



## Outside Counsel

## Expert Analysis

# Appellate Review of Structural Errors in Criminal Trials

Two kinds of errors may infect a criminal trial—trial errors and structural errors.<sup>1</sup> Whereas the standards for appellate review of trial errors are well known and the subject of numerous cases, the standards for review of structural error are less well delineated. Not only are there fewer structural error cases than there are trial error cases, but several U.S. Court of Appeals for the Second Circuit cases involving structural errors appear to establish a standard on appeal that is in tension with the standard established by the U.S. Supreme Court and that leaves many questions as to its application.

### Review of Trial Errors

Most errors related to criminal cases—including, for example, the vast majority of evidentiary errors, errors in jury instructions, errors related to discovery or guidelines calculations—are trial errors. Appellate review of trial errors depends on whether they were preserved below. If so, then the court applies “harmless error analysis,” in which it first determines whether the error was constitutional. If the error was constitutional, then the court must determine whether the error was harmless beyond a reasonable doubt.<sup>2</sup> If the error is not constitutional, then the question is simply whether “there is ‘fair assurance’ that the jury’s judgment was not substantially swayed by the error.”<sup>3</sup>

If the trial error was not preserved (and not waived), then, regardless whether it was constitutional, the court applies a four-step “plain error analysis” set forth in *United States v. Olano*,<sup>4</sup> in which it determines (i) whether there was error, (ii) whether the error is “plain,” (iii) whether the error affected the defendant’s “substantial rights,” and, if and only if the answers to each of the prior three steps is “yes,” then the court considers (iv) whether the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”<sup>5</sup>

### Structural Errors

So much is well-trod ground. Less familiar is the appellate review of structural errors. Structural errors

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are those errors that “ordinarily relate to fundamental rights involving the structure of the trial.”<sup>6</sup> The only errors identified by the Supreme Court as falling in the “structural” category are: denial of counsel,<sup>7</sup> denial of the right of self-representation,<sup>8</sup> denial of the right to paid counsel of one’s choice,<sup>9</sup> biased trial judge,<sup>10</sup> racial discrimination in the selection of the grand jury,<sup>11</sup> denial of the right to trial by jury by giving a defective reasonable-doubt instruction,<sup>12</sup> and denial of a public trial.<sup>13</sup> In addition, lower courts have found that *Batson* errors are structural.<sup>14</sup>

Recent Second Circuit authority has drawn a distinction between large and small structural errors.

The Supreme Court has stated that when structural errors occur, automatic reversal is required. In *Neder v. United States*, the Court stated that “...we have found an error to be ‘structural,’ and thus subject to automatic reversal, only in a very limited class of cases.”<sup>15</sup> In *Washington v. Recuenco*, the Court stated “[o]nly in rare cases has this Court held that an error is structural, and thus requires automatic reversal. In such cases, the error ‘necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.’”<sup>16</sup> More recently in *Rivera v. Illinois*, the Supreme Court reiterated the point, stating that “...we typically designate an error as ‘structural,’ therefore ‘requir[ing] automatic reversal,’...”<sup>17</sup>

Almost all of the Supreme Court cases involving structural error have arisen when the error was substantial. For example, when counsel was wrongly denied throughout the trial,<sup>18</sup> when the courtroom was improperly closed for a significant portion of the proceedings,<sup>19</sup> or when racial discrimination

affected the selection of the entire grand jury.<sup>20</sup> The Court has not addressed the question whether smaller structural errors—say, a brief, improper, denial of counsel or closure of the courtroom, or racial discrimination against a single potential member of a grand jury—are subject to the per se rule of reversal, or to some other standard. The Court’s assertion of the automatic reversal rule has been categorical, however, and it has never suggested that a smaller structural error should be treated differently from a larger one.

### ‘Triviality Analysis’

Recent Second Circuit authority, however, has drawn a distinction between large and small structural errors. When faced with structural errors—most often the wrongful closure of a courtroom—that effect only a part of the trial, the court has not applied the automatic reversal rule. Rather, it has applied a “triviality standard,”<sup>21</sup> under which the

analysis turns on whether the closure subverts the values the drafters of the Sixth amendment sought to protect: “1) to ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury.”<sup>22</sup>

Using this analysis, the Second Circuit has upheld several convictions<sup>23</sup> notwithstanding the existence of structural errors. It has used the triviality analysis not only for violations of the sixth amendment right to a public trial but also to uphold a conviction notwithstanding that a defendant was denied his sixth amendment right to consult with his counsel. The Second Circuit found that the deprivation—which it acknowledged was structural—had been sufficiently short that it was trivial and did not mandate reversal.<sup>24</sup>

In explaining its position, the Second Circuit has emphasized that some errors, even though they are structural, are simply too small to warrant reversal:

Suppose, for example, that in a lengthy, multi-defendant trial, three months into trial, for a few minutes after a luncheon recess, trial proceeded without the judge being aware that the attorney for one of the defendants had not yet returned to the courtroom. Assume that the evidence received during those few minutes had nothing to do with the temporarily

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unrepresented defendant's complicity, and that upon counsel's tardy return a few minutes later, counsel reviewed the evidence received in his absence and advised the court that, while he objected to the trial having been conducted in his absence, he had no objection to any of the evidence. Trial then continued for another several months. We very much doubt, notwithstanding the brief "structural" deprivation for an inconsequential portion of the trial, that the Supreme Court would require that the conviction be vacated.<sup>25</sup>

#### Four Questions

There is force to the Second Circuit's reasoning. Errors that plainly do not affect the outcome of the case and plainly do not sacrifice the values that underlie the relevant constitutional provisions should not lead to reversal of a conviction. But the Second Circuit's triviality analysis leads to at least four significant problems or questions.

First, the triviality analysis must be reconciled with the automatic reversal rule. In *Yarborough v. Keane*, the Second Circuit attempted the reconciliation by reinterpreting the Supreme Court cases that had set forth the structural error doctrine: "We do not understand *Fulminante's* list of examples of [structural errors] to mean that any violation of the same constitutional right is a 'structural defect' regardless whether the error is significant or trivial. Nor does the fact that the Supreme Court has applied harmless error analysis to one level of violation of a particular right necessarily mean that even the most egregious violations of that right would also require demonstrated prejudice."<sup>26</sup>

According to *Yarborough*, then, there are no constitutional rights the violation of which requires automatic reversal; rather the violation of any constitutional right could mandate automatic reversal, without regard to either the harmless error or plain error standards, if the violation were sufficiently profound.

This explanation of structural errors is inconsistent with the development of the structural error doctrine in the Supreme Court. The cases in which the doctrine has been developed have plainly categorized certain rights as structural, as distinguished from all other (trial) rights. As the Supreme Court stated in *United States v. Gonzalez-Lopez*<sup>27</sup> (which was decided well after *Yarborough*), "it is hard to read that case [*Fulminante*] as doing anything other than dividing constitutional error into two comprehensive categories."<sup>28</sup>

Second, how is the court to decide whether a structural error is "trivial?" How long must a wrongful courtroom closure last for it to pass from the "trivial" to "automatic reversal?" If only one prospective grand juror is excluded on account of race, is that "trivial" in the face of overwhelming evidence of a defendant's guilt? How many witnesses must a defense lawyer be absent for before the violation is not trivial? There is no obvious way to answer these questions, but deciding which errors are so small that they do not warrant reversal inevitably invites fears of a "slippery slope," and comparison with the "harmless error analysis" used for trial errors.

Third, in each of the Second Circuit's triviality

analysis cases the structural error had been preserved. Under the triviality analysis, does that matter? Whereas the presence or absence of an objection is the very first question in the analysis of trial errors, the triviality analysis makes no mention of it. But whether a defendant objects should make a difference in analysis, otherwise defendants will have less incentive to object to errors and might "game" the system by allowing errors to happen and then raising them on appeal. If preserved structural errors are not cause for reversal so long as they are trivial, would a different standard apply if the structural error had been forfeited?

Fourth, trial errors may be reviewed differently on direct appeal than on collateral review.<sup>29</sup> The triviality analysis cases arose in both contexts—most on habeas<sup>30</sup> but one on direct appeal.<sup>31</sup> No distinction was made between them, and the question thus posed is whether the triviality analysis applies differently on direct appeal than on collateral review.

The Second Circuit's determination that even small structural errors do not mandate reversal of criminal convictions is entirely reasonable, but it is in tension with the Supreme Court's automatic reversal rule.

#### Conclusion

The Second Circuit's determination that even small structural errors do not mandate reversal of criminal convictions is entirely reasonable, but it is in tension with the Supreme Court's automatic reversal rule. Even if the triviality analysis could be reconciled with the automatic reversal rule, that analysis leaves a number of questions unanswered. As more cases are decided under the triviality standard, that standard's boundaries will be developed in a variety of circumstances, and thus the line between trivial errors and others should become clear, as should the distinction between the triviality standard and the more familiar "harmless error analysis."

The Second Circuit must also explain whether (and, if so, how) a defendant's objection to a structural error will affect the scope of review in the appellate court (as it should). It must also explain whether the standard is the same on direct appeal as on collateral review.

1. *Arizona v. Fulminante*, 499 U.S. 279, 307-10 (1991); see also *Gibbons v. Savage*, 555 F.3d 112, 119 (2d Cir. 2009).

2. *Chapman v. California*, 386 U.S. 18, 24 (1967) (stating that "before 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").

3. *United States v. Yousef*, 327 F.3d 56, 121 (2d Cir. 2003) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)); see also *United States v. Spell*, 789 F.2d 143, 144 (2d Cir. 1986) (applying harmless error analysis to admission of evidence); Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded").

4. 507 U.S. 725 (1993).

5. *United States v. Olano*, 507 U.S. 725, 736 (1993) (internal

citations and quotations omitted); see also Fed. R. Crim. P. 52(b).

6. *Gibbons v. Savage*, supra, 555 F.3d at 119.

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

8. *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n.8 (1984).

9. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

10. *Turney v. Ohio*, 273 U.S. 510 (1927).

11. *Vasquez v. Hillery*, 474 U.S. 254 (1986).

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

13. *Waller v. Georgia*, 467 U.S. 39, 49 (1984).

14. See, e.g., *United States v. Kimbrel*, 532 F.3d 461, 469 (6th Cir. 2008); *Tankleff v. Senkouski*, 135 F.3d 235, 248 (2d Cir. 1998).

15. 527 U.S. 1, 8 (1999) (emphasis added) (citations and internal quotations omitted).

16. 548 U.S. 212, 218-19 (2006) (footnote omitted) (emphasis supplied) (quoting *Neder v. United States*, 527 U.S. 1, 9 (1999)).

17. —U.S.—, —, 129 S. Ct. 1446, 1455 (2009) (emphasis added) (quoting *Recuenco*). See also *Peck v. United States*, 106 F.3d 450, 454 (2d Cir. 1997) ("a per se rule of reversal applies when structural error is present at trial").

18. *Gideon v. Wainwright*; *Gonzalez-Lopez*.

19. *Waller v. Georgia*.

20. *Vasquez v. Hillery*.

21. See, e.g., *Gibbons v. Savage*, supra, 555 F.3d at 120-22; *Smith v. Hollins*, 448 F.3d 533, 540 (2d Cir. 2006); *Carson v. Fischer*, 421 F.3d 83, 92 (2d Cir. 2005); *Peterson v. Williams*, 85 F.3d 39, 44 (2d Cir. 1996). The Second Circuit has also applied the triviality standard in assessing a deprivation of a defendant's right to counsel. See *United States v. Triumph Capital Group Inc.*, 487 F.3d 124, 134-35 (2d Cir. 2007).

22. *Smith v. Hollins*, supra, 448 F.3d at 540 (quoting *Carson v. Fischer*, 421 F.3d 83, 95 (2d Cir. 2005)). See also *Gibbons v. Savage*, supra, 555 F.3d at 121 (same).

23. See, e.g., *Gibbons v. Savage*, supra (upholding conviction notwithstanding improper closure of the courtroom, in violation of the defendant's sixth amendment right to a public trial); *Smith v. Hollins*, supra (same); *Carson v. Fischer*, supra (same); *Peterson v. Williams*, supra (same); *United States v. Triumph Capital Group*, supra (upholding conviction notwithstanding improper deprivation of the defendant's right to consult with his counsel, in violation of his sixth amendment right to counsel).

24. *United States v. Triumph Capital Group*, supra.

25. *Gibbons v. Savage*, supra, 555 F.3d at 120.

26. *Yarborough v. Keane*, 101 F.3d 894, 897 (2d Cir. 1996).

27. 548 U.S. 140 (2006).

28. *Id.* at 149 n.4.

29. Compare *Chapman v. California*, 386 U.S. 18, 24 (1967) (requiring that the error be "harmless beyond a reasonable doubt"), with *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (requiring that the error have no "substantial and injurious effect or influence in determining the jury's verdict"). There is some question whether *Brecht* survives statutory amendments to the habeas corpus statute, 28 U.S.C. §2254, in all circumstances. See *Gutierrez v. McGinness*, 389 F.3d 300, 306-07 (2d Cir. 2004).

30. *Gibbons v. Savage*; *Smith v. Hollins*; *Carson v. Fischer*; *Yarborough v. Keane*; *Peterson v. Williams*.

31. *United States v. Triumph Capital Group*.