

No. A. _____

In the Supreme Court of the United States

GREGORY CARTER,

Applicant,

v.

BLAINE LAFLER, Warden,

Respondent.

PETITION FOR WRIT OF CERTIORARI

FEDERAL DEFENDER OFFICE

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QUESTIONS PRESENTED FOR REVIEW

This case involves the intersection of structural errors and procedural-default doctrine. Typically, when a state court declines to adjudicate a claim for failure to follow a procedural rule, federal habeas petitioners must show cause and prejudice before the federal court can review the merits of the claim. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). But when the defaulted claim is structural, petitioners will struggle to obtain federal review of the claim because structural errors “affect[] the framework within which the trial proceeds,” and therefore “defy analysis by harmless-error standards.” *Arizona v. Fulimante*, 499 U.S. 279, 309–10 (1991) (internal quotation marks omitted). Although some structural errors do not always render the criminal proceedings fundamentally unfair, others do. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017).

This petition presents two issues warranting this Court’s review:

- (1) Can reasonable jurists debate whether habeas petitioners asserting procedurally defaulted fair cross-section claims must show actual prejudice or that the trial was fundamentally unfair to obtain federal review?**
- (2) Can habeas petitioners asserting a procedurally defaulted fair cross-section claim demonstrate prejudice by showing that the error rendered their trials fundamentally unfair?**

PARTIES TO THE PROCEEDINGS

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

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	ii
PARTIES TO THE PROCEEDINGS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	ix
STATEMENT OF JURISDICTION	xi
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	xi
INTRODUCTION	1
STATEMENT OF THE CASE.....	2
1. The Systemic Exclusion of Kent County Citizens	2
2. Mr. Carter’s Jury Trial and Direct Appeal	3
3. State Post-Conviction Proceedings	3
4. Federal Post-Conviction Proceedings	4
REASONS FOR GRANTING THE WRIT	6
I. This Court should grant certiorari, reverse the judgment of the Sixth Circuit, and remand with instructions to issue a COA because reasonable jurists could debate whether a Sixth Amendment fair cross-section violation always renders a trial fundamentally unfair. 9	
A. The Sixth Circuit resolved the merits of Mr. Carter’s legal arguments without jurisdiction.....	10
B. Reasonable jurists could debate whether Mr. Carter can obtain federal review of his meritorious Sixth Amendment claim by showing that a fair cross-section violation always renders a trial fundamentally unfair.	11
C. A GVR order with instructions to grant a COA is appropriate in this case.14	
II. The Sixth Circuit erred by holding that habeas petitioners asserting procedurally defaulted structural errors must show a reasonable	

probability of a different outcome at trial no matter the nature of the error.....	15
A. Structural errors that render a criminal trial fundamentally unfair are prejudicial	19
B. A fair cross-section violation always renders a trial fundamentally unfair	20
C. This case is an ideal vehicle to resolve the question presented ...	22
CONCLUSION.....	23
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	1
CERTIFICATE OF SERVICE.....	1
DECLARATION VERIFYING TIMELY FILING	1

TABLE OF AUTHORITIES

Cases

<i>Ambrose v. Booker (Ambrose I)</i> , 684 F.3d 638 (6th Cir. 2012)	passim
<i>Ambrose v. Booker (Ambrose II)</i> , 801 F.3d 567 (6th Cir. 2015)	13
<i>Ambrose v. Booker</i> , 24 F. Supp. 3d 626 (E.D. Mich. 2014)	13
<i>Arizona v. Fulimante</i> , 499 U.S. 279 (1991)	16
<i>Brooks v. Gilmore</i> , No. CV 15-5659, 2017 WL 3475475 (E.D. Pa. Aug. 11, 2017)	11
<i>Buck v. Davis</i> , 137 S. Ct. 759 (2017)	8, 9, 10
<i>Carter v. Lafler</i> , No. 1:09-cv-215, 2016 WL 7852533 (W.D. Mich. Dec. 14, 2016)	5
<i>Coleman v. Thompson</i> , 501 U.S. 722, 750 (1991)	6, 15
<i>Duren v. Missouri</i> , 439 U.S. 357 (1979)	1
<i>Engle v. Isaac</i> , 456 U.S. 107 (1982)	18
<i>Expressions Hair Design v. Schneiderman</i> , 137 S. Ct. 1144 (2017)	14
<i>Francis v. Henderson</i> , 425 U.S. 536 (1976)	19
<i>Garcia-Dorantes v. Warren</i> , 801 F.3d 584, 600–04 (6th Cir. 2015)	1, 3, 9
<i>Garcia-Dorantes v. Warren</i> , 978 F. Supp. 2d 815 (E.D. Mich. 2013)	13
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	21
<i>Glover v. United States</i> , 531 U.S. 198, 203–04 (2001)	18
<i>Halbert v. Michigan</i> , 545 U.S. 605 (2005)	18
<i>Hernandez v. Mesa</i> , 137 S. Ct. 2003 (2017) (per curiam)	15
<i>Holland v. Illinois</i> , 493 U.S. 474 (1990)	21, 22

<i>In re Salinas</i> , No. 91905-4, 2018 WL 283411 (Wash. Jan. 4, 2018)	12
<i>Jones v. Bell</i> , 801 F.3d 556 (6th Cir. 2015).....	16
<i>Kimmelman v. Morrison</i> , 477 U.S. 365 (1986)	18
<i>Lafler v. Cooper</i> , 566 U.S. 156 (2012).....	18
<i>Lawrence ex rel. Lawrence v. Chater</i> , 516 U.S. 163 (1996).....	14
<i>Ledet v. Davis</i> , No. 4:15-CV-882-A, 2017 WL 2819839 (N.D. Tex. June 28, 2017) ...	11
<i>Murray v. Carrier</i> , 477 U.S. 478 (1986)	19
<i>Neder v. United States</i> , 527 U.S. 1 (1999).....	7, 20, 21
<i>Newton v. State</i> , No. 86, 2017 WL 3614030 (Md. Ct. App. Aug. 23, 2017)	11
<i>Parks v. Warren</i> , 278 F. Supp. 3d 975 (E.D. Mich. 2017).....	12
<i>People v. Carter</i> , No. 235590, 2003 WL 1795513 (Mich. App. Apr. 3, 2003)	3
<i>Powell v. Howes</i> , No. 05-CV-71345, 2016 WL 5661571 (E.D. Mich. Sept. 30, 2016). 12	
<i>Puckett v. United States</i> , 556 U.S. 129 (2009)	7
<i>Smith v. Texas</i> , 311 U.S. 128 (1940)	21
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	6, 18, 19
<i>Stutson v. United States</i> , 516 U.S. 193 (1996).....	14
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993)	21
<i>Taylor v. Louisiana</i> , 419 U.S. 522 (1975)	21, 22
<i>Tumey v. Ohio</i> , 273 U.S. 510 (1927).....	21
<i>United States v. Frady</i> , 456 U.S. 152 (1982)	18
<i>Vansickel v. White</i> , 166 F.3d 953 (9th Cir. 1999)	16

<i>Vasquez v. Hillery</i> , 474 U.S. 254 (1986).....	21
<i>Weaver v. Massachusetts</i> , 137 S. Ct. 1899 (2017)	passim
<i>Wiggins v. Smith</i> , 539 U.S. 510, 538 (2003)	18
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000)	19

Statutes

28 U.S.C. § 2106 (2012)	14
28 U.S.C. § 2253 (2012)	8, 9
28 U.S.C. § 2254 (2012)	8, 9

Other Authorities

Amy Knight Burns, Note, <i>Insurmountable Obstacles: Structural Errors, Procedural Default, and Ineffective Assistance</i> , 64 Stan. L. Rev. 727 (2012)	16
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OPINIONS BELOW

The Sixth Circuit's order denying Mr. Carter's motion for a certificate of appealability is included in the Appendix at A-1. The Sixth Circuit's unpublished order denying the petition for panel rehearing is included at A-2. The District Court's opinion denying Mr. Carter's motion to amend the judgment is included at A-3. The district court's judgment is included at A-4. The district court order approving and adopting the report and recommendation to deny the petition is included at A-5. The magistrate judge's report and recommendation to deny Mr. Carter's § 2254 petition and a certificate of appealability is included at A-6. The Sixth Circuit published opinion reversing and remanding the district court's order denying Mr. Carter's § 2254 petition is included at A-7. The Sixth Circuit Order consolidating cases and appointing the Federal Defender Office for the Eastern District of Michigan to represent Mr. Carter is included at A-8. The Western District of Michigan District Court opinion adopting the recommendation to deny the writ is included at A-9. The Western District of Michigan Magistrate Judge report and recommendation is included at A-10. The Eastern District of Michigan District Court opinion adopting the report and recommendation and transferring the case is included at A-11. The Eastern District of Michigan Magistrate Judge report and recommendation is included at A-12.

The Michigan Supreme Court order denying leave to appeal Mr. Carter's motion for relief from the judgment is included at A-13. The Michigan Court of

Appeals order denying leave to appeal Mr. Carter's motion for relief from the judgment is included at A-14. The Kent County Circuit Court opinion denying Mr. Carter's motion for relief from the judgment is included at A-15.

Orders from companion cases are also included in the appendix. The order granting a COA in *Parks v. Warren*, No. 2:05-cv-010036 (E.D. Mich.), is included at A-16. The order denying the application to amend the judgment to add a COA in *Wellborn v. Berghuis*, No. 1:05-cv-00346 (W.D. Mich.), is included at A-17. The motion to dismiss the appeal in *Powell v. Howes*, No. 16-2410, is included at A-18. Mr. Powell's motion to dismiss voluntarily his appeal in *Powell v. Howes*, No. 16-2410, is included at A-19.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The court of appeals denied rehearing of Mr. Carter's request for a certificate of appealability to review the merits of his § 2254 petition on October 26, 2017. Mr. Carter filed an application for an extension on January 11, 2018. Justice Kagan granted an extension up to and including March 25, 2018, which is a Sunday. This petition is timely filed pursuant to Supreme Court Rule 13.1 and 30.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a criminal defendant's right to trial by an impartial jury, which includes the right to a jury drawn from a fair cross-section of the community. The Sixth Amendment provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed

This case also involves the application of 28 U.S.C. § 2253 (2012), which provides:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Mr. Carter requests that this Court grant, reverse, and remand with instructions to issue a certificate of appealability. This Court has such authority pursuant to 28 U.S.C. §2106, which states:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

INTRODUCTION

Gregory Carter, an African-American man, was convicted of armed robbery by an all-white jury selected from a venire that was not a fair cross-section of his community. *See generally Duren v. Missouri*, 439 U.S. 357 (1979). Mr. Carter did not object to the composition of the venire before his petit jury was empaneled because he did not know that the system of sending jury summonses to citizens of Kent County systemically excluded black and Latino eligible jurors. As soon as he learned about the flawed system, Mr. Carter sought relief in Michigan courts. Each Michigan court refused to review his Sixth Amendment claim because he did not object to the composition of his venire at trial. In federal habeas proceedings, the warden has invoked the procedural-default doctrine.

The Sixth Circuit has already determined that he has shown cause to excuse the default, see *Ambrose v. Booker (Ambrose I)*, 684 F.3d 638, 645–49 (6th Cir. 2012), and that the claim is meritorious, see *Garcia-Dorantes v. Warren*, 801 F.3d 584, 600–04 (6th Cir. 2015). Despite the fact that a fair cross-section violation is a structural error, the Sixth Circuit said that Mr. Carter must present evidence that there is “a reasonable probability that a properly selected jury [would] have been less likely to convict.” *Ambrose I*, 684 F.3d at 652 (internal quotation marks omitted). The Sixth Circuit has denied Mr. Carter a COA.

STATEMENT OF THE CASE

1. The Systemic Exclusion of Kent County Citizens

The systematic exclusion of minorities that gives rise to this litigation is well documented and undisputed. In April 2001, court employees in Kent County, Michigan, made a programming error while converting to a new automated jury selection system that excluded seventy-five percent of eligible Kent County jurors from service. (APP 042) Programmers designed the new system to select names randomly from a database of the county's 453,981 eligible jurors, but erroneously entered the figure 118,169 into the relevant parameter. (APP 043) As a result, the system randomly selected jurors from only the first 118,169 names in the database, excluding nearly seventy-five percent of eligible jurors from service. (*Id.*) Because the names of eligible jurors were organized in ascending zip code order, virtually all jurors from higher-numbered zip codes were excluded. (*See* APP 043–44) Those zip codes are concentrated in the city of Grand Rapids, and are home to most of Kent County's black and Latino citizens. (*See id.*)

Before long, regular court observers began noticing something wrong with the jury pool. Subsequent analysis shed further light on minority underrepresentation in the jury pool. (APP 043) That analysis confirmed that there was a striking change in black representation in the jury pool from April 2001 through August 2002, and that statistical evidence revealed that the process of selection of African-American jurors for inclusion on the roll had changed. (APP 044)

Professor Edward Rothman, Ph.D., found that during the relevant time frame, only 4.79% of potential jurors in the jury pool were black, rather than the expected 8.24%; only 4.32% of potential jurors were Latino, instead of the expected 5.98%; and the combined black/Latino minority group made up only 10.02% of the jury pool rather than the expected 14.02%. The difference between the expected percentage of a group in the jury pool and the actual percentage, or the “absolute disparity,” were 3.45% for blacks, 1.66% for Latinos, and 4% for the combined black/Latino population. (APP 045); *Garcia-Dorantes*, 801 F.3d at 601. The decreased likelihood that minorities would appear in jury venires, termed the “comparative disparities,” were 42% for blacks, 28% for Latinos, and 29% for the combined black/Latino population. (*Id.*); *Garcia-Dorantes*, 801 F.3d at 601.

2. Mr. Carter’s Jury Trial and Direct Appeal

A Kent County jury convicted Mr. Carter of armed robbery and possession of a firearm when committing a felony and sentenced to a term of imprisonment of 15 to 40 years for the first count and a 2-year consecutive term on the second count. *People v. Carter*, No. 235590, 2003 WL 1795513, at *1 (Mich. App. Apr. 3, 2003). Mr. Carter directly appealed the conviction, but did not argue that his venire was improperly constituted. *See id.*

3. State Post-Conviction Proceedings

After exhausting his appeals, Mr. Carter learned through local news coverage that a computer-input error in Kent County’s jury selection software caused the

underrepresentation of minorities in the jury pools. Mr. Carter moved for relief from judgment under Mich. Ct. R. 6.500, arguing that he was denied his right to a fair trial because the input error “systematically excluded” minorities from the jury pool and venires. His motion was denied at each level in the Michigan state courts. *People v. Carter*, No. 127081 (Mich. May 31, 2005) (APP 107); *People v. Carter*, No. 254482 (Mich. App. Aug. 20, 2004) (APP 108); *People v. Carter*, No. 01-00091-FC (Kent Cty. Cir. Ct. Oct. 27, 2003) (APP 109–12).

4. Federal Post-Conviction Proceedings

Mr. Carter filed a 28 U.S.C. § 2254 petition for a writ of habeas corpus in the Eastern District of Michigan. The only constitutional claim he asserted was that the petit jury was not selected from a venire that represented a fair cross-section of the community in violation of the Sixth Amendment. A magistrate judge recommended finding cause and prejudice to excuse the procedural default, holding an evidentiary hearing on the merits of the fair cross-section claim, appointing counsel, and transferring the case to the Western District of Michigan. (APP 097, 105) The district court adopted the recommendation and transferred the case to the Western District of Michigan for an evidentiary hearing. (APP 095)

In the Western District, a new magistrate judge took a fresh look at Mr. Carter’s case and determined there was no need for an evidentiary hearing or to appoint counsel because Mr. Carter could not overcome the procedural bar. (APP 071)

Rejecting the views of the judge in the Eastern District of Michigan, the district judge adopted the report and recommendation in full, but granted a COA. (APP 070)

Mr. Carter appealed pro se, and the Sixth Circuit combined his case with others raising the same issue and appointed the Federal Defender Office for the Eastern District of Michigan to represent Mr. Carter. (APP 062) Ultimately, the Sixth Circuit found cause to excuse the default. *Ambrose I*, 684 F.3d at 645 (APP 049–55) The court also concluded that habeas petitioners must show that the procedurally defaulted structural error resulted in “actual prejudice.” *Id.* at 649 (APP 059–60) Mr. Carter’s case was remanded for consideration of whether he could make that showing. (APP 061)

After full briefing, the district court again denied Mr. Carter’s petition for a writ of habeas corpus because it believed that a constitutionally composed jury might have convicted him anyway. *Carter v. Lafler*, No. 1:09-cv-215, 2016 WL 7852533 (W.D. Mich. Dec. 14, 2016) (APP 039) The district court adopted the recommendation and dismissed the Mr. Carter’s habeas petition. *Carter v. Lafler*, No. 1:09-cv-215, 2017 WL 235833 (W.D. Mich. Jan. 19, 2017) (APP 014).

Mr. Carter moved to amend the judgement to permit a COA in light of the grant of certiorari in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), where this Court considered whether prejudice is presumed when an attorney is ineffective for failing to object to a structural error. Mr. Carter’s request was based on the fact that the Sixth Circuit expressly adopted the prejudice standard described in *Strickland v.*

Washington, 466 U.S. 668 (1984), for analyzing the prejudice caused by ineffective counsel. *Ambrose I*, 684 F.3d at 652 (APP 060). The district court denied that motion, reasoning that, even if *Weaver* altered the analysis, “the impetus should come from the Supreme Court or the Circuit Court.” (APP 011)

When this Court issued its opinion in *Weaver*, Mr. Carter sought a COA from the Sixth Circuit. Without the assistance of any briefing, one judge denied Mr. Carter the opportunity to litigate these claims after analyzing *Weaver* and concluding that *Weaver*’s holding was that “prejudice is not presumed in cases involving claims of ineffective assistance of counsel that result in structural error.” (APP 007) Mr. Carter moved for panel rehearing on the question whether he should receive a COA. A panel concluded that the court “did not overlook or misapprehend any material point of law or fact when [it] entered [the] previous order.” (APP 001)

REASONS FOR GRANTING THE WRIT

This case involves the application of two doctrines that often confuse the lower courts: the procedural-default doctrine and the structural-error doctrine. On the one hand, this Court requires habeas petitioners to show cause and prejudice to obtain federal review of a constitutional claim that state courts have not adjudicated because the defendant failed to follow an independent and adequate state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

On the other hand, this Court has recognized “that some errors”—structural errors—“should not be deemed harmless beyond a reasonable doubt.” *Weaver*, 137 S.

Ct. at 1907. “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.” *Id.* An error is structural if it “necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence,” *Neder v. United States*, 527 U.S. 1, 9 (1999) (emphasis omitted), if it “def[ies] analysis by harmless-error standards,” and “affect[s] the entire adjudicatory framework,” *Puckett v. United States*, 556 U.S. 129, 141 (2009) (citation and internal quotation marks omitted).

The Sixth Circuit employs a categorical rule: procedurally defaulted structural errors of any kind are unreviewable unless the petitioner can show a reasonable probability that the outcome of trial would have been different had the error not occurred. *Ambrose I*, 684 F.3d at 651. This Court has since rejected that categorical rule and used a more nuanced approach to assess prejudice when a structural error comes to light after a verdict has been rendered. This Court identified subcategories of structural error—the most important of which is those structural errors that always undermine the fundamental fairness of the proceedings. *See Weaver*, 137 S. Ct. at 1908 (describing the three categories). In the context of a post-conviction motion for a new trial based on a claim of ineffective assistance of counsel, “the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or . . . to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.” *Id.* at 1911 (citation omitted). This

Court left open the possibility that the type of prejudice that must be shown depends on the type of structural error alleged. If the error always renders a trial fundamentally unfair, then courts may address the merits of the claim regardless of the error's impact on the outcome of the trial.

Despite this significant new guidance, the district court and the Sixth Circuit rejected Mr. Carter's request for a COA so he can show prejudice by showing that a fair cross-section violation always renders a trial fundamentally unfair.

Further review is imperative. This Court should grant, reverse, and remand (GVR) this matter to the Sixth Circuit with instructions to grant a COA because that court did not properly apply 28 U.S.C. § 2253(c)(2), where "the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (internal quotation marks omitted).

In the alternative, this Court should grant plenary review to address whether a 28 U.S.C. § 2254 habeas petitioner asserting that he was deprived an impartial jury in violation of the Sixth Amendment can show prejudice by demonstrating that the defaulted structural error always renders a trial fundamentally unfair.

- I. **This Court should grant certiorari, reverse the judgment of the Sixth Circuit, and remand with instructions to issue a COA because reasonable jurists could debate whether a Sixth Amendment fair cross-section violation always renders a trial fundamentally unfair.**

Mr. Carter cannot litigate the remaining questions his 28 U.S.C. § 2254 petition presents “[u]nless a circuit justice or judge issues a certificate of appealability.” 28 U.S.C. § 2253(c)(1). To obtain a COA, he must make “a substantial showing of the denial of a constitutional right.” *Id.* § 2253(c)(2). “At the COA stage, the only question is whether the applicant has shown that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Buck*, 137 S. Ct. at 773 (internal quotation marks omitted). “The COA inquiry . . . is not coextensive with a merits analysis.” *Id.*

Mr. Carter has already made a substantial showing that Kent County’s system of summoning jurors in May 2001 violated the Sixth Amendment’s guarantee of a fair and impartial jury. Under current Sixth Circuit precedent, if Mr. Carter can obtain federal court review, he will be entitled to a writ of habeas corpus. *See Garcia-Dorantes*, 801 F.3d at 600–04 (holding that Kent County’s system of summoning jurors in 2001 resulted in a fair cross-section violation). Nobody disputes that this meritorious claim was never adjudicated because Michigan courts invoked a procedural rule. And the Sixth Circuit has already concluded that Mr. Carter is not to blame for the default. *See Ambrose I*, 684 F.3d at 645–49 (finding cause external

to the defense for Mr. Carter's procedural default) (APP 049–55). The only remaining issue is whether federal courts may grant him the relief he seeks. This turns on a question that reasonable jurists could debate: Must he show that the outcome of his trial would have been different?

A. The Sixth Circuit resolved the merits of Mr. Carter's legal arguments without jurisdiction.

When the Sixth Circuit denied Mr. Carter's application for a COA, it made a merits determination without jurisdiction. Mr. Carter's primary contention is that federal courts can review his claim and grant a writ if he "show[s] *either* a reasonable probability of a different outcome in his or her case *or* . . . that the particular . . . violation was so serious as to render his or her trial fundamentally unfair." *Weaver*, 137 S. Ct. at 1911 (emphasis added). He claims that a fair cross-section violation always renders a trial fundamentally unfair.

Like the Fifth Circuit's COA denial in *Buck*, the Sixth Circuit "phrased its determination in proper terms—that jurists of reason would not debate that [Mr. Carter] should be denied relief—but it reached that conclusion only after essentially deciding the case on the merits." *Buck*, 137 S. Ct. at 773. In denying Mr. Carter's request, the Court analyzed *Weaver* and concluded that the holding was categorical, i.e., that all § 2254 petitioners must show "actual prejudice" regardless of the nature of the structural error asserted. (*See* APP 007)

B. Reasonable jurists could debate whether Mr. Carter can obtain federal review of his meritorious Sixth Amendment claim by showing that a fair cross-section violation always renders a trial fundamentally unfair.

The issue Mr. Carter raises is debatable. At least some reasonable jurists believe *Weaver* stands for the proposition that a petitioner can show prejudice if the structural error results in fundamental unfairness. The Maryland Court of Appeals, for example, considered whether the presence of an alternate juror during deliberations is the type of structural error that results in fundamental unfairness. *Newton v. State*, No. 86, 2017 WL 3614030, at *5–8 (Md. Ct. App. Aug. 23, 2017). In doing so, the court interpreted *Weaver* to mean that the *Strickland* prejudice prong is satisfied “[i]f the error is structural because it is fundamentally unfair.” *Id.* at *6. In *Brooks v. Gilmore*, No. CV 15-5659, 2017 WL 3475475, at *7–8 (E.D. Pa. Aug. 11, 2017), a district court relied on *Weaver* to find prejudice when the nature of a structural error—an inaccurate reasonable-doubt instruction—undermines the fundamental fairness of the proceedings. *See also Ledet v. Davis*, No. 4:15-CV-882-A, 2017 WL 2819839, at *14 (N.D. Tex. June 28, 2017) (“The burden is on the defendant to show either a reasonable probability of a different outcome in his case or that the particular public-trial violation was so serious as to render his trial fundamentally unfair.”). Recently, Justice McCloud of the Washington Supreme Court specially concurred, noting that she disagreed with her colleagues’ interpretation of *Weaver* and their belief that “*Weaver* held that a petitioner alleging ineffective assistance of counsel due to failure to assert a courtroom closure claim can never prevail if ‘he has

not met his burden of showing that he was prejudiced by the courtroom closure error.” *In re Salinas*, No. 91905-4, 2018 WL 283411, at *10 (Wash. Jan. 4, 2018) (McCloud, J., concurring) (footnote omitted). Instead, she believed *Weaver* “listed a showing of ‘fundamental unfairness’ as an alternative to proof of ‘prejudice’ as a means of gaining relief.” *Id.*

These cases highlight the debatability of the issue Mr. Carter hopes to argue on appeal. These reasonable jurists interpret *Weaver* differently, and so Mr. Carter should have the opportunity to brief and argue whether he can show prejudice by proving that a fair cross-section violation always renders a trial fundamentally unfair.

Moreover, this is a rare case where there is direct evidence that reasonable jurists could debate the legal question presented. This office has represented six habeas petitioners who have raised fair cross-section violations based on Kent County’s problematic system of selecting jurors. In this case, the venue of the litigation apparently made a difference. The four petitioners whose claims were reviewed in the Eastern District of Michigan received a COA or were granted conditional writs. *See Parks v. Warren*, 278 F. Supp. 3d 975, 989 (E.D. Mich. 2017) (APP 014 (denying petition, but granting a COA)); *Powell v. Howes*, No. 05-CV-71345, 2016 WL 5661571, at *10 (E.D. Mich. Sept. 30, 2016) (denying petition, but granting

a COA);¹ *Garcia-Dorantes v. Warren*, 978 F. Supp. 2d 815, 835 (E.D. Mich. 2013), *aff'd on other grounds*, 801 F.3d 584 (6th Cir. 2015) (granting petition); *Ambrose v. Booker*, 24 F. Supp. 3d 626, 658 (E.D. Mich. 2014) (granting petition), *rev'd*, *Ambrose v. Booker (Ambrose II)*, 801 F.3d 567 (6th Cir. 2015). The two petitioners whose cases were transferred to the Western District of Michigan were denied COAs. *See* (APP 011) (order denying motion to amend judgment to grant a COA); *Wellborn v. Berghuis*, No. 1:05-CV-346, 2016 WL 7744446, at *15 (W.D. Mich. Dec. 2, 2016), *report and recommendation adopted*, No. 1:05-CV-346, 2017 WL 131721 (W.D. Mich. Jan. 13, 2017) (denying petition) (APP 117) (order denying motion to amend judgment to grant a COA). The location of a petitioner's claim should have no bearing on whether further litigation should be authorized, and yet it apparently does.

The Sixth Circuit erroneously denied Mr. Carter's motion for a COA. Reasonable jurists could debate whether Mr. Carter can prove prejudice by showing that a fair cross-section violation always renders a trial fundamentally unfair.

¹ After the Sixth Circuit set Mr. Powell's appeal for oral argument, the Michigan Attorney General made a plea offer: in exchange for dismissal of the appeal, Mr. Powell entered a no-contest plea on December 28, 2017. The Kent County Prosecutor's Office agreed to a sentence of time served. On January 18, 2018, a Kent County judge imposed the agreed sentence, and Mr. Powell was released from custody. (APP 118–20)

C. A GVR order with instructions to grant a COA is appropriate in this case.

Section 2106 of Title 28 grants this Court authority to issue a GVR order under appropriate circumstances. 28 U.S.C. § 2106. A GVR order is proper when it

[C]onserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before [ruling] on the merits, and alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues

Lawrence ex rel. Lawrence v. Chater, 516 U.S. 163, 167 (1996) (internal quotation marks, alterations, and citations omitted). In criminal cases, “[w]hen a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, [this Court’s] legal traditions reflect a certain solicitude for his rights,” and so when there is no prejudice to the prosecution a GVR order is an appropriate resolution. *Stutson v. United States*, 516 U.S. 193, 196 (1996).

A GVR order is the correct course in these circumstances in light of *Weaver* and *Buck*. Further review in the Sixth Circuit will conserve this Court’s resources and benefit this Court if future review is necessary. The Supreme Court is “a court of review, not of first view.” *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (internal quotation marks omitted) (quoting *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014)). Accordingly, if this Court decides whether a fair cross-section violation is presumptively prejudicial structural error,

then it should do so in a case after a court of appeals has had the opportunity to consider that question. *Cf. Hernandez v. Mesa*, 137 S. Ct. 2003, 2006–08 (2017) (per curiam) (GVR’ing to permit the court of appeals to decide the question whether claims are cognizable in the first instance). A GVR order would also cure the unequal treatment of the six habeas petitioners who are litigating this very issue in the very same procedural posture.

Mr. Carter’s request is simple: he would like the opportunity to litigate. He has never had the opportunity to file briefs on the merits of the arguments. After *Weaver*, the Sixth Circuit has not considered whether a fair cross-section violation is inherently prejudicial. Because the Sixth Circuit addressed the merits of Mr. Carter’s debatable legal argument without jurisdiction, this Court should grant certiorari, reverse the Sixth Circuit’s judgment, and remand with instructions to grant a COA.

II. The Sixth Circuit erred by holding that habeas petitioners asserting procedurally defaulted structural errors must show a reasonable probability of a different outcome at trial no matter the nature of the error.

Although a GVR order is appropriate, this case is an ideal vehicle for this Court to consider the intersection of structural errors and the procedural-default doctrine. Typically, when a state court declines to adjudicate a claim for failure to follow a procedural rule, federal habeas petitioners must show cause and prejudice before the federal court can review the merits of the claim. *Coleman*, 501 U.S. at 750. But when the defaulted claim is structural, petitioners will struggle to obtain federal review of the claim because structural errors “affect[] the framework within which the trial

proceeds,” and therefore “defy analysis by harmless-error standards.” *Arizona v. Fulimante*, 499 U.S. 279, 309–10 (1991) (internal quotation marks omitted).

Strictly applying these doctrines together creates an inescapable situation: “requiring a showing of prejudice to resurrect a procedurally defaulted [structural] claim is functionally equivalent to foreclosing the claim entirely,” leading to the “absurd result of the theoretically available claim guarded by an always-insurmountable barrier.” Amy Knight Burns, Note, *Insurmountable Obstacles: Structural Errors, Procedural Default, and Ineffective Assistance*, 64 Stan. L. Rev. 727, 730 (2012); see also *Vansickel v. White*, 166 F.3d 953, 960 (9th Cir. 1999) (Reinhardt, J., dissenting) (arguing that because “prejudice as to the result . . . cannot[] be shown in jury composition cases,” an actual prejudice requirement “impos[es] an insurmountable barrier to the vindication of a right to due process [that] is incompatible with the Constitution”).

The Sixth Circuit employs a categorical rule: procedurally defaulted errors of any kind are unreviewable unless the petitioner can show a reasonable probability that the outcome of trial would have been different had the error not occurred. *Ambrose I*, 684 F.3d at 651. It has applied that categorical rule no matter the nature of the structural error. See *Jones v. Bell*, 801 F.3d 556, 563–64 (6th Cir. 2015) (requiring proof that had the habeas prisoner represented himself at trial, the outcome would have been different to overcome a procedural bar).

A contextual approach is more appropriate than a categorical rule to deciding whether a federal petitioner asserting a procedurally defaulted structural error must show prejudice. This Court suggested as much in *Weaver*, which involved “the proper application[] of two doctrines: structural error and ineffective assistance of counsel.” 137 S. Ct. at 1907. In concluding that Mr. Weaver had to show actual prejudice and could not do so, this Court took three analytical steps. First, it identified the reasons why the error is deemed structural, and there are three categories of structural errors. *See id.* at 1907–08. Next, it considered the costs of reversal in post-conviction proceedings. *See id.* at 1910–12. Last, it balanced the two competing interests to decide what type of prejudice showing is required by looking at the specific facts of the case and the nature of the error. *See id.* at 1912–13 (“In the criminal justice system, the constant, indeed unending, duty of the judiciary is to seek and to find the proper balance between the necessity for fair and just trials and the importance of finality of judgments. . . . [I]n light of the other circumstances present in this case, petitioner must show prejudice in order to obtain a new trial.”).

The analytical framework used in *Weaver* applies equally to procedurally defaulted claims asserted by federal habeas petitioners. The *Strickland* standard evolved directly from the procedural default doctrine governing habeas corpus review. As the Court explained in *Strickland*,

The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. As indicated by the “cause and prejudice” test for overcoming procedural waivers of claims of error, the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment.

Strickland, 466 U.S. at 697 (citing *United States v. Frady*, 456 U.S. 152, 162–169 (1982); *Engle v. Isaac*, 456 U.S. 107, 126–129 (1982)). The standards are the same because “[a]n ineffectiveness claim . . . is an attack on the fundamental fairness of the proceeding whose result is challenged,” and “fundamental fairness is the central concern of the writ of habeas corpus.” *Id.*

As this common origin suggests, both *Strickland* claims and procedural default analysis are focused on the same ultimate goal: ensuring fundamental fairness. “[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.” *Id.* at 684. The right to the effective assistance of counsel is accordingly not limited to issues related to the defendant’s guilt or innocence, but extends to plea negotiations, *Lafler v. Cooper*, 566 U.S. 156, 168 (2012); litigation of pretrial motions, *Kimmelman v. Morrison*, 477 U.S. 365, 383–84 (1986); sentencing hearings, *Glover v. United States*, 531 U.S. 198, 203–04 (2001); *Wiggins v. Smith*, 539 U.S. 510, 538 (2003); and direct appeals, *Halbert v. Michigan*, 545 U.S. 605 (2005).

In federal habeas corpus proceedings as well, “errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the

issuance of the federal writ.” *Williams v. Taylor*, 529 U.S. 362, 375 (2000). Like *Strickland* claims, the cause-and-prejudice standard focuses on “ensuring the ‘fundamental fairness [that] is the central concern of the writ of habeas corpus.’” *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (quoting *Strickland*, 466 U.S. at 697).

The prejudice requirements of *Strickland* and the procedural-default doctrine also reflect the same balance “between the necessity for fair and just trials and the importance of finality of judgments.” *Weaver*, 137 S. Ct. at 1913. Both standards take into consideration the costs of reversal post-conviction and after direct review. *See id.* at 1912; *Francis v. Henderson*, 425 U.S. 536, 538–42 (1976).

This is an ideal vehicle to clarify whether the two prejudice standards are the same and whether, to overcome a procedural default, a petitioner can show that the structural error alleged resulted in a fundamentally unfair trial.

A. Structural errors that render a criminal trial fundamentally unfair are prejudicial

There are three categories of structural errors: (1) those which are “not designed to protect the defendant from erroneous conviction but instead protect[] some other interest”; (2) errors the effects of which “are simply too hard to measure”; and (3) errors that “always result[] in fundamental unfairness.” *Weaver*, 137 S. Ct. at 1908. The last category is the most important: unless the structural error is the type that renders trials fundamentally unfair, petitioners must show a reasonable probability of a different outcome to prevail on an ineffective-assistance claim. *See id.* at 1911.

This Court assumed that a petitioner could show prejudice if the structural error undermined the fundamental fairness of the proceeding. *Id.* (“Petitioner therefore argues that under a proper interpretation of *Strickland*, even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair. For the analytical purposes of this case, the Court will assume that petitioner’s interpretation of *Strickland* is the correct one.”). But this Court left open the possibility that prejudice may be presumed when “the violation . . . pervade[s] the whole trial or lead[s] to basic unfairness.” *Id.* at 1913. Although a partial closure of the courtroom during voir dire is not be such a structural error, a fair cross-section may be. This case is an ideal vehicle to answer that question because Mr. Carter has already shown that he is not to blame for the default and that Kent County violated his right to an impartial jury.

B. A fair cross-section violation always renders a trial fundamentally unfair

A fundamentally fair trial is one in which the defendant is tried “before an impartial judge, under the correct standard of proof and with the assistance of counsel; [where] *a fairly selected, impartial jury* was instructed to consider all of the evidence and argument in respect to [the charges].” *Neder*, 527 U.S. at 9 (emphasis added). This Court has identified four rights as fundamental to the fairness of the proceedings: the right to counsel, the right to an accurate reasonable-doubt instruction, the right to a trial before an unbiased judge, and the right to have a grand

jury free of racial exclusion screen the charges. *See Weaver*, 137 S. Ct. at 1908 (citing *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963); *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)); *id.* at 1911 (citing *Tumey v. Ohio*, 273 U.S. 510, 535 (1927); *Vasquez v. Hillery*, 474 U.S. 254, 261–64 (1986)). The common thread running through each of these rights is their protection of the credibility and integrity of the adjudicatory process.

Venires that do not represent a fair cross-section of the community, do not lead to “a fairly selected, impartial jury,” *Neder*, 527 U.S. at 9, and therefore undermine the integrity of the adjudicatory process. “[T]he American concept of the jury trial contemplates a jury drawn from a fair cross section of the community,” and therefore it is a fundamental component of an impartial jury. *Taylor v. Louisiana*, 419 U.S. 522, 527, 530 (1975). Juries are “instruments of public justice,” and thus must be “a body truly representative of the community.” *Id.* (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)). For one thing, the requirement that venires be drawn from a fair cross-section of the community “is a means of assuring” an impartial jury—exactly what the Sixth Amendment guarantees. *Holland v. Illinois*, 493 U.S. 474, 480 (1990). The fair cross-section requirement “deprives the State of the ability to ‘stack the deck’ in its favor” or to “draw up jury lists in a such a manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition.” *Id.* at 480–81. While the focus of the jury-trial right is to protect the accused against

oppressive state action, the goal of the fair cross-section requirement “is jury impartiality with respect to both contestants: neither the defendant nor the State should be favored.” *Id.* at 483. Thus, “the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial,” and is also an essential ingredient of a fundamentally fair trial. *Taylor*, 419 U.S. at 528.

C. This case is an ideal vehicle to resolve the question presented

This case presents an opportunity to clarify how to identify those errors that always render a trial fundamentally unfair and state whether a fair cross-section violation is such an error. There are no material facts in dispute about the cause of the underrepresentation of black and Latino citizens in the Kent County jury pool. There is no dispute about whether Mr. Carter exhausted his claim or how the Michigan courts resolved it. And there is no question that Mr. Carter would prevail on the merits of his constitutional claim if a federal court can review it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

March 26, 2018

FEDERAL DEFENDER OFFICE

By:

A handwritten signature in black ink, appearing to read 'C. P. Fitzharris', written over a horizontal line.

Colleen P. Fitzharris

Counsel of Record

James Gerometta

Counsel for Petitioner Gregory Carter

Detroit, Michigan

No:

IN THE
SUPREME COURT OF THE UNITED STATES

GREGORY CARTER,
Petitioner,

v.

BLAINE LAFLER, Warden,
Respondent.

CERTIFICATE OF SERVICE

I certify that on March 26, 2018, in accordance with SUP. CT. R. 29, copies of the (1) Petition for Writ of Certiorari, (2) Motion for Leave to Proceed In Forma Pauperis, (3) Certificate of Service, and (4) Declaration Verifying Timely Filing, were served by mail within three days upon the Attorney General for the State of Michigan.

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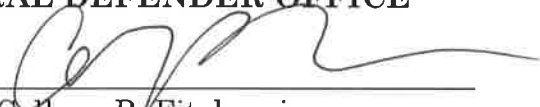
BLAINE LAFLER, Warden,
Respondent.

DECLARATION VERIFYING TIMELY FILING

Petitioner Gregory Carter, through undersigned counsel, and pursuant to SUP. CT. R. 29.2 and 28 U.S.C. § 1746, declares that the **Petition for Writ of Certiorari** filed in the above-styled matter was filed electronically on March 26, 2018, which is timely pursuant to the rules of this Court. On March 26, 2018, this petition was also sent through the United States Postal Service by first-class mail, postage prepaid, and bears a postmark showing that the document was mailed on or before the last day for filing, addressed to the Clerk of the Supreme Court of the United States,

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