

**[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 OPINION

JUSTICE WECHT

DECIDED: October 1, 2026

For those facing criminal prosecution, lawyers “are necessities, not luxuries.”¹ No person should be dissuaded or discouraged from seeking the advice of an attorney, nor penalized for doing so. Yet, that is precisely the effect when, as in this case, a prosecutor stands before a jury and implies that a defendant’s act of retaining counsel is indicative of his guilt, or consciousness thereof. Such argument is manifestly improper, and it should be condemned in the strongest terms.

Nonetheless, for the reasons that the Majority details, the resultant effect upon the trial is not a “structural error,” whether under the United States Supreme Court’s *Weaver*² paradigm or under the more traditional framing of that concept. As we have long held,

¹ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

² *Weaver v. Massachusetts*, 582 U.S. 286, 295-96 (2017) (discussing reasons that certain errors have been held to be “structural,” and thus cannot be deemed harmless).

“there is no *per se* rule which requires the grant of a new trial whenever the district attorney acts improperly.”³ Offensive though the implication of the prosecutor’s comment was in this case, it was one moment in an otherwise fair trial, which the trial court addressed with a prompt curative instruction. Given the overwhelming and uncontradicted evidence of Ronald Jenkins’ guilt, it is difficult to dispute that the prosecutor’s comments were harmless beyond a reasonable doubt.⁴ For these reasons, I join the Majority Opinion.

My concern is that there is some potential for confusion in the Majority’s repeated references to the prosecutor’s commentary in this case as merely “impacting” Jenkins’ due process right to a fair trial,⁵ but not “violating” it. The tension apparent here merits some examination. The Majority clearly has chosen its words carefully, and, I believe, correctly. This is something of a semantic curiosity, with the nature of the constitutional right at issue. The “due process right to a fair trial” is a broad, catch-all constitutional guarantee that is more difficult to pin down than some of its more specifically worded companions. A “fair trial” is the sum of innumerable individual components. As a sampling of its various elements, a fair trial is a *mélange* of all of the properly admitted

³ *Commonwealth v. Clancy*, 192 A.3d 44, 63 (2018) (quoting *Commonwealth v. Johnson*, 533 A.2d 994, 997 (Pa. 1987)); see also *Commonwealth v. Cousar*, 928 A.2d 1025, 1042 (Pa. 2007) (noting that “prosecutorial misconduct is evaluated under the harmless error standard”).

⁴ See *Commonwealth v. Story*, 383 A.2d 155, 168 (Pa. 1978) (“[W]e hold that, in applying the overwhelming evidence test to determine if an error is harmless, a court may rely only on uncontradicted evidence. The uncontradicted evidence of guilt must be so overwhelming, and the prejudicial effect of the improperly admitted evidence so insignificant by comparison, that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict.”); Maj. Op. at 42-44 (applying the overwhelming evidence test).

⁵ U.S. CONST. amend. XIV, § 1 (“...nor shall any State deprive any person of life, liberty, or property, without due process of law”).

evidence, the trial court's sound rulings on motions and objections, the appropriate management and instruction of the jurors, and, particularly here, the prosecutor's delivery of argument within the bounds of permissible advocacy. There are many errors and missteps that can happen along the way. Among these are some that, while susceptible to the label of "unfair," nonetheless fail to shake the reality that the defendant has received a fair trial overall. While it is a mantra so often repeated as to seem trite or even tiresome, it remains true that a "defendant is entitled to a fair trial but not a perfect one."⁶ Individual instances of trial court error or inflammatory prosecutorial conduct may threaten the "due process right to a fair trial," while still falling short of crossing the line into actually depriving the defendant of that right. At the same time, it does seem odd at first blush to refer to an error of constitutional magnitude as merely "impacting" the defendant's constitutional right, rather than violating it.

As the Majority notes, the United States Supreme Court has addressed the dichotomy between claims that prosecutorial conduct deprives the defendant of a specific constitutional guarantee, and those in which the defendant invokes the catch-all "fair trial" right. As the Court explained in *Donnelly v. DeChristoforo*:

This is not a case in which the State has denied a defendant the benefit of a specific provision of the Bill of Rights, such as the right to counsel, or in which the prosecutor's remarks so prejudiced a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right. When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's remark . . . by itself so infected the trial with unfairness as to make the

⁶ *Commonwealth v. Martinolich*, 318 A.2d 680, 695 (Pa. 1974) (quoting *Commonwealth v. Hill*, 301 A.2d 587, 590 (Pa. 1973)); see also *Commonwealth v. Hairston*, 84 A.3d 657, 678 (Pa. 2014) ("This court's consideration of claims of prosecutorial misconduct is centered on whether the defendant was deprived of a fair trial, not a perfect trial.").

resulting conviction a denial of due process. We do not believe that examination of the entire proceedings in this case supports that contention.⁷

As this language indicates, notwithstanding that inappropriate prosecutorial commentary can be of constitutional significance, a finding that such commentary amounts to a constitutional deprivation requires a more wholistic evaluation of the proceedings; we must determine whether those remarks “so infected the trial with unfairness as to make the resulting conviction a denial of due process.”⁸ This inquiry is materially similar to the analysis that this Court long has conducted when assessing claims of prosecutorial misconduct:

[W]here the language of the district attorney is intemperate, uncalled for and improper, a new trial is not necessarily required. The language must be such that its unavoidable effect would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant, so that they could not weigh the evidence and render a true verdict. The effect of such remarks depends upon the atmosphere of the trial, and the proper action to be taken is within the discretion of the trial court.⁹

In light of the U.S. Supreme Court’s guidance and the teachings of our own precedent, the Majority correctly frames the issue before us and rightly finds that the prosecutor’s references to Jenkins’ pre-arrest retention of counsel—though highly unwarranted and worthy of condemnation—did not deprive Jenkins of his due process right to a fair trial.¹⁰

⁷ *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (citations and footnote omitted); see Maj. Op. at 18 (citing *Donnelly*).

⁸ *Id.*

⁹ *Clancy*, 192 A.3d at 63 (quoting *Commonwealth v. Stoltzfus*, 337 A.2d 873, 882 (Pa. 1975)).

¹⁰ *Cf. Darden v. Wainwright*, 477 U.S. 168, 179 (1986) (similarly noting that the prosecutor’s “argument deserves the condemnation it has received from every court to review it, although no court has held that the argument rendered the trial unfair”).

That said, all members of this Court presently agree that the prosecutor's remarks produced an error in Jenkins' trial. The proper classification of that error is a deceptively difficult question in light of the United States Supreme Court's discussion of "structural error" in its 2017 decision in *Weaver*. Were it not for *Weaver*'s new classification scheme, the answer would be rather straightforward, given that claims relating to improper prosecutorial argument bear all the hallmarks of a "trial error" subject to harmless error analysis, rather than a structural error. Traditionally, and as *Weaver* itself reiterated, "the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'"¹¹ An isolated remark delivered during the prosecutor's closing argument is undoubtedly of the latter sort, and it differs in kind from the more easily recognizable instances of structural error, such as adjudication before a biased judge¹² or the complete denial of counsel.¹³ Those are the sort of errors that are structural because they "affect the 'entire conduct of the [proceeding] from beginning to end,'" *i.e.*, the very *structure* of the trial.¹⁴

Nonetheless, there is language in *Weaver* that can be read as ushering in a change in the structural error doctrine, or at least attempting to do so. In an effort to flesh out the "precise reason why a particular error is not amenable" to harmless error analysis, the *Weaver* Court articulated "at least three broad rationales."¹⁵ These are: (1) "First, an error has been deemed structural in some instances if the right at issue is not designed

¹¹ *Weaver*, 582 U.S. at 295 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

¹² *See Tumey v. Ohio*, 273 U.S. 510 (1927).

¹³ *See Gideon*, *supra* n.1.

¹⁴ *Greer v. United States*, 593 U.S. 503, 513 (2021) (quoting *Fulminante*, 499 U.S. at 309) (bracketed material in original).

¹⁵ *Weaver*, 582 U.S. at 295.

to protect the defendant from erroneous conviction but instead protects some other interest”; (2) “Second, an error has been deemed structural if the effects of the error are simply too hard to measure”; and (3) “Third, an error has been deemed structural if the error always results in fundamental unfairness.”¹⁶

The *Weaver* categories are somewhat deceptive. In connection with each category, the *Weaver* Court discussed previous precedents and attempted to provide additional clarification as to why a certain error was held to be structural in those cases. As I read *Weaver*, the Court’s endeavor was not necessarily meant to articulate new categories of structural error with the intent to sweep in vast swathes of novel claims that bear no resemblance to the traditional definition, which *Weaver* also cited, *i.e.*, errors that affect “the framework within which the trial proceeds” rather than a mere “error in the trial process itself.”¹⁷ For present purposes, it is also telling that *Weaver* did not discuss any of the U.S. Supreme Court’s precedents assessing inflammatory prosecutorial commentary, which, as the Majority emphasizes, that Court never has treated as a structural error.¹⁸ I find no indication in *Weaver* that the Court meant to drastically alter the standard applicable to such claims. For these reasons, the error here must be classified as a trial error subject to harmless error analysis, just as prosecutorial misconduct claims always have been.

It is here that Justice McCaffery departs, as he takes the position that the prosecutor’s comments in this case implicate “some interest other than the defendant’s interest in avoiding an erroneous conviction,” namely the right to consult with an attorney,

¹⁶ *Id.* at 295-96.

¹⁷ *Id.* at 295 (quoting *Fulminante*, 499 U.S. at 310).

¹⁸ See Maj. Op. at 32-35 (discussing *Donnelly*, *Darden*, and *Greer v. Miller*, 483 U.S. 756 (1987)).

which he views as falling into *Weaver*'s first category of structural error.¹⁹ Justice McCaffery fears that, absent a determination that the indecorous commentary of the prosecutor here rises to the level of structural error, remarks of this sort may have an unacceptable chilling effect upon the right of the individual to consult with counsel. Although I favor the Majority's approach, and do not believe that the error here can be classified as structural, I am sympathetic to Justice McCaffery's sentiments and concerns.

Both the law and the facts in this case point toward affirmance of Jenkins' judgment of sentence. But I recognize the reality that, absent appreciable consequence in the form of reversal, there may be little practical deterrence value in decisions such as this, appellate finger-wagging notwithstanding. Yet, this is always a tacit difficulty with harmless-error review.²⁰ Harmless-error review is a balancing act of competing interests. Without it, we might run a different sort of risk than the one that Justice McCaffery identifies, where some appellate judges may be reluctant to acknowledge errors at all in cases where the defendant is obviously guilty. In retaining the latitude to identify errors yet recognize their harmlessness in certain cases (where properly raised and argued by the parties²¹), appellate courts can reach the correct disposition of a specific case, while

¹⁹ Conc. & Diss. Op. (McCaffery, J.) at 2 (citing *Weaver*, 582 U.S. at 295).

²⁰ See *Story*, 383 A.2d at 164 (stressing that "courts must be careful in applying the harmless error rule, for if the violation of a rule is too readily held harmless, the importance and effectiveness of the rule is denigrated"); see also *Commonwealth v. Hamlett*, 234 A.3d 486, 497-98 (Pa. 2020) (Wecht, J., dissenting) ("This unpleasant side effect not only can dilute and defeat important rights, but also can undermine the deterrence value of appellate reversal, demonstrating to future parties and courts that similar errors are inconsequential, and that scrupulous care need not be taken to avoid them. A rule that frequently is broken without consequence soon becomes no rule at all.") (footnote omitted).

²¹ See generally *Hamlett*, 234 A.3d at 495-523 (Wecht, J., dissenting) (contending that the Commonwealth must be made to carry its burden to establish harmless error, rather than the appellate court addressing the issue *sua sponte*). The Commonwealth in (continued...)

nonetheless providing important guidance and reasoning, as well as a warning that the identified errors may be fatal to the prosecution in closer cases. Moreover, it is worth stressing Justice Mundy’s observation that, even if it does not rise to the level of reversible (or structural) error, prosecutorial misconduct nonetheless may warrant disciplinary action.²² This is another tool in this Court’s toolbox for ensuring that the standards of our profession are maintained. Perhaps this tool should be deployed more frequently.

Finally, I agree with Justice McCaffery that there is something to be said for the notion that the prosecutor’s commentary in this case implicated Jenkins’ right to consult with counsel, even if it did not “violate” his constitutional right in that regard. The right to counsel is, of course, constitutionally guaranteed.²³ I acknowledge that, under both federal law and the law of this Commonwealth, the constitutional right to counsel does not “attach” until an individual is formally charged with a criminal offense.²⁴ That is the moment at which there is a “criminal prosecution” for purposes of the Sixth Amendment and Article I, Section 9, and that the defendant therefore is entitled to the assistance of counsel, or the provision of counsel if he cannot afford his own. Nonetheless, the right to consult with an attorney before formal charging remains so important that it forms a core component of the familiar *Miranda* warning, which comes into play well before a person

this case does argue that any errors in the prosecutor’s remarks were harmless. See Commonwealth’s Br. at 41-48.

²² See Conc. Op. (Mundy, J.) at 2 n.1.

²³ See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.”); PA. CONST. art. I, § 9 (“In all criminal prosecutions the accused hath a right to be heard by himself and his counsel . . .”).

²⁴ See *Moran v. Burbine*, 475 U.S. 412, 428 (1986) (Sixth Amendment); *Commonwealth v. Arroyo*, 723 A.2d 162, 170 (Pa. 1999) (Article I, Section 9); see also Conc. Op. (Mundy, J.) at 2 (stressing that Jenkins’ “Sixth Amendment right to counsel had not attached at the relevant time, and hence, was not burdened”).

is charged.²⁵ Regardless of the fact that an individual's constitutional right to counsel may not attach before formal charging documents are filed, I sincerely doubt that any jurist would deem it acceptable for government actors to, for instance, physically prevent a person from speaking to his attorney prior to the moment of "attachment." It is likewise objectionable to penalize such a consultation by inviting a jury to consider it as evidence of one's guilt. As I see it, every person enjoys the right at any time whatsoever to walk into an attorney's office and to confidentially discuss a legal issue of whatever sort, or to call an attorney when law enforcement comes a-knocking. That may not be a "Sixth Amendment" right, but it is an important one all the same.

In sum, although I share many of Justice McCaffery's concerns and believe that the points he raises are thought-provoking, I believe that the Majority's articulation and application of the law are correct. I accordingly join the Majority Opinion.

²⁵ See *Miranda v. Arizona*, 384 U.S. 436, 471 (1966) ("[W]e hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation"); Amici Curiae Br. of PACDL and Defender Ass'n of Phila. at 9 (discussing *Miranda*).