No. 22-3009

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEVEN M. HOHN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS (Nos. 2:19-cv-02491-JAR-JPO *et al.*)

AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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FRAP 29 Statement

This amicus curiae brief is filed pursuant to Federal Rule of Appellate Procedure 29 on behalf of the National Association of Criminal Defense Lawyers ("NACDL"). NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of over 10,000 lawyers, many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in protecting criminal defendants from structural errors that deprive them of a fundamentally fair trial.

Both parties have consented to the filing of this brief. Neither party's counsel authored any part of this brief, nor did either party or party's counsel contribute money intended to fund preparation or submission of this brief.

Introduction

While the harmless-error rule serves to check the overexpansion of the zone of reversible error, the *structural* error rule serves to check the overexpansion of the harmless-error rule. And the structural error rule is arguably the more important of the two, because it goes directly to the criminal trial's ability to function—and to appear to function—as a reliable and fair mechanism for determining a defendant's guilt and punishment.

While the Supreme Court has described structural errors as "limited" and "exceptional," it has not hesitated to apply the label to errors of a sort that render the application of the harmless-error rule improper or unwise. And the Court has given itself and the lower courts a blueprint for recognizing when this is so, by enumerating several factors, any one or combination of which may render the application of harmless-error analysis inappropriate. These include: the fact that the error breaches a right designed to protect interests other than the defendant's interest in not being wrongly convicted, the fact that the prejudicial effect of the error is unduly

hard to measure, and the fact that the error unfailingly results in fundamental unfairness. The Court has additionally suggested that the application of the structural error rule is particularly appropriate with respect to errors that are within the prosecution's power to avoid. And the Court has not ruled out the possibility that still other rationales for deeming an error structural may exist.

Thus, in determining whether the structural error rule should continue to apply to the error at issue in this case, this Court should not mistake the Supreme Court's description of structural errors as "limited" and "exceptional" as an exhortation to the lower courts to hesitate to identify such errors. The number of structural errors is limited only by the ability of prosecutors and trial judges to commit errors of a sort that are not amenable to harmless-error analysis. The Supreme Court has not hesitated to label errors of this type structural, and neither should this Court.

Argument

I. The "structural error" doctrine emerged as a check against the improper application of the harmless-error rule.

The "structural error" doctrine is the product of a century-long dialectic over how errors in criminal litigation should be addressed.

In the early twentieth century, virtually any errors in a criminal trial were commonly deemed presumptively adequate to justify the granting of a new trial. *See* Roger A. Fairfax, Jr., *A Fair Trial, Not A Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 Marq. L. Rev. 433, 435 (2009). Frustration with this regime led to a campaign for a "harmless error" principle. *Id.* at 437–42. That principle became law in 1919, with an Act providing that: "On the hearing of any appeal . . . in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." Act of Feb. 26, 1919, Pub. L. No. 65-281, 40 Stat. 1181. The doctrine of harmless error was further embedded in federal criminal litigation when the Federal Rules of Criminal Procedure went into effect in 1946, including Rule 52(a)'s provision stating that: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 52(a) (1946).

In this fashion, the harmless error principle became entrenched in appellate review of federal criminal trials. But uncertainty remained regarding its application to *constitutional* errors—as reflected in the Supreme

Court's acknowledgment in *Kotteakos v. United States*, 328 U.S. 750 (1946), that harmlessness might not apply if the "departure is from a constitutional norm." *Id.* at 764–65.

The Court settled this question in *Chapman v. California*, 386 U.S. 18 (1967), holding that a constitutional error *can* be deemed harmless, provided that the prosecution is able to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24.

Once again, however, the Court stopped short of endorsing an across-the-board application of the harmless-error principle, acknowledging prior cases indicating "that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Id.* at 23. The appended footnote cited (*inter alia*) *Gideon v. Wainwright*, 372 U.S. 335 (1963), which involved the complete denial of counsel to an indigent defendant, and *Tumey v. Ohio*, 273 U.S. 510 (1927), which involved statutes authorizing officials with a personal stake in the outcome to serve as judges in certain cases. *Chapman*, 386 U.S. at 23 n.8. In *Gideon* the Court recognized the "obvious truth" that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon*, 372 U.S. at

344. And in *Tumey*, the Court was unmoved by the government's argument that the evidence "show[ed] clearly that the defendant was guilty," declaring: "No matter what the evidence was against him, he had the right to have an impartial judge." *Tumey*, 273 U.S. at 535.

The Court picked up on this reference to harmlessness-immune errors—and first used the term "structural" to describe them—in *Arizona v. Fulminante*, 499 U.S. 279 (1991). The Court acknowledged that, since *Chapman*, it had recognized that "most" constitutional errors are amenable to harmless-error analysis. *Id.* at 306. But the Court noted that the cases in which it had applied harmlessness analysis to constitutional errors had involved "trial error"—*i.e.*, "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." *Id.* at 307–08.

Pointing to the *Chapman* footnote citing *Gideon* and *Tumey*, the Court explained that those cases, by contrast, had involved "structural defects in the constitution of the trial mechanism." *Id.* at 309. Such defects, the Court stressed, "defy analysis by 'harmless-error' standards." *Id.* And the Court cited cases issued "since [its] decision in *Chapman*" in which it had refused to

apply harmlessness analysis to constitutional errors, including *Vasquez v. Hillery*, 474 U.S. 254 (1986), which involved racial discrimination in the selection of the grand jury; *McKaskle v. Wiggins*, 465 U.S. 168 (1984), which involved the deprivation of the defendant's right to self-representation at trial, and *Waller v. Georgia*, 467 U.S. 39 (1984), which involved an infringement upon the defendant's right to a public trial. *Fulminante*, 499 U.S. at 310. "Each of these constitutional deprivations," the Court explained, "is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id*. Faced with errors of this type, the Court observed, a reviewing court must reverse, without regard to any suggestion that the errors were harmless.

The *Fulminante* Court did not hold that the newly coined label of "structural" applied to the error before it (the admission of a coerced confession (*id*. at 310–12)), but in the ensuing years it identified several more structural errors, including a jury instruction that improperly diluted the "beyond a reasonable doubt" standard, *Sullivan v. Louisiana*, 508 U.S. 275 (1993); the denial of the defendant's right to counsel of his choice, *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); a state supreme court justice's failure to recuse himself despite having been personally involved in the

prosecution, *Williams v. Pennsylvania*, 579 U.S. 1 (2016); and counsel's decision, over his client's objection, to admit his client's factual guilt during the guilt phase of a capital trial, *McCoy v. Louisiana*, 584 U.S. 414 (2018).

The Court has also made plain that *Fulminante*'s listing of prior cases treating errors as "structural" was not comprehensive. In *Weaver v. Massachusetts*, 582 U.S. 286 (2017), the Court cited pre-*Fulminante* precedent in observing that racial or gender discrimination in the selection of the petit jury belonged on the list, even though the Court had not previously labeled this error structural "in express terms." *Id.* at 301 (*citing*, *inter alia*, *Batson v. Kentucky*, 476 U.S. 79 (1986)). Scholars have added many more pre-*Fulminante de facto* structural error holdings to the list—including violation of the protection against double jeopardy, *Price v. Georgia*, 398 U.S. 323 (1970); damaging publicity in the community in which the trial was held, *Sheppard v. Maxwell*, 384 U.S. 333 (1966); racial discrimination in the use of peremptory challenges, *Batson v. Kentucky*, 476 U.S. 79 (1986); selection of the jury by a magistrate lacking jurisdiction, *Gomez v. United States*, 490 U.S. 858 (1989); improper exclusion of a juror on the basis of his views regarding capital punishment, *Gray v. Mississippi*, 481 U.S. 648 (1987); denial of access to counsel during trial, *Geders v. United States*, 425 U.S. 80

(1976); denial of the constitutional right to a speedy trial, *Strunk v. United States*, 412 U.S. 434 (1973); and appointment of an interested prosecutor, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). 3B *Federal Practice & Procedure* § 855 (Westlaw, current through April 2023 Update) (FPP § 855).

II. The Supreme Court has made plain that errors must be treated as structural when the application of the harmless-error rule to them would be improper, unfair, or impractical.

In the years since *Fulminante*, the Court has also continued to flesh out the rationales that underlie the structural-error doctrine. Most significantly, the Court has identified "at least three broad rationales" that may, individually or in any combination, support the treatment of an error as structural. *Weaver*, 582 U.S. at 295.

First, an error is structural when "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Id.* The right to self-representation at trial, for example, "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Id.* The presence or absence of prejudice to the defendant is simply "irrelevant to the basis underlying the right." *Id.* In fact, the defendant is more likely to

suffer harm from *exercising* this right than from being deprived of the opportunity to do so, *id*. (*citing McKaskle*, 465 U.S. at 177 n.8)—highlighting the absurdity of attempting to review the error for prejudice.

Another error implicating this rationale is the infringement of the defendant's right to a public trial, which exists in part to protect the interests of persons other than the defendant, including the press and the "public at large." *Id*. at 298–99; *Waller*, 467 U.S. at 49 & n.9. This right also appears to implicate the principle that "the administration of justice should reasonably *appear* to be disinterested as well as be so in fact." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 869–70 (1988) (emphasis added; internal quotation marks omitted); *see Weaver*, 582 U.S. at 301. These principles apply as well to racial discrimination in jury selection, which implicates the excluded juror's interest in avoiding a "profound personal humiliation," *Powers v. Ohio*, 499 U.S. 400, 413–14 (1991), and "strikes at the fundamental values of our judicial system and our society as a whole," *Vasquez*, 474 U.S. at 262 (internal quotation marks omitted).

Second, an error is structural when its effects "are simply too hard to measure." *Weaver*, 582 U.S. at 295. Errors affecting the defendant's Sixth Amendment right to counsel are likely to implicate this rationale, in light of

the innumerable strategic and other decisions that counsel must make before, during, and after a criminal trial. In *Gonzalez-Lopez*, for example, the Court explained why the consequences of the erroneous deprivation of a defendant's right to his counsel of choice are "necessarily unquantifiable and indeterminate":

> Different 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. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the framework within which the trial proceeds—or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

Gonzalez-Lopez, 548 U.S. at 150 (citation and internal quotation marks omitted).

Attempting to gauge the prejudice from this error, the Court observed, would mean trying to identify "differences in the defense that *would have been made* by the rejected counsel—in matters ranging from questions asked

on *voir dire* and cross-examination to such intangibles as argument style and relationship with the prosecutors." *Id.* at 151 (emphasis added). Indeed, the Court would have to engage in a two-tiered process of speculation—first speculating on "what matters the rejected counsel would have handled differently," and then speculating as to "what *effect* those different choices or different intangibles might have had." *Id.* (emphasis added). The error must be deemed structural, the Court concluded, in light of the difficulty of trying to rest meaningful conclusions on such speculation about how the defendant was harmed from not being tried in this doubly speculative "alternate universe." *Id.* at 150.

Errors the effects of which are manifested behind a shroud of confidentiality are also likely to implicate this rationale. The prejudice inflicted by an appellate judge's personal bias, for example, is virtually impossible to assess regardless of whether the judge cast a deciding vote—because "the deliberations of an appellate panel, as a general rule, are confidential." *Williams*, 579 U.S. at 14–15. "As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process." *Id.* at 15; *see also Vasquez*, 474 U.S. at 263 ("when the trial judge is

discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from view, and we must presume that the process was impaired") (*citing Tumey*, 273 U.S. at 535). The same goes for errors that seriously impair the composition or deliberation of the jury: Courts can only speculate as to what effects racial discrimination in the selection of the jury, exposure to pretrial publicity, or an instruction that allowed the jury to convict on something less than proof beyond a reasonable doubt, may have had on its deliberations. *Vasquez*, 474 U.S. at 263; *Sullivan*, 508 U.S. at 280. The Sixth Amendment requires more than "appellate speculation" that such errors might not have prejudiced the defendant. *Sullivan*, 508 U.S. at 280.

Third, an error is structural if "the error *always* results in fundamental unfairness." *Weaver*, 582 U.S. at 296 (emphasis added). The complete denial of counsel, and the failure to give a reasonable-doubt instruction, implicate this rationale. *Id*. (*citing Gideon*, 372 U.S. at 343–45; *and Sullivan*, 508 U.S. at 279). In the face of these errors, "the resulting trial is always a fundamentally unfair one," and "[i]t therefore would be futile for the government to try to show harmlessness." *Id*.

The Court noted that these rationales are "not rigid," and that a particular structural error may implicate more than one of them. *Id.*; *see also McCoy*, 584 U.S. at 427 (holding that counsel's decision to admit client's factual guilt over client's objection implicated "at least the first two" of the rationales outlined above). And the Court has stressed that "one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case." *Weaver*, 582 U.S. at 296. Structural error analysis is "categorical," rather than "case-by-case"—*i.e.*, a particular type of constitutional error "is either structural or it is not." *Neder v. United States*, 527 U.S. 1, 14 (1999). This is because "[t]he purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of *any* criminal trial." *Weaver*, 582 U.S. at 294–95 (emphasis added). In light of the importance of these basic guarantees, where the defendant objects to a structural error at trial and raises the issue on direct appeal, he "generally is entitled to automatic reversal regardless of the error's actual effect on the outcome." *Id.* at 299 (internal quotation marks omitted).

The Court has also suggested (albeit before it coined the phrase "structural error") that the fact that a type of error is "possible only under

color of state authority," and is thus "wholly within the power of the State to prevent," may support its treatment as a structural error. *Vasquez*, 474 U.S. at 262. Thus, the Court rejected the state's complaint that a retrial amounted to an "unduly harsh penalty" for its racial discrimination in the selection of the grand jury. *Id*. If the state would take steps to ensure that grand jury discrimination becomes "a thing of the past," the Court observed, "no conviction will ever again be lost on account of it." *Id*.

Although the Court has described structural errors as "limited" and "exceptional," *Greer v. United States*, 593 U.S. 503, 513 (2021) (internal quotation marks omitted), it has never declared the roster of such errors closed. To the contrary, it continues to identify such errors where the rationales outlined above apply. *See, e.g., McCoy*, 584 U.S. at 427–28.

The lower courts have also continued to identify structural errors. A leading treatise and 2020 law review article enumerate numerous structural errors that circuit courts have identified since *Fulminante*, including the presence of a biased juror, *United States v. French*, 904 F.3d 111 (1st Cir. 2018); the nonconsensual absence of the judge while the trial is underway, *United States v. Mortimer*, 161 F.3d 240 (3d Cir. 1998); an invalid jury waiver, *United States v. Shorty*, 741 F.3d 961 (9th Cir. 2013); defense

counsel's complete failure to subject the prosecution's case to meaningful adversarial testing, *United States v. Ragin*, 820 F.3d 609 (4th Cir. 2016); preventing the defendant from arguing a legitimate defense theory, *United States v. Brown*, 859 F.3d 730 (9th Cir. 2017); barring a defendant from presenting all evidence in support of a cognizable defense, *United States v. Smith-Baltiher*, 424 F.3d 913 (9th Cir. 2005); instructing the jury in a manner that constructively amends the indictment, *United States v. Narog*, 372 F.3d 1243 (11th Cir. 2004); allowing the prosecution, but not the defense, to exercise "left-over" peremptory challenges mid-trial, *United States v. Harbin*, 250 F.3d 532 (7th Cir. 2001); and prosecutorial breach of a plea agreement, *Dunn v. Colleran*, 247 F.3d 450 (3d Cir. 2001). *See* Zachary L. Henderson, *A Comprehensive Consideration of the Structural-Error Doctrine*, 85 Mo. L. Rev. 965, 989–92 (2020); FPP § 855 n.56.

Conclusion

In sum, the structural error doctrine has long played, and continues to play, a vital role in checking improper or unwise applications of the harmless-error rule. Particularly with respect to errors that implicate the Sixth Amendment right to counsel, errors the effects of which are impossible to quantify, errors that tend to undermine the appearance of justice, and errors

that lie entirely within the prosecution's power to prevent, the structural error doctrine serves to prevent serious injustice from being swept under the rug.

The error at issue here—the government's deliberate and surreptitious intrusion into a criminal defendant's case-related pretrial discussions with his attorney—checks all of these boxes. The error goes straight to the defendant's Sixth Amendment right. Its prejudicial effects are manifested in the prosecution's use of the wrongly-acquired information to guide its strategic decisions before, during, and after the trial in ways that cannot reliably be parsed out afterward. The government's ability to surreptitiously collect and use a criminal defendant's confidential pretrial communications with his attorney without consequence seriously undermines the appearance that criminal trials take place on a balanced playing field. And because this error involves the government's deliberate misconduct, it is entirely within the government's power to prevent.

The structural-error doctrine was made for just such errors. Rather than discarding thirty years of precedent to assign itself and the parties the impossible task of assessing whether such conduct was "harmless," the Court

should leave in place the wise holding of *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995).

Respectfully submitted on March 8, 2024.

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Certificate of Compliance with FRAP 29(B)(4)

I hereby certify that, pursuant to FRAP 29(b)(4), the foregoing Amicus Brief of the National Association of Criminal Defense Lawyers is proportionately spaced, has a typeface of 14 points, and contains 3,701 words.

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Certificate of Service

Undersigned counsel certifies that on March 8, 2024, he electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. Because counsel for the Appellant and the Appellee are registered CM/ECF users, they will also be served by the CM/ECF system. 10th Cir. R. 31.5.

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