

**[J-41-2025] [MO: Todd, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 66 MAP 2024
	:	
Appellee	:	Appeal from the Order of the
	:	Superior Court at No. 599 MDA
	:	2022, entered on January 9, 2024,
v.	:	Affirming the Judgment of Sentence
	:	of the Dauphin County Court of
	:	Common Pleas, Criminal Division,
RONALD JENKINS, JR.,	:	at No. CP-22-CR-0005285-2019
	:	entered on March 30, 2022.
	:	
Appellant	:	ARGUED: May 14, 2025

CONCURRING AND DISSENTING OPINION

JUSTICE McCAFFERY

DECIDED: October 1, 2026

Today, the Majority properly declares baseless attacks on the integrity of opposing counsel during closing argument are improper. Nonetheless, the Majority’s result — concluding the prosecutor’s improper argument was harmless — ensures that zealous advocates nonetheless will be incentivized to employ such tactics based on the possibility that such a violation will be deemed harmless in hindsight. While the prosecutor’s remarks may not have meaningfully contributed to the guilty verdict, I cannot agree that they are harmless to the public’s right to retain an attorney and to the administration of justice in our society. I conclude the remarks constitute structural error and thus I cannot join the Majority’s harmless error analysis.

The Majority ably sets forth the law of structural error, so I will only highlight those portions that are relevant to my disagreement with its analysis. A structural error is one that “affects the framework within which the trial proceeds, rather than being simply an

error in the trial process itself.” *Weaver v. Mass.*, 582 U.S. 286, 295 (2017) (citation, brackets, and internal quotation marks omitted). As such, a structural error is not harmless. See *id.* at 294.

In *Weaver*, the Supreme Court of the United States identified three broad categories of structural error. Of import here, the first category includes constitutional rights which protect some interest other than the defendant’s interest in avoiding an erroneous conviction. *Weaver*, 582 U.S. at 295. This category includes the right to self-representation: “This is true of the defendant’s right to conduct his own defense, which, when exercised, usually increases the likelihood of a trial outcome unfavorable to the defendant.” *Id.* (citation and internal quotation marks omitted). Instead, the right to self-representation “is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.” *Id.* (citation omitted).

The structural right to self-representation is the flip side of the coin from the issue before us. Indeed, it makes no sense to declare a right to represent oneself in the absence of a right to retain, and consult with, private counsel. The right to retain counsel contains multiple facets — most famously, the right of the indigent to appointed counsel. See *Gideon v. Wainwright*, 372 U.S. 335 (1963). Importantly, however, the right to counsel also includes the right to counsel of one’s choice. See *U.S. v. Gonzalez Lopez*, 548 U.S. 140 (2006). While certainly serving a defendant’s interest in avoiding an erroneous conviction, the right to counsel serves other purposes as well. As the High Court noted, the Sixth Amendment right to counsel of choice “commands, not that a trial be fair, but that a particular guarantee of fairness be provided — to wit, that the accused be defended by the counsel he believes to be best.” *Id.* at 146. Thus, a violation of the right to counsel of choice is recognized as a structural error, for which “[n]o additional

showing of prejudice is required to make the violation ‘complete.’” *Id.* Under *Gonzalez Lopez*, the right to counsel of choice, like the right to self-representation, is premised on the fundamental right to self-determination, even if the choice leads to an increased risk of conviction. See *id.* at 147 (“The right to select counsel of one’s choice, by contrast, has never been derived from the Sixth Amendment’s purpose of ensuring a fair trial.”).

Clearly, Jenkins was not denied his right to counsel in this case. Yet, stated simply, the prosecutor’s argument penalized Jenkins for consulting with his attorney by implying the attorney aided and abetted Jenkins’s lies to investigators. See Majority Opinion at 26. The comment also impugned the professional integrity of Jenkins’s counsel, and indeed, all criminal defense counsel. As the Majority aptly and succinctly states, the prosecutor “suggest[ed] that [Jenkins’s] consultation with or retention of a lawyer is somehow indicative of guilt”, *id.* at 22, “by insinuating that the decision to lie was made with the aid and/or blessing of counsel.” *Id.* at 26. The prosecutor’s argument thereby “disparag[ed] the critical role attorneys play in both the proper functioning of our criminal justice system[] and the **preservation of constitutional protections for the welfare of all people.**” *Id.* at 22 (emphasis added).

Nonetheless, the Majority subsequently concludes that the right to consult with counsel “is, first and foremost, *intended* to prevent erroneous convictions, and is not chiefly intended to protect other important constitutionally protected individual rights[.]” *Id.* at 38 (emphasis in original). Because the Majority concedes the right to consult with counsel protects other important rights, even if they are secondary considerations, I cannot square this conclusion with the Majority’s prior statement or with *Gonzalez Lopez*. Either the right to consult with counsel serves **only** to protect against erroneous conviction, or it **also** serves: (a) the fundamental liberty interest of self-determination; (b) the proper functioning of our criminal justice system; and (c) the preservation of

constitutional protections for the welfare of all people. I find no precedential support for the Majority's attempt to rank these purposes to enhance the value of one at the expense of the others.

I agree with the Majority's initial observation: retention of counsel serves many important interests in our society beyond mere protection from erroneous conviction. There is no need to provide a comprehensive list of all the interests served, as several are immediately apparent. For example, voluntary compliance with the law is a fundamental policy of all legal regimes. Today, there are literally thousands of pages of law governing a person's actions. Consultation with an attorney before acting, while not mandatory, should certainly not be **discouraged** by officers of the court.

Beyond the interests of individual citizens and the welfare of all people, the Majority's harmless error analysis ignores the interests of the judicial system itself. As the Majority rightfully notes, popular culture often demeans the ethics and morality of the justice system. See Majority Opinion at 22, n.10. Popular culture repeatedly features defense attorneys and prosecutors as corrupt in cinema and television. While the courts, thankfully, have no power to control how others view or portray us, we should not endeavor to confirm these cynical portrayals. Various authorities, ranging from case law to Codes of Civility, all condemn baseless arguments that impugn the integrity of opposing counsel as a trial tactic. See *U.S. v. Young*, 470 U.S. 1, 9 (1985) ("Defense counsel, like his adversary, must not be permitted to make unfounded and inflammatory attacks on the opposing advocate.") (footnote omitted); *People v. T.P.*, --- N.E.3d --- (N.Y. 2025) ("A prosecutor ... must avoid resorting to name calling, such as stating during the summation that the defendant and their lawyer are liars.") (citation, internal quotation marks and brackets omitted); *State v. Book*, 109 A.3d 1027, 1041 (Conn. 2015) ("The [*pro se*] defendant's bare allegations of prosecutorial impropriety amounted to an attack on

opposing counsel, which the court may properly take steps to prevent.”) (*citing Young*); *Cassim v. Allstate Ins. Co.*, 94 P.3d 513, 521 (Cal. 2004) (“Nor may counsel properly make personally insulting or derogatory remarks directed at opposing counsel or impugn counsel’s motives or character.”) (citation omitted); *Owens-Corning Fiberglass Corp. v. Crane*, 683 So.2d 552, 555 (Fla. 1996) (“it is never acceptable for one attorney to effectively impugn the integrity or credibility of opposing counsel before the jury”); *U.S. v. Collins*, 78 F.3d 1021, 1040 (6th Cir. 1996) (“It is also unprofessional for counsel to make personal attacks on opposing counsel.”); *Beavers on Behalf of Beavers v. Northrop Worldwide Aircraft Svcs., Inc.*, 821 S.W.2d 669, 680 (Tex. App. 1991) (“Attacks on the integrity of opposing counsel are improper.”) (citation omitted); Pa. Code of Civility, Art. II, §§ 3, 5 (“A lawyer should not engage in any conduct that diminishes the dignity or decorum of the courtroom ... [and] should abstain from making disparaging personal remarks or engaging in acrimonious speech or conduct toward opposing counsel[.]”).

I do not submit these authorities as establishing any rights held by Jenkins or any individual. Instead, I highlight them for the (hopefully) undisputed principle that courtrooms should not resemble television dramas. Allowing prosecutors — who have the last say in closing arguments — to gamble on whether their aspersions on defense counsel will be found to be harmless degrades not only that particular proceeding, but the perception of the justice system as a whole. The inevitable result of permitting such baseless personal attacks will be to encourage similar behavior by the opposing party. See *Young*, 470 U.S. at 10 (opining that the circumstances there were “but one example of an all too common occurrence in criminal trials — the defense counsel argues improperly, provoking the prosecutor to respond in kind, and the trial judge takes no corrective action.”).

We, as the stewards of the practice of law and therefore of our justice system, should not countenance behavior that strikes so fundamentally at the perception of that system. “Judges and lawyers must always be mindful of the appearance of justice as well as its dispensation.” Pa. Code of Civility, Preamble. “The conduct of lawyers and judges should be characterized at all times by professional integrity and personal courtesy in the fullest sense of those terms.” *Id.*

I imagine the Majority would respond by stating it agrees — that is why they hold the prosecutor’s statements here to be improper. This must be cold comfort to Jenkins’s counsel, whose professional integrity was baselessly impugned by the prosecutor. Those who know Jenkins, or read this decision, also know that their consultation with counsel can still be used against them, **so long as** the prosecution can convince a court the improper reference is somehow harmless in hindsight. Undoubtedly, allowing this conviction to stand should make any reasonable person question whether the juice of consulting with an attorney is worth the squeeze of having that consultation used against them at trial.

This is especially true because it may never be clear why one consults with an attorney. Nearly every person in our society has needed, at one time in their life, to consult with an attorney. Be it divorce, child custody, breach of contract, business entity formation, or any number of other issues, it can be difficult, if not impossible, for a third party to determine the exact reasons for a privileged consultation.

Even here, where there is currently no dispute that Jenkins consulted with an attorney regarding this criminal investigation, the matters he discussed with counsel are not of record. It is possible that Jenkins merely wanted to understand the possible consequences if he refused to be interviewed. Or, he may have wished to understand what would happen if he admitted to investigators that he had not only smoked marijuana

on the night in question but also gave some to the victim. In any event, there is certainly no evidence of record that counsel encouraged Jenkins to lie or otherwise mislead investigators.

The result of the Majority's decision will unavoidably discourage, to an unknown and variable degree, individuals from consulting with attorneys. This is contrary to many vital interests in our justice system, not just the interest in avoiding erroneous convictions. Accordingly, while I agree with the Majority that the prosecutor's remarks were improper, I dissent from the Majority's harmless error analysis as the improper remarks harmed interests beyond the fairness of this trial and thus constituted structural error.

Justice Donohue joins this concurring and dissenting opinion.