No. _____

In The
Supreme Court of the United States

GERALD FIELDS,

Petitioner,

v.

JAY FORSHEY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

ANDREW S. POLLIS
Counsel of Record
MILTON AND CHARLOTTE KRAMER LAW CLINIC
CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
11075 East Boulevard
Cleveland, Ohio 44106
216.368.2766
andrew.pollis@case.edu

Counsel for Petitioner Gerald Fields

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

QUESTIONS PRESENTED

1. When a state trial court fails to conduct a *Faretta* colloquy before sentencing a defendant without counsel—a fundamentally unfair structural error that would require automatic reversal—is appellate counsel ineffective for failing to raise the issue on direct appeal?

2. When a habeas petitioner asserts ineffective assistance of counsel resulting in a fundamentally unfair structural error (such as deprivation of the right to counsel at sentencing), must that petitioner also demonstrate actual prejudice, even when doing so is inherently impossible?

RELATED PROCEEDINGS

Fields v. Forshey, No. 22-3031 (United States Court of Appeals for the Sixth Circuit) (opinion affirming the judgment of the district court denying habeas relief, filed August 8, 2023; order denying petition for rehearing en banc, filed October 5, 2023).

Fields v. Forshey, No. 2:21-cv-1877 (United States District Court for the Southern District of Ohio) (opinion denying motion to alter judgment denying habeas relief, filed December 20, 2021; opinion denying habeas relief, filed November 9, 2021).

State of Ohio v. Fields, No. 2020-1479 (Supreme Court of Ohio) (direct appeal: order declining to review appellate court's denial of Fields' application to reopen his direct appeal, filed February 2, 2021).

State of Ohio v. Fields, No. 2020-1071 (Supreme Court of Ohio) (direct appeal: order declining to review appellate court's judgment affirming Fields' conviction, filed December 29, 2020).

State of Ohio v. Fields, No. CT2019-0073 (Court of Appeals of Ohio, Fifth Appellate District, Muskingum County) (direct appeal: opinion affirming the state trial court's judgment of conviction, issued July 27, 2020; order denying Fields' application to reopen his direct appeal, filed October 27, 2020).

State of Ohio v. Fields, No. CT2019-0073 (Court of Appeals of Ohio, Fifth Appellate District, Muskingum County) (direct appeal: opinion affirming the state

RELATED PROCEEDINGS—Continued

trial court's judgment of conviction, issued July 27, 2020).

State of Ohio v. Fields, No. CR2019-0123 (Court of Common Pleas, Muskingum County, Ohio) (judgment entry of conviction and sentence, filed August 14, 2019).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Gerald Fields respectfully petitions 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 district court's order denying habeas relief (App. 1) is unreported but available at 2023 U.S. App. LEXIS 20863. The Sixth Circuit's order denying Fields' petition for rehearing en banc (App. 98) is unreported but available at 2023 U.S. App. LEXIS 26646. The district court's order denying habeas relief (App. 35) is unreported but available at 2021 U.S. Dist. LEXIS 216245.

The Ohio Supreme Court entries declining to review Fields' direct appeal and application to reopen his appeal (App. 46–47) are reported at 160 Ohio St. 3d 1507, 2020-Ohio-6835, 159 N.E.3d 1152, and 161 Ohio St. 3d 1422, 2021-Ohio-254, 161 N.E.3d 721, respectively. The Ohio Fifth District Court of Appeals' opinion affirming the judgment of the trial court (App. 62) is reported at 2020-Ohio-3995; its judgment entry denying Fields' application to reopen his direct appeal (App. 57) is unreported. The Muskingum County Court of Common Pleas judgment entry (App. 89) is unreported.

JURISDICTION

The Sixth Circuit issued its opinion and judgment on August 8, 2023, and denied Mr. Fields' timely petition for en banc rehearing on October 5, 2023. Mr. Fields applied for and received an extension of time to file this petition to March 3, 2024 (No. 23A558.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

STATUTES INVOLVED

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254 (as amended).

OHIO REV. CODE § 2929.14: Definite Prison Terms.

OHIO REV. CODE § 2953.08: Appeal as a Matter of Right—Grounds.

INTRODUCTION

"[T]he necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the

defendant to present his case as to sentence is apparent." *Mempa v. Rhay*, 389 U.S. 128, 135 (1967). That necessity led the Court to hold that the fundamental right to counsel applies at sentencing. *Id.* at 137.

The necessity is all the greater in a jurisdiction like Ohio, where the felony sentencing system is "purely discretionary." 3 LEWIS R. KATZ ET AL., BALDWIN'S OHIO PRACTICE–CRIMINAL LAW, § 118:2, at 881 (3d ed. 2009). Unlike most discretionary trial-court decisions—which are subject to *some* appellate review, even if only for abuse of discretion—Ohio appellate courts have very little power to review sentencing decisions that fall within the statutory range. *See State v. Jones*, 163 Ohio St. 3d 242, 2020-Ohio-6729, 169 N.E.3d 649 (base sentences); *State v. Gwynne*, ___ Ohio St. 3d ___, 2023-Ohio-3851, ___ N.E.3d ___ (consecutive sentences). *See also Campbell v. Ohio*, 583 U.S. 1204, 1205 (2018) (Sotomayor, J., statement respecting denial of certiorari) (finding it "deeply concerning" that Ohio *precludes* appellate review over certain sentencing decisions). So the sentencing hearing in the trial court is essentially the whole ballgame.

At such a consequential proceeding, no defendant can waive the right to counsel without first being told just how high the stakes are—or, in the Court's words, the "dangers and disadvantages" of proceeding pro se. *See Faretta v. California*, 422 U.S. 806, 835 (1975). And when the trial court fails to warn—instead proceeding to sentence the defendant without a waiver and without counsel—the fundamentally unfair structural error qualifies for automatic reversal on direct appeal. So

an appellate lawyer who abandons the issue necessarily provides ineffective assistance. And the defendant, a victim of the whole process, should have no burden to demonstrate prejudice when challenging appellate counsel's ineffectiveness in habeas.

But the Sixth Circuit below held otherwise. It questioned whether *Faretta* applies at sentencing at all. It suggested that Mr. Fields waived his right to *any* counsel by assenting to his prior counsel's withdrawal. And it cited Mr. Fields' "criminal court experience," App. 12, as a possible substitute for a proper *Faretta* colloquy.

The Sixth Circuit also imposed an actual-prejudice requirement that contradicts longstanding precedent left undisturbed by this Court's holding in *Weaver v. Massachusetts*, 582 U.S. 286 (2017). Even post-*Weaver*, structural errors involving fundamental unfairness—like deprivation of the right to counsel—never require a showing of prejudice, whether on direct appeal or in habeas. Indeed, it would never be possible to demonstrate prejudice from the deprivation of counsel, because the result *with* counsel is inherently unknowable unless it happens.

The Sixth Circuit is not alone in misconstruing *Faretta* and *Weaver*, and deep splits have emerged. This Court should grant certiorari and settle the conflicts on these important questions.

STATEMENT OF THE CASE

1. In June 2019, an Ohio jury convicted Petitioner Gerald Fields of drug offenses in state court. App. 90. On August 12, 2019, the trial court sentenced Mr. Fields, without counsel, to a term of ten years—five times as long as the Ohio statutes in question required.[1] App. 91–92. At the sentencing hearing, Mr. Fields' recently retained counsel moved to withdraw, citing a misunderstanding regarding the scope of his representation. App. 2. Before granting that motion to withdraw, the trial court posed one question to Mr. Fields: "*You know you're still going to be sentenced today?*" App. 96 (emphasis added). Mr. Fields answered "yes." App. 96. The court then sentenced Mr. Fields to

[1] Mr. Fields was convicted of a minor misdemeanor (Count 2), three fifth-degree felonies (Counts 1, 3, and 4), and a second-degree felony (Count 5). For sentencing purposes, the trial judge merged Count 1 with Count 3 and Count 2 with Count 4. The chart below compares the available sentences to the actual sentences imposed on Mr. Fields:

	Statutory Base Incarceration Ranges	**Mr. Fields' Base Incarceration Lengths (Run Consecutively)**
Count 3 OHIO REV. CODE § 2925.03(A)(2)	Six to twelve months. *See* OHIO REV. CODE § 2929.14(A)(5).	Twelve months.
Count 4 OHIO REV. CODE § 2925.03(A)(2)	Six to twelve months. *See* OHIO REV. CODE § 2929.14(A)(5).	Twelve months.
Count 5 OHIO REV. CODE § 2925.04(A)	Two to eight years. *See* OHIO REV. CODE § 2929.14(A)(2)(b).	Eight years.

ten years in prison with no counsel by his side and no other warnings about why proceeding without counsel was unwise. App. 92.

2. Mr. Fields filed a timely notice of appeal to the Ohio Court of Appeals for Muskingum County, Fifth Appellate District. App. 3, 62–63. The state trial court appointed appellate counsel, App. 3, who raised six issues[2] on direct appeal but failed to raise the uncounseled sentencing. App. 3. On July 27, 2020, the state court of appeals overruled all assignments of error and affirmed the trial court's judgment. App. 62, 88. On September 2, 2020, Mr. Fields filed a notice of appeal from this judgment to the Supreme Court of Ohio, which declined to accept jurisdiction. App. 47.[3]

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[2] On direct appeal, Mr. Fields' counsel raised the following issues:

1. trial counsel was ineffective by failing to object when the trial court abused its discretion by telling jurors to continue deliberations to reach a verdict;
2. the trial court abused its discretion by allowing an officer to testify;
3. the trial court plainly erred by initially misreading—but then correcting—the charges against Mr. Fields when giving jury instructions;
4. Mr. Fields' conviction warranted reversal because of the insufficiency of evidence;
5. Mr. Fields' conviction warranted reversal because it was against the manifest weight of the evidence; and
6. the trial court plainly erred by imposing consecutive sentences.

App. 66–68.

[3] In December 2019, Mr. Fields additionally filed a *pro se* petition for post-conviction relief, raising, among other issues, the

3. In October 2020, Mr. Fields filed a pro se application to reopen his direct appeal under OHIO R. APP. P. 26(B). App. 48. He argued that his appointed appellate attorney had provided ineffective assistance in failing to assign error to the uncounseled sentence. App. 49–50. The state appellate court denied his application, finding no ineffective assistance because "Appellant himself requested that his trial counsel withdraw, with full knowledge and a cautionary statement by the trial court that sentencing would still go forward." App. 59. The appellate court disregarded Mr. Fields' argument that his assent to prior counsel's withdrawal was inadequate "without any mention of a waiver of counsel, or securing new counsel." *See* App. 50–51. In December 2020, Mr. Fields appealed that denial to the Supreme Court of Ohio, which declined once again to exercise jurisdiction. App. 46.

4. On April 16, 2021, Mr. Fields filed a pro se petition for writ of habeas corpus in the United States District Court for the Southern District of Ohio, raising five claims, including Claim 4 (the state trial court deprived Mr. Fields of his Sixth Amendment right to counsel at sentencing) and Claim 5 (Mr. Fields' appellate counsel was constitutionally ineffective in not raising the uncounseled-sentencing error on direct appeal). App. 38. Claim 4 was procedurally defaulted; Mr. Fields relied on cause and prejudice from appellate

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trial court's denial of counsel at sentencing. On December 30, 2019, the state trial court denied this petition. And on April 27, 2020, the state appellate court affirmed that denial.

counsel's ineffective assistance to excuse the procedural default. Claim 5 was not defaulted.

5. The district court denied Mr. Fields' habeas petition in November 2021, App. 35, concluding that the errors asserted in Claims 4 and 5 were harmless. App. 42. Mr. Fields then timely moved to alter or amend the judgment under FED. R. CIV. P. 59(e), App. 30, which the district court denied as well. App. 29.

6. Mr. Fields filed a timely notice of appeal in January 2022. The Sixth Circuit Court of Appeals granted a certificate of appealability for Claim 4 and Claim 5. App. 23. The panel ultimately affirmed the district court's dismissal of Mr. Fields' habeas petition on August 8, 2023. Mr. Fields timely petitioned for rehearing en banc, which the Sixth Circuit denied on October 5, 2023. App. 98.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant the Writ to Reaffirm that Trial Courts Must Warn Defendants of the Dangers and Disadvantages of Self-Representation at Sentencing—and That When They Don't, Effective Appellate Counsel Must Raise that Structural Error on Direct Appeal.

Criminal defendants are guaranteed the right to counsel at all critical stages, including sentencing. *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (citing *Mempa v. Rhay*, 389 U.S. 128 (1967); *Specht v.*

Patterson, 386 U.S. 605 (1967)); *Iowa v. Tovar*, 541 U.S. 77, 80–81 (2004). And depriving a defendant of the fundamental right to counsel at a critical stage is structural error. *Weaver v. Massachusetts*, 582 U.S. 286, 296 (2017) (citing *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1993)).

The Court has repeatedly emphasized the importance of making a defendant "aware of the dangers and disadvantages of self-representation" before finding a waiver of the fundamental right to counsel. *Faretta v. California*, 422 U.S. 806, 835 (1975); *Patterson v. Illinois*, 487 U.S. 285, 298–300 (1998); *Tovar*, 541 U.S. at 90. This duty to warn applies at all critical proceedings throughout the trial process, though with different levels of required specificity. *See Patterson*, 487 U.S. at 298–300 (1998); *Tovar*, 541 U.S. at 90.

But circuit courts, including the Sixth Circuit below, often fail to enforce the duty to conduct a *Faretta* colloquy before finding waiver of the right to counsel. In fact, circuits—and panels within the circuits—conflict in their application and interpretation of *Faretta*'s basic duty to warn, with some insisting upon a warning and others excusing a lack of warning if the record otherwise contains evidence that the accused was aware of the dangers of self-representation.

All of this leads to confusion and contradictory results, watering down not only the *Faretta* requirements, but also the obligation of appellate counsel to raise structural error involving deprivation of counsel. The state appellate court would have been obligated to

reverse the uncounseled sentence even without a prejudice showing had Mr. Fields' appellate counsel raised the issue, and the result should be no different simply because his appellate representation was also inadequate.

A. This Court Requires Trial Courts to Warn a Defendant of the "Dangers and Disadvantages" of Self-Representation Before the Defendant May Waive the Right to Counsel at Sentencing.

In a trilogy of cases, this Court explained that trial courts have a duty, at all critical stages, to warn defendants of the dangers and disadvantages of self-representation before finding a waiver of the right to counsel. In *Faretta*, the Court reaffirmed that a defendant has a constitutional right to represent himself in a criminal case and that this right is "necessarily implied by the structure of the [Sixth] Amendment," which gives the defendant directly the right to make his defense. 422 U.S. at 813–16, 819. The Court further held that when a defendant voluntarily and intelligently elects to defend himself, a court violates the defendant's constitutional right to conduct his own defense when it compels him to accept counsel. *Id.* at 835–36.

The Court recognized, however, that "[w]hen an accused manages his own defense, he relinquishes . . . many of the traditional benefits associated with the right to counsel," and to represent himself, an accused

"must 'knowingly and intelligently' forgo those relinquished benefits." *Id.* at 835. Most important to Mr. Fields' case, the *Faretta* Court then mandated that to waive the right to counsel, an accused "should be *made aware* of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Ibid.* (emphasis added) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

The Court next took up the waiver-of-counsel requirements in *Patterson v. Illinois*, where the Court held that the type of warnings "required before a waiver of [the] right [to counsel] will be recognized" depend on a "pragmatic assessment of the usefulness of counsel to the accused *at the particular proceeding*, and the dangers to the accused of proceeding without counsel." 487 U.S. at 298 (emphasis added). The Court recognized that *Faretta*'s warning requirement applies at all critical proceedings, albeit varying in form and complexity based on the nature of the proceeding. *Id.* at 299–300 (finding that the accused must still be made aware of the dangers and disadvantages of self-representation when waiving his right to counsel at postindictment questioning but that the inquiry need not be as searching as one required at trial).

Finally, in *Iowa v. Tovar*, the Court again endorsed the "pragmatic" approach taken in *Patterson*, explaining that there is no "script to be read to a defendant who states that he elects to proceed without counsel" and that "information a defendant must possess" to

waive his right to counsel "will depend" in part on the "stage of the proceeding." *Tovar*, 541 U.S. at 88.

This line of precedent leaves no room for doubt: a trial court must satisfy its *Faretta* duties at *all* critical stages of the criminal process, even if the content of the required warnings will depend on the stage. *See Patterson*, 487 U.S. at 298. Further, when the purported waiver occurs at sentencing, the need for a skillful attorney (and, thus, for a warning to a defendant who seeks to proceed without one) is crucial; sentencing involves complex statutes and guidelines, and only a lawyer can be expected to navigate both the legal standards and the discretionary factors that trial courts consider. *See United States v. Salemo*, 61 F.3d 214, 220 (3d Cir. 1995). So there is no question that a trial court must give a *Faretta* warning before finding waiver of counsel at sentencing. "Neither logic nor precedent supports carving out an exception [from the *Faretta* requirements] when the [purported] waiver occurs at sentencing." *Salemo*, 61 F.3d at 219.

B. The Sixth Circuit Below Disregarded *Faretta*'s Command and Excused the State Trial Court's Failure to Warn Mr. Fields of the Dangers and Disadvantages of Self-Representation.

The Sixth Circuit's decision below disregards the duty to warn. It instead deferred to the state appellate court's flawed analysis.

That analysis came only after the state appellate court affirmed Mr. Fields' conviction. He moved pro se to reopen his appeal, arguing that his appellate counsel was ineffective for failing to challenge the uncounseled sentence. App. 48–50. Mr. Fields explained that the trial court had neglected to obtain or find a waiver of his right to counsel before sentencing him while unrepresented. App. 50–51.

The state appellate court denied Mr. Fields' application to reopen without addressing the heart of the waiver problem. It found that Mr. Fields' appellate counsel was not ineffective for failing to challenge the uncounseled sentence because the state trial court had warned Mr. Fields that "sentencing would still go forward" that same day. App 59. But the timing of the hearing was not the issue; the issue was ensuring that Mr. Fields understood why proceeding without counsel was so risky. And in glossing over the sentencing court's duty to warn Mr. Fields of the risks, the state appellate court obscured appellate counsel's duty to raise the issue. So, having failed to address the waiver/ineffectiveness issue "on the merits," the state appellate court's decision enjoys no deference in habeas. *See Wilson v. Sellers*, 584 U.S. 122, 125 (2018).

But the Sixth Circuit below nevertheless fell victim to that flawed analysis. It held that Mr. Fields' state appellate counsel was not ineffective for failing to raise the uncounseled sentence, focusing again on Mr. Fields' assent to his prior counsel's withdrawal and

his "criminal court experience,"[4] App. 12, but finding no deficiency in the trial court's failure to conduct a *Faretta* colloquy or in appellate counsel's failure to raise that deficiency on direct appeal.

The court below also questioned whether *Faretta* even applies at the sentencing stage. In doing so, it put the Sixth Circuit in conflict with the Third, D.C., Fifth, Eighth, and Ninth Circuits, all of which have found that the duty to warn applies at sentencing. And it undermined the spirit of the *Faretta-Patterson-Tovar* trilogy.

C. Courts—Among and Within the Circuits—Disagree on Whether a Trial Court Must Affirmatively Warn a Defendant of the Dangers and Disadvantages of Self-Representation Before Finding a Waiver of the Right to Counsel at Sentencing.

Across and within the circuits, courts conflict over a trial court's duty to engage an accused in a discussion of the dangers and disadvantages of self-representation before finding the accused waived his right to counsel. The Third and D.C. Circuits require trial courts to engage defendants in a discussion warning them of the perils of self-representation before finding waiver—a requirement these circuits apply equally at sentencing. Confusion persists in the remaining

[4] The Sixth Circuit articulated no basis for elevating Mr. Fields' "criminal court experience" (whatever that may be) to a level that substitutes for the trial court's *Faretta* duties.

circuits; some panels within those circuits faithfully follow *Faretta*'s warning requirements, while others indulge inferences from other parts of the record to excuse an insufficient or missing colloquy. Still other panels recognize the duty *Faretta* places upon trial courts but fail to enforce that duty.

1. The Third and D.C. Circuits require trial courts to conduct *Faretta* inquiries sufficient to ascertain that the accused understands the dangers and disadvantages of self-representation.

The conflict begins with the Third and D.C. Circuits, both of which faithfully apply *Faretta*'s warning requirements.

The Third Circuit requires trial courts to conduct a "searching inquiry" that ensures a defendant understands the perils of self-representation before finding a waiver of counsel. *United States v. Welty*, 674 F.2d 185, 189 (3d Cir. 1982); *see also McMahon v. Fulcomer*, 821 F.2d 934, 945 (3d Cir. 1987). That searching inquiry must occur "at sentencing, just as at trial," sufficient to ensure that "the defendant's waiver was understanding and voluntary." *Salemo*, 61 F.3d at 220 (cleaned up); *see also Richardson v. Superintendent Coal Twp. SCI*, 905 F.3d 750, 762–63 (3d Cir. 2018).

In the absence of a proper *Faretta* inquiry, the Third Circuit will not indulge inferences based on circumstantial evidence. Rather, absent an explicit inquiry, the Third Circuit simply finds reversible error.

See Welty, 674 F.2d at 191 (holding that the fact the defendant "was in the trial judge's words, 'an experienced litigant,' cannot, without more, suffice to establish [his] reluctant decision to proceed pro-se . . . was knowingly and intelligently made"); *Salemo*, 61 F.3d at 221 (explaining that the court could not "infer a valid waiver of the right to counsel" based on the judge's impression that the defendant was capable of representing himself because he had previously been actively involved in litigating his case).

The D.C. Circuit has likewise found that trial courts have an affirmative duty to conduct a colloquy warning an accused of the dangers and disadvantages of self-representation. *See*, *e.g.*, *United States v. Hall*, 610 F.3d 727, 735 (D.C. Cir. 2010) (*Faretta* "placed a responsibility on the trial court to . . . conduct[ ] a colloquy."). And that duty—"to engage the defendant in a short discussion on the record regarding the[ ] dangers and disadvantages [of self-representation]"—applies with equal force at sentencing. *United States v. O'Neal*, 844 F.3d 271, 279 (D.C. Cir. 2016) (cleaned up).

2. Most other circuits follow no uniform rule.

Outside the Third and D.C. Circuits, inconsistency abounds.

a. Some panels stay faithful to *Faretta*.

Panels in the Fifth, Seventh, Eighth, and Ninth Circuits have all held that *Faretta* requires trial courts to warn an accused of the dangers and disadvantages of self-representation before finding a valid waiver at sentencing. *See*, *e.g.*, *United States v. Virgil*, 444 F.3d 447, 453–55 (5th Cir. 2006) (holding that "district courts are required to provide *Faretta* warnings to ensure that a waiver is valid" and remanding for resentencing as the trial court failed to warn the accused of the perils of self-representation before allowing him to waive his right to counsel at sentencing); *United States v. Sparkman*, 289 Fed. Appx. 12, 13 (5th Cir. 2008) (same); *United States v. Mancillas*, 880 F.3d 297, 301–02 (7th Cir. 2018) (holding that "*Faretta* colloquies . . . are necessary to ensure that a defendant properly waives the right to counsel" and the trial court's "summarily denying" a defendant's request to proceed pro se at sentencing without any inquiry "is error"); *Shafer v. Bowersox*, 329 F.3d 637, 647–48 (8th Cir. 2003) (explaining that "the Supreme Court has clearly established that the presiding court must undertake a thorough colloquy with the defendant before permitting him to proceed [pro se]" including at sentencing); *United States v. Franklin*, 650 Fed. Appx. 391, 393 (9th Cir. 2016) (quoting *United States v. Hayes*, 231 F.3d 1132, 1137–38 (9th Cir. 2000)) (holding the district court erred "in allowing Franklin to represent himself at sentencing without having first given adequate *Faretta* cautions" and finding "[t]he court must offer

'some instruction or description, however minimal, of the specific dangers and disadvantages of proceeding pro se.'").

Unlike these circuits, the Sixth Circuit has not specified what *Faretta* requires at sentencing. But it has recognized (though not in its decision below) that *Faretta* duties apply at the trial stage and has adopted a model inquiry that trial courts are expected to conduct. *See United States v. Johnson*, 24 F.4th 590, 599 (6th Cir. 2022) (holding that when faced with a defendant wishing to proceed pro se, a district court in its circuit must ask a series of questions like those in the model inquiry in the *Bench Book for United States District Judges*).[5]

b. Other panels permit circumstantial evidence to substitute for a *Faretta* colloquy.

While many panels across the circuits faithfully follow *Faretta*'s duty to warn, other panels—sometimes within the same circuit—excuse an inadequate colloquy by finding the functional equivalent of harmless

[5] The Sixth Circuit in the decision below also suggested that applying *Faretta* at sentencing is not a clearly established requirement, as this Court "has not applied the *Faretta* inquiry in the sentencing context." App. 11. But the Court has made plain that sentencing is a critical stage, *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (citing *Mempa v. Rhay*, 389 U.S. 128 (1967)), and that *Faretta*'s duty to warn applies at all critical stages. *See Patterson*, 487 U.S. at 298–300; *Tovar*, 541 U.S. at 88.

error. That is the approach the Sixth Circuit essentially endorsed below. App. 11–12.

But the Sixth Circuit panel below is not alone in failing to adhere to *Faretta*. Perhaps the most direct attack comes from a Second Circuit panel in *Dallio v. Spitzer*, 343 F.3d 553, 563–64 (2d Cir. 2003). The *Dallio* court disclaimed *any* affirmative duty to warn a defendant of the dangers and disadvantages of proceeding without counsel, characterizing that portion of *Faretta* as dictum and noting the Court's use of "should," rather than "shall," in describing the duty. *Id.* at 562–63.

While no other circuit appears to have taken so extreme an approach, some panels in the First, Fourth, Seventh, and Ninth Circuits have rejected challenges to uncounseled convictions, even when the trial court has violated *Faretta*, if circumstantial evidence supports an inference that the defendant nevertheless understood what the trial court failed to explain. *See*, *e.g.*, *United States v. Francois*, 715 F.3d 21, 30 (1st Cir. 2013) (recognizing "the trial judge must warn the defendant of the dangers and disadvantages of self-representation" but affirming the district court's waiver finding because the "record amply support[ed] the . . . conclusion that [the defendant] was fully aware of the disadvantages he would face as a pro se defendant") (cleaned up); *United States v. Robinson*, 753 F.3d 31, 43–44 (1st Cir. 2014) (same); *United States v. Jones*, 65 F.4th 926, 931 (7th Cir. 2023) (excusing absence of *Faretta* colloquy if "the record adequately establishes that the defendant knowingly and voluntarily waived his right to

counsel"); *Arrendondo v. Neven*, 763 F.3d 1122, 1130 (9th Cir. 2014) (finding that in "the rare case . . . adequate waiver will be found on the record in the absence of a specific inquiry by the trial judge" as "the test concerns what the accused understood rather than what the court said . . . , explanations are not required") (cleaned up). *See also United States v. Roof*, 10 F.4th 314, 359–60 (4th Cir. 2021) (looking to both the *Faretta* colloquy and the record as a whole to affirm finding of waiver).

An Eleventh Circuit panel has similarly found waiver at sentencing, despite an inadequate or missing *Faretta* hearing, by looking to the record for circumstantial evidence supporting an inference of waiver. *See Rose v. United States*, 590 Fed. Appx. 937, 940–42 (11th Cir. 2014) (holding that despite lack of a *Faretta* colloquy, the district court did not err because the record otherwise contained evidence of factors supporting finding waiver), *vacated on other grounds*, 577 U.S. 918 (2015).

Finally, panels in the Tenth and Eleventh Circuits are also willing to excuse their trial courts' failure to warn defendants of the dangers and disadvantages of self-representation and have described *Faretta* hearings as merely a "means to the end" of creating an adequate record of waiver. *See United States v. Hammet*, 961 F.3d 1249, 1256 (10th Cir. 2020); *Rose*, 590 Fed. Appx. at 941.

The problem of permitting circumstantial evidence to substitute for a proper *Faretta* warning is patent. When dealing with rights as important as the right to counsel, we should ensure that a finding of waiver is based on an informed dialog with the defendant, not on after-the-fact inferences that always leave room for doubt. Clarity and certainty are key.

D. When a Trial Court Fails to Warn the Accused of the Dangers and Disadvantages of Self-Representation at Sentencing, Appellate Counsel Must Raise the Issue Unless the Record Exposes a Strategic Reason for Not Doing So.

A trial court's failure to warn a pro se defendant of the dangers and disadvantages of self-representation at sentencing denies the defendant his Sixth Amendment right to counsel. This structural error "generally . . . entitle[s]" the defendant "to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" *Weaver v. Massachusetts*, 582 U.S. 286, 299 (2017) (quoting *Neder v. United States*, 527 U.S. 1, 7 (1999)). So it is, by definition, ineffective assistance for appellate counsel not to raise this issue on appeal absent an overwhelming strategic reason not to do so.

Appellate counsel is ineffective when counsel commits an error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and "there is a reasonable probability that inclusion of the [omitted] issue would have

changed the result of the appeal." *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Howard v. Bouchard*, 405 F.3d 459, 485 (6th Cir. 2005). Failing to raise a claim on appeal amounts to deficient performance when "that claim was plainly stronger than those actually presented to the appellate court," *Davila v. Davis*, 582 U.S. 521, 533 (2017), or was a "dead-bang winner." *United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995) ("[A] 'dead-bang winner,' . . . is an issue which was obvious from the trial record. . . .")

Under that standard, there is no room for dispute that Mr. Fields' appellate counsel was ineffective in failing to raise his uncounseled sentence. Appellate counsel raised six other issues, almost all calling upon the appellate court to find abuse of discretion (a far higher hurdle).

With no required showing of prejudice, structural error is on the list of mandatory issues effective appellate counsel must raise unless the record reveals that doing so may be contrary to the client's interest. If, for example, the outcome on remand could be worse if the appeal succeeds, then counsel has a strategic reason for leaving well enough alone.[6] But when (as here) a defendant is sentenced to the statutory maximum—when, in short, the worst outcome is the same outcome—there is no justification for counsel's failure to raise the error.

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[6] Clearly, appellate counsel was unconcerned about the potential for a remand for sentencing purposes, because one of the issues argued that the sentence was plain error. App. 66–68.

Not raising the structural error of an uncounseled sentence was "inexplicable," as it was "plainly stronger than those [claims] actually presented." *Mapes v. Coyle*, 171 F.3d 408, 427 (6th Cir. 1999); *Davila*, 582 U.S. at 533. Five of the six issues raised on direct appeal were subject to deferential review, while the uncounseled sentence would have been subject to *de novo* review. *State v. Angus*, 87 N.E.3d 617, 620–21 (Ohio Ct. App. 2017) ("We employ a de novo standard of review when evaluating errors based upon violations of constitutional law [such as the Sixth Amendment right to counsel]."). Nor did Mr. Fields' appellate counsel exhibit a strategy of focusing on a single central issue, as an appellate advocate can sometimes do. *See Jones v. Barnes*, 463 U.S. 745, 751–52 (1983). Instead he raised six scattered assignments of error. So in failing to raise the uncounseled sentence, Mr. Fields' appellate counsel did not act as a "reasonably competent attorney," and his representation fell outside "the range of competence demanded of attorneys in criminal cases." *Strickland*, 466 U.S. at 687.

II. The Court Should Grant the Writ to Clarify that a Structural Error Involving Fundamental Unfairness—Such as Deprivation of the Right to Counsel—Requires No Showing of Prejudice Under *Weaver* in Habeas Proceedings, Even When Raised Through a Claim of Ineffective Assistance of Counsel.

A deep, well-recognized conflict exists among lower courts regarding the standard for determining

prejudice when ineffective assistance of counsel leads to a structural error, including structural errors involving fundamental fairness.[7]

Seven years ago, the Court chipped away at the conflict by deciding *Weaver v. Massachusetts*, 582 U.S. 286, 293 (2017). *Weaver* teaches that a defendant must demonstrate prejudice to prevail on a claim of ineffective assistance for trial counsel's failure to object to certain types of structural error, such as the closure of the courtroom. *Id.* at 301. In so holding, the *Weaver* Court assumed, without explicitly holding, that other types of structural errors—those that "lead to fundamental unfairness"—can warrant relief without a showing of prejudice, even when raised through an ineffective-assistance claim. *Id*. at 300. Indeed, the presumption of prejudice for fundamentally unfair errors has been clearly established for decades. *See Brecht v. Abrahamson*, 507 U.S. 619, 629–30, 638 (1993) (reaffirming that structural errors are not subject to harmless-error analysis, but instead are prejudicial per se in habeas contexts); *see also Strickland v. Washington*, 466 U.S. 668, 692 (1984) ("Since fundamental fairness is the central concern of the writ of habeas corpus, no special standards ought to apply to ineffectiveness claims made in habeas proceedings.") (cleaned up).

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[7] Mr. Fields asserted a claim of ineffective assistance of appellate counsel, the success of which would also supply the cause and prejudice to overcome the procedural default created by appellate counsel's failure to raise the issue. *See Murray v. Carrier*, 477 U.S. 478, 491 (1986).

But *Weaver*, even in assuming a distinction for fundamentally unfair structural errors, has spawned a conflict among the lower courts, which now disagree on the need for a prejudice showing. Some courts construe *Weaver* as supporting a presumption of prejudice in such circumstances, which has always been the case with deprivation of counsel. Other courts limit the presumption of prejudice to particular structural errors. Still other courts interpret *Weaver* to require a prejudice showing even for fundamentally unfair structural errors. The Tenth Circuit's jurisprudence crystallizes the conflict; despite *Brecht* and *Strickland*, the Tenth Circuit reads the uncertainty as itself a basis for denying habeas for want of "federal law clearly established by the Supreme Court." *Fairbourn v. Morden*, No. 22-8005, 2023 U.S. App. LEXIS 12302, at *19 (10th Cir. May 19, 2023), *cert. denied*, ___ U.S. ___, 144 S. Ct. 229 (2023).

Identically situated defendants continue to be treated fundamentally differently, but now may face inconsistent outcomes both across and within circuits. The Court should grant certiorari to align the lower courts.

A. The Court in *Weaver* Left Undisturbed the Clearly Established Law that Excuses a Prejudice Showing, Even in Habeas, for Structural Errors that "Always Result[] in Fundamental Unfairness."

The Court has recognized a handful of errors involving constitutional rights so basic to a fair trial that

the error warrants automatic reversal of a conviction on direct appeal.[8] *See Neder v. United States*, 527 U.S. 1, 7–8 (1999). Known as structural errors, these errors "affect the framework within which the trial proceeds," rather than being "simply an error in the trial process itself," and "defy analysis by harmless error standards." *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991). The structural-error doctrine "seemed simple at first," but "has threatened to become hopelessly complex with the passage of time." *See* Zachary L. Henderson, *A Comprehensive Consideration of the Structural-Error Doctrine*, 85 MO. L. REV. 965, 1010 (2020); *United States v. Marcus*, 560 U.S. 258, 270 (2010) (Stevens, J., dissenting) (referring to the doctrine as an "analytic maze").

Raising a structural error outside direct appellate review adds to the complexity. If a defendant raises a structural error through ineffective assistance of counsel, the court must determine whether the petitioner

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[8] Clearly established structural errors include: (1) total deprivation of the right to counsel, *see Gideon v. Wainwright*, 372 U.S. 335, 339 (1963); (2) lack of an impartial trial judge, *see Tumey v. Ohio*, 273 U.S. 510, 535 (1927); (3) racial discrimination in grand-jury selection, *see Vasquez v. Hillery*, 474 U.S. 254, 264 (1986); (4) denial of self-representation at trial, *see McKaskle v. Wiggins*, 465 U.S. 168, 177–78, n.8 (1984); (5) denial of public trial, *see Waller v. Georgia*, 467 U.S. 39, 49, n.9 (1984); (6) defective reasonable-doubt jury instructions, *see Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993); (7) denial of one's counsel of choice, *see United States v. Gonzalez-Lopez*, 548 U.S. 140, 140 (2006); (8) a magistrate judge's presiding over jury selection without both parties' consent, *see Gomez v. United States*, 490 U.S. 858, 876 (1989); and (9) counsel's admitting guilt over defendant-client's objections, *see McCoy v. Louisiana*, 584 U.S. 414, 417 (2018).

needs to demonstrate prejudice—as is typically required under *Strickland*, 466 U.S. at 687—or whether automatic reversal is warranted, as structural errors warrant when preserved.

To address the open-court violation at issue in *Weaver*, the Court articulated a three-part typology to classify structural errors:

> (1) Errors not meant to protect the defendant from erroneous conviction but instead protect some other interest, such as the defendant's right to self-representation;
>
> (2) Errors with effects that are too difficult to measure, such as denying a defendant the right to choose his or her own attorney; and
>
> (3) Errors that always result in fundamental unfairness, such as a *defendant that is denied counsel* and a judge that fails to give reasonable-doubt jury instructions.[9]

Weaver, 582 U.S. at 295–96 (emphasis added).

The Court concluded that the petitioner's public-trial error qualified as a structural error under the first two categories. *Id.* at 298–99. Thus, when a defendant raises a public-trial error through ineffective assistance of counsel, "*Strickland* prejudice is not shown automatically." *Id.* at 301.

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[9] An error can still qualify as structural even if "the error does not lead to fundamental unfairness in every case." *Weaver*, 582 U.S. at 296.

The *Weaver* Court did not address the application of its analysis to the third category of structural error, fundamental unfairness. It *did* reaffirm precedent holding that "certain errors are deemed structural and require reversal because they cause fundamental unfairness." *Ibid.* At bottom, *Weaver* left undisturbed the settled law that preceded it, which recognizes no need for a prejudice showing from the deprivation of the right to counsel. *See Brecht*, 507 U.S. at 629–30, 638; *Strickland*, 466 U.S. at 692.

B. Inter- and Intra-Circuit Conflicts Have Emerged over the Important Questions *Weaver* Left Open.

Nearly seven years have passed since *Weaver*. In those years, lower courts have diverged in their handling of fundamentally unfair structural errors raised by habeas petitioners through claims asserting ineffective assistance of counsel.[10]

The Sixth Circuit required Mr. Fields to demonstrate that being sentenced without counsel resulted in actual prejudice, even though the deprivation is fundamentally unfair, prejudice is impossible to show, and the impact of an uncounseled proceeding is "not for this Court to speculate." *See Glasser v. United States*,

[10] It is fair to question whether *Weaver* should have any application to claims, like Mr. Fields', involving ineffective assistance of *appellate* counsel. *See*, *e.g.*, *Pou v. Superintendent SCI Forest*, No. 1:19-cv-00346, 2021 U.S. Dist. LEXIS 227687, at *9 (W.D. Pa. Nov. 29, 2021).

315 U.S. 60, 76, 62 (1942). The error is even more outrageous considering that one hundred miles to the east of Mr. Fields' home in Ohio, an identically situated Pennsylvanian would benefit from the Third Circuit's presumption of prejudice under *Weaver*. *See*, *e.g.*, *Hutchinson v. Superintendent Greene SCI*, 860 Fed. Appx. 246, 249 (3d Cir. 2021), *cert. denied*, ___ U.S. ___, 142 S. Ct. 2687 (2022); *Barney v. Adm'r, N.J. State Prison*, 48 F.4th 162, 165 (3d Cir. 2022), *cert. denied*, ___ U.S. ___, 143 S. Ct. 801 (2023).

1. Courts in the First, Second, Third, Seventh, Ninth, and Tenth Circuits sometimes presume prejudice for fundamentally unfair structural error.

Rather than address whether to presume prejudice for all fundamentally unfair structural errors raised through an ineffective-assistance-of-counsel claim in a habeas petition, lower courts review whether to presume prejudice under *Weaver* on an error-by-error basis.

Courts in the First, Second, and Third Circuits presume prejudice for Sixth Amendment violations raised through ineffective-assistance-of-counsel claims on habeas. *See*, *e.g.*, *Hutchinson*, 860 Fed. Appx. at 249 (interpreting *Weaver* as directing courts to presume prejudice for denial-of-counsel errors raised by a habeas petitioner through ineffective assistance of counsel, but affirming denial of habeas petition because the petitioner did not allege denial of counsel); *Pierotti*

v. Harris, 350 F. Supp. 3d 187, 197 (E.D.N.Y. 2018) (presuming prejudice under *United States v. Cronic*, 466 U.S. 648, 659 (1984), for a constructive-deprivation-of-counsel error raised through ineffective assistance of counsel by a habeas petitioner and granting writ of habeas corpus); *Miranda v. Kennedy*, No. 1:21-cv-11731-DJC, 2022 U.S. Dist. LEXIS 132251, at *18–19 (D. Mass. July 26, 2022) (acknowledging that the court will presume prejudice for the three Sixth Amendment violations established in *Cronic* when raised by a habeas petitioner through ineffective-assistance-of-counsel, but denying the habeas petition because petitioner asserted a trial error).

And courts in the Third and Tenth Circuits will presume prejudice for choice-of-counsel errors. *See*, *e.g.*, *United States v. Calhoun*, No. 19-3310, 2022 U.S. App. LEXIS 34430, at *5 (3d Cir. Nov. 30, 2022) (presuming prejudice for a habeas petitioner alleging a procedurally defaulted choice-of-counsel error but affirming the denial of writ because the petitioner failed to demonstrate cause), *cert. denied*, 144 S. Ct. 371 (2023); *United States v. Alcorta*, No. 13-40065-03-DDC, 2020 U.S. Dist. LEXIS 144580 (D. Kan. Aug. 12, 2020) (interpreting *Weaver*'s self-imposed limitation on its holding to support presuming prejudice for choice-of-counsel errors asserted by habeas petitioners through ineffective assistance of counsel but denying habeas petition because the petitioner failed to demonstrate that he was denied choice of counsel), *aff'd*, No. 20-3198, 2023 U.S. App. LEXIS 13975 (10th Cir. June 6, 2023).

Habeas petitioners may not need to demonstrate prejudice for other fundamentally unfair structural errors—such as absence of a reasonable-doubt instruction, a biased juror, or a biased judge—if their cases are before courts in the Third, Seventh, or Ninth Circuits, respectively. *See Baxter v. Superintendent Coal Twp. SCI*, 998 F.3d 542, 547 (3d Cir. 2021) (interpreting *Weaver* as requiring the habeas petitioner to demonstrate prejudice for an erroneous-reasonable-doubt-instruction error raised through ineffective assistance of counsel but presuming prejudice for complete failures to give such instruction because "the resulting trial is always a fundamentally unfair one") (cleaned up), *cert. denied*, ___ U.S. ___, 142 S. Ct. 1130 (2022); *Walker v. Pollard*, No. 18-C-0147, 2020 U.S. Dist. LEXIS 190229, at *41, *42 n.7 (E.D. Wis. Oct. 14, 2020) (noting that because a biased-juror error involves "the denial of the right to an impartial decisionmaker" and "clearly implicates fundamental fairness," *Weaver* supports the presumption of prejudice, but denying habeas petition because petitioner failed to establish the structural error); *Patterson v. Williams*, No. 2:20-cv-01614-JAD-DJA, 2023 U.S. Dist. LEXIS 173988, at *38 (D. Nev. Sep. 27, 2023) (explaining that if a habeas petitioner asserting a judicial-bias error through ineffective assistance of counsel overcomes the presumption that the judge is not biased, "prejudice need not be proven," but ultimately denying habeas petition after presuming prejudice because petitioner failed to demonstrate trial counsel's deficient performance).

2. Courts in the Third and Ninth Circuits sometimes interpret *Weaver* as supporting the presumption of prejudice for habeas petitioners asserting structural errors involving fundamental unfairness raised through ineffective assistance of counsel.

Two courts of appeals have held that when a defendant claims ineffective assistance of counsel resulting in fundamentally unfair structural error, the reviewing court must apply the same presumption of prejudice that governs the structural error on direct review.

In the Third Circuit, some "structural errors require automatic reversal" when raised in a habeas petition through ineffective assistance of counsel. *Barney*, 48 F.4th at 165 (nevertheless affirming the denial of defendant's habeas petition as defendant asserted no fundamentally unfair structural error). Citing this Court's public-trial-violation analysis, the Third Circuit concluded that a court can presume prejudice if a structural error "'always lead[s] to a fundamentally unfair trial'" and "'deprive[s] the defendant of a reasonable probability of a different outcome.'" *Ibid.* (quoting *Weaver*, 582 U.S. at 300, 303). The Ninth Circuit interprets *Weaver* similarly, holding that habeas petitioners are not required to demonstrate actual prejudice if the structural error is of the type that "always result[s] in actual prejudice" by "render[ing] a criminal trial fundamentally unfair." *United States v. Pollard*, 20 F.4th 1252, 1256 n.3 (9th Cir. 2021)

(affirming denial of defendant's habeas petition because defendant asserted a trial error) (cleaned up).

3. The Fifth, Sixth, and Eleventh Circuits always require habeas petitioners to demonstrate actual prejudice, sometimes with no reference to *Weaver*.

By contrast, the Sixth Circuit requires all habeas petitioners asserting *any* structural error through ineffective assistance of counsel to demonstrate prejudice, as do some courts in the Ninth Circuit. The Fifth and Eleventh Circuits impose the same requirement on habeas petitioners, without any consideration of *Weaver*. No presumption of prejudice exists for these petitioners.

In the Sixth Circuit, "when a defendant raises a structural error on collateral review rather than on direct review, he must prove actual prejudice, even though he would not have had to prove actual prejudice if he had raised it on direct review." *Parks v. Chapman*, 815 Fed. Appx. 937, 944 (6th Cir. 2020). The Sixth Circuit's rule requires a prejudice showing for several types of fundamentally unfair structural errors, including "denial of counsel, no reasonable-doubt instruction, [and a] biased judge," when these errors are asserted through ineffective assistance of counsel. *Ibid.* It reached this result for two reasons: (1) the principle in *Weaver* "that finality and judicial economy can trump even structural error," *ibid.*; and (2) raising a

fundamentally unfair error on collateral review results in "a larger burden on the system and on the concept of fairness." *Ibid.* (citing *Weaver*, 582 U.S. at 301). The Sixth Circuit concludes that for habeas petitioners asserting fundamentally unfair structural errors, "actual prejudice should be easy to show." *Ibid.*

Some courts in the Ninth Circuit similarly interpret *Weaver* as requiring habeas petitioners to demonstrate prejudice for structural errors asserted through ineffective assistance of counsel. *See*, *e.g.*, *United States v. Shults*, No. 1:17-cr-00136 JLT SKO, 2024 U.S. Dist. LEXIS 1176, at *25 (E.D. Cal. Jan. 3, 2024) (citing *Weaver* as requiring habeas petitioners asserting any structural errors through ineffective assistance of counsel to demonstrate prejudice under *Strickland*); *Govea v. United States*, No. 3:18-cv-00575 W, 2019 U.S. Dist. LEXIS 58611 (S.D. Cal. Apr. 4, 2019) (same); *Duncan v. United States*, No. 2:17-cv-00091-EJL, 2019 U.S. Dist. LEXIS 48470 (D. Idaho Mar. 22, 2019) (same).

The Fifth and Eleventh Circuits impose the same actual-prejudice requirement on habeas petitioners asserting procedurally defaulted fundamentally unfair structural errors through ineffective assistance of counsel, although they do so without discussing *Weaver*. *See*, *e.g.*, *Canfield v. Lumpkin*, 998 F.3d 242, 246 (5th Cir. 2021) (requiring petitioner to demonstrate actual prejudice for his counsel failing to challenge or rehabilitate a juror that openly expressed bias against petitioner on the record, allowing the juror to serve on the jury), *cert. denied*, ___ U.S. ___, 142 S. Ct. 2781 (2022); *Whatley v. Warden, Ga. Diagnostic &*

Classification Ctr., 927 F.3d 1150, 1163, 1185–86 (11th Cir. 2019) (requiring petitioner to demonstrate actual prejudice after trial counsel did not object to the petitioner taking the stand in shackles during the penalty phase, dismissing the State's concerns on the record because " 'he's convicted now' ").

C. Without Clarification from This Court, the Availability of Habeas Relief Will Continue to Vary from Circuit to Circuit.

The need to clarify *Weaver*'s impact on fundamentally unfair structural errors is basis enough for granting this petition. Review here is all the more appropriate because proper resolution of the question presented is a matter of tremendous practical importance—constitutional integrity across courts.

The *Weaver* Court correctly identified fundamentally unfair structural errors as different from other structural errors in the ineffective-assistance-of-counsel context. In conducting harmless-error analysis of constitutional violations in direct appeal and habeas corpus cases, the Court repeatedly has reaffirmed that "[s]ome constitutional violations . . . by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988). *Accord Weaver*, 582 U.S. at 293 ("The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial.").

"Such errors necessarily render a trial fundamentally unfair and deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 157–58 (2006) (cleaned up).

Unlike the public-trial error asserted in *Weaver*, deprivation of counsel is "so likely" to result in prejudice "that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive[,] for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654 (1984). As explained by Justice Southerland in his timeless opinion for the Court in *Powell v. Alabama*, 287 U.S. 45 (1932):

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [The layman] requires the guiding hand of counsel at every step in the proceedings against him. . . . If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Id. at 68–69.

Like other Sixth Amendment structural errors, the deprivation of counsel has "'consequences that

are necessarily unquantifiable and indeterminate.'" *Gonzalez-Lopez*, 548 U.S. at 150 (establishing deprivation of choice of counsel, a less severe version of deprivation of counsel, as prejudicial per se because the error's consequences are too hard to measure (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993))). But because petitioners like Mr. Fields suffered the *added* insult of deficient counsel who failed to raise the error on direct review, they are left with no choice but to make a "speculative inquiry into what might have occurred in an alternate universe" in a fruitless attempt to demonstrate prejudice. *Ibid.* That makes no sense. Further review is warranted.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ANDREW S. POLLIS
Counsel of Record
MILTON AND CHARLOTTE KRAMER
LAW CLINIC
CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW
11075 East Boulevard
Cleveland, Ohio 44106
216.368.2766
andrew.pollis@case.edu

Counsel for Petitioner
Gerald Fields