CHAPTER 13

POST-CONVICTION CHALLENGES

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I. INTRODUCTION

Because of the Double Jeopardy Clause and the constitutional right to a jury trial, the prosecutor generally will be unable to seek review of an acquittal.[1] The criminal defendant who is convicted has greater opportunities to challenge the trial court's judgment.[2] This Chapter addresses the opportunities most likely to be made available in the typical criminal case.

Three types of post-conviction proceedings will be examined in this chapter: 1) motions made in the trial court after a conviction, 2) direct appellate review of convictions, and 3) collateral attacks on convictions. We assume that everyone has a basic familiarity with the following facts: criminal cases are tried in both federal and state courts; an appeal of one sort or another generally is provided a convicted defendant; the defendant may raise claims concerning almost any trial errors, defects in trial procedure, problems with the substantive law or the overall fairness of the results on appeal; but crowded appellate courts may screen some appeals and decide them on the basis of written briefs, reserving oral argument for special cases. Questions concerning the right to counsel and to the effective assistance of counsel in post-conviction proceedings are addressed in Chapters 5 and 10. The special aspects of appellate review of sentences have been examined in Chapters 11 and 12.

[1] This Chapter does not examine the issue of when a decision becomes final for purposes of appeal. See, e.g., United States v. Nixon, 418 U.S. 683, 690–92 (1974). Nor are special techniques of avoiding review examined—e.g., the concurrent sentence doctrine, see, e.g., Benton v. Maryland, 395 U.S. 784 (1969) (discretion to avoid review of one of concurrent judgments); the mootness doctrine, see, e.g., Sibron v. New York, 392 U.S. 40 (1968) (case not moot on direct appeal where adverse collateral consequences are possible); Dove v. United States, 423 U.S. 325 (1976), (certiorari petition dismissed when petitioner dies). The examination of appeals, as opposed to collateral attack, focuses on defendants who have been convicted at trial as opposed to those who have pled guilty, although a few cases do address defendants who pled guilty.

[2] As noted in the previous chapter on double jeopardy, not all government appeals are constitutionally barred. Generally, if the prosecutor is not challenging an acquittal or seeking a second adjudication on the guilt-innocence question, the Constitution will not stand in the way of an appeal. While Congress has acted to open the doors to government appeals virtually to the limits of the Constitution in 18 U.S.C.A. § 3731, not all states permit the government such review.

II. GROUNDS FOR DIRECT ATTACKS ON A CONVICTION

If the defendant has been convicted, there are several procedural avenues by which he can attack the judgment "directly", i.e., through motions to the trial judge or by way of direct appeal. This section considers some possible grounds for a direct attack, and some defenses that the government might have against a remedy that would vacate the judgment.

A. INSUFFICIENT EVIDENCE

1. The General Standard

A defendant may move during trial or after a verdict is returned for an acquittal on the ground that the evidence is insufficient to sustain a conviction. Federal Rule of Criminal Procedure 29 indicates the opportunities available to a defendant to make and repeat such a motion. The same legal standard is used in judging post-verdict as mid-trial motions. Courts have wisely adopted the general rule that a guilty verdict can only stand if there is sufficient evidence to convince a reasonable jury of guilt beyond a reasonable doubt of all necessary elements of the government's case.[3] See United States v. Ramirez, 362 F.3d 521 (8th Cir. 2004) ("While the evidence need not preclude every outcome other than guilty, we consider whether it would be sufficient to convince a reasonable jury beyond a reasonable doubt."). After In re Winship, discussed in Chapter 10, this standard of review is probably required by the Constitution. When the burden of persuasion as to a defense is placed upon the defendant, a guilty verdict will be set aside if no reasonable jury could have rejected the defendant's evidence, when measured under the appropriate standard of proof. For example, if a defendant bears the burden of proving insanity by a preponderance of the evidence, a jury verdict of guilty will be set aside if the defendant's evidence is so strong that any *reasonable* jury would have found the proof of insanity to be preponderant.

Review by Trial Judge for Insufficiency

The standard for review by a trial judge upon a motion for acquittal is well-stated by the court in United States v. Mariani, 725 F.2d 862 (2d Cir.1984):

[3] In conspiracy cases, an ill-defined and objectionable "slight evidence" standard has been utilized by some courts, but it never has been justified. See, e.g., United States v. Shoffner, 71 F.3d 1429 (8th Cir.1995) ("Once the existence of a conspiracy is established, even slight evidence connecting a defendant to the conspiracy may be sufficient to prove the defendant's involvement.").

When a defendant moves for a judgment of acquittal, the court must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If it concludes that upon the evidence there must be such a doubt in a reasonable mind, it must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If it concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, it must let the jury decide the matter.

Timing of a Motion for Acquittal

Fed.R.Crim.P. 29 provides, as does the law of most states, that a motion for judgment of acquittal must be granted after the evidence of either side is concluded if the evidence against the defendant is insufficient to warrant conviction. If the defendant makes a motion for acquittal at the close of the government's case, the trial court may reserve a ruling on the motion until the end of the case. If the defendant, after making the motion, puts on evidence, the trial court in subsequently ruling on the motion for acquittal is to consider only the evidence presented as of the time "the ruling was reserved." Rule 29(b). Therefore, the defendant who puts on evidence after the judge reserves a ruling on the motion avoids the risk that the evidence and the government's rebuttal will be considered as favorable to the government for purposes of the dismissal motion. That is, the defendant does not waive the right to have the acquittal motion judged solely on the basis of the government's evidence, without reference to the evidence offered after the government rests. While Rule 29 specifically limits only the trial court and not the appellate court, the Advisory Committee's comment to the Rule states that "in reviewing a trial court's ruling, the appellate court would be similarly limited" to the evidence presented as of the time the motion was made.

Fed.R.Crim.P. 29(c) provides that a motion for judgment of acquittal can be made after the jury returns a verdict, but it sets a time limit for such a motion—it must be made "within 7 days after a guilty verdict or after the court discharges the jury, whichever is later." In Carlisle v. United States, 517 U.S. 416 (1996), the defendant's motion for acquittal was made 8 days after the jury was discharged. The Court, in an opinion by Justice Scalia, held that the district court has no jurisdiction to entertain a motion for acquittal made outside the time limit of Rule 29(c)—even if the defendant is innocent. Justice Scalia declared that the Rule is "plain and unambiguous" and that there is "simply no room in the

text * * * for the granting of an untimely post-verdict motion for judgment of acquittal, regardless of whether the motion is accompanied by a claim of legal innocence, is filed before sentencing, or was filed late because of attorney error." Justice Souter wrote a short concurring opinion, as did Justice Ginsburg, joined by Justices Souter and Breyer. Justice Ginsburg argued that the Rule 29 time bar might be lifted if defense counsel were somehow misled by the trial court. But Carlisle's counsel was not misled; rather, he neglected to follow plain instructions as set forth in the Rule. She also observed that Carlisle was not bereft of protection at this point, because he could still challenge his conviction on appeal, and could also bring a collateral attack on grounds of ineffective assistance of counsel.

Justice Stevens, joined by Justice Kennedy, dissented in *Carlisle*. He contended that there was nothing in Rule 29(c) that "withdraws the court's pre-existing authority to refrain from entering judgment of conviction against a defendant whom it knows to be legally innocent."

2. The Standard of Appellate Review of Sufficiency of the Evidence

Rational Trier of Fact Test: Jackson v. Virginia

At one time, there was a tendency among appellate courts to uphold verdicts supported by *any* evidence. Only "no evidence" cases produced reversals. But in Jackson v. Virginia, 443 U.S. 307 (1979), the Supreme Court rejected the "no evidence" test. Writing for the Court, Justice Stewart opined that the "no evidence" rule was inadequate to protect against misapplication of the proof beyond a reasonable doubt requirement, and that the critical question on review of a criminal conviction is whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. He also wrote that the standard should be utilized by federal courts hearing habeas corpus attacks on state convictions. Justice Stewart elaborated on the appropriate test for review of sufficiency claims:

> After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh

> the evidence, and to draw reasonable inferences from basic facts to ultimate facts. * * * The criterion thus impinges upon jury discretion only to the extent necessary to guarantee the fundamental protection of due process of law.[4]

Thus, the standard for appellate review of sufficiency of the evidence under *Jackson* is the same as the standard used by the trial court in ruling on a motion for acquittal. See United States v. Mariani, supra.

Ironically, Jackson, who was convicted of first degree murder, did not benefit from his victory on the legal standard of sufficiency. Jackson was convicted of premeditated murder and claimed that he shot the victim by accident. The Court found that because Jackson, among other things, admitted firing several shots into the ground and reloading his gun before killing the deceased, a rational trier of fact could have found beyond a reasonable doubt that the killing was premeditated.

Jackson was a habeas corpus case, but the standards set forth in *Jackson* apply to direct appeals as well. See, e.g., United States v. Aina-Marshall, 336 F.3d 167 (2d Cir. 2003) ("A defendant challenging a conviction based on insufficient evidence bears a heavy burden. * * * A conviction will be affirmed so long as any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."). Indeed, as a result of changes in federal habeas corpus law, a convicted defendant has an especially difficult time in making a *Jackson* challenge in a federal habeas proceeding. See Coleman v. Johnson, *infra.*

Application of Jackson: Wright v. West

In Wright v. West, 505 U.S. 277 (1992), West was convicted of grand larceny on the basis of possession of stolen goods. The theft occurred several weeks before the items were found in West's house; only a few of the stolen items were found there; West had made no attempt to conceal the items; and West testified that he had bought the items at a flea market. West challenged his conviction on sufficiency grounds, arguing that his was a "mere possession" case, and that a rational trier of fact could not conclude that West had the intent to commit grand larceny. The court of appeals held in favor of West, but the Supreme Court concluded that the lower court had misapplied the standards of *Jackson* in reversing West's conviction.

Justice Thomas, in a plurality opinion joined by Chief Justice Rehnquist and Justice Scalia, concluded that "the case against West was strong." He stressed the following points: 1) over 15 of the stolen items were recovered from West's home; 2) West had failed to offer specific

[4] Justice Stevens dissented and was joined by Chief Justice Burger and Justice Rehnquist. Justice Powell did not participate.

information about how he came to possess the stolen items, saying only that he frequently bought and sold items at various flea markets; 3) West contradicted himself repeatedly on the witness stand as to where he had bought the stolen goods; 4) West had no explanation whatsoever for the presence of some of the stolen goods in his home; 5) West failed to produce any other supporting evidence, such as testimony of the person from whom he claimed to have purchased some of the goods, even though he stated that he had known this person for years; and 6) the jury was entitled to disbelieve West's "uncorroborated and confused" testimony, and "was further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt."

Justice Thomas concluded as follows:

> In *Jackson,* we emphasized repeatedly the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review. We said that "all of the evidence is to be considered in the light most favorable to the prosecution"; that the prosecution need not affirmatively "rule out every hypothesis except that of guilt"; and that a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume—even if it does not appear affirmatively in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Under these standards, we think it clear that the trial record contained sufficient evidence to support West's conviction.[5]

For other examples of appellate review of sufficiency challenges, see United States v. Jackson, 368 F.3d 59 (2d Cir. 2004) (defendant convicted of felon-firearm-possession; conviction reversed because of insufficient evidence that the defendant was a felon; the government offered a conviction entered against "Aaron Jackson", but there are many Aaron Jacksons, and the government "offered no evidence that the two Aaron Jacksons were of the same race, or of similar height, coloring, fingerprint configuration, or even general physical description."); United States v. Ramirez, 362 F.3d 521 (8th Cir. 2004) (driver of car contended he did not know that drugs were in the car; appellate court finds sufficient evidence: "The circumstances surrounding the traffic stop and Ramirez's trip, including documents found inside the truck and his inconsistent and improbable explanations for his trip; his lies regarding his plans to meet his uncle; * * * his implausible trial testimony; and expert testimony concerning the methods used by drug traffickers, when considered

[5] Justices White, O'Connor, Blackmun, Stevens, and Kennedy all concurred in the judgment, in three separate opinions. They all agreed that under *Jackson,* there was sufficient evidence to convince a rational factfinder of West's guilt beyond a reasonable doubt. Justice Souter also concurred in the judgment, but did not reach the sufficiency issue.

together" provided sufficient evidence of the defendant's knowing participation in drug trafficking).

More on Deference to Jury Determinations: Cavazos v. Smith

The Court repeated its emphasis in Wright v. West on deference to jury verdicts in a per curiam summary disposition in Cavazos v. Smith, 132 S. Ct. 2 (2011), where it reversed a Ninth Circuit opinion granting habeas relief to a state defendant convicted in a case involving "shaken baby syndrome." The court noted that the fact that the government's evidence and theory might be disputed is no reason to overturn a jury verdict, in a case in which expert testimony was in dispute and there were affirmative indications of trauma that supported the government's experts' opinion that the death occurred from sudden tearing of the brainstem caused by shaking, even though the experts were unable to identify the precise point of the tearing. Three dissenters protested the summary disposition.

Two Layers of Deference to Jury Determinations on Habeas Review: Coleman v. Johnson and Parker v. Matthews

In Coleman v. Johnson, 132 S.Ct. 2060 (2012) (per curiam), the Court once again considered and applied the standard for reviewing habeas claims challenging the sufficiency of evidence at a state trial. Johnson was convicted of being an accomplice and conspirator in the murder of a victim killed by a shotgun blast to the chest. Johnson's convictions were affirmed in state court, and a federal district court denied relief before the Third Circuit held that the evidence at trial was insufficient to support Johnson's conviction under the standard set forth in Jackson v. Virginia.

The Supreme Court observed that *Jackson* claims "face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference." As to the first layer, the Court noted its instruction from Cavazos v. Smith, supra: "it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." Thus, the first layer of deference is appellate deference to jury findings. The second level is federal habeas deference to state court decisions. A federal court may not overturn a state court's finding of sufficient evidence merely because the federal court disagrees with the finding; a federal court may only overturn a state court finding if it is "objectively unreasonable."

The trial evidence left little doubt that Johnson, along with the shooter, intended to confront the victim, but the Third Circuit (contrary to the state courts) found insufficient evidence that Johnson shared the

shooter's intent to kill the victim. Reviewing the record, the Supreme Court concluded that the state appellate court's ruling finding sufficient evidence was entitled to greater deference than the Third Circuit gave it.

The Court reached a similar result in Parker v. Matthews, 132 S.Ct. 2148 (2012) (per curiam), where it found that the Sixth Circuit "set aside two 29-year-old murder convictions based on the flimsiest of rationales" and, again emphasized the "twice-deferential" standard of review in federal habeas corpus proceedings. The Court also rejected the Sixth Circuit's finding that a prosecutor's argument violated due process, observed that the circuit court "cited no precedent of this Court in support of its conclusion that due process prohibits a prosecutor from emphasizing a criminal defendant's motive to exaggerate exculpatory facts," and made clear that circuit precedent does not constitute "clearly established Federal law, as determined by the Supreme Court" (which is the statutory standard).

Court Reviewing Sufficiency of the Evidence Must Consider All Evidence Admitted at Trial, Even if Erroneously: McDaniel v. Brown

In McDaniel v. Brown, 558 U.S.120 (2010), the Court considered whether, in reviewing a conviction for sufficiency of evidence, the reviewing court must consider evidence that was admitted in error. Brown was convicted of sexual assault, and challenged the verdict for sufficiency, but also argued that DNA evidence was unreliable and therefore erroneously admitted. Brown did not, however, dispute the fact that the evidence presented at trial was sufficient. Under these circumstances, the Court in a per curiam opinion ruled that there could be no relief under *Jackson* for insufficiency. The Court explained as follows:

> An appellate court's reversal for insufficiency of the evidence is in effect a determination that the government's case against the defendant was so lacking that the trial court should have entered a judgment of acquittal. Because reversal for insufficiency of the evidence is equivalent to a judgment of acquittal, such a reversal bars a retrial. To make the analogy complete between a reversal for insufficiency of the evidence and the trial court's granting a judgment of acquittal, a reviewing court must consider all of the evidence admitted by the trial court, regardless whether that evidence was admitted erroneously.

General Verdict with Insufficient Evidence on One Ground: Griffin v. United States

Is reversal required when a defendant is charged with multiple acts or means of committing a crime in a single count, and the evidence is insufficient as to one of the acts or means? In Griffin v. United States, 502 U.S. 46 (1991), the Court relied on the common-law rule that a general verdict is valid so long as it is legally supportable on any one of the submitted grounds—"even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action."

Griffin was charged, with others, in a conspiracy that was alleged to have two objects: (1) impairing the efforts of the Internal Revenue Service to ascertain income taxes (the "IRS object"); and (2) impairing the efforts of the Drug Enforcement Administration to ascertain forfeitable assets (the "DEA object"). The evidence introduced at trial implicated Griffin's codefendants in both conspiratorial objects, but it did not sufficiently connect Griffin with the DEA object. The trial court over objection instructed the jury that it could return a guilty verdict if it found Griffin to have participated in either one of the two objects of the conspiracy. The jury returned a general verdict of guilty. The court of appeals found the evidence tying Griffin to the DEA object insufficient, but nonetheless affirmed Griffin's conviction on the ground that sufficient evidence existed to tie her to the IRS object. Griffin argued that this result violated her right to due process, because the jury might not actually have found her guilty of the IRS crime. But the Supreme Court disagreed in an opinion by Justice Scalia.

Justice Scalia recognized that despite the general common-law rule upholding an ambiguous general verdict, the Court had held in Stromberg v. California, 283 U.S. 359 (1931), that "where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." He also recognized that in Yates v. United States, 354 U.S. 298 (1957), the Court used a similar principle to void a conviction in which one means alleged in a single count was insufficient in law because barred by the statute of limitations. But Justice Scalia found these precedents to be exceptions to the general rule, and inapposite to a case where one of the objects in a single count was void not because of a legal error but rather due to factual insufficiency. He explained the *Stromberg-Yates* exception, and distinguished it from the general rule, as follows:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the

> Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence. * * * It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance—remote, it seems to us—that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.

Thus, the Court found it fair to presume from the general verdict that the jury convicted on the factually sufficient ground.[6] Compare United States v. Garcia, 992 F.2d 409 (2d Cir.1993) (*Griffin* distinguished where three legal theories were submitted to the jury, and two of them were legally erroneous: "If the challenge is evidentiary, as long as there was sufficient evidence to support one of the theories presented, then the verdict should be affirmed. However, if the challenge is legal and any of the theories was legally insufficient, then the verdict must be reversed.").

B. MOTION FOR NEW TRIAL

Federal Rule of Criminal Procedure 33, providing for a new trial on motion "if the interest of justice so requires," affords another avenue for direct attack on a conviction. Note that, as was true of motions for acquittal, post-verdict new trial motions are defendants' remedies.

One might expect that the same trial judge who erred once is unlikely to be quick to change her mind, but it sometimes happens. The trial judge knows that it is likely that a convicted defendant will appeal, and the post-trial motion enables the trial judge to correct any error that an appellate court would correct. In close cases, the trial judge has authority to grant a new trial even if an appellate court, acting on the basis of a cold record, would not, because the trial judge is well situated to see or feel the prejudicial impact of an error that on paper does not appear to be significant.

One ground on which a motion for a new trial might be granted is that the trial judge is convinced that a verdict is against the weight of the evidence. "Against the weight of the evidence" is not the same as "insufficient evidence." The standards governing a trial judge's ruling on a motion for a new trial on "weight of the evidence" grounds are well-stated by the court in United States v. Martinez, 763 F.2d 1297 (11th Cir.1985):

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[6] Justice Blackmun concurred in the judgment. Justice Thomas did not participate.

On a motion for judgment of acquittal, the court must view the evidence in the light most favorable to the verdict, and, under that light, determine whether the evidence is sufficient to support the verdict. Thus * * * the court assumes the truth of the evidence offered by the prosecution. On a motion for a new trial based on the weight of the evidence, the court need not view the evidence in the light most favorable to the verdict. It may weigh the evidence and consider the credibility of the witnesses. If the court concludes that despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

* * * While the district court's discretion is quite broad, there are limits to it. The court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable. The evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand. Motions for new trials based on weight of the evidence are not favored. Courts are to grant them sparingly and with caution, doing so only in those really exceptional cases.

Applying these principles trial courts, generally speaking, have granted new trial motions on weight of the evidence only where the credibility of the government's witnesses has been impeached and the government's case has been marked by uncertainties and discrepancies.

C. NEWLY DISCOVERED EVIDENCE CLAIMS

Judges are understandably reluctant to overturn verdicts supported by sufficient evidence to amount to proof beyond a reasonable doubt. If courts readily accepted newly discovered evidence claims, litigants who discovered that a tactical judgment made in one trial did not work would ask for another chance to litigate, and litigation would become interminable. The line between discovery of new evidence and discovery of new theories of how to use evidence is fuzzy, but rarely must it be sharpened in light of the reluctance of courts to take seriously either claim.

Requirements for a Newly Discovered Evidence Claim

A defendant must meet a four prong test before a court will grant him a retrial based on any newly discovered evidence. As stated in United States v. Lenz, 577 F.3d 377 (1st Cir.2009), the defendant must establish the following:

(1) the evidence was unknown or unavailable at the time of the trial;

(2) the evidence could not have been discovered earlier with due diligence;

(3) the evidence is material and not merely cumulative or impeaching; and

(4) the evidence would probably result in an acquittal upon retrial.

In *Lenz*, the court concluded that a witness's newfound willingness to corroborate the defendant's story was not newly discovered evidence: "Whether or not a witness will testify truthfully is simply not 'evidence' that can be used as a basis to invoke Rule 33 of the Federal Rules of Criminal Procedure." See also United States v. Gonzalez, 933 F.2d 417 (7th Cir.1991) (defendants were not entitled to a new trial on the basis of newly discovered evidence where the evidence would merely impeach a government witness's testimony that he had never had anything to do with cocaine, and evidence of the defendants' guilt was overwhelming).

Newly Discovered vs. Newly Available

There is a distinction between newly *discovered* and newly *available* evidence. Evidence is not "new" merely because it has been generated after the conviction. For example, in Harris v. Vasquez, 913 F.2d 606 (9th Cir.1990), a death penalty case, the court concluded that the defendant's new psychiatric reports did not justify another penalty hearing. Because defense counsel possessed evidence of the defendant's brain damage at the original hearing, and no new psychiatric techniques or theories were alleged to have arisen in the interim, the court concluded that the new reports were not new evidence but merely new opinions from new psychiatrists.

New Forensic Techniques: District Attorney's Office v. Osborne

Advances in forensic testing techniques have occasionally given rise to new evidence claims—e.g., exculpatory DNA tests. But they are not always successful. When the forensic testing is conducted long after the crime, it will sometimes not be sufficiently conclusive to show that the defendant would probably be acquitted on retrial. See Dumond v. Lockhart, 911 F.2d 104 (8th Cir.1990), where the court held that evidence of a genetic marker test done on a semen sample, showing that the sample was unlikely to be the defendant's, was newly discovered evidence. Yet the defendant's motion for a new trial was found properly denied because it was not likely that the evidence would produce an acquittal on retrial.

In District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52 (2009), a convicted defendant argued that he had a constitutional right to DNA testing that he claimed would provide newly discovered evidence to exonerate him. The state had in fact conducted a rudimentary form of DNA testing before the trial; that test tended to include Osborne as a possible perpetrator in a sex crime, but it was not definitive. Osborne's counsel decided not to ask for a more sophisticated test to be done, fearing that it would further incriminate Osborne. Osborne was convicted and several years later brought a civil rights action against the state, alleging that he had a due process right to an even more sophisticated DNA test than was available at the time of his trial.

In a 5–4 opinion, the Court held that convicted defendants have no freestanding due process right to DNA testing. Chief Justice Roberts, writing for the majority, declared as follows:

> DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices. The Federal Government and the States have recognized this, and have developed special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure—usually but not always through legislation.
>
> Against this prompt and considered response, the respondent, William Osborne, proposes a different approach: the recognition of a freestanding and far-reaching constitutional right of access to this new type of evidence. The nature of what he seeks is confirmed by his decision to file this lawsuit in federal court under 42 U. S. C. § 1983, not within the state criminal justice system. This approach would take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause. There is no reason to constitutionalize the issue in this way. Because the decision below would do just that, we reverse.

Chief Justice Roberts noted that the defendant's right to obtain evidence after trial is more circumscribed than the right to exculpatory evidence before or during trial:

> Osborne's right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief. *Brady* is the wrong framework.

Instead, the question is whether consideration of Osborne's claim within the framework of the State's procedures for postconviction relief "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or "transgresses any recognized principle of fundamental fairness in operation." Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.

We see nothing inadequate about the procedures Alaska has provided to vindicate its state right to postconviction relief in general, and nothing inadequate about how those procedures apply to those who seek access to DNA evidence. Alaska provides a substantive right to be released on a sufficiently compelling showing of new evidence that establishes innocence. It exempts such claims from otherwise applicable time limits. The State provides for discovery in postconviction proceedings, and has—through judicial decision—specified that this discovery procedure is available to those seeking access to DNA evidence. These procedures are not without limits. The evidence must indeed be newly available to qualify under Alaska's statute, must have been diligently pursued, and must also be sufficiently material. These procedures are similar to those provided for DNA evidence by federal law and the law of other States, see, e.g., 18 U. S. C. § 3600(a), and they are not inconsistent with the "traditions and conscience of our people" or with "any recognized principle of fundamental fairness."

Justice Alito filed a concurring opinion in which Justice Kennedy, joined, and in which Justice Thomas joined in part. He argued that it would be inappropriate to allow Osborne to forego testing at trial and then to request a different test many years later. In Justice Alito's view, this would "allow prisoners to play games with the criminal justice system" because "with nothing to lose, the defendant could demand DNA testing in the hope that some happy accident—for example, degradation or contamination of the evidence—would provide the basis for postconviction relief."

Justice Stevens filed a dissenting opinion, joined by Justices Ginsburg and Breyer and by Justice Souter in part. Justice Stevens argued that the state had no legitimate interest in denying the test, because Osborne had agreed to pay for it; and the state's interest in finality could not outweigh a plausible claim of innocence.

Justice Souter also filed a dissenting opinion, concluding that state officials had "demonstrated a combination of inattentiveness and intransigence that add up to procedural unfairness that violates the due process clause."

Second Thoughts of Witnesses and Jurors

Once a verdict is rendered and judgment is imposed, experienced judges know that the participants in the trial process might have second thoughts after sending a person to prison, or even to death. Most second thoughts, when raised as grounds for reversal due to newly discovered evidence, are treated as routine and ignored. See, e.g., Mastrian v. McManus, 554 F.2d 813 (8th Cir.1977) (recantation by star witness does not warrant new trial). For example, jurors cannot attack their verdicts by raising questions about the quality of the deliberations or the firmness of their votes. See Fed.R.Evid. 606(b). Similarly, witnesses who recant their trial testimony and change stories are viewed with utmost suspicion, not only because of the commonness of feelings of remorse, but also because of a judicial fear that improper post-trial influence may be encouraged by ready judicial acceptance of recantations. Third party confessions exculpating the defendant, which are viewed with suspicion even if offered during a trial, see, e.g., Fed.R.Evid. 804(b)(3), are scrutinized with great care. See, e.g., United States v. Kamel, 965 F.2d 484 (7th Cir.1992) (third party "repeatedly and firmly denied involvement in the crime for a period of three years. [The third party's] purported confession, coming after his conviction and shortly before sentencing, when he has relatively little to lose by accepting sole responsibility * * * is far less credible.").

Time Limits

The Advisory Committee on Criminal Rules had suggested that newly discovered evidence motions could be made "at any time before or after final judgment," but the Federal Rule (Rule 33(b)(1)) imposes a three-year time limit. See Herrera v. Collins, 506 U.S. 390 (1993), upholding, against a constitutional attack, a Texas procedure that requires a new trial motion based on newly discovered evidence to be made within 30 days of judgment.

D. THE EFFECT OF AN ERROR ON THE VERDICT

1. Harmless Error

If constitutional error has occurred at a trial (e.g., introduction of a confession in violation of the Sixth Amendment), should reversal be automatic? The next case considers this question.

CHAPMAN v. CALIFORNIA

Supreme Court of the United States. 1967.
386 U.S. 18.

MR. JUSTICE BLACK delivered the opinion of the Court.

[At a murder trial the prosecutor commented on Chapman's failure to testify and the trial court told the jury it could draw adverse inferences from their silence. The comment and the instruction violated Chapman's privilege against self-incrimination under Griffin v. California, 380 U.S. 609 (1965). Although it recognized this, the California Supreme Court held that the error was harmless. Justice Black indicated at the outset of his opinion that two questions were presented: (1) whether a *Griffin* error could ever be harmless, and (2) if so, was the error harmless in this case? Justice Black also stated as an introductory point that the effect of a constitutional error on a state proceeding is a question of federal law.]

We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule. All 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for "errors or defects which do not affect the substantial rights of the parties." 28 U.S.C.A. § 2111. * * * All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

* * *

In fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one. What harmless-error rules all aim at is a rule that will save the good in harmless-error practices while avoiding the bad, so far as possible.

[Justice Black refers to Fahy v. Connecticut, 375 U.S. 85, where the Court, construing the harmless error statute, said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."] Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial

that their infraction can never be treated as harmless error,[a] this statement in *Fahy* itself belies any belief that all trial errors which violate the Constitution automatically call for reversal. At the same time, however, like the federal harmless-error statute, it emphasizes an intention not to treat as harmless those constitutional errors that "affect substantial rights" of a party. An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy,* be conceived of as harmless. Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. * * * We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our *Fahy* case.

* * *

[The Court went on to hold that the error was not harmless. Justice Stewart concurred in the result and opted for automatic reversal for *Griffin* violations. Justice Harlan dissented on the ground that application of a state harmless error rule was an independent state ground barring Supreme Court review.]

Errors Subject to the Chapman Analysis

The Court has invoked *Chapman* in several cases to hold errors harmless. See Harrington v. California, 395 U.S. 250 (1969) (holding harmless the improper introduction of confessions of non-testifying codefendants); Milton v. Wainwright, 407 U.S. 371 (1972) (declaring that any error in obtaining statements of accused in violation of right to counsel was harmless). The harmless error rule applies to all Fourth Amendment violations as well; see the discussion of the exclusionary rule in Chapter 2.[7]

[a] See, e.g., Payne v. Arkansas, 356 U.S. 560 (coerced confession); Gideon v. Wainwright, 372 U.S. 335 (right to counsel); Tumey v. Ohio, 273 U.S. 510 (impartial judge).

[7] The harmless error rule employed in habeas corpus cases is stricter (i.e., reversal less likely) than the *Chapman* standard that is applied to constitutional errors on direct review. See the discussion of habeas corpus later in this Chapter.

Harmless Error Review as a Way to Avoid Ruling on the Merits of the Constitutional Challenge

Note that a court may refuse to consider the merits of a constitutional claim on the ground that even if error, it would be harmless in any event. This use of harmless error as merits-avoidance is taken to task by Professor Kamin in Harmless Error and the Rights/Remedies Split, 88 Va. L.Rev. 1 (2002). Professor Kamin argues that excessive use of the harmless error rule will fail to deter official misconduct. He therefore suggests that the "harmlessness of an alleged error should never be used as a threshold question; that is, courts should determine whether or not the conduct alleged was error, and should turn to the impact of that error only after determining that it occurred." Professor Kamins also suggests that "where a state official should have known that her conduct was error, the state should be denied the benefit of the harmless error rule." He concludes that "it is only by applying the harmless error rule in these ways * * * that the rule can be kept from stifling the development of constitutional law and can become a tool for changing the behaviors of prosecutors and law enforcement."

Constitutional Errors Not Subject to Harmless Error Review

The Supreme Court has held that most constitutional violations are subject to the harmless error rule, but, as it recognized in the footnote in *Chapman,* some errors can never be harmless. The question is how to determine which errors can be harmless and which cannot.

The errors that the Court has held can never be harmless include: (1) total deprivation of the right to counsel (*Gideon,* cited in the footnote in *Chapman*); (2) a biased judge (Tumey v. Ohio, cited in the footnote in *Chapman*); (3) unlawful exclusion of members of the defendant's race from the grand jury (Vasquez v. Hillery, 474 U.S. 254 (1986)); (4) violation of the right to a public trial (Waller v. Georgia, 467 U.S. 39 (1984)); (5) violation of the right of self-representation (McKaskle v. Wiggins, discussed in Chapter 10); (6) improper exclusion of a juror who is reluctant to impose the death penalty (Gray v. Mississippi, discussed in Chapter 10); (7) improper instruction on the prosecution's burden of proof (Sullivan v. Louisiana, discussed infra); and (8) improper denial of the defendant's right to chosen counsel (United States v. Gonzalez-Lopez, infra).

In addition, harmless error analysis cannot apply if a new trial would in itself be the harm. Thus, violations of the right to speedy trial and a multiple prosecution in violation of the Double Jeopardy Clause will never be harmless error. Finally, some errors require a showing of prejudice before a constitutional violation can even be found. This is so, for example, under the *Strickland* standard for ineffective assistance of

counsel and under the *Brady* standard for disclosure of exculpatory evidence by the prosecution. In these two areas, a court that finds a constitutional violation has by definition determined that the error is harmful, and the *Chapman* standard becomes superfluous. See Capra, Access to Exculpatory Evidence: Resolving the *Agurs* Problems of Prosecutorial Discretion and Retrospective Review, 53 Ford.L.Rev. 391 (1984); Kyles v. Whitley, discussed in Chapter 8 (harmless error analysis redundant after *Brady* violation has been found).

Involuntary Confessions: Arizona v. Fulminante

In Arizona v. Fulminante, 499 U.S. 279 (1991), the Court retreated from the *Chapman* footnote insofar as it implied that admission of an involuntary confession could never be harmless error. Chief Justice Rehnquist, writing for five members of the Court, explained the *Chapman* footnote as a "historical reference."

The Chief Justice distinguished a trial error—"error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt"—from an error that is not subject to such an assessment, "a structural defect affecting the framework in which the trial proceeds." A structural defect can never be harmless, because by definition the error infects the entirety of the trial. In contrast, a trial error can be harmless, because it is a more discrete violation and its harm can be more easily pinpointed. According to the majority, admission of an involuntary confession falls into the category of trial error, while total deprivation of counsel as in *Gideon*, or a biased judge as in *Tumey*, falls into the category of structural defect.

For purposes of harmless error analysis, the Chief Justice saw no reason to distinguish admission of coerced confessions from admissions of confessions obtained in violation of the defendant's Sixth Amendment rights or in violation of *Miranda*. As the Court had already found that these violations could be harmless, the Chief Justice concluded that admission of a coerced confession could also be harmless. The Chief Justice noted, however, that due to the substantial impact that a confession has on the trial, it would be the rare case in which admission of a coerced confession would be harmless on the facts. On the merits, the Court found that the admission of Fulminante's involuntary confession was not harmless error.

QUESTIONS ABOUT FULMINANTE

Chief Justice Rehnquist's reference to "structural" error requires a determination of which errors affect an entire trial. In some instances, there

is structural error even if a trial was arguably "fair." Consider the defendant who is deprived of the right to proceed *pro se*. It is no answer to say that at his trial, his counsel performed very well and the evidence against him was overwhelming. The right to self-representation is not based upon an effective defense and a correct verdict, but rather upon personal autonomy. Whether or not a violation of this right can be labeled a structural defect, the harmless error cannot apply because it is irrelevant to the wrong suffered. A similar example is the denial of the accused's right to counsel of choice, discussed infra.

Is it possible that the application of the harmless error standard to coerced confessions will make a reviewing court more likely to find certain police tactics impermissible? Is anyone better off when a court holds that a confession was coerced but that its introduction at trial is harmless, where if automatic reversal were required, a court concerned about the cost of retrial might hold the confession voluntary?

Error in a Burden of Proof Instruction: Sullivan v. Louisiana

In Sullivan v. Louisiana, 508 U.S. 275 (1993), the Court unanimously held that a constitutionally deficient beyond-a-reasonable-doubt instruction can never be harmless error. At Sullivan's trial, the judge gave an instruction as to reasonable doubt that was virtually identical to the instruction held constitutionally defective in Cage v. Louisiana, 498 U.S. 39 (1990) (instruction defining reasonable doubt in terms of grave and substantial doubt suggests "a higher degree of doubt than is required for acquittal under the reasonable doubt standard"). The state appellate court determined that the evidence against Sullivan was overwhelming and that therefore the erroneous instruction was harmless beyond a reasonable doubt.

Justice Scalia, writing for the Court, noted that the Sixth Amendment right to jury trial means an entitlement to a jury verdict; so, for example, the trial judge may not direct a verdict for the State, no matter how overwhelming the evidence. Justice Scalia explained why, under *Chapman*, an erroneous reasonable doubt instruction could not be harmless:

> Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. This must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury trial guarantee.

> Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. * * * There is no *object,* so to speak, upon which harmless-error scrutiny can operate. * * * The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury verdict of guilty.

Justice Scalia distinguished cases where the trial court gives an erroneous instruction that erects a presumption regarding an element of the offense that might affect the jury's finding of a predicate fact (e.g., that malice can be presumed if the jury finds that the defendant possessed a deadly weapon). See Yates v. Evatt, 500 U.S. 391 (1991) (erroneous burden-shifting presumption can be assessed for harmlessness). While such an instruction may impermissibly ease the State's burden of having to prove all elements of the offense, the jury is still instructed that it must find the existence of the predicate facts supporting the presumption beyond a reasonable doubt. In contrast, where the instructional error consists of a misdescription of the burden of proof, this "vitiates *all* of the jury's findings," and a reviewing court can only engage in "pure speculation," which would mean that "the wrong entity judges the defendant guilty."

Erroneous Instructions on the Elements of a Crime: Neder v. United States

The trial judge in Neder v. United States, 527 U.S. 1 (1999) erroneously instructed the jury that it would not have to decide whether Neder's false statements on tax forms were "material." In the trial judge's view, the question of materiality was for the judge, not the jury. Neder was convicted. The instruction was error because materiality is an element of the crime of tax fraud, and therefore the question of materiality was for the jury. On appeal, the government agreed with the defendant that the erroneous instruction was error, but argued that the error was harmless. Neder argued that depriving the jury of the power to decide an element of the crime can never be harmless. The Supreme Court, in an opinion by Chief Justice Rehnquist, held that such an error was subject to harmless error review. He analyzed the harmless error question in the following passage:

> Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not necessarily render a criminal trial

> fundamentally unfair or an unreliable vehicle for determining guilt or innocence. * * * In fact, as this case shows, quite the opposite is true: Neder was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel; a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to Neder's defense against the tax charges. Of course, the court erroneously failed to charge the jury on the element of materiality, but that error did not render Neder's trial "fundamentally unfair," as that term is used in our cases.

The Chief Justice distinguished *Sullivan* on the ground that a defective instruction as to one element of a crime did not vitiate *all* of the jury's findings. He also relied on prior case law finding defective instructions on issues other than reasonable doubt to be harmless error. On the applicability of *Sullivan*, the Chief Justice concluded as follows:

> It would not be illogical to extend the reasoning of *Sullivan* from a defective "reasonable doubt" instruction to a failure to instruct on an element of the crime. But * * * the matter is not res nova under our case law. And if the life of the law has not been logic but experience, we are entitled to stand back and see what would be accomplished by such an extension in this case. The omitted element was materiality. Petitioner underreported $5 million on his tax returns, and did not contest the element of materiality at trial. Petitioner does not suggest that he would introduce any evidence bearing upon the issue of materiality if so allowed. Reversal without any consideration of the effect of the error upon the verdict would send the case back for retrial—a retrial not focused at all on the issue of materiality, but on contested issues on which the jury was properly instructed. We do not think the Sixth Amendment requires us to veer away from settled precedent to reach such a result.

Justice Stevens concurred in the judgment in *Neder*. Justice Scalia, joined by Justices Souter and Ginsburg, dissented. He noted that cases such as *Sullivan* indicate that if the entire case is taken away from the jury, this cannot be harmless error. If that is so, how could it be harmless error to take an element of the case away from the jury? Justice Scalia stated that

> we do not know, when the Court's opinion is done, how many elements can be taken away from the jury with impunity, so long as appellate judges are persuaded that the defendant is surely guilty. What if, in the present case, besides keeping the materiality issue for itself, the District Court had also refused to instruct the jury to decide whether the defendant signed his tax return? If Neder had never contested that element of the offense, and the record contained a copy of his signed return, would his conviction be automatically

reversed in that situation but not in this one, even though he would be just as obviously guilty? We do not know. We know that all elements cannot be taken from the jury, and that one can. How many is too many (or perhaps what proportion is too high) remains to be determined by future improvisation.

Apprendi Violations Can Be Harmless: Washington v. Recuenco

In Apprendi v. New Jersey, discussed in Chapters 10 and 11, the Court held that the Sixth Amendment was violated when the defendant received a sentence beyond the statutory maximum on the basis of facts proven to the judge at sentencing, but not to the jury. In Washington v. Recuenco, 548 U.S. 212 (2006), the Court held that *Apprendi* violations are not "structural" and are subject to harmless error review. Justice Thomas, writing for six members of the Court, relied heavily on Neder v. United States; as in *Neder* an issue was taken from the jury and given to the judge (the difference in *Apprendi* being that the issue was decided by the judge at sentencing rather than at trial). Justice Thomas reasoned as follows:

> The only difference between this case and *Neder* is that in *Neder*, the prosecution failed to prove the element of materiality to the jury beyond a reasonable doubt, while here the prosecution failed to prove the sentencing factor of "armed with a firearm" to the jury beyond a reasonable doubt. Assigning this distinction constitutional significance cannot be reconciled with our recognition in *Apprendi* that elements and sentencing factors must be treated the same for Sixth Amendment purposes.

The Court remanded for a determination of whether the error was harmless. Justice Kennedy wrote a short concurring opinion emphasizing that the Court was not revisiting the merits of its *Apprendi* jurisprudence. Justice Stevens wrote a short dissent, contending that the Court should never have taken the case because the state court's decision could have been based on its own constitution. Justice Ginsburg wrote a separate dissenting opinion joined by Justice Stevens.

Automatic Reversal for Violation of the Right to Counsel of Choice: United States v. Gonzalez-Lopez

In United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), the Court held that the violation of the constitutional right to counsel of choice can never be harmless. The trial court had denied the defendant the right to hire a lawyer from outside the state; the defendant then hired a different lawyer to defend him. The Court of Appeals found the denial to be a violation of the right to the defendant's constitutional right to counsel of choice; that ruling was not contested in the Supreme Court. The

government did contend, however, that the defendant was required to show "prejudice" from the denial of his right to counsel of choice. But the Court, in an opinion by Justice Scalia for five Justices, held that no showing of prejudice was required. He noted that any prejudice inquiry would be "speculative" because "[d]ifferent attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial."

Justice Alito, joined by Chief Justice Roberts, Justice Kennedy, and Justice Thomas, dissented. He argued that the majority's rule of automatic reversal was anomalous because "a defendant who is erroneously required to go to trial with a second-choice attorney is automatically entitled to a new trial even if this attorney performed brilliantly."

Breach of Plea Agreement Is Not a Structural Error Justifying Automatic Relief: Puckett v. United States

In Puckett v. United States, 556 U.S. 129 (2009), Puckett entered into a plea agreement in which the government agreed to support a reduction of Puckett's sentence for acceptance of responsibility. But at the sentencing proceeding the government opposed a sentence reduction on those grounds. Yet Puckett's counsel did not object to, or even mention, the government's breach of its plea agreement. On appeal Puckett raised the issue of breach, but the reviewing court found that he had forfeited his claim of error. It reviewed for plain error and found none—specifically finding that the error did not affect Puckett's substantial rights because the sentencing court indicated that it would not reduce his sentence in any case.

In the Supreme Court, Puckett argued that the plain error standard was inappropriate because a breach of a plea agreement amounts to a "structural error"—rendering it unnecessary to show prejudice and mandating automatic relief. But the Supreme Court, in an opinion by Justice Scalia, rejected this argument. Justice Scalia declared as follows:

> [B]reach of a plea deal is not a "structural" error as we have used that term. We have never described it as such, and it shares no common features with errors we have held structural. A plea breach does not "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence," Neder v. United States; it does not "defy analysis by harmless-error standards" by affecting the entire adjudicatory framework; and the "difficulty of assessing the effect of the error," United States v.

Gonzalez-Lopez, is no greater with respect to plea breaches at sentencing than with respect to other procedural errors at sentencing, which are routinely subject to harmlessness review.

Justice Souter, joined by Justice Stevens, dissented.

Improper Denial of a Peremptory Challenge Is Not Automatically Reversible: Rivera v. Illinois

The defendant in Rivera v. Illinois, 556 U.S. 148 (2009), exercised a peremptory challenge at trial. The trial judge denied the challenge and seated the juror (who ended up serving as foreperson). The trial judge concluded that the defendant struck the juror on impermissible grounds under *Batson*. Rivera was convicted and appealed on the ground that he had a proper reason for striking the juror. The appellate court agreed, but nonetheless affirmed the conviction, on the ground that the trial court's error in seating the juror was harmless: Rivera conceded that the jury (including the juror he sought to strike) was unbiased. Rivera argued, however, that automatic reversal was necessary because it was impossible to tell whether the outcome would have been different had the juror been struck.

The Court, in a unanimous opinion by Justice Ginsburg, held that an improper denial of a peremptory strike did not warrant an automatic reversal. Justice Ginsburg emphasized that the defendant has no constitutional right to a peremptory challenge, and concluded as follows:

> If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws.

Harmlessness Standard for Non-Constitutional Error: The Kotteakos-Lane Rule

In Kotteakos v. United States, 328 U.S. 750 (1946), the Court established a test of harmlessness for trial errors of a *nonconstitutional* dimension: reversal is not required if the federal appellate court "is sure that the error did not influence the jury or had but very slight effect." Put the other way, reversal is required for a non-constitutional error if it "had substantial and injurious effect or influence in determining the jury's verdict." United States v. Lane, 474 U.S. 438 (1986) (applying the *Kotteakos* standard to a misjoinder under Fed.R.Crim.P. 8(b)). See also Fed.R.Crim.P. 52(a) (an error that does not affect "substantial rights must be disregarded.").

The *Kotteakos-Lane* standard is clearly less protective of defendants than the harmless error rule applied to constitutional errors under *Chapman*. See United States v. Owens, 789 F.2d 750 (9th Cir.1986) (if admission of prior identification was merely a violation of the hearsay rule, it was harmless under the *Kotteakos-Lane* standard; but if admission also violated the defendant's constitutional right to confrontation, the error was harmful under the *Chapman* standard and reversal was required).

If you read federal cases from different circuits, you undoubtedly will find varying statements of the standard for harmless nonconstitutional error. Some examples are found in Saltzburg, Capra & Martin, 1 Federal Rules of Evidence manual § 103.03[1][d] (10th ed. 2011). State courts, although bound to apply *Chapman* to constitutional errors, are free to adopt their own harmless error standards for nonconstitutional errors.

2. Plain Error

The harmless error standards discussed above are applied when the defendant makes a timely and specific objection at trial. A more stringent standard for reversal is applied when the defendant fails to make an objection at trial, and then argues on appeal that the trial court was in error. The appellate court in such a situation reviews for "plain error." The rationale for the more stringent standard is that if a defendant does not properly object at trial, he deprives the trial judge of the opportunity to focus on the problem and perhaps correct the error at that point. The distinction between harmful error and plain error is set forth in Federal Rule of Criminal Procedure 52, which states as follows:

> **(a) Harmless Error.** Any error, defect, irregularity or variance that does not affect substantial rights must be disregarded.
>
> **(b) Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Thus, Rule 52(a), by negative implication, states that reversal is required if the error affected substantial rights.[8] However, if the defendant did not bring the error to the attention of the court, then a reversal *may* be granted under Rule 52(b) if the error affected substantial rights.

[8] This is the harmless error standard applied for non-constitutional errors. For constitutional errors on direct review, the more defendant-friendly *Chapman* standard requires reversal unless the error was harmless beyond a reasonable doubt.

Application of the Plain Error Standard: United States v. Olano

The Supreme Court had occasion to review the concept of "plain error," and its distinction from harmful error, in United States v. Olano, 507 U.S. 725 (1993). The Court held that the presence of alternate jurors during deliberations was not, under the circumstances of the case, an error that the court of appeals was authorized to correct under Fed.R.Crim.P. 52(b). The defendants had not objected to the presence of the alternate jurors during the deliberations, even though this practice at the time violated the plain terms of Fed.R.Crim.P. 24(c). [The current Rule 24 allows the court to retain alternate jurors even after the jury retires to deliberate although the alternates cannot participate in deliberations unless they actually replace regular jurors].

Writing for the Court, Justice O'Connor reasoned that Rule 52(b) "defines a single category of forfeited-but-reversible error." She identified *three conditions* on a court's power to reverse because of errors that were not properly preserved for review in the trial court:

1. There must be an error, i.e., a deviation from a legal rule *absent a waiver* by a defendant. Justice O'Connor distinguished waiver of a right from forfeiture of a right, stating that "[w]hereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment of a known right." Thus, if the defendant knowingly and voluntarily waives a right—such as the right to a jury trial—there is no error in the proceedings and the plain error rule is inapplicable. If, on the other hand, the defendant fails to object to an erroneous ruling by the trial court, then the plain error standard is applicable.

2. The error must be plain, which means it must be clear or obvious—so obvious that the judge should have seen it even though it was not flagged by defense counsel.

3. The plain error must affect substantial rights, which means that it must have been prejudicial in the sense of affecting the outcome of the case.

Justice O'Connor emphasized that the language of Rule 52(b) is permissive, not mandatory. She stated that "the Court of Appeals should correct a plain forfeited error affecting substantial rights if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." However, a "plain error affecting substantial rights, does not, without more" mandate reversal, "for otherwise the discretion afforded by Rule 52(b) would be rendered illusory."

So in essence there is a fourth requirement for plain error reversal—the error if uncorrected would seriously affect the fairness, integrity or public reputation of judicial proceedings.

Justice O'Connor compared Rule 52(a), which defines harmless error, with Rule 52(b). She concluded that the rules were different in the manner in which they allocated the burden of persuasion in showing prejudice. She analyzed the difference between the rules as follows:

> When the defendant has made a timely objection to an error and Rule 52(a) applies, the Court of Appeals normally engages in a specific analysis of the District Court record—a so-called "harmless error" inquiry—to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, the Court of Appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial. This burden-shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: while Rule 52(a) precludes error-correction only if the error "does *not* affect substantial rights" (emphasis added), Rule 52(b) authorizes no remedy unless the error *does* "affec[t] substantial rights."

Justice O'Connor left open the possibility that "[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome," and declined to address the errors that should be presumed prejudicial. She concluded that normally, the defendant must make a "specific showing of prejudice" under Rule 52(b).

In *Olano*, the Court held that the defendants had failed to show that their substantial rights had been affected by any error. Justice O'Connor noted that the trial judge instructed the alternates that they were not to participate in deliberations, and that the defendants had made no showing that the presence of the alternates affected deliberations in any way.[9]

Error "Plain" at the Time of Appellate Review: Johnson v. United States

Can an error be "plain" when the trial court rules correctly at the time of trial, but then the law changes while the case is on direct appeal? This was one of the questions in Johnson v. United States, 520 U.S. 461 (1997). At Johnson's trial for perjury, the trial judge rather than the jury decided the question of whether Johnson's false statement to a grand jury

[9] Justice Kennedy wrote a short concurring opinion. Justice Stevens, joined by Justices White and Blackmun, dissented.

was "material." This practice was in accord with circuit precedent at the time. However, in United States v. Gaudin, 515 U.S. 506 (1995), the Court held that the jury and not the judge must decide whether a false statement is material in cases such as Johnson's. *Gaudin* was decided after Johnson's trial, but while Johnson's case was on direct appeal—therefore *Gaudin* was applicable retroactively to Johnson's case. (See the discussion on retroactivity in Chapter 1). However, Johnson had not objected at trial to the trial judge taking the materiality question away from the jury. Indeed, Johnson complained at trial about the prosecution's proffer of evidence of materiality; he argued that the evidence was irrelevant, on the ground that materiality was a question for the judge rather than the jury.

Chief Justice Rehnquist, writing for a unanimous Court, noted that because of *Gaudin*, an "error" had occurred at Johnson's trial. He also noted, however, that because *Gaudin* was decided after Johnson's trial, it was difficult to determine whether the error complained of was "plain" within the meaning of *Olano*:

> In the case with which we are faced today, the error is certainly clear under "current law," but it was by no means clear at the time of trial.
>
> The Government contends that for an error to be "plain," it must have been so both at the time of trial and at the time of appellate consideration. In this case, it says, petitioner should have objected to the court's deciding the issue of materiality, even though near-uniform precedent both from this Court and from the Courts of Appeals held that course proper. Petitioner, on the other hand, urges that such a rule would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent. We agree with petitioner on this point, and hold that in a case such as this—where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be "plain" at the time of appellate consideration. * * * The second part of the *Olano* test is therefore satisfied.

It must be remembered, though, that under *Olano* plain error does not give rise to relief unless the error affected "substantial rights" and "seriously affects the fairness, integrity or public reputation of judicial proceedings." The Chief Justice concluded that it was not necessary to decide whether the error at Johnson's trial affected substantial rights, because it was clear that the error did not affect the fairness or integrity of the proceedings. He found that the evidence indicating that statements were material was "overwhelming," and that the question of materiality was "essentially uncontroverted at trial and remains so on appeal."

Therefore, "no miscarriage of justice will occur if we do not notice the error."

Plain Error Review of an Apprendi Violation: United States v. Cotton

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." [*Apprendi* is set forth in full in the Chapter 10 discussion of constitutionally-based proof requirements]. In federal prosecutions, such facts must also be charged in the indictment. In United States v. Cotton, 535 U.S. 625 (2002), the Court reviewed an *Apprendi* violation for plain error. The defendants in *Cotton* received a sentence beyond the statutory maximum, after the trial judge (rather than the jury) found that the drug offenses involved more than 50 grams of cocaine base. The indictment made no allegation as to any amount of drugs. The government conceded that the defendants' enhanced sentence was erroneous under *Apprendi*, but pointed out that the defendants had failed to raise the *Apprendi* argument before the district court.

The Supreme Court, in an opinion by Chief Justice Rehnquist, held that the defendants were not entitled to relief because they could not meet their burden of showing plain error under the circumstances. Chief Justice Rehnquist concluded that the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. He explained as follows:

> The evidence that the conspiracy involved at least 50 grams of cocaine base was overwhelming and essentially uncontroverted. Much of the evidence implicating respondents in the drug conspiracy revealed the conspiracy's involvement with far more than 50 grams of cocaine base. Baltimore police officers made numerous state arrests and seizures between February 1996 and April 1997 that resulted in the seizure of 795 ziplock bags and clear bags containing approximately 380 grams of cocaine base. A federal search of respondent Jovan Powell's residence resulted in the seizure of 51.3 grams of cocaine base. A cooperating co-conspirator testified at trial that he witnessed respondent Hall cook one-quarter of a kilogram of cocaine powder into cocaine base. Another cooperating co-conspirator testified at trial that she was present in a hotel room where the drug operation bagged one kilogram of cocaine base into ziplock bags. Surely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base.

Plain Error Review of Failure to Obtain a Knowing and Intelligent Guilty Plea: United States v. Dominguez-Benitez

As discussed in Chapter 9, Fed.R.Crim.P. 11 sets forth procedural requirements that the court must follow to obtain a valid guilty plea. These requirements are to ensure that the defendant knows the rights he is giving up by pleading guilty and foregoing a trial. In United States v. Dominguez-Benitez, 542 U.S. 74 (2004), the Court considered how a violation of the Rule 11 requirements are to be reviewed for plain error. The parties in *Dominguez-Benitez* entered into the kind of plea in which the government agrees to make a sentencing recommendation, but the court is not bound to accept it. Fed.R.Crim. P. 11(c)(3)(B). Under Rule 11, the defendant entering into such an agreement must be warned that he cannot withdraw his guilty plea if the court refuses to go along with the Government's recommendations. Dominguez-Benitez was not so warned, and he received a sentence much higher than he expected under the agreement. But he never made a timely objection. On appeal, he argued that he should be allowed to withdraw his plea because of plain error.

Justice Souter, writing for the Court, analyzed the function of plain error review for an alleged error in following the procedural requirements of Rule 11.

> [T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it, and for several reasons, we think that burden should not be too easy for defendants in Dominguez's position. First, the standard should enforce the policies that underpin Rule 52(b) generally, to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error. Second, it should respect the particular importance of the finality of guilty pleas, which usually rest, after all, on a defendant's profession of guilt in open court, and are indispensable in the operation of the modern criminal justice system. And, in this case, these reasons are complemented by the fact, worth repeating, that the violation claimed was of Rule 11, not of due process.
>
> We hold, therefore, that a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea. A defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is "sufficient to undermine confidence in the outcome" of the proceeding.

The Court remanded for a determination of whether the defendant could prove plain error. It noted that relevant factors would include the

difference between the sentence the defendant received and the sentence he anticipated under the agreement; the strength of the evidence that could have been presented at trial; and "any record evidence tending to show that a misunderstanding was inconsequential to a defendant's decision, or evidence indicating the relative significance of other facts that may have borne on his choice regardless of any Rule 11 error."

Plain Error Standard Applies to Forfeited Objection on Breach of Plea Agreement: Puckett v. United States

In Puckett v. United States, 556 U.S. 129 (2009), Puckett argued that the plain error standard was inappropriate when the error was the breach of a plea agreement. But the Court, in an opinion by Justice Scalia, disagreed. Justice Scalia reviewed the plain error doctrine, and in the following passage found it applicable:

> If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed. There is good reason for this; anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal.
>
> This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute. In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from "sandbagging" the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.
>
> * * *
>
> We have repeatedly cautioned that any unwarranted extension of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice; and that the creation of an unjustified exception to the Rule would be even less appropriate. The real question in this case is not whether plain-error review applies when a defendant fails to preserve a claim that the Government defaulted on its plea-agreement obligations, but rather what conceivable reason exists for disregarding its evident application. Such a breach is undoubtedly a violation of the defendant's rights, but the defendant has the

opportunity to seek vindication of those rights in district court; if he fails to do so, Rule 52(b) as clearly sets forth the consequences for that forfeiture as it does for all others.

Justice Souter, joined by Justice Stevens, dissented.

"Any Possibility" Test Is Too Permissive for Plain Error Review: United States v. Marcus

In United States v. Marcus, 560 U.S. 258 (2010), the Court was reviewing a Second Circuit decision conducting plain error review of a claim that Marcus did not raise at trial. Marcus was convicted of sex trafficking. On appeal, for the first time, he argued that some of his conduct preceded the statute under which he was convicted, and therefore his conviction violated the Ex Post Facto Clause of the Constitution. The Government argued that because some of the conduct was conceded to be after the statute went into effect, there was no error that affected Marcus's substantial rights. Justice Breyer, writing for the Court, framed the issue as follows:

> The Second Circuit has said that it must recognize a "plain error" if there is "any possibility," however remote, that a jury convicted a defendant exclusively on the basis of actions taken before enactment of the statute that made those actions criminal.

Justice Breyer found the "any possibility" standard too permissive for plain error review. He explained that the standard was inconsistent with the third criteria for plain error review established in the Court's cases:

> The third criterion specifies that a "plain error" must "affec[t]" the appellant's "substantial rights." In the ordinary case, to meet this standard an error must be "prejudicial," which means that there must be a reasonable probability that the error affected the outcome of the trial. The Court of Appeals, however, would notice a "plain error" and set aside a conviction whenever there exists "any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct." This standard is irreconcilable with our "plain error" precedent.

Justice Breyer noted that there is an exception permitting plain error review for "structural" errors, but concluded that the Ex Post Facto error was not structural:

> The error at issue in this case created a risk that the jury would convict respondent solely on the basis of conduct that was not criminal when the defendant engaged in that conduct. A judge might have minimized, if not eliminated, this risk by giving the jury a proper instruction. We see no reason why, when a judge fails to give such an instruction, a reviewing court would find it any more difficult

to assess the likely consequences of that failure than with numerous other kinds of instructional errors that we have previously held to be non-"structural"—for example, instructing a jury as to an invalid alternative theory of guilt, omitting mention of an element of an offense, or erroneously instructing the jury on an element.

Justice Breyer further found that the Second Circuit's "any possibility" test was inconsistent with the fourth plain error criterion, which permits an appeals court to recognize plain error only if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson*. He explained as follows:

> In cases applying this fourth criterion, we have suggested that, in most circumstances, an error that does not affect the jury's verdict does not significantly impugn the "fairness," "integrity," or "public reputation" of the judicial process. The Second Circuit's "any possibility, no matter how unlikely" standard, however, would require finding a "plain error" in a case where the evidence supporting a conviction consisted of, say, a few days of preenactment conduct along with several continuous years of identical postenactment conduct. Given the tiny risk that the jury would have based its conviction upon those few preenactment days alone, a refusal to recognize such an error as a "plain error" (and to set aside the verdict) is most unlikely to cast serious doubt on the "fairness," "integrity," or "public reputation" of the judicial system.

Justice Stevens dissented in *Marcus*. He contended that the Court's plain error jurisprudence was too formalistic:

> In our attempt to clarify Rule 52(b), we have, I fear, both muddied the waters and lost sight of the wisdom embodied in the Rule's spare text. Errors come in an endless variety of shapes and sizes. Because error-free trials are so rare, appellate courts must repeatedly confront the question whether a trial judge's mistake was harmless or warrants reversal. * * * This Court's ever more intensive efforts to rationalize plain-error review may have been born of a worthy instinct. But they have trapped the appellate courts in an analytic maze that, I have increasingly come to believe, is more liable to frustrate than to facilitate sound decisionmaking.

Justice Sotomayor did not participate in the decision in *Marcus*.

Appellate Court May Not Invoke Plain Error to Increase a Sentence in the Absence of a Government Appeal: Greenlaw v. United States

In Greenlaw v. United States, 554 U.S. 237 (2008), the defendant appealed from his sentence, and the government filed no cross-appeal.

The court of appeals rejected the defendant's challenge to his sentence and then proceeded *sua sponte* to determine whether the defendant's sentence was too low. Relying on the doctrine of plain error, the court of appeals entered an order increasing the defendant's sentence by 15 years. The Supreme Court, in an opinion by Justice Ginsburg for six Justices, held that the court of appeals could not use the plain error doctrine to increase a sentence from which the government had not appealed.

Justice Ginsburg relied on 18 U. S. C. § 3742(b), which provides that the government may not appeal a sentence "without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." She declared that "Congress, in § 3742(b), has accorded to the top representatives of the United States in litigation the prerogative to seek or forgo appellate correction of sentencing errors, however plain they may be. That measure should garner the Judiciary's full respect." Justice Alito, joined by Justices Breyer and Stevens, dissented.

E. DISENTITLEMENT FROM THE RIGHT TO APPEAL

The Fugitive Dismissal Rule: Ortega-Rodriguez v. United States

If a defendant flees during the pendency of his appeal, the appellate court has the authority to dismiss the appeal. See Molinaro v. New Jersey, 396 U.S. 365 (1970). This "fugitive dismissal" rule is based upon two justifications: 1) the appellate court should not render a judgment that may prove unenforceable; and 2) a defendant who takes flight disentitles himself from the right to call upon the resources of the appellate court.

In Ortega-Rodriguez v. United States, 507 U.S. 234 (1993), the Court considered whether the justifications behind the fugitive dismissal rule apply when a defendant flees the jurisdiction of a district court and is recaptured *before* he invokes the jurisdiction of the appellate court. The Court, in a 5--4 decision, held that "when a defendant's flight and recapture occur before appeal, the defendant's former fugitive status may well lack the kind of connection to the appellate process that would justify an appellate sanction of dismissal."

Justice Stevens pointed out that the enforceability concerns behind the fugitive dismissal rule are not applicable to a defendant who has been returned before the appellate process has begun. He further claimed that flight while the case is pending in the district court was a sign of disrespect for the authority of that court, not of the appellate court; therefore the disentitlement justification of the fugitive dismissal rule

would ordinarily not apply to pre-appeal flight, and the defendant's act of flight "is best sanctioned by the district court itself."

The Court refused, however, to adopt a bright-line rule that pre-appeal flight could never result in dismissal of an appeal. Justice Stevens noted that "some actions by a defendant, though they occur while his case is before the district court, might have an impact on the appellate process sufficient to warrant an appellate sanction." For example, the government may be prejudiced in locating witnesses for retrial if the appeal is significantly delayed; or the appellate court may be inconvenienced due to the inability to consolidate the fugitive defendant's appeal with other related appeals. The Court ruled that if such circumstances existed, "a dismissal rule could properly be applied."[10] The Court remanded the case to determine whether the defendant's pre-appeal flight imposed consequences on the appellate system sufficient to justify dismissal of his appeal.

Chief Justice Rehnquist, joined by Justices White, O'Connor, and Thomas, dissented. He stated that "there is as much of a chance that flight will disrupt the proper functioning of the appellate process if it occurs before the court of appeals obtains jurisdiction as there is if it occurs after the court of appeals obtains jurisdiction."

III. COLLATERAL ATTACK

A. REMEDIES GENERALLY

1. Collateral Attacks

After new trial motions have been made and all appeals are exhausted—or lost, perhaps for failure to comply with an appellate rule, such as a time limit on filing a notice of appeal—a defendant has a natural incentive to attempt additional attacks on the conviction.

Post-conviction remedies, of which habeas corpus is the most common, have always been regarded as *collateral* remedies, "providing an avenue for upsetting judgments that have become otherwise final." Mackey v. United States, 401 U.S. 667 (1971) (Harlan, J., separate opinion). They are not designed to substitute for direct review of convictions, nor can all the questions properly subject to appeal be raised collaterally. Because collateral attacks collide with principles of finality,

[10] See United States v. Reese, 993 F.2d 254 (D.C.Cir.1993) (applying *Ortega-Rodriguez* and dismissing an appeal where the defendant became a fugitive after the trial and before sentencing; the defendant's flight precluded the court from consolidating his appeal with that of his co-defendant); United States v. Rosales, 13 F.3d 1461 (11th Cir.1994) (dismissing an appeal where flight caused such a significant delay that the prosecution would be prejudiced in locating witnesses if a new trial were granted).