[Introductory Note: The law on the analysis to be used by appellate courts in reviewing alleged trial and procedural errors in criminal cases, both federal and state, is very complex and often poorly understood by both lawyers and judges. Even the U.S. Supreme Court has had difficulty developing and articulating appropriate governing principles.

This is a document for lawyers and judges, primarily prosecutors and criminal defense lawyers and judges who preside over criminal cases. It is a modified portion of an appellate brief I wrote for a Colorado criminal appeal, but as the text indicates, the general principles are applicable in virtually all states. Of course. non-lawyers, including law students, are free to consult it

As with all documents I post, this document does not express any opinion on the law of any jurisdiction (even though this was written as a portion of a Colorado appellate brief), and all such opinions are expressly disclaimed. Application of these principles is highly fact and issue specific, and this analysis was written in the context of an appeal of a highly specific procedural issue. Furthermore, the law on harmless and plain error remains unsettled. It is critical to consult the most recent case law, particularly the most recent decisions of the U.S. Supreme Court, when addressing these issues.

Users who are not criminal lawyers or judges who preside over criminal cases are urged to consult competent counsel on these issues.]

THE HARMLESS AND PLAIN ERROR DOCTRINES: HISTORY AND ANALYSIS

The proper algorithm to be used by appellate courts in determining: 1. whether error has occurred; 2. whether the magnitude of any error warrants the relief sought; and, 3. the apportionment of proof and persuasion on these issues, is devilishly complicated, particularly as general understanding of the historical basis for the error rules has dimmed over time. Thus, a brief history of the error doctrines employed by appellate courts would seem valuable.

THE HARMLESS ERROR DOCTRINE - BACKGROUND

Prior to 1919,criminal convictions were routinely reversed on appeal for the most minor of trivial defects. See, e.g., *State v. Campbell*, 109 S.W. 706, 707 (Mo. 1908) (Rape conviction overturned because the indictment alleged the crime occurred “against the peace and dignity of state” rather than “against the peace and dignity of *the* state.” (emphasis added)). In fact, any technical defect resulted in reversal. James Edward Wicht III, *There Is*

No Such Thing As A Harmless Constitutional Error: Returning To A Rule Of Automatic Reversal, 12 BYU J. Pub. L. 73 (1997) and cases cited therein; *Williams v. State*, 27 Wis. 402 (1871) (Indictment read "against the peace and dignity of the State of Wisconsin" instead of "against the peace and dignity of the State.")

As a result of cases like these, there was a great threat that convictions would be reversed based on trivial technicalities, and the error-free requirement for upholding convictions reduced some trials to nothing more than games for planting the seeds of reversible error into the appellate record. This "gamesmanship" caused both "widespread and deep" concern about the criminal justice process. *Kotteakos v U.S.*, 328 U.S. 750, 759 (1946); see also, Robert W. Calvert, *The Development Of The Harmless Error Doctrine In Texas*, 31 Tex. L. Rev. 1, 13-15 (1952); Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167 (1995); Donald A. Winslow, *Note, Harmful Use Of Harmless Error In Criminal Cases*, 64 Cornell L. Rev. 538 (1979).

The Harmless Error Rule

Congress responded to this problem by articulating what has become known as the harmless error rule. Act of February 26, 1919, ch 48, 40 Stat. 1181, Judicial Code § 269, 28 U.S.C. § 369 (1919) (repealed, 1948), successor provision currently codified at 28 U.S.C. § 1119 (2004), Fed. R. Crim. Pro. 52(a)11 (identical to its Colorado counterpart, Colo. R. Crim. Pro. 52(a)).[1]

To be classified as "harmless" under the original rule, the error must not have affected the substantial rights of the parties. *Id.* Thus, the harmless error rule prevented reversal of

1 A separate statutory provision, 28 U.S.C. § 2111 (1994) applies the harmless-error rule to the Federal appellate courts, stating, "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." *Id.* This statutory provision appears to be unnecessary, however, because Fed. R. Crim. Pro. 54(a) provides that all of the Federal Rules "apply to all criminal proceedings … in the United States Courts of Appeals." Fed. R. Crim. Pro. 54(a). See, Edwards, *supra* at 1174, n. 11; see 3A Charles A. Wright, Federal Practice and Procedure § 852 at 296 (2d Ed. 1982) (apparently § 2111 was enacted "on the mistaken belief that the (harmless-error rule) [applied] only to the district courts.")

convictions based on small errors that were unlikely to have affected the outcome of the trial. See, Wicht, *supra*, and the cases cited therein; Roger J. Traynor. *The Riddle of Harmless Error*. Ohio State University Press: Columbus, Ohio (1970).

The current version of Fed. R. Crim. Pro.52(a) – identical to its Colorado counterpart, Colo. R. Crim. Pro. 52(a) – reads as follows:

> Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

Justice Rutledge explained the rationale for the harmless error rule in the *Kotteakos* decision:

> "The general object [of the harmless error rule] was simple: To substitute judgment for [the] automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure will engender and reflect in a printed record." *Kotteakos*, *supra*, at 759-760.

To meet this broad objective, the harmless error rule was written in broad, general terms. *Id*.

Prior to the Supreme Court's decision in *Chapman v. U.S.*, 386 U.S. 18 (1967), the courts consistently held that constitutional errors could never be harmless. Appellate courts reversed all convictions in cases where the defendant's constitutional rights were violated and remanded the cases for retrial.

Chapman vs. U.S.

The *Chapman* Court held, however, that certain constitutional violations could also be found harmless. *Id.* at 22. (Holding harmless a violation of the defendant's right to remain silent infringed by the prosecution's commenting to the jury on Chapman's failure to testify.)

Chapman noted that all states, including Colorado, had enacted harmless error rules, none of which – including Colorado's – made any distinction between Federal, Constitutional or other errors. *Id.*at 21-22; Colo. R. Crim. P. § VIII, Rule 52 (Identical to Fed R. Crim. Pro. 52 adopted by the United States Supreme Court pursuant to 28 U.S.C. §1119,*supra*.)

Thus, the *Chapman* Court concluded that there could be Constitutional errors that – under the circumstances of a particular case - "are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless" and, therefore, do not require automatic reversal. *Id.*

The minimal algorithm for analyzing Constitutional errors under the harmless error doctrine as articulated by *Chapman* was whether the reviewing court was convinced, beyond a reasonable doubt, that the error did not contribute to the conviction. *Id. at 23-24*. The burden of proof on this issue was imposed on the party that received the benefit of the alleged error. *Id. at 24*. Thus, in criminal cases, the prosecution has the burden of convincing the trial court, beyond a reasonable doubt, that the Constitutional error complained of did not contribute to the defendant's conviction.

On the other hand, *Chapman* did identify some Constitutional rights "so basic to a fair trial" that their violation may never be treated as harmless. See, *e.g.*, *Payne v. Arkansas*, 356 U.S. 560 (1958) (coerced confession); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel denied.);*Tumey v. Ohio*, 273 U.S. 510 (1927) (Right to impartial judge). And, subsequent to *Chapman*, decisions expanded the list of errors that were effectively deemed non-harmless, albeit non-presumptively, to include, *inter alia*, allowing a jury instruction containing an erroneous conclusive presumption, *Cardella v. California*, 491 U.S. 263, 266 (1989), allowing a jury to receive an instruction misstating an element of the offense, *Pope v. Illinois*, 481 U.S. 497, 501-504 (1987), and allowing the jury to hear an instruction containing an erroneous rebuttable presumption, *Rose v. Clark*, 478 U.S. 570 (1986).

Arizona v. Fulimante

Finally, in *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Supreme Court put flesh on the analytical skeleton of the harmless error doctrine as set forth by *Chapman*. The *Fulminante opinion* is not a paragon of clarity in most respects.[2] Nevertheless, the relevant portions of a majority of the Justices on the proper application of the harmless error doctrine are clear.

Fulminante divides Constitutional errors raised in criminal appeals into two classes: "structural errors" and "trial errors." The Colorado Supreme Court has adopted this distinction. *Griego v. People*, 19 P.3d 1, 7 (Colo. 2001).

Structural Errors

Structural errors are defects in the trial mechanism that defy analysis by the harmless error doctrine. They are defects that obviously affect the entire conduct of the trial, from beginning to end. Included among errors properly classified as structural errors are cases such as *Gideon*, *supra* (right to counsel denied.) and *Tumey*, *supra* (Right to impartial judge), both Constitutional rights among those identified by *Chapman*, supra, as "so basic to a fair trial" that their violation can never be treated as harmless. *Chapman*, *supra* at 23; *Fulminante*, *supra* at 309-311; accord, *Neder v U.S.* 527 U.S. 1, 7 (1999); *Griego*, supra.

Fulminante notes with approval post-*Chapman* cases identifying additional Constitutional structural errors. *Id*.; see, *Vasquez v. Hillery*, 474 U.S. 254 (1986) (grand jury racial discrimination); *McKastle v. Wiggens*, 456 U.S. 168 (1984) (right to self-representation); and *Waller v. Georgia*, 467 U.S. 39 (1984) (right to a public trial). According to *Fulminante*, each of these Constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.

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2 The "majority opinion" by White. J. represented the views of only four of the nine Justices. The rationale for the decision is found in the opinion (essentially a dissenting opinion, but not so identified) of Rhenquist, C.J., joined in relevant part by O'Connor, Souter, and Scalia, J.J. Qualifying this decision for Excedrin Headache numeration is the opinion of Kennedy, J. who joined in Rhenquist's opinion, but concurred in the result reached by White, J. and the other three Justices in the minority.

Fulminante, *supra* at 310.

The U.S. Supreme Court has held, however, that an instructional error is never a structural error, but is evaluated under harmless error and plain error (see, *infra*) principles. *Neder*, *supra* at 8-15. The Colorado Supreme Court has followed *Neder*. *Griego*, *supra* (overruling a line of cases holding to the contrary, including: *Cooper v. People*, 973 P.2d 1234, 1242 (Colo. 1999); *Bogdanov v. People*, 941 P.2d 247, 252-253 (Colo. 1997); *People v. Snyder*, 874 P. 2d 1076 (Colo. 1994); *People v. Vance*, 933 P.2d 576, 580 (Colo. 1997); see, *People v. Miller,* 113 P.3d 743 (Colo. 2005).

Trial Errors

Trial errors, on the other hand, are errors, including Constitutional errors, that occur during presentation of the case to the jury and that may be quantitatively assessed in the context of other evidence presented in order to determine whether – in the case of Constitutional errors – they were, or were not, harmless beyond a reasonable doubt. *Griego*, *supra*; see, *e.g.*, *Clemons v. Mississippi*, 494 U.S. 738 (1990) (jury instructions in capital case.); *Satterwhite v. Texas*, 486 U.S. 249 (1988) (admission of evidence at sentencing without presence of defense counsel.); *Crane v. Kentucky*, 476 U.S. 683 (1986) (exclusion of defendant's testimony on taking of confession.); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (right to cross-examine witness for bias.); *Rushen v. Spain*, 464 U.S. 114 (1983) (defendant's right to be present at trial.); *U.S. v. Hasting*, 461 U.S. 499 (1983) (comment on defendant's silence at trial); *Hopper v. Evans*, 456 U.S. 605 (1982 (statutory prohibition of particular jury instruction); *Kentucky v. Horton*, 441 U.S. 786 (1979) (instruction of presumption of innocence.); *Moore v. Illinois*, 434 U.S. 220 (1977) (admission of identification evidence.); *Brown v. U.S.*, 411 U.S. 223 (1973) (admission of hearsay testimony of co-defendant.); *Milton v. Wainwright*, 407 U.S. 371 (1973 (confession in violation of *Massiah v U.S.*, 377 U.S. 201 (1964)); *Chambers v. Maroney*, 399 U.S. 42 (1970) (Fourth Amendment); and *Coleman v.*

Alabama, 399 U.S. 1 (1970) (counsel at preliminary hearing); see, *Neder*, *supra* at 8-9 (Trial errors may be subject to either harmless error or plain error (discussed, infra) analysis.); accord, *Griego*, *supra* at 8; see, *Miller*, *supra* at 13.

Harmless Error Rule Summary

In short, the current state of both Federal and Colorado law is that errors subject to analysis on appeal under the harmless error rules (Fed. R. Crim. Proc. 52(a) and Colo. R. Crim. Pro. 52(a)) should be handled as follows:

1. Was the error or Constitutional dimension? If not, it will be held harmless and the verdict below upheld unless it affected "substantial rights."

2. If the error was a Constitutional error, was it a structural error or a trial error?

3. If the Constitutional error was a structural error – a defect in the trial mechanism that obviously affected the entire conduct of the trial, from beginning to end, and, therefore defies analysis by the harmless error doctrine, the verdict below will be reversed.

4. If the Constitutional error was a trial error – errors that occur during presentation of the case to the jury that may be quantitatively assessed in the context of other evidence presented – the error will be deemed harmless and the verdict below upheld if the error is determined to be harmless beyond a reasonable doubt, with the prosecution bearing the burdens of proof and persuasion.

THE PLAIN ERROR DOCTRINE

The plain error doctrine is formalized as Fed. R. Crim. Pro. 52(b) and its identical Colorado counterpart, Colo. R. Crim. Proc. 52(b), both of which provide:

> Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Fed. R. Crim. Pro. 52(b) codifies the standard laid down in *U.S. v. Atkinson*, 297 U.S. 157, 160 (1936), accord, *U.S. v Young*, 470 U.S. 1, 15 (1985), see generally, *U.S. v. Olano*,

507 U.S. 725 (1993). Fed. R. Crim. Pro. 52(b) has remained unchanged since the original version of the Criminal Rules, and was intended as " a restatement of existing law." Advisory Committee's Notes on Fed. R. Crim. Pro. 52, 18 U.S. C. App., p. 833. *Olano*, *supra* at 731.

While nothing in the text of the rule expressly limits the application of the plain error doctrine to trial errors that were forfeited (because they were not the subject of a contemporaneous objection at trial), and the language of the rule is permissive, even allowing appellate courts to consider errors *sua sponte*, generally Rule 52(b) is applied to forfeited but reversible errors. *Olano*, *supra* at 732; see, Harmless Error vs. Plain Error, *infra*; see, *eg. Gibson*, *supra*, ("Because the defendant did not object to theft instruction at trial, the proper standard of review to apply was plain error. …")

Plain Error Rule Summary

There are three requirements that must be satisfied in order for an appellate court to grant relief under R. 52(b):

1.There must have been an "error;"

2.The error must be "plain;" and,

3. the error must "affect substantial rights." *Olano*, *supra* at 732.

"Plain" is synonymous with "clear" or "obvious." *Olano*, *supra* at 734; see *Young*, *supra* at 17, n. 14. "Affect substantial rights" – the same language used in Fed R. Crim. Proc. 52(a) and its identical Colorado counterpart, Colo. R. Crim. Pro. 52(a) – means the error must have been prejudicial; it must have affected the outcome in the trial court. *Olano*, *supra* at 734; see, *e.g.*, *Bank of Nova Scotia v. U.S.*, 487 U.S. 250, 255-257 (1988); *Kotteakos*, *supra* at 758-765.

Rule 52(b) leaves the correction of plain errors affecting substantial rights to the sound discretion of appellate courts, and that discretion should not be exercised unless the error, "'seriously affect(s) the fairness, integrity or public reputation of judicial proceedings.'" *Young*,

supra at 470 (quoting *Atkinson*, *supra* at 160 cited in *Olano*, *supra* at 732. Plain error is grave error the seriously affects the substantial rights the accused. *Stewart*, *supra* at 120; *Espinosa v. People*, 712 P.2d 476, 478 (Colo. 1985). It is an error that is "both obvious and substantial." *Stewart*, *supra*; *People v. Barker*, 501 P.2d 1041, 1043 (Colo. 1972).

Normally, under plain error review, reversal is required only if the error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction, but if the issue raised is of constitutional dimension, then reversal is required unless the appellate court is convinced, by the Prosecution, that the error is harmless beyond a reasonable doubt. *Harlan*, *supra* at 490; Colo. R. Crim. Proc. 52(b).

HARMLESS ERROR AND PLAIN ERROR COMPARED & CONTRASTED

Generally, when a defendant has made a timely objection to an alleged error at trial, Rule 52(a) (Federal or Colorado) – the harmless error rule, R. 52(a) – applies, while Rule 52(b) (Federal or State) – the plain error rule – is applied almost exclusively to forfeited but reversible error.

Both rules require the same inquiry – whether the alleged error "affect[ed] substantial rights," but with one important difference: Under Rule 52(b), the error must be proven prejudicial, and it is the defendant who bears the burden of proof and persuasion on this issue. "Courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error … had [a] prejudicial impact on the jury's deliberations." *Young*, *supra* at 17, n.14.; *Olano*, *supra* at 734.

On the other hand, Rule 52(a) (Federal or Colorado) – the harmless error rule – dictates both a different burden and a shifting of the burden by a subtle, yet important, difference in language. The harmless error doctrine requires that the reviewing court be convinced, beyond a reasonable doubt, that the error did not contribute to the conviction. *Chapman*, *supra* at 23-24. The burden of proof on this issue is borne by the party that

received the benefit of the alleged error. *Id.* at 24. Thus, in criminal cases, the prosecution has the burden of convincing the trial court, beyond a reasonable doubt, that the Constitutional error complained of did not contribute to the defendant's conviction. *Id.* [In contrast, under R. 52(b), the reviewing court will not afford relief unless the defendant proves that the error had a prejudicial effect.]

While Rule 52(a) requires courts to disregard errors if they do not affect substantial rights, Rule 52(b) does not provide a remedy unless the error does affect substantial rights.