006. The court also refused Gibbs's request to find that the courtroom closure constituted structural error under *Weaver v. Massachusetts*, 582 U.S. 286 (2017). App.007-008.

REASONS FOR GRANTING THE WRIT

I. This Court should recognize that prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), is shown by an attorney's failure to preserve a claim that would leave to automatic reversal on appeal.

This Sixth Circuit misinterpreted *Weaver* as holding that a habeas petitioner "must show a reasonable probability that the outcome of his *trial* would have been different" in order to show prejudice for the purposes of excusing procedural default. App.006. This Court "has declined to provide a general definition of 'prejudice' for purposes of cause and prejudice." *Joseph v. Coyle*, 469 F.3d 441, 462 (6th Cir. 2006). The Sixth Circuit—in holding that "prejudice" cannot mean the loss of an automatic

reversal on appeal—unfairly cabined the definition of prejudice, reading distinctions into this Court's precedent that do not exist. As far back as *Murray v. Carrier*, 477 U.S. 478, 488 (1986), this Court has blanketly stated that ineffective assistance of counsel may excuse procedural default—because the default may be imputed to the State, which must ensure proper representation. The Court did not endorse any arbitrary distinction between trial and appellate harm to a defendant.

To read *Weaver* as suggesting otherwise misreads the context of that opinion. *Weaver* emphasized that, when a public-trial violation is preserved and raised on direct review, then "the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" *Weaver*, 582 U.S. at 299 (quoting *Neder v. United States*, 527 U.S. 1, 7 (1999)). In that way, *Weaver* fully supports Gibbs's prejudice argument.

Weaver did at one point describe "prejudice in the ordinary sense," as "a reasonable probability that the jury would not have convicted him if his attorney had objected to the closure." 582 U.S. at 303. But elsewhere in the decision this Court explained that its description of the "ordinary sense" of prejudice was not meant to act as an absolute restriction on the way a petitioner may demonstrate prejudice from his lawyer's deficiencies—as the Sixth Circuit seemed to assume. For example, the Court explained that "the concept of prejudice is defined in different ways depending on the context in which it appears." *Id.* at 300. Indeed, "[i]n the

ordinary *Strickland* case, prejudice means 'a reasonable probability that, but for counsel's unprofessional errors, the result of *the proceeding* would have been different.'" *Id.* (quoting *Strickland*, 466 U.S.at 694) (emphasis added). By referring to prejudice arising from the result of the "proceeding" the Court stated a rule that would encapsulate Gibbs's argument here.

This Court also emphasized that, in line with *Strickland,* "the prejudice inquiry is not meant to be applied in a 'mechanical' fashion." *Weaver*, 582 U.S. at 300. Instead, "the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.'" *Id.* (quoting *Strickland*, 466 U.S. at 696).

It would be fundamentally unfair not to allow Gibbs to show prejudice here. After the trial judge and the lawyers deprived Gibbs of his constitutional right to a public trial, Gibbs raised the issue at his first real opportunity: When his appellate lawyer explained what his trial attorney should have done. At that point, Gibbs did not wait to raise the issue in postconviction hearing, his appellate attorney asked for a remand, which the Michigan Court of Appeals granted. During that remand, the trial judge conceded that, despite her comments to the contrary immediately prior to summoning the venire, her regular practice was to close the courtroom to spectators once jury selection had begun. The judge made clear that she had no intention of allowing entry during voir dire: "I'm telling you, after we start, when the panel is in the room, you're absolutely right no one would be coming or going. I agree with that.

If that's a violation, then I violated." App.013. However, despite this clear violation of such critical right and requirement that the trial court set forth reasons under the *Waller* factors that include a balancing of such factors before a courtroom closure, the Michigan Court of Appeals found itself bound by the principle of plain error because of the trial attorney's failure to object—rather than issuing an automatic reversal. App.037-038.

Thus, under *Weaver*, Gibbs can show prejudice from the trial attorney's failure to object because this failure led directly to the Michigan Court of Appeals applying plain-error review to Gibbs's public-trial claim when he raised it on appeal. App.037. And the application of plain-error review made a critical difference, since the appellate court concluded that Gibbs failed to satisfy the fourth-prong of the plain-error analysis, requiring that the error "'either resulted in the conviction of any actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" App.037, quoting *People v. Vaughn,* 821 N.W.2d 288, 297 (Mich. 2012). There is a reasonable probability, under *Weaver*, that, but for the trial attorney's failure to object, the outcome of Gibbs's appeal would have been different.

In fact, under *Weaver*, prejudice can be presumed when a petitioner shows "that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair." 582 U.S. at 301. In that sense, the reasons for a courtroom

closure are important. In *Weaver*, the trial court made a simple one-time omission of factual findings before an otherwise valid courtroom closure. Here, no party disputes that the closure in Gibbs's case was a routine, unconstitutional practice, apparently agreed to by the whole legal community in the courtroom without notice to defendants. In other words, the trial court did not attempt to safeguard Gibbs's constitutional right to a public trial and in dereliction of its duty, failed to make factual findings as required before a closure is allowed. *See Weaver,* 582 U.S. at 298 ("[A] judge may deprive a defendant of his right to an open courtroom by making proper factual findings in support of the decision to do so.")

Moreover, in *Weaver*, "the closure decision apparently was made by court officers rather than the judge." 582 U.S. at 304. Here, the trial court stated that she was fully aware of and endorsed the courtroom closure from the public. Because of this unique procedure, the record is clear that, had the trial attorney objected, the trial court would have nonetheless closed the courtroom, but Gibbs would have been entitled to an automatic reversal. The only missing factor is the simple act of the trial attorney voicing that the trial court had failed to engage an on-the-record explanation of its courtroom closure—thereby notifying Gibbs of the closure. But for the trial attorney's unprofessional error in failing to protect Gibbs's constitutional rights, the result of the proceeding would have been different.

II. This case is a good vehicle to resolve these questions.

This case presents a good vehicle for the Court to address the issues raised in this petition. That a procedural default occurred is undisputed. App.005. The only question is whether ineffective assistance excuses that default, and whether trial counsel's errors prejudiced Gibbs, either through actual or presumed prejudice. Here, the record is unusually robust on the decisionmaking process of the key players in the case: The trial court explained its decision to close the courtroom during remand as part of the direct appeal. App.002-003. And the trial attorney explained his decision not to object during the evidentiary hearing held during the federal district court case. App.004. This Court should grant this petition for review, clarify the issue of prejudice in this context, and ultimately grant Gibbs's petition for habeas relief.

CONCLUSION

Petitioner Phillip Gibbs requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER

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