No. 21-5826

In the Supreme Court of the United States

ARMEL BAXTER,
Petitioner,

v.

SUPERINTENDENT COAL TOWNSHIP SCI; DISTRICT ATTORNEY PHILADELPHIA; ATTORNEY GENERAL PENNSYLVANIA,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the United States

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In Baxter's murder trial, the trial court's jury instruction on reasonable doubt included a hypothetical. For the first time on collateral review, Baxter claimed that, because of the hypothetical, the instruction impermissibly lowered the Government's burden of proof, and that his trial counsel was ineffective for not objecting to it. The Third Circuit did not decide whether the instruction was unconstitutional, instead denying habeas relief on the basis that Baxter was not prejudiced because the evidence against him was overwhelming. The question presented is:

Should this Court deny review where the lower court did not decide the threshold question of whether the reasonable doubt instruction at issue is unconstitutional, leaving the key antecedent question unresolved and this Court with no question to settle, and where there is no circuit split to resolve.

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INTRODUCTION

According to Baxter, this case is about whether the Court should answer the question left open in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), namely, "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." Pet. At 2. The trial court error at issue here was including a hypothetical in the court's reasonable doubt instruction that arguably lowered the Commonwealth's burden of proof. The Commonwealth has agreed both in the Third Circuit court of appeals in this case and in a currently-pending Pennsylvania Supreme Court case that this instruction did lower the Commonwealth's burden of proof and so was unconstitutional. Yet the Third Circuit did not decide that question here, instead assuming it for the sake of argument and agreeing with the Commonwealth that habeas relief should be denied because Baxter was not prejudiced by the instruction.

To briefly explain: In *Weaver*, the petitioner argued that *Strickland v. Washington,* 466 U.S. 668 (1984), should be interpreted to require a finding of ineffectiveness without a traditional showing of prejudice, where attorney errors leading to the temporary closure of a courtroom

during jury selection rendered the trial "fundamentally unfair." The Court determined the error to be structural and assumed without deciding that the petitioner's reading of *Strickland* was correct. *Weaver*, 137 S. Ct. at 1911. Nonetheless, the Court held that S*trickland* prejudice still had to be shown because not all errors (even structural ones) always lead to fundamental unfairness, and because of the difference between a violation preserved and raised on direct review and one raised as part of an ineffective assistance of counsel claim. *Id.* at 1912.

The *Weaver* opinion explicitly left open whether structural errors that "always lead to fundamental unfairness" also require a showing of *Strickland* prejudice, or whether the fundamental unfairness itself is sufficient to prove prejudice under *Strickland*. *Id* at 1911. In its analysis, the Court specifically cited a jury instruction that impermissibly lowered the government's burden of proof (an error recognized in *Cage v. Louisiana*, 498 U.S. 39 (1990), and designated as structural in *Sullivan v. Louisiana*, 508 U.S. 275 (1993)), as an example of the type of error that "always results in fundamental unfairness." *Id.* at 1908, 1911.

The error complained of here involves a reasonable doubt instruction that a Philadelphia Common Pleas judge (and to our knowledge, no one else) gave in homicide cases when she was sitting as a judge between 1995 and 2011. The Pennsylvania state courts have upheld the instruction; the Eastern District of Pennsylvania federal district courts

have reached varying conclusions. The Third Circuit decision that is the subject of this petition did not decide whether the instruction was unconstitutional, ultimately determining that Baxter's claim would fail regardless.

Baxter asks this Court to answer the question left open in *Weaver*, but ignores the fact that the court of appeals did not decide the threshold question regarding the challenged instruction's constitutionality. He presumably so proceeds because without a holding that the instruction is unconstitutional, *Weaver* is not implicated and there is nothing for this Court to review. *See* U.S. Sup. Ct. R. 10(c).

Baxter also argues that this Court's review is necessary because "federal courts have taken significantly different approaches post-*Weaver*" to the question presented. Pet. at 2. However, for support, Baxter cites just four cases: one unpublished Sixth Circuit case, one unpublished District of South Carolina case, and two other cases (one published Tenth Circuit case and one unpublished Eastern District of Wisconsin case). The latter two cases simply note but do not even decide the open *Weaver* question. Hardly a "division" in the lower courts warranting this Court's resolution.

Lastly, Baxter urges this Court to correct alleged errors in the lower court's opinion. Putting aside that *certiorari* is not an error-correcting mechanism, though the lower court's opinion includes some

inartful language, its holding is fully supported by and consistent with this Court's precedents.

In short, because the lower court left the threshold question regarding the challenged instruction's constitutionality unanswered, because the lower courts are not divided on it, and because the Third Circuit's narrow decision is consistent with this Court's precedents, the petition should be denied.

STATEMENT OF THE CASE

In April 2007, Petitioner Baxter and a co-defendant shot and killed Demond Brown on a playground in Philadelphia. Baxter was identified as one of the shooters by three friends, one of whom essentially acted as a getaway driver. Baxter and his co-defendant then fled and were ultimately captured by law enforcement two months later in Wilkes-Barre, Pennsylvania, about 120 miles from Philadelphia.

A. State Proceedings

In January 2009, Baxter and his co-defendant were jointly tried before the Honorable Reneé Cardwell Hughes in the Philadelphia Court of Common Pleas. While issuing her closing charges to the jury, Judge Hughes defined reasonable doubt as follows (we repeat the instruction in full and italicize the problematic language):

> Now, let's talk about this burden that the Commonwealth bears. This is the burden of proof beyond a

reasonable doubt. Ladies and gentlemen, without question, it is the highest standard in the law, and it is the only standard that supports a verdict of guilty. Now, although the Commonwealth bears this burden of proving a citizen guilty beyond a reasonable doubt, this does not mean that the Commonwealth must prove its case beyond all doubt. The Commonwealth is not required to meet some mathematical certainty.

The Commonwealth is not required to demonstrate the complete impossibility of innocence. A reasonable doubt is a doubt that would cause a reasonably careful and sensible person to pause, to hesitate, to refrain from acting upon a matter of the highest importance to your own affairs or to your own interests. A reasonable doubt, ladies and gentlemen, must fairly arise out of the evidence that was presented or out of the lack of evidence that was presented with respect to some element of each of the crimes charged.

Now, as we move through this, what I'm going to do is define for you each of the crimes charged; that definition is called the elements of the crimes. The Commonwealth must prove each element beyond a reasonable doubt. *I find it helpful to think about reasonable doubt this way: Each of you loves someone. Each one of you is blessed to love someone. A spouse, 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.

> Ladies and gentlemen, a reasonable doubt must be a real doubt. It may not be a doubt that is imagined or manufactured to avoid carrying out an unpleasant responsibility. You cannot find a citizen who is accused of a crime guilty based upon a mere suspicion of guilt. If the Commonwealth has met the burden, then the defendant is no longer presumed to be innocent and you should find him guilty. On the other hand, if the Commonwealth has not met its burden, then you must find him not guilty.

App. 22a (emphasis added).

Counsel did not object to this instruction at trial. Baxter was convicted of first-degree murder and related offenses and sentenced to a mandatory term of life without parole. Baxter did not raise this issue on direct appeal, the Pennsylvania Superior Court affirmed, and the Pennsylvania Supreme Court denied allowance of appeal. *Commonwealth v. Baxter*, 996 A.2d 535 (Pa. Super. 2010), *app'l denied*, 17 A.3d 1250 (Pa. 2011) (Table).

Baxter then filed a *pro se* petition for post-conviction relief under Pennsylvania's Post-Conviction Relief Act, 42 Pa. C.S. §§ 9541–46. He again did not raise the reasonable doubt instruction issue. The PCRA court dismissed the petition, the Pennsylvania Superior Court affirmed, and the Pennsylvania Supreme Court denied review. *Commonwealth v. Baxter*, No. 1277 EDA 2015, 2016 WL 6803858 (Pa. Super. Nov. 17, 2016), *app'l denied*, 169 A.3d 547 (Pa. 2017) (Table).

B. Federal Proceedings

Baxter filed for a writ of habeas corpus under 28 U.S.C. § 2254 in the Eastern District of Pennsylvania. In his petition, Baxter challenged the reasonable doubt instruction for the first time as part of an ineffective assistance of trial counsel claim. He argued that the instruction impermissibly lowered the Government's burden of proof, an error previously recognized by this Court. *See Cage v. Louisiana*, 498 U.S. 39, 40–41 (1990) (finding that level of doubt required for acquittal is improperly elevated in reasonable doubt instruction containing phrases "grave uncertainty," "substantial doubt," and "moral certainty"); *Sullivan v. Louisiana*, 508 U.S. 275, 280–81 (1993) (holding that *Cage* errors are structural and require reversal when preserved at trial and raised on direct appeal).

The Magistrate Judge issued a report and recommendation that the petition be denied. As to the reasonable doubt instruction, the Magistrate Judge reasoned that, "though the contested instruction is inartful and its illustration inapt, it does not violate due process because there is no 'reasonable likelihood that the jury applied it unconstitutionally.'" *Baxter v. McGinley*, No. 18-46, 2019 WL 7606222, at *6 (E.D. Pa. Dec. 5, 2019) (quoting *Victor v. Nebraska*, 511 U.S. 1, 62 (1994)); App. 30a. The Magistrate Judge also noted that, even if Baxter's trial counsel had performed deficiently in failing to object to the

contested instruction, Baxter could not show the requisite prejudice due to the "overwhelming evidence" marshalled against him at trial. *Id.* at *5 n.6; App. 29a.

The district court approved and adopted the report and recommendation and denied Baxter's petition with prejudice. *Baxter v. McGinley*, No. 18-46, 2020 WL 299517 (E.D. Pa. Jan. 17, 2020); App. 17a. However, the district court also issued a certificate of appealability limited to whether Baxter's trial counsel was ineffective for failing to object to the instruction. *Id.*

On appeal to the Third Circuit court of appeals, Baxter argued that the instruction was unconstitutional, that his trial counsel was deficient for failing to object to it, and that prejudice should be presumed because the error was a structural error that always results in fundamental unfairness. The Commonwealth agreed with Baxter on the first two points and disagreed on the third, arguing instead that *Strickland* prejudice still must be shown when trial counsel fails to object to a faulty reasonable doubt instruction.[1]

The Third Circuit held that, even if the instruction was unconstitutional and trial counsel was deficient for failing to object to it,

[1] The Commonwealth recently took the same position regarding the same instruction in the Pennsylvania Supreme Court. *See Commonwealth v. Drummond*, No. 28 EAP 2021 (Br. for Respondents, filed Jan. 5, 2022).

Baxter's claim failed because he was not prejudiced. *Baxter v. Superintendent Coal Township SCI*, 998 F.3d 542, 546–49 (3d Cir. 2021); App. 11a–14a. Importantly for present purposes, the Third Circuit expressly did *not* hold that the instruction was unconstitutional. *Id.* at 547 n.5; App. 8a.

Moving beyond the threshold (and unanswered) question of the instruction's constitutionality, the Third Circuit held that actual prejudice must be shown. The Court correctly noted that *Weaver* left open the question of whether trial court errors that result in fundamental unfairness require reversal on collateral review. *Id.* at 547; App. 10a. Then, relying on this Court's precedents in *Strickland v. Washington*, 466 U.S. 668 (1984), and *United States v. Cronic*, 466 U.S. 648 (1984), the Third Circuit held that petitioners who receive flawed reasonable doubt instructions must show actual prejudice on collateral review to obtain relief. *Baxter*, 998 F.3d at 548 n.7; App. 11a–12a. The Court then affirmed the district court's denial of the petition because "the reasonable doubt instruction did not prejudice him." *Id.* at 549; App. 14a.

This petition for a writ of *certiorari* followed.

REASONS FOR DENYING THE PETITION

A. This is an inappropriate vehicle to decide the question that the petitioner seeks to present.

Baxter argues that this is an "ideal vehicle" to decide the issue left open by *Weaver* because Judge Hughes's reasonable doubt instruction resulted in a structural error that always results in fundamental unfairness. Pet. at 19. This is not so. Indeed, not every faulty jury instruction, even on reasonable doubt, rises to the level of a *Cage* error such that fundamental unfairness always results. *See Victor v. Nebraska*, 511 U.S. 1 (1994) (holding that faulty reasonable doubt instructions that included some of the disfavored language from *Cage* nevertheless passed constitutional muster due to the pieces surrounding the faulty language).[2]

More importantly for present purposes, the Third Circuit did not decide the question, instead assuming without deciding that that the instruction was "partially incorrect" and led to a "structural error." *Baxter*, 998 F.3d at 548; App. 11a. Because the resolution of the constitutionality of the instruction is a necessary prerequisite to

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[2] It should be noted that there is disagreement in the Eastern District of Pennsylvania lower courts as to whether the instruction given here was merely faulty as in *Victor* or unconstitutional as in *Cage* and *Sullivan*. *Compare, e.g., Bey v. Kauffman*, No. 19-2127, 2020 WL 5775932, at *17 (E.D. Pa. July 15, 2020) (holding instruction, taken as a whole, did not violate the petitioner's due process rights), *with Brooks v. Gilmore*, No. 15-5659, 2017 WL 3475475, at *5 (E.D. Pa. Aug. 11, 2017) (holding instruction constitutionally infirm because the inapt analogy was "the centerpiece of the charge").

reaching the question Baxter wishes this Court to decide, this is an inappropriate vehicle for certiorari. *See, e.g., Unite Here Local 355 v. Mulhall*, 571 U.S. 81, 85 (2013) (Breyer, J., dissenting) ("[I]n considering the briefs and argument, we became aware of two logically antecedent questions that could prevent us from reaching the question [presented].").

Put another way, because there is no lower court holding on the threshold antecedent question, there is no question of federal law for this Court to settle. *See* U.S. Sup. Ct. R. 10(c).

B. The Lower Courts Are Not Divided Over How to Apply *Weaver*.

Baxter also raises the specter of a "division" among lower courts as a reason to grant review. Yet, there is no such division. Indeed, Baxter cites only four cases for support, three of which are unpublished. And of the four cases cited, only two even reach the issue Baxter seeks to present here. *See* Pet. at 10–13.

In an attempt to persuade this Court that the lower courts are divided on how to interpret *Weaver*, Baxter principally relies on *Parks v. Chapman*, 815 F. App'x 937 (6th Cir. June 9, 2020), *cert. denied*, 141 S. Ct. 1696 (2021). According to Baxter, *Parks* stands for the proposition that some courts interpret *Weaver not* to leave open the very question *Weaver* unequivocally *did* leave open: whether *Strickland* prejudice

must be shown for structural errors that always result in fundamental unfairness when raised on collateral review. Pet. at 10–11. He cites the *Parks* court's statement that "*Weaver* stands for the idea that finality and judicial economy can trump even structural error." Pet. at 11 (citing *Parks*, 815 F. App'x at 944).

However, *Parks* is an unpublished decision with no precedential value. Further, it discusses *Weaver* only in *dicta* while deciding whether the court could consider a procedurally defaulted claim. *Parks*, 815 F. App'x at 944. The *Parks* court did not decide whether certain structural errors may avoid a showing of *Strickland* prejudice on the merits because it held *Parks* could not overcome his procedural default. *Id.* at 944–45.

Nor have other courts adopted this *dicta*, as Baxter suggests. The sole case Baxter claims followed *Parks* on this issue, *United States v. Jackson*, No. 17-810, 2021 WL 694848, at *12 (D.S.C. Feb. 23, 2021), was also in the context of a procedural default, not the merits of an ineffectiveness claim. *Jackson*, 2021 WL 694848, at *10. Indeed, the *Jackson* court intimated that *Weaver* was relevant only "by analogy." *Id.* at 10–11.

This leaves just the lone published decision Baxter cites, *Meadows v. Lind*, 996 F.3d 1067 (10th Cir. 2021). Yet *Meadows* simply acknowledged that *Weaver* left open the question Baxter seeks to raise.

Id. at 1080. The court then avoided answering that question because it found that the trial court error complained of there (the arbitrary exclusion of hard-of-hearing prospective jurors) was not the type of error that always results in fundamental unfairness. *Id.* at 1080–81.

In short, contrary to Baxter's suggestion, lower courts are not divided on the question this Court left open in *Weaver*; they simply have not yet addressed it.[3] Baxter's attempt to manufacture a conflict thus fails. The incorrect recitation of this Court's precedent in unpublished *dicta* and side-stepping of *Weaver*'s open question do not create a split of authority requiring clarification from this Court. Additionally, because the instruction here is unique to a single retired Philadelphia judge, other districts and circuits will never have occasion to review the same instruction, and therefore no circuit split on the underlying constitutionality of the instruction ever will develop.

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[3] Indeed, other than this case, all of the published circuit court opinions applying *Weaver* to claims of ineffective assistance of counsel based on purported structural errors have either, like the court in *Meadows*, held that the error at issue did not fall into the narrow class of cases for which *Weaver* left an open question, or that the error complained of was not structural at all. *See Williams v. Burt*, 949 F.3d 966, 977–78 (6th Cir. 2020) (holding that, after *Weaver*, failure to object to a courtroom closure required defendant to show *Strickland* prejudice); *United States v. Aguiar*, 894 F.3d 351, 356 (D.C. Cir. 2018) (same); *United States v. Coleman*, 961 F.3d 1024, 1029 (8th Cir. 2020) (avoiding the issue by holding that a constitutionally invalid guilty plea is not a structural error); *Kipp v. Davis*, 971 F.3d 866, 876 n.5 (9th Cir. 2020) (rejecting contention that referencing a defendant's beliefs and associations at sentencing is a structural error); *cf. Whatley v. Warden, Georgia Diagnostic and Classification Prison*, 927 F.3d 1150, 1186 (11th Cir. 2019) (holding that prejudice presumption arising from keeping defendant in shackles absent justification, in violation of *Deck v. Missouri*, 544 U.S. 622 (2005), does not apply on collateral review), *cert. denied*, 141 S. Ct. 1299 (2021).

C. The Lower Court's Holding is Grounded in This Court's Precedent.

Baxter also urges this Court's review to correct alleged errors the court of appeals made in applying *Weaver* and *Sullivan* in this case. Pet. at 14–16. Of course, even if Baxter were correct, correcting a lower court's error is hardly the *certiorari* function of this Court. *See, e.g.*, Robert L. Stern & Eugene Gressman, *Supreme Court Practice* 178 (4th Ed. 1969) (noting that the "Supreme Court is not primarily concerned with the correction of errors in lower court decisions"); U.S. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). In any event, Baxter is not correct.

Though the lower court does appear to have mischaracterized this Court's holding in *Sullivan* (apparently seeking a distinction that does not exist between the total failure to give a reasonable doubt instruction and the issuance of an instruction that miscasts the burden), that discussion is *dicta* and thus there is no error to correct. Indeed, despite its inartful discussion of *Sullivan*, the Third Circuit's holding is consistent with the well-established precedents of *Strickland v. Washington*, 466 U.S. 668 (1984), and *United States v. Cronic*, 466 U.S. 648 (1984). Rather than creating a watershed new rule as Baxter claims, the Third Circuit followed this Court's precedents.

Weaver recognized the difference between a violation preserved and raised on direct review and one raised as part of an ineffective assistance of counsel claim on collateral review. 137 S. Ct. at 1910. Thus, this Court held that although structural errors are not subject to a harmless error analysis on direct review, not *all* structural errors will result in a new trial when raised on *collateral* review. *Id.* The *Weaver* Court identified three reasons why an error may be considered structural and held that for the two at issue in *Weaver* (because of the difficulty of assessing the effect of the error and because the right at issue protects interests that do not belong to the defendant), *Strickland* prejudice must still be shown.

The Third Circuit here merely applied the same logic to the third reason (when an error always results in fundamental unfairness) in holding that if a reasonable doubt instruction "contains an error," then the court "examine[s] whether the instruction resulted in actual prejudice." *Baxter*, 998 F.3d at 548, 548 n.7 (citing *Cronic*, 466 U.S. at 658–60 and *Strickland*, 466 U.S. at 695–96); App. 11a–12a; *see also Weaver*, 137 S. Ct. at 1914 (requiring a showing of prejudice in all ineffective assistance of counsel cases is appropriate) (Thomas, J., concurring); *id.* at 1915 (noting that the prejudice prong of *Strickland* is "entirely different" from the harmless error review undertaken on direct review and that, in order to succeed under *Strickland*, a litigant must

show actual prejudice or his claim must belong to the narrow class of cases identified in *Cronic*) (Alito, J., concurring). Thus, though error correction is not this Court's primary function, even if it were, there is no error to correct here.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court deny the petition for a writ of *certiorari*.

Respectfully submitted,

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