App No. _____

In the

Supreme Court of the United States

GERALD FIELDS,

Applicant,

v.

JAY FORSHEY,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME TO FILE PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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To the Honorable Brett Kavanaugh, as Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

In accordance with this Court's Rules 13.5, 22, 30.2, and 30.3, Gerald Fields respectfully requests that the time to file his petition for a writ of certiorari be extended by 60 days, up to and including March 4, 2024.[1] The Court of Appeals issued its opinion on August 8, 2023 ("Opinion," attached as Exhibit A) and denied rehearing en banc on October 5, 2023 (Order attached Exhibit B). Absent an extension of time, the petition would be due on January 3, 2024. Mr. Fields files this Application more than 10 days before that date. This Court would have jurisdiction over the judgment under 28 U.S.C. § 1254(1). Respondent Jay Forshey does not oppose this extension request.

Background

This case presents two key issues related to the fundamental right to counsel that are strong candidates for certiorari review and that different circuit courts—and even different panels within the circuit courts—handle inconsistently:

1. Whether *Faretta v. California,* 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975), imposes a duty on trial courts to make defendants aware of "the dangers and disadvantages" of self-representation before finding a

[1] A 60-day extension would extend the date to file the petition for certiorari to March 3, 2024, a Sunday. Under this Court's Rule 30.1, the extension "period shall extend until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed"—here March 4, 2024.

knowing and voluntary waiver of their right to counsel (as the Third and D.C. Circuits hold), or whether, despite failing to warn defendants of these dangers and disadvantages, trial courts may find they validly waived their right to counsel, if the record otherwise reflects a knowing and voluntary decision to proceed pro se (as the Second and Eleventh Circuits hold); and

2. Whether, in the aftermath of *Weaver v. Massachusetts*, 582 U.S. 286, 137 S. Ct. 1899, 198 L.Ed.2d 420 (2017) (plurality), deprivation of counsel at the critical stage of sentencing is a structural error that compromises "fundamental fairness," such that a habeas petitioner need show no prejudice when raising the issue in a petition for a writ of habeas corpus.

In June 2019, a jury convicted Applicant Gerald Fields of drug offenses in Ohio state court. Before sentencing, the trial court granted Mr. Fields' trial counsel's motion to withdraw. Mr. Fields retained new counsel, but before sentencing, that new counsel also moved to withdraw, citing Mr. Fields' misunderstanding about the scope of representation. At no time did Mr. Fields indicate that he preferred self-representation—only that he assented to this particular counsel's withdrawal. Before granting the motion to withdraw, the trial court posed one question to Mr. Fields about the implications: "*You know you're still going to be sentenced today?*" Mr. Fields indicated that he understood sentencing would proceed, and the court discharged his lawyer. The court then sentenced Mr. Fields, without counsel, to ten years in prison—

the longest permissible prison term and significantly longer than Ohio's highly discretionary sentencing laws required.

Mr. Fields filed a timely notice of appeal to the Ohio Court of Appeals for Muskingum County, Fifth Appellate District. The state trial court appointed appellate counsel who raised six issues on direct appeal but failed to raise the structural error of the uncounseled sentencing. The state court of appeals overruled all assignments of error and affirmed the trial court's judgment, and the Supreme Court of Ohio declined to exercise jurisdiction.

Mr. Fields filed a pro se motion to reopen his direct appeal under Ohio R. App. P. 26(B). He argued, among other things, that his appointed appellate attorney had provided ineffective assistance of counsel in failing to assign error to the uncounseled sentence—a structural error that required no showing of prejudice. The state appellate court denied his application and the Supreme Court of Ohio declined once again to exercise jurisdiction.

In April 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). Claim 4 was procedurally defaulted; Mr. Fields relied on cause and prejudice from appellate counsel's ineffective assistance to excuse the procedural default.

Claim 5 was not defaulted. The district court denied Mr. Fields' habeas petition in November 2021, concluding that the errors asserted in Claims 4 and 5—involving the absence of counsel to represent him at sentencing—were harmless, despite the obvious question whether counsel at sentencing might have succeeded in reducing the discretionary prison term to something less than ten years.

Mr. Fields filed a timely notice of appeal in January 2022. The Sixth Circuit Court of Appeals granted a certificate of appealability for Claims 4 and 5. 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 without opinion on October 5, 2023.

The Two Issues Mr. Fields Will Raise in His Petition

Issue 1:
May a Trial Court Sentence an Unrepresented Defendant to Prison Without First Warning of the "Dangers and Disadvantages" of Proceeding Without Counsel?

The Sixth Circuit acknowledged that the trial court is required to conduct an inquiry into whether a defendant's waiver of the right to counsel during a criminal trial is knowing and voluntary. It also correctly stated that the trial court must "ensure that the defendant understands 'the dangers and disadvantages of self-representation'" before permitting him to waive that right. Opinion at 9 (quoting *Faretta v. California*, 422 U.S., at 835). But the Sixth Circuit declined to find Mr. Fields' appellate counsel ineffective for failing to raise the issue, citing Mr. Fields' assent to his sentencing counsel's withdrawal.

The issue squarely before the Sixth Circuit was this: is it enough just to make sure that the defendant understands ***the court will proceed*** without counsel, or is there an additional obligation to ensure that the defendant understands ***the "dangers and disadvantages"*** of doing so? In Ohio, for example, sentencing statutes are complex, confer tremendous discretion on trial judges (as to both base sentences and determinations to run them consecutively), and severely restrict meaningful appellate review.[2] Lawyers know how to navigate those statutes in arguing for relative leniency, but a layperson typically does not.

Circuits answer that question in drastically different ways, sometimes varying by panel composition. Some circuits require the trial court to conduct an on-the-record inquiry to warn defendants of those dangers and disadvantages and to establish that the defendants' decision is knowing and voluntary. *See Richardson v. Superintendent Coal Township SCI*, 905 F.3d 750, 762–763, (3d Cir. 2018); *United States v. O'Neal*, 844 F.3d 271, 279 (D.C. Cir. 2016). Other circuits, while recognizing the value of an on-the-record inquiry, excuse a trial judge's failure to conduct one if the facts and circumstances of the case reflect a knowing and voluntary decision to forego counsel. *See Rose v. United States*, 590 Fed. App'x 937, 941 (11th Cir. 2014); *Dallio v. Spitzer*,

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[2] Base sentences are not reviewable in Ohio at all except for legal error. *See State v. Jones*, 2020-Ohio-6729, 169 N.E. 3d 649 (construing Ohio Rev. Code Ann. § 2929.11 (Lexis 2018), § 2929.12 (Lexis 2014), and § 2953.08(G)(2)(a) (Lexis 2019)). And before reversing the imposition of consecutive sentences, an appellate court "must have a firm belief or conviction that the record does not support the trial court's findings." *State v. Gwynne*, 2023-Ohio-3851, __ N.E. 3d ___, ¶ 15 (construing Ohio Rev. Code Ann. § 2929.14(C)(4) (Lexis 2023) and § 2953.08(G)(2) (Lexis 2019).)

343 F.3d. 553, 563–564 (2d Cir. 2003). But most circuits appear rife with intra-circuit conflict on this question—inconsistently interpreting and applying the waiver requirements. *Compare, e.g.*, *United States v. Stapleton*, 56 F.4th 532, 534 (7th Cir. 2022) (tacitly acknowledging that *Faretta* requires a trial judge to hold a colloquy before permitting a defendant to proceed pro se) *with United States v. Jones*, 65 F.4th 926, 931 (7th Cir. 2023) (explaining that no formal colloquy is required "if the record adequately establishes that the defendant knowingly and voluntarily waived his right to counsel"). Mr. Fields' petition will seek certiorari to resolve these inter-circuit and intra-circuit conflicts.

Issue 2:
Is a Separate Prejudice Showing Necessary When a Habeas Petitioner Establishes Deprivation of Counsel, a Structural Error Implicating "Fundamental Fairness"?

The Sixth Circuit recognized that the total deprivation of counsel at sentencing, as Mr. Fields experienced, is a structural error. Opinion at 7. It concluded, however, that under *Weaver*, 582 U.S., at 293–295, 298–300, 137 S. Ct. 1899, 198 L.Ed.2d 420, the denial of counsel is a "structural error [that] does not automatically establish actual prejudice to cure procedural default" when raised in a habeas proceeding through a claim of ineffective assistance. *Id.* Thus, in the Sixth Circuit, habeas petitioners deprived of counsel at sentencing must demonstrate the unknowable—that the sentence likely would have been different with counsel present—even though this Court has consistently instructed lower courts to presume prejudice for denial-of-counsel claims. *See United States v. Cronic*, 466 U.S. 648, 659,

104 S. Ct. 2039, 80 L.Ed.2d 657 (1984) (establishing that "the presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial," so "no specific showing of prejudice" is required); *Garza v. Idaho*, ___U.S.___, 139 S. Ct. 738, 744, 203 L.Ed.2d 77 (2019) (affirming that no showing of prejudice is necessary for denial-of-counsel claims as established in *Cronic*).

Unlike the Sixth Circuit, multiple circuits have declined to extend *Weaver* that far. *See e.g., Barney v. Adm'r*, 48 F.4th 162, 165 (3d Cir. 2022) (explaining that *Weaver* did not alter the presumption of prejudice for defendants denied counsel); *Farabee v. Clarke*, 967 F.3d 380, 396 (4th Cir. 2020) (presuming prejudice for procedurally defaulted denial-of-counsel claim, with no discussion of *Weaver*); *Thomas v. Davis*, 968 F.3d 352 (5th Cir. 2020), *cert. denied*, ___U.S.___, 141 S. Ct. 2710, 210 L.Ed.2d 876 (2021) (explaining presumption of prejudice for habeas petitioners' denial of counsel when raised in an ineffective-assistance-of-counsel claim); *Pierotti v. Harris*, 350 F. Supp. 3d 187, 196–199 (E.D.N.Y. 2018) (noting that although *Weaver* indicates that "prejudice is to be presumed only in very limited circumstances," the denial of counsel is one of those circumstances). At least one circuit has held that *Weaver* left the question unresolved. *See Meadows v. Lind*, 996 F.3d 1067, 1080 (10th Cir. 2021) ("And while the Court in *Weaver* assumed for the purpose of its analysis that it would automatically reverse . . . an error that always results in fundamental unfairness, it expressly withheld judgment on this issue."). And here, the Sixth Circuit has imposed

a prejudice requirement, even as it sometimes does not. *Compare Moss v. Miniard*, 62 F.4th 1002, 1012 (6th Cir. 2023), *reh'g denied*, 6th Cir. No. 21-1655, 2023 U.S. App. LEXIS 13648 (June 1, 2023) (explaining that "prejudice may be presumed when a trial counsel's performance is so grossly deficient that it amounts to an effective denial of counsel" for habeas petitioners, with no discussion of *Weaver*). Mr. Fields' petition for certiorari will provide the Court opportunity to resolve these disparate applications of *Weaver*.

Reasons For Granting an Extension of Time

The Court should extend the time for Mr. Fields to file his Petition for Writ of Certiorari by 60 days for three reasons.

First, Mr. Fields' undersigned counsel practices at Case Western Reserve University School of Law's Milton and Charlotte Kramer Law Clinic, where he supervises third-year law students working as certified legal interns admitted by the Supreme Court of Ohio under Ohio R. Gov. Bar II. All certified legal interns that worked on Mr. Fields' Sixth Circuit appeal have since graduated. On October 17, 2023, Mr. Fields effectively retained new representation when two third-year law students agreed to represent him for the purposes of filing a petition for certiorari. As this new counsel was not previously involved in litigating this case, they require additional time to familiarize themselves with the trial and appellate records and to prepare the petition.

Second, the relevant time period overlaps with the end of the fall semester and the start of winter break. The certified legal interns are actively preparing for final examinations and writing term papers. The certified legal interns' finals period ends on December 20, 2023, and their winter break includes holiday travel plans to their respective family homes. The extension accommodates the certified legal interns' academic calendar.

Third, the certified legal interns have substantial additional clinic commitments during the relevant time period including:

- A reply brief in Ohio's Eighth District Court of Appeals in *State of Ohio v. Fredrick Johnson*, No. CA-23-113034, currently anticipated to be due December 27, 2023;
- An opening brief in Ohio's First District Court of Appeals in *State of Ohio v. Brian Acklin*, No. C-2300396, due December 27, 2023;
- An opening brief in Ohio's Ninth District Court of Appeals in *City of Akron v. Anthony Irvin*, No. CA-30841, currently anticipated to be due in January 2024; and
- An opening brief in the United States Court of Appeals for the Sixth Circuit in *United States v. Fredrick Johnson*, No. 23-3535, currently anticipated to be due at some point in January 2024.

Mr. Fields files this application not to delay but to provide Mr. Fields' counsel enough time to develop the arguments for the Court's review. The requested

extension would provide them with the time necessary to prepare a concise and thorough petition.

Conclusion

Applicant Mr. Fields requests that the time to file a writ of certiorari in the above-captioned matter be extended 60 days to and including Monday, March 4, 2024.

Respectfully submitted this 14th day of December, 2023.

By: _____

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