No. 19-6252

IN THE

SUPREME COURT OF THE UNITED STATES

EDINSON HERRERA RAMIREZ,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), this Court affirmed a denial of postconviction relief for ineffective assistance of counsel where the petitioner had demonstrated structural error but failed to show prejudice.

Did the Maryland Court of Appeals correctly conclude that, even if defense counsel's failure to question or move to strike a certain juror resulted in structural error, the petitioner claiming ineffective assistance of counsel was, under *Weaver*, required to prove prejudice and failed to do so?

TABLE OF CONTENTS

CONTENTS OF APPENDIX

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at 464 Md. 532. The opinion of the Court of Special Appeals of Maryland is unreported, but is available at 2018 WL 3025900. The memorandum opinion of the Circuit Court for Carroll County, Maryland, denying Ramirez's petition for postconviction relief, is unreported.[1]

JURISDICTION

The Court of Appeals of Maryland affirmed the opinion of the Court of Special Appeals on July 12, 2019, and its mandate issued on August 13, 2019. On September 26, 2019, Edinson Herrera Ramirez, timely filed, in proper person, a petition for a writ of certiorari in this Court. Jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 1257(a).

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1 The circuit court's opinion is attached as an appendix.

STATEMENT OF THE CASE

1. The home invasion and shooting

On October 11, 2004, Ramirez and Jerry Burkett, armed with a sawed-off shotgun and a handgun, entered the home of Rodney and Linda Hidey, shot Mr. Hidey, and stole $80,000 from a safe in the basement. *Ramirez v. State*, 464 Md. 532, 544–52 (2019).

The Hideys kept the existence of the safe a secret; they covered the safe to conceal it and refrained from talking about it. *Id.* at 545, 547–48. Ramirez knew where the cash-filled safe was located because, in the summer of 1999, he spent two months working on the construction of the house and had helped Mr. Hidey move the safe into the area of the home that was to become the basement. *Id.* at 544–45, 547–48. Other than Ramirez, Mr. Hidey told, at most, one other person about the safe. *Id.* at 548. On the other hand, Ramirez told Mr. Burkett, his wife Naomi Burkett, and Burkett's acquaintance, Larry Fincham, about the safe and its contents, and expressed his need for money. *Id.* at 549–551.

Ramirez also shared with his girlfriend, Gail Vollmer, his knowledge of the safe's existence. *Id.* at 552.[2]

Ramirez and Mr. Burkett spent weeks planning the home invasion. *Id.* at 549–51. Ramirez gave Mr. Burkett a pump-action shotgun, which Mr. Burkett sawed off. *Id.* at 551. At Mr. Burkett's request, Ms. Burkett purchased a .22 caliber revolver and ammunition, and gave them to Mr. Burkett. *Id.* Ms. Burkett altered an orange ski mask to make the eyeholes smaller and gave it to Ramirez. *Id.*

On October 11, 2004, Ms. Burkett drove Mr. Burkett to Ramirez's house. *Id.* Mr. Burkett brought with him a pillowcase containing the revolver, ammunition, and a green ski mask. *Id.* When they arrived, Ramirez, who had the sawed-off shotgun and the orange ski mask Ms. Burkett had sewn, told them "he couldn't get a driver."[3] *Id.* Ms. Burkett agreed to act as the getaway driver.

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[2] Ms. Burkett, Mr. Fincham, and Ms. Vollmer testified for the State at trial. 464 Md. at 549–52.

[3] A month earlier, on September 4, 2004, Ramirez and Mr. Burkett had unsuccessfully tried to break into the Hideys' home by opening a window to the basement, which triggered an

Id. Ramirez gave her a walkie-talkie and Ms. Burkett drove Ramirez and Mr. Burkett to an area near Ridge Road. *Id.* When Mr. Burkett and Ramirez got out of the car, they took with them the guns and pillowcase, and placed the masks over their heads. *Id.*

That night, Ms. Hidey was home with her three young children, ages three, five, and six, when a pair of masked gunmen entered the home around 10:00 p.m. *Id.* at 545. One of the intruders wore a green ski mask and held a .22 caliber revolver. *Id.* at 545, 548. The other intruder wore an orange ski mask and pointed a sawed-off shotgun at Ms. Hidey. *Id.* Ms. Hidey observed that the orange-masked gunman matched the build, height, and weight of Ramirez, with whom she had interacted on multiple occasions during the construction of the house. *Id.* at 544–45.

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alarm. 464 Md. at 545, 548–50. During that attempted break-in, Mr. Burkett carried a duffle bag that contained tools and two Halloween masks. *Id.* at 550. Although Mr. Fincham acted as the getaway driver during that failed attempt, he refused to participate in the October home invasion when he learned that Ramirez and Mr. Burkett would be carrying guns during its commission. *Id.*

The green-masked gunman asked Ms. Hidey, "Where's the money?" *Id.* at 545. The orange-masked gunman then whispered something to the green-masked gunman, which prompted him to revise his question and inquire more specifically, "Where's the safe?" *Id.* at 546. Ms. Hidey directed the duo to the safe's location in the basement. *Id.* The green-masked gunman demanded that Ms. Hidey open the safe. *Id.* After Ms. Hidey revealed that she did not know the combination, the orange-masked gunman again whispered in the ear of the green-masked gunman. *Id.* The green-masked gunman then asked about Mr. Hidey's whereabouts. *Id.* When Ms. Hidey responded that he was at a meeting, the gunmen decided to wait for Mr. Hidey's arrival. *Id.* While they waited, the green-masked gunman threatened to shoot the couple and their children if Ms. Hidey failed to cooperate. *Id.*

When the security system alerted that a car had pulled into the driveway, the green-masked gunman instructed Ms. Hidey to remain seated in the family room, where her daughter was sleeping, and she obeyed. *Id.* In the kitchen, the orange-masked gunman crouched down out of sight, lying in wait for Mr. Hidey. *Id.*

After Mr. Hidey entered the house through the kitchen door, the orange-masked gunman jumped out and held Mr. Hidey at gunpoint. *Id.* Mr. Hidey observed that the orange-masked gunman had multiple physical characteristics that matched Ramirez, including his stature, build, eye color, and unibrow. *Id.* at 548.

The green-masked gunman asked Mr. Hidey where the safe was located. *Id.* at 547. Initially, Mr. Hidey denied owning a safe. *Id.* at 548. However, once Mr. Hidey realized that Ms. Hidey had already disclosed the safe's existence, Mr. Hidey, together with his wife and daughter, and the gunmen, headed to the basement. *Id.*

Following a failed attempt to open the safe, Mr. Hidey grabbed the sawed-off shotgun. *Id.* at 549. After a struggle, the orange-masked gunman regained control of the sawed-off shotgun and bludgeoned Mr. Hidey with it, and the green-masked gunman shot Mr. Hidey in his left inner thigh. *Id.*

While Mr. Hidey was bleeding profusely from his head, the green-masked gunman renewed his demand that Mr. Hidey open the safe and threatened to kill Mr. Hidey if he did not do so within five minutes. *Id.* at 547, 549. Mr. Hidey had difficulty opening the safe because his blood was pouring over his eyes. *Id.* at 549. Facing

the green-masked gunman's countdown, Mr. Hidey provided Ms. Hidey the combination to the safe and she opened it. *Id.* at 547, 549.

The masked gunmen transferred a large amount of cash from the safe to the pillowcase, which they carried out of the house after tying up the Hideys and their daughter. *Id.* at 549. Eventually, Mr. Hidey freed himself and called the police. *Id.*

About 45 minutes after Ms. Burkett dropped off the gunmen at the Hidey residence, she received a transmission over the walkie-talkie from Ramirez, who told her to pick them up and informed her that they had "shot somebody." *Id.* at 551. Ms. Burkett picked up Mr. Burkett and Ramirez across the street from the Hideys' home on Ridge Road. *Id.* at 551–52. Mr. Burkett told his wife that they had left behind a tool bag, but he was unconcerned about it because there were no fingerprints on the tools contained inside. *Id.* at 552. The trio then headed to Ramirez's house. *Id.* Once there, they emptied the pillowcase and counted the cash, which totaled about $80,000. *Id.*

In late October 2004, Ramirez put a $2,000 down-payment on a car for his girlfriend, Vollmer. *Id.* After Ramirez was

implicated in the underlying crimes, he called Vollmer and told her that the robbery of which he was accused took place the same night that he and Vollmer had gone to the casino together. *Id.* Ramirez urged Vollmer to "go in and tell them what you know." *Id.* Vollmer, however, could not recall whether she had gone to a casino on October 11, 2014. *Id.*

In December 2004, Ramirez called David Santana from Canada. *Id.* During the call, Ramirez asked Santana to retrieve cash Ramirez had hidden in a box underneath some rocks near Harpers Ferry, West Virginia, and send it to him. *Id.* At the location provided by Ramirez, Santana found a box that contained $9,850 in cash. *Id.*

During their investigation into the home invasion, the police searched near the Hidey residence along Ridge Road and found a green ski mask and a duffel bag containing tools and two Halloween masks. *Id.* at 553. Ms. Burkett and Mr. Fincham each identified the duffel bag as belonging to Mr. Burkett. *Id.* at 553–54. Ms. Burkett also identified the green ski mask as belonging to Mr. Burkett. *Id.* at 553. Mr. Hidey and Ms. Hidey both confirmed that the green mask looked like the mask worn by one of the

robbers. *Id.* In a search of another property, the police located a revolver, which Ms. Burkett identified as the revolver she had purchased. *Id.* Mr. and Ms. Hidey confirmed that the revolver looked like the one the green-masked man had carried. *Id.* The police also executed a search warrant at the Burketts' home, where they found a saw and an orange ski mask that was similar to the one Ms. Burkett had sewn for Ramirez, both of which Ms. Burkett confirmed belonged to Mr. Burkett. *Id.* at 554.

2. Juror selection at Ramirez's trial

Ramirez was charged and brought to trial in the Circuit Court for Carroll County, Maryland. *Id.* at 538. During voir dire, the trial court asked the prospective jurors: "Have you[,] or any member of your family or close friends[,] ever been victims of a crime, accused of a crime[,] or a witness in a criminal case[, such that] that experience affects your ability to render a fair and impartial verdict?" *Id.* at 542 (some brackets added).

Juror 27 answered in the affirmative and engaged in the following colloquy at the bench:

THE COURT: What is your experience, please?

> JUROR 27: I had an apartment that was broken into about a year-and-a-half ago.
>
> THE COURT: All right. Would that experience, in any way, affect your ability to render a fair and impartial verdict in this case?
>
> JUROR 27: I believe it would.

Id. (brackets deleted). There was no further individual inquiry of Juror 27 and he did not answer any other questions during voir dire, including a question that asked whether any juror could not fairly judge a case involving first-degree burglary. *Id.*; *see also id.* at 556, 570.

When the judge solicited strikes for cause, defense counsel sought to strike another juror, Juror 25. *Id.* at 542. As grounds for the strike, she said: "Their home was broken into. Their response as to whether it would affect them was, [']I believe it would.[']" *Id.* The motion was granted. *Id.* at 567. Juror 25, however, had not answered any questions in voir dire. *Id.* at 543. Defense counsel did not move to strike Juror 27 for cause. *Id.* at 567. Defense counsel exercised nine of her ten allotted peremptory challenges, but did not peremptorily strike Juror 27. *Id.* at 543, 567. Juror 27 was seated on the jury. *Id.* at 543.

Immediately after the jury was sworn, however, defense counsel did seek to strike Juror 27 on the ground that, as the judge excused the chosen jurors, Juror 27 shook his head and looked at counsel with "not a very pleasant face." *Id.* at 543. In response, the judge noted "that there was a lot of glee from those who made it out without being chosen." *Id.* at 544. After the prosecutor deferred to the judge, the judge ruled that he would reserve on the motion and allow defense counsel to re-raise it if necessary. *Id.* Defense counsel did not re-raise the issue. *Id.*

Ramirez was convicted at trial of all charges against him, and his convictions were affirmed on direct appeal. *See Ramirez v. State*, 178 Md. App. 257 (2008), *cert. denied*, 410 Md. 561 (2009).

3. Ramirez's postconviction proceedings

In 2014, almost ten years after his conviction, Ramirez filed a petition in the circuit court under the Maryland Uniform Postconviction Procedure Act,[4] and complained, for the first time, that his counsel was constitutionally ineffective for failing to strike

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[4] Md. Code Ann., Crim. Proc. §§ 7-101 to 7-301 (LexisNexis 2018).

Juror 27. At the hearing on Ramirez's postconviction petition, trial defense counsel testified that, before the day of trial, she met with Ramirez to explain the jury selection process, including the procedure for striking prospective jurors. *Ramirez*, 464 Md. at 555. She asked him to let her know, during voir dire, if there were prospective jurors whom he did not want on the jury. *Id.* Counsel spoke with Ramirez in Spanish (his native language), Tr. 2/3/15 at 60, and reviewed voir dire procedures extensively with him due to the cultural difference, Tr. 2/3/15 at 62.

On the day of trial, before meeting with Ramirez, defense counsel reviewed the juror list, which contained information about the jurors' ages and employment, and she made notes as warranted concerning individual jurors. 464 Md. at 555. Counsel then met with Ramirez to review the jury list. *Id.* Once jury selection began, Ramirez was involved in the selection of jurors. *Id.*

The only prospective juror about whom defense counsel was questioned at the postconviction hearing was Juror 27. *Id.* Defense counsel testified that although she did not "remember exactly what" Juror 27 said, she remembered that he "gave an indication

that perhaps he needed to be . . . looked at more closely with respect to whether or not [he] could be fair or impartial." *Id.* She recalled that "[t]here had been an incident in [his] background that had caused [him] to not answer the question as to being fair and impartial as forcefully as [she] would have liked to see before seating" him. *Id.*

In answer to the question, "did there come a time that you asked that juror number 27 be struck?" defense counsel recalled that she had asked that he be struck for cause, and that the trial judge had reserved on the issue as voir dire proceeded. Tr. 2/3/15 at 66; *see also* Tr. 2/3/15 at 69.

Ramirez was the only other witness at the postconviction hearing. Tr. 2/3/15 at 2. Ramirez did not dispute defense counsel's testimony that she explained the voir dire process to him and that he participated in the selection of the jury. Although Ramirez testified about other claims he had raised in his postconviction petition, when he was asked about the claim regarding voir dire, Ramirez said only: "No, I do not wish to testify." Tr. 2/3/15 at 26.

The postconviction court found that Ramirez had not met his burden of demonstrating that trial counsel's performance was

constitutionally deficient due to the failure to challenge Juror 27 before the jury was sworn. *Ramirez*, 464 Md. at 555–56. In support of its finding, the postconviction court cited defense counsel's postconviction hearing testimony, Juror 27's silence in response to all but the crime victim question, and defense counsel's willingness to challenge him after he was picked for the jury. App. at 19–20. The postconviction court further found that, even if counsel's performance had been deficient, Ramirez had not shown that Juror 27 was in fact biased, and thus had failed to show that there was a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. 464 Md. at 555–56. Ramirez appealed to the Court of Special Appeals. *Id.* at 556.

After submission of the case, the Court of Special Appeals noticed a discrepancy in the record: the transcript reflected that Juror 27 said that his experience as a burglary victim would affect his ability to be fair, but defense counsel moved to strike for cause on that basis Juror 25, who had not answered any voir dire questions. 464 Md. at 556; *see also* Order at 1 (filed 3/15/18). The Court of Special Appeals remanded the case to the postconviction court to determine whether the stricken juror was in fact Juror 27.

464 Md. at 556, 568. The postconviction court responded that the trial transcript accurately reflected that defense counsel moved to strike for cause Juror 25—not Juror 27. *Id.*[5]

The Court of Special Appeals, in an unpublished 2-1 decision, affirmed the postconviction court's denial of Ramirez's petition. *Id.* at 556. The Court of Special Appeals concluded that Ramirez had not shouldered his burden of showing that counsel's failure to strike Juror 27 was the result of unreasonable professional judgment and that Ramirez had failed to carry his burden of proving the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Ramirez*, 464 Md. at 556–58.

In finding that defense counsel's conduct was not deficient, the Court of Special Appeals emphasized counsel's testimony that "a great number of factors went into her decision to challenge potential jurors[.]" *Id.* at 557. The Court of Special Appeals cited

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[5] The postconviction court's response did not specifically address whether it was Juror 25 or Juror 27 who said he had been a burglary victim. 464 Md. at 556, 568. In subsequent briefing to the Court of Appeals, the State advised that employees of the State's Attorney's office had verified that the trial transcript was accurate in indicating that Juror 27—as opposed to Juror 25—had responded to the "crime victim" question. *Id.* at 568 n.9.

the fact that Juror 27 did not respond to the questions whether he would be unable to decide a burglary case on the evidence and whether there was "any reason" he could not be fair as reasons that trial counsel might ultimately have discounted Juror No. 27's response to the crime victim question. *Id.*; *see* 2018 WL 3025900, at *2, 6.

The Maryland Court of Appeals affirmed. All seven judges. however, disagreed with the intermediate appellate court and found that defense counsel's performance was deficient. 464 Md. at 541, 567–72 (majority opinion); *id.* at 582 (McDonald, J., concurring in the finding of deficient performance). Citing the response to the intermediate appellate court's remand order, the Court of Appeals proceeded on the premise that defense counsel had intended to move to strike Juror 27, the prospective juror who had said his apartment had been broken into, but "inexplicably" struck Juror 25, who had answered no questions. *Id.* at 569–70. The court held that, in allowing Juror 27 to be seated without follow-up inquiry, or moving to strike for cause or peremptorily, defense counsel's conduct "'fell below an objective standard of

reasonableness . . . under prevailing professional norms.'" *Id.* at 569–70 (quoting *Strickland,* 466 U.S. at 688).[6]

Nevertheless, in a 6-1 opinion, the court further held that Ramirez failed to prove that he was prejudiced by his counsel's deficient performance. 464 Md. at 541, 572–81 (majority opinion); *see id.* at 582–85 (McDonald, J., dissenting from the majority's holding as to prejudice). As a threshold matter, the court reasoned that trial counsel's failure to ask follow-up questions, move to strike, or peremptorily challenge Juror 27 did *not*[7] cause "structural error," which it defined as "error that rendered Ramirez's trial fundamentally unfair." *Id.* at 573. But even if it did, the court explained, this Court's decision in *Weaver* clarified that structural error does not relieve a petitioner of the obligation to

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[6] The court further held that Ramirez's trial counsel's deficient performance was not salvaged by the challenge to Juror 27 after the jury was sworn. 464 Md. at 572.

[7] Ramirez misstates this conclusion. (Pet. at 5 ("On Page 39[,] the panel concluded that counsel's deficient performance caused structural error, 'i.e., error that rendered Ramirez's trial fundamentally unfair.'")). The opposite is true.

prove prejudice when alleging ineffective assistance of counsel. *Id.* at 573 (citing *Weaver*, 137 S. Ct. at 1912). Ramirez's appellate defense counsel[8] did not proffer, and the court did not find, any of the circumstances under which the presumption of prejudice applies—that is, an actual or constructive denial of the assistance of counsel or an actual conflict of interest of defense counsel.[9] 464 Md. at 577 (citing *Strickland*, 466 U.S. at 692). The court further found, relying in part on strong evidence of Ramirez's guilt, that Ramirez failed to meet his burden of showing that there is a substantial or significant possibility that his trial counsel's failure to challenge Juror 27 affected the verdicts. 464 Md. at 577–81.

In his opinion, the sole dissenting judge cited *Weaver* for the proposition that "[i]neffective assistance of counsel that renders a trial fundamentally unfair is not only structural error, but also is prejudicial by definition." *Id.* at 582–83 (McDonald, J., dissenting)

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[8] Ramirez was represented by counsel in the postconviction court and in the Maryland Court of Appeals, but not in the Maryland Court of Special Appeals.

[9] Ramirez also does not claim in this Court the wholesale denial of the assistance of counsel. Nor does he challenge the Maryland Court of Appeals' conclusion on this ground.

(footnote omitted). The dissenting judge would have concluded that, as the seating of the "admittedly biased juror" was attorney error that deprived Ramirez of the right to an impartial jury, it resulted in a "fundamentally unfair trial" that was "necessarily prejudicial." *Id.* at 584–85.

REASONS FOR DENYING THE PETITION

This case involves the proper application of the doctrines of structural error and ineffective assistance of counsel, an issue this Court considered less than three years ago in *Weaver*. The Maryland Court of Appeals applied *Weaver* to the facts of Ramirez's case when it affirmed the circuit court's order denying Ramirez postconviction relief on his ineffective-assistance-of-counsel claim.

Ramirez's argument in support of his petition for writ of certiorari consists of a near-verbatim reproduction of the dissenting opinion in the Court of Appeals, Pet. at 5–8, followed by the claim that this case presents a conflict with the cases cited by the dissenting judge on the question whether the seating of a biased juror necessarily results in *Strickland* prejudice, Pet. at 8.

Of the three cases cited by the dissenting judge for the proposition that postconviction relief is warranted due to the presence of a biased juror, *Ramirez*, 464 Md. at 584 (McDonald, J., dissenting), only one involves ineffective assistance of counsel. All predate *Weaver* by more than a decade. Thus, none engage in the analysis mandated by *Weaver*. Any "conflict" between those cases and the Maryland Court of Appeals' opinion in this case is either illusory or rendered immaterial by this Court's intervening decision in *Weaver*.

A grant of certiorari is unwarranted for two additional reasons. First, *Weaver* is a recent case. Before this Court explicates the issues presented in *Weaver* further, there is benefit in allowing other federal courts and state courts of last resort to do so.

Second, the Maryland Court of Appeals decided whether trial defense counsel's conduct was deficient based on the premise that counsel confused Juror 25 and Juror 27. Petitioner never suggested that counsel mistook Juror 25 for Juror 27, and both the postconviction court and the intermediate appellate court found that counsel acted purposefully in not striking Juror 27. This

anomaly in the record makes this case an unsuitable vehicle for decision of the issue presented.

1. *Weaver* resolves the supposed "conflict" urged by Ramirez.

Weaver arose from defense counsel's failure to object to the closure of the courtroom during voir dire. In the direct review context, violation of the Sixth Amendment right to a public trial would be deemed a structural error that would entitle the defendant to automatic reversal without any showing of prejudice. *Weaver*, 137 S. Ct. at 1905. The question in *Weaver* was whether, when the issue instead arose in the context of an ineffective-assistance-of-counsel claim on collateral review, the same automatic reversal was required. *Id.* The Court held that it was not.

In its plurality opinion, the Court began by considering the three broad rationales for why a given error might be deemed structural. *Id.* at 1908. The first is where "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest"; for example, the right to conduct one's own defense. *Id.* The second is where an error's

effects are "simply too hard to measure." *Id.* The third is when "the error always results in fundamental unfairness." *Id.*

The Court then made clear that, in the ineffective-assistance of-counsel context, "the term 'structural error' carries with it no talismanic significance as a doctrinal matter." *Id.* at 1910. The petitioner must still demonstrate, as required by *Strickland*, that "the attorney's error 'prejudiced the defense.'" *Id.* at 1910 (quoting *Strickland*, 466 U.S. at 687). In the "ordinary" case, prejudice means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Weaver*, 137 S. Ct. at 1911 (citing *Strickland*, 466 U.S. at 687).

The Court advanced several reasons for placing the burden on Weaver to show *Strickland* prejudice in order to merit reversal. First, when the issue of courtroom closure is raised for the first time on collateral review, the trial judge has been deprived of the chance to cure the violation. *Id.* at 1912. Second, when review on direct appeal is precluded as unpreserved, the costs and uncertainties of a new trial are usually greater because more time ordinarily will have elapsed, and thus the strong interest in the

finality of criminal convictions is more at risk. *Id.* The Court cautioned that the rules governing ineffective-assistance-of-counsel claims must be applied scrupulously to ensure that they not be allowed to "'function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011)).

Addressing the merits of Weaver's ineffective-assistance-of-counsel claim, four members of the Court assumed—without deciding—that "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." 137 S. Ct. at 1911. Under this assumption, the plurality held that the closure during voir dire did not rise to the level of fundamental unfairness. *Id.* at 1913.

Three concurring justices rejected a fundamental unfairness test. *Id.* at 1914–16. They stated that, in lieu of showing that counsel's error affected the verdict, a petitioner could establish prejudice only by showing that he was effectively denied counsel altogether—that is, he suffered from "actual or constructive denial of counsel, state interference with counsel's assistance, or counsel

that labors under actual conflicts of interest." *Id.* at 1915 (Alito, J., concurring in the judgment) (citing *United States v. Cronic*, 466 U.S. 648, 658–60 (1984)); *see also Weaver*, 137 S. Ct. at 1914 (Thomas, J., concurring) (stating that "no part of the discussion about fundamental unfairness . . . is necessary to [the plurality's] result" and that Justice Alito's concurrence "correctly applies our precedents"). Two dissenting justices, in contrast, would have held that a "defendant who shows that his attorney's constitutionally deficient performance produced a structural error" should not have to make a further showing of prejudice under *Strickland*. *Weaver*, 137 S. Ct. at 1916 (Breyer, J., dissenting).

In *Weaver*, therefore, this Court did not adopt the proposition on which the petitioner here relies: that, when a defendant demonstrates structural error arising from constitutionally deficient performance, the requirement to show *Strickland* prejudice is satisfied if the structural error was of a type that rendered the trial "fundamentally unfair." Rather, the four justices in *Weaver*'s plurality assumed that proposition only for the sake of argument, and the three concurring justices expressly rejected that proposition.

In light of *Weaver*, there is no conflict between this case and the two cases that the dissenting opinion below cited for the proposition that "[c]ourts have not hesitated to grant postconviction relief when it is established that the jury that returned the conviction included a biased member." 464 Md. at 584 (citing *Wolfe v. Brigano*, 232 F.3d 499, 503 (6th Cir. 2000), and *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (en banc)). Neither *Wolfe* nor *Dyer* involved a postconviction claim of ineffective assistance of counsel in failing to move to strike biased jurors.

Rather, the court in *Wolfe* considered, in federal habeas review, whether the state trial court violated Wolfe's right to an impartial jury when it denied challenges *that defense counsel properly lodged* against four allegedly biased jurors. 232 F.3d at 500–01. Similarly, *Dyer* was a federal habeas proceeding in which the federal court considered whether the defendant was denied a fair trial where, between the guilt- and sentencing-phase of trial, defense counsel brought to the judge's attention information that cast doubt on a juror's veracity, but the judge, finding the juror unbiased, allowed trial to proceed. 151 F.3d at 972–73. In the

habeas proceeding, additional investigation and an evidentiary hearing added to the record of the juror's lack of candor. *Id.* at 973. Neither *Wolfe* nor *Dyer* presented the issue raised by *Weaver* and presented here: *In an ineffective-assistance-of-counsel claim*, what showing of prejudice must be made where it was defense counsel's deficient performance that resulted in structural error?

The third case upon which Ramirez primarily relies to demonstrate a conflict among lower courts, *Hughes v. United States*, 258 F.3d 453 (6th Cir. 2001), is an ineffective-assistance-of-counsel case, but it was decided without the benefit of this Court's analysis in *Weaver*. Absent that guidance, the *Hughes* court leapt too quickly from its finding that the presence of an "actually biased" juror is structural error to its conclusion that reversal was warranted. 258 F.3d at 463. In light of *Weaver*, there is no conflict.

Hughes was charged with stealing a federal marshal's firearm and personal property at gunpoint. 258 F.3d at 455–56. During voir dire, one of the potential jurors said that she had a nephew and a couple of friends on the police force with whom she was quite close and, as a result, she did not think she could be fair. *Id.* at 456. Although Hughes contended that he asked trial defense

counsel to remove the juror for cause, counsel neither questioned the juror nor attempted to remove her for cause or by peremptory strike. *Id.*

The *Hughes* court found the potential juror "actually biased" based upon her declaration that she did not think she could be fair coupled with her personal relationships with law-enforcement personnel, where the case involved the armed robbery of a federal marshal. *Id.* at 460. Then, relying on *Johnson v. Armontrout*, 961 F.2d 748, 754 (8th Cir. 1992), and *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000), the court held that the presence of a biased juror was a structural defect that required the presumption of *Strickland* prejudice. 258 F.3d at 463–64. As this Court explained in *Weaver*, that presumption, based on a structural defect without more, is not warranted.

Indeed, the *Hughes* court did precisely what *Weaver* cautioned against: it assigned "talismanic significance" to "structural error" in an ineffective-assistance-of-counsel context. *See Weaver*, 137 S. Ct. at 1910. After citing *Gonzalez*, a case on direct appeal, for the proposition that the "'presence of a biased juror cannot be harmless; the error requires a new trial without a

showing of actual prejudice,'" the *Hughes* court concluded, without further analysis, that because the presence of a biased juror cannot be harmless, the presence of a biased juror is necessarily prejudicial under *Strickland*. *Hughes*, 258 F.3d at 463 (citing *Gonzalez*, 214 F.3d at 1111 (citations omitted)). The court in *Hughes* did not take into account the important distinction emphasized in *Weaver*: "the difference between a . . . violation [of a constitutional requirement] preserved and then raised on direct review and a . . . violation raised as an ineffective-assistance-of-counsel claim." 137 S. Ct. at 1912 (plurality opinion); *see id.* at 1915–16 (Alito, J., concurring) (noting that ineffective-assistance-of-counsel analysis under *Strickland* "is entirely different" from the analysis of "structural error" in cases that were decided on direct appeal from a conviction) (citing *Neder v. United States*, 527 U.S. 1, 7 (1999); *Arizona v. Fulminante*, 499 U.S. 279, 309–310 (1991)).

The Maryland Court of Appeals, on the other hand, had the benefit of *Weaver*'s analysis of the relationship between structural error and *Strickland* prejudice, and thus held that, even if Ramirez had shown structural error, he was not relieved of the obligation

to show actual or presumptive prejudice. *Ramirez*, 464 Md. at 573–77. Indeed, the Court of Appeals distinguished *Hughes* on just this basis. *Id.* at 573 n.11. Its holding is consistent with a majority of the justices' opinions in *Weaver*. In light of *Weaver*, there is no conflict between *Hughes* and this case for this Court to resolve.

Hughes and this case are reconcilable for an additional reason. *Weaver* instructs that, if a petitioner claiming ineffective assistance of counsel were to be excused from showing prejudice, it would depend on the nature of the specific structural error involved. 137 S. Ct. at 1912–13. It would make a difference whether the structural error at issue is: (1) an error that denies a right that "is not designed to protect the defendant from erroneous conviction but instead protects some other interest"; (2) an error whose effects "are simply too hard to measure" or "'cannot be ascertained'"; or (3) a type of error that "always results in fundamental unfairness." *Id.* at 1908 (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006)). In the case of the third type of error, involving inherent fundamental unfairness, *Weaver* acknowledges precedents (not involving juror bias) indicating that such errors always require reversal on direct

appeal, but declines to address "whether the result should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review." 137 S. Ct. at 1911–12. On the other hand, *Weaver* uses its classification of errors to demonstrate the "critical" point that some errors deemed "structural"—those in categories (1) and (2)—do not "lead to fundamental unfairness in every case," *id.* at 1908, and do not establish an automatic showing of *Strickland* prejudice. *Id.* at 1911.

In *Hughes*, when the court found a structural defect in the proceedings, it found first, based on a record that it concluded presented "no ambiguity," that the juror was "actually biased." 258 F.3d at 459–60. It made this finding by examining the juror's stated reason for bias in relation to the facts of the case: "[The juror's] declaration that 'I don't think I could be fair,' based on her personal relationships with a police officer and police detectives, in a case involving the theft of a federal marshal's firearm and personal property at gunpoint, constituted an express admission of bias." *Id.* at 460. The Maryland Court of Appeals, on the other hand, deemed Juror 27 "*allegedly* biased," remarking that Juror

27's response "merited, at a minimum, follow-up questions by trial counsel." *Ramirez*, 464 Md. at 573 (emphasis added). The court deemed it "far from clear" that defense counsel's deficient performance "resulted in structural error" at all, and observed: "Not every claim with respect to the failure to strike or challenge an allegedly biased juror will result in a determination that a trial was fundamentally unfair." *Id.*

Even if the seating of an "actually biased" juror is a structural error that "*always* results in fundamental unfairness," *Weaver*, 137 S. Ct. at 1908 (emphasis added), the seating of an "allegedly biased" juror is not—whether the trial is unfair depends on whether the juror is, in fact, biased. Thus, if the "alleged bias" found by the court here fits anywhere within *Weaver*'s classification of structural error, it is an error the effects of which "are simply too hard to measure" or "cannot be ascertained." *Id.* at 1908. An unconfirmed "allegation" of bias at most implicates a kind of error that, under *Weaver*, necessitates a showing of prejudice if raised in the ineffective assistance of counsel context.

Unlike this case, the finding of *actual* bias in *Hughes* would arguably place that error in *Weaver*'s third category of structural

errors. Thus, the different outcomes reached in *Hughes* and here can be explained by the two courts' different assessments of juror bias—which, viewed in light of *Weaver*'s categories, lead to different outcomes. There is no conflict for this Court to resolve.

2. It is premature for this Court to address issues left open by *Weaver*.

In claiming that the Maryland Court of Appeals' opinion conflicts with this Court's precedent, Ramirez implicitly urges this Court to address an issue that *Weaver* leaves open: whether *Strickland* prejudice may be shown by a demonstration of fundamental unfairness, and in this case, simply by a showing that Juror 27 sat on the jury. 137 S. Ct. at 1911, 1913. *Weaver* lists several precedents involving *preserved* errors that were deemed structural and required reversal on direct appeal because they caused fundamental unfairness. *Id.* at 1911. But none of those cases involved a biased juror.

Resolution of questions left open in *Weaver* of whether, and what kind of, fundamental unfairness constitutes *Strickland* prejudice is premature because the case law on the matter is still in its infancy. Post-*Weaver*, only a few cases not involving trial

closure have considered whether, where ineffective assistance of counsel results in structural error, *Strickland* prejudice can be established by a showing of "fundamental unfairness."[10] It appears that only one of these cases involved a potentially biased juror.

In *Commonwealth v. Douglas*, 553 S.W.3d 795 (Ky. 2018), a juror disclosed in voir dire that he had been the victim of an armed robbery twenty years earlier but affirmed that he could nonetheless be fair. *Id.* at 798. Later, based on evidence introduced in the sentencing phase of trial, the same juror disclosed his new realization that it was the defendant Douglas who had robbed him. *Id.* After learning of that disclosure, defense counsel informed the judge that Douglas had decided to appeal the conviction rather

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10 *See, e.g.*, *Reams v. State*, 560 S.W.3d 441 (Ark. 2018) (holding that, where petitioner shows that jury was not drawn from a fair cross-section of the community, *Strickland* prejudice is presumed); *Cabrera v. State*, 173 A.3d 1012 (Del. 2017) (holding that to prove ineffective assistance of counsel based on a *Batson* error, petitioner was required to show actual prejudice); *Krogmann v. State*, 914 N.W.2d 293 (Iowa 2018) (holding that, where defense counsel failed to object to pretrial freeze on defendant's assets, prejudice is presumed); *Newton v. State*, 168 A.3d 1 (Md. 2017) (holding that, assuming presence of alternate juror in jury room was structural error, it was not fundamentally unfair, and thus, defendant was required to show actual prejudice).

than ask for a new trial. *Id.* In ruling on Douglas's postconviction claim that counsel was ineffective for failing to move for a new trial, the court observed that "[e]ven though we find that *Weaver* clarifies that a biased juror's participation during sentencing is a structural error, we are not persuaded that structural error analysis applies to all claims of ineffective assistance dealing with jury selection." *Id.* at 801.

Unlike this case, the court's ultimate holding in *Douglas* that defense counsel was not ineffective rested on its conclusion that there was no deficient performance because counsel had followed the defendant's direction not to move for a new trial. *Id.* at 802. Thus, *Douglas* cannot be deemed to conflict with the decision of the Maryland Court of Appeals here.

When "frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). *Weaver* was decided less than three years ago. This Court should give lower courts an

opportunity to apply *Weaver* to varying factual scenarios before it considers whether to revisit the questions left open by that case.

3. The uncertain record provides a poor vehicle for decision.

Even if this Court were inclined to address questions left open by *Weaver*, this case is a poor vehicle for doing so. There is a significant problem in the record that results from the different readings of the voir dire transcript by petitioner, the postconviction court, and the Court of Special Appeals on the one hand, and the Court of Appeals on the other.

Neither Ramirez's petition for postconviction relief, defense counsel's testimony at the postconviction hearing, the postconviction court's opinion, nor the intermediate appellate court's opinion assumed that defense counsel failed to move to strike Juror 27 because she confused Juror 25 and 27.[11] For

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[11] Only in its Court of Appeals brief did the State allude to the possibility of mistake. It noted that Ramirez had not, in his brief, disputed the Court of Special Appeals' premise that trial defense counsel heard Juror 27's response to the crime victim question and attributed it to him when considering whether to strike him. As such, the State argued, it was too late to argue the case on a

example, in holding that trial defense counsel's performance was not deficient, the intermediate appellate court took into account that Juror 27 gave no response to questions going to bias aside from the crime victim question. 464 Md. at 556–57 (quoting *Ramirez*, 2018 WL 3025900, at *6). It attributed significance to the fact that defense counsel was willing to challenge Juror 27 for expressing displeasure at having been chosen for the jury but not for his response to the crime victim question. *Id.* It considered defense counsel's testimony that demographic factors influenced her. *Id.* And it noted that Ramirez had "condoned" his counsel's decision not to move to strike Juror 27. *Ramirez*, 2018 WL 3025900, at *6. Had the Court of Special Appeals considered trial defense counsel's actions to be a matter of mistaken identity, it would not have cited these circumstances to conclude that defense counsel's performance was not deficient.

The Court of Appeals, on the other hand, rendered its opinion on the premise that defense counsel inadvertently

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different factual premise in the Court of Appeals. (Brief for Respondent at 35–37 (filed 5/7/19)).

confused Juror 25 and Juror 27. At one point in its analysis, the Court of Appeals deemed this premise "inescapably clear." *Ramirez*, 464 Md. at 568. Only a few sentences later, however, the Court of Appeals called its premise but "one plausible explanation": "Indeed, *one plausible explanation* for trial counsel's motion to strike Juror 25 for cause is that she misattributed Juror 27's response to the 'crime victim' question to Juror 25, and made the motion to strike for cause with respect to the wrong prospective juror." *Id.* (emphasis added).

Ramirez's defense counsel was never questioned about the possibility that she mistook Juror 25 for Juror 27. Nor was she questioned about the attendant possibility that, having mistakenly stricken Juror 25, she realized her mistake when Juror 27 was in the jury box, but decided not to strike him then, based upon his demeanor or any of the other circumstances she cited in her postconviction testimony. When given the opportunity, Ramirez himself refused to testify about the facts surrounding Juror 27. Tr. 2/3/15 at 26. Rather than remand this case for further factual elucidation in light of its suggested interpretation of the

transcript, the Court of Appeals decided the case based on inference.

The issue of deficient performance is logically antecedent to the issue of prejudice. Even if this Court were inclined to consider the issue of prejudice in this case, it should not do so unless it is confident that there is, indeed, only one plausible explanation for trial counsel's conduct. The muddy record alone counsels against certiorari review.

4. The Maryland Court of Appeals correctly held that Ramirez failed to show *Strickland* prejudice.

Ramirez's only claim below was the claim he makes in his petition for certiorari: that reversal was required because Juror 27's participation on the jury constituted structural error that affected the fundamental fairness of his trial. The Court of Appeals rejected this claim based on a correct reading of *Weaver*: "[E]ven if we were to determine structural error, that would not relieve Ramirez of the obligation to prove prejudice when alleging the ineffective assistance of counsel." 464 Md. at 573 (citing *Weaver*, 137 S. Ct. at 1912 (other citations omitted)). It found that Ramirez

had not been denied the actual or constructive assistance of counsel, *see Cronic*, 466 U.S. at 658, and had not shown that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *See Strickland*, 466 U.S. at 694.

Ramirez does not dispute either of these conclusions. Under this Court's precedent, the ruling below was correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: January 13, 2020

Respectfully submitted,

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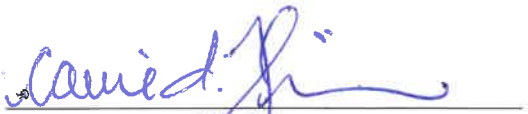

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