

**[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 MUNDY**

**DECIDED: October 1, 2026**

I am sympathetic to the concern expressed by Justice McCaffery, *i.e.*, that baseless attacks upon defense counsel should not be seen to have any place in Pennsylvania courtrooms. See *generally Commonwealth v. Molina*, 104 A.3d 430, 456 (Pa. 2014) (Saylor, J., concurring) (“[A]ll actors involved in the criminal justice apparatus must both respect individual liberties and refrain from overreaching.”). Justice McCaffery forwards, *inter alia*, a deterrence rationale for deeming such errors structural, and relatedly, a consequentialist argument suggesting the majority’s holding could discourage individuals from consulting with counsel in the pre-arrest timeframe. See Concurring & Dissenting Op. at 5-7; see *also* Brief for *Amicus* Pa. Ass’n of Criminal Defense Lawyers, *et al.*, at 8-11 (describing the salutary role and multiple functions of pre-arrest counsel). While I agree that would be undesirable, I also ultimately join the majority’s determination that prosecutorial misconduct in the form of unwarranted and improper remarks about the

defendant's hiring of pre-arrest counsel does not fall into recognized categories of structural error.<sup>1</sup>

As the majority develops, structural errors are limited to circumstances that are so likely to cause harm that prejudice should be presumed because the cost of litigating the issue is unjustified. See *Commonwealth v. King*, 57 A.2d 607, 614 (Pa. 2012) (citing *U.S. v. Cronin*, 466 U.S. 648, 659 (1984)).<sup>2</sup> This is a limited class of errors that completely infect the validity of the trial or its outcome, such as: a defective reasonable-doubt instruction, the absence of counsel (or counsel being asleep or intoxicated), a lawyer's statement to the jury that his client is guilty, a court's refusal to let counsel confer with his client, a biased magistrate, and the like. See *Commonwealth v. Taylor*, 309 A.3d 754, 765 (Pa. 2024) (giving examples of structural error). While Appellant and his *amici* point to *Taylor's* description of the violation of the right to remain silent as being structural in that instance, *Taylor* is materially distinguishable. The error in *Taylor* affected whether the defendant was tried as an adult, or subject to Juvenile Court proceedings, which obviously impacted the whole case from beginning to end.

Finally, to the extent the responsive opinion may be read to suggest the "Sixth Amendment right to counsel of one's choice" protects other rights, Concurring & Dissenting Op. at 2-3, I note Appellant's Sixth Amendment right to counsel had not attached at the relevant time, and hence, that is not the right that was burdened. It was,

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<sup>1</sup> This Court may have other ways of discouraging such misconduct through its supervision of the Pennsylvania Bar's disciplinary apparatus. See *Commonwealth v. Stern*, 701 A.2d 568, 570 (Pa. 1997) (referencing this Court's exclusive authority to regulate the conduct of attorneys as embodied in Article V, Section 10 of our organic law).

<sup>2</sup> The Court in *Weaver v. Massachusetts*, 582 U.S. 286 (2017), also acknowledged that sometimes an error is classified as structural because its harm is so hard to measure that it would be wasteful of resources to allow the government to even try. See *id.* at 295-96; see also *id.* at 295 (indicating an error may occasionally be deemed structural where the burdened right is meant to protect some interest not directly connected to protecting the defendant from an erroneous conviction, such as self-determination).

rather, Appellant's due process right to a fair trial that was impacted by the prosecutor's errant remark. See Majority Op. at 27; see also *id.* at 40 & n.16 (observing, as well, that Appellant agrees his Sixth Amendment right to counsel was not violated); accord *State v. Angel T.*, 973 A.2d 1207, 1218-21 (Conn. 2009). The error in the instant case strikes me as the counterpart to that identified in *Molina*, where we found that a district attorney's comment which burdened the defendant's constitutional right to remain silent in the pre-arrest timeframe was subject to harmless-error review. See *Molina*, 104 A.3d at 453 (majority in relevant part).

Accordingly, I join the majority opinion.

Justice Brobson joins this concurring opinion.