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Beyond Harmless Error: 'Triviality' of Intrusions

The arguments of many criminal defendants ultimately founder on the shoals of the legal doctrine of harmless error. The harmless-error rule has been called "probably the most cited rule in modern criminal appeals,"[1] and may determine the outcome of more criminal appeals than any other doctrine.[2]

A leading treatise on federal appellate practice calls harmless error "probably the most far-reaching doctrinal change in American procedural jurisprudence since its inception."[3]

Rule 52 of the Federal Rules of Criminal Procedures dictates the basic framework by which appellate courts review errors alleged to have been made at trial. Where a defendant has made a timely objection to an error in the trial court, Rule 52(a) provides that appellate courts should apply a harmless error review, noting that "[a]ny error, defect, irregularity or variance which does not affect substantial rights should be disregarded." The U.S. Court of Appeals for the Second Circuit has described these errors—known as trial errors —as those "discrete events that occur during the presentation of the case and may be quantitatively assessed in the context of the other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."[4]

There are, however, errors which "affect the framework within which the trial proceeds" and therefore fundamentally undermines its fairness or validity. These errors—known as structural errors—cannot be subject to harmless error review and require an automatic reversal. Structural errors have been found only in a limited number of cases, including the deprivation of the right to counsel.[5]

'Triviality' Standard

While structural errors specifically have been identified as those which can not be evaluated by the harmless error rule set forth in Rule 52(a), a recent decision from the Second Circuit seems to blur the distinction between appellate review of trial errors and structural errors. The decision may presage an erosion of the concept of structural errors and an expansion in the application of the harmless error doctrine, which has frequently been criticized, in part because harmless error review has tended to substantially undercut constitutional protections. Invoking a "triviality" standard for constitutional errors, the case may be cause for alarm among constitutional seismologists ever mindful that today's local tremors may lead to tomorrow's continental shifts in the law.

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In *United States v. Triumph Capital Group, Inc.*,[6] the Second Circuit addressed the degree to which a client's ability to communicate with his counsel can be restricted without interfering with a defendant's Sixth Amendment rights. In ruling that no constitutional violation had occurred, the Second Circuit found the error that occurred in that case to be so trivial so as not to implicate the constitution. "Triviality" analysis appears to be a relatively new standard of constitutional review. Previously employed in right to public trial cases, the *Triumph Capital* decision signals an expansion of that doctrine.

The defendant in *Triumph Capital,* Ben Andrews, was convicted of nine counts of bribery, fraud, money laundering and making false statements for his role in the alleged unlawful investment of Connecticut State pension funds. Mr. Andrews appealed the conviction arguing that his constitutional right to assistance of counsel was violated during trial. Specifically, Mr. Andrews asserted that a court order issued after his first day of cross-examination which prohibited him from speaking to his attorney about his testimony during the evening recess was unconstitutional.

At the end of Mr. Andrews' cross-examination, his attorney announced his intention to talk to Mr. Andrews about his testimony, saying that "[he] just want[ed] to make sure that no one views that as any kind of a violation of the rules." When the government objected, the trial court issued an order preventing defense counsel from talking with the defendant about his testimony until court reconvened the following day. Within 20 minutes of the court's adjournment, however, the prosecutors voiced concern about the raised constitutional concerns. Accordingly, later that evening, the court rescinded its order.

Although Mr. Andrews was no longer in the courthouse during these events, defense counsel acknowledged that Mr. Andrews was reachable by cell phone. Despite this fact, defense counsel did not talk to his client that evening.

In order to rectify the effects of the restriction, the court recessed the following morning, allowing Mr. Andrews as much time as needed to discuss the case with his attorney. Defense counsel argued that those discussions would not be equivalent to the quality of the conversations that would have occurred the night before because his recollection of the prior day's testimony was "hazy" and that he had not taken notes on the assumption that he would be able to talk to Mr. Andrews immediately after the prior day's testimony. Nevertheless, Mr. Andrews consulted with his attorney for approximately 45 minutes before re-taking the stand to complete his cross-examination.

'Geders' and 'Perry'

Analyzing the question whether the court's order violated Mr. Andrews' Sixth Amendment right to counsel, the Second Circuit was guided by two Supreme Court decisions. In *Geders v. United States*, the Supreme Court held that a court order preventing a testifying defendant from consulting at all with his counsel during an overnight recess violated the Sixth Amendment.[7] In *Perry v. Leeke*, the Supreme Court held that barring all communications between a defendant and his counsel during a 15-minute break in the defendant's testimony was constitutionally permissible.[8] The Court of Appeals observed that courts have "struggled to define the constitutional line between *Geders* and *Perry*," which included this case.[9]

First, the court observed that not all restrictions on communications between a defendant and his attorney are unconstitutional. Rather, where there is an "important need to protect a countervailing interest," a defendant's ability to consult with an attorney may be restricted as long as the restriction

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is "carefully tailored" and "limited."[10] Finally, the court stated that even where a restriction is found to be "unjustified," they "may be so trivial that they do not amount to a constitutional violation."[11]

Setting forth the Supreme Court's rationale in *Geders* and *Perry*, the court emphasized that the distinction between the two cases was not the quantity of the communication that is restricted, but "the constitutional quality" of the restricted communication. Thus, the Second Circuit reasoned, the dispositive factor in *Perry* was that court's assumption that it was "appropriate to presume that nothing but the testimony would be discussed" during the 15-minute recess.[12]

In Mr. Andrews' case, the court's order did not restrict all contact with counsel, but only prohibited discussion of the defendant's testimony over the nighttime recess. The question whether a constitutional deprivation occurs when the only attorney-client communication prohibited was communication about the defendant's testimony was one of first impression in the Second Circuit. Relying on similar cases from the U.S. Courts of Appeals for the Fourth, Seventh and Ninth circuits, the court held that even where a restriction on communication bars discussion only of the defendant's testimony, the Sixth Amendment can be violated.

> [A] defendant's constitutional right to consult with his attorney on a variety of trial-related issues during a long break, such as an overnight recess, is inextricably intertwined with the ability to discuss his ongoing testimony. Thus, a ban on discussing testimony during a substantial recess does materially impede communication of a 'constitutional quality.' Accordingly, such a restriction generally will not be sufficiently 'carefully tailored' to be constitutionally permissible under *Geders* and *Perry*.[13]

Finding that a constitutional violation can occur in cases like Mr. Andrews', the court stated that it was required to consider the "totality of circumstances" to determine whether Mr. Andrews' Sixth Amendment rights were violated. A number of factors in Mr. Andrews' case led the court to conclude, however, that although the restriction on Mr. Andrews' communication was unjustified, the effect of the court order was so trivial that it did not amount to a Sixth Amendment violation.

The facts noted by the court included: (1) defense counsel's awareness within 20 minutes after the order was entered that the government may seek to have the order rescinded; (2) the ban on communication was not absolute; (3) prior to taking the stand again, Mr. Andrews was afforded an opportunity to consult with counsel as long as needed; and (4) the government acted in full good faith.[14] "When all of the circumstances are taken into consideration, it is evident that [Mr.] Andrews' communication with his attorney was only trivially affected by the short-lived court-imposed restriction on overnight communication."

'Triumph Capital'

In *Triumph Capital*, the Second Circuit noted that under *Geders* "a violation of a defendant's Sixth Amendment right to counsel…constitutes a structural defect."[15] Thus, if the district court's unjustified restriction was found to have resulted in a constitutional violation, Mr. Andrews' conviction would have been automatically reversed. The Second Circuit found this unnecessary, however, holding that the court's order, although unjustified, was "trivial" in nature and therefore did not implicate the Constitution.

This "triviality" analysis was borrowed by the Court from the "related context of the Sixth Amendment right to a public trial—another structural error for which harmless error analysis does not apply." Courts in the Second Circuit have found that some unjustified courtroom closures can be found so "trivial" as to not violate the Constitutional guarantees of the Sixth Amendment. "[T]he analysis turns on whether the conduct at issue 'subverts the values the drafters of the Sixth Amendment sought to protect.'"[16]

In *Peterson v. Williams*, the Second Circuit found that an inadvertent, brief closure of the courtroom, where the events that transpired in camera later were repeated in open court, did not violate the Sixth Amendment's right to a public trial. Rather, the court found that the events were "so trivial" as to not implicate the Constitution. In discussing the "triviality standard," the Second Circuit observed that it was different from a harmless error inquiry because it did not "dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer 'prejudice' or 'specific' injury," but looked at whether the actions of the court and their effect "deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment."[17]

In *Triumph Capital*, the Second Circuit found that the court's actions did not rise to a subversion of the values set forth in the Sixth Amendment.

> [A] court order banning communications during a trial recess—even if unjustified—is issued in good faith and does not actually prevent the defendant from communicating, unfettered, with his attorney about the full panoply of trial related issues prior to the trial resuming, nor meaningfully interferes with the quality of advice and counsel the attorney is able to provide during that recess—the fundamental values of the Sixth Amendment…have not been subverted.[18]

New, Unnecessary Doctrine?

The Second Circuit's reliance on the triviality standard in both *Triumph Capital* and *Peterson* is somewhat confusing, injecting a new, and seemingly unnecessary, doctrine of appellate review. Although the deprivation of counsel and right to a public trial have been deemed structural errors generally, in each case the court could have determined that the circumstances did not warrant a finding of structural error and applied the harmless error analysis, ending with the same result. However, in *Triumph Capital*, the court specifically noted that the deprivation of counsel was a structural error, yet failed to apply the automatic reversal standard. Instead, the "triviality standard" was crafted to impose what looks like a harmless error review on structural errors.

In *Washington v. Recuenco*, the Supreme Court stated that "[i]f a criminal defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that most constitutional errors are subject to harmless-error analysis."[19] This statement implies that constitutional errors are not deemed structural in broad categories. In other words, not all "deprivation of counsel" claims are structural in nature. Rather, as in *Triumph Capital*, they can be evaluated by the totality of the circumstances in which they occurred. If they do not rise to the level of a structural error as defined by case law, then they are subject to harmless error review. There seems no need, therefore, for a "triviality standard" as set forth in *Triumph Capital* and *Peterson*.

Conclusion

In recent years we have witnessed with alarming frequency the post-conviction exoneration of mounting numbers of innocent people. The number of wrongfully convicted individuals raises the question of why courts did not remedy constitutional errors long before innocent people spent years in prison. It has become increasingly apparent that the answer in many cases is the doctrine of harmless error, and the increasing utilization of the "guilt-based" approach to harmless error review. Whether the implementation of the "triviality" doctrine is a favorable development in the law is open to serious question.

1. William M. Landes & Richard A. Posner, "Harmless Error," 30 J. Legal Stud. 161, 161 (2001).
2. John M. Walker Jr., "Harmless Error Review in the Second Circuit," 63 Brook. L. Rev. 395 (1997).
3. 2 Steven A. Childress & Martha S. Davis, "Federal Standards of Review §7.03," at 7 (2d ed.1986).
4. *United States v. Yakobowicz*, 427 F3d 144, 153-54 (2d Cir. 2005).
5. John M. Walker Jr., "Harmless Error Review in the Second Circuit," Brook. L. Rev. (Summer 1997).
6. 2007 WL 1519791 (2d Cir. May 25, 2007).
7. 425 US 80 (1976).
8. 488 US 272 (1989).
9. 2007 WL 1519791 at *1.
10. Id. at *3 (citing *Morgan v. Bennett*, 204 F.3d 360, 367 (2d Cir. 2000)).
11. Id. at *3.
12. *Perry*, 488 US at 284.
13. 2007 WL 1519791 at *6.
14. Id. at 10.
15. 2007 WL 1519791 at *5 (citing *Jones v. Vacco*, 126 F3d 408, 416 (2d Cir. 1997)).
16. Id. at *8 (citing *Smith v. Hollins*, 448 F3d 533, 540 (2d Cir. 2006)).
17. 85 F3d 39, 42 (2d Cir. 1996).
18. 2007 WL 1519791 at *8.
19. 126 SCt 2546, 2548 (2006).