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The Case Against Automatic Reversal of Structural Errors

ABSTRACT. This Note describes the case law governing three structural errors and shows that the rule of automatic reversal has led appellate courts to narrow the scope of the rights at issue. To avoid this effect, the Note proposes a new framework for determining whether a given type of error is “structural” and thus requires automatic reversal. The rule of automatic reversal should apply only to types of error that never contribute to a verdict.

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INTRODUCTION

The rule of automatic reversal requires appellate courts to reverse all criminal convictions tainted by certain errors. The Supreme Court calls these errors “structural errors” and distinguishes them from “trial errors” that do not require an automatic reversal.¹ When an appellate court confronts a new type of error, the court must decide whether to treat it as a structural error (which must be reversed automatically) or as a trial error (which does not always require reversal). This Note describes an important and previously undocumented doctrinal consequence of labeling a type of error as “structural”: over time, the rule of automatic reversal narrows the definitions of structural errors and thereby weakens the procedural safeguards that protect defendants. To avoid that consequence, this Note proposes a new framework for deciding whether a type of error is “structural.” The proposed test is straightforward: a type of error should only be labeled as “structural” (and therefore reversed automatically) if it never contributes to a verdict.

To illustrate, consider the Supreme Court’s 2006 decision in *United States v. Gonzalez-Lopez*.² There, the defendant hired an out-of-state lawyer to represent him; that lawyer filed a motion for admission pro hac vice so that he could participate in the trial.³ The district court erroneously denied that motion, and as a result the defendant went to trial without his preferred lawyer. He lost. On appeal, the government conceded that the district court was wrong to deny the pro hac vice motion, but argued that the error was harmless. To decide the case, the Court had to determine whether this type of error—depriving the defendant of his counsel of choice—is a “structural error” requiring automatic reversal, or a “trial error” that does not always require reversal.⁴ To make this determination, the Court applied the test it set out fifteen years earlier in *Arizona v. Fulminante*.⁵ Under that test, the error is “structural” because it “bears directly on the framework within which the trial proceeds”; as a structural error, it must be reversed automatically.⁶

Under this Note’s proposed framework, by contrast, the Court would have asked instead whether this type of error—the erroneous deprivation of defendant’s counsel of choice—never contributes to a verdict. The answer to

1. *Arizona v. Fulminante*, 499 U.S. 279, 307-12 (1991).

2. 126 S. Ct. 2557 (2006).

3. *Id.* at 2560.

4. *Id.* at 2563-64.

5. *Fulminante*, 499 U.S. at 307-12.

6. *Gonzalez-Lopez*, 126 S. Ct. at 2564 (citation omitted).

that question is “no”—this type of error contributes to the verdict in almost every case. Therefore, under this Note’s proposed test, the Court would have held that this type of error is a “trial error” and would then have asked whether the error was harmless in this particular case.

To determine whether the error was harmless, the Court would have applied the test for harmlessness articulated in *Chapman v. California*, according to which a constitutional error is harmless if on appeal the prosecution proves “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”⁷ Had the Court applied the *Chapman* test, it would have found abundant doubt regarding whether the particular error in *Gonzalez-Lopez* contributed to the verdict and likely would have concluded that the error therefore was not harmless.⁸ Because the error was not harmless, the Court would have reversed and remanded for a new trial. In short, regardless of whether the Court labeled this type of error as a “structural error” or a “trial error,” the outcome would have been the same: reversed and remanded for a new trial.

But the outcomes of future cases will be affected by the Court’s decision in *Gonzalez-Lopez* to treat this type of error as structural. As Part II demonstrates, over the long run the rule of automatic reversal narrows the definitions of structural errors and thereby weakens constitutional safeguards that protect defendants. Part II examines three procedural rights: the right to an unbiased judge; the right to a defense counsel free from conflicts of interest; and the right to an adequate jury instruction on the meaning of reasonable doubt. The doctrinal fates of these rights suggest that courts have weakened all three to avoid applying the drastic remedy of automatic reversal. It is therefore likely that in the long run, *Gonzalez-Lopez* will generate case law that approves trial courts’ denials of defense lawyers’ pro hac vice motions; that case law, in turn, will make it *more* difficult for defendants to secure the counsel of their choice.

Because the rule of automatic reversal tends to narrow the definitions of the rights that the rule protects, this Note proposes a new, more limited test for determining whether a given type of error is structural. Under this test, only types of error that never contribute to the verdict would be labeled “structural” and automatically reversed. Part III describes and critiques the current *Fulminante* test for determining when an error is “structural” and describes the proposed alternative. First, however, Part I discusses the scholarship on automatic reversal.

7. 386 U.S. 18, 24 (1967).

8. See *Gonzalez-Lopez*, 126 S. Ct. at 2560-61 (describing the facts).

I. THE DEFENDERS OF AUTOMATIC REVERSAL

With few exceptions, legal scholarship on automatic reversal urges the courts to extend the rule of automatic reversal to more errors of criminal procedure. This Part describes that literature and shows that legal scholars have so far failed to appreciate the problem described below in Part II, namely, that the rule causes subsequent courts to narrow the definition of the right protected by the rule. To be sure, existing scholarship is correct that automatic reversal should apply to some types of error—namely, to those types of error that *never* contribute to a verdict. As Part III discusses in detail, automatic reversal is the only workable rule for those types of error. But in addition to those types of error, scholars have urged courts to extend automatic reversal to many other types of error that *do* contribute to a verdict. In so doing, scholars may have indirectly contributed to an erosion of the procedures that protect defendants.

Some scholars argue that every constitutional error, simply because it violates the Constitution, must be reversed automatically; anything less than automatic reversal, these scholars suggest, is not enough to right a constitutional wrong.⁹ This argument now appears somewhat dated; the Supreme Court has made clear that many constitutional errors can indeed be harmless.¹⁰

9. A typical and oft-cited example of this argument is Professor Steven Goldberg's sharp criticism of *Chapman*. Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421 (1980). Another frequently cited example is Professor Charles Ogletree's strong disapproval of *Fulminante*, which held that erroneous admission of coerced confessions is not a structural error. Ogletree argued that automatic reversal is the only way that appellate courts can "vindicate" constitutional procedural rights. Charles J. Ogletree, Jr., Comment, *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152 (1991). Other scholars have made the same point. E.g., Francis A. Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 IOWA L. REV. 311, 329-35 (1985) (claiming that automatic reversal weakens constitutional protections in state courts); Stuart P. Green, *The Challenge of Harmless Error*, 59 LA. L. REV. 1101, 1103 (1999) (warning that harmless-error analysis "creates the danger that the constitutionally prescribed role of the jury might be undermined").

Justice Scalia has made a related argument that certain errors must be considered structural because these errors prevent the jury from reaching a verdict. *Neder v. United States*, 527 U.S. 1, 31-32 (1999) (Scalia, J., dissenting). Put another way, appellate courts cannot determine how these errors contribute to the verdict because these errors prevent the jury from ever reaching a valid verdict. Scholars have echoed Scalia's arguments. E.g., Linda E. Carter, *The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court's "No Harm, No Foul" Debate in Neder v. United States*, 28 AM. J. CRIM. L. 229 (2001).

10. E.g., *Washington v. Recuenco*, 126 S. Ct. 2546 (2006) (fact-finding by judge in violation of defendant's right to jury trial); *Crawford v. Washington*, 541 U.S. 36, 76 (2004) (Rehnquist, C.J., dissenting) (violation of the Confrontation Clause); *Neder*, 527 U.S. at 9-10 (failure to instruct the jury on an element of the crime).

Professors Tom Stacy and Kim Dayton argue that the rule of automatic reversal deters “law enforcement officials” from committing procedural errors.¹¹ But Stacy and Dayton offer no reason to think that a reversal impresses law enforcement officials more than does, say, a sternly worded opinion that both condemns the error and affirms the verdict. Nor do Stacy and Dayton consider whether the rule of automatic reversal may lead appellate courts to define the scope of error more narrowly, and thereby ratify conduct that would otherwise have been condemned and forbidden.

Scholars also argue that automatic reversal is a cost-efficient way of maximizing the number of correct appellate decisions. If certain types of error are almost always prejudicial to the defendant, the argument goes, those types of error ought to be reversed automatically to save appellate courts the effort of deciding whether a particular error was harmless in a particular case. Professor Philip Mause made this argument two years after the Court decided *Chapman*;¹² Professor William Landes and Judge Richard Posner have since restated it with more theoretical rigor.¹³ The problem with Landes and Posner’s defense of automatic reversal is that they assume that each type of error is clearly defined. In other words, they assume that appellate courts can effortlessly determine whether, for example, a trial court’s denial of a defense lawyer’s pro hac vice motion was correct or erroneous. But that assumption is false: types of error are not so clearly defined—in many cases, it is debatable whether an error occurred at all. The initial decisions that establish an error rarely define the error in terms that are specific enough to decide easily whether later trials are erroneous or not. Because errors are vaguely defined, appellate courts have great latitude to find that, in a later trial, no error occurred at all. Part II, below, describes three areas of the law in which appellate courts have done just that.

II. THE DOCTRINAL CONSEQUENCES OF AUTOMATIC REVERSAL

This Part examines in detail three errors that trigger automatic reversal: judicial bias; deprivation of conflict-free defense counsel; and failure to instruct the jury on the meaning of reasonable doubt. In each case, the rule of automatic reversal has created a conflict between two distinct purposes of

11. Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 95-98 (1988).

12. See Philip J. Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 535-37 (1969).

13. William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. LEGAL STUD. 161, 169-70 (2001).

appellate review. One purpose of appellate review is retrospective: the court must examine the fairness of the particular trial at issue in order to affirm a fairly obtained verdict and reverse an unfairly obtained verdict. A second purpose of appellate review is prospective: the court must articulate the best practices and procedures for future trials. The following Section describes a theory of how automatic reversal forces an appellate court to choose between those two purposes; the later Sections use that theory to explain the doctrinal history of the three errors described above. The final Section offers responses to expected objections.

A. A Three-Generational Theory of Appellate Review of Error

Imagine three generations of criminal appeals where the defendant in each claims that his trial judge was biased against him. Imagine further that the first-generation appeal is an easy case: the defendant's trial judge had plenary power to convict and a direct financial incentive to do so. The Supreme Court finds that the judge was biased, holds that the defendant's due process rights were violated, and reverses the conviction. In this case, the retrospective and prospective purposes of appellate review work in tandem. The Court reverses because the trial was unfair; that reversal establishes the rule that future trials may not be conducted by biased judges. The Court does not pause to consider whether in future appeals such an error could be found harmless under the *Chapman v. California* test for harmlessness—that is, the Court does not consider whether the prosecution might, in some future cases, be able to avoid reversal by proving “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”¹⁴

Now imagine, years later, that a second-generation case reaches an appellate court. This case is more difficult: a jury convicted the defendant, but the judge presiding over that jury had crossed swords with the defendant years earlier while working as a prosecutor and may have harbored a grudge against him. Yet despite that possible bias, the judge's rulings were all straightforward and unobjectionable, the evidence of guilt was overwhelming, and the jury's deliberations were brief. In reviewing the guilty verdict, the appellate court is forced to choose between the prospective and retrospective purposes of appellate review. Looking forward, the court may wish to establish a clear rule that in these circumstances, trial judges should recuse themselves. But looking

14. 386 U.S. 18, 24 (1967). If the Court had applied *Chapman* to this hypothetical case, it would have found that there was reasonable doubt as to whether this error contributed to the verdict and reversed. The verdict was entirely in the judge's hands, and only the judge could have known whether the financial temptation contributed to his decision.

backward, the appellate court may be reluctant to reverse this particular conviction because the court is certain, beyond a reasonable doubt, that bias did not contribute to the jury's verdict. The appellate court will be reluctant to reverse the conviction for several reasons. First, many cases are costly to retry. Second, appeals take years to complete. By the time the defendant is retried, evidence may have disappeared and witnesses may have moved away. Finally, many of the second-generation cases discussed below are federal habeas petitions reviewing state court judgments that are five, ten, or even twenty years old.¹⁵ Retrials may simply be impossible in such cases.

Harmless-error review would allow the appellate court to achieve both purposes. Looking forward, the court could both find that a serious error occurred and hold that the error ought never be repeated. Looking backward, the court could find that the error did not affect the verdict. For example, in *United States v. Jordan*, the Fifth Circuit held that the district judge erred by presiding over the trial of a defendant who had harmed the judge's personal friend.¹⁶ Yet the appellate court also affirmed the conviction because the error did not contribute to the jury's verdict; the trial had been competently conducted.¹⁷ That holding established an important precedent under the federal judicial recusal statute,¹⁸ but it did not incur the high cost of reversing the conviction.

The rule of automatic reversal, however, makes such a solution impossible. If the appellate court were to declare that an error occurred—thereby setting a precedent that judges must recuse themselves in such circumstances—then the court would also be forced to reverse the conviction. Such a result, looking backward, may be deeply troubling, especially if the evidence is overwhelming and if the state will not be able to retry the case. Faced with this conflict between the prospective and retrospective purposes of appellate review, many second-generation appellate courts choose to affirm the conviction by declaring that no error occurred.¹⁹ Appellate judges are reluctant to reverse a conviction when they are certain that the error did not contribute to the jury's verdict. In

15. *E.g.*, *Bracy v. Schomig*, 286 F.3d 406 (7th Cir. 2002) (en banc) (reviewing a state trial that occurred in 1982).

16. 49 F.3d 152, 159 (5th Cir. 1995).

17. *Id.*

18. *Id.* at 158-59. *Jordan* considered the federal judicial recusal statute, 28 U.S.C. § 455(a) (2000), rather than the Due Process Clause right to an unbiased decision maker. Despite that difference, the case shows that such errors can be reviewed for harmlessness and need not be reversed automatically.

19. See *infra* notes 38-43 (judicial bias); *infra* notes 75-80 (conflicted counsel); *infra* notes 96-105 (flawed jury instruction on the meaning of reasonable doubt).

such cases, the appellate courts might *want* to write an opinion finding error but are unwilling to reverse the conviction to do it. Scholars have observed this phenomenon in studying the outcomes of *Batson v. Kentucky*²⁰ appeals, in which defendants claim that the prosecution discriminated against prospective jurors. Professor Pamela Karlan summed up other scholars' studies of *Batson* appeals as follows: "[W]hen [appellate] courts cannot calibrate the remedy [of reversal], they fudge on the right instead," and hold that the defendant's right was not violated.²¹ That memorable phrase describes not only the case law applying *Batson*, but also the case law governing all other errors to which the rule of automatic reversal applies. The Sections below tell the same story about three other types of error. For each type of error, second-generation decisions affirmed convictions by finding that no error occurred; those decisions thereby created precedents that narrowed the definition of the error and the scope of defendants' right.

Would the first- and second-generation outcomes have differed if the appellate courts had reviewed the convictions for harmless error under *Chapman*, and thus had required the prosecution to prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"?²² To the defendants, no. The first-generation defendant's conviction still would have been reversed (because the error did contribute to the verdict); the second-generation defendant's conviction still would have been affirmed (because the error, beyond a reasonable doubt, did not contribute to the verdict). But the *doctrinal* outcomes would have differed. The second-generation court reached its decision only by narrowing the definition of the error. That doctrinal difference may not matter to the second-generation defendant, but it might make all the difference to a third-generation defendant.

Imagine a third-generation trial in which the defendant's guilt is in real doubt. Imagine also that the evidence of the judge's bias is precisely the same as the evidence of bias in the controlling second-generation precedent—here again, the judge prosecuted the defendant for a different crime years earlier. The defendant asks the former prosecutor to recuse himself and invokes the first-generation precedent condemning bias; the judge, however, cites the more recent second-generation precedent and stays on the case. During the trial that follows, the judge's evidentiary rulings—arguably incorrect, but not an abuse of discretion—permit the prosecution to introduce evidence that

20. 476 U.S. 79 (1986).

21. Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2015 (1998).

22. *Chapman v. California*, 386 U.S. 18, 24 (1967).

sways the jury to convict. Here, then, the second-generation precedent has made all the difference. By narrowing the definition of “bias,” the second-generation precedent has permitted a trial that the first-generation precedent prohibited. And if the third-generation defendant appeals his conviction, and claims that in his case (unlike in the second-generation case) bias really did alter the course of the trial, and really did contribute to the verdict, that appeal will fail. The defendant cannot argue that he was prejudiced without first showing that an error occurred, and the second-generation case held that no error occurred.

It is therefore no surprise that the Federal Reporter contains little evidence of third-generation appeals. There is no reason for an appellate court to write an opinion saying,

If we were not bound by second-generation precedent to conclude that no error occurred here, then we would find that this *was* an error. And if we were not also bound by first-generation precedent to treat such errors as requiring automatic reversal, then we would apply harmless-error review, would find that the error may have contributed to the verdict, and so would reverse. But we do not do any of this because, as mentioned, the second-generation case requires us to find that no error occurred in the first place. There is therefore no need for us to decide whether what happened here, if it *were* error, would be harmless.

In fact, there are very good reasons for courts not to publish such an opinion. It is dicta; it is wasted effort; it saps the public’s faith in the courts. The evidence of third-generation cases—in the form of published appellate opinions—is therefore scarce. But it does not follow that the cases themselves are rare. Throughout the rest of this Part, some possible third-generation cases are identified—that is, cases that may have ended in acquittal or reversal if not for the narrowing effect of second-generation precedents.

The next three Sections apply the three-generational theory to the doctrinal history of three different errors that trigger automatic reversal: judicial bias; deprivation of conflict-free defense counsel; and failure to instruct the jury on the meaning of reasonable doubt.

B. *The Diminished Meaning of "Bias"*

In its 1955 decision *In re Murchison*, the Supreme Court set a new standard for when a trial judge must recuse himself for bias.²³ This Section explains how later decisions diluted the *Murchison* standard by narrowing the meaning of "bias" back to what it had been at the common law: direct financial interest in the outcome.²⁴ This Section suggests that this narrowing occurred because the Court set the rule that a "biased" judge requires an automatic reversal.

Murchison held that a judge who sat as a one-man grand jury could not later judge the contempt trials of witnesses who perjured themselves during the judge's closed grand jury sessions.²⁵ *Murchison* reasoned that a judge who had himself accused the defendant of contempt could not later be "wholly disinterested" when presiding over the defendant's contempt trial.²⁶ *Murchison* reversed the conviction without considering whether the judge's bias—though error—was nevertheless harmless.²⁷ This failure to consider the error's possible harmlessness is entirely understandable in context: in *Murchison* and other bias cases, the Court was interested in eliminating what it saw as the inherent unfairness of peculiar state court practices in which one man sat as judge, jury, and prosecutor.²⁸ A reversal would get the states' attention; holding the error harmless would not.

Murchison and the other early bias cases did not explain why bias cannot be harmless. In later cases, however, the Court came up with an explanation. In *Chapman*, the case in which the Court held that some constitutional errors can be harmless, the Court explained that bias is not such an error; bias must be reversed automatically because the right to an unbiased judge is "so basic to a

23. 349 U.S. 133, 137 (1955).

24. At common law, financial bias was the only type of bias that required judges to recuse themselves. See 3 WILLIAM BLACKSTONE, COMMENTARIES *361.

25. *Murchison*, 349 U.S. at 137.

26. *Id.*

27. See *id.* at 139.

28. In another example, the Court reversed the conviction of a bootlegger who had been tried before a town mayor. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). In *Tumey*, an Ohio statute gave the mayor power to determine guilt and to levy fines on the guilty, and the town's funding scheme gave him "a direct, personal, substantial pecuniary interest" in the outcome. *Id.* at 523. If the mayor convicted, the town reimbursed his "costs." *Id.* at 520. A unanimous Court held that the trial violated *Tumey's* Fourteenth Amendment right to due process. *Id.* at 514-15. In *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), the Court reversed another conviction from an Ohio mayor's court. And in *Connally v. Georgia*, 429 U.S. 245 (1977), the Court vacated a conviction secured based on evidence seized pursuant to a warrant signed by a justice of the peace whose salary was based on the number of warrants he approved.

fair trial” that bias “can never be treated as harmless error.”²⁹ The Court has repeated that explanation ever since in continuing to hold that “bias” requires automatic reversal.³⁰

Consistent with the theory described above in Section II.A, the rule of automatic reversal caused second-generation courts to narrow the definition of “bias” from the expansive definition given by the Court in *Murchison*.³¹ *Del Vecchio v. Illinois Department of Corrections* is the leading second-generation case that illustrates the pernicious effects of automatic reversal.³²

As a young man, George Del Vecchio committed a horrible murder that made headlines across Chicago. A prosecutor, Louis Garippo, cut him a break,³³ and as a result of Garippo’s decision Del Vecchio did not spend his life in prison; instead, he was a free man eight years later. Four years after his release, Del Vecchio murdered a child. At his murder trial, his judge was Louis Garippo, the same man who had helped him obtain a lenient sentence twelve years before. The evidence of Del Vecchio’s guilt at his second trial was “overwhelming”;³⁴ the jury convicted him and sentenced him to death.³⁵

The question presented to the Seventh Circuit on Del Vecchio’s habeas petition was whether Judge Garippo was biased. *Murchison* suggests that the answer to that question was “yes.” After all, might not Garippo have been tempted to act with the “zeal of a prosecutor,” as the Court noted in *Murchison*?³⁶ Faced with similar circumstances, other judges had recused themselves voluntarily,³⁷ and some states had reversed convictions of defendants whose judges refused to do so.³⁸ The Seventh Circuit, however, did

29. *Chapman v. California*, 386 U.S. 18, 23 & n.8 (1967) (citations omitted).

30. *See, e.g., Washington v. Recuenco*, 126 S. Ct. 2546, 2551 & n.2 (2006) (describing a biased trial judge as rendering the trial “fundamentally unfair” or “inherently unreliable”); *Rose v. Clark*, 478 U.S. 570, 577 (1986) (holding that a biased judge makes the trial “fundamentally unfair”).

31. *See supra* notes 23–27 and accompanying text.

32. 31 F.3d 1363 (7th Cir. 1994) (en banc).

33. *Id.* at 1368.

34. *Id.* at 1369.

35. *Id.*

36. *In re Murchison*, 349 U.S. 133, 137 (1955).

37. *E.g., United States v. Zerilli*, 328 F. Supp. 706 (C.D. Cal. 1971).

38. *E.g., Mustafoski v. State*, 867 P.2d 824, 836 (Alaska Ct. App. 1994); *People v. Corelli*, 343 N.Y.S.2d 555 (N.Y. App. Div. 1973). The majority rule, however, is that judges are not disqualified from presiding over criminal trials merely on the ground that they have previously prosecuted the defendants in unrelated criminal proceedings. *See Jay M. Zitter, Annotation, Prior Representation or Activity as Prosecuting Attorney as Disqualifying Judge from*

not read *Murchison* so broadly. The Seventh Circuit summarized *Murchison* and the other early bias cases as follows: "In each of these [early Supreme Court] cases, it is fair to say that the influences involved struck at the heart of human motivation, that an average man would find it difficult, if not impossible, to set the influence aside."³⁹

That was an aggressive reading of the Court's first-generation precedents. After all, in one case the judge's "motivation" was merely five dollars.⁴⁰ Nor did the Seventh Circuit take seriously *Murchison*'s first-generation emphasis on the "appearance of bias."⁴¹ Instead, the Seventh Circuit held that the Supreme Court "simply uses the 'appearance of justice' language to make the point that judges sometimes must recuse themselves when they face possible temptations to be biased, even when they exhibit no actual bias against a party or a cause. In short, bad appearances alone do not require disqualification."⁴²

The Seventh Circuit was not alone in its decision to restrict the Court's first-generation decisions to their facts. Three other second-generation appellate courts had faced this issue and decided that no error had occurred.⁴³ The court sustained *Del Vecchio*'s conviction and his death sentence.

If the Seventh Circuit had applied the *Chapman* test for harmless error and asked whether the judge's previous interaction with the defendant had "contribute[d] to the verdict obtained,"⁴⁴ it would almost certainly have concluded that the judge's failure to recuse himself was harmless. After all, the jury found guilt and passed the death sentence; all the judge did was preside over the trial. With the transcript available, the habeas court could have reviewed the judge's rulings for any favoritism. Had the habeas court been able to review Judge Garippo's bias for harmless error, it might have held both that Garippo should have recused himself—indeed, that he had a constitutional duty to recuse himself—but that his failure to live up to his duty was,

Sitting or Acting in Criminal Case, 85 A.L.R.5th 471, 510 (2001) (collecting cases); see also Peter M. Friedman, Comment, *Don't I Know You from Somewhere?: Why Due Process Should Bar Judges from Presiding over Cases when They Have Previously Prosecuted the Defendant*, 88 J. CRIM. L. & CRIMINOLOGY 683 (1998) (collecting and lamenting second-generation cases that agree with *Del Vecchio*).

39. *Del Vecchio*, 31 F.3d at 1373.

40. *Connally v. Georgia*, 429 U.S. 245, 246 (1977).

41. *Murchison*, 349 U.S. at 137.

42. *Del Vecchio*, 31 F.3d at 1372.

43. *Id.* at 1375-77 (citing *Corbett v. Bordenkircher*, 615 F.2d 722, 723-24 (6th Cir. 1980); *Barry v. United States*, 528 F.2d 1094 (7th Cir. 1976); *Murphy v. Beto*, 416 F.2d 98, 100 (5th Cir. 1969)).

44. *Chapman v. California*, 386 U.S. 18, 24 (1967).

nevertheless, harmless because it did not affect the jury's verdict or sentence. But the Seventh Circuit could not do this; its only option for affirming Del Vecchio's conviction was to narrow the meaning of "bias."

Del Vecchio's restricted definition of "bias" was the central issue in the subsequent habeas petition of William Bracy and Roger Collins, two men convicted of murder and sentenced to death by an Illinois state court in 1982.⁴⁵ Twelve years after Bracy and Collins's trial, their judge, Thomas Maloney, was convicted of taking bribes to influence the outcomes of other criminal cases. Bracy and Collins, who had not paid any bribes, filed habeas petitions in federal court claiming that the judge had been hard on them in order to conceal his favoritism toward other defendants.⁴⁶ Bracy and Collins had no evidence to support that claim aside from Maloney's general pattern of ruling for the prosecution except when bribed. Their habeas petition requested discovery on their claim of bias.⁴⁷

The district court denied that discovery request, citing *Del Vecchio* to hold that Bracy and Collins had not alleged any bias.⁴⁸ The Seventh Circuit affirmed,⁴⁹ also relying on *Del Vecchio's* narrowed definition of bias: "[F]or bias to be an automatic ground for the reversal of a criminal conviction the defendant must show either the actuality, rather than just the appearance, of judicial bias, 'or a possible temptation so severe that we might presume an actual, substantial incentive to be biased.'"⁵⁰

The Supreme Court unanimously reversed the Seventh Circuit's denial of discovery,⁵¹ and on remand Bracy and Collins's lawyers at last examined Maloney on the stand. The former judge vehemently denied taking any bribes or showing any bias,⁵² and the petitioners' other discovery requests also "drew a blank."⁵³ After all the discovery was finished, the district court again faced

45. See *People v. Collins*, 478 N.E.2d 267 (Ill. 1985).

46. *United States ex rel. Collins v. Welborn (Collins I)*, 868 F. Supp. 950, 990 (N.D. Ill. 1994), *aff'd sub nom. Bracy v. Gramley (Bracy I)*, 81 F.3d 684 (7th Cir. 1996), *rev'd*, 520 U.S. 899 (1997) (*Bracy II*).

47. *Collins I*, 868 F. Supp. at 969.

48. *Id.* at 991.

49. *Bracy I*, 81 F.3d 684.

50. *Id.* at 688 (quoting *Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363, 1380 (7th Cir. 1994) (en banc)).

51. *Bracy II*, 520 U.S. 899.

52. *United States ex rel. Collins v. Welborn (Collins II)*, 79 F. Supp. 2d 898, 907 (N.D. Ill. 1999).

53. *Bracy v. Schomig (Bracy III)*, 286 F.3d 406, 422 (7th Cir. 2002) (en banc) (Posner, J., concurring in part and dissenting in part); see *Collins II*, 79 F. Supp. 2d at 909 (finding that

essentially the same dilemma it had faced five years before; and in the meantime another Seventh Circuit decision had reaffirmed *Del Vecchio's* narrow definition of bias.⁵⁴ The district court was in a difficult position—the meaning of bias had become so restricted that the court, on these facts, could not find that Maloney had been biased, even though it seemed that Maloney's questionable rulings during the sentencing hearing may have led the jury to condemn Bracy and Collins to death. During the penalty phase of their trial, Maloney markedly favored the prosecution.⁵⁵ As the Seventh Circuit would later put it, “[i]f the death penalty hearing had been scripted, it could not have been more damaging to Bracy and Collins.”⁵⁶

What the district court wished to do was precisely what the doctrine of automatic reversal forbade it from doing. The district court wished to say: of course Maloney had an interest in punishing these petitioners. But upon examining the trial record, the court could confidently find that Maloney's bias had no effect on the jury's verdict of guilt—precisely the examination called for by the *Chapman* test for harmless error. Only during the sentencing phase, in which Maloney's discretionary rulings were much more questionable and much more devastating to the petitioners, could the court conclude that Maloney's bias might have contributed to the outcome.

And that was precisely what the district court did. Defying common sense,⁵⁷ the court held that Maloney was unbiased during the guilt phase of Bracy and Collins's trial, but then (days later) “actually” biased during the sentencing phase.⁵⁸

it could not “be assumed [that Maloney] was always, or even usually, motivated by his pecuniary and/or penal interests when exhibiting his prosecution-oriented tendencies”).

54. *Cartalino v. Washington*, 122 F.3d 8, 11 (7th Cir. 1997) (Posner, C.J.) (applying *Del Vecchio's* restricted definition of “bias” but remanding for further proceedings because the petitioner had presented evidence that his judge accepted a bribe to convict him).
55. Maloney erroneously permitted the prosecution to introduce, as aggravating evidence, other crimes of which Bracy had been accused but not yet convicted. *Bracy III*, 286 F.3d at 416-17 (plurality opinion). He refused to allow Bracy's lawyer time to prepare an argument against admitting this evidence, and he refused to allow Collins to sever his own sentencing so as to avoid prejudice to him from the evidence of Bracy's previous misdeeds. *Id.* at 416. Maloney was unconcerned about the defense's failure to introduce any mitigating evidence, and he even tried to dissuade Bracy's lawyer from making a closing argument. *Id.* at 417.
56. *Id.* at 415.
57. *Id.* at 419 (Posner, J., concurring and dissenting) (“To reverse [the death sentences] while upholding the convictions is an unprincipled splitting of the difference, rather than legal justice.”); *id.* at 432 (Rovner, J., concurring in part and dissenting in part) (“The rationale for confining the finding of bias to the capital phase of the trial . . . remains elusive.”).
58. *Id.* at 411 (plurality opinion) (“[W]e will focus today on actual bias.”); *id.* at 419 (finding that Maloney was biased during the sentencing phase).

A divided en banc panel upheld that decision over strong dissents.⁵⁹ Only four of the eleven judges on the panel agreed with the district court that Maloney was unbiased during the guilt phase and then biased at the penalty phase; the other judges would have either denied all of petitioners' claims or granted them all.⁶⁰ Despite the plurality's insistence that it was obeying the doctrine of automatic reversal,⁶¹ the dissents are correct that the plurality only reached its result by defying both that rule and any common-sense understanding of the meaning of bias.

The Due Process Clause's protections against judicial bias remain a mess. The federal courts continue to overrule, on habeas, the states' sensible attempts to evaluate judicial bias using harmless-error review,⁶² while sustaining death sentences imposed by judges with strong personal antipathies toward the defendants. A good example of such a third-generation case is *Wright v. Cowan*,⁶³ a habeas case controlled by *Del Vecchio*. Patrick Wright was convicted of rape, murder, and attempted murder before Judge Paul Komada, an Illinois state judge acquainted with one of Wright's victims. Wright was only free to commit those crimes because four years earlier, then-prosecutor Komada agreed to a generous plea bargain. In *Del Vecchio*, Judge Garippo merely presided over the jury's sentencing decision; here, by contrast, Judge Komada himself condemned Wright to death. Nevertheless, the federal court found no

59. *Id.* at 419-20 (Posner, J., concurring in part and dissenting in part).

60. Three judges thought the conviction and sentence were both valid and would deny the writ altogether. *See id.* at 426 (Posner, J., concurring in part and dissenting in part). Four judges thought the conviction and the sentence were both flawed and that the writ should issue as to both. *See id.* at 426 (Rovner, J., concurring in part and dissenting in part).

61. *Id.* at 415 ("We should not be misunderstood to be saying that rulings at the guilt phase are subject to a harmless error analysis, whereas in the penalty phase they are not.").

62. The Seventh Circuit again provides a good example. In 1991, Wisconsin's appellate court decided *State v. Rochelt*, 477 N.W.2d 659 (Wis. Ct. App. 1991), in which a trial judge had written a letter to a state police instructor, imploring him to release two officers to testify in a criminal trial that the judge was about to conduct. *Id.* at 661-62. The judge's letter showed that he had likely prejudged the officers' credibility and possibly believed that the defendants before him were guilty. Though condemning the letter and lamenting that the letter "raises a reasonable question regarding the judge's impartiality," the appellate court nevertheless concluded that in this particular case, the judge presided over a fair trial. *Id.* at 662. The Seventh Circuit overruled *Rochelt*'s sensible rule in *Franklin v. McCaughtry*, 398 F.3d 955 (7th Cir. 2005), a case in which Franklin's trial judge in Wisconsin state court wrote a memorandum to the state's appellate courts in which he discussed the facts of Franklin's case. That memorandum suggested that the judge had made up his mind that Franklin was guilty, but there was no indication that the judge's state of mind actually contributed to the jury's verdict.

63. 149 F. Supp. 2d 523, 540-41 (C.D. Ill. 2001).

bias.⁶⁴ This state of affairs may be due to the rule of automatic reversal, which places second-generation courts, like the *Del Vecchio* panel, in the difficult position of choosing between affirming the verdict in the particular case on the one hand, and sustaining a robust definition of “bias” for future cases on the other.

C. *The Diminished Right to Conflict-Free Counsel*

The narrowing effect of the rule of automatic reversal is also apparent in the history of the right to conflict-free counsel. The Supreme Court first established this right in its 1942 decision *Glasser v. United States*;⁶⁵ the *Glasser* Court held that if the right is violated, then the conviction must be reversed automatically.⁶⁶

Glasser established that a criminal defendant has a right to conflict-free counsel, but did not specify *how* that right should be guaranteed. One reading of *Glasser* is that the right only applies if the defendant realizes that his lawyer has a conflict of interest and raises an objection. This was the Court’s interpretation in its 1978 decision *Holloway v. Arkansas*.⁶⁷ Another reading of *Glasser*, however, is that the trial judge has an affirmative duty to be alert to possible conflicts and to draw the defendant’s attention to them whenever the judge “knows or reasonably should know that a particular conflict exists.”⁶⁸ Two years after *Holloway*, the Court suggested this affirmative duty in dicta in *Cuyler v. Sullivan*⁶⁹ and a year later applied that dictum in *Wood v. Georgia*, where the Court held that in some cases the Sixth Amendment requires a trial judge to take affirmative steps to prevent defense counsel’s conflicts of

64. *Id.* at 537-38. Instead, the court granted Wright’s habeas petition on the ground that Komada had failed to consider certain mitigating evidence. *Id.*

65. 315 U.S. 60 (1942).

66. *Id.* at 75-76.

67. 435 U.S. 475, 488 (1978) (“[W]henver a trial court improperly requires joint representation over timely objection reversal is automatic.” (emphasis added)).

68. *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980).

69. *Id.* The *Sullivan* Court did not reverse, however, because “[n]othing in the circumstances of this case indicates that the trial court had a duty to inquire whether there was a conflict of interest.” *Id.* Because the trial judge neither knew nor could be expected to know of the conflict, *Sullivan* held that reversal would only be required if “an actual conflict of interest adversely affected his lawyer’s performance.” *Id.* at 348. It is for this standard that *Sullivan* is most often cited.

interest.⁷⁰ By 1981, then, the Court's first-generation precedents had established the trial judge's affirmative duty to inquire into conflicts of interest whenever the judge knows or reasonably should know that a particular conflict exists.

In its 2002 decision in *Mickens v. Taylor*, the Court ended the experiment with a trial judge's affirmative duty to inquire into potential conflicts of interest.⁷¹ A five-Justice majority held that the Sixth Amendment is violated only if "defense counsel is forced [by the trial court] to represent codefendants over his timely objection."⁷² Two dissenting Justices in *Mickens* read *Holloway*, *Sullivan*, and *Wood* to place an affirmative duty on the trial judge to prevent conflicts of interest even if the defense lawyer makes no express objection.⁷³

What the *Mickens* dissents failed to acknowledge, however, is that the second-generation cases decided after *Wood* had already narrowed the scope of the right. A close reading of those second-generation decisions shows that the rule of automatic reversal caused the lower courts to first reduce and then all but eliminate the trial judge's affirmative duty to prevent conflicts—long before the *Mickens* majority formally abolished the duty in 2002.

After *Wood* was decided in 1981, the first of the second-generation appeals were brought by defendants who had ignored their trial judges' advice and retained their counsel despite the counsel's conflict of interest. On direct appeal, these defendants claimed that their judges had not inquired closely enough into the conflict or else had not "personally advise[d]" them of their rights.⁷⁴ The appellate courts refused to reverse these cases, reasoning that the

70. 450 U.S. 261, 273 n.18 (1981) ("*Sullivan* mandates a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'" (quoting *Sullivan*, 446 U.S. at 347)). The *Wood* Court granted certiorari on the question of whether Georgia's antipornography statute violated the Due Process Clause, but vacated the defendants' convictions on another ground entirely, namely that their lawyer's salary was paid by their employer, who was less interested in acquittal than in securing a ruling that this troublesome statute was unconstitutional. *Wood*, 450 U.S. at 273. The Court remanded for further hearings on the issue of conflict because "the possibility of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further." *Id.* at 272.

71. 535 U.S. 162 (2002).

72. *Id.* at 168.

73. *Id.* at 184-85 (Stevens, J., dissenting); *id.* at 190 (Souter, J., dissenting).

74. FED. R. CRIM. P. 44. This rule requires the trial judge, in any case in which one lawyer represents two or more defendants, to "personally advise each defendant of the right to the effective assistance of counsel." The rule was approved shortly after *Holloway* and was meant to prevent conflicts of interest. *Id.* advisory committee's note. The rule does not require automatic reversal; the Advisory Committee note explains that "[t]he failure in a particular

trial judges had done a good enough job.⁷⁵ This was the first step toward weakening the affirmative duty that the Court created in *Wood*.

Based on those decisions, later appellate courts refused to reverse even when trial courts had failed to make any inquiry whatsoever into conflicts of interest.⁷⁶ The Fifth, Sixth, and Seventh Circuits went so far as to imply that a trial judge's failure to inquire could never be an independent cause for reversal.⁷⁷ The First and Second Circuits did more for defendants: these circuits remanded some cases for new evidentiary hearings to determine whether an actual conflict of interest had existed at the trial.⁷⁸ (Although that is

case to conduct a Rule 44(c) inquiry would not, standing alone, necessitate the reversal of a conviction of a jointly represented defendant." *Id.*

75. *E.g.*, *United States v. Crespo de Llano*, 838 F.2d 1006, 1012-13 (9th Cir. 1987) (holding that the trial court's hearing was sufficient even though the court did not "personally advise" the defendants); *United States v. Cirrincione*, 780 F.2d 620, 627 (7th Cir. 1985) (holding that the trial court's hearing was adequate to advise defendants of their lawyers' potential conflict); *United States v. Benavidez*, 664 F.2d 1255, 1258 (5th Cir. 1982) (holding that the trial court's hearing regarding defense counsel's conflict of interest was sufficient to avoid reversal, even though the court "did not 'personally advise' either appellant of his rights as required by [Rule 44(c)]").
76. *E.g.*, *United States v. Burney*, 756 F.2d 787, 791 (10th Cir. 1985) ("Although we do not condone the trial court's failure to make the Rule 44(c) inquiry, we agree with those decisions concluding that the failure alone is not sufficient grounds for reversal."); *United States v. Mers*, 701 F.2d 1321, 1326 (11th Cir. 1983) (refusing to reverse even after the judge admitted her failure to conduct a "probing inquiry" into a potential conflict of interest, because "that error will not require reversal"); *United States v. Arias*, 678 F.2d 1202, 1205 (4th Cir. 1982) ("[T]he mere failure of the district court to inquire and advise as required by [Rule] 44(c) does not make necessary a reversal.>").
77. *See, e.g.*, *Riggs v. United States*, 209 F.3d 828, 831 n.1 (6th Cir. 2000) (refusing to reverse because the defendant could not prove on appeal that "the trial judge knew of any potential conflict of interest"); *United States v. Fish*, 34 F.3d 488, 493 (7th Cir. 1994) (excusing the trial judge's decision not to inquire into potential conflicts because "the trial court's reliance on defense counsel's own assessment regarding the potential for conflict was entirely reasonable"); *United States v. Holley*, 826 F.2d 331, 334 (5th Cir. 1987) (refusing to reverse even though the trial court failed to inquire because the defendant "has not shown an actual conflict of interest"); *Wilson v. Morris*, 724 F.2d 591, 594-95 (7th Cir. 1984) (en banc) (refusing to reverse when the trial judge failed to inquire into joint representation, and implying that an appellate court should only reverse when proof of "actual conflict" appears on the record).
78. *E.g.*, *United States v. Jiang*, 140 F.3d 124 (2d Cir. 1998) (remanding for an evidentiary hearing); *Strouse v. Leonardo*, 928 F.2d 548 (2d Cir. 1991) (refusing to find any lapse of duty when the trial judge failed to inquire into a conflict of interest and instead remanding for a hearing on the issue of actual conflict); *Brien v. United States*, 695 F.2d 10 (1st Cir. 1982) (refusing to reverse because a federal habeas hearing would suffice to determine whether an actual conflict existed). Early decisions of the Seventh and Sixth Circuits also followed this practice. *E.g.*, *United States ex rel. Ballard v. Bengston*, 702 F.2d 656, 664 (7th

a better solution than nothing, it is not as effective as the trial judge addressing the problem before or during the trial itself.) In those few cases in which an appellate court did reverse on the ground that the trial judge failed in her duty to inquire, the defendants' lawyers either objected on the record⁷⁹ or else labored under conflicts of interest that were so egregious and clear that their clients could prove, on appeal, that an actual conflict of interest adversely affected their performances.⁸⁰ (Although such reversals were defense victories, these few victors had to carry a near-impossible burden;⁸¹ had the appellate courts instead applied the *Chapman* standard, the *prosecution* would have had to shoulder the burden of proving that the judge's failure to inquire was harmless beyond a reasonable doubt.) In no case did an appellate court reverse solely because the judge failed to carry out her affirmative duty to inquire.

Simply put, the second-generation courts reversed only those convictions in which the trial judge ignored the defendant's express objection or in which the trial transcript revealed an obvious, actual conflict that adversely affected the lawyer's performance in the courtroom. The affirmative duty established by the first-generation decision, *Wood*, vanished almost as soon as it appeared.

One reason for that disappearance was the rule of automatic reversal. Because of that rule, the second-generation appellate courts could only maintain *Wood's* affirmative duty if at the same time they reversed the

Cir. 1983) (refusing to reverse even though the trial judge had brusquely refused to grant a continuance or to appoint new counsel, and instead remanding for a new hearing on whether "the prospect of dilatory practices" justified the judge's decision); *United States v. Taylor*, 657 F.2d 92 (6th Cir. 1981) (remanding for further hearing on whether an actual conflict existed).

79. *E.g.*, *United States v. Rogers*, 209 F.3d 139 (2d Cir. 2000) (reversing when the trial court ignored the defendant's express objection to the court's decision to appoint a police commissioner as his lawyer); *Selsor v. Kaiser*, 81 F.3d 1492 (10th Cir. 1996) ("Where there is both a timely objection and the trial court fails to appoint separate counsel or to inquire adequately into the possibility of a conflict of interest, the reversal will be automatic."); *United States v. Cook*, 45 F.3d 388 (10th Cir. 1995) (same); *Hamilton v. Ford*, 969 F.2d 1006 (11th Cir. 1992) (same).
80. *Campbell v. Rice*, 265 F.3d 878, 884-85, 888 (9th Cir. 2001); *Ciak v. United States*, 59 F.3d 296, 302, 304-06 (2d Cir. 1995). In both cases, the transcript of the trial revealed that the defense lawyer had an obvious conflict: in *Campbell*, the defendant's lawyer was under indictment by the prosecutor's office; in *Ciak*, the defendant's lawyer had represented key prosecution witnesses in prior cases and his cross-examination was obviously flawed as a result. In *United States v. Levy*, 25 F.3d 146, 154-59 (2d Cir. 1994), the Second Circuit reversed because an actual conflict adversely affected counsel's performance, but refused to find that the district court had breached its duty to inquire.
81. To show a Sixth Amendment violation, the defendant must prove that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

conviction. In cases in which the trial court's failure to inquire was harmless beyond a reasonable doubt, a reversal would have seemed a windfall for the defendant and a waste of judicial resources.

The difficult position of the second-generation courts is illustrated by *United States v. Mers*, a fairly straightforward drug case in which Herman Mers and his son Lester sold two thousand pounds of marijuana to DEA agents.⁸² Two other men stood guard with guns while the marijuana changed hands. At trial, the Merses admitted the sale and all the taped conversations leading up to it, but claimed that the DEA agents had entrapped them. The two guards had a different defense: they knew nothing of the drugs and instead thought they were guarding a truck of valuable antiques. All four men were defended by the same lawyer; all four were convicted.

The trial judge did anticipate that a conflict might arise, and she did ask the guards whether they agreed to proceed with just one lawyer (they did). Unfortunately, the judge did not fully explain to them the precise nature of the conflict that would arise and did not specifically advise them that they had a right to their own lawyers.

On appeal to the Eleventh Circuit, the two guards claimed that a conflict of interest had adversely affected their trial: their lawyer had spent too much time on the Mers's entrapment defense and not enough energy on their claim that they knew nothing about the drugs. The appellate panel was not persuaded; the court concluded that no other strategy had been "realistically available" to the guards' lawyer.⁸³ All four men had been caught red-handed; the Mers's only chance was to plead entrapment; the guards' only chance was to plead ignorance of the drugs in the truck. Unlike the Supreme Court decisions in *Glasser* and *Holloway*, here there was no realistic chance that a defense lawyer could win the case by shifting blame between the defendants. Quite the contrary: a "united front" defense was obviously "the best strategy available."⁸⁴

Should the Eleventh Circuit have reversed these convictions, despite the near-certainty that the outcomes would have been the same had the guards hired their own lawyer? Surely not; the panel was correct that "[i]t would be the height of formalism to reverse a conviction because of literal noncompliance with a procedural rule when the evil that the rule has been designed to prevent has never occurred."⁸⁵

82. 701 F.2d 1321 (11th Cir. 1983).

83. *Id.* at 1331.

84. *Id.* at 1329 (citation omitted) (internal quotation marks omitted).

85. *Id.* at 1326.

The rule of automatic reversal prevented second-generation courts like *Mers* from both affirming valid convictions and also repeating clearly and forcefully what *Wood* had held the Sixth Amendment to require. Again and again, the second-generation courts chose to diminish the scope of the right rather than reverse a conviction in which the error did not contribute to the verdict. Rather than embrace the *Wood* Court's decision to read an affirmative duty into the Sixth Amendment, the second-generation courts instead tolerated trial judges' failures as constitutional. Each such decision was one more precedent limiting the affirmative duty created by *Wood*, until eventually that duty was all but gone.

By diminishing the scope of the right, these second-generation cases made it harder for defendants to win third-generation cases. One example of such a case may be *United States ex rel. Smith v. Hardy-Hall*.⁸⁶ Smith and another man were convicted of armed robbery on the strength of victims' eyewitness identification. Their lawyer never raised a formal objection with the trial judge regarding any potential conflict. The district court denied Smith's habeas petition because "the record does not show that an objection to multiple representation was made" and because no actual conflict appeared on the record.⁸⁷ Had the trial court inquired into the matter at trial, as the Supreme Court once held that the Sixth Amendment required, the case might have come out differently. Cases like *Smith* demonstrate that even before *Mickens* formally abolished trial judges' duty to inquire into potential conflicts of interest, second-generation cases had already eliminated that duty.

D. *The Confused Meaning of "Reasonable Doubt"*

The rule of automatic reversal has also diminished a defendant's right to a jury instruction on the meaning of "proof beyond a reasonable doubt." That right is secured by the Due Process Clause,⁸⁸ but the scope of the right is uncertain: what, precisely, must the judge tell the jury about reasonable doubt? To that crucial question, the appellate courts have given what Professor Robert Power calls a "crazy quilt"⁸⁹ of answers: two circuits and several states

86. No. 94-6973, 1996 U.S. Dist. LEXIS 3714 (N.D. Ill. Mar. 27, 1996). The opinion is cursory: its brief discussion does not provide enough detail even to guess whether joint representation harmed the defendants' chances. Their state appeals were never published.

87. *Id.* at *10.

88. See *Jackson v. Virginia*, 443 U.S. 307, 320 n.14 (1979); see also *Taylor v. Kentucky*, 436 U.S. 478, 490 (1978) (recognizing a right to a jury instruction on the presumption of innocence).

89. Robert C. Power, *Reasonable and Other Doubts: The Problem of Jury Instructions*, 67 TENN. L. REV. 45, 47 (1999).

recommend that trial judges say nothing at all besides the bare words “beyond a reasonable doubt”;⁹⁰ most federal judges instruct jurors to compare their deliberations to important decisions they might make in their personal lives;⁹¹ many state judges follow the recommendation of the Federal Judicial Center and instruct jurors to convict only if they are “firmly convinced” of the defendant’s guilt;⁹² and a few states continue to permit their judges to describe the standard as “moral certainty” of guilt.⁹³ These differences are surprising because the Due Process Clause ought, in theory, to provide only one standard.

One reason for the courts’ failure to converge on a single definition of reasonable doubt is the Supreme Court’s decision, in the 1993 case of *Sullivan v. Louisiana*, to apply the rule of automatic reversal to all faulty reasonable doubt instructions.⁹⁴ Since then, most appellate courts, including the Supreme Court itself, have narrowed the scope of the right to the facts of *Sullivan* and its precursor, *Cage v. Louisiana*.⁹⁵ In other words, defendants have the right to a jury instruction that is slightly better than the instruction given in *Sullivan*; they do *not* have the right to any specific, accurate instruction. Any number of flawed instructions are thus affirmed as constitutional, so long as they are worded differently from the instruction at issue in *Sullivan*.

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90. See Jessica N. Cohen, *The Reasonable Doubt Jury Instruction: Giving Meaning to a Critical Concept*, 22 AM. J. CRIM. L. 677, 682-88 (1995). Both the Fourth Circuit and the Seventh Circuit recommend that the trial judge not explain the meaning of “beyond a reasonable doubt.” See *United States v. Collins*, 372 F.3d 629, 635 (4th Cir. 2004); Pattern Criminal Federal Jury Instructions for the Seventh Circuit § 2.04 (1998), available at <http://www.ca7.uscourts.gov/pjury.pdf>. Early Supreme Court decisions established that the Constitution requires no further explanation of the standard. See *Holland v. United States*, 348 U.S. 121, 140 (1954) (“Attempts to explain the term ‘reasonable doubt’ do not usually result in making it any clearer to the minds of the jury.” (quoting *Miles v. United States*, 103 U.S. 304, 312 (1880))); *Hopt v. Utah*, 120 U.S. 430, 440-41 (1887).
91. Power, *supra* note 89, at 72-81 (describing this approach as “dominant” in the federal courts).
92. *E.g.*, *State v. Reyes*, 116 P.3d 305, 314 (Utah 2005) (exercising supervisory authority to require Utah trial courts to use the Federal Judicial Center instruction). Justice Ginsburg has recommended that courts adopt the Federal Judicial Center instruction. *Victor v. Nebraska*, 511 U.S. 1, 26-28 (1994) (Ginsburg, J., concurring).
93. *E.g.*, *Calhoun v. State*, 932 So. 2d 923, 970 (Ala. Crim. App. 2005) (affirming a conviction based on an instruction that described the standard as “moral certainty”); *Commonwealth v. Lebron*, 845 N.E.2d 1206, 1208 n.1 (Mass. App. Ct. 2006) (recommending that trial judges instruct the jury to acquit the defendant only if “they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge”).
94. 508 U.S. 275 (1993).
95. 498 U.S. 39 (1990). *Sullivan* did not restate the precise instruction given. Instead, *Sullivan* noted that the instruction given there was “essentially identical” to the instruction described in *Cage v. Sullivan*, 508 U.S. at 277.

Just one year after deciding *Sullivan*, the Court dramatically narrowed the scope of the right in *Victor v. Nebraska*.⁹⁶ In *Victor* and its companion case, the trial judges gave instructions tainted by many of the same confusing phrases present in *Cage* and *Sullivan*—phrases like “moral certainty,”⁹⁷ “possible doubt,”⁹⁸ and “substantial doubt,”⁹⁹ along with additional confusing phrases not considered before, such as “moral evidence.”¹⁰⁰ At best, these phrases are obsolete, repeated from a jury instruction given in 1850;¹⁰¹ at worst, they suggest that jurors may find guilt based on their “moral” conclusions or may demand that the defendant come forward with a “substantial” reason for them to doubt the prosecution. The better result would have been for the *Victor* Court to ban these phrases from instructions altogether by holding them to be error.

The rule of automatic reversal prevented that holding. If not for the rule of automatic reversal, the *Victor* Court could have both condemned the problematic phrases and also found that error harmless beyond a reasonable doubt. The facts of *Victor* strongly suggest that the confusing phrases were harmless: first, these phrases were surrounded by other language that better explained the prosecution’s burden of proof;¹⁰² and second, the evidence against defendants was overwhelming and unrebutted.¹⁰³ But the rule of automatic reversal foreclosed that option: the Court could not both condemn the problematic phrases as unconstitutional and also affirm the convictions.

Since *Victor*, the Court has not again considered the constitutionality of jury instructions on reasonable doubt. Some state appellate courts have used their supervisory authority to require trial judges to give specific, improved instructions.¹⁰⁴ Other courts, however, continue to approve the erroneous

96. 511 U.S. 1 (1994).

97. Compare *id.* at 7, 18, with *Cage*, 498 U.S. at 41.

98. Compare *Victor*, 511 U.S. at 7, 18, with *Cage*, 498 U.S. at 40.

99. Compare *Victor*, 511 U.S. at 18, with *Cage*, 498 U.S. at 41.

100. *Victor*, 511 U.S. at 7.

101. In 1850, Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court defined the reasonable doubt standard using the phrases “moral certainty” and “moral evidence.” *Commonwealth v. Webster*, 5 Mass. 295, 320 (1850). His definition was copied in many other states. See also Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 516-19 (1975).

102. *Victor*, 511 U.S. at 5, 21-22.

103. See *People v. Sandoval*, 841 P.2d 862, 867-69 (Cal. 1992); *State v. Victor*, 457 N.W.2d 431, 436-39 (Neb. 1990).

104. See, e.g., *State v. Portillo*, 898 P.2d 970, 974 (Ariz. 1995) (exercising supervisory authority to order future trial courts to use the Federal Judicial Center instruction); *Ruffin v. State*, 906

phrases that the Court condemned in *Cage* and *Sullivan*.¹⁰⁵ As Professor Power has noted, *Victor* encouraged trial judges to “say everything” – that is, to “give every instruction ever approved by the appellate courts – the more the better – because appellate courts will treat such accurate language as antibodies that surround erroneous statements and render them harmless.”¹⁰⁶ If not for the rule of automatic reversal, the *Victor* Court could have labeled the “erroneous statements” for what they were – error – and yet still affirmed the valid convictions.

E. Responses to Objections

This Part has suggested that the rule of automatic reversal causes second-generation appellate courts to diminish the scope of rights protected by the rule. To be sure, there are other explanations for this trend. The rule of automatic reversal is not the *only* cause.

One alternative explanation is that the courts have simply become less friendly to defendants’ appeals. Professor Cass Sunstein’s recent research shows that appellate judges’ rulings in appeals from administrative agencies vary depending on their political ideology.¹⁰⁷ Strikingly, however, Sunstein’s findings show no correlation between appellate judges’ political preferences and their rulings in criminal cases.¹⁰⁸ And even in state death penalty cases – long considered one of the most politically charged and least neutral areas of appellate law¹⁰⁹ – empirical investigations have shown no correlation between

A.2d 360, 371 (Md. 2006) (reversing conviction because the trial judge failed to give the Maryland pattern instruction on reasonable doubt); *State v. Reyes*, 116 P.3d 305, 314 (Utah 2005) (exercising supervisory authority to order future trial courts to use the Federal Judicial Center instruction).

¹⁰⁵ *E.g.*, *Harvell v. Nagle*, 58 F.3d 1541, 1545-47 (11th Cir. 1995) (approving a reasonable doubt instruction that contained thirty-one sentences and paraphrased different legal conceptions of the standard); *State v. Velasco*, 751 A.2d 800, 822 (Conn. 2000) (approving an instruction defining reasonable doubt as “a real doubt, an honest doubt”); *Commonwealth v. Painten*, 709 N.E.2d 423, 430 (Mass. 1999) (approving instructions that told the jury that “the evidence must convince you of the defendant’s guilt to a reasonable and moral certainty”); *Commonwealth v. Gagliardi*, 638 N.E.2d 20, 23-25 (Mass. 1994) (approving long, contradictory instructions).

¹⁰⁶ Power, *supra* note 89, at 97.

¹⁰⁷ CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 24-38 (2006).

¹⁰⁸ *Id.* at 48-50.

¹⁰⁹ See generally Gerald F. Uelman, *Elected Judiciary*, in 2 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 864, 865 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

judges' political elections and their rulings.¹¹⁰ To be sure, political preferences do not always correlate with judges' attitudes toward defendants' rights. Yet Professor Sunstein's results suggest that changes in judicial personnel are not the only reason for the diminishing scope of the rights described above. Indeed, even the current conservative Supreme Court continues to reaffirm and even expand important trial rights of defendants, as illustrated by *Crawford v. Washington* (which expanded defendants' rights under the Confrontation Clause),¹¹¹ *United States v. Booker* (which expanded defendants' jury trial rights under the Sixth Amendment),¹¹² and *Holmes v. South Carolina* (which reaffirmed defendants' right to present evidence of third-party guilt).¹¹³

III. A NEW DOCTRINAL FRAMEWORK FOR CLASSIFYING ERROR

Because the rule of automatic reversal encourages appellate courts to narrow the definition of errors protected by the rule, courts should reform the current doctrinal framework for determining whether an error triggers automatic reversal. Section III.A describes the current framework and scholarly critiques of it. Section III.B proposes a new framework that would avoid the doctrinal consequences described above in Part II.

A. *Arizona v. Fulminante: The Current Framework for Applying Automatic Reversal*

In its 1991 decision in *Arizona v. Fulminante*,¹¹⁴ the Supreme Court created a framework for determining which errors require automatic reversal. The *Fulminante* Court divided procedural errors into two categories: "structural errors," which require automatic reversal, and "trial errors," which do not require reversal if the prosecution proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."¹¹⁵ After *Fulminante*, a federal appellate court faced with a new type of error must decide whether the type of error is a "structural error," in which case the court must reverse automatically, or whether it is instead a "trial error," in which case the

110. John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465 (1999).

111. 541 U.S. 36 (2004).

112. 543 U.S. 220 (2005).

113. 547 U.S. 319 (2006).

114. 499 U.S. 279 (1991).

115. *Chapman v. California*, 386 U.S. 18, 24 (1967).

court may affirm the conviction if the error did not contribute to the verdict. *Fulminante* provided three tests to determine whether a given type of error is a “structural error”: if the type of error “affect[s] the framework within which the trial proceeds”;¹¹⁶ if its effect on the verdict cannot “be quantitatively assessed” on appeal;¹¹⁷ or if it does not occur “during the presentation of the case to the jury.”¹¹⁸ In recent opinions the Court has applied a fourth test for structural error: if the type of error “necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence,”¹¹⁹ then the type of error is structural and must be reversed automatically.

Professor David McCord has persuasively criticized the *Fulminante* test for being vague and difficult to apply to as-yet-unclassified types of error.¹²⁰ He is correct: even today, sixteen years after *Fulminante*, it is still unclear whether certain types of error are properly considered structural errors or trial errors. For example, is the government’s failure to charge an element of the offense in the indictment a structural error? The circuits are split on the issue,¹²¹ in large part because *Fulminante* does not give a clear answer. On the one hand, *Fulminante* suggests that this type of error is structural because it does not occur “during the presentation of the case to the jury”¹²² and because it does not seem possible to “quantitatively assess[.]” this type of error on appeal.¹²³ But on the other hand, *Fulminante* suggests that this type of error is *not* structural because it does not always affect the “framework” of the trial¹²⁴ and because it does not “necessarily” render the trial “fundamentally unfair” or “an

116. 499 U.S. at 310.

117. *Id.* at 308.

118. *Id.* at 307.

119. *E.g.*, *Washington v. Recuenco*, 126 S. Ct. 2546, 2551 (2006) (quoting *Neder v. United States*, 527 U.S. 1, 9 (1999)).

120. David McCord, *The “Trial”/“Structural” Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401, 1416-24 (1997) (describing errors that are hard to classify using the *Fulminante* framework).

121. Compare *United States v. Du Bo*, 186 F.3d 1177, 1180-81 (9th Cir. 1999), and *United States v. Spinner*, 180 F.3d 514, 515-16 (3d Cir. 1999), with *United States v. Allen*, 406 F.3d 940, 943-45 (8th Cir. 2005), and *United States v. Robinson*, 367 F.3d 278, 285-86 (5th Cir. 2004). See generally *United States v. Omer*, 429 F.3d 835, 836, 841-42 (9th Cir. 2005) (Graber, J., dissenting from denial of rehearing en banc) (describing the circuit split).

122. *Fulminante*, 499 U.S. at 307.

123. *Id.* at 307-08.

124. *Id.* at 310.

unreliable vehicle for determining guilt or innocence.”¹²⁵ For example, if the defendant knew that the government had to prove a particular element of the crime, and if he prepared his defense accordingly, then the government’s failure to include that element in the indictment would not alter the “framework” of the trial, and would not make the trial “unfair.”

Scholars have also criticized the *Fulminante* framework on the ground that it does not accurately describe some errors that the Court has held to be structural. While *some* of the errors now labeled as structural are related to the “framework” of the trial or render the trial “unreliable” or “unfair,” that is not true of *all* structural errors. Some structural errors simply do not contribute to the verdict in any discernible way. Instead, as Professors Tom Stacy and Kim Dayton have pointed out, these errors violate *other* rights that are entirely separate from the right to an accurate trial.¹²⁶

Consider, for instance, the right to a public trial. The Court has held that a violation of this right is a structural error requiring automatic reversal.¹²⁷ But it is hard to see what a trial’s publicity has to do with its reliability or its fundamental fairness. After all, judges sometimes do close trials to the public when they have a good reason to do so—usually, to protect the privacy or safety of witnesses.¹²⁸ It is difficult to believe that trials closed for a bad reason¹²⁹ are unreliable and that trials closed for a good reason¹³⁰ are reliable. Instead, the denial of this right implicates the distinct value of transparency, a value that is balanced against the competing values of witnesses’ safety and privacy. The Court may be right to treat the denial of a public trial as a

125. *Washington v. Recuenco*, 126 S. Ct. 2546, 2551 (2006) (quoting *Neder v. United States*, 527 U.S. 1, 9 (1999)).

126. Stacy & Dayton, *supra* note 11, at 94-95.

127. *Waller v. Georgia*, 467 U.S. 39, 49 (1984) (“[A] defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee.”).

128. *See, e.g., Sevencan v. Herbert*, 342 F.3d 69, 77 (2d Cir. 2003) (holding that the closure of the courtroom during the testimony of undercover agents was appropriate because the agents’ undercover work was ongoing); *Bell v. Jarvis*, 236 F.3d 149, 165-68 (4th Cir. 2000) (en banc) (holding that the right to a public trial is not absolute and that a trial judge may close the court to the public during the testimony of child victims of sex offenses).

129. *E.g., Waller*, 467 U.S. at 49 (disapproving the Georgia court’s decision to close a seven-day suppression hearing based on the government’s concern that two hours of evidence might disclose details of ongoing investigations).

130. *E.g., Bell*, 236 F.3d at 167-68 (“[S]afeguarding the physical and psychological well-being of a minor’ victim of sex crimes, including protecting them from further trauma and embarrassment, is precisely the type of compelling interest that can overcome the presumption in favor of an open trial.” (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982))).

structural error requiring automatic reversal—but if so, *Fulminante* does not explain why.

Or consider the error of race discrimination in the selection of a grand jury. Under the Court's ruling in *Vasquez v. Hillery*,¹³¹ a defendant's conviction must be reversed automatically if the grand jury that indicted him systematically excluded jurors of a particular race. It is of no importance that the grand jury had enough evidence to indict or that a properly selected trial jury later convicted the defendant after a fair trial. The value that automatic reversal enforces in a case like *Hillery* has little if anything to do with the reliability of the ultimate verdict; it has more to do with the value of antidiscrimination in the criminal process.

Or consider the right, established in *Faretta v. California*,¹³² of a criminal defendant to represent himself. Many trials of self-representing innocent defendants would be more reliable if the court forced those defendants to accept representation by a competent lawyer. But the right to self-representation has little to do with the verdict's reliability; the right is instead grounded in the defendant's autonomy and dignity.¹³³

In short, scholars have persuasively criticized *Fulminante* on two fronts: first, the *Fulminante* framework is vague and thus cannot determine whether a new type of error is structural; second, the *Fulminante* framework does not account for several types of error that the Court has held to be structural. However, scholars' proposed solutions to these problems are unsatisfactory. Professors Stacy and Dayton propose a new framework that would result in broader application of the rule of automatic reversal. For example, they suggest reversing automatically whenever a new trial can "correct the damage constitutional error has wrought,"¹³⁴ or whenever automatic reversal would create "disincentives sufficient enough to deter constitutional violations."¹³⁵ Professor McCord, by contrast, proposes eight factors courts should consider in deciding whether to reverse a given error.¹³⁶ In practice, it appears that his eight-factor test would effectively broaden automatic reversal by requiring

131. 474 U.S. 254 (1986).

132. 422 U.S. 806 (1975); see also *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (noting that this error cannot ever be harmless and thus requires automatic reversal).

133. See, e.g., *Martinez v. Court of Appeal*, 528 U.S. 152, 160 (2000) (stating that the right to self-representation is "grounded in part in a respect for individual autonomy"); *Wiggins*, 465 U.S. at 178 ("The right to appear *pro se* exists to affirm the accused's dignity and autonomy.").

134. Stacy & Dayton, *supra* note 11, at 95.

135. *Id.* at 97.

136. McCord, *supra* note 120, at 1454–58.

appellate courts to reverse whenever the constitutional right is “important” to the defendant and to the public.¹³⁷ Both McCord’s framework and Stacy and Dayton’s framework would require courts to reverse convictions where the particular error was harmless beyond a reasonable doubt, and thus both frameworks would aggravate the problem identified above in Part II, namely, that when an appellate court must choose between reversing a valid conviction and narrowing the definition of an error, the court often chooses to narrow the definition. A new framework is necessary.

B. A New Framework for Applying Automatic Reversal: Chapman v. California Revived

To avoid the consequences of automatic reversal described in Part II, appellate courts should apply the rule only when absolutely necessary. In place of automatic reversal, courts should instead apply the test for harmless error set forth in *Chapman* and should affirm convictions if on appeal the prosecution proves “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”¹³⁸ If courts take the *Chapman* standard seriously, then there is no need for the rule of automatic reversal for most errors.

To see how this is so, consider the reasoning behind the Court’s holding in *Gonzalez-Lopez*¹³⁹ that the erroneous deprivation of defendant’s counsel of choice is a structural error. The Court, writing through Justice Scalia, emphasized the difficulty of determining how the error contributes to the verdict:

To determine the effect of wrongful denial of choice of counsel . . . we would not be looking for mistakes committed by the actual counsel, but for differences in the defense that would have been made by the rejected counsel—in matters ranging from questions asked on *voir dire* and cross-examination to such intangibles as argument style and relationship with the prosecutors. We would have to speculate upon what matters the rejected counsel would have handled differently—or

¹³⁷. Professor McCord suggests that these are the first two factors a court should consider in deciding whether to reverse. *Id.* at 1454–55. Only seventh does he mention whether the error actually contributed to the verdict. *Id.* Applying his test, therefore, appellate courts would frequently be forced to reverse convictions in which an “important” right was violated, even if the error did not contribute to the verdict.

¹³⁸. *Chapman v. California*, 386 U.S. 18, 24 (1967).

¹³⁹. *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006).

indeed, would have handled the same but with the benefit of a more jury-pleasing courtroom style or a longstanding relationship of trust with the prosecutors. And then we would have to speculate upon what effect those different choices or different intangibles might have had.¹⁴⁰

Justice Scalia is right that these questions are often extremely difficult to answer. But that difficulty is no reason to reject the *Chapman* standard. *Chapman*, by placing the burden on the prosecutor to prove beyond a reasonable doubt that the error did not contribute to the verdict, already requires appellate courts to reverse cases like *Gonzalez-Lopez*, in which it is impossible to know whether the error contributed to the verdict. There was no reason for the *Gonzalez-Lopez* Court to also hold that every case involving this type of error will pose a similar impossibility. Surely there is some set of facts under which the prosecution can prove that the deprivation of counsel of choice did not contribute to the jury's verdict.

Errors like the one at issue in *Gonzalez-Lopez* and the three discussed above in Part II are prohibited because they do contribute to the verdict. They therefore can and should be reviewed on appeal under *Chapman*'s test for harmlessness. *Chapman* will require their reversal unless the appellate court can be sure beyond a reasonable doubt that they did not contribute to this particular verdict. If the appellate courts take *Chapman* seriously, then they have all the authority they need to reverse errors whose effects on the verdict are impossible to assess.

Yet automatic reversal should not be abolished altogether. Some types of error must either be reversed automatically or else not at all. For example, as discussed above in Section III.A, the right to a public trial, the right to the absence of discrimination in the selection of a grand jury, and the right to defend oneself at trial have nothing at all to do with ensuring that the jury's verdict is correct. Instead, these errors serve different purposes: to ensure that trials are transparent, to prevent racial discrimination, and to preserve the defendant's dignity and autonomy. Under the *Chapman* standard, such errors will always be "harmless" because they never contribute to the jury's decision. Professor Eric Muller has persuasively argued this point in his discussion of *Batson* error—another error reversed automatically because, as Muller demonstrates, without the rule of automatic reversal the error would never be reversed at all.¹⁴¹

140. *Id.* at 2565.

141. Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Selection, and the Sixth Amendment*, 106 YALE L.J. 93, 116-19 (1996).

Because the “public” nature of a trial has nothing to do with the jury’s verdict, even the most flagrant violations of the public-trial right would be affirmed under the *Chapman* standard. Therefore, a judge’s erroneous decision to close a trial should be reversed automatically, not because closing the trial made the verdict unreliable, but for just the opposite reason. If such an error is ever to be reversed on appeal, then it must always be reversed on appeal.

The case law applying the public-trial right shows that this is true. Rather than look at whether the decision to close a trial contributed to the verdict, it appears instead that appellate courts ask how egregious the error was. If the trial judge had good reasons for closing the trial, then the appellate courts will find that no error occurred at all and thus will affirm the verdict.¹⁴² But if the trial judge closed the trial for a bad reason, or for no reason at all, then the courts will find error and reverse.¹⁴³ The decision whether to reverse has nothing to do with the *Chapman* standard, that is, nothing to do with whether the error “contribute[d] to verdict obtained.”¹⁴⁴ So if we were to abolish automatic reversal, then appellate courts would be forced to affirm most, if not all, convictions obtained when the trial judge closed the courtroom for bad reasons—because the prosecution will almost always be able to prove that the error did not contribute to the verdict obtained. Without automatic reversal, appellate courts would never reverse convictions in which the trial judge improperly closed the trial.

For errors like the denial of a public trial, courts must apply the rule of automatic reversal if they are ever to reverse such errors. The narrowing effect of that rule, described above in Part II, is therefore the necessary price to pay if such errors are ever to be reversed. But we need not pay that price in regard to other kinds of error, like biased judges and opaque reasonable-doubt instructions. Those errors are forbidden precisely because they taint the verdict. There is, therefore, no reason to apply the rule of automatic reversal to such errors; they can instead be reviewed under *Chapman*, and the conviction should be affirmed if the appellate court is certain, beyond a reasonable doubt, that the error did not contribute to the verdict.

The framework for determining whether a given type of error is structural, and thus requires automatic reversal, should be this: does this type of error *ever* contribute to the verdict? If so, then *Chapman* provides the appropriate test for reviewing the error; the conviction may be affirmed, but only if the prosecution proves “beyond a reasonable doubt that the error complained of did not

142. See *supra* note 128.

143. See *supra* note 129.

144. *Chapman v. California*, 386 U.S. 18, 24 (1967).

contribute to the verdict obtained.”¹⁴⁵ If the type of error never contributes to the verdict, however, then automatic reversal is the only workable rule.

Unfortunately, lower federal courts are bound by the framework set forth by the Supreme Court in *Fulminante*. State courts, however, are free to adopt the framework proposed here. There is no question that state courts may make *greater* use of automatic reversal than the U.S. Supreme Court. A state may interpret its own constitution to grant criminal defendants greater protections than are guaranteed by the U.S. Constitution.¹⁴⁶ In theory, state courts are somewhat more limited by U.S. Supreme Court precedent when they wish to make less use of automatic reversal because if the U.S. Supreme Court has ruled that the U.S. Constitution requires that a given error be reversed automatically, state courts must obey.¹⁴⁷ But in practice, this limitation is not so great. By my count, the Supreme Court has identified only ten types of error that must be reversed automatically.¹⁴⁸ That leaves a universe of other errors that state courts may classify on their own. For example, state courts are free to

145. *Id.*

146. See *Michigan v. Long*, 463 U.S. 1032, 1032 (1983) (holding that the U.S. Supreme Court will not disturb a state ruling that rests on an “adequate and independent” state ground).

147. *E.g.*, *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (overturning, on direct review, the Louisiana court’s holding that a defective reasonable-doubt instruction could be harmless error).

148. The Court has stressed that “most” errors are not subject to automatic reversal under the federal Constitution. *Washington v. Recuenco*, 126 S. Ct. 2546, 2551 (2006). There are at least ten exceptions: in addition to the three errors described in Part II, the Court has also applied automatic reversal to the erroneous deprivation of a defendant’s chosen counsel, see *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2566 (2006); to the denial of the defendant’s right to represent himself, see *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984); to the denial of the right to a public trial, see *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984); to a grand jury selected in a racially discriminatory manner, see *Vasquez v. Hillery*, 474 U.S. 254 (1986); to a petit jury selected in a discriminatory manner, see *Batson v. Kentucky*, 476 U.S. 79 (1986); and to some jury selection errors in capital cases, see *Gray v. Mississippi*, 481 U.S. 648, 660-66 (1987). (*Gray* found per se reversible error where the court improperly excused a juror who expressed uncertainty in his ability to vote for the death penalty.) The Court has also reversed at least two constitutional errors without expressly deciding whether that reversal would be automatic. See *Estelle v. Williams*, 425 U.S. 501, 512 (1976) (reversing because the defendant was forced to wear prison garb at trial); *Ham v. South Carolina*, 409 U.S. 524, 527 (1973) (reversing because the trial judge refused to ask prospective jurors about their racial bias). This count does not include in this count the Court’s two automatic reversals that depended on federal statutory rights of criminal procedure. See *Nguyen v. United States*, 539 U.S. 69 (2003) (vacating and remanding an appellate decision affirming a criminal conviction because one judge sat on the panel without statutory authority to do so); *Gomez v. United States*, 490 U.S. 858, 871-76 (1989) (reversing a federal conviction because the jury selection was overseen by a magistrate judge, in violation of a federal statute governing the jurisdiction of magistrate judges).

decide for themselves whether the failure to charge an element of the offense is a structural error requiring automatic reversal; the federal courts are split on this issue, and the Supreme Court has not yet resolved it.¹⁴⁹

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA),¹⁵⁰ federal habeas courts must defer to a state court's choice not to apply automatic reversal.¹⁵¹ Though the Supreme Court has authority to review those state interpretations de novo on direct review, it has done so only twice.¹⁵² In short, then, state appellate courts have discretion to fashion their own tests for determining when a particular type of error must be reversed automatically.

And they have more reason to do so because most criminal errors take place in state trials. In 2002, there were 35,664 felony jury trials and 55,447 felony bench trials in the twenty-three states that record trial data.¹⁵³ In the federal district courts, by contrast, there were only 2843 felony or class A misdemeanor jury trials and 620 bench trials in a comparable period.¹⁵⁴ More trials create more errors to be litigated on appeal, and because state criminal trial courts often have fewer resources and operate under tighter time pressures, state criminal trials may produce more errors, on average, than federal trials.¹⁵⁵

CONCLUSION

Trial judges perform vital constitutional duties during criminal trials. Appellate courts must explain those duties and remind trial judges of their importance. The rule of automatic reversal creates a conflict between that

149. See *supra* note 121 and accompanying text.

150. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

151. Unless the state court's decision is contrary to "clearly established Federal Law, as determined by the Supreme Court of the United States," a federal court may not grant the prisoner's habeas petition. 28 U.S.C. § 2254(d) (2000); see also *Carey v. Musladin*, 127 S. Ct. 649, 652-53 (2006) (denying the habeas petition because the California decision was not contrary to "clearly established" federal law).

152. *Sullivan*, 508 U.S. 275; *Chapman v. California*, 386 U.S. 18 (1967).

153. Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 764 (2004).

154. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2003, tbl.D-4 (2004), <http://www.uscourts.gov/judbus2003/contents.html> (reporting data for the twelve months ending September 30, 2003).

155. See generally Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1464-69 (2005) (reviewing empirical studies of the resource differences between state and federal courts).

prospective appellate function and the retrospective appellate function of evaluating the fairness of the particular trial below. To affirm a verdict that was fairly obtained, the rule requiring automatic reversal forces an appellate court to find that no error occurred, thereby narrowing the doctrinal definition of the error.

To avoid this doctrinal consequence, appellate courts should reject the *Fulminante* framework for determining when the rule of automatic reversal applies. In its place, appellate courts should apply the rule of automatic reversal only to types of error that never contribute to the verdict.