No. 21-5826

IN THE
Supreme Court of the United States

ARMEL BAXTER,
Petitioner,

v.

SUPERINTENDENT COAL TOWNSHIP SCI, ET AL.,
Respondent.

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

PETITIONER'S REPLY BRIEF

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REPLY

The Commonwealth asserts that several roadblocks preclude this Court's review. *First*, it contends that the case presents "an inappropriate vehicle to decide the question" presented because the Third Circuit did not decide a question to which the Commonwealth readily concedes the answer. Opp. 10–11. *Second*, it argues that there is no division among courts in applying *Weaver* that would warrant this Court's intervention. *Id.* at 11–13. And *third*, the Commonwealth asserts that the court's "inartful" opinion is consistent with this Court's precedent in *Sullivan*. *Id.* at 14–16. Each argument is illusory.

I. THERE IS NO VEHICLE PROBLEM

1. *Baxter* unquestionably holds, as a matter of federal law, that a petitioner must demonstrate actual prejudice when asserting a claim for ineffective assistance of counsel for trial counsel's failure to object to a defective reasonable doubt instruction—a decision that answers the question expressly left open in *Weaver*. *Baxter* v. *Superintendent Coal Twp. SCI*, 998 F.3d 542, 548–49 (3d Cir. 2021). The Commonwealth ignores that holding and the corresponding fact that this holding is now the law of the Third Circuit, see *Earl* v. *NVR, Inc.*, 990 F.3d 310, 314 (3d Cir. 2021) (citing 3d Cir. IOP 9.1), and has been applied by courts across the circuit as such, see, *e.g.*, *Green* v. *Superintendent Houtzdale SCI*, C.A. No. 21-2277, 2021 WL 6337321, at *1 (3d Cir. Oct. 29, 2021) (denying certificate of appealability in challenge to an identical reasonable doubt instruction); *Dixon* v. *Mahally*, C.A. No. 2:18-cv-1367, 2021 WL 5883161, at *19 (W.D. Pa. Dec. 13, 2021) (erroneous reasonable doubt instruction); Report and Recommendation at 10-15, *Moore* v. *Rivello*, No. 20-cv-00838 (E.D. Pa. Oct. 7, 2021) ECF

No. 25 (erroneous reasonable doubt instruction); *McBride* v. *Smith*, C.A. No. 17-5374, 2021 WL 4191969, at *3 (E.D. Pa. Sept. 15, 2021) (same). The petition thus presents an important question of federal law that impacts the liberty of those, like Mr. Baxter, who were convicted pursuant to a constitutionally deficient reasonable doubt instruction.[1]

The court's reasoning forecloses the possibility that some structural errors might not require a showing of actual prejudice under *Strickland*. Because an erroneous reasonable doubt instruction always results in fundamental unfairness, see *infra* §§ I.3, III.2, the court conclusively determined that a petitioner must demonstrate actual prejudice whenever a structural error gives rise to an ineffective assistance of counsel claim. See *Hutchinson* v. *Superintendent Greene SCI*, 860 F. App'x 246, 247 (3d Cir. 2021) (applying *Baxter* to ineffective assistance claim premised on *Batson* violation). *Baxter* thus effectively slams the door shut on the critical question that this Court left open in *Weaver*.

2. The Commonwealth's argument also implies that a court can avoid this Court's review simply by skirting a separate but potentially dispositive question in favor of a question it chooses to resolve. Opp. 10–11. So too might enterprising litigants avoid this Court's review by conceding an issue before the court below to avoid any analysis of the issue on account of a vehicle problem. But that is not the standard this Court

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[1] Confusingly, the Commonwealth suggests that this case presents "no question of federal law for this Court to settle" because the Court of Appeals did not address the constitutionality of the reasonable doubt instruction. Opp. 11. But whether prejudice should be presumed under Strickland in this case is no less a question of federal law than whether the trial court's instruction was constitutionally deficient as evidenced by this Court's decision in Weaver.

applies. And this case presents the ideal vehicle precisely *because* the Commonwealth has conceded the unconstitutionality of the trial court's instruction both here and in other pending lawsuits about the same erroneous instruction. See*, e.g.*, Opp. 1; *Commonwealth* v. *Drummond*, No. 28 EAP 2021, at 16 (Jan. 5, 2022) (Brief for the Commonwealth as Appellee). The Court thus need only address the limited question presented by the petition to resolve this case.

In any event, *Strickland* permits courts to address the performance and prejudice prongs of an ineffective assistance of counsel claim in any order. *Strickland* v. *Washington*, 466 U.S. 668, 697 (1984). Neither question is "antecedent" such that a court *need always* answer one before the other. Thus, the Commonwealth's reliance on Justice Breyer's dissent in *Unite Here Local 355* v. *Mulhall*, 571 U.S. 83, 85 (2013), is an inapt comparison. There, the Court dismissed the writ of certiorari as improvidently granted because of mootness and standing concerns. *Id.* (Breyer, J., dissenting). But questions of mootness and standing, which courts *must* answer first because they implicate a court's power under Article III, wholly differ from the "antecedent" question presented by this case, which does not implicate jurisdictional limits. See *Strickland*, 446 U.S. at 697.

Unsurprisingly, this Court has granted writs of certiorari where the question presented implicated only one prong of a *Strickland* claim. For example, in *Glover* v. *United States*, the Court assumed "for analytical purposes" that the trial court erred in calculating a Sentencing Guidelines range. *Glover* v. *United States*, 531 U.S. 198, 199–200 (2001). After concluding that an increased sentence from this hypothetical error would be prejudicial, the Court remanded for a further determination as to whether counsel's

performance was deficient. *Id.* at 205. In *Lee* v. *United States*, the government conceded before the court of appeals and this Court that the petitioner received objectively unreasonable representation, requiring the Court to determine only whether the petitioner suffered prejudice. *Lee* v. *United States*, 137 S. Ct. 1958, 1962 (2017). More frequently, the Court grants petitions presenting a question under *Strickland*'s deficiency prong despite the need for a further finding as to prejudice after the Court's decision. See, *e.g., Andrus* v. *Texas*, 140 S. Ct. 1875, 1877 (2020) (per curiam) (finding deficient performance by counsel and remanding for the court to address *Strickland*'s prejudice prong in the first instance); *Hinton* v. *Alabama*, 571 U.S. 263, 264 (2014); *Missouri* v. *Frye*, 566 U.S. 134, 150 (2012); *Maples* v. *Thomas*, 565 U.S. 266, 285 (2012). In each, a court's later finding on the alternate prong of the *Strickland* claim might render this Court's analysis unnecessary. But that posed no jurisprudential or practical bar to this Court's review.

3. Even if resolution of the "threshold" issue were a prerequisite, the Third Circuit's opinion did hold—albeit implicitly—that the trial court's instruction was not unconstitutional. Despite disclaiming that it would not reach the question, Pet. App. 8a, the court's conclusion that Petitioner must demonstrate actual prejudice under *Weaver* follows *only* from a finding that the instruction at issue was constitutionally sufficient.

An erroneous reasonable doubt instruction which miscasts the burden of proof violates both a defendant's right to due process and a jury trial. *Sullivan* v. *Louisiana*, 508 U.S. 275, 278 (1993). Unlike other instructional errors, a wholly erroneous description of this standard results in a structural error that cannot be harmless because the lack of an adequate instruction "vitiates *all* the jury's findings." *Id.* at 281

(emphasis in original); see *Johnson* v. *United States*, 520 U.S. 461, 469 (1997) (distinguishing errors in reasonable doubt instructions from improper instructions on the elements of an offense). Thus, a wholly erroneous reasonable doubt instruction *always* results in a trial that is "fundamentally unfair." *Weaver*, 137 S. Ct., 1908 (2017).

In contrast to this well-established standard, the Third Circuit misinterpreted *Sullivan* and its progeny to hold that constitutionally erroneous instructions do not result in a structural defect that always leads to a "fundamentally unfair" trial. Pet. App. 11a (citing *Victor* v. *Nebraska*, 511 U.S. 1, 5 (1994) and *United States* v. *Isaac*, 134 F.3d 199, 204 (3d Cir. 1998)). Instead, the court of appeals held that an error in a "reasonable doubt instruction" is subject to the same rules concerning other jury instructions, which would include harmless error review. See Pet. App. 11a.

Applying that reasoning to *Weaver*, it concluded that, because some unconstitutional instructions are harmless and do not result in a fundamentally unfair trial, a petitioner must demonstrate actual prejudice to prevail on an ineffective assistance of counsel claim challenging a defective reasonable doubt instruction. Pet. App. 11a–12a. But this follows from a mistaken reading of *Sullivan* and *Victor*, which together stand for no more than the straightforward proposition that a reasonable doubt instruction must be evaluated as a whole. *Victor* v. *Nebraska*, 511 U.S. 1, 22 ("Taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury." (quoting *Holland* v. *United States*, 348 U.S. 121, 140 (1954) (cleaned up))). The court's approach in this case has been rejected repeatedly. See *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (noting jury instructions omitting an element of the offense "differ[] markedly from the

constitutional violations we have found to defy harmless error review"); *Sullivan*, 508 U.S. at 284 (Rehnquist, C.J., concurring) ("I accept the Court's conclusion that a constitutionally deficient reasonable-doubt instruction is a breed apart from many other instructional errors"); *United States* v. *Trujillo*, 960 F.3d 1196, 1204 (10th Cir. 2020) ("[T]he Court has distinguished between errors in reasonable doubt instructions and errors in other jury instructions.").

II. COURTS DIVERGE IN INTERPRETING *WEAVER*

The Commonwealth does not meaningfully dispute that courts have varied in their assessment of *Strickland* claims following *Weaver*. As the Petition details, some, such as the Sixth Circuit, continue to hold that a petitioner must demonstrate actual prejudice on collateral review for *all* structural errors. *Parks* v. *Chapman*, 815 F. App'x 937 (6th Cir. 2020). In contrast, the Tenth Circuit recognizes that structural errors presented on collateral review must be assessed on a case-by-case basis, and that it remains an unresolved question whether structural errors that "always result in fundamental unfairness" require are presumptively prejudicial. *Meadows* v. *Lind*, 996 F.3d 1067, 1077 (10th Cir. 2021); see also *Walker* v. *Pollard*, No. 18-C-0147, 2020 WL 6063493, at 12 n.7 (E.D. Wis. Oct. 14, 2020).

The Commonwealth rejects the premise of this argument by asserting Petitioner relies on a number of unpublished or non-precedential decisions. Opp. 11–12. But this makes no difference. Indeed, this Court routinely grants writs of certiorari involving unpublished opinions from the federal courts of appeals. See Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 Nw. U. L. Rev. at 29 (forthcoming 2022). Although an opinion may lack precedential value

itself, many "unpublished decisions are unpublished because they [purport to] apply settled circuit law." *Id* at 30.

That is precisely the problem here. Although the Commonwealth rejects *Parks* for its supposed lack of precedential value, Opp. 12, it misses the point. Petitioner does not rely on *Parks* for its own precedential value. Rather, *Parks* indicates that, post-*Weaver*, courts continue to apply *pre-Weaver* precedent, holding a petitioner must demonstrate actual prejudice for *all Strickland* claims, even those premised on structural error. See *Parks*, 815 F. App'x at 942 (citing *Ambrose* v. *Booker*, 684 F.3d 638 (6th Cir. 2012)); see also*, e.g.*, *Carter* v. *Lafler*, No. 17-1409, 2017 WL 4535923, at 3 (6th Cir. 2017) (order) (petitioner must show actual prejudice "even if the error is structural"); *Wellborn* v. *Berghuis*, No. 17-2076, 2018 WL 4372196, at *3 (6th Cir. May 16, 2018) (stating, post-*Weaver*, that a petitioner can establish *Strickland* prejudice only by establishing a reasonable probability of a different outcome). *Parks* also suggests that courts are incorrectly relying on *Weaver* to buttress their own pre-existing precedent. See *Parks* 815 F. App'x at 942 ("*Weaver* stands for the idea that finality and judicial economy can trump even structural error."). Despite this Court's reasoning that finality interests might inform a court's application of *Strickland*, it has never held that interests in finality trump fundamental fairness in the application of a non-retroactive rule.

III. THE COURT OF APPEALS IS WRONG

1. The Commonwealth does not attempt to defend the constitutionality of the instruction offered by the trial court. Here, the jury was instructed that "reasonable doubt" compares to the decision to have a loved one undergo surgery for life threatening illness. Pet. App. 22a. As the trial court described: "[i]you go

forward [with the decision to have surgery], it's not because you have not 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. This instruction violated due process.

This instruction in fact is more problematic than that at issue in *Cage* and *Sullivan*. In *Cage*, the Court reasoned that the inclusion of the phrases "grave uncertainty" and "moral certainty" rendered a reasonable doubt instruction defective because they "suggest a higher degree of doubt that is required for acquittal." *Cage* v. *Louisiana*, 498 U.S. 39, 41 (1990). The trial court's instruction here lowered the bar even further as it equated "reasonable doubt" with a quantum of doubt that would preclude one from pursuing a life-saving treatment for a loved one. As the Commonwealth agrees, this does not comport with due process. See *id.; Holland* v. *United States*, 348 U.S. 121, 140 (1954).

2. The Commonwealth also agrees the court "mischaracterized this Court's holding in *Sullivan*" by drawing a false distinction between the total failure to administer a reasonable doubt instruction and the use of an instruction that miscasts the burden on proof. Opp. 14. But the court's application of *Sullivan* goes far beyond a mere mischaracterization; rather, it radically departs from this Court's precedent and impacts its mistaken application of *Weaver*.

Baxter supposes to invent a new, murky category of constitutionally deficient reasonable doubt instruction subject to harmless error review. Pet. App. 11a. The court's reasoning confuses erroneous and inartful reasonable doubt instructions. Whereas a wholly erroneous definition of reasonable doubt unconstitutionally lowers the government's burden and thus "vitiate[s] all of [a] jury's findings," *Johnson*, 520 U.S. at 469, an

inartful instruction that as a whole "correctly convey[s] the concept of reasonable doubt" does not implicate a defendant's constitutional rights, *Victor*, 511 U.S. at 22 (quoting *Holland*, 348 U.S. at 140). Put differently, an inartful but ultimately correct assertion of the standard cannot be a structural defect that leads to a "fundamentally unfair" trial because it is no defect at all. See *Sullivan*, 508 U.S. at 281. Thus, the court's reasoning as to why, under *Weaver*, Mr. Baxter's claim requires actual prejudice follows from the implicit conclusion that the instruction was not constitutionally deficient as a whole. Neither this Court nor the other courts of appeals have distinguished between a fully defective reasonable doubt instruction and the failure to give an instruction at all. *Supra* § I.3; see also *Ex parte Gillentine*, 980 So. 2d 966, 967–71 (Ala. 2007) ("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 impact in either case is the same: the error "vitiates all the jury's findings." *Sullivan*, 508 U.S. at 281.

As *Weaver* contemplates, if any structural error were to absolve the petitioner of the need to demonstrate actual prejudice, it is a structural error that necessarily renders the proceeding "fundamentally unfair." See *Weaver*, 137 S. Ct. at 1913. The effect of such an error cannot be quantified. When a jury's conviction flows from an erroneous reasonable doubt instruction, "there has been no jury verdict within the meaning of the Sixth Amendment." *Sullivan*, 508 U.S. at 280. For this reason, such an error can never be subject to harmless error review because it would require "[a] reviewing court . . . engage in pure speculation." *Id* at 281.

The concerns underlying *Sullivan* do not dissipate when a petitioner bases an ineffective assistance of counsel claim on a defective reasonable doubt instruction. Under *Strickland*, any "assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Strickland*, 466 U.S. at 695. But that presumption must fall away where, as here, the jury received a deficient instruction on the standard that "plays a vital role in the American scheme of criminal procedure." See *In re Winship*, 397 U.S. 358, 363 (1970). Just as the question of harmless error, a court cannot determine whether "but for counsel's unprofessional errors, the result of the proceeding would have been different," *Weaver*, 137 S. Ct. at 1911, without "engag[ing] in pure speculation" as to what the jury would have concluded if properly instructed, *Sullivan*, 508 U.S. at 281. And when a court engages in such speculation, "the wrong entity judges the defendant guilty" in violation of the Sixth Amendment. *Id.* (quoting *Rose* v. *Clark*, 478 U.S. 570, 578 (1986)) (alteration omitted). The Third Circuit's decision to the contrary was erroneous.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, this Court should grant the petition.

Respectfully submitted,

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