Structural Errors

Author : Phil Dixon

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Often, when the defendant complains on appeal of a constitutional violation at trial, there must be some showing of prejudice in order for the defendant to obtain relief. Even if a defendant shows that a violation occurred, the State usually has an opportunity to demonstrate that the error is harmless beyond a reasonable doubt. If the error is unlikely to have affected the result within the greater context of the trial, the defendant is not entitled to relief under harmless error review. *Chapman v. California*, 386 U.S. 18 (1967). Some errors, however, are deemed so serious and capable of affecting the fundamental integrity of the trial that harmless error review does not apply. These types of "structural" errors typically entitle the defendant to a new trial without any showing of prejudice and without regard to how the error may have affected the verdict. "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver v. Massachusetts*, 582 U.S. ___ (2017) (Slip. op. at 9). There are some wrinkles, depending on the particular type and degree of the violation, including when the issue is raised and whether the issue was preserved at trial. *Id.* (structural error first raised on collateral review in ineffective assistance of counsel claim must show prejudice). These aren't necessarily issues that frequently occur at trial, but several recent cases have discussed the concept. Given the potential impact of these errors at trial, I wanted to cover some basics of structural error in today's post.

Structural Error under the U.S. Constitution

The U.S. Supreme Court has recognized a limited category of structural errors. These include:

1) The total deprivation of the right to counsel under the Sixth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963). This includes the right to hire counsel of one's choice where the defendant has the resources to do so. *U.S. v. Gonzlaez-Lopez*, 548 U.S. 140 (2006). What constitutes a total deprivation? Compare the recent case of *State v. Veney*, ___ N.C. App. ___ (June 5, 2018) (no structural error for judge to give preliminary instructions to jury venire members while defense counsel was absent from courtroom for approximately two minutes) with another case discussed in the opinion: *State v. Luker*, 311 N.C. 301 (1984) (denial of defense counsel for presentation of evidence and closing argument constituted structural error).

2) The denial of the right to self-representation under the Sixth Amendment. *McKaskle v. Wiggins*, 465 U.S. 168 (1984). The pro se defendant must be competent to stand trial under *Indiana v. Edwards*, 554 U.S. 164 (2008), and must voluntarily and knowingly waive the right to the assistance of counsel. Assuming those conditions are met, though, it is structural error to require the defendant to have an attorney where he or she wishes to represent his or her self.

3) Racial discrimination in the selection of grand jurors under the Fourteenth Amendment. *Vasquez v. Hillery*, 474 U.S. 254 (1986). *See also State v. Moore*, 329 N.C. 245 (1991) (finding racial discrimination in selection of grand jury foreperson a structural error under Article I, Sec. 26 of the North Carolina constitution).

4) Failure to correctly instruct the jury on reasonable doubt under the Fifth and Fourteenth Amendments. *Sullivan v. Louisiana*, 508 U.S. 275 (1993); *see also Victor v. Nebraska*, 511 U.S. 1, 5 (1994) ("So long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution

does not require that any particular form of words be used in advising the jury of the government's burden of proof.").

5) Denial of the right to a public trial under the First and Sixth Amendments. *Waller v. Georgia*, 467 U.S. 39 (1984). This right extends to the jury selection stage of trial. *Presley v. Georgia*, 558 U.S. 209 (2010). Denial of public access to trial can be justified in certain situations (think cases involving classified information, national security issues, or cases with demonstrable risks of disruption or harm to parties or witnesses), but the court must make findings and consider every reasonable alternative to excluding the public. Failure to do so is structural error. Circumstances justifying closure of the courtroom "will be rare. . . ." *Waller*, 467 U.S. at 45.

6) Denial of the right to an impartial tribunal under the Fifth and Fourteenth Amendments. *Tumey v. Ohio*, 273 U.S. 510 (1927) (Due process violated where adjudicator has a direct financial interest in the outcome of the proceedings). *See also Turner v. Louisiana*, 379 U.S. 466 (1965) (Due process violation required new trial without regard to prejudice where two state witnesses served as bailiffs escorting the jury during trial).

For now, we know that the above six types of errors will be considered structural under the federal constitution, and thus normally require automatic reversal when established. Or at least that's traditionally been the count . . .

McCoy v. Louisiana and the Defendant's Right to Autonomy in Defense Objectives

Just last month the U.S. Supreme Court decided *McCoy v. Louisiana*, ___ *S. Ct.* ___ (2018). *McCoy* involved a defense lawyer that admitted the defendant's guilt to a triple homicide to the jury throughout the trial, despite the express and repeated objections of the defendant. Defense counsel decided that admitting guilt was the best strategy to avoid the death penalty in light of overwhelming evidence of guilt. The trial court allowed him to so argue, despite the defendant's insistence that he was innocent [the evidence that McCoy committed the homicides was apparently very strong]. The state appellate courts found that defense counsel was not ineffective and had the authority to admit guilt over the client's objections where, in counsel's reasonable view, it was the best strategy to avoid death.

The U.S. Supreme Court reversed in a 6-3 opinion. The court distinguished between trial management functions that counsel provides—what objections, stipulations, and arguments to make, for instance—and the types of decisions that remain squarely the province of the accused, like "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *McCoy* at 9. The defense lawyer is generally entitled to determine how best to achieve the objectives of the defense, but the defendant decides the overall objective of the defense. "We hold that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *Id.* at 4. Rejecting that the error should be viewed as one of ineffective assistance of counsel, the court observed: "Violation of the defendant's Sixth Amendment-secured autonomy ranks as error of the kind that our decisions have called 'structural'. . . ." *Id.* at 14. In light of that finding, the Court held that no showing of prejudice was required, and the defendant was entitled to a new trial.

The Court's opinion discusses both Sixth Amendment rights to counsel and to self-representation in determining the defendant's rights were violated by defense counsel's admission, but never explicitly categorized the violation as one or the other. The Court's opinion seemed to acknowledge the blurry line between the two rights in this area:

The choice [between self-representation and the assistance of counsel] is not all or nothing. To gain assistance, a defendant need not surrender control entirely to counsel. For the Sixth Amendment, in granting to the accused personally the right to make his defense, speaks of the assistance of counsel, and an assistant, however expert, is still an assistant. *Id.* at 9 (internal citations omitted).

So, is this rule a *new* type of structural error—the violation of the defendant's right to autonomy in the conduct of her defense under the Sixth Amendment, as the majority put it— or something else? Is it more properly considered a deprivation of the right to counsel, or perhaps some kind of hybrid violation of the right to counsel and the right to self-

representation? The dissenting opinion takes the majority to task for "the Court's newly discovered fundamental right." *McCoy* at 18 (Alito, J., dissenting). We'll likely have to wait for further cases to tell us where this one falls in the list or if it's a new addition. Regardless of how the error is categorized, *McCoy* makes clear that the client's expressed wishes control on whether to admit guilt. Where defense counsel concedes guilt over the objections of the defendant, a structural error has occurred, requiring a new trial without any showing of prejudice.

Sound Familiar?

As practitioners may know, North Carolina (along with a majority of the states), already prohibited an unconsented-to admission of guilt by defense counsel. *See State v. Harbison*, 315 N.C. 175 (1985). North Carolina courts call this type of error per se ineffective assistance of counsel, rather than structural error, but the result is the same: a new trial without any regard to prejudice. Jeff blogged about an interesting recent application of *Harbison* in *State v. Payne*, ___ N.C. App. ___, 808 S.E.2d 476 (November 21, 2017) here, involving a successful pretrial insanity defense presented over the defendant's objection, requiring a new trial. To the extent *McCoy* has much impact in North Carolina, it puts the reasoning in cases like *Payne* on even firmer ground and ties *Harbison* to a federal constitutional right.

Note that North Carolina follows the absolute impasse rule, which goes a good deal further than *McCoy* in dictating the extent of client control, even as to purely tactical matters. *See State v. Ali*, 329 N.C. 304 (1991). Where defense counsel and a fully-informed defendant reach an absolute impasse on how to proceed with tactical matters (such as which jurors to strike, whether to put on evidence, whether to request a mistrial, and what witnesses to examine, among others), a North Carolina lawyer must abide by the client's wishes. See Jessie's blog post on absolute impasse here for a discussion of this rule and its limits. Thus, while the federal constitution now requires the client be in charge of the fundamental objective of the defense, North Carolina has long given the client control over both the objective of the defense *and* the way those objectives will be achieved, at least where there is an absolute impasse on the point between lawyer and client.

Structural Errors under the North Carolina Constitution

North Carolina has recognized structural errors arising from the North Carolina constitution in addition to those under the federal constitution. As noted above, racial discrimination in the selection of grand jurors has been deemed structural error under Article I, Section 26. *State v. Moore*, 329 N.C. 245 (1991). Violation of the right to a unanimous jury of twelve has also been deemed structural error under Article I, Section 24 when the error concerns the numerical composition of the jury. *See generally State v. Poindexter*, 353 N.C. 440 (2001) (juror removed for misconduct after deliberations began; verdict returned by eleven jurors void and issue not subject to harmless error review); *State v. Bunning*, 346 N.C. 253 (1997) (substitution of juror with alternate after deliberations began was fundamental flaw; harmless error review inappropriate); *State v. Hudson*, 280 N.C. 74 (1971) (verdict returned by eleven jurors after one juror fell ill was "nullity" despite defendant's consent to such verdict; no prejudice required).

The Court of Appeals recently found structural error arising from improper waiver of the right to a jury trial in *State v. Boderick*, ___ N.C. App. ___, 812 S.E.2d 889 (March 20, 2018). Article I, Section 24 was amended in 2014 to allow bench trials in lieu of a jury for consenting defendants in noncapital cases. The amendment applies to cases in which the defendant was arraigned on or after December 1, 2014. In *Boderick*, the defendant was arraigned in February of 2014 and tried in 2016. Two days into the jury trial, the court declared a mistrial. The defendant then agreed to waive the jury and submit to a bench trial, resulting in his conviction. Finding the waiver of jury trial invalid, the court granted a new trial. "Where the error under the previous version of Article I, Section 24 involved a verdict that was rendered by an 'improperly constituted' fact-finder—or, in other words, anything less than twelve unanimous jurors—the error is said to be structural and automatic reversal is mandated." Slip op. at 14.

I plan to return to this topic in a future post and delve a little more deeply into some of the wrinkles of federal structural errors. Appellate gurus, is there an argument for other structural errors under the state or federal constitution that I missed? Other questions? Leave a comment and let me know what you think.