No. 21-

IN THE

Supreme Court of the United States

ARMEL BAXTER,

Petitioner,

v.

SUPERINTENDENT COAL TOWNSHIP SCI, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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September 27, 2021

QUESTION PRESENTED

Whether an erroneous reasonable-doubt instruction that would be structural error on direct appeal warrants a presumption of prejudice when raised in a federal habeas petition through an ineffective assistance of counsel claim.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner herein, who was the appellant below, is Armel Baxter. The respondents herein, which were the appellees below, are the Superintendent Coal Township SCI (State Correctional Institution), the Attorney General of Pennsylvania, and the District Attorney of Philadelphia.

RULE 14.1(B)(III) STATEMENT

This case arises from the following proceedings in the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit:

Baxter v. *Superintendent Coal Township SCI*, No. 20-1259 (3d Cir. Apr. 8, 2021)

Baxter v. *McGinley*, No. 18-cv-46 (E.D. Pa. Jan. 17, 2020)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Armel Baxter respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 998 F.3d 542 (3d Cir. 2021) and is reproduced in the appendix to this petition at Pet. App. 1a–14a. The opinion of the United States District Court for the Eastern District of Pennsylvania is available at *Baxter* v. *McGinley*, 2020 WL 299517 (E.D. Pa. Jan. 17, 2020). The report and recommendation of the United States Magistrate Judge is available at *Baxter* v. *McGinley,* 2019 WL 7606222 (E.D. Pa. Sept. 5, 2019) and is reproduced at Pet. App. 19a–38a.

JURISDICTION

The Third Circuit entered judgment on April 8, 2021, Pet. App. 1a, and denied Armel Baxter's petition for rehearing en banc on April 30, 2021, Pet. App. 15a-16aa. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the U.S. Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

The Suspension Clause of the U.S. Constitution provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended . . . ." U.S. Const. art. I, § IX.

STATEMENT OF THE CASE

This case presents an important question left open in *Weaver* v. *Massachusetts*, 137 S. Ct. 1899 (2017): Whether a structural error resulting in fundamental unfairness—in this case an unconstitutional reasonable-doubt instruction—is presumptively prejudicial when raised as part of an ineffective assistance of counsel claim on collateral review.

The question in *Weaver* was whether the temporary closure of a courtroom during jury selection rendered a trial so fundamentally unfair that it was presumptively prejudicial on an ineffective assistance of counsel claim on collateral review. See *id.* at 1913. Because "not every public-trial violation will in fact lead to a fundamentally unfair trial," the Court determined that the defendant was required to show prejudice under *Strickland* v. *Washington*, 466 U.S. 668 (1984). *Weaver*, 137 S. Ct. at 1911. However, the Court's opinion expressly left open whether certain other structural errors which require reversal on direct appeal—such as an erroneous reasonable-doubt instruction—would be presumptively prejudicial if they were "raised instead in an ineffective-assistance claim on collateral review." See *id.* at 1911–12. The *Weaver* opinion therefore anticipated the need to address the precise question presented here.

Addressing the instant question is all the more important because federal courts have taken significantly different approaches post-*Weaver*. Some, like the Tenth Circuit, acknowledge the open question. Others, like the Sixth Circuit, assert that the Court's language requires that an actual prejudice standard be applied to *all* structural errors on collateral review regardless of what would have happened on direct appeal. Here, the Third Circuit tried to have it both ways by (1) positing that a complete failure to give

any reasonable-doubt instruction might warrant a presumption of prejudice, but (2) an erroneous instruction would require the defendant to show prejudice.

The Third Circuit was wrong because the erroneous reasonable-doubt instruction in Mr. Baxter's case was the type of structural error that *Weaver* discussed as requiring automatic reversal on direct appeal. Any requirement to show prejudice or conduct a "harmless-error" analysis in the context of an erroneous reasonable-doubt instruction is, as this Court has unanimously held, "illogic[al]" *Sullivan* v. *Louisiana*, 508 U.S. 275, 280 (1993). In *Sullivan,* the Court declared that a defective reasonable-doubt instruction cannot be a harmless error because the result of the instruction is that there is "no jury verdict within the meaning of the Sixth Amendment" and thus, "no *object*, so to speak, upon which harmless error scrutiny can operate." *Id.* See also *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991) (such an error adversely "affect[s] the framework within which the trial proceeds.") That the erroneous instruction is the subject of an ineffectiveness claim on federal habeas review does not magically restore the necessary Sixth Amendment premise of valid jury findings and a valid jury verdict.

There is also no question that, here, the state trial judge Renee Cardwell Hughes's reasonable-doubt instruction at Mr. Baxter's trial was unconstitutional, created a structural error, and would have required reversal if raised on direct appeal. The Third Circuit's decision cannot be squared with numerous decisions from this Court. See *Holland* v. *United States*, 348 U.S. 121, 140 (1954) (holding that a charge on reasonable-doubt should be expressed "in terms of the kind of doubt that would make a person hesitate to

act, rather than the kind on which he would be willing to act.") (citation omitted); *Cage* v. *Louisiana*, 498 U.S. 39, 41 (1991) (per curiam) (holding an instruction violates due process where jurors could interpret it to allow conviction based on any "degree of proof below" the reasonable-doubt standard); *Sullivan*, 508 U.S. at 281 (asserting that a misdescription of the burden denies the defendant the "right to a jury verdict of guilt beyond a reasonable doubt").

The question presented is dispositive in Mr. Baxter's case. Similarly situated defendants have received relief from Judge Hughes's unconstitutional reasonable-doubt instruction, *e.g. Brooks* v. *Gilmore,* No. CV 15-5659, 2017 WL 3475475, at *7 (E.D. Pa. Aug. 11, 2017) (reversing conviction on habeas review and finding Judge Hughes's reasonable-doubt instruction amounted to structural error under *Sullivan*), *appeal discontinued sub nom. Brooks* v. *Superintendent Greene SCI,* No. 17-2971, 2018 WL 1304895 (3d Cir. Feb. 28, 2018); *Edmunds* v. *Tice*, No. CV 19-1656, 2020 WL 6810409, at *10 (E.D. Pa. Aug. 31, 2020) (same), *report and recommendation adopted*, No. CV 19-1656, 2020 WL 6799259 (E.D. Pa. Nov. 19, 2020); see also Samantha Melamed, *A Judge's Odd Analogy Could Overturn a Dozen Old Philly Murder Convictions*, Phila. Inquirer (Jan. 2019), https://www.inquirer.com/news/philadelphia-murder-convictions-judge-renee-cardwell-hughes-larry-krasner-20190102.html, and but-for the Third Circuit's flawed and illogical analysis, Mr. Baxter would also have received the new trial that he deserves.

I. BACKGROUND OF THE CASE

A. Proceedings at Trial

In April 2007, Demond Brown was shot and killed in Philadelphia. Three witnesses placed Mr. Baxter

and his co-defendant, Jeffrey McBride, at the scene of the shooting. Rachel Marcelis, a friend who was in a car with the two men that day, testified that either McBride or Baxter asked her to pull over at the playground because they saw someone, got out, and then returned to her car where McBride made incriminating statements relating to shooting someone. Two eyewitnesses who were on the playground placed Mr. Baxter and Mr. McBride at the scene. To rebut this evidence, the defense planned to call two witnesses who would have given descriptions of the shooters as being much taller than Mr. Baxter. Pet. App. 21a. These subpoenaed witnesses failed to appear at trial on the day they were scheduled to testify because they assumed that snowy weather would have closed the courthouse. *Id.* at 20a–21a. Mr. Baxter's attorney did not seek a bench warrant, and the witnesses did not testify.

At the conclusion of the trial, Judge Hughes gave the following reasonable-doubt instruction to the jury:

> I find it helpful to think about reasonable doubt in this way: Each one of you loves someone. . . . A spouse, a significant other, a parent, a child, a niece, a nephew, each one of you has someone in your life who is precious.
>
> If you were advised by your loved one's physician that that loved one had a life-threatening illness and that the only protocol was a surgery, very likely you would ask for a second opinion. You'd probably get a third opinion. You'd probably start researching the illness, what is the protocol, is surgery really the only answer. You'd probably, if you're like me, call everybody

> you know in medicine: What do you know about this illness? What do you know about this surgery? Who does this surgery across the country? What is my option.
>
> At some moment, however, you're going to be called upon to make a decision: Do you allow your loved one to go forward? If you go forward, it's not because you have moved beyond all doubt. There are no guarantees. If you go forward, it's because you have moved beyond all reasonable doubt.

Pet. App. 22a; N.T. 02/04/09 at 142–45. Mr. Baxter's counsel did not object to the instruction, and the jury convicted him and his co-defendant of first-degree murder, conspiracy, and possession of an instrument of crime. Mr. Baxter is serving a life sentence without the possibility of parole.

B. Proceedings on Appeal and Post-Conviction

Mr. Baxter appealed his conviction to the Pennsylvania Superior Court, which affirmed the trial court's decision. Pet. App. 6a; *Com.* v. *Baxter*, 996 A.2d 535 (Pa. Super. Ct. 2010). The Pennsylvania Supreme Court denied a petition for allowance of appeal, Pet. App. 6a; *Com.* v. *Baxter*, 17 A.3d 1250 (Pa. 2011). Mr. Baxter then filed a *pro se* petition for post-conviction relief pursuant to 42 Pa. Const. Stat. § 9541 *et seq.* (Post Conviction Relief Act or "PCRA"), raising several arguments, including claiming that his trial counsel was ineffective for not requesting bench warrants for subpoenaed defense witnesses when they failed to testify at trial.[1]

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[1] While the post-conviction petition was pending, Judge Hughes stepped down from the bench following a reprimand

Mr. Baxter amended the petition twice with the assistance of appointed counsel, who also failed to identify the erroneous reasonable-doubt instruction. The judge convened a PCRA hearing in November 2014, but dismissed the petition in March of 2015. Mr. Baxter appealed to the Pennsylvania Superior Court, which affirmed the dismissal. *Commonwealth* v. *Baxter*, No. 1277 EDA 2015, 2016 WL 6803858 (Pa. Super. Ct. Nov. 17, 2016). The Supreme Court of Pennsylvania denied leave to appeal in May of 2017. *Commonwealth* v. *Baxter*, 641 Pa. 689 (2017) (per curiam) (unpublished table decision).

C. Federal Habeas Proceedings

Mr. Baxter timely filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the Eastern District of Pennsylvania on January 9, 2018. He raised three issues in his petition, including the one at issue here: that Judge Hughes's hypothetical "elevated the level of doubt necessary to secure an acquittal", and that Mr. Baxter's trial counsel was "ineffective for failing to object [in violation of the Sixth Amendment]." Pet App. 30a, 25a; Habeas petition at 6.

The Magistrate Judge issued a Report and Recommendation to the district court, stating that the petition should be denied with prejudice. The district court denied Mr. Baxter's petition, but issued a certificate of appealability on the question of whether Mr. Baxter's "trial counsel was ineffective for failing to object to the trial court's given jury instruction on

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from the state Supreme Court for "ordering her court reporter to delete from the record comments she had made reflecting a bias against a criminal defendant." Brief for Appellant at 4 n.2, *Baxter* v. *Superintendent Coal Twp. Sci*, No. 20-1259 (3d Cir. July 23, 2020), ECF No. 14; see also *Commonwealth* v. *Dougherty*, 18 A.3d 1095, 1097 (Pa. 2011)).

reasonable doubt." Order, *Baxter* v. *Superintendent Coal Twp. Sci*, No. 18-CV-0046 (E.D. Pa. Jan. 29, 2020), ECF No. 50.

D. Third Circuit Proceedings

Mr. Baxter appealed to the Third Circuit, focusing on the specific question outlined in the Certificate of Appealability. He argued that the unconstitutional reasonable-doubt instruction was structural error, and under *Weaver*, prejudice should be presumed as part of his ineffective-assistance claim. The Commonwealth did not dispute that the instruction was erroneous nor did it argue that Mr. Baxter's counsel was not deficient for failing to object to the instruction, but rather solely argued that Mr. Baxter failed to show prejudice.

The Third Circuit agreed that *Weaver* controlled the case and assumed that Mr. Baxter's case constituted structural error. However, it understood *Weaver* to stand for the proposition that not every structural error presumes prejudice and specifically noted that this Court had left open the question of whether an "erroneous reasonable doubt instruction is a structural error that warrants presumptive prejudice." It improperly sought to dodge this open question by concluding that because the court in Mr. Baxter's case had given *some* reasonable-doubt instruction, the error was not so structural as to require automatic reversal on direct appeal. As such, it concluded that in the "context of an ineffective assistance of counsel claim," it would undertake a prejudice analysis as outlined in *Strickland*. The Third Circuit ultimately affirmed the District Court's denial of Mr. Baxter's habeas petition because "the reasonable doubt instruction did not prejudice Baxter." Pet. App. 3a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE AN OPEN QUESTION

A. *Weaver* v. *Massachusetts* Expressly Left Open Whether Structural Errors Yield Automatic Prejudice on Collateral Review

Weaver clarified an extremely narrow question of law when it held that the temporary closure of a courtroom during jury selection is not presumptively prejudicial when first raised on collateral review. See 137 S. Ct. at 1913. This Court's opinion expressly left open the question whether certain delineated structural errors which required reversal on direct appeal would also be presumptively prejudicial "if [such] errors were raised instead in an ineffective-assistance claim on collateral review." *Id.* at 1912.

Generally speaking, certain structural errors objected to at trial and then raised on direct appeal entitle a defendant to reversal without any inquiry into whether the error impacted the outcome. See *id.* at 1910. The Court outlined three broad categories of these errors: first "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," *id.* at 1908 (citing *McKaskle* v. *Wiggins*, 465 U.S. 168, 177, (1984) (deprivation of the right to self-representation at trial)); second, "if the effects of the error are simply too hard to measure," *id.* (citing *Vasquez* v. *Hillery*, 474 U.S. 254, 263, (1986) (unlawful exclusion of grand jurors of defendant's race)); and third, "if the error always results in fundamental unfairness," *id.* (citing *Gideon* v. *Wainwright*, 372 U.S. 335, 343–45, (1963) (total deprivation of counsel) and *Sullivan*, 508 U.S.

275, 279, (1993) (erroneous reasonable-doubt instruction)).

The import of these types of errors is that the government cannot in such cases "deprive the defendant of a new trial by showing that the error was 'harmless beyond a reasonable doubt.'" *Id.* at 1910 (quoting *Chapman* v. *California*, 386 U.S. 18, 24 (1967)). The question presented here is whether, for structural errors that always result in fundamental unfairness, the analysis should change on collateral review. *Weaver* specifically left open that question of whether a defendant who would have been granted automatic reversal on direct appeal should also be given a presumption of prejudice on an ineffective-assistance claim on collateral review for a structural error that always results in fundamental unfairness.

B. The Lower Courts Are Divided Over How to Apply *Weaver*

Weaver has created division among the lower courts over what type of structural errors require a showing of prejudice on collateral review and what structural errors do not. Thus, courts are not just confused about whether an unconstitutional reasonable-doubt instruction merits a finding of presumptive prejudice on collateral review—they are uncertain whether the magnitude of error matters at all. This confusion and uncertainty merit this Court's intervention.

Under one approach, courts such as the Sixth Circuit in *Parks* v. *Chapman*, 815 F. App'x 937 (6th Cir. 2020) have concluded that *Weaver* did not leave open the door for automatic reversals based on structural errors in the ineffective-assistance context. See *id.* at 944 (holding that "when a defendant raises a structural error on collateral review rather than on direct review, he must prove actual prejudice"), *cert. denied*,

141 S. Ct. 1696 (2021); *Carter* v. *Lafler*, No. 17-1409, 2017 WL 4535932, at *3 (6th Cir. Aug. 30, 2017) (same).

In *Parks*, the Sixth Circuit reasoned that structural errors raised on collateral review demand showings of actual prejudice because "if the error is one that results in fundamental unfairness . . . actual prejudice should be easy to show" before the trial court or on direct appeal. 815 F. App'x at 944. Only "minimal time will have passed, so witnesses and evidence are still available" for the court to readily consider. *Id.*

On the other hand, "when the error is raised on collateral review, it is a larger burden on the system and on the concept of fairness" because, according to the Sixth Circuit, "*Weaver* stands for the idea that *finality and judicial economy can trump even structural error*." *Id.* (emphasis added). That is a startling position, never previously taken by this Court. Nevertheless, consistent with *Parks*, some courts have started to follow suit. See, *e.g.*, *United States* v. *Jackson*, Cr. No. 3:17-810-CMC, 2021 WL 694848, at *12 (D.S.C. Feb. 23, 2021) (relying on the Sixth Circuit decision in *Parks* to conclude that a structural error on direct review should be treated differently on collateral review).

Other courts have interpreted *Weaver* to leave open the possibility that some structural errors might require reversal on collateral review because they always result in fundamental unfairness. See, *e.g.*, *Meadows* v. *Lind*, 996 F.3d 1067, 1080 (10th Cir. 2021) (noting that the Court "expressly withheld judgment on this issue"); *Walker* v. *Pollard*, No. 18-C-0147, 2020 WL 6063493, at *12 n.7 (E.D. Wis. Oct. 14, 2020) (acknowledging that *Weaver* left undecided whether "a structural error that calls the trial's fun-

damental fairness into question would automatically result in prejudice under *Strickland*").

The Tenth Circuit in *Meadows* restricted the scope of its analysis to whether "the arbitrary exclusion of four hard-of-hearing prospective jurors" was the sort of error that always results in fundamental unfairness. *Meadows*, 996 F.3d at 1081. Because the Tenth Circuit answered this question in the negative, it declined to address "whether automatic relief is available" for structural errors that always yield fundamental unfairness. See *id.* *Meadows*, like *Weaver*, involved a less-serious trial error when compared to a deficient reasonable-doubt instruction.

Similarly, in *Walker*, the court examined whether a defendant's right to an impartial decisionmaker—which the court found would implicate fundamental fairness if proven—would merit an automatic prejudice finding on collateral review. *Walker*, 2020 WL 6063493, at *12–13 & n.7. The district court noted that "*Weaver* does not suggest that, to prevail here, [the Defendant] must satisfy *Strickland*'s 'reasonable probability' formulation of prejudice." *Id.* at *12 n.7. Because the court ultimately found the juror in question was not biased, it avoided addressing whether *Weaver* required a showing a prejudice on collateral review.

Without this Court's intervention, lower courts will remain uncertain and divided as to whether structural errors raised for the first time on collateral review may merit a finding of presumptive prejudice on collateral review. Indeed, already, different answers to that basic question exist depending on where in the country a defendant files his or her petition. And that uncertainty will be compounded for jurisdictions that assume structural errors can merit presumptive prejudice on collateral review. Those jurisdictions will

make different decisions about whether unconstitutional reasonable-doubt instructions are presumptively prejudicial. See, *e.g.*, *Hutchinson* v. *Superintendent Greene SCI,* No. 19-3311, 2021 WL 2577517, at *3 (3d Cir. June 23, 2021) (relying on *Weaver* to find unpreserved *Batson* claim requires proof of prejudice on collateral review if raised as part of ineffective-assistance-of-counsel claim).

C. This Case Presents an Important and Recurring Question.

Whether a presumption of prejudice applies in a particular context will significantly affect the process of review. If this Court reads *Sullivan* and *Weaver* to require presumptive prejudice for reasonable-doubt errors regardless of the type of review, then courts would benefit from a streamlined, binary inquiry. Petitioners and state authorities battle over a presumption of prejudice precisely because of the impact such a presumption may have on the outcome of review proceedings. But the application of such a presumption here would only serve to highlight the importance of proper reasonable-doubt instructions and the verdict-invalidating implications of bad ones. Proper articulation of the standard for jurors to apply in criminal cases is "fundamental to the American scheme of justice"—and every criminal trial demands adherence to it. *Sullivan*, 508 U.S. at 277.

As the differing interpretations of *Weaver*'s open question suggest, currently there is "no[] . . . clear or consistent path for courts to follow" in deciding whether improper reasonable-doubt instructions require presumptive prejudice on collateral review. *Lockyer* v. *Andrade*, 538 U.S. 63, 72 (2003).

II. THE LOWER COURT'S OPINION MISREADS THIS COURT'S PRECEDENT

A. Read Together, *Weaver* and *Sullivan* Instruct That on Collateral Review Courts Should Presume Prejudice for Erroneous Reasonable-Doubt Instructions

Weaver, relying upon *Sullivan*, identified the failure to give a reasonable-doubt instruction as an example of a structural error that might require a presumption of prejudice on collateral review. See 137 S. Ct. at 1911–12. The Third Circuit seized upon that language in reasoning that "[t]he complete failure to give such an instruction is a structural error that so infects the trial process that the verdict cannot be said to reflect a proper verdict." Pet App. 11a. "When a reasonable doubt instruction is given however, the rules concerning evaluating a jury instruction apply." Pet. App. 11a. Thus, the Third Circuit concluded that while the complete failure to give a reasonable-doubt instruction might warrant a presumption of prejudice, a (merely) incorrect instruction should trigger actual prejudice review.

That reasoning contradicts this Court's straightforward holding in *Sullivan*; namely that an incorrect reasonable-doubt standard "vitiates *all* the jury's findings." *Sullivan* itself *was* a case about an incorrect reasonable-doubt instruction, not a complete failure to give such an instruction. See 508 U.S. at 277 ("The trial judge gave a definition of 'reasonable doubt' that was, as the State conceded below, essentially identical to the one held unconstitutional in *Cage*.") (citation omitted). Thus, *Sullivan* did not draw a distinction between an incorrect instruction and the failure to give any instruction; it *equated* the effect of an incorrect instruction with failure to give any instruction at all. See *id.* In either case, the ver-

dict is void *ab initio*. There are no jury findings that would support the further assessment of facts by a reviewing court in order to determine whether the verdict was nonetheless correct. Because "there has been no jury verdict within the meaning of the Sixth Amendment," there is "no *object*, so to speak, upon which harmless-error scrutiny can operate." *Id.* Reasonable-doubt errors are thus a "breed apart" from other instructional errors that "*are* amenable to harmless-error analysis." *Id.* at 284 (Rehnquist, C.J., concurring).

More broadly, *Sullivan*'s holding reflects the consistent and fundamental role that reasonable-doubt has played within our legal system. The burden of proof is part and parcel of our criminal process, and even predates the beginning of the Republic. See Miller W. Shealy, Jr., *A Reasonable Doubt About "Reasonable Doubt,"* 65 Okla. L. Rev. 225, 276 (2013) (scholars "agree that the term seems to have first appeared in the Boston Massacre trials of March 1770"). Properly instructing the jury that the government must prove its case beyond a reasonable-doubt is neither an onerous nor a complex requirement.

Indeed, post-*Sullivan*, only a single court appears to have *failed* to give a reasonable-doubt instruction at all. See *Ex parte Gillentine*, 980 So. 2d 966, 967–68 (Ala. 2007). And in that case, the Alabama Supreme Court—fully consistent with *Sullivan*—held that there was no distinction between a failure to give an instruction and giving an erroneous instruction. *Id.* at 971 ("If a structural error exists in a case in which there is a constitutionally deficient reasonable-doubt instruction, then, a fortiori, a structural error exists in a case in which there is no reasonable-doubt instruction at all.").

The Third Circuit's distinction between an erroneous reasonable-doubt instruction and a complete failure to give instructions is thus a false distinction. If upheld, this distinction will all but overrule *Sullivan*, giving cover to trial courts that err when instructing on a fundamental aspect of our criminal system.

B. The Reasonable-Doubt Instruction Here Violated Due Process

The Commonwealth had not contested that the reasonable-doubt instruction was constitutionally flawed because, inter alia, it equated the decision to convict with the decision to save the life of a loved one. Nonetheless, the Third Circuit suggested that: "Even if the example used in the instruction improperly cast the reasonable doubt standard, the surrounding language correctly expressed the standard." Pet. App. 12a. That sentence does not remedy the error here. In addition to the false equivalence described above, the instruction cannot survive due process scrutiny under the Court's long-standing precedents of *Cage* and *Holland* for a number of reasons.

First, the instruction improperly altered the reasonable-doubt bar in the very same way that the instructions in *Cage* and *Sullivan* did. In *Cage*, this Court held that an instruction violates due process where jurors could interpret it to allow conviction based on any "degree of proof below" the reasonable-doubt standard. *Cage*, 498 U.S. at 39; see also *Sullivan*, 508 U.S. at 277 (same). This was especially so when the court characterized reasonable-doubt in "grave" and "substantial" terms. *Cage*, 498 U.S. at 39. Here, those terms were an emotionally charged metaphor: "you're going to be called upon to make a decision: Do you allow your loved one to go forward [with surgery]?" Pet. App. 40a. The metaphor changes the reasonable-doubt bar even more so than the improper

insertion of "grave" and "substantial" language to describe reasonable-doubt because "one would need profound, if not overwhelming doubt to deny a loved one their only or best opportunity for cure." *Gilmore*, 2017 WL 3475475, at *4.

Second, the instruction violates the Court's clear mandate in *Holland* v. *United States* that a reasonable-doubt instruction must be expressed "in terms of the kind of doubt that would make a person hesitate to act . . . rather than the kind on which he would be willing to act." 348 U.S. at 140. Here, the instruction turned unequivocally on the willingness to act because it "directed the jury to convict if they would choose to authorize life-saving surgery for a loved one, without considering that hesitation alone is sufficient for reasonable doubt." Report and Recommendation at 29, *Lewis* v. *Sorber*, No. 18-1576 (E.D. Pa. Feb. 1, 2021), ECF No. 59. Nor does the metaphor—which comprises some forty percent of the instruction by word count, *Gilmore*, 2017 WL 3475475, at *3, *9—leave room for hesitancy as "the only known protocol . . . for that condition" is the experimental surgery.

Third, the instruction improperly shifts the burden of proof in that it suggests to the jury that their role in this scenario is to seek "a second opinion" or a "third opinion." Such instructions alleviate the prosecutor's burden to prove its case as to all the elements and instructs the jurors to look elsewhere—and everywhere—to determine whether "you allow your loved one to go forward [with the surgery]." Pet. App. 40a. To the extent a properly constructed metaphor could be created at all, it would suggest to the jurors that the surgeon has to prove his case to them in favor of surgery. The requirement that the prosecution prove its case beyond a reasonable-doubt is absolute and

must be unflinching. Indeed, "the true rule is that the burden of proof never shifts; that in all [criminal] cases, before a conviction can be had, the jury must be satisfied from the evidence, *beyond a reasonable doubt*, . . . that the defendant is guilty in the manner and form as charged." *Sparf* v. *United States*, 156 U.S. 51, 178 (1895) (emphasis added).

C. The Procedural Posture of the Case Does Not Permit Harmless Error Review

It is no answer to the question presented that Mr. Baxter asserts his claim of error for the first time in a federal habeas petition and in the context of an ineffective assistance claim.

To state the obvious, many defendants might raise such a claim for the first time in collateral review. As noted above, Mr. Baxter's counsel did not object to the trial judge's instruction. Had Mr. Baxter raised the claim as error on direct appeal, the appellate court might well have held that his counsel's failure to object constituted waiver. See, *e.g.*, *United States* v. *House*, 684 F.3d 1173, 1196 (11th Cir. 2012) ("Where a party expressly accepts a jury instruction, such action constitutes invited error and serves to waive his right to challenge the accepted instruction on appeal.") (cleaned up); *United States* v. *DiSantis*, 565 F.3d 354, 361 (7th Cir. 2009).

On the other hand, Mr. Baxter could not have couched his claim of structural error within an ineffective-assistance claim on direct appeal. *Commonwealth* v. *Grant*, 813 A.2d 726, 738 (Pa. 2002) (prohibiting defendants from raising ineffective assistance of counsel claims on direct appeal). Consequently, the *only* venue for Mr. Baxter's claim to be heard was on collateral review.

In the end, in whatever forum the issue is raised, the failure to object to a defective reasonable-doubt instruction is not and can never be an "isolated" or "trivial" error. See Pet. App. 12a. As this Court noted in *Sullivan*, "[i]t is self-evident . . . that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." 508 U.S. at 278. Thus, it "would not satisfy" the latter amendment "to have a jury determine that the defendant is *probably* guilty," because "the jury verdict required by the Sixth Amendment is a jury verdict beyond a reasonable doubt." *Id.* In turn, the Due Process Clause prescribes that the prosecution must persuade the jury "'beyond a reasonable doubt' of the facts necessary to establish each of th[e] elements" of the offense charged. *Id.* at 277–78. So when a judge tells the jury to consider the evidence under an improper proof standard, that mistake affects each necessary fact-finding—and thus affects the right to a jury verdict itself. "There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question of whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." *Id.* at 280. *Weaver*'s reasons for not presuming prejudice—and *Sullivan*'s reasons *for* presuming prejudice—suggest that reasonable-doubt errors require a presumption of prejudice regardless of review posture.

III. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS THE QUESTION RESERVED IN *WEAVER*

Mr. Baxter's case is an ideal vehicle for this Court to address an issue reserved in *Weaver* and that has so far been interpreted differently by three circuit courts. The procedural posture of this case is exactly

the one that the Court identified in *Weaver*; namely, that Mr. Baxter's reasonable-doubt instructional error claim arises in the context of ineffective assistance of counsel. Nor is there reasonable argument that Mr. Baxter's trial counsel was ineffective for failing to object to the "chose surgery" instruction and his appellate counsel was likewise ineffective under *Martinez* v. *Ryan*, 566 U.S. 1 (2012), for failing to raise the issue as well. Resolving the question here, as earlier noted, is also dispositive in Mr. Baxter's case. The "chose surgery" instruction infected each and every one of the jury's findings and, in the words of Justice Scalia, "left no object, so to speak, upon which harmless-error scrutiny can operate." *Sullivan*, 508 U.S. at 280. Moreover, a decision here will clearly establish the law with respect to the treatment of such errors on habeas and encompass cases to which the Antiterrorism and Effective Death Penalty Act (AEDPA) applies, as well as those, like this one, where AEDPA does not apply.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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