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United States Court of Appeals
Tenth Circuit

May 19, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRADLEY ROSS FAIRBOURN,

Petitioner - Appellant,

v.

NEICOLE MORDEN, Warden of the Wyoming State Penitentiary; WYOMING ATTORNEY GENERAL,

Respondents - Appellees.

No. 22-8005
(D.C. No. 0:21-CV-00166-KHR)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **HARTZ**, **McHUGH**, and **CARSON**, Circuit Judges.

Bradley Ross Fairbourn, a Wyoming state prisoner, is serving two life sentences following convictions for murder in the first degree and attempted murder in the first degree. In a direct appeal after a Wyoming Rule of Appellate Procedure 21 motion and hearing, Mr. Fairbourn contended he received ineffective assistance of counsel because his counsel, Valerie Schoneberger, failed to strike a juror who had a prior attorney-client relationship with the prosecutor, Daniel Erramouspe. The

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

Wyoming Supreme Court applied the traditional two-prong standard from *Strickland v. Washington*, 466 U.S. 668 (1984), concluded Mr. Fairbourn had not demonstrated prejudice from any deficient performance by Ms. Schoneberger given the overwhelming evidence establishing Mr. Fairbourn's guilt, and thus affirmed his convictions. Through a petition pursuant to 28 U.S.C. § 2254, Mr. Fairbourn contends the Wyoming Supreme Court reached a decision contrary to clearly established federal law by requiring him to demonstrate prejudice rather than treating the alleged deficient performance by counsel as a structural error. In support of this argument, Mr. Fairbourn relies on *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). The district court rejected Mr. Fairbourn's argument that *Weaver* required the Wyoming Supreme Court to treat his claim as one asserting structural error capable of bypassing *Strickland*'s prejudice requirement, but it granted a certificate of appealability ("COA") on the issue.

We agree with the district court's analysis and, therefore, affirm its denial of relief. In *Weaver*, the Court considered whether an ineffective assistance of counsel claim regarding counsel's failure to object to a state trial court's closure of a courtroom should be reviewed under the typical two-prong *Strickland* analysis. It held that the *Strickland* test applies even where the error underlying counsel's deficient performance is structural. Accordingly, Mr. Fairbourn has not satisfied the lofty standard for relief established by § 2254(d)(1).

I. BACKGROUND

We start by setting forth the facts of Mr. Fairbourn's offense conduct. Then we review the state court proceedings. Finally, we discuss the proceedings in federal court on Mr. Fairbourn's § 2254 petition.

A. Offense Conduct

Mr. Fairbourn does not contend the Wyoming Supreme Court made any "unreasonable determination[s] of the facts in light of the evidence" when deciding his appeal. 28 U.S.C. § 2254(d)(2). Accordingly, because Mr. Fairbourn's case appears before us on a § 2254 petition, we accept the facts of his offense conduct as summarized by the Wyoming Supreme Court. *See* 28 U.S.C. § 2254(e)(1).

On a June night in 2016, Mr. Fairbourn traveled from Denver toward his home in Utah. After stopping at a motel in Rawlins, Wyoming, Mr. Fairbourn saw an advertisement online for a "'2 girls' special" further west in Rock Springs, Wyoming. ROA at 108. Mr. Fairbourn contacted the number listed in the online posting and arranged a meeting, arriving in Rock Springs a little after 1 a.m. Mr. Fairbourn went to the motel room occupied by the two women—Naisha Story and Natalia Arce—, met them, and said he would be back with some money. Rather than returning with money, Mr. Fairbourn returned with a knife. Upon reentering the room, Mr. Fairbourn stabbed both women. While Ms. Arce was able to escape the hotel room and call her boyfriend—Christopher Crayton—for help, the wounds Mr. Fairbourn inflicted on Ms. Story proved fatal.

In response to Ms. Arce's call, Mr. Crayton drove to the scene, spotted Mr. Fairbourn, accosted Mr. Fairbourn, beat Mr. Fairbourn, and detained Mr. Fairbourn until police arrived. Police transported Mr. Fairbourn to the hospital and collected evidence from his person. The evidence included Mr. Fairbourn's blood-stained clothing and a cell phone belonging to Ms. Story, recovered from Mr. Fairbourn's jeans pocket. Police also recovered a bloody knife and a scabbard from a nearby roof. Video surveillance showed Mr. Fairbourn walking up to the building shortly after the stabbings. DNA testing revealed blood from both victims on the blade of the knife and blood from Ms. Arce and from Mr. Fairbourn on the handle of the knife.

B. State Court Proceedings

The State of Wyoming charged Mr. Fairbourn with one count of murder in the first degree and one count of attempted murder in the first degree. A jury trial commenced. During voir dire, the prosecutor, Mr. Erramouspe, asked the prospective jurors if any of them knew him. Of the thirty-four prospective jurors, at least ten knew Mr. Erramouspe. One of those jurors was John Hartley, who Mr. Erramouspe had represented in a criminal case "years and years ago." *Id.* at 168. Mr. Erramouspe asked Mr. Hartley if the prior relationship was "going to have any impact on [his] decisions in [Mr. Fairbourn's] case," to which Mr. Hartley responded "No." *Id.* After Mr. Erramouspe passed the jury panel, Ms. Schoneberger did not pose any questions to Mr. Hartley about his relationship with Mr. Erramouspe. Ms. Schoneberger did, however, ask several of the other prospective jurors who knew Mr. Erramouspe about

their potential biases in viewing the evidence. In doing so, Ms. Schoneberger succeeded in challenging several jurors for cause and identified several other jurors on whom she ultimately used peremptory challenges. Mr. Hartley was empaneled as a juror.

A six-day trial ensued. The jury heard testimony from several hotel guests, Ms. Arce, Mr. Crayton, and several law enforcement members who investigated the case. The jury also heard a recording of a jailhouse phone call between Mr. Fairbourn and a relative, on which Mr. Fairbourn admitted to meeting the women and stated details of the evening that contradicted his initial story to police. The jury further heard extensive testimony regarding the DNA evidence collected by authorities on the night of the stabbings and how the DNA recovered from the knife handle matched both Mr. Fairbourn and Ms. Arce. In defense of the charges, Mr. Fairbourn contended that while he met the women, he did not return to their room after the initial interaction and someone else must have come and stabbed them while he was outside in the parking lot. Mr. Fairbourn had no explanation for how he had come into possession of Ms. Story's cellphone.

The jury convicted Mr. Fairbourn of both charges. The trial court sentenced Mr. Fairbourn to two life terms without the possibility of parole. Mr. Fairbourn appealed.

During the pendency of his appeal, Mr. Fairbourn filed a Wyoming Rule of Appellate Procedure 21 motion for a new trial based on ineffective assistance of trial counsel. In support of the motion, Mr. Fairbourn argued, in part, that "counsel failed

to question or strike a juror [, Mr. Hartley, who] had been represented by one of the prosecuting attorneys twenty years earlier." *Id* at 124. The trial court held a hearing on Mr. Fairbourn's Rule 21 motion, at which Mr. Hartley and Ms. Schoneberger, among others, testified.

Rule 21 counsel for Mr. Fairbourn questioned Mr. Hartley about his attorney-client relationship with Mr. Erramouspe. Mr. Hartley could not recall how he had selected Mr. Erramouspe as his attorney other than that 'Erramouspe' was a well-known family name in Rock Springs. Mr. Hartley also could not recall where Mr. Erramouspe's law office was or if he ever met him there. Mr. Hartley, however, did reveal that his criminal case involved an underage drinking charge and that he believed he was happy with Mr. Erramouspe's representation in the case, as he had paid a fine and did not receive any jail time. Mr. Hartley, although contending it was not the job of jurors to "evaluate the lawyers," admitted it was fair to say that where a juror has "a prior attorney-client relationship with the lead prosecuting attorney, you have some built-in trust already of Mr. Erramouspe." *Id.* at 1642. Nonetheless, Mr. Hartley indicated no reservations about having served on the jury or his ability to be impartial. Finally, during cross-examination, the State suggested Mr. Erramouspe had represented Mr. Hartley in two cases. *See id.* at 1647 ("Q. Would it surprise you

to know that [Mr. Erramouspe] actually represented you on two cases? A. It would surprise me. That does surprise me.").[1]

Ms. Schoneberger also testified at the Rule 21 hearing. In response to a question from Mr. Fairbourn's Rule 21 counsel about why she did not ask Mr. Hartley any questions regarding his attorney-client relationship with Mr. Erramouspe, she responded: "I was satisfied based on my observations of him and his answers that he didn't feel any prejudice, that he would be fair and impartial. I felt like he was credible in that regard, and I didn't see a need to delve further into that." *Id.* at 1667. Ms. Schoneberger later added that "[i]n Mr. Hartley's case, I felt from his demeanor and all the questioning that he was being very forthcoming, not just about this issue. I think he was forthcoming about other things, and so we were satisfied with him and his answers at that point."[2] *Id.* at 1668. Ms. Schoneberger also represented that in her work as an appellate attorney on contract for the public defender's office, it was not "uncommon for members of the jury panel to have been represented by one of the attorneys," especially in "small jurisdictions." *Id.* at 1670. Ms. Schoneberger further indicated she focused her attention during voir dire on the

[1] As Mr. Hartley could not recall the second case, there was speculation about whether the two cases were tried or pleaded at the same time or whether they occurred at separate times, such that Mr. Hartley had retained Mr. Erramouspe on a second occasion after satisfaction with his first representation.

[2] On cross-examination, Ms. Schoneberger elaborated that "I think he seemed fine. The process of jury selection is not so much selecting the ones you want or a good jury. It's mostly deselecting the really bad ones, so he seemed to us to be fair and open-minded and willing to speak and participate. He was adequate." ROA at 1739.

potential jurors that she, her co-counsel, and Mr. Fairbourn thought were most problematic and harbored prejudice.

In a written order, the trial court denied Mr. Fairbourn's Rule 21 motion. The trial court found Mr. Hartley was "both thoughtful and honest," and took the duty of jury service seriously. *Id.* at 1918. It also noted that Mr. Hartley had limited memory of his attorney-client relationship with Mr. Erramouspe. As a result, the trial court concluded Mr. Fairbourn failed to demonstrate that Mr. Hartley should have been struck for cause or that he harbored actual bias or prejudice. The trial court also rejected the proposition that implied bias could be attributed to Mr. Hartley.

Mr. Fairbourn appealed the trial court's adverse ruling on his Rule 21 motion, and the Wyoming Supreme Court consolidated the appeal with his direct appeal. The Wyoming Supreme Court affirmed both the denial of Mr. Fairbourn's Rule 21 motion and his convictions. The Wyoming Supreme Court understood Mr. Fairbourn to argue that his counsel was ineffective for "fail[ing] to strike a prospective juror [, Mr. Hartley], who later became the jury foreman." *Id.* at 124. And, as part of this argument, the Wyoming Supreme Court recognized that Mr. Fairbourn had argued for application of "a presumption of bias" by Mr. Hartley based on his prior attorney-client relationship with Mr. Erramouspe. *Id.* at 124–25.

The Wyoming Supreme Court declined to apply such a presumption, instead applying the traditional prejudice requirement for ineffective assistance claims that requires a defendant to demonstrate that "a reasonable probability exists that he would have enjoyed a more favorable verdict." *Id.* at 123 (quoting *Mills v. State*, 458

P.3d 1, 9 (Wyo. 2020)). The Wyoming Supreme Court concluded Mr. Fairbourn had not made this showing. In support of this conclusion, the Wyoming Supreme Court stated:

> Assuming, without deciding, that all Mr. Fairbourn's claims demonstrate defense counsel's substandard representation, his arguments cannot overcome the overwhelming evidence of his guilt:
>
> - Text messages between Mr. Fairbourn and Ms. Arce beginning at 9:54 p.m. and continuing until Mr. Fairbourn received the room number at 1:04 a.m.
> - Traveling from Rawlins to Rock Springs without funds to pay for expected services.
> - Ms. Arce's eyewitness testimony that Mr. Fairbourn was the person who stabbed her and Ms. Story.
> - Video placing Mr. Fairbourn next to the building where the knife was found.
> - Mr. Fairbourn's evolving fabrications in statements to law enforcement and others.
> - Ms. Story's cell phone in Mr. Fairbourn's pocket.
> - Ms. Story's blood and DNA found on Mr. Fairbourn's pants which were "stained throughout."
> - Mr. Fairbourn's DNA on the handle of the knife.
> - Ms. Story's and Ms. Arce's DNA on the knife blade.
>
> Although defense counsel posed alternative explanations—transference of the DNA and the possibility of an unknown assailant—these required the jury to ignore the physical and testimonial evidence presented at trial. The text messages traced Mr. Fairbourn's movements prior to the crime; the JFC Engineers & Surveyors video placed Mr. Fairbourn at the location where the knife was discovered; the DNA evidence and Ms. Story's cell phone connected him to the victims; and the surviving victim identified him as the assailant. There is no reasonable probability that a jury would have reached a more favorable conclusion.

Id. at 129 (footnote and paragraph numbers omitted). Because Mr. Fairbourn did not pursue a state post-conviction motion, the Wyoming Supreme Court's decision on direct appeal concluded state court proceedings.

C. Federal Court § 2254 Proceedings

Mr. Fairbourn filed a § 2254 petition raising claims of ineffective assistance of counsel, including that counsel failed to preserve Mr. Fairbourn's right to an impartial jury by not striking Mr. Hartley due to his prior attorney-client relationship with Mr. Erramouspe. As part of this claim, Mr. Fairbourn contended the Wyoming Supreme Court contravened federal law by holding him to the second prong of *Strickland*, rather than treating the error underlying the ineffective assistance claim as a structural error that necessitated a presumption of implied juror bias and entitled Mr. Fairbourn to a new trial.

The district court granted the State's motion for summary judgment and denied § 2254 relief.[3] The district court concluded Mr. Fairbourn failed to identify a Supreme Court decision establishing that a defendant need not show prejudice under *Strickland* when contending counsel rendered ineffective assistance by not striking a juror. Thus, the district court held the Wyoming Supreme Court's rejection of Mr. Fairbourn's ineffective assistance of counsel claim on this ground was not contrary to clearly established federal law.

[3] A magistrate judge ruled on Mr. Fairbourn's § 2254 petition after Mr. Fairbourn consented to such.

The district court's order granting the State's motion for summary judgment and denying Mr. Fairbourn's § 2254 petition neither granted nor denied a COA. In a subsequent order, the district court granted a COA on two issues: (1) "whether the *Strickland* actual-prejudice standard applies to a structural error rendering a trial fundamentally unfair"; and (2) if Mr. Fairbourn prevailed on the first issue, "whether de novo review applies to [his] argument that [Mr. Hartley] was impliedly biased."[4] Supp. Preliminary Record at 17–18. This appeal followed.

II. DISCUSSION

A. § 2254 Deference Standard & Standard of Review

A federal court reviews a § 2254 petition from a state prisoner under the standards established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Hanson v. Sherrod*, 797 F.3d 810, 824 (10th Cir. 2015). "[U]nder AEDPA, when a state court has considered a claim on the merits, this court may grant a habeas petition only if the decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

[4] Mr. Fairbourn's § 2254 petition alleged other instances of ineffective assistance of counsel and, in the district court, he also sought a COA on the issue of "[w]hether, under *United States v. Cronic*, 466 U.S. 648 (1984), a presumption of prejudice should apply in this case given the alleged attorney errors [he] identified in his habeas corpus petition." Supp. Preliminary Record at 14. The district court denied a COA on this issue. Although Mr. Fairbourn briefed the *Cronic* issue in his opening brief on appeal, he did not file a motion asking us to expand the COA and he conceded at oral argument that the *Cronic* issue was not properly before us. Oral Argument at 9:30–10:08. Accordingly, we do not address the issue. *See Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003) (absent grant of a COA, appellate court lacks jurisdiction to review denial of relief by district court on an issue raised in a § 2254 petition).

Supreme Court of the United States.'" *Id.* (quoting 28 U.S.C. § 2254(d)(1)). "The AEDPA standard is highly deferential and requires that we give state-court decisions the benefit of the doubt." *Id.* (internal quotation marks and ellipsis omitted). A state court decision is contrary to clearly established federal law if (1) "'the state court applies a rule that contradicts the governing law set forth in Supreme Court cases'" or (2) "'the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from' the result reached by the Supreme Court." *Bland v. Sirmons*, 459 F.3d 999, 1009 (10th Cir. 2006) (brackets omitted) (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). In analyzing a § 2254 petition asserting a state court decision was contrary to clearly established federal law, we "focus[] *exclusively* on Supreme Court decisions." *Hanson*, 797 F.3d at 824 (emphasis added); *see also* 28 U.S.C. § 2254(d)(1).

Finally, in conducting this review "[w]e presume the factual findings of the state court are correct unless the petitioner rebuts that presumption by 'clear and convincing evidence,'" *Welch v. Workman*, 639 F.3d 980, 991 (10th Cir. 2011) (quoting 28 U.S.C. § 2254(e)(1)), which Mr. Fairbourn has not attempted to do. And "[w]e review the district court's legal analysis of the state court decision *de novo*." *Bland*, 459 F.3d at 1009.

B. Applicability of Strickland

"An ineffectiveness claim . . . is an attack on the fundamental fairness of the proceeding whose result is challenged." *Strickland*, 466 U.S. at 697. "[E]rrors that

undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the federal writ." *Williams*, 529 U.S. at 375; *see also Strickland*, 466 U.S. at 697 (describing "fundamental fairness" as a "central concern of the writ of habeas corpus").

The familiar two-prong standard from *Strickland* typically governs ineffective assistance of counsel claims. Under that standard, a defendant "must show that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced thereby." *United States v. Holder*, 410 F.3d 651, 654 (10th Cir. 2005) (citing *Strickland*, 466 U.S. at 688–89). Regarding the second prong of *Strickland*, "to show that the outcome of his trial was prejudiced by counsel's error, the defendant must show that those 'errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Hanson*, 797 F.3d at 826 (quoting *Strickland*, 466 U.S. at 687). Put another way, the prejudice prong of *Strickland* requires a defendant to demonstrate there was a "reasonable probability" of a more favorable outcome absent counsel's deficient performance. *Holder*, 410 F.3d at 654.

The Wyoming Supreme Court applied *Strickland* to Mr. Fairbourn's claim that counsel rendered ineffective assistance by not striking Mr. Hartley and concluded Mr. Fairbourn could not satisfy the prejudice prong of *Strickland* given the overwhelming evidence of his guilt. Through his § 2254 petition, Mr. Fairbourn does not challenge the Wyoming Supreme Court's analysis on the prejudice prong of *Strickland*. Rather, Mr. Fairbourn contends that because the issue underlying his ineffective assistance of counsel argument involved the right to a fair and impartial

jury and would have been a structural issue had trial counsel raised it in the first instance, the prejudice prong of *Strickland* either does not apply or the Wyoming Supreme Court should have presumed prejudice based on Mr. Hartley's implied bias from his prior attorney-client relationship with Mr. Erramouspe. And, in an attempt to demonstrate the Wyoming Supreme Court acted "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), Mr. Fairbourn relies upon *Weaver v. Massachusetts*.[5] We are unconvinced that *Weaver* prevented the Wyoming Supreme Court from applying a traditional *Strickland* prejudice prong analysis to Mr. Fairbourn's ineffective assistance claim.

In *Weaver*, a state defendant pursed a direct appeal raising a claim of ineffective assistance of counsel based on counsel's failure to object to the trial

[5] Mr. Fairbourn also relies upon *Gray v. Mississippi*, 481 U.S. 648 (1987), and *Irvin v. Dowd*, 366 U.S. 717 (1961). Both of these cases stand for the proposition that a defendant has a right to an impartial jury and that violation of that right requires reversal and retrial without a showing of prejudice. *See Gray*, 481 U.S. at 668 ("We have recognized that 'some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error.' The right to an impartial adjudicator, be it judge or jury, is such a right." (brackets omitted) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967))); *Irvin*, 366 U.S. at 722 ("'A fair trial in a fair tribunal is a basic requirement of due process.' . . . [A] juror must be as 'indifferent as he stands unsworne.' . . . 'The theory of the law is that a juror who has formed an opinion cannot be impartial.'" (first quoting *In re Murchison*, 349 U.S. 133, 136 (1955), then quoting E. Coke, A Commentary upon Littleton 155B (19th ed. 1832), then quoting *Reynolds v. United States*, 98 U.S. 145, 155 (1878))). However, both cases featured preserved challenges to the impartiality of the jury rather a challenge to the impartiality of the jury brought through a claim of ineffective assistance of counsel. Accordingly, for purposes of the demanding standard announced by § 2254(d)(1), *Gray* and *Irvin* are incapable of demonstrating the Wyoming Supreme Court acted contrary to federal law clearly established by the Supreme Court.

court's closure of the courtroom during jury selection. 137 S. Ct. at 1905. The Supreme Court grappled with the conflict between a properly preserved objection to closure of the courtroom, which is a structural error that does not require a showing of prejudice, and an ineffective assistance of counsel claim that typically requires a showing of prejudice. *Id.* at 1907.

As a starting point for this analysis, *Weaver* discussed the concept of structural error and how three types of errors are "not amenable" to a typical prejudice analysis. *Id.* at 1908. Those types of errors are (1) an error where "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," (2) an error where the "effects . . . are simply too hard to measure," and (3) an error that "always results in fundamental unfairness." *Id.* The Court further acknowledged that the three types of errors "are not rigid" and "more than one of these rationales may be part of the explanation for why an error is deemed to be structural." *Id.* And the Court recognized that "[a]n error can count as structural even if the error does not lead to fundamental unfairness in every case," meaning that some defendants experiencing a structural error in their proceeding could not demonstrate prejudice. *Id*.

Weaver then acknowledged the well-established conclusion that infringement of the right to a public trial is a structural error. *Id.* at 1910 (citing *Press-Enter. Co. v. Superior Ct. of Cal.*, 464 U.S. 501, 508–10 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980)). Thus, had Mr. Weaver preserved his challenge to the closure of the courtroom and raised it on direct appeal, he generally

would have been entitled to a new trial without showing prejudice. *See id.* ("[I]n the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" (quoting *Neder v. United States*, 527 U.S. 1, 7 (1999))).

Zeroing in on the differing interests underlying correction of a preserved structural error versus a structural error raised through the lens of ineffective assistance of counsel, the Court stated:

> [W]hen state or federal courts adjudicate errors objected to during trial and then raised on direct review, the systemic costs of remedying the error are diminished to some extent. That is because, if a new trial is ordered on direct review, there may be a reasonable chance that not too much time will have elapsed for witness memories still to be accurate and physical evidence not to be lost. There are also advantages of direct judicial supervision. Reviewing courts, in the regular course of the appellate process, can give instruction to the trial courts in a familiar context that allows for elaboration of the relevant principles based on review of an adequate record. For instance, in this case, the factors and circumstances that might justify a temporary closure are best considered in the regular appellate process and not in the context of a later proceeding, with its added time delays.
>
> When an ineffective-assistance-of-counsel claim is raised in postconviction proceedings, the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases. The finality interest is more at risk[.]

Id. at 1912. Thus, the Court *held* that "[t]hese differences justify *a different standard* for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel."[6] *Id.* (emphasis

[6] In its summation, the Court likewise stated:

added). The Supreme Court then subjected Mr. Weaver's claim of error to the traditional *Strickland* prejudice requirement, concluding he had not demonstrated that counsel's error resulted in a "fundamentally unfair" trial or that there was "a reasonable probability of a different outcome but for counsel's failure to object." *Id.* at 1913.

Because *Weaver*, the case upon which Mr. Fairbourn relies to satisfy the § 2254(d)(1) standard, applied *Strickland*'s prejudice prong rather than relying on the structural nature of the underlying error to presume prejudice, *Weaver* supports the approach taken by the Wyoming Supreme Court rather than demonstrating that the Wyoming Supreme Court acted "contrary to" federal law clearly established by the Supreme Court.[7] *See Meadows v. Lind*, 996 F.3d 1067, 1081 (10th Cir. 2021) ("[T]he

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> In the criminal justice system, the constant, indeed unending, duty of the judiciary is to seek and to find the proper balance between the necessity for fair and just trials and the importance of finality of judgments. When a structural error is preserved and raised on direct review, the balance is in the defendant's favor, and a new trial generally will be granted as a matter of right. When a structural error is raised in the context of an ineffective-assistance claim, however, finality concerns are far more pronounced. For this reason, and in light of the other circumstances present in this case, petitioner must show prejudice in order to obtain a new trial. As explained above, he has not made the required showing.

Weaver v. Massachusetts, 137 S. Ct. 1899, 1913 (2017).

[7] To be sure, *Weaver* limited its holding to an ineffective assistance of counsel claim with an underlying structural error involving the closure of a courtroom. 137 S. Ct. at 1907. However, that it remains an open question whether the Supreme Court might, in the future, address differently an ineffective assistance of counsel claim

Court in *Weaver* did not require future courts to import the structural error standard into ineffective-assistance cases."). And, because we conclude the Wyoming Supreme Court did not act contrary to federal law as clearly established by the Supreme Court when applying *Strickland*'s prejudice prong to Mr. Fairbourn's ineffective assistance of counsel claim, we need not reach the second question on which the district court granted a COA.

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with an underlying structural error involving jury selection is of no help to Mr. Fairbourn because he needed to demonstrate the Wyoming Supreme Court acted contrary to existing Supreme Court precedent. *See House v. Hatch*, 527 F.3d 1010, 1021–22 (10th Cir. 2008) (where an issue is "'an open question'" there is no "clearly established federal law" and a petitioner cannot satisfy § 2254(d)(1) (quoting *Carey v. Musladin*, 549 U.S. 70, 76 (2006))). Furthermore, to the extent Mr. Fairbourn points us to several sibling circuit court opinions that he contends are favorable to his position, these cases are incapable of satisfying § 2254(d)(1)'s requirement because they are not decisions from the Supreme Court. Finally, Mr. Fairbourn, further relying upon *Weaver*, suggests his trial was rendered fundamentally unfair by trial counsel not objecting to Mr. Hartley's presence on the jury. While *Weaver* "assume[d]" that a fundamental fairness inquiry was part of the *Strickland* analysis in cases involving an underlying structural error such as a "biased judge," it did not hold such or clearly establish any law on this point. 582 U.S. at 300–01. In any event, even if the Wyoming Supreme Court needed to but did not conduct a fundamental fairness analysis, Mr. Fairbourn has not identified a case holding that a trial is rendered fundamentally unfair if a juror, twenty years earlier, had an attorney-client relationship with the prosecutor. And depending on the juror's particular experience with his prior counsel and the nature of the attorney-client relationship, it is not automatically the case that a jury would favor the prosecution based on the two-decade old relationship.

III. CONCLUSION

We AFFIRM the district court's denial of relief on Mr. Fairbourn's § 2254 petition.

Entered for the Court

Carolyn B. McHugh
Circuit Judge