
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ULICES AGUILAR, PETITIONER,
vs.
WARREN MONTGOMERY, RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether ineffective assistance of counsel that leads to structural error in the form of a biased juror creates a presumption of the prejudice required by *Strickland v. Washington*, 466 U.S. 668 (1984).

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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Ulices Aguilar petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

**I.
OPINIONS BELOW**

The unpublished memorandum opinion of the United States Court of Appeals for the Ninth Circuit is included in the appendix as Appendix 1. An order denying a petition for rehearing en banc is included in the appendix as Appendix 4. The district court order denying the underlying petition for writ of habeas corpus and the report and recommendation the district court adopted are included in the appendix as Appendix 2. The state court of appeals opinion affirming Petitioner's convictions and subsequent denials of state habeas corpus petitions are included in the appendix as Appendix 3.

II.
JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 7, 2017, *see* App. A001-03, and a timely petition for rehearing en banc was denied on October 31, 2017, *see* App. A083. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III.
CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy
the right to a speedy and public trial, by an impartial jury
. . . and to have the Assistance of Counsel for his defence.

IV.
STATEMENT OF THE CASE

A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 28 U.S.C. § 2254. The court of appeals had jurisdiction under 28 U.S.C. § 2253.

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED.

1. The Trials.

On May 6, 2004, a “Northerner,” or “Norteno,” gang member named Everado Marquez was shot at his home in Pixley, California. Everado’s brother, Juan, saw two men – one running away from the house and another waiting on the neighbors’ driveway. App. A119. When the first man reached the second man, they both ran. App. A119. Juan identified the first man as a man named Miguel Cisneros, and eventually identified the second man as Petitioner. See App. A119 & A120 n.2. Mr. Cisneros had had an argument with Everado three weeks earlier because Mr. Cisneros believed Everado had stolen his car. App. A119. Mr. Cisneros was also allegedly trying to switch from the “Northerner” gang to the rival “Southerner,” or “Sureno,” gang Petitioner allegedly belonged to. See App. A125-27.

Mr. Cisneros and Petitioner were both charged with first degree murder, a firearm enhancement, and a gang enhancement. App. A120-21. Petitioner did not dispute his presence at the scene of the crime, but did dispute whether he had known Mr. Cisneros was going to shoot Everado Marquez, whether he had aided and abetted the shooting, and whether the shooting was gang-related. App. A122.

Petitioner was tried separately. The jury in a first trial acquitted him of first degree murder and could not reach a verdict on second degree murder. App. A121. Petitioner was then retried on the second degree murder charge

and the firearm and gang enhancements. *See App. A121-27.* The second jury found Petitioner guilty and also found the firearm and gang enhancements to be true. *App. A127.*¹

2. Juror Bias and Concealment.

Juror 9 sent the court a note during the second trial indicating she thought she might know a gang member who was referenced in a document found in Mr. Cisneros's house. *App. A128; see App. A293.* The court asked the juror if it was going to affect her ability to sit fairly in the case, and she replied, "If it doesn't have nothing to do with him, no." *App. A297.*

Defense counsel then asked if he could ask some questions, and the court inquired further:

THE COURT: The fact that he was Norteno-associated and defendant here may be Sureno-associated, is that going to affect your ability to be fair in this?

JUROR NO. 9: Maybe a little bit.

THE COURT: Well –

JUROR NO. 9: I'm not saying that – I still have to see everything, so I can't say –

THE COURT: That's what we're asking.

JUROR NO. 9: No.

THE COURT: You could see the evidence and decide this based on the evidence?

JUROR NO. 9: Like, okay, put it this way. Right now I can't say he's guilty or not guilty. Just because he's a Sureno, that doesn't have nothing to do with me. I don't claim. My family does, but that has nothing to do with me.

THE COURT: What you disclosed before.

¹ The evidence is described in more detail in the Statement of the Case section of Petitioner's court of appeals opening brief, which is included in the Appendix. *See App. A121-27.* It is only briefly summarized here because the details are relatively irrelevant to the argument made in this petition.

JUROR NO. 9: Right.

THE COURT: That's all we want to know. You're not going to say –

JUROR NO. 9: Because he –

THE COURT: Because he's a Sureno, therefore, I'm not going –

JUROR NO. 9: I don't claim, so I don't care about that.

THE COURT: All right. Thank you very much.

App. A298-99.

Additional information provided the next day contradicted some of this, however. One of Petitioner's brothers told defense counsel the juror had a gang tattoo and was playing Norteno rap music "making derogatory terms to Surenos calling them Sur rattas or whatever" on her phone in the hallway. App. A305. In addition, a defense witness had seen a red "North Star" tattoo on the juror's neck, along with "some writing with a big N on it," App. A306-07, which stood for Norteno, App. A093, A129. Defense counsel had not been paying attention to the music, but had seen "a big red star tattooed on her neck," App. A305, which the prosecutor agreed was a Northerner gang symbol, App. A093, A129. This was not only inconsistent with what the juror had said the previous day, but also inconsistent with the juror's following statement during voir dire:

I have a family member that's involved in it, but I don't – I stay away. It doesn't bother my mind at all. I'm not involved, and I don't care to be. So I just wanted to let you know that I do have family members.

App. A290.

After describing what had been seen in the hallway, defense counsel expressed concern that "it was never really brought up that if her family's, you know – if she would tend to side with the gang or be biased against my client

because he's in a rival gang.” App. A306. After the lunch break, the court read back the original exchange with the juror the day before, and the defense attorney simply said, “Okay.” App. A309. He raised concerns again only in a motion for new trial. App. A314. The court rejected the claim, on the grounds that there was no admissible evidence of the juror playing the Northerner rap music, the juror had frankly revealed her gang connections, and defense counsel had not been denied an opportunity to question her. App. A334, A338.

3. Appeal and Habeas Proceedings.

Petitioner was sentenced to a prison term of 15 years to life for the second degree murder conviction and a consecutive term of 25 years to life for the gang and firearm enhancements. App. A133. He thereafter appealed. He included arguments that the trial court should have discharged Juror 9 and that defense counsel had been ineffective by failing to move to discharge Juror 9 during trial and not obtaining declarations supporting the allegations in the new trial motion. App. A068-72. The state court of appeals rejected these and Petitioner's other arguments. App. A068-72. It rejected the ineffective assistance of counsel claim not on the merits but because there was no record of the reasons for the trial attorney's actions, so the claim was “properly decided in a habeas proceeding rather than on direct appeal.” App. A071-72.

Petitioner thereafter filed a petition for review with the state supreme court which was denied. App. A074. He then filed state habeas petitions – first in the superior court and then in the state court of appeals and state

supreme court – in which he again raised the argument about Juror 9 and the trial attorney’s ineffective assistance, along with multiple other claims. *See* App. A158-59, A167, A170-73, A185, A188-92, A216, A220-22, A224-25, A227-29, A238-39. The superior court denied the petition because a petitioner “cannot re-litigate an issue already raised in an appeal by filing a writ of habeas corpus,” without recognizing the state court of appeals had specifically stated the ineffective assistance of counsel claim should be decided in a habeas proceeding. App. A076. The state court of appeals denied the petition in a two-sentence order which read as follows:

The “Petition for Writ of Habeas Corpus,” filed November 14, 2011, is denied without prejudice. Insofar as petitioner claims that the trial court erroneously denied his motion for new trial based on prosecutorial misconduct and the misconduct of juror #3 [two claims added in the habeas petition], petitioner has failed to show that these issues are not barred because they were not raised in his appeal. (*In re Walker* (1974) 10 Cal. 3d 764, 773-775.)

App. A080. The state supreme court denied the petition without comment. *See* App. A082.

Petitioner then filed a federal habeas petition. It included the claims that the refusal to discharge Juror 9 violated his right to a fair trial and impartial jury and that his trial counsel had provided ineffective assistance by, *inter alia*, failing to move to discharge Juror 9. *See* App. A259-65, A267-69. A magistrate judge issued a report and recommendation that the petition be denied, which the district court adopted. *See* App. A004-42. The report and recommendation gave two reasons for rejecting the Juror 9 ineffective assistance of counsel claim. The first reason given was a California state procedural bar known as the “*Dixon* bar,” after the case of *In re Dixon*, 264

P.2d 513 (Cal. 1953), App. A034, which precludes raising claims in California state habeas proceedings which could have been raised on direct appeal, *see Johnson v. Lee*, 136 S. Ct. 1802 (2016) (discussing *Dixon* bar and upholding it as adequate state procedural bar).² The report and recommendation then added that the claim also failed on the merits, by referencing a prior discussion finding the state trial court had not erred on the substantive issue of whether to discharge Juror 9 because the trial attorney had offered only hearsay rather than “competent admissible evidence.” App. A024; *see* App. A040.

Petitioner thereafter appealed to the United States Court of Appeals for the Ninth Circuit. That court granted a certificate of appealability on (1) whether the district court erred by denying the Juror 9 ineffective assistance of counsel claim as procedurally defaulted and (2) whether another juror’s communication with her boyfriend violated Petitioner’s right to a fair and impartial jury and/or was procedurally defaulted under the *Dixon* bar. App. A116-17. On the Juror 9 ineffective assistance of counsel issue, Petitioner pointed out the *Dixon* bar was inapplicable for two reasons: first, because Petitioner in fact had raised the claim on direct appeal but been directed by the state court of appeals to raise it in a habeas proceeding instead; and, second, because the *Dixon* bar does not apply to ineffective assistance of counsel claims, *see In re Robbins*, 959 P.2d 311, 340-41 n.34 (Cal. 1998) (citing *People v. Mendoza Tello*, 933 P.2d 1134, 1135 (Cal. 1997)). *See* App. A140-41. Petitioner then argued the reliance on the absence of admissible evidence in ruling on the merits was misplaced because the attorney’s failure to present

² The case cited in the state court of appeals habeas denial – *Walker* – is a later case following *Dixon*.

admissible evidence was the whole point of the ineffective assistance of counsel claim. *See* App. A142-43. Petitioner argued that a competent attorney would have provided admissible non-hearsay evidence and that an evidentiary hearing was necessary to inquire into whether such evidence was available and what it would have established. *See* App. A142-43 & n.14.

The panel assigned to decide the case rejected Petitioner's arguments. *See* App. A003. It did agree the district court had erred in applying the *Dixon* bar to this claim. App. A002. It then granted certification under 28 U.S.C. § 2253(c)(2) on the merits of the claim,³ but denied the claim. App. A003. It ruled the California Supreme Court's silent resolution of the claim was not an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), because Petitioner could not show prejudice. App. A003. It added that, presumably because of this, no evidentiary hearing on the adequacy of the trial attorney's representation was required. *See* App. A003.

Petitioner thereafter filed a petition for rehearing en banc, in which he argued, inter alia, that it was error to reject the Juror 9 ineffective assistance of counsel claim based on a failure to show prejudice because a biased juror is structural error which creates a presumption of prejudice. App. A098-101. The petition for rehearing was denied without comment, however. *See* App. A083.⁴

³ Petitioner had argued in his brief that certification of the procedural bar issue was also an implicit certification of the underlying merits issue, since consideration of the procedural bar would be meaningless if the merits could not also be considered. App. A141-42 n.13.

⁴ The juror who was the subject of the other certified issue had both consulted with a boyfriend during deliberations and concealed the boyfriend's

V.

REASONS FOR GRANTING THE WRIT

This case presents a question of how two important principles for review of constitutional claims interact. The first principle is a principle establishing a narrow set of exceptions to a general rule that constitutional errors are subject to review for harmless error. As this Court has recognized, certain errors are “structural errors” that require automatic reversal, because they “affect the framework within which the trial proceeds,” *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991), *quoted in Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017), and “defy analysis by harmless error standards,” *Fulminante*, 499 U.S. at 309, *quoted in Weaver*, 137 S. Ct. at 1907-08. The second principle is that a habeas petitioner making a claim of ineffective assistance of counsel must ordinarily show both deficient performance, i.e., that “counsel’s representation fell below an objective standard of reasonableness,” *Strickland*, 466 U.S. at 687-88, and “prejudice,” meaning “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” *id.* at 694.

The Court considered the question of how these principles interact for one type of structural error – denial of the right to a public trial – in *Weaver*, where a trial attorney’s ineffective assistance had led to a denial of the right to

past gang association, as set forth in more detail in the court of appeals briefing and the petition for rehearing en banc. *See* App. A094-95, A130-33. This claim had not been raised on direct appeal, however, which led the court of appeals panel to hold the *Dixon* bar did apply to that claim. *See* App. A002. Petitioner is not further pursuing this claim here.

a public trial during jury selection. In a holding expressly limited to “the context of trial counsel’s failure to object to the closure of the courtroom during jury selection,” *id.*, 137 S. Ct. at 1907, the Court held ineffective assistance of counsel creating structural error of that type did not relieve the defendant of showing prejudice. “Instead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or, as the Court has assumed for these purposes (citation omitted), to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.” *Weaver*, 137 S. Ct. at 1911.

The Court expressly reserved the question of whether such a showing had to be made when the ineffective assistance of counsel led to other types of structural errors, however. It noted that “certain errors are deemed structural and require reversal because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process,” and gave as examples the failure to give a reasonable doubt instruction, a biased judge, and exclusion of grand jurors on the basis of race. *Id.* at 1911 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 278-79 (1993), *Tumey v. Ohio*, 273 U.S. 510, 535 (1927), and *Vasquez v. Hillery*, 474 U.S. 254, 261-64 (1986)). It then stated that “this opinion does not address whether the result should be any different if the errors [in those cases] were raised instead in an ineffective-assistance claim on collateral review.” *Weaver*, 137 S. Ct. at 1911.

This case presents the issue which the Court reserved in *Weaver*. Specifically, it presents the issue of what to require for a claim of ineffective assistance of counsel creating structural error in the form of a biased

factfinder, here, a biased juror.⁵ For the reasons which follow, the Court should grant this petition to resolve the question reserved in *Weaver*.

A. THE COURT SHOULD GRANT THE PETITION BECAUSE THE LOWER FEDERAL COURTS AND STATE COURTS ARE DIVIDED ON THE QUESTION OF WHETHER INEFFECTIVE ASSISTANCE OF COUNSEL LEADING TO STRUCTURAL ERROR IN THE FORM OF DENIAL OF THE RIGHT TO AN IMPARTIAL JURY PRESUMPTIVELY SATISFIES THE PREJUDICE PRONG OF *STRICKLAND*.

The Court granted the petition in *Weaver* because the lower federal courts and state courts were divided on the question of whether *Strickland* requires a defendant claiming that ineffective assistance of counsel denied his right to a public trial must make a showing of *Strickland* prejudice. *See id.*, 137 S. Ct. at 1907. There is a similar division in the lower courts here.

To begin, the federal courts are divided. The Eighth Circuit has held that “some professional failures of counsel, including the failure to strike a

⁵ The Court has recognized that a biased juror is structural error just like a biased judge. *See Gomez v. United States*, 490 U.S. 858, 876 (1989) (“Among those basic fair trial rights that ““can never be treated as harmless”” is a defendant’s ‘right to an impartial adjudicator, be it judge or jury.’” (Quoting *Gray v. Mississippi*, 481 U.S. 648, 668 (1987), and *Chapman v. California*, 386 U.S. 18, 23 (1967).)); *Rose v. Clark*, 478 U.S. 570, 577 (1986) (“Harmless-error analysis thus presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury.”). *See also United States v. Mitchell*, 690 F.3d 137, 148 (3d Cir. 2012) (citing *Gomez* and *Gray* and also collecting court of appeals cases recognizing biased juror is structural error).

biased juror (citation omitted), result in structural errors that are presumed prejudicial.” *Sanders v. Norris*, 529 F.3d 787, 791 (8th Cir. 2008) (citing *Johnson v. Armontrout*, 961 F.2d 748, 754-56 (8th Cir. 1992), and *McGurk v. Stenberg*, 163 F.3d 470, 473-75 (8th Cir. 1998)). The Sixth Circuit has held similarly, stating in *Hughes v. United States*, 258 F.3d 453 (6th Cir. 2001):

The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice. Accordingly, given that a biased juror was impaneled in this case, prejudice under *Strickland* is presumed, and a new trial is required.

Hughes, 258 F.3d at 463 (citation and internal quotation marks omitted). *See also Miller v. Webb*, 385 F.3d 666, 676 (6th Cir. 2004) (quoting *Hughes*); *Quintero v. Bell*, 256 F.3d 409, 415 (6th Cir. 2001) (“Quintero’s case merits a presumption of prejudice because the presence of the seven [biased] jurors and trial counsel’s de facto acceptance of the jury composition amounted to a structural error, which we exempt from harmless error analysis.”), *vacated and remanded for reconsideration in light of Bell v. Cone*, 535 U.S. 685 (2002), *aff’d on remand*, 368 F.3d 892 (6th Cir. 2004), *cert. denied*, 544 U.S. 936 (2005).

On the other side of the coin, the Fifth Circuit has rejected an automatic presumption of prejudice. While treating the nature of the right to an impartial jury as “an important guidepost” in evaluating whether there was the prejudice required by *Strickland*, it expressly declined to adopt the Sixth Circuit’s view “that a structural error alone is sufficient to warrant a presumption of prejudice in the ineffective assistance of counsel context.” *Virgil v. Dretke*, 446 F.3d 598, 607 & n.36 (5th Cir. 2006).

State courts have also rejected the Eighth Circuit and Sixth Circuit view.

The Pennsylvania Supreme Court, in *Commonwealth v. Mallory*, 941 A.2d 686 (Pa. 2008), expressly “declined . . . to adopt the Eighth Circuit’s reasoning in *McGurk v. Stenberg, supra.*” *Mallory*, 941 A.2d at 702.⁶ And the Illinois Supreme Court, after considering both the federal cases and state cases adopting a presumption of prejudice, rejected that position as well. After acknowledging and discussing *Davis v. Woodford*, 384 F.3d 628 (9th Cir. 2004), *People v. Vieyra*, 169 P.3d 205 (Colo. App. 2007), *Whitney v. State*, 857 A.2d 625 (Md. App. 2004), *State v. Carter*, 641 N.W.2d 517 (Wis. 2002), *Virgil*, and *Hughes*, and noting its already contrary precedent in *People v. Metcalfe*, 782 N.E.2d 263 (Ill. 2002), the Illinois Supreme Court stood by its precedent:

Defendant merely prefers that this court adopt a different approach to claims of ineffectiveness of counsel during jury selection because some federal court circuits and a handful of state courts have done so. This hardly constitutes a groundswell of opposition to this court’s reasoning in *Metcalfe*.

In addition, it appears to us that the analysis defendant favors amounts to little more than an end run around [*United States v. Cronic*], 466 U.S. 648 (1984)]. Once it is determined that counsel was deficient for not striking a biased juror, prejudice is presumed because the defendant was deprived of an impartial jury and that makes the trial fundamentally unfair. Thus, only the deficient performance prong of the *Strickland* test is considered, the defendant does not have to actually demonstrate prejudice, and a new trial is required. This Court rejected the defendant’s *Cronic* argument in *Metcalfe* . . . , and we similarly reject defendant’s indirect attempt to revisit that argument here.

⁶ The infringement on the jury trial right in *McGurk*, which was also the infringement considered in *Mallory*, was the complete denial of a jury trial, not just the right to an unbiased or impartial jury. See *McGurk*, 163 F.3d at 474; *Mallory*, 941 A.2d at 702.

People v. Manning, 948 N.E.2d 542, 550 (Ill. 2011).

In sum, the lower courts are divided on the question of whether ineffective assistance of counsel that creates this different form of structural error should create a presumption of prejudice, just as they were divided regarding the interaction of ineffective assistance of counsel and the form of structural error considered in *Weaver*. That is reason to grant the petition here just as it was reason to grant the petition in *Weaver*.

B. THE COURT SHOULD GRANT THE PETITION BECAUSE THIS CASE IS A GOOD VEHICLE TO ILLUSTRATE A CONTEXT ON THE OPPOSITE SIDE OF THE CONTEXT CONSIDERED IN *WEAVER*.

As noted *supra* p. 11, the holding in *Weaver* was expressly limited to “the context of trial counsel’s failure to object to the closure of the courtroom during jury selection,” *id.*, 137 S. Ct. at 1907. Most of the lower court opinions the Court considered in *Weaver* did not appear to consider the possibility that the nature of the structural error could make a difference. They appeared instead to take an all or nothing approach to the interaction of ineffective assistance of counsel and structural error, either generally stating that ineffective assistance of counsel leading to structural error creates a presumption of prejudice, *see, e.g., Owens v. United States*, 483 F.3d 48, 65 (1st Cir. 2007); *Littlejohn v. United States*, 73 A.3d 1034, 1043 (D.C. 2013), or generally stating that it did not create such a presumption, *see, e.g., Purvis v. Crosby*, 451 F.3d 734, 740-41 (11th Cir. 2006).

What *Weaver* recognized – and then held – is that resolution of the issue

can vary with the type of structural error and the reasons the error is structural. *Weaver* noted there are at least three rationales for finding a particular error to be structural. First, the right may be designed not to protect the defendant from erroneous conviction but instead to protect some other interest. *Id.*, 137 S. Ct. at 1908. Second, it may be that “the effects of the error are simply too hard to measure.” *Id.* Third, the error may be one that “always results in fundamental unfairness.” *Id.*

The Court then turned to the error before it – denial of the right to a public trial – and described the critical question as “whether a public-trial violation counts as structural [error] because it always leads to fundamental unfairness or for some other reason.” *Id.* at 1908. After considering the public trial case law, it concluded public trial violations do not always result in fundamental unfairness. *See id.* at 1910. It further noted that “[t]he public-trial right also protects some interests that do not belong to the defendant.” *Id.* Based on these considerations, the Court held a defendant raising a public trial violation via an ineffective assistance of counsel claim does have to prove prejudice, as noted *supra* p. 11.

The Court then recognized the different question that would be presented in the case of an error that was structural solely because of its effect on fundamental fairness, as also noted *supra* p. 11.

Neither the reasoning nor the holding here calls into question the Court’s precedents determining that certain errors are deemed structural and require reversal because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process. (Citation omitted.) Those precedents include *Sullivan v. Louisiana*, 508 U.S., at 278-279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (failure to give a reasonable-doubt instruction);

Tumey v. Ohio, 273 U.S. 510, 535, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927) (biased judge); and *Vasquez v. Hillery*, 474 U.S., at 261-264, 106 S. Ct. 617, 88 L. Ed. 2d 598 (exclusion of grand jurors on the basis of race). See *Neder*[*v. United States*, 527 U.S. 1,] 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 [(1999)] (describing each of these errors as structural). This Court, in addition, has granted automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the selection of the petit jury, see *Batson v. Kentucky*, 476 U.S. 79, 100, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 145-146, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994), though the Court has yet to label those errors structural, see e.g., *Neder*, *supra*, at 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35. The errors in those cases necessitated automatic reversal after they were preserved and then raised on direct appeal. And this opinion does not address whether the results should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review.

Weaver, 137 S. Ct. at 1911-12.

The distinction recognized by this caveat is another reason to grant the petition in this case. The structural error the ineffective assistance of counsel led to here was one of these errors that affect fundamental fairness, namely, the right to an impartial factfinder. That lets the Court use this case for two purposes. First, the Court can decide whether structural error *ever* eliminates the need to make a specific showing of prejudice where the structural error was due to ineffective assistance of counsel. Second, assuming the Court holds that there are some structural errors that have such an effect, the Court can use this case as an illustration.

C. THE COURT SHOULD GRANT THE PETITION BECAUSE THE FUNDAMENTAL NATURE OF THE RIGHT TO AN IMPARTIAL JURY AND OTHER STRUCTURAL ERRORS THAT CAUSE FUNDAMENTAL UNFAIRNESS MAKE THE QUESTION PRESENTED AN IMPORTANT ONE.

A third reason to grant the petition is that the question presented is an important one. Structural errors such as denial of the right to an impartial jury are treated as structural errors because they are fundamental. To track the way the Court expressed it in *Weaver*, they “cause fundamental unfairness.” *Id.*, 137 S. Ct. at 1911. As expressed in the Court’s original harmless error opinion in *Chapman v. California*, 386 U.S. 18 (1967), they are “so basic to a fair trial that their infraction can never be treated as harmless error.” *Id.*, 386 U.S. at 23. As subsequently expressed in *Rose v. Clark*, 478 U.S. 570 (1986): “Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence (citation omitted), and no criminal punishment may be regarded as fundamentally fair.” *Id.* at 577-78.

The importance of these fundamental rights is not lessened when they are lost through the ineffective assistance of counsel, moreover. In a way, the harm done becomes even more fundamental when it is the result of ineffective assistance of counsel. For the defendant is then deprived of two fundamental rights – the right lost through the ineffective assistance *and* the right to effective assistance of counsel. This doubles the harm in some ways, for the right to effective assistance of counsel is itself of “vital importance.”

Strickland, 466 U.S. at 685.

D. THE COURT SHOULD GRANT THE PETITION BECAUSE THE VIEW TAKEN BY THE COURT OF APPEALS HERE – THAT A SHOWING OF PREJUDICE IS REQUIRED EVEN IF THE INEFFECTIVE ASSISTANCE OF COUNSEL RESULTED IN DENIAL OF THE RIGHT TO AN IMPARTIAL JURY – IS NOT THE BETTER VIEW.

Finally, the Court should grant the petition here because the view taken by the court of appeals panel here – that a showing of prejudice is required even if the ineffective assistance of counsel resulted in denial of the right to an impartial jury – is not the better view. This is made evident by a comparison of the right denied in *Weaver* – the right to a public trial – with the right at issue here – the right to an impartial jury.

It was reasonable to require a showing of prejudice from the denial of the right to a public trial in *Weaver* for at least three reasons. First, not every denial of the right to a public trial leads to a fundamentally unfair trial; in *Weaver*, it was just the jury selection that was closed, due to the number of prospective jurors and the size of the courtroom, *see id.*, 137 S. Ct. at 1906, which the Court contrasted with a hypothetical closure of trial during a crucial witness’s testimony, *see id.* at 1913. Second, the public trial right protects interests other than interests of the defendant, such as the rights of the public at large and the press. *Id.* at 1910. Third, the right to a public trial is subject to exceptions, so “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.” *Id.* at 1909.

These rationales do not apply to denial of the right to an impartial jury. To begin with the last of the rationales, a judge may *never* deprive a defendant of his right to an impartial jury. Second, the right to an impartial jury protects solely the defendant’s interest, at least when it is the bias about which a defendant would presumably complain, i.e., bias against the defendant. *Compare Batson v. Kentucky*, 476 U.S. at 87 (recognizing that exclusion of jurors based on race also implicates interests of jurors and interest of public confidence in fairness of justice system).⁷ Third, it is hard to imagine a denial of the right to an impartial jury which does not make the trial fundamentally unfair.

Finally, and related to the last of the points above, it is virtually impossible to evaluate the precise effect a biased juror has on secret jury deliberations. As the Ninth Circuit said in its en banc opinion recognizing the structural error of seating a juror who is presumed to be biased because she has lied during voir dire:⁸

A juror . . . who lies materially and repeatedly in response to legitimate inquiries about her background introduces destructive uncertainties into the process. There is, of course, the possibility that she did so because of some personal bias against the defendant which she managed to hide from the court. But a perjured juror is unfit to serve even in the absence of such vindictive bias. If a juror treats with contempt the court’s admonition to answer voir dire

⁷ In one sense, society as a whole also has an interest in a jury which is not biased against defendants, but that is only in the sense that society has an interest in the fair treatment of its individual members.

⁸ Lying to conceal the bias was included in the allegation of juror bias here, as noted *supra* p. 5.

questions truthfully, she can be expected to treat her responsibilities as a juror – to listen to the evidence, not to consider extrinsic facts, to follow the judge’s instructions – with equal scorn. Moreover, a juror who tells major lies creates a serious conundrum for the fact-finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people’s veracity? Having committed perjury, she may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony.

Dyer v. Calderon, 151 F.3d 970, 983 (9th Cir. 1998) (en banc).

The one rationale of *Weaver* which does extend to an ineffective assistance of counsel claim based on denial of the right to an impartial jury is the concern about delayed adjudication of claims and depriving the trial court of an opportunity to cure the error, *see id.*, 137 S. Ct. at 1912. But these concerns exist for any ineffective assistance of counsel claim. They must be balanced against the other concerns just discussed, namely, how fundamental the denied right is, whether it is a right based on multiple interests rather than just the defendant’s, and how absolute the right is.

Of additional importance is the virtual impossibility of showing how a biased juror affected the trial proceedings. As Justice Breyer warned in his dissenting opinion in *Weaver*:

I do not see how we can read *Strickland* as requiring defendants to prove what this Court has held cannot be proved. If courts do not presume prejudice when counsel’s deficient performance leads to a structural error, then defendants may well be unable to obtain relief for incompetence that deprived them “of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.” *Neder, supra*, at 8-9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (internal quotation marks omitted). This would be precisely the sort of “mechanical” application that *Strickland* tells us to avoid.

In my view, we should not require defendants to take

on a task that is normally impossible to perform. Nor would I give lower courts the unenviably complex job of deciphering which structural errors really undermine fundamental fairness and which do not – that game is not worth the candle.

Weaver, 137 S. Ct. at 1917 (Breyer, J., dissenting).

The Court’s response to these concerns in *Weaver* – where the right denied was the right to a public trial just during jury selection – was a not unreasonable response, namely, that the only potential prejudice was the relatively speculative possibility “that the potential jurors might have behaved differently if petitioner’s family had been present” and/or “the presence of the public might have had some bearing on juror reaction.” *Id.* at 1912. But the taint of a biased juror is very different. A biased juror taints jury deliberations, which take place in secret with no record at all made of what is said or discussed. In that context, Justice Breyer’s concerns are at their zenith. Discerning the prejudicial effect of a biased juror’s effect on secret jury deliberations and the resulting verdict is not just “unenviably complex.” It is impossible.

* * *

VI.
CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

DATED: December 12, 2017

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ULICES AGUILAR, PETITIONER,

vs.

WARREN MONTGOMERY, RESPONDENT.

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 12th day of December, 2017, copies of the Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid to counsel for the Respondent, Deputy Attorney General Justain Riley, at 1300 I Street, Suite 215, P.O. Box 944255, Sacramento, CA 94244-2550.

Respectfully submitted,

December 12, 2017

s/ Carlton F. Gunn
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