

2016

A New Look at Constitutional Errors in a Criminal Trial Notes

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Tisdale, Gavin R., "A New Look at Constitutional Errors in a Criminal Trial Notes" (2016). *Connecticut Law Review*. 342.

https://opencommons.uconn.edu/law_review/342

CONNECTICUT LAW REVIEW

VOLUME 48

JULY 2016

NUMBER 5

Note

A New Look at Constitutional Errors in a Criminal Trial

GAVIN R. TISDALE

On appeal, an essential question in reviewing a constitutional error in a criminal trial is whether the error was a trial error or a structural error. The Supreme Court's current framework for answering this question has led to widespread confusion and misapplication in both the courts and scholarship. In practice, that question—whether an error was trial error or structural error—can lead to antithetical results: structural error generally results in a new trial for the defendant without any showing of prejudice while trial error only requires the prosecution to prove that the error was harmless beyond a reasonable doubt. Given the contrast between these two results, it is necessary that the framework under which courts evaluate constitutional errors in a criminal trial uphold the purposes of appellate review.

This Note begins with an overview of the current standards of review for constitutional errors in a criminal trial and then details the history of structural error. Then this Note establishes a mode of analysis for evaluating the merits of the current framework, other scholars' suggestions, and this Note's proposal. Finally, this Note introduces a new framework for appellate review of constitutional errors in a criminal trial by removing structural errors as a class and requiring all constitutional errors to undergo harmless-error review. The chasm in scholarly work on structural error, coupled with the implications of the Court's current framework on the chances of a defendant's success on appeal, call for a revived discussion about the merits of Court's current framework. This Note hopes to contribute to that discussion.

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A New Look at Constitutional Errors in a Criminal Trial

GAVIN R. TISDALE*

*“[T]he Constitution entitles a criminal defendant
a fair trial, not a perfect one.”*¹

—Justice Rehnquist

I. INTRODUCTION

During jury selection in a criminal case, a defense attorney moves for a peremptory strike of a juror. Over objection, the judge erroneously denies the attorney’s motion. The jury goes on to convict the defendant, and the defense attorney promptly files an appeal on the grounds of erroneous denial of a peremptory strike. On appeal, one of the first questions the court must ask is whether the error—erroneous denial of a peremptory strike of a juror—is a structural error or a trial error. The defense argues that it is a structural error, which requires a new trial without further analysis. The prosecution, on the other hand, will argue that it was a trial error, that it was harmless, and, thus, no new trial is necessary. How appellate courts determine that initial question—whether an error is a structural error or a trial error—is the focus of this Note.

Twenty-five years ago, the United States Supreme Court attempted to clarify the framework for appellate review of constitutional errors occurring during criminal trials.² In that decision, *Arizona v. Fulminante*, the Court established a bright-line rule for appellate courts to distinguish between two categories of constitutional errors: (1) structural errors and (2) trial errors.³ Unfortunately, a decision that was designed to bring consistency to the lower courts resulted in widespread misapplication in

* University of Connecticut School of Law, J.D. Candidate 2017; Boston College, B.A. 2013. I would like to thank Professor Paul Bader and the members of the *Connecticut Law Review* for their guidance and thoughtful commentary. Tremendous gratitude is due to Natalia Peña for entertaining my senseless ramblings on this topic. Finally, I would like to dedicate this Note to my parents, Tom and Jeanie Tisdale, for inspiring me to pursue my passions.

¹ *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

² *Arizona v. Fulminante*, 499 U.S. 279, 306–10 (1991).

³ *Id.* Structural errors are a small class of constitutional errors that occur in a criminal trial that require automatic reversal without any inquiry into their harmfulness. *Id.* at 309–10. Trial errors are all of the other constitutional errors that occur in a criminal trial, which do not require reversal if the state can prove that the error was harmless beyond a reasonable doubt. *Id.* at 307–08.

the early years and an adverse effect on defendants' rights over the long term.

In the first few years after *Fulminante*, there were dozens of examples of appellate courts applying the *Fulminante* framework in an inconsistent manner and reaching contradictory conclusions.⁴ Even as courts have continued to sort out which errors fall into which category, the practical implications of the framework have forced judges to narrow the scope of constitutional protections in order to uphold factual guilt in the face of possible structural error.⁵ Even though the confusion and the erosion of the basic rationale are at the expense of a criminal defendant's fundamental trial rights, only a handful of authors have suggested a framework to replace *Fulminante*. And those that have tend to focus on preserving the fundamental fairness of the criminal trial while consequently undermining the trial as a vehicle for determining guilt or innocence.

This Note proposes a new framework for appellate review of constitutional error in criminal trials. In Part II, this Note outlines the current standards of appellate review of errors in a criminal trial. Parts III and IV then review two time periods: the era between the Court's decision in *Chapman* and *Fulminante* (1967–1991), and the era since *Fulminante* (1991–present). Part V takes a step back to look at the “Thirty-Thousand Foot View” of the change in appellate review in order to show how the theoretical intent of *Chapman* and *Fulminante* has been compromised in practice.

In Part VI, this Note establishes a common metric to analyze both the existing and proposed frameworks by focusing on the two primary principles of appellate review—accurate fact-finding and fundamental fairness. Secondary considerations—including judicial efficiency, finality, reducing gamesmanship, consistency, and flexibility—are also used to evaluate the strengths and weaknesses of standards of appellate review. In Part VII, this Note then applies the mode of analysis to the current *Fulminante* framework as well as four scholarly proposals.

This Note's proposed framework would eliminate the distinction between structural error and trial error and, instead, analyze all properly preserved constitutional errors under harmless-error review. Courts would still review for plain error, but the defendant would bear the burden of persuasion if there had been a reasonable opportunity to object to the error during trial. Unlike other scholarly suggestions, this framework focuses primarily on the fact-finding principle of appellate review instead of the fundamental fairness principle. Overall, this framework would be more

⁴ See *infra* notes 100–05 and accompanying text (explaining how Professor McCord was able to cite dozens of cases that misapplied the *Fulminante* framework in different ways).

⁵ See *infra* notes 204–10 and accompanying text (explaining how structural error has caused judges to narrow the constitutional protections warding against biased judges and conflicted counsel).

functional in practice, as it provides a clear, consistent framework for all errors but still has sufficient safeguards to protect the fundamental fairness of a criminal trial.

II. STANDARDS OF REVIEW

Under the “contemporaneous objection rule,”⁶ an appellate court will review an error from the trial only if the defendant raised a timely objection during trial.⁷ If a party does not make a timely and specific objection to an error during trial, the error is “forfeited,”⁸ unless an objection could not be made during trial because of a change in the law⁹ or because the error concerned subject matter jurisdiction.¹⁰

But even a forfeited error is reviewed for plain error. Under plain-error review, the defendant must show that (1) an error occurred, (2) the error was obvious, (3) the error affected the defendant’s “substantial rights,” and (4) the error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.”¹¹ An appellate court is likely to find plain error when the error undermined a constitutional right of the defendant, but the court is unlikely to find plain error if the defendant or defense counsel contributed to the error, curative instructions were given, or if there was overwhelming evidence of guilt against the defendant.¹²

If an error *was* properly preserved during trial, appellate courts apply harmless-error analysis, which states that a court will disregard “[a]ny error, defect, irregularity, or variance that does not affect substantial

⁶ *Review Proceedings*, 43 GEO. L.J. ANN. REV. CRIM. PRO. 905, 933 (2014) [hereinafter Annual Review of Criminal Procedure].

⁷ *See* *Puckett v. United States*, 556 U.S. 129, 134 (2009) (explaining that only the plain-error standard of review is used for errors that are not objected to during trial).

⁸ *Id.* When counsel fails to make a timely assertion of a right, he forfeits his client’s right to press the issue on appeal. *Id.* at 134–35. It should be noted that there is a difference between forfeiture and waiver, even though the terms are used interchangeably. The distinction is important because forfeiture allows for plain-error review while waiver usually does not. *United States v. Olano*, 507 U.S. 725, 733 (1993) (internal citations omitted). This distinction confuses scholars, attorneys, and judges—even Supreme Court Justices—alike. *See* *Freytag v. Comm’r*, 501 U.S. 868, 894 n.2 (1990) (Scalia, J., concurring) (“The Court [in Justice Blackmun’s majority opinion] uses the term ‘waive’ instead of ‘forfeit.’ The two are really not the same, although our cases have so often used them interchangeably that it may be too late to introduce precision. . . .”).

⁹ *Hamling v. United States*, 418 U.S. 87, 102 (1974) (explaining that a claim is not precluded under the contemporaneous objection rule because of a change in law between the trial and the appeal) (internal citations omitted).

¹⁰ *United States v. Cotton*, 535 U.S. 625, 630 (2002) (explaining that a subject matter jurisdiction objection was preserved even though it was not raised on appeal).

¹¹ *Olano*, 507 U.S. at 732 (internal quotations omitted); *see also* FED. R. EVID. 103 (“A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and . . . a party on the record: (a) timely objects or moves to strike; and (b) states the specific ground, unless it was apparent from the context . . .”).

¹² Annual Review of Criminal Procedure, *supra* note 6, at 948–53.

rights. . . .”¹³ The Supreme Court has designated different standards of harmlessness for constitutional errors and non-constitutional errors.¹⁴ A non-constitutional error is harmless if the court concludes that “the judgment was not substantially swayed by the error.”¹⁵ But if the error is a *constitutional* error, the court must then distinguish between structural error and trial error.¹⁶ A constitutional trial error requires a new trial only if the state¹⁷ can prove beyond a reasonable doubt that the error did not contribute to the verdict.¹⁸ Structural error, on the other hand, always requires a new trial.¹⁹

There is some confusion about if and when structural errors can be forfeited, and the United States Supreme Court has sent mixed signals. In 1986, the Court stated that Article III structural errors cannot be waived or forfeited.²⁰ Seven years later, the Court refused to address whether structural errors could be forfeited because the case at hand could be decided on narrower grounds.²¹ In 1997, the Court confounded things again by stating, in dicta, that “the seriousness of the error claimed does not remove consideration of it from the ambit of the [plain-error review].”²² In 2010, the Court reserved the question of what effect structural error may have on the third prong of *Olano*, which presupposes that structural error is subject to forfeiture,²³ though the answer is unclear. Further, it can be argued that removing an entire type of error from review under Rule 52(b) would conflict with the rule that the courts do not have

¹³ FED. R. CRIM. P. 52(a).

¹⁴ Annual Review of Criminal Procedure, *supra* note 6, at 958.

¹⁵ *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

¹⁶ *Arizona v. Fulminante*, 499 U.S. 279, 308–10 (1991). Non-constitutional errors go through no such categorization. Parts III and IV, *infra*, go into great detail about how the courts have attempted to distinguish between structural error and trial error.

¹⁷ The Supreme Court used the term the “beneficiary of a constitutional error,” *Chapman v. California*, 386 U.S. 18, 24 (1967), but the beneficiary is almost certainly the government in criminal cases because the constitutional protection attaches to the defendant. *See, e.g.*, U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to”)

¹⁸ *Chapman*, 386 U.S. 18, 24 (1967).

¹⁹ *Fulminante*, 499 U.S. at 308–10.

²⁰ *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850–51 (1986) (“To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by [United States Constitution] Article III, § 2. . . .”).

²¹ *United States v. Olano*, 507 U.S. 725, 735 (1993) (stating that, “[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed”). It is possible to read these case together for the conclusion that like other errors such as subject matter jurisdiction, Article III errors can never be forfeited.

²² *Johnson v. United States*, 520 U.S. 461, 466 (1997).

²³ *See United States v. Marcus*, 560 U.S. 258, 263 (2010) (explaining that the Court has “noted the possibility that certain errors, termed “structural errors,” might “affect substantial rights” [from the plain-error analysis] regardless of their actual impact on an appellant’s trial”).

“the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure.”²⁴ Nevertheless, scholars have mixed views as to whether the Court has definitively ruled on whether structural error can be forfeited.²⁵

Likewise, lower courts are in disagreement about the effect of forfeiture on structural error. Two judges on the United States Court of Appeals for the District of Columbia Circuit recently addressed this issue in depth in *Al Bahlul v. United States*.²⁶ Judge Tatel argued in his concurring opinion that the United States Supreme Court’s comment in *Commodity Futures Trading Commission v. Schor*²⁷—that Article III structural claims cannot be waived or forfeited—is controlling.²⁸ But *Schor* was decided before the Supreme Court defined structural error as a term of art in *Fulminante*.²⁹ In Judge Henderson’s dissenting opinion, she argued that the United States Supreme Court had decided this issue in *Johnson*³⁰ and has actively noted that plain-error applies to “‘all’ forfeited arguments in a criminal case.”³¹ According to Judge Henderson, the First and Fifth Circuits concur with her reasoning.³² The United States Courts of Appeals for the Seventh, Ninth, and Tenth Circuits have also held that other

²⁴ *Carlisle v. United States*, 517 U.S. 416, 426 (1996).

²⁵ Compare Michael H. Graham, *Rule 103(a): Reversible, Harmless and Structural Error; an Overview*, in 2 HANDBOOK OF FED. EVID. § 103:1 (7th ed.) (“A structural error requires automatic reversal regardless of whether or not the error can be shown to have affected a substantial right and regardless of whether the error was properly preserved below; structural errors are not subject to either harmless error or plain error analysis. . . .”) with David McCord, *The “Trial”/“Structural” Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401, 1406 (1997) (explaining structural-error and harmless-error analyses without reference to forfeiture) and generally Steven M. Shepard, Note, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180 (2008) (same).

²⁶ 792 F.3d 1 (D.C. Cir. 2015).

²⁷ 478 U.S. 833, 850–51 (1986) (“To the extent that [a] structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty. . . .”).

²⁸ *Al Bahlul*, 729 F.3d. at 23 (Tatel, J., concurring).

²⁹ Compare *Schor*, 478 U.S. at 833 (decided in 1986) with *Arizona v. Fulminante*, 499 U.S. 279 (1991).

³⁰ *Johnson v. United States*, 520 U.S. 461, 466 (1997) (“[T]he seriousness of the error claimed does not remove consideration of it from the ambit of the [plain-error review].”); see *supra* note 22 and accompanying text.

³¹ *Al Bahlul*, 792 F.3d at 30 (“Such a breach is undoubtedly a violation of the defendant’s rights, but the defendant has the opportunity to seek vindication of those rights in district court; if he fails to do so, rule 52(b) as clearly sets forth the consequences for that forfeiture as it does for all others.” (internal quotations and citations omitted) (emphasis added) (Henderson, J., dissenting) (quoting *Puckett v. United States*, 556 U.S. 129, 136 (2009)).

³² See *id.* (referring to *United States v. Delgado*, 672 F.3d 320, 331 (5th Cir. 2012) (“[W]e are bound by the Supreme Court’s plain-error cases, which we do not read as allowing for any exceptions to the application of the plain-error test for forfeited claims.”) and *United States v. Padilla*, 415 F.3d 211, 220 (1st Cir. 2005) (explaining that the Court in *Johnson* held that “forfeited errors, even if structural, are subject to the imperatives of Rule 52(b)”).

structural errors are subject to forfeiture.³³ But the United States Courts of Appeals for the Third and Sixth Circuits have held that structural errors cannot be forfeited,³⁴ while the United States Court of Appeals for the Second Circuit has reserved judgment on the issue.³⁵ *Al Bahlul*, the circuit cases cited in Judge Henderson's dissenting opinion, and the cases from the Seventh, Ninth, and Tenth Circuits can be read together for the proposition that Article III structural claims cannot be forfeited while other structural errors still can be forfeited, but the extent of forfeiture on structural error remains uncertain, especially in light of the decisions in the Third and Sixth Circuits.

The focus of this Note is how the courts should evaluate properly preserved constitutional error. Currently, courts must define a properly preserved constitutional error as either a structural or trial error.³⁶ This Note proposes a new solution to that dichotomy. As such, this Note will evaluate only federal criminal cases and is limited to constitutional errors. Issues regarding plain error and non-constitutional error are addressed only inasmuch as they affect the structural error framework.

III. CHAPMAN TO FULMINANTE

Prior to 1967, all properly preserved constitutional errors were grounds for automatic reversal.³⁷ But in *Chapman v. California*, the United States Supreme Court announced that “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was

³³ See *United States v. Yamashiro*, 788 F.3d 1231, 1236 (9th Cir. 2015) (applying plain-error review to the denial of counsel during the allocution phase of the defendants proceeding, a structural error, but finding that structural error automatically satisfies the third prong of the *Olano* plain-error test); *United States v. Turrietta*, 696 F.3d 972, 976 n.9 (10th Cir. 2012) (“[The Defendant’s] claim of ‘structural’ error has little bearing on the application of the plain error test. Rule 52(b) does not permit exceptions based on the gravity of the asserted error.”); *United States v. Folks*, 236 F.3d 384, 390 (7th Cir. 2001) (explaining that failing to object to an improper amendment to an indictment, though a structural error, is subject to plain-error review).

³⁴ See *Railey v. Webb*, 540 F.3d 393, 399 (6th Cir. 2008) (“[I]t is beyond dispute that judicial bias is structural error, not susceptible to forfeiture (or harmless error analysis).”); *United States v. Adams*, 252 F.3d 276, 285–86 (3d Cir. 2001) (“[A] fair reading of *Olano* dictates that when a defendant fails to object to a[n] [error], his claim on appeal is reviewed for plain error. . . unless he can show. . . that the error belongs in a special category of errors that should be corrected regardless of prejudice (*i.e.* the category of structural errors).”).

³⁵ See *United States v. Cain*, 671 F.3d 271, 292 (2d Cir. 2012) (explaining that “[w]e need not resolve whether a structural error may be forfeited, a question that remains open in this Circuit and in the Supreme Court. . . .”) (referencing *Puckett v. United States*, 556 U.S. 129 (2009)). This decision, of course, runs counter to the idea that the Supreme Court resolved the issue, albeit in dicta, in *Marcus*. See *supra* note 23 and accompanying text.

³⁶ See *supra* note 18 and accompanying text (explaining how *Fulminante* created a bright-line rule for properly preserved constitutional error).

³⁷ *Chapman v. California*, 386 U.S. 18, 20 (1967).

harmless beyond a reasonable doubt,³⁸ but the state generally bears the burden of persuasion.³⁹ In that case, the Court found that the state failed to meet its burden to show that the error—comments by the judge and prosecutor referring to the defendant’s decision not to testify as evidence of guilt—did not contribute to the defendant’s conviction,⁴⁰ and the case was subsequently reversed and remanded for a new trial “free from the pressure of unconstitutional inferences.”⁴¹

Chapman is fundamental to understanding appellate review for two reasons. First, it extended the harmless-error test to constitutional errors, which meant that even constitutional errors could be harmless.⁴² Second, in a footnote, the Court identified three examples of constitutional error that could *never* be harmless:⁴³ admitting into evidence a coerced confession in violation of the defendant’s Due Process rights under the Fourteenth Amendment,⁴⁴ the denial of the right to the assistance of legal counsel in violation of the defendant’s Sixth Amendment right,⁴⁵ and a partial judge overseeing a trial in violation of the defendant’s Due Process rights under the Fourteenth Amendment.⁴⁶ With these three examples, courts began finding other errors that required automatic reversal.⁴⁷

A. *Post-Chapman Automatic Reversal*

Several authors and sources have attempted to identify those constitutional errors that the Supreme Court has held or identified as

³⁸ *Id.* at 24.

³⁹ *Id.* (citing 1 WIGMORE, EVIDENCE § 21 (3d ed. 1940)). The Court stated that it is “the burden of the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.” *Id.* Because the constitutional protections primarily attach to the defendant, the state is almost always the beneficiary of the error. *See supra* note 17.

⁴⁰ *Chapman*, 386 U.S. at 20.

⁴¹ *Id.* at 26.

⁴² *Id.* at 24.

⁴³ *Id.* at 23 n.8 (internal citations omitted).

⁴⁴ *See Payne v. Arkansas*, 356 U.S. 560, 567 (1958) (“It seems obvious from the *totality* of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an ‘expression of free choice,’ that its use before the jury, over the petitioner’s objection, deprived him of ‘that fundamental fairness essential to the very concept of justice,’ and, hence, denied him due process of law, guaranteed by the Fourteenth Amendment.” (internal citations omitted)).

⁴⁵ *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (“[A] provision in the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment.”).

⁴⁶ *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (“[I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.”).

⁴⁷ Courts and scholars fluctuate between using the terms “automatically reversible” and “*per se* reversible.” For the sake of consistency, this Note will use “automatically reversible.”

automatically reversible in the years between *Chapman* and *Fulminante*.⁴⁸ Even with several decades of hindsight, the sources differ on whether the United States Supreme Court established an automatically reversible error rule in different cases.⁴⁹ The examples of automatically reversible error are listed below and then compared to the Supreme Court's take of automatically reversible errors in order to show the discrepancies.

1. *McCord's Five*

In his 1992 article on the evolution of automatic reversal, Professor McCord argued that there are only five types of automatically reversible error in addition to the three errors listed in *Chapman*.⁵⁰ The five errors are (1) the "abridgement of the right to self representation,"⁵¹ (2) the "abridgement of the right to a public trial,"⁵² (3) the "unlawful exclusion of members of the defendant's race from a grand jury,"⁵³ (4) the "failure to assure an impartial jury in a capital case,"⁵⁴ and (5) the "appointment of an interested party's attorney as prosecutor for contempt charges."⁵⁵

2. *The Ninth Circuit's*

A federal appellate practice guide for the Ninth Circuit recognizes McCord's five and adds three:⁵⁶ (1) the "denial of the right to effective assistance of counsel as the result of multiple representation in which an

⁴⁸ See, e.g., McCord, *supra* note 25, at 1406 (listing "automatically reversible" errors in that time period, which are now referred to as structural errors); Bennett Evan Cooper, FEDERAL APPELLATE PRACTICE: NINTH CIRCUIT § 18:12 (2015-2016 Edition) (same); Lisa Griffin, 1 FEDERAL CRIMINAL APPEALS § 4:71 (2015) (same).

⁴⁹ The clearest way to show the discrepancy is by total number of identified automatically reversible errors. Some authors cite different cases for variations of the same error, but the listing below has limited any overlap between errors.

⁵⁰ McCord, *supra* note 25, at 1406.

⁵¹ *Id.* (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (explaining in a footnote that since the right of self-representation (i.e. the defendant proceeding *pro se*) usually increases the likelihood of an unfavorable outcome for the defendant, the denial of the right is not amenable to harmless-error review)).

⁵² *Id.* (citing *Waller v. Georgia*, 467 U.S. 39, 49–50 n.9 (1984) (explaining that the Court granted a new suppression hearing, which was previously done behind closed doors in violation of the defendant's Sixth Amendment right to a public trial, only because it agreed with the lower courts that the defendant should not be required to prove prejudice and that harmless-error was inappropriate)).

⁵³ *Id.* (citing *Vasquez v. Hillery*, 474 U.S. 254, 263–64 (1986) (explaining that discrimination by a grand jury "undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review")).

⁵⁴ *Id.* (citing *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (explaining that because the erroneous exclusion of a juror in a capital case "goes to the very integrity of the legal system, the Chapman harmless-error analysis cannot apply")).

⁵⁵ *Id.* (citing *Young v. United States*, 481 U.S. 787, 809–14 (1969) (explaining that the appointment of an interested prosecutor undermines the objectivity of the trial and the public trust in the judicial system, and is therefore not amenable to harmless-error review)).

⁵⁶ Cooper, *supra* note 48. It should be noted that the guide does not claim to create an exhaustive list.

actual conflict of interest affects the adequacy of representation,⁵⁷ (2) the unlawful exclusion of the defendant's gender from the jury,⁵⁸ and (3) the failure to have all critical stages of a criminal trial presided over by judge with jurisdiction.⁵⁹

3. *The Federal Criminal Appeals Guide's*

A Federal Criminal Appeals guide adds another error that constitutes automatic reversal: a violation of the bar on double jeopardy.⁶⁰

4. *The United States Supreme Court's*

In a 2006 decision, the Supreme Court listed what appear to be all of the errors that it has classified as automatically reversible errors.⁶¹ The Court explained: "Only in rare cases has this Court held that an error . . . requires automatic reversal."⁶² In a footnote, the Court listed five errors that were defined before *Fulminante*: (1) the total deprivation of the right to counsel, (2) the lack of an impartial trial judge, (3) the unlawful exclusion of grand jurors of the defendant's race, (4) the deprivation of the right to self-representation at trial, and (5) the deprivation of the right to a public trial.⁶³ Although the Court does not explicitly state that this is an exhaustive list, by listing cases that are both relevant and irrelevant to the error at hand, the Court implies that the list contains all of the structural errors that the Court has classified up to that point. This would allude to the exclusion of errors that other authors purport to be additions to the limited class of structural errors, like the "appointment of an interested party's attorney as prosecutor for contempt charges,"⁶⁴ the "denial of the

⁵⁷ *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980) (explaining that once a defendant is represented by an attorney with an actual conflict of interest, it is never harmless-error)). Other research revealed the Court decided that issue two years early in *Holloway v. Arkansas*, 435 U.S. 475, 489–91 (1978).

⁵⁸ *Id.* (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 257 (1988) (explaining that the exclusion of the defendant's gender is similar to the exclusion of the defendant's race and therefore unamenable to harmless-error analysis)).

⁵⁹ *Id.* (citing *Gomez v. United States*, 490 U.S. 858, 876 (1989) (explaining that the right to have all critical stages of a criminal trial conducted by a judge with jurisdiction to preside is a trial right like the right to an impartial adjudicator which is unamenable to harmless-error analysis)) (additional citations omitted).

⁶⁰ Griffin, *supra* note 48 (citing *Price v. Georgia*, 398 U.S. 323, 331 (1970) (explaining that a violation of the bar on double jeopardy is unamenable to harmless-error analysis)).

⁶¹ *Washington v. Recuenco*, 548 U.S. 212, 218 n.2 (2006). Because this decision was written after *Fulminante*, the Court uses the term "structural error." However, most of the decisions it cites were decided before the Court changed the term of art from "*per se* reversible error" or "automatically reversible error" to "structural error" in *Fulminante*.

⁶² *Id.* at 218.

⁶³ *Id.* at 218 n.2.

⁶⁴ See *supra* note 55 and accompanying text (explaining that the appointment of an interested prosecutor undermines the objectivity of the trial and the public trust in the judicial system, and is therefore not amenable to harmless-error review).

right to effective assistance of counsel as the result of multiple representation in which an actual conflict of interest affects the adequacy of representation,⁶⁵ the unlawful exclusion of the defendant's gender from the jury,⁶⁶ the failure to have all critical stages of a criminal trial presided over by a judge with jurisdiction,⁶⁷ and a violation of the bar on double jeopardy.⁶⁸

There are a few possible explanations for the discrepancies between authors and the Court: either the authors misinterpreted the Court's holdings in some of the cases as classifying a new automatically reversible error, the Court did not intend this list to be exhaustive, or the Court did not adequately review its previous holdings. Regardless, the discrepancy between sources is indicative of the ensuing confusion after *Chapman*. If scholars and the Court are at odds over what classifies as automatically reversible, lower courts and attorneys are likely to be as well, which puts the consistency of a defendant's appeal at stake.

IV. *FULMINANTE*

In 1991, the Supreme Court decided *Arizona v. Fulminante*, a case that, on its facts, mirrored an error that the Court had already decided was automatically reversible.⁶⁹ In a splintered opinion, a majority of justices held that the admission of the defendant's coerced confession was amenable to harmless-error analysis, but that the prosecution had not proven harmless error beyond a reasonable doubt and a new trial was ordered.⁷⁰ *Fulminante* might not be noteworthy in appellate review except that a majority of justices joined the part of Chief Justice Rehnquist's dissenting opinion that created a new framework for evaluating constitutional errors.

⁶⁵ See *supra* note 57 and accompanying text (explaining that once a defendant is represented by an attorney with an actual conflict of interest, it is never harmless-error).

⁶⁶ See *supra* note 58 and accompanying text (explaining that the exclusion of the defendant's gender is similar to the exclusion of the defendant's race and therefore unamenable to harmless-error analysis).

⁶⁷ See *supra* note 59 and accompanying text (explaining that the right to have all critical stages of a criminal trial conducted by a judge with jurisdiction to preside is a trial right like the right to an impartial adjudicator which is unamenable to harmless-error analysis).

⁶⁸ See *supra* note 60 and accompanying text (explaining that a violation of the bar on double jeopardy is unamenable to harmless-error analysis).

⁶⁹ Compare *Arizona v. Fulminante*, 499 U.S. 279, 283–84 (1991) (explaining that the trial court admitted a statement from the defendant that was coerced by a government informant in exchange for protection against other prisoners) with *Payne v. Arkansas*, 356 U.S. 560, 567 (1958) (explaining that the trial court admitted a statement from the defendant that was coerced by a police officer because of a threat of a dangerous mob).

⁷⁰ *Fulminante*, 499 U.S. at 302.

Section II of the Chief Justice's opinion establishes a bright-line rule. The Section began with a string-cite of sixteen cases,⁷¹ all of which were examples of constitutional errors that *were* amenable to harmless-error analysis (i.e. errors that were not classified as automatically reversible). The Chief Justice then explained that, "[t]he common thread connecting these cases is that each involved 'trial error[,]'"⁷² which the Court subsequently defined as "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."⁷³ Chief Justice Rehnquist went on to address footnote eight in *Chapman*,⁷⁴ which would seem to require automatic reversal for this type of error.⁷⁵ But according to

⁷¹ See, e.g., *id.* at 306–07 (Rehnquist, C.J., dissenting in part) ("Clemons v. Mississippi, 494 U.S. 738, 752–754 (1990) (applying harmless-error review to unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); Satterwhite v. Texas, 486 U.S. 249 (1988) (applying harmless-error review to the admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause); Carella v. California, 491 U.S. 263, 266 (1989) (applying harmless-error review to a jury instruction containing an erroneous conclusive presumption); Pope v. Illinois, 481 U.S. 497, 501–504 (1987) (applying harmless-error review to a jury instruction misstating an element of the offense); Rose v. Clark, 478 U.S. 570 (1986) (applying harmless-error review to jury instruction containing an erroneous rebuttable presumption); Crane v. Kentucky, 476 U.S. 683, 691 (1986) (applying harmless-error review to an erroneous exclusion of defendant's testimony regarding the circumstances of his confession); Delaware v. Van Arsdall, 475 U.S. 673 (1986) (applying harmless-error review to a restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment Confrontation Clause); Rushen v. Spain, 464 U.S. 114, 117–118, and n. 2 (1983) (applying harmless-error review to the denial of a defendant's right to be present at trial); United States v. Hasting, 461 U.S. 499 (1983) (applying harmless-error review to an improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause); Hopper v. Evans, 456 U.S. 605 (1982) (applying harmless-error review to a statute improperly forbidding trial court's giving a jury instruction on a lesser included offense in a capital case in violation of the Due Process Clause); Kentucky v. Whorton, 441 U.S. 786 (1979) (applying harmless-error review to the failure to instruct the jury on the presumption of innocence); Moore v. Illinois, 434 U.S. 220, 232 (1977) (applying harmless-error review to admission of identification evidence in violation of the Sixth Amendment Counsel Clause); Brown v. United States, 411 U.S. 223, 231–232 (1973) (applying harmless-error review to the admission of the out-of-court statement of a nontestifying codefendant in violation of the Sixth Amendment Counsel Clause); Milton v. Wainwright, 407 U.S. 371 (1972) (applying harmless-error review to a confession obtained in violation of Massiah v. United States, 377 U.S. 201 (1964)); Chambers v. Maroney, 399 U.S. 42, 52–53 (1970) (applying harmless-error review to the admission of evidence obtained in violation of the Fourth Amendment); Coleman v. Alabama, 399 U.S. 1, 10–11 (1970) (applying harmless-error review to the denial of counsel at a preliminary hearing in violation of the Sixth Amendment Confrontation Clause).").

⁷² *Id.* at 307.

⁷³ *Id.* at 307–08.

⁷⁴ Footnote eight in *Chapman* listed examples of errors that could never be found harmless. See *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967) ("See, e.g., *Payne v. Arkansas*, 356 U.S. 560 (1958) (coerced confession); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (impartial judge).") (internal citations edited).

⁷⁵ *Fulminante*, 499 U.S. at 310.

the Chief Justice, the admittance into evidence of a coerced confession⁷⁶ was different than both the denial of the right to the assistance of legal counsel⁷⁷ and a partial judge overseeing a trial⁷⁸ because the former case dealt with a trial error, while the other two cases dealt with “structural defects . . . , which defy analysis by ‘harmless-error’ standards.”⁷⁹ Therefore, the case before the Court was still susceptible to harmless-error analysis because it did not “affect[] the framework within which the trial proceeds”⁸⁰

What lawyers, courts, and scholars have concluded from this structural error and trial error dichotomy is a bright-line rule with three factors. To find structural error, a court must find that the error: (1) did not occur during the presentation of the case to the jury,⁸¹ (2) cannot be quantitatively assessed on appeal,⁸² or (3) affects the framework in which the trial proceeds.⁸³

In deciding to create this dichotomy, the Court emphasized the need for harmless-error review of trial errors by stating that it is

[E]ssential to preserve the ‘principle that the central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.’⁸⁴

As for the justification of creating structural error, the Court explained that “[w]ithout these basic [structural] protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.”⁸⁵

A. *Post-Fulminante Structural Error*

Similar to the post-*Chapman* era, courts, lawyers, and scholars have struggled to categorize errors as either structural errors or trial errors. As Professor McCord explained in his article, published just five years after

⁷⁶ *Payne*, 356 U.S. at 567.

⁷⁷ *Gideon*, 372 U.S. at 342.

⁷⁸ *Tumey*, 273 U.S. at 523.

⁷⁹ *Fulminante*, 499 U.S. at 309.

⁸⁰ *Id.* at 310.

⁸¹ *Id.* at 307 (explaining that one of the factors is whether the error occurred “during the presentation of the case to the jury”).

⁸² *Id.* at 308 (explaining that one of the factors is whether the error can be “quantitatively assessed” on appeal).

⁸³ *Id.* at 310 (explaining that one of the factors is whether the error “affect[s] the framework within which the trial proceeds”).

⁸⁴ *Id.* at 308 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)).

⁸⁵ *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 577–78 (1986)) (internal quotation marks omitted).

Fulminante, the troublesome applications of the structural error and trial error dichotomy outnumbered the easy applications in just the first few years.⁸⁶ Because of how *Fulminante* was written, lower courts either analogized new types of error with the three-factor test or compared them to either the string-cite of the sixteen trial errors or previously determined automatically reversible errors.⁸⁷

Professor McCord identified five categories of errors with which courts struggled: (1) jury instruction errors,⁸⁸ (2) errors during trial that did not involve the admission or exclusion of evidence,⁸⁹ (3) errors that neither occurred during the trial nor had a bearing on the inclusion or exclusion of evidence,⁹⁰ (4) errors that were arguably, but not clearly, in a previously established structural category,⁹¹ and (5) errors that fit clearly within the evidentiary definition of trial error but brought serious constitutional implications.⁹² Although these categories establish what issues were being presented to lower courts, the two overarching struggles for courts were trying (1) to dichotomize errors when, in reality, errors fall on a spectrum and (2) to justify cases that may be either structural but would really have no impact on the outcome of the case or cases that may contain trial errors that would have major impacts on the fairness of the trial.

The right to a public trial is a perfect example. In *People v. Woodward*,⁹³ the Supreme Court of California held that the trial court was properly closed to the public,⁹⁴ but the judge failed to notify the defendant of the closure.⁹⁵ The Court held that this type of error did not amount to a structural error according to the three *Fulminante* definitions, and was therefore amenable to harmless-error review.⁹⁶ Another court, in *People v. Harris*,⁹⁷ held that holding preemptory challenges in the judge's chambers was a structural error requiring reversal, regardless of the impact on the verdict.⁹⁸ Even though the Supreme Court held that the denial of the right

⁸⁶ McCord, *supra* note 25, at 1418.

⁸⁷ *Fulminante*, 499 U.S. at 306–10.

⁸⁸ McCord, *supra* note 25, at 1418.

⁸⁹ *Id.* at 1419.

⁹⁰ *Id.* at 1420–21.

⁹¹ *Id.* at 1421.

⁹² *Id.* at 1422.

⁹³ 841 P.2d 954 (Cal. 1992).

⁹⁴ The Supreme Court of California explained that posting a “Do Not Enter” sign that stopped people from entering who were not seated before closing arguments began, while allowing those already seated to remain, was not enough to violate the defendant’s Sixth Amendment right. *Id.* at 955.

⁹⁵ *Id.* It is important to note that while the Court held that the closure did not violate the defendant’s Sixth Amendment right, the Court still used the constitutional harmless-error analysis described in *Chapman* to evaluate the defendant’s lack of notice of the closure. *Id.* at 960.

⁹⁶ *Id.*

⁹⁷ 12 Cal. Rptr. 2d 758 (Ct. App. 1992).

⁹⁸ *Id.* at 766–68.

to a public trial was a structural error,⁹⁹ courts struggled to understand exactly how far the reach of that classification could go.

This period is rife with courts applying mismatching rationales to find structural error and trial error. For example, Professor McCord cited four cases that dealt with misdescriptions of the courts' final criminal charges against the defendant.¹⁰⁰ One court held that that this type of error was a trial error because it had been found harmless in an older case;¹⁰¹ another found it to be structural because it "undermines the basic function of the jury;"¹⁰² a third found it to be trial error by foregoing the three-factor test and analogizing it to three of the cases from *Fulminante's* string cite;¹⁰³ and a fourth court concluded that the list of structural errors in *Fulminante* was exhaustive and therefore, must have been trial error.¹⁰⁴ The confusion among the lower courts was so pervasive that only five years after *Fulminante*, Professor McCord was able to list dozens of cases that either used the three *Fulminante* factors, used just the factor regarding the quantitative assessment of the error, simply analogized to other cases without looking at *Fulminante*, or ignored the *Fulminante* analysis altogether.¹⁰⁵

The Supreme Court further mystified the appropriate analysis in some of its commentary in *Brecht v. Abrahamson*.¹⁰⁶ There, the Court referred to the possibilities of constitutional error as falling on a spectrum,¹⁰⁷ which undermines the bright-line rule announced in *Fulminante*.

Possibly in an effort to clarify the analytical disarray, the Court may have also added a fourth factor for structural error in 1999, with its opinion in *Neder v. United States*.¹⁰⁸ In that case, the Court evaluated another error in jury instructions¹⁰⁹ and held this error was subject to harmless-error review.¹¹⁰ In doing so, the Court stated that unlike deprivation of counsel or a biased judge, "an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."¹¹¹ The same language was

⁹⁹ *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984).

¹⁰⁰ McCord, *supra* note 25, at 1418 n.123 and accompanying text.

¹⁰¹ *Id.* (referring to *Schrier v. Iowa*, 941 F.2d 647, 650 (8th Cir. 1991)).

¹⁰² *Id.* at 1419 (quoting *State v. Hamilton*, 618 A.2d 1372, 1377–78 n.5 (Conn. App. Ct. 1993)).

¹⁰³ *Id.* (citing *White v. United States*, 613 A.2d 869, 875–79 (D.C. 1992) (en banc)).

¹⁰⁴ *Id.* (citing *State v. Hall*, 606 So. 2d 972, 980 (La. Ct. App. 1992)).

¹⁰⁵ *See id.* at 1436–40 (listing cases that fell within several "troublesome applications" and the type of approach that each court took).

¹⁰⁶ 507 U.S. 619 (1993).

¹⁰⁷ *Id.* at 629.

¹⁰⁸ 527 U.S. 1, 9 (1999).

¹⁰⁹ The error in the jury instructions was that the instructions omitted an element of the offense. *Id.* at 8.

¹¹⁰ *Id.* at 9.

¹¹¹ *Id.* (emphasis in original).

used more recently in *Washington v. Recuenco*,¹¹² decided in 2006, which held that *Blakely* error¹¹³ was not a structural error.¹¹⁴

Among all of the confusion, the Court has been reluctant to add certain classes of structural error. In fact, the Court has gone so far as to say that there is a “strong presumption” against structural error “[i]f the defendant had counsel and was tried by an impartial adjudicator”¹¹⁵ In the twenty-five years after *Fulminante* there have been only two cases from the United States Supreme Court that defined new structural errors.

In the first, *Sullivan v. Louisiana*,¹¹⁶ the Court held that constitutionally deficient reasonable doubt instructions were a structural error requiring reversal because they denied the defendant the right to a trial by jury.¹¹⁷ In the majority opinion, Justice Scalia first explained that the deficient instructions denied the defendant the right to a jury trial because, on appeal, the court usurped the role of the jury in finding guilt.¹¹⁸ Only after explaining the need for reversal on those grounds did Justice Scalia use the *Fulminante* analysis.¹¹⁹ In evaluating the error before the Court, Justice Scalia summarily reasoned that “[t]he deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as ‘structural error.’”¹²⁰

In the second, *United States v. Gonzalez-Lopez*,¹²¹ the Court held that erroneous deprivation of the right to a defendant’s choice of counsel, not to be confused with the right to effective assistance of counsel, was a structural error.¹²² Justice Scalia cited two of the factors from *Fulminante*, explaining that this type of error is unquantifiable and indeterminate and that it directly affects the framework in which the trial occurs.¹²³

The circuit courts have defined other additional errors as structural. Most circuits have labeled improper amendment of an indictment as a

¹¹² 548 U.S. 212 (2006).

¹¹³ *Blakely* error occurs during the sentencing of a defendant when the presiding judge uses a fact, other than a prior conviction, that has neither been admitted by the defendant nor proven to the jury in order to impose a sentence beyond the statutory maximum. *Blakely v. Washington*, 542 U.S. 296, 304–05 (2004).

¹¹⁴ *Recuenco*, 548 U.S. at 222.

¹¹⁵ *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)).

¹¹⁶ 508 U.S. 275 (1993).

¹¹⁷ *Id.* at 279 (“[T]o hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.”).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 281 (“Another mode of analysis (*Fulminante*) leads to the same conclusion”).

¹²⁰ *Id.* at 281–82.

¹²¹ 548 U.S. 140 (2006).

¹²² *Id.* at 150 (“We have little trouble concluding that erroneous deprivation of the right to counsel of choice . . . qualifies as a ‘structural error.’”).

¹²³ *Id.*

structural error.¹²⁴ And the Second, Sixth, Ninth, and Eleventh Circuits have each held that the accumulation of errors—even if each error in isolation is a trial error—can be a structural error requiring reversal.¹²⁵

In the last twenty-five years, the bright-line rule in *Fulminante* has casted doubt and created confusion within the criminal appellate process. The circuit courts remain split on some issues,¹²⁶ and more alarming, the actual analytical framework between courts varies greatly. Confusion aside, as will be explained in Part VII, the rationale upon which the distinction was originally created has been undermined in practice. And since the classification of structural error or trial error acts as a gatekeeper between harmless-error analysis and automatic reversal, the chances of a successful appeal depend greatly on this initial question. In order to protect the rights of defendants and promote the integrity of the fact-finding process, at the very least the framework in which errors are appealed should be consistent, predictable, and uphold the purposes of a criminal trial.

V. CONNECTING THE DOTS

As mentioned before, the detailed view of automatically reversible error and structural error is necessary to establish how the Court's rationale has evolved over time, but at this point a broader view is necessary to show how the rationale in these cases connect and why the application has been difficult.

From a bird's eye view, the jurisprudence on automatically reversible error in the post-*Chapman* era can be described most aptly as a game of "telephone." After all, it was only in footnote eight that the Court stated that there were three errors that could never be found harmless under harmless-error review.¹²⁷ The Court did not state that harmless error could never be applied to these errors; it simply stated that in its view, if such

¹²⁴ See, e.g., *United States v. Hunter*, 558 F.3d 495, 502–03 (6th Cir. 2009); *United States v. McKee*, 506 F.3d 225, 229–32 (3d Cir. 2007); *United States v. Hoover*, 467 F.3d 496, 502 (5th Cir. 2006); *United States v. Milstein*, 401 F.3d 53, 65–66 (2d Cir. 2005); *United States v. Narog*, 372 F.3d 1243, 1249–50 (11th Cir. 2004); *United States v. Collins*, 350 F.3d 773, 777 (8th Cir. 2003); *United States v. Folks*, 236 F.3d 384, 390 (7th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227, 1233 (9th Cir. 2000); *United States v. Fletcher*, 74 F.3d 49, 53 (4th Cir. 1996); *United States v. Lawton*, 995 F.2d 290, 292 (D.C. Cir. 1993). Additionally, the *Annotated Review of Criminal Procedure* from Georgetown University Law Center gives an updated list of the circuit decisions for structural error. *Annual Review of Criminal Procedure*, *supra* note 6, at 948–53.

¹²⁵ See, e.g., *United States v. Alferahin*, 433 F.3d 1148, 1159 (9th Cir. 2006); *United States v. Yakobowicz*, 427 F.3d 144, 154 (2d Cir. 2005); *United States v. Monger*, 185 F.3d 574, 578 (6th Cir. 1999); *Woods v. Dugger*, 923 F.2d 1454, 1460 (11th Cir. 1991).

¹²⁶ See *supra* notes 26–35 and accompanying text (explaining the discrepancy among circuits regarding forfeiture of structural error); *supra* notes 121–25 and accompanying text (explaining different structural errors among the circuits).

¹²⁷ *Chapman*, 386 U.S. 18, 23 n.8 (1967).

errors occurred, the prosecution could never carry its burden of persuasion.¹²⁸ The first two cases that classified errors as automatically reversible errors were also mentioned only in footnotes.¹²⁹

Waller, which classified the abridgement of the right to a public trial as an automatically reversible error, is particularly curious. In that case, there is no mention of *Chapman*, and the only mention of harmless error is in a string cite of cases that explain how difficult it is to show prejudice from a violation of the right to a public trial.¹³⁰ The Court's rationale was based on the presumption that the defendant would never be able to prove the prejudice from the court's closure, but a new suppression hearing was nonetheless necessary to uphold that right.¹³¹ However, if the *Chapman* standard was correctly applied, it would have been the *prosecution*, not the defendant, who would have the burden to persuade the Court that the error did not affect the verdict. Yet, scholars and courts alike have cast the decision in the pot with the other automatically reversible errors.

Three of the subsequent cases were similarly cast into the pot due to an inferential comparison with one of the original three errors listed in *Chapman*. These errors—an attorney representing multiple defendants with conflicting interests,¹³² the unlawful exclusion of members of the defendant's race from a grand jury,¹³³ and the failure to assure an impartial jury in a capital case¹³⁴—were compared to the impermissibility of a partial judge from *Tumey*¹³⁵ in footnote eight of *Chapman*.¹³⁶ Another link in the game of telephone was added when the appointment of an interested party's attorney as prosecutor for contempt charges,¹³⁷ was compared to an attorney representing multiple defendants with conflicting interests¹³⁸ and the unlawful exclusion of members of the defendant's race from a grand jury.¹³⁹ The failure to have all critical stages of a criminal trial, including

¹²⁸ *Id.* at 23.

¹²⁹ See *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (regarding the abridgement of the right to self representation); *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (reviewing the standard applicable to the abridgement of the public-trial right).

¹³⁰ *Waller*, 467 at 49 n.9.

¹³¹ *Id.* at 50.

¹³² See *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978) (comparing a partial adjudicator to a conflicted attorney). *Holloway* actually used both *Tumey* and *Gideon* as its founding comparisons for automatic reversal. *Id.*

¹³³ See *Vasquez v. Hillery*, 474 U.S. 254, 263–64 (1986) (explaining that automatic reversal is required because, like a biased judge, “we must presume the process was impaired”).

¹³⁴ See *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (“The right to an impartial adjudicator, be it judge or jury, is such a right [that requires automatic reversal].”).

¹³⁵ *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

¹³⁶ *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967).

¹³⁷ *Young v. United States*, 481 U.S. 787, 813 (1987).

¹³⁸ *Holloway v. Arkansas*, 435 U.S. 475, 490–91 (1978).

¹³⁹ *Vasquez v. Hillery*, 474 U.S. 254, 263–64 (1986)

jury selection, presided over by someone with jurisdiction was similarly compared to a partial jury in a capital case.¹⁴⁰

Of course, effective appellate advocacy requires comparison to established precedents that are both on point and well reasoned. American jurisprudence is also expanded into new territories through analogy. But what started as a mere reference in a footnote resulted in whole areas of errors being classified as automatically reversible. For instance, the failure to have all critical stages of a criminal trial, including jury selection, presided over by someone with jurisdiction, was compared to the failure to ensure an impartial jury in a capital case, which had, in turn, been compared to the failure to ensure an impartial judge.¹⁴¹ Likewise, the appointment of an interested party's attorney as prosecutor for contempt charges¹⁴² was analogized to the unlawful exclusion of members of the defendant's race from a grand jury and an attorney representing multiple defendants with conflicting interests, which were in turn compared to a partial judge and the denial of the assistance of legal counsel, respectively.¹⁴³ Thus, the case law has developed in this area so that if a judge or jury shows bias or other conflict, there must be automatic reversal regardless of the depth of the effect. Although this may seem like a fair treatment, the game of telephone comes at a cost. The consequences of these expanding precedents are having adverse impacts on defendants' rights,¹⁴⁴ and scholars and judges are continuing to have a difficult time determining where to draw the line between structural error and trial error.¹⁴⁵ The practical implications are significant—defendant-appellants either get a new trial without further question, or they have to argue that the error was harmful.

The post-*Fulminante* era is less like a game of telephone and more like reading Mad Libs™.¹⁴⁶ The third original automatically reversible error listed in *Chapman*—wrongful admittance of a prior confession—was thrown out of the group in Chief Justice Rehnquist's explanation of the

¹⁴⁰ *Gomez v. United States*, 490 U.S. 858, 876 (1989) (“Among those basic fair trial rights that ‘can never be treated as harmless’ is a defendant’s ‘right to an impartial adjudicator, be it judge or jury.’”) (quoting *Gray v. Mississippi*, 481 U.S. 648, 668 (1987)).

¹⁴¹ See *supra* notes 134 & 140 and accompanying text (connecting the rationale from *Gomez* to *Gray to Tumey*).

¹⁴² *Young*, 481 U.S. at 813.

¹⁴³ See *supra* notes 132, 135, & 138 and accompanying text (connecting the rationale from *Young* to *Vasquez* and then to *Tumey*); *supra* notes 132 & 138 and accompanying text (connecting the rationale from *Young* to *Holloway* and then to *Gideon*).

¹⁴⁴ *Infra* Part VII.

¹⁴⁵ *Supra* Part II.

¹⁴⁶ Mad Libs™ is a game in which one player prompts other players for a list of words which are filled into a story that the group has not yet read. That player then reads the story, which is usually nonsensical and comedic, aloud to the rest of the group.

structural error and trial error dichotomy in *Fulminante*.¹⁴⁷ Post-*Fulminante*, courts have applied a spectrum of frameworks in addressing constitutional error below,¹⁴⁸ even though the Court had set out to clarify the framework. In the confusion, the legal reasoning that connected cases read like a Mad Lib™—an inconsistent assortment of legal principles matched to a fact pattern. As was explained in Part IV.A, the same error was evaluated through four different frameworks, including only some of the factors from *Fulminante*, analogies to the trial error string-cite, and an unsupported conclusion that the types of structural error in *Fulminante* was exhaustive.¹⁴⁹

The Court has only expanded the types of structural errors in a few cases,¹⁵⁰ and in attempting to clarify the *Fulminante* standard, the Court has only muddled the situation further. The reference in the *Brecht* case to errors falling on a spectrum is consistent with common sense but runs counter to the foundation of a bright-line rule.¹⁵¹ The reference to a spectrum of errors is also consistent with the expansion of automatically reversible errors through analogy in the post-*Chapman* era. But the expansion has decreased in the post-*Fulminante* era, and the Court has not taken a hard look at the framework since 2006.¹⁵² The initial confusion, too, has subsided somewhat. Because the classification of errors, or whether an error occurred at all, continue to be questions of great discretion for appellate courts, the current framework for appellate review of constitutional errors in a criminal case fails to uphold its own rationale. This rationale, and how to effectively evaluate the appellate framework, is laid out next.

VI. MODE OF ANALYSIS: BASIC PRINCIPLES AND SECONDARY CONSIDERATIONS

To effectively evaluate the current *Fulminante* framework, other scholarly approaches, and the proposal in this Note, a common metric must be established. This mode of analysis will consider the basic rationale behind the Court's intention to create separate structural error and trial error categories as well as other policy concerns.

¹⁴⁷ *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

¹⁴⁸ *Supra* notes 100–05 and accompanying text.

¹⁴⁹ *Supra* notes 100–06 and accompanying text.

¹⁵⁰ *See supra* notes 116–23 and accompanying text (discussing the *Sullivan* and *Gonzalez-Lopez*).

¹⁵¹ *See Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993) (“At the other end of the spectrum of constitutional errors lie structural defects”) (internal quotation and citation omitted).

¹⁵² *See Washington v. Recuenco*, 548 U.S. 212, 218–19 (2006) (applying the current framework and discussing the original rationale behind it).

In the pre-*Chapman* era, any constitutional violation was grounds for reversal.¹⁵³ But in *Chapman*, the Court expressed that the purpose of the harmless-error review was that it “block[s] setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.”¹⁵⁴ The Court recognized that harmless error “can work very unfair and mischievous results[,]” which is why the Court shifted the burden of persuasion to the state and the burden of proof is the highest in the United States legal system.¹⁵⁵ From this framework, the Court hoped to create a more workable standard that “will save the good in harmless-error practices while avoiding the bad, so far as possible.”¹⁵⁶

The “good” and “bad” in harmless-error review were most clearly described in *Fulminante*, though the rationale is the same in both *Chapman* and *Fulminante*. The central purpose of a criminal trial, according to the Court, “is to decide the factual question of the defendant’s guilt or innocence, and promote[] public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.”¹⁵⁷ Thus, the “good” of harmless-error review in the appellate process is its ability to uphold correctly-decided convictions, even in the face of constitutional error, and to promote public respect through the fairness of the trial. Likewise, the “good” is to reverse convictions if they lack certain protections so that “a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.”¹⁵⁸ The “bad” is the affirmation of wrongly-decided cases and an inability to reverse cases in which the trial was not a just mechanism for determining guilt or innocence. Therefore, the two basic principles of the Court’s analysis are that the central purpose of a trial is to (1) answer the factual question of a defendant’s guilt or innocence¹⁵⁹ and (2) have process that is fundamentally fair.¹⁶⁰

Along with these two primary principles are what will be called secondary considerations. These policy considerations are also important to appellate review but do not necessarily carry as much weight as the

¹⁵³ *Chapman v. California*, 386 U.S. 18, 22–24 (1967). As the Court might have argued in 1967, this change really happened in *Fahy, id.*, but *Chapman* is generally cited for the proposition that harmless-error analysis applies to constitutional errors.

¹⁵⁴ *Id.* at 22.

¹⁵⁵ *Id.* at 24 (“It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment . . . [T]he Court must be able to declare a belief that it was harmless beyond a reasonable doubt.”).

¹⁵⁶ *Id.* at 23.

¹⁵⁷ *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)).

¹⁵⁸ *Id.* at 310.

¹⁵⁹ This principle will be referred to as the “fact-finding principle.”

¹⁶⁰ This principle will be referred to as the “fundamental fairness principle.”

primary principles. Under this mode of analysis, the five secondary considerations used to evaluate the current and proposed frameworks include: (1) promoting judicial efficiency, (2) establishing finality in judicial action, (3) reducing sandbagging¹⁶¹ and gamesmanship, (4) promoting consistency, and (5) permitting flexibility in deserving cases.

Promoting judicial efficiency is important to judicial review because an overburdened court system cannot take the appropriate time needed to evaluate each case on its merits.¹⁶² Likewise, finality of judicial decisions not only promotes judicial efficiency, but also promotes the public's perception of the judicial system as a place where factual and legal questions are answered—not just recycled in numerous appeals and remands.¹⁶³ Legal gamesmanship, and particularly sandbagging, are concerns that certainly should be considered, but their weight should not carry the day. A defendant or his attorney's conscious decision to manipulate the system for his own benefit is a concern that should be recognized, but accusations of sandbagging are usually based solely on speculation and are, fortunately, uncommon.¹⁶⁴

Consistency has two forms: consistency in result and consistency in application. Consistency in result is merited by the desire to have similar cases result in similar conclusions regardless of the district in which they are brought. On a slightly different note, consistency in application is important because both lawyers and defendants need predictability and transparency in the appellate process. This is not to say that each similar case will result in a similar outcome, but rather that the analysis that determines the outcome is applied in the same manner in every case so that lawyers can be effective counselors and advocates for their clients. Flexibility runs counter to the idea of consistency. But flexibility is nonetheless necessary when a rigid application of a certain standard would result in an absurd conclusion.¹⁶⁵

Inherent in any evaluation that includes these factors is a give and take. For instance, an increase in the importance of the fact-finding principle may reduce the fundamental fairness and flexibility. Likewise, an increase

¹⁶¹ Sandbagging is the when a litigant “remain[s] silent about his objection and belatedly rais[es] the error only if the case does not conclude in his favor.” *Puckett v. United States*, 556 U.S. 129, 134 (2009) (internal citations omitted).

¹⁶² See *Stutson v. United States*, 516 U.S. 193, 197 (1996) (explaining that judicial efficiency is an important factor in the Court's vacating and remanding powers).

¹⁶³ See *id.* (explaining that finality is an important factor in the Court's vacating and remanding powers).

¹⁶⁴ See Thomas M. Hoskinson, Note, *Criminal Procedure: Trial Integrity and the Defendant's Rights Under the Plain Error Rule 52(b)*, 37 SUFFOLK U.L. REV. 1129, 1146–47 (2004) (explaining that sandbagging is not well-documented partly because the occurrences are so rare).

¹⁶⁵ See *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) (“[The] . . . struggle of courts [is] sometimes to devise a formula that will encompass all situations and at other times to take hardship cases out from under the rigidity of previous declarations . . .”).

in the fundamental fairness may result in a decrease in finality and judicial efficiency. The trick, of course, is to find a framework that promotes the primary principals and keeps the secondary considerations in check.

A. *Application to the Fulminante Framework*

To both illustrate how this mode of analysis would work and evaluate the status quo, this mode of analysis will be applied to the *Fulminante* framework. Under *Fulminante*, certain errors will require automatic reversal.¹⁶⁶ These structural errors are supposed to be those errors which would so undermine the trial as to classify it as an improper vehicle for justice.¹⁶⁷ Also, trial errors that have a harmful impact on the verdict also get reversed under this framework.¹⁶⁸ In this way the *Fulminante* framework focuses on the principle of fundamental fairness in appellate review.

In regards to the fact-finding principle, harmless-error review, as decided in *Chapman* and applied to trial errors in *Fulminante*, focuses on the result of the trial by upholding decisions when the errors did not contribute to the verdict.¹⁶⁹ However, the fact-finding principle is undermined by automatic reversal for structural errors that probably had no impact on the verdict whatsoever. This, of course, is the tradeoff for the fundamental fairness principle explained above.

The greater issue with the *Fulminante* framework is with its inconsistency. As explained in Part IV, courts have struggled ever since the *Fulminante* decision to apply the framework.¹⁷⁰ Not only do courts take a myriad of approaches to the application of the framework, but because there can be such dramatic results depending on the answer to this question—whether the error is structural or trial—the courts have been inconsistent with their case results.¹⁷¹ An appellant cannot even determine which test will be applied to his or her appeal in many situations.

Consider, for example, erroneous jury instructions. The Supreme Court has held that inaccurate description of an element of a crime within jury instructions is a structural error requiring reversal.¹⁷² However, mildly confusing reasonable doubt instructions in a *death penalty* case were held to be subject to harmless-error analysis.¹⁷³ So, in a *capital* case with mildly confusing jury instructions, the State received a much more deferential

¹⁶⁶ *Arizona v. Fulminante*, 499 U.S. 279, 308–10 (1991).

¹⁶⁷ *Id.* at 310.

¹⁶⁸ *Id.* at 306–07.

¹⁶⁹ *Id.* at 307–08.

¹⁷⁰ *Supra* Part IV.A.

¹⁷¹ *Supra* notes 100–05 and accompanying text.

¹⁷² *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

¹⁷³ *United States v. Sampson*, 486 F.3d 13, 33 (1st Cir. 2007).

standard of review than in a normal criminal sentencing with an inaccurate instruction. To be clear, both of these errors are substantial, but the difficulty in the *Fulminante* framework is that the chances of a successful appeal vary so greatly with the initial gatekeeping function of the courts, and that gatekeeping function produces inconsistent results.

Moreover, the *Fulminante* framework lacks finality and judicial efficiency. Although trial error cases promote finality and judicial efficiency, the structural error classification undermines both by requiring reversal for some cases. Regardless of the effect on the verdict, any structural error during the trial or any harmful trial error must be reversed and remanded.¹⁷⁴

The structural error category binds the courts to an inflexible standard that requires reversal for the most minor structural errors.¹⁷⁵ For example, even if a courtroom is unlawfully closed for a short amount of time, where the jury had no idea, no one tried to enter the courtroom, and the evidence of guilt was overwhelming, the court has no discretion in its decision and therefore, must reverse and remand for a new trial. Gamesmanship is another fault with the *Fulminante* framework. In a case with multiple constitutional errors that would cumulatively constitute structural error in some circuits, a lawyer could sit on her hands while she knows the errors are occurring, wait for a verdict, and if the verdict is not in her client's favor, appeal and possibly have an automatic reversal in some circuits.¹⁷⁶ In the second trial, the prosecution may have a difficult time contacting the witnesses, examining the witnesses after so much time has elapsed, and otherwise putting on an equally compelling case. The result may be that a factually guilty defendant is acquitted in a second trial because of these burdens. This gamesmanship further undermines the fact-finding accuracy of the trial.

VII. OTHER CRITIQUES AND SUGGESTIONS

Only a handful of scholars directly address the specific difficulties with the current *Fulminante* framework. Research has returned only three attempts to create a new framework post-*Fulminante* and one pre-*Fulminante* that is still worth discussion.¹⁷⁷ A few major themes emerged

¹⁷⁴ *Arizona v. Fulminante*, 499 U.S. 279, 308–10 (1991).

¹⁷⁵ *Id.*

¹⁷⁶ See *supra* notes 21–32 and accompanying text (explaining the current disagreement about forfeiture of structural error); *supra* note 125 and accompanying text (explaining that some circuits have defined cumulative constitutional errors as a structural error).

¹⁷⁷ Shepard, *supra* note 25; James Edward Wicht III, *There Is No Such Thing as a Harmless Constitutional Error: Returning to a Rule of Automatic Reversal*, 12 *BYU J. PUB. L.* 73 (1997); McCord, *supra* note 25; Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 *COLUM. L. REV.* 79 (1988).

from looking at other attempts to identify the issues in the structural error framework. Very few articles address the issue directly. Although many articles discuss the benefit or detriment of certain structural errors,¹⁷⁸ only a handful address the overall framework itself. An article from 1988 found that a surprisingly small number of scholars addressed the post-*Chapman* confusion affecting courts,¹⁷⁹ and this lack of scholarly discussion has not changed much since. Unsurprisingly, there is a dearth of articles that support the current framework as it stands.¹⁸⁰ It is also apparent that in the few articles that address the framework head-on or propose a new analysis, the majority focus primarily on the fundamental fairness of the trial and overlook or undermine the fact-finding purpose.

Professor David McCord wrote perhaps the most-cited article only five years after *Fulminante*. As was discussed *supra*,¹⁸¹ Professor McCord highlighted the utterly confusing application of the *Fulminante* standard in the lower courts.¹⁸² Other than the perplexing nature of the *Fulminante* decision, McCord also critiqued the difficulty that harmless-error has on keeping lower courts consistent.¹⁸³ According to McCord, if an appellate court rules that an error was harmless, the lower courts do not learn from their mistakes.¹⁸⁴ The *Fulminante* framework also forces courts to haphazardly divide rights into one category or another when, in reality, the rights at stake are more nuanced than that dichotomy allows.¹⁸⁵

Professor McCord's solution is to use eight factors—instead of *Fulminante*'s three—to more accurately evaluate each right: (1) the importance of the right to the defendant, (2) the importance of the right to the public, (3) the degree of infringement, (4) the significance of the error-causing actor to the criminal process, (5) if the error is attributable to the

¹⁷⁸ See, e.g., William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1391–92 (2001) (evaluating errors made in jury selection through the *Fulminante* framework); Charles J. Ogletree, Jr., Comment, *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 153–54 (1991) (addressing the issues from the Supreme Court's approach to applying harmless-error review to coerced confessions); Kendra Oyer, Comment, *Classifying Constructive Amendment as Trial or Structural Error*, 158 U. PA. L. REV. 609, 610–11 (2010) (evaluating constructive amendments in criminal cases as either a trial error or a structural error under *Fulminante*). Scholars have attempted to change the standard of harmless-error review under *Chapman*. See, e.g., Brent M. Craig, "What Were They Thinking?"—A Proposed Approach to Harmless Error Analysis, 8 FLA. COASTAL L. REV. 1, 1–3 (2006) (proposing a new approach to the "harmless beyond a reasonable doubt" approach from *Chapman*).

¹⁷⁹ Stacy & Dayton, *supra* note 177, at 81 n.11.

¹⁸⁰ This is probably due, in part, to a lack of interest in law review journals for articles that simply support the status quo.

¹⁸¹ See *supra* notes 100–05 and accompanying text.

¹⁸² McCord, *supra* note 25, at 1454.

¹⁸³ *Id.* at 1424 ("The erratic approaches taken by the lower courts were unsurprising given the conflicting messages sent by *Fulminante*.").

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1454.

prosecution, the extent of willfulness of the infringement by the prosecution, (6) the degree to which the defendant is at fault, (7) the likelihood that the result would have been different absent the error, and (8) basic fairness.¹⁸⁶ In applying this framework, the courts' gatekeeping function to define structural error is abandoned entirely and each of these factors are considered to figure out whether it should be reversed.¹⁸⁷

This framework gives more flexibility to the courts while still focusing on fairness, limiting gamesmanship, and upholding the fact-finding purpose. But as McCord discusses, it also creates an inherent inconsistency between cases.¹⁸⁸ Nonetheless, it frees appellate courts to evaluate each matter on a case-by-case basis on the actual issues that are important to the appellate process.¹⁸⁹ Although the eight factors consider both the basic principles and secondary considerations in theory, there is little guidance on how things will balance when push comes to shove with these factors. The abandonment of the courts' gatekeeping function initially seems to limit reversible error, but the factors weigh heavily on the principle of fundamental fairness, which would broaden reversible error in practice. For example, a right that is significant to the defendant, such as a public trial or right to counsel, would almost certainly also be important to the public as a sign of legitimacy. Likewise, the significance of the error-causing actor to the criminal process would always favor the defendant and whether it be error from defendant's counsel, prosecution, jury, or judge, it is simply a matter of degree of significance, though each plays an integral role in the trial. In fact, there is only one factor, the "likelihood that the result would have been different absent the error,"¹⁹⁰ that directly addresses the fact-finding purpose of appellate review. The defendant-favored factors would likely increase reversals even if they were not automatic.

Professors Tom Stacy and Kim Dayton were among the few authors who addressed post-*Chapman* confusion. Although their article does not address *Fulminante* directly as it had not yet been decided, their arguments are as applicable today as they were in 1988. According to Stacy and Dayton, the courts were too limited on automatic reversal and too focused on the fact-finding principle of appellate process.¹⁹¹ By focusing on the fact-finding principle, the rights of the defendant were being undermined and the appellate court was not keeping police, prosecutors, and lower courts in check through reversal.¹⁹² To address those issues, the authors

¹⁸⁶ *Id.* at 1455–57.

¹⁸⁷ *Id.* at 1457–58.

¹⁸⁸ *Id.* at 1460.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1457.

¹⁹¹ Stacy & Dayton, *supra* note 177, at 88.

¹⁹² *Id.*

proposed three questions: (1) “Whether the violation has impaired the purposes of the constitutional right in question;” (2) “Whether redoing the adjudicative process can effectively cure the harm caused by the violation;” and (3) “Whether a case requires reversal to deter future violations, even if it is unwarranted in this particular case.”¹⁹³

These three questions clarify what the lower courts should be looking for, much like the United States Supreme Court attempted to do with *Fulminante*. Further, this framework would greatly extend the fundamental fairness principle and undermine the fact-finding principle, by allowing cases that were justly decided to be reversed just as a deterrent for other trial courts. With that trade-off also comes a reduction in the finality and consistency of appeals, but it increases the flexibility of the appellate court. Therefore, although Professors Stacy and Dayton set out to greatly increase the power of a defendant’s constitutional protections, their framework’s departure from the fact-finding principle, finality, and consistency make it sway too far to the side of fundamental fairness.

In 1997, Professor James Wicht went one step further to say that the courts should return to the pre-*Chapman* era and that all constitutional errors should be grounds for automatic reversal.¹⁹⁴ Similar to Stacy and Dayton, Wicht believed that harmless error review completely overlooks the fundamental fairness inherent in protecting constitutional rights.¹⁹⁵ By trying to establish a constitutional right as either structural or trial based, the inherent value in each right is ignored.¹⁹⁶ Accordingly, the harmless-error doctrine violates the principle of *stare decisis* because there was no “special justification” for departing from the pre-*Chapman* precedent.¹⁹⁷ Moreover, Professor Wicht argues that appellate courts are incapable of effectively weighing the value of constitutional errors.¹⁹⁸

The pros and cons of this proposal were addressed in great detail in Wicht’s article. As far as the courts were concerned, there would clearly be a massive blow to judicial efficiency and finality, but that would be offset by greater clarity and consistency if Wicht’s proposal was adopted.¹⁹⁹ Prosecutors would be burdened by the difficulties of putting on a second trial,²⁰⁰ which would certainly undermine the fact-finding principle, but

¹⁹³ *Id.* at 91–92.

¹⁹⁴ Wicht, *supra* note 177, at 73.

¹⁹⁵ *Id.* at 85 (explaining that the pre-*Chapman* era better protected constitutional rights).

¹⁹⁶ *Id.* at 97.

¹⁹⁷ *Id.* at 86–87.

¹⁹⁸ *Id.* at 93.

¹⁹⁹ *Id.* at 100–01.

²⁰⁰ Major difficulties to second trials are that witnesses’ testimonies may either be weakened over time or be entirely absent in the case of death or relocation and evidence can be lost or destroyed.

trials would be much fairer.²⁰¹ Defendants would also be the beneficiaries of consistent, constitutionally proper results.²⁰² The public would probably pay more in taxes to fund the increase of judicial activity, but it would benefit from the reliability, trust, and transparency of the system.²⁰³ Beyond what Wicht discusses within his article, his proposal would greatly increase the opportunities for gamesmanship and put an extraordinary burden on the prosecution and judge to put on a constitutionally perfect trial for fear that, regardless of whether the verdict was clearly accurate, an appellate court will reverse.

The final attempt to create a better framework was made in an article by then-Yale Law student, Steven M. Shepard.²⁰⁴ Shepard evaluated an issue that is greatly overlooked by scholars and cuts strongly against structural error's effectiveness in protecting defendant's rights. Shepard's main critique is that in some cases a judge must decide between factual guilt and fundamental fairness.²⁰⁵ Through the use of hypothetical scenarios, Shepard illustrates that in a case where factual guilt is clear, yet constitutional error occurred, judges are inclined to narrowly construe the scope of the constitutional error to keep it as a reversible trial error.²⁰⁶ For example, if a defendant's guilt is clear from the record, but a biased judge presided over the trial, courts will tighten the definition of what it means to be "biased" in order to keep it from being classified as a structural error under *Tumey* and its progeny.²⁰⁷ In fact, Shepard points to the history of the definition of "biased judges" and "conflict-free counsel" as prime examples of how courts have set a higher bar for what it means to be biased or conflicted.²⁰⁸ To keep judges from continuing to undermine defendant's rights, Shepard argues that most cases should go under a *Chapman* harmless-error review, and that only errors that the Court has determined to never contribute to the verdict should be labeled as structural error.²⁰⁹ In other words, if the error could ever contribute to the verdict, it should be evaluated under the harmless-error review. According to Shepard, structural error should be limited to violations of rights such as the right to a public trial, absence of discrimination in jury selection, and the right to defend one's self.²¹⁰

²⁰¹ See Wicht, *supra* note 177, at 104–05 (arguing that this rule would increase the reliability of verdicts).

²⁰² *Id.* at 105.

²⁰³ *Id.* at 106–07.

²⁰⁴ Shepard, *supra* note 25.

²⁰⁵ *Id.* at 1185–86.

²⁰⁶ *Id.* at 1186–89.

²⁰⁷ *Id.* at 1190–96.

²⁰⁸ *Id.* at 1186–1201.

²⁰⁹ *Id.* at 1209–10.

²¹⁰ *Id.* at 1210.

More than any other scholar on the subject, Shepard promotes the fact-finding principle of trials. But his critique of the *Fulminante* standard also allows his proposal to uphold the fundamental fairness in a unique way—by diminishing the chances that a judge can narrowly define a defendant’s rights.²¹¹ His approach also promotes a more flexible and consistent application of the law. The most difficult part of his analysis, however, is how a court would be able to decide which errors will *never* contribute to the verdict and are thus structural errors. This would require the courts to consider every possible situation in which an error *might* occur. The theoretical and practical difficulty of thinking of each permutation of how an error can occur is an exercise in futility.

Take, for example, the right to a public trial. Although somewhat far-fetched, consider a situation in which the unlawful closure of the courtroom during *voir dire* excluded a defendant’s cousin from coming in to the proceedings. A jury member is then impaneled who, later in the proceeding, recognized the defendant’s cousin as a former adversary. By not recusing herself, the animus towards the cousin could later infect the jury member’s prejudice in reaching the verdict. Even if, theoretically, the jury members should not focus on anything in the gallery, it is impossible to say that a violation of the right to a public trial never contributes to the verdict, which creates a difficult standard in application.

The suggestions from McCord, Stacy and Dayton, and Wicht all focus primarily on the fundamental fairness of the trial. This focus is possible only at the expense of the fact-finding principle as well as judicial efficiency, finality, gamesmanship, and consistency. Shepard’s article, however, addresses a different, yet equally important, aspect of fundamental fairness—the deterioration of a defendant’s rights. But Shepard puts it in a framework that still requires the courts to hypothesize over which errors will be structural, so that some errors can fall into the structural error classification.²¹² The suggested framework, set out below, attempts to go a step further than the other scholars in its focus on the fact-finding principle of appellate review.

VIII. PROPOSED FRAMEWORK: BURDEN SHIFTING AND THE ABOLISHMENT OF *FULMINANTE*

Under the proposed framework, the *Fulminante* structural error and trial error dichotomy is abolished, as is any attempt to classify certain rights into a given category. The burden of persuasion is shifted in different scenarios to balance the fact-finding purpose and the fundamental

²¹¹ *Id.* at 1185–86.

²¹² *See id.* at 1182 (requiring some errors to still fall in a category that would require automatic reversal).

fairness purpose. This framework also puts greater emphasis on reducing gamesmanship, promoting consistency in application, and permitting flexibility, but the framework may in practice reduce judicial efficiency and reduce the appearance of fundamental fairness. In order to state the framework coherently, it will be outlined in terms of a defendant appealing from a conviction.

Under this framework, appellate courts consider all error together; the court does not decide whether it was structural or trial error. The first question for the courts will be whether the error was properly preserved by a timely objection, forfeited by failure to raise a timely objection, or waived by a knowing and intelligent waiver. If the error was preserved, the court must then determine whether the error that occurred was a constitutional error or a non-constitutional error. All constitutional errors must undergo the harmless-error analysis under *Chapman*. But in compliance with a strict *Chapman* reading, the prosecution must persuade the appellate court beyond a reasonable doubt that the error was harmless—that the error did not contribute to the verdict.²¹³ With this burden shift comes a presumption that a constitutional error was harmful, which is necessary to safeguard the fundamental fairness of the trial. Further, in accordance with current precedent, the state must convince the court that the error in this specific case, not in some theoretical case or hypothetical scenario, did not contribute to the verdict.²¹⁴ But if the preserved error was non-constitutional, the standard from *Kotteakos* still applies. Under *Kotteakos*, the court must conclude only that “the judgment was not substantially swayed by the error.”²¹⁵

Unpreserved error falls into one of two categories. If the forfeiture occurred and defense counsel had no reasonable opportunity to object, then the prosecution must prove that plain error did not occur in trial. If there was a reasonable opportunity to object, then the defense must prove that there was plain error. For purposes of this framework, a reasonable opportunity to object means that (1) defense counsel knew or should have known that an error was occurring or recently occurred, and (2) that during the period necessary to make a timely objection, counsel had an occasion to raise that objection. Under the Federal Rules of Criminal Procedure 52(b), *Puckett*, *Olano*, and other United States Supreme Court cases, plain error is an error that is obvious, affects the defendant’s substantial rights, and “seriously affects the fairness, integrity, or public reputation of judicial

²¹³ *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

²¹⁴ *See Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (“The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.”).

²¹⁵ *Katteekos v. United States*, 328 U.S. 750, 765 (1946).

proceedings.²¹⁶ The other rules regarding specific errors that are not subject to plain-error review, such as subject matter jurisdiction, or errors that have certain timeliness restrictions remain the same.²¹⁷

If a new proceeding is warranted, the court should grant only the remedy that is required, not necessarily a new trial. In accordance with *Waller*, “[T]he remedy should be appropriate to the violation.”²¹⁸ For instance, if reversible error occurred during a suppression hearing, only a new suppression hearing should be ordered, and a new trial is not needed if the second suppression hearing produces essentially the same result. Many errors, however, would still require a new trial.

As for waiver, all rules and precedent regarding waiver remain the same: as long as the waiver was an “intentional relinquishment or abandonment of a known right,”²¹⁹ neither plain-error nor harmless-error analysis would apply. Further, any other appellate review standard not mentioned above remains unchanged by this proposal.²²⁰

A. *Strengths and Weaknesses*

In applying the mode of analysis from Part VI to this proposed framework, it is clear that the major emphasis is on the fact-finding principle of appellate review. By applying harmless-error review to all preserved errors, verdicts will be upheld, regardless of the type of constitutional error, as long as there was little or no impact on the actual verdict. On review, the appellate court’s primary focus is whether the jury would have reached the verdict it did without the error. If the answer is yes, there is no need for a court to vacate and remand.

This framework also promotes the principle of fundamental fairness in a similar way to Shepard’s framework. Since there is no gatekeeping function that defines structural error, there will be no erosion of a defendant’s rights by the narrow interpretation of what it means for a judge to be biased, for counsel to be conflicted, and a defendant’s other rights.

As far as secondary considerations are concerned, this framework promotes judicial efficiency by allowing reversal only on preserved

²¹⁶ *United States v. Olano*, 507 U.S. 725, 732 (1993) (internal quotations omitted); *see also* FED. R. EVID. 103 (“A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and . . . a party on the record: (a) timely objects or moves to strike; and (b) states the specific ground, unless it was apparent from the context . . .”).

²¹⁷ *See* Annual Review of Criminal Procedure, *supra* note 6, at 933–41 (outlining precedent for when counsel has made a “timely” objection in certain circumstances and which types of error are not subject to plain-error even if they are not objected to (not including structural error)).

²¹⁸ *Waller v. Georgia*, 467 U.S. 39, 50 (1984).

²¹⁹ *Olano*, 507 U.S. at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

²²⁰ *See generally* Annual Review of Criminal Procedure, *supra* note 6, at 905–1057 (outlining other appellate review standards, including standards for remand for evidentiary hearings, sentencing appeals, and *habeas* review).

harmful error or on forfeited error if the effected party can overcome the presumption of non-error. Unlike the current framework, or those proposed by McCord, Stacy and Dayton, and Wicht, errors will not require reversal as frequently merely because they fall into a particular class of errors. Instead, an appellate court will only require the burdensome second trial if an error was actually harmful or plain.

This framework also enhances the consistency in application. By removing the gatekeeping function, courts will need to focus just on the specific fact pattern from the record. The confusion inherent in McCord's eight factors or the structural error/trial error dichotomy is not present in this framework because the appellate courts do not need to classify errors in the first place. Finally, by shifting the burden to the defendant when confronted with forfeited errors, this framework virtually eliminates the opportunity for gamesmanship. If the defense counsel had a reasonable opportunity to object at trial but failed to, then the burden is on the defense to show that it was plain-error requiring reversal. Thus, there is no longer the advantage to withholding an objection on a structural error.

The most obvious shortcoming of this framework is that it could undermine the fundamental fairness of the trial. Some of the rights that are so important to the public's perception of a "fair" criminal trial within the United States do not have a great impact, if any, on the verdict.²²¹ By subjecting all errors to harmless-error review, there is the threat that no trial court will ever be reversed for violating certain rights. Some of these errors will be discussed in more depth *infra*. But take, for example, the closure of the courtroom. It is easy enough for the government to argue that the jury should not be affected by who is or is not present in the gallery. In fact, many trials occur with few, if any, observers present, and yet defendants do not claim that the trial is unfair. Even with the presumption of error, the government might overcome this presumption on review, and therefore continue to undermine the defendant's rights. This would make parts of the Constitution into a paper dragon.

The other major detriment of this framework is in the consistency of its results—that similar errors will result in similar outcomes. This framework increases the more nuanced look at error in a fact-specific review of the record. If the same case, dealing with the unlawful closure of a courtroom during the examination of a key witness, were tried ten different times, and the error was on a spectrum from clearly harmless to clearly harmful, the exact line where a court is willing to reverse on harmless-error review may fluctuate between districts and circuits. This, of course, is inherent in harmless-error review, but because the application is broader in this framework, its detriments are as well.

²²¹ See *infra* Part VIII.B.

The effects of these two detriments are weakened, however, by a few considerations. When applied correctly, the *Chapman* harmless-error test presumes harm.²²² Unless the prosecution can prove, beyond a reasonable doubt, that the error was harmless *in this particular case*, the verdict will be reversed.²²³ Thus, inherent in the harmless-error analysis is a presumption of harm that protects the fundamental fairness of the trial. Furthermore, the focus on what exactly it means to be a “fundamentally fair” trial is also shifted. Fundamental fairness can mean both the appearance of fairness and actual fairness. Fundamental rights, like the right to a public trial or a trial by jury, are based primarily in a feeling that secret tribunals and bench trials are unfair vehicles for administering criminal justice.²²⁴ Historically, there is some truth to the American distaste for the English legal system at the time the Constitution was written.²²⁵ But actual fairness is based on the idea that guilty people are correctly convicted and innocent people are correctly acquitted. This idea of actual fairness parallels the fact-finding principle. When push comes to shove in criminal trials, the actual fairness of the case, and not the perceived fairness, should take precedent.

B. *Application of Framework*

To show how this proposed framework would change current structural-error analysis, the framework will be applied to three cases that are currently classified as structural error. The three errors used are (1) the right to a public trial, (2) deficient reasonable doubt instructions, and (3) erroneous deprivation of a defendant’s choice of counsel.

Although the right to a public trial, classified as a structural error after *Waller*, requires automatic reversal under the *Fulminante* framework,²²⁶ under this proposed framework reversal may not actually be a foregone

²²² See *Chapman v. California*, 386 U.S. 18, 24 (1967) (“[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”).

²²³ *Id.*

²²⁴ *In re Oliver*, 333 U.S. 257, 268–70 (1948) (“The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy’s abuse of the *lettre de cachet*. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.”).

²²⁵ See, e.g., Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 483–84 (1986) (describing that the appearance of fairness is fundamental to an analysis on due process).

²²⁶ *Waller v. Georgia*, 467 U.S. 39, 49–50 (1984).

conclusion. Even with the presumption of harmfulness, a prosecutor-appellee could argue that, absent evidence to the contrary, the closure had no impact on the jury. For instance, in the *Waller* case, the jury was not even present during the suppression hearing because the courtroom had been closed to try and protect the privacy of people other than the defendant.²²⁷ On appeal, the Court summarily dismissed the Plaintiff's Fourth Amendment arguments about the result of the suppression hearings and only evaluated the claims regarding the unlawful closure of the trial court during a suppression hearing.²²⁸ In the remand order, the Court only ordered a new suppression hearing, not a new trial, as long as the trial court found in the new hearing that essentially same evidence was suppressed.²²⁹

Under this framework, the appellee could have brought a fact-specific argument as to why the same evidence would or would not have been suppressed regardless of the courtroom being closed. Not only would the judge's legal analysis have likely been dissuaded by the presence or absence of the public, but the jury was not even present to have witnessed any of the argument or the presence or absence of the public. Unlike a normal appellate review for a motion to suppress, the government would need to show that the trial court's decision was harmless beyond a reasonable doubt, which is a more defendant-favored standard of review than the normal *de novo* review of law and clearly erroneous review of fact²³⁰ on a defendant's appeal of a motion to suppress. Even still, the prosecutor-appellee's argument would likely overcome its burden of persuasion and therefore, no new trial would be needed in a case where the evidence was clearly admissible or inadmissible. This is a prime example of how this framework supports the fact-finding principle, finality, and judicial efficiency. There is still enough flexibility that, in certain cases, if the closure is harmful and the prosecution cannot overcome its burden, a new trial or motion is warranted.

Under the *Fulminante* framework, it is unclear when errors in reasonable doubt instructions are structural errors or trial errors.²³¹ The specific deficiency would need to be analyzed in each case and the prosecutor would have to show that the deficiency was harmless beyond a reasonable doubt. Where courts would draw the line on harmlessness may vary between circuits, but under this framework, the application is at least consistent and efficient.

²²⁷ *Id.* at 41–42.

²²⁸ *See id.* at 43 & 43 n.3 (“These cases present three questions: First, does the accused's Sixth Amendment right to a public trial extend to a suppression hearing conducted prior to the presentation of evidence to the jury? Second, if so, was that right violated here? Third, if so, what is the appropriate remedy?”).

²²⁹ *Id.* at 50.

²³⁰ *United States v. Dupree*, 323 F.3d 480, 484 (6th Cir. 2003).

²³¹ *Supra* notes 172–75 and accompanying text.

Of course, there is a strong argument that any decision by the court that a deficient reasonable doubt instruction was harmless usurps the role of the jury and infringes on the right to a jury trial.²³² However, the United States Supreme Court held that “an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.”²³³ Although reasonable doubt instructions change the burden for *each* element of an offense, the omission of an element likewise places the appellate court in the shoes of the jury. The same logic follows, however, that this sort of error does not necessarily render the criminal trial unfair or unreliable. With harmless-error, the defendant will still get a new trial unless the prosecution can overcome the presumption of harmfulness, but the appeals process does not have to pass the initial gate-keeping question in *Fulminante* which leads to erratic results.

Deficient reasonable doubt instructions also show how applying harmless-error review protects the fundamental fairness. As Shepard explains in his note, under the current *Fulminante* framework, once an appellate court determines that reasonable doubt instructions are deficient, a new trial is automatic.²³⁴ This forces the courts to undermine the definition of “deficient” in order to affirm a conviction in a case of borderline deficiency and overwhelming guilt. Under harmless-error review, a court can decide that jury instructions were constitutionally deficient, thereby setting precedent for lower courts and protecting the defendant’s rights, but the court can also decide that the instructions were harmless beyond a reasonable doubt, thereby promoting judicial efficiency and finality.

The erroneous deprivation of the defendant’s right to choose his counsel stresses the boundaries of this framework. Inherent in someone’s choice of counsel are the advocacy skills that the lawyer brings to trial. The chosen lawyer influences, both obviously and subtly, the jury’s decision of the case because of his or her conduct, strategy, and demeanor. As with many errors, it is also extraordinarily difficult to prove a non-occurrence—to prove that the lawyer who would have represented the defendant would have made a difference. But this is where a strict application of harmless-error is necessary, and under this framework the burden is on the prosecution to prove this non-occurrence. With all the nuances that are inherent in the art of trial advocacy, it would be difficult to imagine a scenario in which the prosecution would meet this burden. This is different, however, then saying that the prosecution could *never* meet its burden of proving that a non-occurrence was harmless beyond a reasonable

²³² *Supra* note 118 and accompanying text.

²³³ *Neder v. U.S.*, 527 U.S. 1, 9 (1999) (emphasis in original).

²³⁴ *See supra* note 205–13 and accompanying text.

doubt. That would put this right, and possibly others, into a category which, however you name it, presents the same problems as the current framework.

In a case like this, the appellate court should always analyze the fact-specific argument and refrain from broadly analogizing it to other cases that are frequently reversed. It is this type of error which best show the weaknesses in this proposed framework: there are some errors that would be inherently onerous for the prosecution to meet its burden. This realization follows closely with how automatic-reversal started in the first place. Footnote eight of *Chapman* included a mere list of errors that the Court thought would be impossible to prove harmless at the time.²³⁵ But that logic was greatly undermined when *Payne* was unclassified as an automatically reversible error in the *Fulminante* case.²³⁶ In other words, just because it may be difficult or impossible to think of a situation in which a certain error can be found harmless does not necessarily mean that it should be evaluated under a different standard. This proposed framework does not force these errors to be haphazardly categorized into one type or the other. Instead, the application of the proposed framework would be the same in every case, and in this balance between fact-finding and fundamental fairness, obtain more consistent and fair results.

Overall, there could be a concern that the application of this framework would give trial judges too much flexibility with a defendant's rights. If constitutional errors were frequently found harmless, what would stop a judge from consistently closing the courtroom or appointing conflicted defense counsel? Although this is a considerable danger in theory, it is greatly undermined by the fact that since 1967 there have been constitutional errors subject to harmless-error review and there is no call to arms over widespread judicial abuse. For example, the string-cite of trial errors from *Fulminante* includes errors such as the violation of the Confrontation Clause when a defendant was not permitted to cross-examine a witness for bias.²³⁷ Although there is a lot of debate over the protections and limitations of the Confrontation Clause, there is little to no discussion that judges are undermining the Confrontation Clause solely because it is subject to harmless-error review. The long history of harmless-error review, as applied to constitutional errors since *Chapman*, negates any worry that harmless-error application would result in judicial abuse of constitutional rights.

²³⁵ *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967).

²³⁶ See *supra* notes 75–80 and accompanying text.

²³⁷ *Fulminante v. Arizona*, 499 U.S. 279, 307 (1991) (referring to *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

IX. CONCLUSION

In the twenty-five years since the Court created a distinction between trial errors and structural errors, discussion of the framework as a whole has been noticeably absent.²³⁸ Yet confusion and misapplication of the *Fulminante* framework has been pervasive. Of greater concern is the tendency for courts to use their discretion to limit the strength of a defendant's constitutional protection, by limiting the protective reach of classifications like biased judges or conflicted counsel in order to uphold a seemingly correct jury verdict. The Court may have a chance to revisit the structural error and trial error dichotomy at some point in the near future. In order to keep the discussion alive, the proposed framework focuses on the principle of fact-finding in appellate review, unlike other suggestions that focus primarily on fundamental fairness. By subjecting all properly preserved constitutional errors to harmless-error review, and requiring burden shifting for forfeited errors under plain-error review, the courts would have a more workable framework that balances fundamental fairness, promotes accurate fact-finding, increases judicial efficiency, increases consistency in application, and protects against gamesmanship. This proposal strikes better balance for promoting the Supreme Court's rationale that the "central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promote[] public respect for the criminal process by focusing on the underlying fairness of the trial."²³⁹

²³⁸ See *supra* notes 179–83 and accompanying text.

²³⁹ *Fulminante*, 499 U.S. at 308 (quoting *Van Arsdall*, 475 U.S. at 681).