Fordham Law Review

Volume 83 *Volume 83*
Issue 1 *Volume 83, Issue 1*

Article 9

2014

Searching for a Harmless Alternative: Applying the Harmless Error Standard to Alternative Theory Jury Instructions

Erika A. Khalek
Fordham University School of Law

SEARCHING FOR A HARMLESS ALTERNATIVE: APPLYING THE HARMLESS ERROR STANDARD TO ALTERNATIVE THEORY JURY INSTRUCTIONS

*Erika A. Khalek**

"The well-being of the law encompasses a tolerance for harmless errors adrift in an imperfect world."[1]

Judges in federal criminal cases provide juries with instructions before the jury members retire to consider their verdict. In some situations, the judge may include alternative theories of guilt, informing the jury that it may convict a defendant of a single offense on the basis of one of several different theories. But because most juries in federal criminal trials deliver only a general verdict of either "guilty" or "not guilty," it is usually not possible to determine the theory upon which the jury relied in reaching its decision. This lack of transparency may be problematic if the defendant appeals his conviction on the basis of an alleged "alternative theory error," which occurs when one—but not all—of the theories in the jury instruction is subsequently found to have been invalid. A reviewing court must then determine whether the defendant is entitled to relief as a result of the erroneous instruction, which it assesses by reference to the harmless error standard of review.

The U.S. Supreme Court set forth the standard for determining whether an alternative theory error is harmless in Hedgpeth v. Pulido. Pulido *requires a reviewing court to determine whether the relevant error "had substantial and injurious effect or influence in determining the jury's verdict." However, the circuits are divided in their interpretation of this standard. Some circuits have interpreted the rule as imposing a less demanding standard on the defendant-appellant to establish grounds for reversal, merely requiring it to be shown, for example, that the jury did not necessarily make the findings to rely on the valid theory of guilt. Other circuits, however, impose a more demanding standard, for example, finding an error harmless unless the defendant-appellant can show not only that the*

* J.D. Candidate, 2015, Fordham University School of Law; B.A., 2010, Washington & Lee University. I would like to thank my family, friends, and Ben for their love and support, as well as Professor Ian Weinstein for his guidance and advice.

1. A sentiment of Justice Roger J. Traynor in his foreword to THE RIDDLE OF HARMLESS ERROR, at ix (1970).

jury did not necessarily rely on the valid theory of guilt, but also had evidence that could rationally lead to an acquittal on the basis of the valid theory.

This Note examines the historical development of the Supreme Court's alternative theory error standard so as to better understand why the circuit courts have diverging interpretations. It also considers the impact of general verdicts on harmless error review, particularly as compared to special verdicts. Ultimately, this Note concludes that all circuits should place a heavier burden on the government to defend the harmlessness of alternative theory errors.

INTRODUCTION

Before a jury in a federal criminal case is discharged to consider its verdict, the judge provides it with instructions (which it is required to follow) regarding how to apply the law to the evidence it has heard in order to render a verdict.[2] These instructions may include an "alternative theory jury instruction." An alternative theory jury instruction provides a jury with two or more different theories of guilt, each of which would be sufficient to convict the defendant separate and apart from the other.[3] This possibility arises because a defendant may be charged with "the commission of any one offense in several ways."[4] But because most cases in federal court require the jury to return a general verdict[5]—i.e., to find the defendant simply "guilty" or "not guilty"—it is often impossible to discern how the jury came to its decision and, in the case of alternative theory jury instructions, which of the theories, if any, the jury followed.[6] This uncertainty may present challenges to a judge reviewing an alternative theory jury instruction, for example where a jury renders a general verdict in reliance on an instruction comprised of alternative (or multiple) theories of guilt, and one of these theories is invalid in some respect.[7] This result is referred to as an alternative theory error.

---

2. *See* Torrence Lewis, *Toward a Limited Right of Access to Jury Deliberations*, 58 FED. COMM. L.J. 195, 198 n.8 (2006).

3. *See* Hedgpeth v. Pulido, 555 U.S. 57, 58 (2008) (per curiam).

4. United States v. Miller, 471 U.S. 130, 136 (1985) (holding that if the offense and its elements are completely spelled out, the constitutional right to a grand jury is not violated, even if the indictment alleges other means of committing the same crime).

5. Donald Olander, Note, *Resolving Inconsistencies in Federal Special Verdicts*, 53 FORDHAM L. REV. 1089, 1089 (1985) (citations omitted).

6. *See, e.g.*, Stromberg v. California, 283 U.S. 359, 367–68 (1931) ("The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. It may be added that this is far from being a merely academic proposition . . . .").

7. United States v. Skilling, 638 F.3d 480, 481 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1905 (2012) (citing *Pulido*, 555 U.S. at 61). This is only one of various types of alternative theory jury instructions. *See infra* Part II.A.1.

When a verdict is challenged on the basis of an alternative theory error, it is usually subjected to harmless error review to determine whether the error is "harmless" and so the verdict may stand despite the error.[8] Most errors reviewed under a harmless error standard are found to be harmless,[9] and although the U.S. Supreme Court in *Hedgpeth v. Pulido*[10] provided a standard for determining whether such an error is harmless—namely, whether the flaw in the instructions "had substantial and injurious effect or influence in determining the jury's verdict"[11]—the federal circuit courts are divided in their applications of this standard. Some circuits interpret the Supreme Court's standard to impose a more demanding standard on a defendant-appellant to garner a reversal by proving an error was not harmless, thereby placing a less demanding burden on the government. For example, the Fifth Circuit looks to see whether evidence in the record "could rationally lead to" an acquittal when only the valid theory is considered.[12] In contrast, the Tenth Circuit has held that where one theory for conviction is invalid, a verdict may be *sustained* only if it is possible to discern that the jury relied on the valid ground or "necessarily made the findings required to support a conviction on the valid ground."[13] The varying interpretations are significant because a defendant in a circuit in which it is easier to show an error is not harmless may be granted relief in a situation where that defendant, if he were in a circuit imposing a more rigid standard, may have been denied relief (and vice versa).

For example, in *United States v. Skilling*,[14] the former chief executive officer of Enron Corporation was charged with, among other things, one count of conspiracy based on his efforts to fraudulently manipulate Enron's financial statements to affect Enron's share price and so mislead investors.[15] The jury instructions allowed the jury to convict the defendant of conspiracy under a number of theories, and the jury returned a general verdict finding him guilty.[16] Subsequently, however, the Supreme Court determined that one of the theories under which the defendant had been charged was invalid, and so the case was remanded to the Fifth Circuit to determine whether the error in the instruction was harmless.[17] The Fifth Circuit places a lesser burden on the government to defend a conviction, requiring the defendant-appellant to show that "the record contains evidence that *could rationally lead to* [an acquittal] with respect to the

8. *See infra* Part I.B.2–3.

9. *See, e.g.*, William M. Landes & Richard A. Posner, *Harmless Error* 21 (U. Chi. Law & Econ., Olin Working Paper No. 101, 2000), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=233929.

10. 555 U.S. 57 (2008).

11. *Id.* at 58 (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)).

12. *Skilling*, 638 F.3d at 482.

13. United States v. McKye, 734 F.3d 1104, 1110 n.6 (10th Cir. 2013) (citation omitted).

14. 638 F.3d 480 (5th Cir. 2011).

15. *Id.* at 481, 488.

16. *Id.* at 481.

17. *Id.* (citing Skilling v. United States, 561 U.S. 358, 413–15 (2010)).

[valid theory of guilt]."[18] The Fifth Circuit concluded that the jury instruction error was harmless and upheld the jury's verdict.[19]

The Fifth Circuit emphasized, however, that it had conducted its analysis pursuant to *Pulido*, which it interpreted as requiring the defendant-appellant to show more than the mere fact that the jury did not necessarily find facts establishing guilt on a valid theory for an alternative theory error to be not harmless.[20] The court distinguished its interpretation of *Pulido* from that of those circuits that seem to place a heavier burden on the government to defend an error as harmless.[21] It explicitly noted that the government had introduced evidence at trial that was sufficient to convict the defendant on one theory of fraud but not the other, which could amount to error that is not harmless in heavier burden circuits.[22] *Skilling*, therefore, illustrates that varying tests are applied across circuit courts to determine whether an error is harmless, and that the diverging tests affect the relief granted to defendants on appeal.

I. INSTRUCTION MANUAL: JURY INSTRUCTIONS AND THE HARMLESS ERROR STANDARD

While the Court has always stood by the principle that the right to a fair trial is a "fundamental right,"[23] which is protected under the Due Process Clauses and the Sixth Amendment to the U.S. Constitution,[24] the scope of errors in the trial process requiring reversal has narrowed significantly since the nineteenth century, when even trivial trial errors could require reversal at the expense of judicial economy and fairness.[25]

Part I.A provides some background on the function of jury instructions in the judicial process, with special attention given to alternative theory jury instructions. Part I.B then tracks the development of the harmless error standard of review, focusing on the federal legislation and court decisions that have shaped the current standard. Finally, Part I.C explains how the Court has applied the harmless error review standard to alternative theory jury instructions.

A. Jury Instructions and the Verdict Forms: Clear or Confusing?

This section first provides background information on jury instructions, including noteworthy aspects of alternative theory jury instructions, to more clearly elucidate their practical impact. This section then explains the

18. *Id.* at 482 (quoting Neder v. United States, 527 U.S. 1, 19 (1999)) (emphasis added).
19. *See id.* at 481.
20. *See id.* at 482.
21. *See id.*
22. *See id.* at 484 n.4.
23. Strickland v. Washington, 466 U.S. 668, 684 (1984).
24. U.S. CONST. amends. V, VI, XIV; *see also Strickland*, 466 U.S. at 684–85.
25. *See* Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309, 314 (2002); *see also* Nolan E. Clark, Note, *Harmless Constitutional Error*, 20 STAN. L. REV. 83, 84 (1967). *See generally* TRAYNOR, *supra* note 1.

general verdict (as compared to the special verdict) and discusses its implications for convictions. Finally, this section examines past empirical studies assessing the frequency of errors in instructions as applied to the two verdict forms.

1. Jury Instructions Generally

Commentators have expressed the view that jury instructions may be the most critical part of a trial.[26] It is argued that this is because the instructions not only explain the law to nonlawyers, but because they also "appear at the crossroads in a trial, when the focus is shifting from the witness box to the jury box, and when the jury is turning from listening to deciding."[27] The fact that a jury must be unanimous in its decision is closely connected to this view, and perhaps underscores it.[28]

When instructing the jury, a federal district court judge must provide guidance as to the relevant law but exercises broad discretion in doing so.[29] Generally, the judge must give "reasonable guidance."[30]

Counsel for each party may prepare and submit a written request for instructions.[31] The court is not obligated to adopt the language submitted by a party, however, where the instructions prepared by the court state the substance of the law clearly and accurately.[32]

2. The General and Special Verdict Forms

Most federal civil cases that proceed to a nonbench trial are resolved through a general verdict, where a jury announces the prevailing party and

---

26. *See* 1 KEVIN F. O'MALLEY, JAY E. GRENIG & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 7 App. (6th ed. 2006) (citing M.M. Cramer, *A View from the Jury Box*, 6 LITIG. 3 (1979); John Kennelly, *Closing Arguments: Instructions Are the Key*, 6 TRIAL LAW. GUIDE 53 (1962)). Joan Eads, a seasoned trial lawyer who was selected to serve as a juror in a medical malpractice suit, shared her reflections following this experience, emphasizing that "the court's instructions were by far the most important factor in [the jury's] decision." *See* Joan Eads, *A Lawyer's View from the Jury Box*, TRIAL, Apr. 2004, at 76, 77.

27. *See* O'MALLEY ET AL., *supra* note 26, at § 7 App.

28. *See* U.S. CONST. amend. VII; FED. R. CIV. P. 48(b); 9B ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2492 (3d ed. 2008) (citing Am. Publ'g Co. v. Fisher, 166 U.S. 464, 468 (1897)).

29. *See* O'MALLEY ET AL., *supra* note 26, at § 7:1.

30. *See id.* ("In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination." (quoting Quercia v. United States, 289 U.S. 466, 469 (1933))).

31. *See* O'MALLEY ET AL., *supra* note 26, at § 7:2.

32. *See id.* The procedural requirements of jury instructions are governed by the Federal Rules of Criminal Procedure with respect to criminal cases and the Federal Rules of Civil Procedure with respect to civil cases, both of which provide that a party may request the court to instruct the jury on a particular law, as set out in the request. *See* FED. R. CRIM. P. 30; FED. R. CIV. P. 51.

the amount awarded to him, if any.[33] The process is similar in federal criminal proceedings, where a jury announces a verdict of "guilty" or "not guilty."[34] The general verdict grants the jury broad discretion to determine the factors it considers relevant when deliberating.[35]

In contrast, a jury that renders a special verdict "finds facts without reference to the success of either litigant."[36] Special verdicts originated in England as early as the twelfth century.[37] At that time, jurors were selected based on their knowledge of the subject matter.[38] If a judge found that the jury had erred it its decision, a second jury would review the case.[39] If that jury's decision differed from that of the original jury, the original jurors were "severely punished."[40] Consequently, the special verdict was introduced to protect juries from attaint (dishonor).[41]

Today, Rule 49(a) of the Federal Rules of Civil Procedure provides an alternative to the general verdict: a special verdict. Rule 49(a) authorizes courts to require a jury to return a special verdict, which answers specific factual questions, rather than a general verdict, which simply announces the prevailing party.[42] Although special verdicts are used primarily in civil cases, if at all, they are also used on rare occasions in criminal cases.[43]

---

33. Shaun P. Martin, *Rationalizing the Irrational: The Treatment of Untenable Federal Civil Jury Verdicts*, 28 CREIGHTON L. REV. 683, 694 (1995) (citations omitted); Olander, *supra* note 5, at 1089 (citations omitted).

34. *See* Kate H. Nepveu, Note, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL'Y REV. 263, 263 (2003).

35. *See* O'MALLEY ET AL., *supra* note 26, at § 7 App.

36. Suel O. Arnold, *Special Verdicts*, 6 AM. JURIS. TRIALS 1043, 1046 (1967).

37. Robert Dudnik, Note, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 YALE L.J. 483, 485 (1965) (citing Edmund M. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L.J. 575 (1923)).

38. *Id.* at 484–85.

39. *Id.* at 485.

40. *Id.*

41. *Id.* at 484.

42. *See* FED. R. CIV. P. 49(a). Rule 49(a) provides three different methods by which a court may require a special verdict: "(A) submitting written questions susceptible of a categorical or other brief answer; (B) submitting written forms of the special findings that might properly be made under the pleadings and evidence; or (C) using any other method that the court considers appropriate." *Id.* A special verdict is slightly different than an interrogatory, which is authorized under FED. R. CIV. P. 49(b). Rule 49(b) explains that an interrogatory requires the jury to answer specific factual questions in conjunction with providing a general verdict. FED. R. CIV. P. 49(b); s*ee* David William Navarro, *Jury Interrogatories and the Preservation of Error in Federal Civil Cases: Should the Plain-Error Doctrine Apply?*, 30 ST. MARY'S L.J. 1163, 1193 (1999).

43. 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 360–61 (15th ed. 1809) (stating that a "verdict may be either general, guilty, or not guilty; or special, setting forth all the circumstances of the case, and praying the judgment of the court, whether, for instance, on the facts stated, if it be murder, manslaughter, or no crime at all"); s*ee* United States v. Ogull, 149 F. Supp. 272, 277 (S.D.N.Y. 1957) (citing Blackstone for the proposition that "[s]pecial verdicts are as old a feature of the jury system as are general verdicts"); *see also* United States v. Spock, 416 F.2d 165, 182 n.41 (1st Cir. 1969) ("There are only two classes of cases in which such findings have been used. First, in certain cases the determination of a particular fact will be crucial to sentencing the defendants, as, for example, which of the several objects of a conspiracy, some felonies, some misdemeanors, the defendant agreed to, or the duration of a defendant's participation in a conspiracy.").

Moreover, courts largely no longer employ "true" special verdicts, where a jury does not render a verdict of guilty or not guilty at all, but instead merely provides specific findings of fact.[44] Special verdicts today are more likely to supply additional information in conjunction with a general verdict.[45]

There are at least three acknowledged advantages of special verdicts as compared to general verdicts.[46] First, special verdicts promote a jury system of fairness and effectiveness by affording the public—and the litigants—a better understanding of how the jury came to its decision.[47] Second, special verdicts decrease the likelihood of juror error or confusion because the application of the law to the facts remains with the judge.[48] Finally, retrials based on errors identified on appeal can be limited or avoided.[49] For example, if an error affects a special verdict, it is usually clear which of the jury's findings are affected by the error.[50] Thus, where a second trial is required, it can be cabined to only the specific findings affected.[51]

Consequently, whereas "in a suit involving two or more theories of liability, an appellate court cannot ascertain from a general verdict which theory or theories the jury relied upon in rendering its verdict,"[52] special verdicts "enable the jury to make special written findings on every issue of fact in a particular case."[53] Thus, special verdicts allow for easier location of error,[54] and as such, could benefit appellate courts by providing a clearer

44. Nepveu, *supra* note 34, at 264. Nepveu notes: "The increased use of special verdict forms and special interrogatories raises a number of questions which appear to have escaped academic attention, judging from the infrequent discussion of special verdicts in the literature." *Id.*

45. *See id.* at 263–64.

46. Martin, *supra* note 33, at 696.

47. *Id.* (citing Olander, *supra* note 5, at 1092). Special verdicts may also make it harder for the jury to see how its findings affect the final determination in the case, thus eliminating "bias, prejudice, and jury caprice." 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2503, at 155 (2d ed. 1995); *see also* Navarro, *supra* note 42, at 1192.

48. Martin, *supra* note 33, at 696 (citing Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1520 (6th Cir. 1990)); *see also* Olander, *supra* note 5, at 1090–91.

49. Martin, *supra* note 33, at 696 (citing Olander, *supra* note 5, at 1091).

50. Olander, *supra* note 5, at 1091–92.

51. *Id.*

52. Elizabeth Cain Moore, Note, *General Verdicts in Multi-Claim Litigation*, 21 MEM. ST. U. L. REV. 705, 705 (1991).

53. *Id.* (citing FED. R. CIV. P. 49(a)). Appellate courts have encouraged the use of special verdicts in multiclaim litigation. *See id.* at 706 (citing Kassel v. Gannett Co., 875 F.2d 935, 950 (1st Cir. 1989); Farrell v. Klein Tools, Inc., 866 F.2d 1294, 1299–301 (10th Cir. 1989); Nowell v. Universal Elec. Co., 792 F.2d 1310, 1317 & n.5 (5th Cir. 1986)). Moore quoted the Fifth Circuit's endorsement of the use of FED. R. CIV. P. 49(a): "Special interrogatories . . . are helpful to a jury because they reduce an otherwise complex trial to its simplest and most important issues. The genuine issues are distilled and an appellate court is often aided immeasurably when it is called on to review the case." *Id.* at 706 n.6 (quoting *Nowell*, 792 F.2d at 1317).

54. *Id.* at 705 (citing Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 258 (1920)).

record for review.[55] The judiciary has also expressed that it may consider greater use of special verdicts or instructive interrogatories, where the jury answers specific questions but also renders a general verdict.[56]

General verdicts, however, have their own set of advantages over special verdicts. First, a general verdict prevents the jury from returning inconsistent responses.[57] If a jury returns responses that cannot be reconciled, a judgment cannot be entered, requiring a retrial.[58] Further, a general verdict implies findings in favor of the prevailing party on each contested issue of fact that the jury reviews, which could streamline review on appeal.[59] Finally, supporters of the general verdict find that it is preferable to the special verdict because "it permits the jury to do that which it should do—that is, leaven the strict law with man-on-the-street justice."[60]

3. A Jury's Understanding of the Instructions

Commentators maintain a wide variety of views as to whether and to what extent a jury understands the instructions provided by a court. One view expresses the common assumption that a jury understands and complies with all instructions.[61] On the other end of the spectrum exists the view "that a jury in the main is mystified by the legal abstraction in an instruction, even when the instruction is not doubly complicated."[62] While the former view rationalizes more frequent reversal because of an erroneous jury instruction, the latter supports more frequently finding an error harmless, as it claims instructions have very little influence on the jury.[63]

---

55. Nepveu, *supra* note 34, at 269. Justice Blackmun has voiced his support for this viewpoint. *See id.* at 278 n.123 (citing Griffin v. United States, 502 U.S. 46, 61 (1991) (Blackmun, J., concurring) (stating that the government could have either separated the objectives into separate counts or given special interrogatories)); *see also* O'MALLEY ET AL., *supra* note 26, at § 7 App. (citation omitted).

56. Nepveu, *supra* note 34, at 278 (citation omitted).

57. *See* Olander, *supra* note 5, at 1092.

58. *Id.* (citations omitted). Inconsistent findings may be reconciled where possible. *Id.* (citing Gallick v. Balt. & O.R.R., 372 U.S. 108, 119 (1963); Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, 369 U.S. 355, 364 (1962)).

59. ROBERT E. JONES ET AL., RUTTER GROUP PRACTICAL GUIDE: FEDERAL CIVIL TRIALS AND EVIDENCE Ch. 18-A (citing Jennings v. Jones, 499 F.3d 2, 7 (1st Cir. 2007); Freeman v. Chi. Park Dist., 189 F.3d 613, 615 (7th Cir. 1999)). The guide notes, however, that a general verdict may require reversal for error found on appeal "because the reviewing court cannot determine the basis for the jury's verdict." *Id.* (citations omitted).

60. *See* O'MALLEY ET AL., *supra* note 26, at § 8:9 (citing Fleming James, Jr., *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218, 246–48 (1961)). The authors noted that FED. R. CIV. P. 49 had powerful dissidents who argued for its repeal, including former U.S. Supreme Court Justices Hugo L. Black and William O. Douglas. *Id.* The justices referred to the rule as "but another means utilized by courts to weaken the constitutional power of juries." Amendments to Rules of Civil Procedure for the United States District Courts, 31 F.R.D. 587, 619 (1963) (statement of Justices Black and Douglas rejecting the adoption of the 1963 amendments to the Federal Rules of Civil Procedure).

61. *See* TRAYNOR, *supra* note 1, at 73.

62. *Id.*

63. *Id.* (citations omitted).

Yet, commentators also express another view: it is impossible to know whether a jury understood and followed instructions, and thus it is impossible to know whether an error matters.[64]

Empirical evidence reveals conflicting findings as to whether juries generally understand and follow instructions. Perhaps unsurprisingly, where juries understand and follow instructions, it is more difficult for an appellate court to find that an error did not influence the verdict if the error involves an issue material to the case.[65] Linguists who have studied and tested jury instructions, however, "have found disturbingly low levels of understanding within juries, and have attributed these problems to writing structures."[66] One commentator, following experiences on both civil and criminal juries, expressed the view that juries do not understand how to apply law to the facts at hand.[67] To improve the jury process, the commentator recommended the following: (1) when instructing the jury at the end of the case, the judge should encourage the jury to break each charge into its required elements and treat each element separately to determine if the evidence supports each element; and (2) where the jurisdiction permits the court to summarize evidence, the judge should weave the evidence into the instructions, "or use the threat of doing so to induce counsel to link the evidence to the law in their closing arguments."[68]

Where juries are required to provide a special verdict, rather than a general verdict, evidence has revealed that jurors "reported feeling better informed, more satisfied that their verdict was correct, more confident that their verdict reflected a proper understanding of the judge's instructions, and more satisfied that the prosecutor was helpful."[69] Nonetheless, the ultimate benefits to a jury's decision are unclear.[70] Moreover, "[s]pecial

64. *Id.* (citation omitted).

65. *Id.* at 74; *cf.* Robert and Veda Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979) (providing empirical evidence illustrating juries' limited comprehension of jury instructions).

66. *See* O'MALLEY ET AL., *supra* note 26, at § 7 App. (citing, as an example, Charrow, *supra* note 65).

67. Christopher N. May, *"What Do We Do Now?": Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869, 870 (1995).

68. *Id.*; *see also* O'MALLEY ET AL., *supra* note 26, at § 7 App. (providing examples of specific guidance to ensure clarity for the jury).

69. Nepveu, *supra* note 34, at 265 (citing Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 50 (1994)). The survey underlying the study polled both criminal and civil jurors. Heuer, *supra*, at 50.

70. *See* Nepveu, *supra* note 34, at 265 (citing Elizabeth C. Wiggins & Steven J. Breckler, *Special Verdicts as Guides to Jury Decision Making*, 14 LAW & PSYCHOL. REV. 1, 19 (1990) (finding that, based on evidence from a mock trial simulation, general verdicts were unaffected by the use of special verdicts)). The Wiggins study researchers hypothesized this result occurred because "the effect of a particular answer was obvious to the jury, allowing their overall impressions of the parties . . . to affect their answers." *Id.* at 265 (citing Wiggins & Breckler, *supra*, at 27, 32). "While the jurors who were given special verdicts understood better the legal question of burden of proof, they did no better . . . in applying that knowledge to fact patterns." *Id.* (citing Wiggins & Breckler, *supra*, at 28–29).

problems" arise when a jury is advised on alternative theories of guilt, which are charged rather commonly.[71]

B. The Harmless Error Review Standard: Evolving Complexity

"[T]he evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex."[72] As this section illustrates, the harmless error review standard was developed gradually and continues to evolve today. This section first examines judicial review prior to the introduction of the harmless error standard. It then discusses the initial era following Congress's enactment of the harmless error doctrine, and how the Supreme Court's interpretation of the doctrine affected the spectrum of errors that may be assessed under it. Finally, this section focuses on the application of the harmless error review standard in the context of alternative theory jury instructions.

1. Pre-Harmless Error Review

Throughout the nineteenth century, both English and U.S. courts liberally reversed convictions due to even trivial trial errors.[73] Nevertheless, a defendant faced significant challenges if he wished to appeal, as the opportunity to appeal a conviction was limited.[74]

---

71. BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT 107 (2d ed. 2007).

72. TRAYNOR, *supra* note 1, at 80.

73. *See* William Wesley Patton, *To Err Is Human, to Forgive, Often Unjust: Harmless Error Analysis in Child Abuse Dependency Proceedings*, 13 U.C. DAVIS J. JUV. L. & POL'Y 99, 102 (2009); *see also* Martha S. Davis, *Harmless Error in Federal Criminal and Habeas Jurisprudence: The Beast That Swallowed the Constitution*, 25 T. MARSHALL L. REV. 45, 46 (1999).

74. The forerunner to the right to appeal conviction for a criminal offense—a writ of error in favor of the defendant—was only introduced in the nineteenth century. *See* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 522–23 (1992) (citation omitted). Whether to issue a writ of error was entirely at the discretion of the circuit court judge. *Id.* at 523. The early development of the criminal appeal process occurred primarily in state courts, as criminal law fell largely within the purview of state common and statutory law rather than federal law. *See id.* at 528. In 1894, the Supreme Court in *McKane v. Durston* unanimously held that a defendant does not have a constitutional right to appeal a criminal conviction because the common law did not afford it. McKane v. Durston, 153 U.S. 684, 687 (1894); *see also* Arkin, *supra*, at 505. The Court expressed the view that it fell within a state's discretion to determine "whether an appeal should be allowed." *McKane*, 153 U.S. at 688; *see also* Arkin, *supra*, at 505. Close to a century later, the Court affirmed its earlier view in *McKane* that a constitutional right to appeal does not exist. Arkin, *supra*, at 505 (citing Jones v. Barnes, 463 U.S. 745 (1983)). The dissenters in *Jones* emphasized, however, that a right to appeal effectively existed because if the Court was presented with the issue, it would likely hold that "a State must afford at least some opportunity for review of convictions"; nonetheless, the dissenters continued, it was unlikely that such an issue would come before the Court, because "a right to appeal is now universal for all significant criminal convictions." *Jones*, 463 U.S. at 756–57 n.1 (Brennan, J., dissenting); *see also* Arkin, *supra*, at 506. Several years later, however, Justice Marshall expressed the view that only capital criminal cases are entitled to appellate review. Arkin, *supra*, at 506 (citing Whitmore v. Arkansas, 495 U.S. 149, 167 (1990) (Marshall, J., dissenting)). Indeed, former Chief Justice Rehnquist has stated that "perhaps . . . the time has come to abolish appeal as a matter of right from the [federal] district courts to the courts of appeals, and allow such review only when it is granted in the

While trial errors involving the erroneous admission or rejection of evidence did not automatically warrant setting aside a verdict and granting a new trial in English courts in the early nineteenth century, this position was rejected a few decades later with the introduction of the "Exchequer rule."[75] The Exchequer rule, announced in *Crease v. Barrett*,[76] was interpreted to allow even trivial errors to require a new trial.[77] Subsequently, this interpretation of the Exchequer rule was accepted across English courts.[78] It was not until Parliament enacted a harmless error statute in the early twentieth century that the Exchequer rule lost much of its influence over judicial decision making.[79]

The Exchequer rule also gained recognition in U.S. courts, where a similar tendency to reverse for even trivial errors existed if defendants were granted the opportunity to appeal.[80] As Justice Story explained, "the admission of illegal evidence . . . necessitates a reversal[.]"[81] The rule not only applied to trivial evidentiary errors, however, but also to a broad spectrum of trivial errors. For example, a state appellate court in California reversed because of a typographical error in an indictment, which had charged the defendant with entry into a building with intent to commit

---

discretion of a panel of the appellate court." *Id.* at 508 (quoting Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 605–06 (1985)). Chief Justice Rehnquist cited the interests of "lawyers' time, speedy disposition, and finality" in favor of this view. *Id.* (quoting Resnik, *supra*, at 605). Relatedly, the right to counsel where a charge carries the possibility of a prison sentence was not mandated until 1963. *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963).

75. John H. Wigmore, *New Trials for Erroneous Rulings upon Evidence; A Practical Problem for American Justice*, 3 COLUM. L. REV. 433, 433–34 (1903) (citing R. v. Ball, (1807) 168 Eng. Rep. 721; R. & R. 133). For a further discussion of the line of cases leading up to *Crease v. Barrett* and subsequently endorsing it, see TRAYNOR, *supra* note 1, at 7–9.

76. (1835) 149 Eng. Rep. 1353 (Ex.); 1 C.M. & R. 919.

77. *Id.*; *see* Wigmore, *supra* note 75, at 434–35. *But see* TRAYNOR, *supra* note 1, at 5. Justice Traynor argues that *Crease* set out a standard similar to that announced in *Chapman v. California*, 386 U.S. 18 (1967), despite the fact that more than a century passed before the latter case was decided. *Id.* He explains that in *Crease*, the Court did not require automatic reversal due to the trial court's erroneous exclusion of evidence. *Id.* Instead, the court reversed because, despite its "strong" opinion in favor of the jury's verdict for the plaintiff, it could not say that the evidence would have no effect on the jury. *Id.* at 5–6. The court, later in the opinion, used the phrase "clear beyond all doubt." *Id.* at 5 (citation omitted). Justice Traynor believes that it was the subsequent application of *Crease* by the English courts that created a rigid rule requiring reversal for almost any trial error. *See id.* at 8–9.

78. Wigmore, *supra* note 75, at 435; *see also* Clark, *supra* note 25, at 83.

79. Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, § 4 (Eng.); *see also* Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2032 (2008). *But see* TRAYNOR, *supra* note 1, at 11 (arguing that appellate judges nonetheless rarely dismissed appeals relating to trial errors). The Criminal Appeal Act was in fact Parliament's second attempt at preventing automatic reversal by the courts. *See* Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, sch. 48 (Eng.). In 1873, it had passed the Judicature Act, which applied to civil cases, with little success. *See* TRAYNOR, *supra* note 1, at 10–11; Fairfax, *supra*, at 2032.

80. Wigmore, *supra* note 75, at 435; *see* TRAYNOR, *supra* note 1, at 13–14; *see also supra* note 74 and accompanying text.

81. Waldron v. Waldron, 156 U.S. 361, 380 (1894); *see also* Wigmore, *supra* note 75, at 436 n.4.

"larcey [sic]."[82] The defendant was not charged with the "requisite felonious intent,"[83] merely because of this typographical error. Such liberal determinations diminished the public's confidence in the judiciary and ultimately led to the legislature's enactment of statutes to "rein in the courts."[84]

2. Introduction and Development of the Harmless Error Review Standard

By the twentieth century, Congress had taken measures to ensure that "trial verdicts were not lightly disturbed," particularly where appeal was based on "mere technical errors."[85] Congress passed legislation, which stated that only errors affecting "substantial rights" required reversal.[86] The judiciary, in turn, began to grapple with the interpretation of this legislation, introducing the harmless error review standard in 1946 in the landmark case of *Kotteakos v. United States*.[87] In *Kotteakos*, the Court held that for an error to require reversal due to an effect on substantial rights, the error must have had "substantial influence" on the verdict or left the reviewing court in "grave doubt" as to whether it did substantially influence the verdict.[88] Put differently, the Court assessed the error to determine whether it "had substantial and injurious effect or influence in determining the jury's

82. People v. St. Clair, 56 Cal. 406, 407 (1880).

83. TRAYNOR, *supra* note 1, at 4 (discussing the holding in *St. Clair*).

84. Patton, *supra* note 73, at 102 (quoting Roy Wasson, *The Appellate Process: The Riddling of the* Diguilio *Harmless-Error Standard: Whether Error "Contributed" to the Verdict*, 5 BARRY L. REV. 57, 62–64 (2005)). As an example of the level of public outcry to the rule of automatic reversal, Fairfax cites the creation of the "Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation," which included Justice Felix Frankfurter and President William H. Taft. *See* Fairfax, *supra* note 79, at 2033.

85. *See* Fairfax, *supra* note 79, at 2033 (quoting Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1006 (1973).

86. Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181, *repealed by* Act of June 25, 1948, ch. 646, § 39, 62 Stat. 892, 992. The federal harmless error statute in its current form reads: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (2012). As Justice Traynor emphasized, this language provides little guidance to appellate courts in determining when nontechnical errors are harmless. TRAYNOR, *supra* note 1, at 15. The Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure include Rules emulating this statute. *See* FED. R. CIV. P. 61; FED. R. CRIM. P. 52(a); *see also* Cooper, *supra* note 25, at 314–15 (describing the adoption of Rule 61 of the Federal Rules of Civil Procedure and Rule 52 of the Federal Rules of Criminal Procedure following the enactment of the federal harmless error statute). Likewise, Federal Rule of Evidence 103(a) states that "[a] party may claim error . . . only if the error affects a substantial right of the party." FED. R. EVID. 103(a).

87. 328 U.S. 750, 776 (1946). It has been stated that *Kotteakos* remains the "touchstone" decision for harmless error analysis. *See* Cooper, *supra* note 25, at 316 (citations omitted). The harmless error standard of review is applied in some form in every American jurisdiction. *See* Chapman v. California, 386 U.S. 18, 22 (1967); GERSHMAN, *supra* note 71, at 490.

88. *Kotteakos*, 328 U.S. at 765; *see also* GERSHMAN, *supra* note 71, at 491. The Court later restated the test as whether the error "undermines confidence in the outcome of the trial." Kyles v. Whitley, 514 U.S. 419, 434 (1995) (citation omitted).

verdict."[89] Thus, *Kotteakos* required appellate courts "to substitute judgment for automatic application of rules."[90] In doing so, the Court sought to ensure that a defendant who had been fairly convicted did not have available the "multiplicity of loopholes" stemming from trivial errors.[91]

The standard introduced in *Kotteakos* applies to the evaluation of nonconstitutional errors[92] and is different from the test generally applicable to constitutional trial errors.[93] At the time of *Kotteakos*, cases were "reversed for constitutional error without a word as to the possibility that the error could be harmless."[94]

a. Harmless Error Standard Applied to Constitutional Errors

In 1963, the Court in *Fahy v. Connecticut*[95] stated that the harmless error standard may apply to constitutional errors, though the Court in *Fahy* expressly declined to consider whether the error at issue—the erroneous admission of evidence—was harmless.[96] In *Fahy*, the Court instructed appellate courts to determine whether it was a "reasonable possibility" that the error "might have contributed to the conviction."[97]

It was *Fahy*, however, that the Court relied on a few years later in *Chapman v. California*,[98] when it held that constitutional errors of due process made in the context of a criminal case may be held harmless.[99] The

89. *Kotteakos*, 328 U.S. at 776.

90. *Id.* at 760.

91. *Id.*

92. In *Kotteakos*, the Court noted that its holding likely did not apply to constitutional errors. *Id.* at 764–65 (stating that if the Court ascertained that "the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress"); *see also* Cooper, *supra* note 25, at 317 (same).

93. *See* GERSHMAN, *supra* note 71, at 490–91. Gershman provides some examples distinguishing constitutional from nonconstitutional errors. Evidentiary rulings admitting or excluding evidence and misconduct by a prosecutor or judge are generally nonconstitutional, but errors may "rise to the level of a constitutional violation" if a defendant is deprived of the right to a fair trial under the Due Process Clause or not accorded a different constitutional right. *Id.* at 492.

94. TRAYNOR, *supra* note 1, at 55 (citing Chapman v. California, 386 U.S. 18, 42–44 (1967) (Stewart, J., concurring)).

95. 375 U.S. 85 (1963).

96. *Id.* at 86.

97. *Id.* at 86–87.

98. 386 U.S. at 24 (majority opinion) (stating that "[w]e, therefore, do no more than adhere to the meaning of our *Fahy* case"); *see also* TRAYNOR, *supra* note 1, at 37 (explaining *Chapman*'s adherence to the test set forth in *Fahy*). The Court elaborated, stating that "[t]here is little, if any, difference between our statement in *Fahy* . . . about 'whether there is a reasonable possibility that the evidence . . . might have contributed to the conviction' and requiring . . . constitutional error to [be proven] beyond a reasonable doubt." *Chapman*, 386 U.S. at 24 (quoting *Fahy*, 375 U.S. at 86).

99. *Chapman*, 386 U.S. at 22 ("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.").

Court explained that such errors may be held harmless and thus disregarded if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[100]

Only two years after *Chapman*, in *Harrington v. California*,[101] the Court—holding itself out as applying the harmless error standard set out in *Chapman*—found a constitutional error harmless because of "overwhelming" evidence against the defendant.[102] This application has been described as "much different" and "more prosecution-favorable" as compared with a harmless error analysis "based on whether there is a reasonable possibility that the error might have contributed to the conviction."[103] The two standards remain in tension today, as the Court continues to waver in its application between them.[104] It has been argued, however, that the trend seems to be in favor of the overwhelming evidence test.[105]

Regardless of this apparent tension, over time the courts began to accept the application of the harmless error standard to constitutional errors.[106] Indeed, currently most federal constitutional errors may be held harmless.[107]

Nonetheless, the *Chapman* Court emphasized that there remained certain constitutional errors, often referred to as structural errors, which could never be treated as harmless and so required automatic reversal.[108] The Court provided three examples of such errors: (1) admission of a coerced confession; (2) deprivation of the right to counsel at trial; and (3) lack of an impartial judge.[109]

---

100. *Id.* at 24; *see also* Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say . . . that the constitutional error was harmless beyond a reasonable doubt."). The Court emphasized that the beneficiary of the error bears the burden of proving that there was no injury. *Chapman*, 386 U.S. at 24; *see also* HARRY T. EDWARDS & LINDA A. ELLIOT, FEDERAL COURTS STANDARDS OF REVIEW 88 (Thomson/West ed. 2007). This is in contrast to nonconstitutional errors, for which the defendant bears the burden of proving harmfulness. *See* GERSHMAN, *supra* note 71, at 493 (citations omitted).

101. 395 U.S. 250 (1969).

102. *Id.* at 254.

103. David McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401, 1406–07 (1997).

104. *See id.*; *see also* Fairfax, *supra* note 79, at 2037.

105. McCord, *supra* note 103, at 1406–07; *see also* Fairfax, *supra* note 79, at 2037.

106. EDWARDS, *supra* note 100, at 88.

107. *Id.*; *see also* GERSHMAN, *supra* note 71, at 493 (noting that while initially a finding of harmless constitutional error was the exception, it has become more common as courts have warmed to its application). For examples of constitutional errors that are per se reversible, see *infra* note 109 and accompanying text.

108. Chapman v. California, 386 U.S. 18, 23 (1967).

109. *See id.* at 23 & n.8 (citations omitted). The Court later rejected the view that the admission of a coerced confession required automatic reversal, finding that it was not a structural error. *See* Arizona v. Fulminante, 499 U.S. 279, 309 (1991) (finding admission of an involuntary confession to be a "classic 'trial error'"); *see also* McCord, *supra* note 103, at 1411 (explaining the same).

Approximately twenty-five years after *Chapman*, the Court in *Arizona v. Fulminante*[110] attempted to refine the test for determining whether constitutional error is subject to harmless error review, basing the distinction on whether the error was a trial error or structural error.[111] The Court explained that a trial error is able to "be quantitatively assessed in the context of other evidence," whereas a structural error "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself."[112] Armed with this standard, the Court has only deemed a handful of errors reversible per se since *Fulimante*.[113] Such errors include a finding of "fundamental unfairness" and where the effect of a violation is unascertainable.[114]

b. Harmless Error Standard Applied on Direct and Collateral Review

Aside from analyzing error differently based on whether it is constitutional or nonconstitutional, the Court's analysis has also differed between cases on direct and collateral review.[115]

While direct review is the principle means of challenging a conviction, collateral review, such as via federal habeas proceedings,[116] is "secondary and limited," as it allows for an "extraordinary remedy."[117] As such, "an error that may justify reversal on direct appeal will not necessarily support a

110. 499 U.S. 279 (1991).

111. *Id.* at 307–08.

112. *Id.* at 308, 310. "[T]he term 'structural error' does not refer to constitutional structure; instead, it corresponds to the 'infrastructure' within which a criminal case is tried. Only those constitutional errors that transcend[] the criminal process, and implicate that trial infrastructure or framework, according to *Fulminante*, were reversible per se." Fairfax, *supra* note 79, at 2038 (citation omitted).

113. "A full decade-and-a-half after *Fulminante*'s inventory of those structural constitutional errors subject to automatic reversal, only two additions—a defective reasonable doubt instruction and deprivation of counsel of one's choice—have been made." Fairfax, *supra* note 79 at 2039 (citations omitted). Moreover, between *Chapman* and *Fulminante*, the Court only found five constitutional errors to require automatic reversal: "abridgment of the right to self-representation; abridgment of the right to a public trial; unlawful exclusion of members of the defendant's race from a grand jury; failure to assure an impartial jury in a capital case; and appointment of an interested party's attorney as prosecutor for contempt charges." *See Fulminante*, 499 U.S. at 310; McCord, *supra* note 103, at 1406 (citations omitted). For a further explanation, see *supra* note 112.

114. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006).

115. *See* Brecht v. Abrahamson, 507 U.S. 619, 633 (1993).

116. A writ of habeas corpus, which is provided for state prisoners pursuant to 28 U.S.C. § 2254, asks a federal court to review whether a prisoner's detention is unlawful. *See* 28 U.S.C. § 2254(a) (2012); *see also* LARRY W. YACKLE, FEDERAL COURTS: HABEAS CORPUS 1 (2d ed. 2003). A habeas petition is a rare vehicle through which a federal court can review a state court decision, which is no longer subject to review. *See* YACKLE, *supra*, at 161–64.

117. *Brecht*, 507 U.S. at 633 (quoting Barefoot v. Estelle, 463 U.S. 880, 887 (1983)).

collateral attack on a final judgment."[118] This result protects the state's interest in preserving the finality of its judgments.[119]

Accordingly, with respect to federal habeas corpus proceedings, which involve collateral review of a criminal conviction within the context of a civil trial, the Court in *Brecht v. Abrahamson*[120] held that the *Kotteakos* standard,[121] rather than the *Chapman* standard, should be used to assess nonstructural *constitutional* errors.[122] Thus, the Court instructed that the harmless error test applied determines whether the error has a "substantial and injurious effect or influence in determining the jury's verdict."[123] The Court explained that *Kotteakos*'s "less onerous" standard "promotes the considerations underlying our habeas jurisprudence" and "is better tailored to the nature and purpose of collateral review."[124]

c. Empirical Studies Examining the Harmless Error Standard's Effect on Judgments

While the distinction between the *Chapman* and *Kotteakos* standards is important, as the harmless error test applied may significantly affect whether an error is deemed harmless,[125] it is not wholly clear what impact this has had in practice. Although reversal rates on the whole at the federal appellate level have decreased significantly since 1960, commentators have cited a number of possible reasons for this trend.[126] One scholar has expressed the view that this conclusion could be consistent with the theory

118. *Id.* at 634 (quoting United States v. Frady, 456 U.S. 152, 165 (1982)). The Court further noted that in the past it had applied different standards to habeas proceedings than would be applied on direct review, such as when it decides whether a constitutional decision should apply retroactively to a criminal defendant. *Id.*

119. *Id.* at 635. The Court elaborated that not only would application of the *Chapman* standard in this context undermine the states' interest in finality and infringe upon their sovereignty with respect to criminal matters but granting relief in a habeas proceeding due to a "reasonable possibility" that the trial error affected the verdict directly conflicts with "the historic meaning of habeas corpus—to afford relief to those whom society has 'grievously wronged.'" *Id.* at 637 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

120. 507 U.S. 619 (1993).

121. *Id.* at 637–38.

122. *Id.*; *see also* EDWARDS, *supra* note 100, at 82.

123. *Brecht*, 507 U.S. at 623 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

124. *Id.* In *Brecht*, the Wisconsin Supreme Court affirmed a first-degree murder conviction after determining that, under *Chapman*, though the prosecution's use of the defendant's post-*Miranda* silence for impeachment purposes was impermissible, the error was harmless beyond a reasonable doubt. *See id.* By the time *Brecht* reached the Supreme Court, five prior courts had ruled on this issue. *Id.* at 636. The Court affirmed the conviction of the defendant, finding that the Seventh Circuit had properly applied the *Kotteakos* standard and, based on the merits, the error did not have a substantial and injurious influence on the conviction. *See id.* at 638.

125. Gregory Mitchell, Comment, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CALIF. L. REV. 1335, 1341–52 (1994).

126. Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659, 675 (2007) (citing Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 135 n.42 (2005)).

that judges have found less error in more recent years because they have "less time to look for [it]."[127] Judge Posner has also expressed this view, stating: "the less time an appellate court spends on a case the more likely it is simply to affirm the district court."[128] Further, he noted that "affirmance [is] the easy way out."[129] Judge Posner also attributed lower reversal rates to the fact that there are simply proportionately fewer "hard" cases than there once were.[130]

Studies also show that reversal rates vary by circuit and state, which indicates that other factors, such as the ideology of the panel, may be relevant.[131] Similarly, one scholar has noted that lower reversal rates could indicate a "level of affinity" between judges on the circuit and district courts.[132] The role of the government in proceedings as it relates to a defendant's rights can also have an impact; one commentator recently endorsed the view that "the American prosecutor enjoys an independence and discretionary privileges unmatched in the world."[133] This consideration is particularly acute where a defendant proceeds postconviction without the assistance of counsel.[134]

---

127. *See id*. at 675 (quoting Oldfather, *supra* note 126, at 136).

128. RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 74–75 (2d ed. 1996); *see also* Lindquist, *supra* note 126, at 675–76 (discussing Judge Posner's views and judges' caseloads).

129. POSNER, *supra* note 128, at 75; *see also* Lindquist, *supra* note 126, at 676 (discussing Judge Posner's views and judges' caseloads).

130. POSNER, *supra* note 128, at 75.

131. *See* Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 LAW & SOC'Y REV. 163, 176–78 (2006) (finding a 17 percent reversal rate in the Eleventh Circuit, but a 69 percent reversal rate in the D.C. Circuit between 1980 and 2002); *see also* 24 GEORGE T. PATTON, INDIANA PRACTICE APPELLATE PROCEDURE § 5.1 (3d ed. 2001 & Supp. 2008) (discussing reversal rates on the state level); Lindquist, *supra* note 126, at 702 (discussing diversities in panel ideologies).

132. *See* Lindquist, *supra* note 126, at 676. Lindquist provides ideological similarity, lenient review standards, and cohesive circuit law as motivations for lower reversal rates. *Id.* She also notes that the differences in reversal rates across circuits may be attributable to circuit norms regarding the level of deference to district courts with respect to findings of fact. *Id*. Lindquist cites the First and Second Circuits as circuits where the probability of reversal has recently significantly decreased. *See id.*

133. *See* Michael Edmund O'Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 660 (2010) (quoting Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 568 (1984) (citation omitted)); *see also* CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE 189 (5th ed. 2012) (explaining that Rule 404(a) of the Federal Rules of Evidence "gives a criminal defendant some counterweight against the strong investigative and prosecutorial resources of the government").

134. Christopher T. Robertson, *Contingent Compensation of Post-Conviction Counsel: A Modest Proposal to Identify Meritorious Claims and Reduce Wasteful Government Spending*, 64 ME. L. REV. 513, 519 (2012). Robertson elaborates: "Proceeding [without counsel] is particularly dangerous because state [and federal] post-conviction procedures are generally marked by strict pleading requirements, inflexible filing deadlines, elaborate preclusion doctrines, and other technical pitfalls that cannot practicably be navigated without highly skilled counsel." *Id.* (quoting Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 354 (2006)).

But the harmless error standard specifically has also affected the decrease in reversal rates.[135] The Court has emphasized that the harmless error standard "promotes public respect . . . by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error"[136] and argues it is a defense against litigants' abuse of the process and, more generally, ensures public faith in the judicial process.[137]

3. The Harmless Error Standard as Applied to Alternative Theory Jury Instructions

The current divergence among the circuits in their application of the harmless error standard to alternative theory errors did not materialize until after *Hegdpeth*, in particular because alternative theory errors were not originally subjected to harmless error review. In the earlier Supreme Court case of *Stromberg v. California*,[138] the Court applied a much stricter test, holding that it was a constitutional error to instruct a jury on alternative theories of guilt, one of which was legally invalid, and return a general verdict that may have relied on the legally invalid theory.[139] At that time, as discussed above,[140] a constitutional error warranted automatic reversal of the conviction.[141]

---

135. *See generally* Lindquist, *supra* note 126, at 676; Mitchell, *supra* note 125, at 1341–52. Notably, a study providing empirical information about habeas corpus motions filed by state prisoners in federal district courts under the Antiterrorism and Effective Death Penalty Act of 1996 found that only 4 out of 267 capital cases and 4 out of 2384 noncapital cases held an error not harmless. *See* NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 50, 52, 63 (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf. For an explanation of habeas proceedings, see Devon Lash, Note, *Giving Meaning to "Meaningful Enough": Why* Trevino *Requires New Counsel on Appeal*, 82 FORDHAM L. REV. 1855, 1862–63 (2014).

136. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

137. TRAYNOR, *supra* note 1, at 50.

138. 283 U.S. 359 (1931).

139. *Id.* at 367–68; *see also* Yates v. United States, 354 U.S. 298 (1957). In *Stromberg*, the defendant, a member of the Young Communist League (an affiliate of the Communist Party), had been convicted in state court for displaying a red flag in a public place in violation of California's Penal Code. *See Stromberg*, 283 U.S. at 361–62. The statute at issue consisted of three purposes, which the trial court treated disjunctively. *Id.* at 364–65. The trial court instructed the jury that it could find in favor of the government if any one purpose was met. *Id.* at 386. Consequently, because the defendant had been convicted pursuant to a general verdict, the Court held that the prosecution needed to show that each clause within the statute was valid in order to uphold the conviction. *See id.* at 365. The Court found the first clause of the statute was ambiguous and indefinite, as it could conceivably encompass conduct that California "could not constitutionally prohibit." *Id.* at 369. Thus, it ultimately deemed the statute unconstitutional because it violated the defendant's First and Fourteenth Amendment rights. *Id.* The Court vacated the defendant's conviction. *Id.*

140. *See supra* Part I.B.2.

141. *See* Hedgpeth v. Pulido, 555 U.S. 57, 60 (2008) (per curiam) (discussing how *Stromberg* was decided at a time when constitutional errors could not be held harmless). While most federal constitutional errors can be held harmless, there are two primary exceptions: structural errors and errors involving constitutional rights that require a defendant to demonstrate harm. *See* EDWARDS, *supra* note 100, at 88 (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006); Kyles v. Whitley, 514 U.S. 419, 433–34 (1995)).

Following *Chapman*, which confirmed that constitutional errors could be subjected to harmless error review, however, the Court concluded in a series of cases that instructional error was not structural error requiring automatic reversal but instead a trial error subject to harmless error review.[142] For example, in *Neder v. United States*,[143] the Court held that the omission of an element of the relevant offense in a jury instruction was subject to harmless error review[144] and stated that to determine whether an error was harmless, a reviewing court must ask "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element."[145] In providing this standard, the Court relied significantly upon matters of public policy,[146] expressing its view that "where an omitted element is supported by uncontroverted evidence," applying harmless error review allows for "an appropriate balance between 'society's interest in punishing the guilty [and] the method by which decisions of guilt are made.'"[147] The Court described this balance in further detail. On the one hand, the Court noted the importance of a fair trial, which "promotes public respect for the criminal process."[148] On the other hand, it highlighted the importance of not becoming a slave to procedure, explaining that jury trials are intended "to guard against a spirit of oppression and tyranny on the part of rulers" in a broad sense.[149] Thus, the Court came to the conclusion that "where a defendant did not, and apparently could not, bring forth facts contesting the omitted element"—such as in the instant case—"answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee."[150]

It was against this backdrop that the Court in 2008 decided *Hedgpeth v. Pulido*.[151] In *Pulido*, the Court held that a general verdict rendered by a jury following instruction on alternative theories of guilt, one of which was

142. *Pulido*, 555 U.S. at 60. Other than *Neder v. United States*, 527 U.S. 1 (1999), the Court also cited the following examples: *Pope v. Illinois*, 481 U.S. 497 (1987) (based on the misstatement of an element of an offense) and *Rose v. Clark*, 478 U.S. 570 (1986) (based on erroneous burden-shifting as to an element of an offense). *Id.* at 60–61.

143. 527 U.S. 1 (1999).

144. *Id.* at 4. In *Neder*, the defendant was charged with fraud, including tax fraud, under a number of federal criminal statutes for activities in connection with fraudulently obtaining bank loans. *Id.* These statutes include: 18 U.S.C. §§ 1341, 1343–44 and 26 U.S.C. § 7206(1). *Id.* at 6. The trial court had erroneously instructed the jury that to convict the defendant of the tax fraud offenses, it did not need to consider the materiality of any false statements made. *Id.* The Court agreed with the Eleventh Circuit that this error was subject to harmless error analysis, finding that "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair." *Id.* at 7, 9; *cf.* Johnson v. United States, 520 U.S. 461, 469 (1997) ("The failure to submit materiality to the jury . . . can just as easily be analogized to improperly instructing the jury on an element of the offense . . . an error which is subject to harmless-error analysis . . . .").

145. *Neder*, 527 U.S. at 19.

146. *See id.* at 18–19.

147. *Id.* at 3 (quoting Connecticut v. Johnson, 460 U.S. 73, 86 (1983) (plurality opinion)).

148. *Id.* at 18–19 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).

149. *Id.* at 19 (quoting United States v. Gaudin, 515 U.S. 506, 510–11 (1995)).

150. *Id.* at 18–19.

151. 555 U.S. 57 (2008) (per curiam).

invalid, may amount to a harmless error.[152] The Court stated that to determine whether an erroneous instruction is harmless on collateral review, the reviewing court should ask "whether the flaw in the instructions 'had substantial and injurious effect or influence in determining the jury's verdict.'"[153] The Court elaborated that a reviewing court need not require "absolute certainty" that the jury relied on the valid ground.[154]

While the Court did not further elaborate on how to apply this standard,[155] it explicitly rejected reliance on an earlier line of cases, beginning with *Stromberg*, which had required automatic reversal for constitutional error in the case of an erroneous jury instruction.[156] The Court emphasized that a substantial and injurious effect should not be presumed because a general verdict form[157] had been used.[158]

In 2010, the Court in *Skilling v. United States* clarified that the harmless error review standard set out in *Pulido*, which had been decided on collateral review, applied equally to cases on direct appeal.[159] Accordingly, alternative theory jury instruction errors, though considered constitutional in character, may be subjected to a standard reserved primarily for nonconstitutional errors.[160]

Moreover, the *Skilling* decision is representative of the cases that have since led to divergent interpretations and applications by circuit courts concerning alternative theory errors. In *Skilling*, the jury delivered a general verdict finding the former CEO of Enron Corporation guilty after it was provided with instructions that allowed for conviction of conspiracy for misleading investors by fraudulently manipulating Enron's financial statements under a number of theories, including securities fraud and honest services fraud.[161] The defendant appealed, and the Court eventually granted certiorari.[162] In its review, the Court significantly narrowed the scope of honest services fraud, holding that the statute criminalizes only bribery and kickbacks, thus eliminating the statute's applicability to the

152. *Id.* at 58.

153. *Id.* (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)).

154. *Id.* at 58, 62 (quoting *Brecht*, 507 U.S. at 623). In *Pulido*, the jury had been instructed that the defendant could be found guilty of felony murder if the defendant had the intent to aid and abet in the underlying felony, either before or after the murder had occurred. *Id.* at 59. The jury convicted the defendant of felony murder pursuant to a general verdict. *Id.* The California Supreme Court held that under state law the theory allowing for conviction based on the intent formed after the murder was invalid, and accordingly, that portion of the instruction was too. *Id.* Nonetheless, it found the error harmless. *Id.*

155. *See, e.g.*, United States v. McKye, 734 F.3d 1104, 1113 (10th Cir. 2013) (Briscoe, J., concurring) (stating that the Court did not provide guidance on applying this standard in this context); Babb v. Lozowsky, 719 F.3d 1019, 1034 (9th Cir. 2013) (same), *overruled on other grounds by* Moore v. Helling, No. 12-15795, 2014 WL 3973407 (9th Cir. Aug. 15, 2014).

156. *See Pulido*, 555 U.S. at 60.

157. For a discussion on the general verdict form, see *supra* Part I.A.2.

158. *Pulido*, 555 U.S. at 62.

159. Skilling v. United States, 561 U.S. 358, 464 n.46 (2010). For a closer review of *Skilling*, see *infra* Part II.A.

160. *See* discussion *supra* Part I.B.2.b.

161. United States v. Skilling, 638 F.3d 480, 481, 488 (5th Cir. 2011).

162. *See id.* at 481.

defendant's case.[163] The Court did not reverse any of the defendant's convictions but remanded the case to the Fifth Circuit to determine whether the error in the honest services instruction was harmless.[164] The Fifth Circuit's approach, which is discussed in more detail below,[165] reveals the stark contrast between its line of analysis and that seemingly followed by the circuits placing a heavier burden on the government.[166]

II. ALTERNATIVE THEORIES: THE CIRCUITS' DIVERGING APPLICATIONS OF THE HARMLESS ERROR REVIEW STANDARD TO ALTERNATIVE THEORY ERRORS

The circuit courts are divided in their application of the harmless error review standard to alternative theory errors. Since *Pulido*, some courts have adjusted the test that they apply, allowing for a lesser burden on the government to sustain a conviction, while others have seemed to continue to follow an approach that harkens back to the *Stromberg* line of cases. This section will lay out in detail the varying approaches of the circuit courts.

A. Circuits Maintaining a Heavy Burden on the Government to Defend Harmlessness

This section examines circuit court decisions from the Tenth, Second, Fourth, and Seventh Circuits that have continued post-*Pulido* to place a heavy burden on the government to defend harmlessness.

---

163. *Skilling*, 561 U.S. at 408; *see also Skilling*, 638 F.3d at 481. The Court made this decision in response to Skilling's argument that the honest services fraud statute (18 U.S.C. § 1346) was unconstitutionally vague. *See Skilling*, 561 U.S. at 398–99.

164. *See Skilling*, 561 U.S. at 398–99.

165. *See infra* Part II.B.

166. Furthermore, the Fifth Circuit's approach sheds light on the Supreme Court's additional distinction between honest services fraud and securities fraud. The government had introduced evidence at trial that the defendant had made misleading statements to Enron's board of directors, some of which were not communicated to the public. *See Skilling*, 638 F.3d at 484 n.4. As such, the court opined, "[T]his evidence would prove honest-services fraud," which no longer applied to the defendant, "*but not securities fraud*," which was the valid remaining theory for the defendant's conspiracy charge. *See id.* (emphasis added). The evidence would not prove securities fraud because the Court's standard set out in *Basic Inc. v. Levinson* applies a semi-strong fraud-on-the-market theory (that is based on the Efficient Capital Markets Hypothesis), which stands for the proposition that all publicly available information (including public material misrepresentations) are reflected in the market price of shares. *See* Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988) ("An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action."); *see also* Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2416 (2014) (upholding *Basic*'s fraud-on-the-market presumption while allowing for a rebuttal of this presumption at the class-certification stage); *cf.* WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 673 (4th ed. 2012) (discussing the Efficient Capital Markets Hypothesis). The strong form theorizes that share prices reflect all past information, such that no public disclosure is required. *See* ALLEN ET AL., *supra*, at 673.

1. Tenth Circuit

The Tenth Circuit has held that, where one ground for conviction is invalid, the only way that a verdict may be sustained is if it is possible to determine that the jury relied on the valid ground or "necessarily made the findings required to support a conviction on the valid ground."[167]

In *United States v. McKye*,[168] a jury convicted the defendant of both securities fraud and conspiracy to commit money laundering.[169] The securities fraud statute under which the defendant was charged required that the fraud involve a "security."[170] The district court judge had instructed the jury that, as a matter of law, all notes were securities under the statute[171] (but not, however, that the investment notes at issue—known as "Premium 60 Accounts"—were themselves notes).[172] The defendant appealed, arguing that his convictions could not stand because the jury had been erroneously instructed that, as a matter of law, the term security includes a note.[173] The Tenth Circuit agreed with the defendant that whether a note is a security is a mixed question of fact and law under Supreme Court precedent.[174] The Tenth Circuit found that because the government was required to prove as an element of its case that the notes at issue were securities, the district court had erred in its instruction.[175]

While the government argued that the record contained "ample facts" from which the jury could have made the determination that the notes at issue were securities, the Tenth Circuit emphasized that the government did not provide even one citation to the record to support its argument.[176] Accordingly, the Tenth Circuit found that this error required reversal because the government had failed to show that it was harmless beyond a

---

167. United States v. McKye, 734 F.3d 1104, 1110 n.6 (10th Cir. 2013) (citation omitted). The *McKye* majority relied on *United States v. Holly*, 488 F.3d 1298 (10th Cir. 2007), and *United States v. Holland*, 116 F.3d 1353 (10th Cir. 1997), *overruled on other grounds by* Bousley v. United States, 523 U.S. 614 (1998), which were decided prior to *Pulido*, as noted by Chief Judge Briscoe in her concurrence. *Id.* at 1112 (Briscoe, J., concurring).

168. 734 F.3d 1104 (10th Cir. 2013).

169. *Id.* at 1105 (majority opinion).

170. The defendant was charged with eight counts of securities fraud under 15 U.S.C. § 78j(b) and one count of conspiracy to commit money laundering under 18 U.S.C. § 1956(h). *Id.*

171. *Id.* at 1107.

172. *Id.* at 1110.

173. *Id.* at 1105.

174. *Id.* at 1110. The court relied on *United States v. Gaudin*, 515 U.S. 506 (1995), *Reves v. Ernst & Young*, 494 U.S. 56 (1990), and *McNabb v. SEC*, 298 F.3d 1126 (9th Cir. 2002), to make this determination. *Id.* at 1108–10.

175. *Id.* at 1110.

176. *Id.* The Tenth Circuit elaborated that while the evidence may exist in the record, "it is not the responsibility of this court to comb the record to find it." *Id.* at 1110–11; *see also* Brief of Plaintiff-Appellee at 34, *McKye*, 734 F.3d 1104 (No. 12 Cr. 06108) ("The government presented ample facts from which the jury could determine whether or not the defendant engaged in fraudulent conduct in connection with the purchase or sale of any security. And from that, the jury could also determine whether or not the instruments used properly fell within that definition." (internal citations omitted)).

reasonable doubt.[177] Consequently, the Tenth Circuit reversed, holding that the government did not meet its burden of showing that the conviction was "uncontested and supported by overwhelming evidence."[178]

2. Second Circuit

Following the Supreme Court's holding in *Skilling*, which, as discussed above,[179] narrowed the scope of honest services fraud to encompass only mail fraud prosecutions involving bribery or kickbacks, the Second Circuit stated that to determine whether a *Skilling* error is harmless, it looks to see whether a "reasonable probability" exists that the error in the instructions "affected the outcome of the trial."[180]

A court in the Southern District of New York applied this holding in *United States v. Post*,[181] finding that a *Skilling* instruction error was not harmless.[182] In *Post*, the defendants were each charged with one count of conspiracy to commit mail fraud or honest services fraud and one count of substantive mail fraud or honest services fraud.[183] The activities underlying these charges involved three different but related fraudulent schemes

177. *McKye*, 734 F.3d at 1110 (citing United States v. Holly, 488 F.3d 1298, 1307 n.7 (10th Cir. 2007)).

178. *Id.* (quoting *Holly*, 488 F.3d at 1307). Judge Briscoe wrote separately solely to "voice [her] concern" that the harmless error standard of review expressed in *Holly* may be inconsistent with *Pulido*. *Id.* at 1111 (Briscoe, J., concurring). She emphasized that *Holly* relied on *Stromberg v. California*, 283 U.S. 359 (1931), which *Pulido* explicitly repudiated, as it was decided before the Supreme Court had held that constitutional errors may be subjected to harmless error review. *Id.* at 1112. She further explained that she concurred in judgment because she was bound by the circuit's precedent and the government did not attempt to establish that the jury verdict had rested on the valid theory. *Id.* at 1114.

179. *See supra* notes 159–66 and accompanying text. This type of error is often referred to as *Skilling* error.

180. United States v. Marcus, 560 U.S. 258, 262 (2010); *see also* United States v. Post, 950 F. Supp. 2d 519, 532 (S.D.N.Y. 2013); *cf.* United States v. Nouri, 711 F.3d 129, 140 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 309 (2013) (finding an alternative instruction error harmless where the Second Circuit had "no doubt that, had the jury been properly instructed, it would have found the defendants guilty of honest services wire fraud based on their scheme of concealed bribery," because it had relied on the *same* facts in convicting the defendants pursuant to the federal commercial bribery statutes); United States v. Botti, 711 F.3d 299, 311 (2d Cir. 2013) (conviction for honest services affirmed despite *Skilling* error—though not alternative instruction error—where "bribery was the only theory that the evidence would support and the only theory that the Government argued at trial"). Also in *Botti*, the Second Circuit stated that it "has reversed in cases . . . where the Government argued a non-bribery or -kickback scheme theory of honest services mail fraud, or where the Government *intertwined an alternative theory with a bribery or kickback scheme*." *Botti*, 711 F.3d at 311 (emphasis added).

181. 950 F. Supp. 2d 519 (S.D.N.Y. 2013).

182. *Id.* at 538.

183. *Id.* at 523. The specific language in the indictment framed the conspiracy charge as an intent "to devise a scheme and artifice to defraud, and to deprive the City . . . and its citizens of their intangible right to the honest services of [defendant] and to deprive the City . . . [and] its citizens . . . of money and property" by, among other things, concealing the personal and financial relationship between the defendants. *Id.* (citation omitted). The indictment framed the substantive mail fraud count to encompass the use of the mail to carry out the conspiracy scheme. *Id.* The jury instructions tracked the language in the indictment. *Id.* at 525.

committed by the two defendants, who had a close personal and financial relationship.[184] Under the first scheme, it was alleged that defendant Post, through her official position in two agencies that received federal funding, had helped defendant Charles receive that same funding.[185] Charles submitted proposals to the city for review, and Post would then recommend the city accept the proposals.[186] Charles's company, however, was only a front with no experience in the relevant industry.[187] Throughout this scheme, the defendants concealed their personal relationship.[188] The second scheme involved Post recommending that an entity owned by Charles receive a loan; once Charles's entity received the loan, it did not make interest payments on the loan for a time, though Post did not record this.[189] The third scheme involved Post's approval of federal funds to entities controlled by Charles, again without disclosure of their personal relationship.[190] The jury convicted both defendants on each count by general verdict.[191] Following the Supreme Court's holding in *Skilling*,[192] the defendants filed a motion to dismiss their conspiracy and substantive mail fraud convictions.[193] They argued that dismissal of the convictions was proper because the jury may have relied on the erroneous honest services fraud theory instruction.[194] Specifically, the defendants noted that the jury instruction allowed the jury to convict the defendants of mail fraud "based on *either* its finding of traditional pecuniary fraud *or* its finding of honest services fraud."[195]

The court agreed that the honest services fraud jury instruction was erroneous, and citing *Pulido*, proceeded to apply harmless error review.[196] Notably, the government argued that the instruction error was harmless because of the "overwhelming" evidence of traditional pecuniary fraud presented to the jury at trial.[197] The court rejected this argument as

184. *Id.* at 523.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 522, 526. The defendants were convicted under 18 U.S.C. §§ 1341, 1346, and 1349. *Id.* at 522.
192. *See supra* notes 159–66 and accompanying text.
193. *See Post*, 950 F. Supp. 2d at 522 (citing FED. R. CRIM. P. 12(b)(3)). The defendants' case was still pending because the district court had granted the defendants' request to delay sentencing until after certain Supreme Court cases, including *Skilling*, were decided. *Id.* at 527. The court noted that the defendants' motion alleged more than simply a defect in the indictment, which is encompassed by Rule 12(b)(3)(B), but nonetheless decided to consider the issue because "an indictment's defects can affect a defendant's substantive rights at trial." *Id.* at 528 (citations omitted).
194. *Id.* at 527.
195. *Id.* at 528.
196. *Id.* at 529. The court also cited *Neder v. United States*, 527 U.S. 1 (1999), for this proposition, which *United States v. Hedgpeth*, 555 U.S. 57 (2008) (per curiam), had endorsed. *Id.*
197. *Id.* at 533.

insufficient to sustain the defendants' convictions.[198] The court emphasized that in its assessment it looked to see 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."[199] Instead, the court found the error was not harmless.[200]

In conducting its analysis, the court compared cases that had ordered reversal due to *Skilling* error with those that had instead found the error harmless.[201] For example, in *Martignoni v. United States*,[202] a court in the Southern District of New York found that a *Skilling* error was not harmless.[203] The court came to this conclusion largely because the honest services theory had been the "central feature" of the relevant counts, and so it was clear that the court was unable to establish under which theory the jury had convicted the defendant.[204] *Martignoni* is an example of cases that are deemed not harmless because "the evidence that would go to a valid conviction was not overwhelming" and "the government repeatedly urged the jury to convict purely on the basis of a conflict-of-interest theory."[205]

In contrast, the court cited a Third Circuit case, *United States v. Andrews*,[206] as representative of a harmless *Skilling* error.[207] In *Andrews*, despite an invalid honest services theory instruction, the Third Circuit determined that the error was harmless because that theory was incidental to

198. *Id.*

199. *Id.* at 534 (citing Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)). The court continued, explaining that if "overwhelming proof that a defendant committed some valid crime was *alone* sufficient" to amount to a harmless instructional error, "then so long as the Government presents overwhelming evidence for conviction of *some* crime, a conviction could stand no matter how pervasively incorrect instructions suffused the proceedings and how strongly the Government stressed the incorrect theory in its opening and closing statements." *Id.*

200. *Id.* at 533, 541.

201. *See id.* at 534–35.

202. No. 10-CV-6671, 2011 WL 4834217 (S.D.N.Y. Oct. 12, 2011).

203. *See id.* at *10. The *Post* court cited other similar cases in which the evidence was not overwhelming and where the government urged the jury to convict purely on the basis of a conflict-of-interest theory. *See Post*, 950 F. Supp. 2d at 535 (citing United States v. Mahaffy, 693 F.3d 113, 136 (2d Cir. 2012); United States v. Bruno, 661 F.3d 733, 740–41 (2d Cir. 2011)).

204. *See Post*, 950 F. Supp. 2d at 535 (quoting *Martignoni*, 2011 WL 4834217, at *7, *10).

205. *See id.* (citing *Mahaffy*, 693 F.3d at 136, and *Bruno*, 661 F.3d at 740–41, as other such cases).

206. 681 F.3d 509 (3d Cir. 2012). Chief Judge Briscoe's concurrence in *United States v. McKye* also cites *United States v. Andrews* as a comparison to the Fifth Circuit's approach in *United States v. Skilling*. *See* United States v. McKye, 734 F.3d 1104, 1113 (10th Cir. 2013) (Briscoe, J., concurring) ("Where there is a clear alternative theory of guilt, supported by overwhelming evidence, a defendant likely cannot show that an instruction permitting the jury to convict on an improper basis was not harmless error." (quoting *Andrews*, 681 F.3d at 521)).

207. *Post*, 950 F. Supp. 2d at 536–37.

the case, and the more prominent pecuniary fraud theory did not contain an error.[208]

The *Post* court determined that the instant case "seem[ed] to fall somewhere in between the center of gravity of each group of cases."[209] Engaging in a "multi-factor inquiry,"[210] the court found the error to be not harmless because the theory involving the erroneous instruction *pervaded through the case* more significantly than in cases where an error was deemed harmless.[211]

The court ultimately concluded that, based on evidence presented to the jury—such as the fact that the government mentioned the honest services theory in its closing argument and the fact that the jury was told it could convict under an honest services fraud theory and not a pecuniary fraud theory—it could not find that the error was harmless beyond a reasonable doubt.[212]

3. Fourth Circuit

The Fourth Circuit has also maintained a heavier burden on the government to demonstrate that an error is harmless. The Fourth Circuit has stated that it would affirm a conviction only if "the evidence that the jury necessarily credited in order to convict the defendant under the instructions given . . . is such that the jury must have convicted the defendant on the legally adequate ground in addition to or instead of the legally inadequate ground."[213]

In *Bereano v. United States*,[214] the defendant (a lawyer and lobbyist) was convicted of mail fraud for defrauding his lobbying clients under theories of both honest services fraud and pecuniary fraud.[215] The defendant ran a fraudulent billing scheme, where he would funnel cash through his law firm

---

208. *Andrews*, 681 F.3d at 520, 525–26; *see also Post*, 950 F. Supp. 2d at 537 (characterizing the invalid honest services theory in *Andrews* as "merely incidental"). The Third Circuit emphasized that it based the determination on "the context in which the instruction was provided and the other evidence presented at trial." *Andrews*, 681 F.3d at 522.

209. *Post*, 950 F. Supp. 2d at 537.

210. *Id.* at 534.

211. *Id.* at 537. The court also rejected the government's argument that the theories overlapped entirely. *Id.* at 531, 541 ("Ultimately, then, because the Government opted to articulate two overlapping but distinct theories of fraud, it may not now say that conviction on an honest services fraud theory was the exact same as conviction on the money or property fraud theory.").

212. *Id.* at 538 (citing Neder v. United States, 527 U.S. 1, 16 (1999)).

213. Bereano v. United States, 706 F.3d 568, 578 (4th Cir. 2013) (quoting United States v. Jefferson, 674 F.3d 332, 361 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 648 (2012)).

214. 706 F.3d 568, 578 (4th Cir. 2013).

215. *Id.* at 570. The defendant had been charged with eight counts of mail fraud in violation of 18 U.S.C. §§ 1341 and 1346, which involved two separate theories of mail fraud. *Id.* Section 1341 criminalizes using mail for the purpose of executing "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses," while § 1346 is defined more broadly to include "a scheme or artifice to deprive another of the intangible right of honest services." *See* 18 U.S.C. §§ 1341, 1346 (2012); *Bereano*, 706 F.3d at 570 & n.2.

and use it to contribute to various political candidates rather than for the ostensible purpose of his law firm operations.[216] For example, the defendant would issue a check to a law firm employee, seemingly for office purposes, and then have that employee deliver the proceeds of the check to him.[217] The proceeds would ultimately be made into a political contribution.[218] The defendant would then falsely bill a lobbying client for items such as "legislative entertainment" and thereby funnel the cash back into his law firm.[219]

Following the Supreme Court's holding in *Skilling*, which narrowed the scope of honest services fraud to encompass only mail fraud prosecutions involving bribery or kickbacks,[220] the defendant petitioned for a writ of *coram nobis*[221] to vacate his sentence.[222] The district court denied the defendant's petition, though the court admitted the error with respect to the honest services fraud conviction because the defendant's indictment had not contained allegations of bribery or kickbacks.[223] The court upheld the conviction because it determined that the pecuniary fraud theory under which the defendant had also been charged was unaffected by the Supreme Court's honest services fraud decision and so the conviction remained intact.[224] The court explained that the defendant was nonetheless guilty under the pecuniary fraud theory because he had used the mail to defraud his lobbying clients of their money and property, as required under 18 U.S.C. § 1341.[225] The court agreed with the government that the defendant could not have been convicted of the mail fraud charges without the jury necessarily finding the defendant guilty under the pecuniary fraud theory, and as such, the court determined that the honest services theory error was harmless beyond a reasonable doubt.[226]

The Fourth Circuit agreed and affirmed the defendant's conviction because it found that a reasonable jury could not both acquit the defendant of a form of pecuniary fraud and convict him of honest services fraud, where both frauds related to the same false billing scheme.[227] It endorsed

---

216. *Bereano*, 706 F.3d at 570.
217. *Id.*
218. *See id.*
219. *Id.*
220. *Id.* at 569; *see also supra* notes 161–66 and accompanying text (discussing Skilling v. United States, 561 U.S. 358, 358 (2010)).
221. A writ of *coram nobis* is brought as a means to challenge an alleged error of fact that does not appear in the record. *See* Deborah F. Harris, Annotation, *Application of Civil or Criminal Procedural Rules in Federal Court Proceeding on Motion in Nature of Writ of Error* Coram Nobis, 53 A.L.R. FED. 762 (1981).
222. *Bereano*, 706 F.3d at 570.
223. *Id.* at 569, 575.
224. *Id.* at 569.
225. *Id.* at 575.
226. *Id.*
227. *Id.* at 579. While acknowledging that an alternative theory error is subject to harmless error review, the Fourth Circuit relied on *Yates v. United States*, 354 U.S. 298 (1957), in its determination of whether the error was harmless. *Id.* at 577. *Yates* instructs that a general verdict of guilty should be set aside if it rests on two alternative theories, one

the district court's rationale that such a different result would be inconsistent because a conviction stemming from an honest services fraud charge "necessarily acknowledges that the jury accepts . . . that [the defendant] knowingly took advantage of his client[s'] trust by sending them false bills."[228] Thus, "the jury also necessarily accepted that [the defendant] knowingly obtained his clients' money by false pretenses," which the Fourth Circuit reasoned "equates to a conviction for pecuniary fraud."[229]

4. Seventh Circuit

Similarly, the Seventh Circuit has stated that it would deem an error harmless only if "the trial evidence was such that the jury must have convicted the petitioners on both theories."[230]

In *Sorich v. United States*,[231] the defendant, an employee in Chicago Mayor's Office, had been convicted of mail fraud under both theories of honest services fraud and pecuniary fraud.[232] The activities underlying his conviction involved engaging in a fraudulent scheme to ensure that certain political workers and employees gained employment with the City of Chicago, despite a court order that forbade awarding city jobs for political reasons.[233]

The Seventh Circuit affirmed the defendant's conviction, rejecting his argument that the district court's erroneous honest services fraud theory required reversal.[234] Instead, the Seventh Circuit determined that the error had no "substantial and injurious effect or influence" in determining the jury's verdict,[235] because the court found that the theories of fraud under which the defendant was charged were "coextensive" and premised on a

---

of which is invalid, and it is "impossible to tell which ground the jury selected." *Yates*, 354 U.S. at 312.

228. *Bereano*, 706 F.3d at 579 (citation omitted).

229. *Id.* (citation omitted). In *Bereano*, the Fourth Circuit relied on its precedent, *United States v. Jefferson*, 674 F.3d 332 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 648 (2012). *Id.* at 578. In *Jefferson*, the Fourth Circuit applied the Supreme Court principle espoused in *Neder*, finding the honest services error harmless beyond a reasonable doubt; it explained that the jury had necessarily found facts supporting the defendant's convictions under the bribery honest services theory by finding the defendant guilty of the substantive bribery violations. *See Jefferson*, 674 F.3d at 362–63.

230. Sorich v. United States, 709 F.3d 670, 674 (7th Cir. 2013). Stated differently, the Seventh Circuit elaborated that "if the evidence on the two fraud theories was so thoroughly coextensive that the jury could only find the defendant guilty or not guilty of both, then the conviction will stand even though one theory is later held to be legally invalid." *Id.* (quoting Turner v. United States, 693 F.3d 756, 759 (7th Cir. 2012)).

231. 709 F.3d 670 (7th Cir. 2013).

232. *Id.* at 672–73. The defendant had been charged with four counts of mail fraud in violation of 18 U.S.C. §§ 1341 and 1346 and was found guilty on two counts. *See id.* at 672–73. For more detail on the statute, see *supra* note 215.

233. *Sorich*, 709 F.3d at 672, 675. The Seventh Circuit had determined that the relevant jobs constituted employment for purposes of the statute. *See id.* at 677 (citation omitted).

234. *Id.* at 671.

235. *Id.* at 674 (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)).

"single scheme," such that "any honest services violation had to be premised on money/property fraud."[236]

B. Circuits Maintaining a Less Demanding Burden on the Government to Defend Harmlessness

This section examines circuit and district court decisions from the Ninth and Fifth Circuits that have placed a less demanding burden post-*Pulido* on the government to defend harmlessness.

1. Ninth Circuit

The Ninth Circuit looks to see whether there is a "reasonable probability" that the jury convicted the defendant on the valid ground.[237]

In *Babb v. Lozowsky*,[238] the defendant was charged with robbery and murder.[239] The jury was given two instructions, premised on different theories, under which it could find the defendant guilty of first-degree murder.[240] The first instruction detailed the findings necessary to convict the defendant under a theory of "willful, deliberate and premeditated killing," while the second instruction detailed the findings necessary to convict the defendant under a theory of felony murder.[241] The jury convicted the defendant by general verdict of first-degree murder with a deadly weapon and robbery with a deadly weapon.[242]

The defendant subsequently petitioned for a writ of habeas corpus, which the District of Nevada granted.[243] The district court granted relief based on its determination that: (1) the first instruction provided to the jury was unconstitutional because it blurred the distinction between the premeditation and deliberation elements underlying the first-degree murder theory, thus erroneously relieving the government of its requisite burden to prove each element of the offense;[244] and (2) *Byford v. State*,[245] a Nevada Supreme Court case, which narrowed the conduct that qualified as first-

236. *Id.*

237. Babb v. Lozowsky, 719 F.3d 1019, 1034 (9th Cir. 2013), *overruled on other grounds by* Moore v. Helling, No. 12-15795, 2014 WL 3973407 (9th Cir. Aug. 15, 2014). After stating that *Pulido* did not provide guidance on how to assess the impact of an erroneous instruction in the context of a general verdict, the Ninth Circuit explained that "[g]enerally, however, when considering whether erroneous instructions constitute harmless error, courts ask whether it is reasonably probable that the jury would still have convicted the petitioner on the proper instructions." *Id.* at 1034 (citing Belmontes v. Brown, 414 F.3d 1094, 1139 (9th Cir. 2005), *rev'd on other grounds sub nom.* Ayers v. Belmontes, 549 U.S. 7 (2006)).

238. 719 F.3d 1019 (9th Cir. 2013), *overruled on other grounds by* Moore v. Helling, No. 12-15795, 2014 WL 3973407 (9th Cir. Aug. 15, 2014)

239. *Id.* at 1024.

240. *Id.*

241. *Id.* Felony murder is murder that is committed during the perpetration of certain felonies, including robbery. *See id.*

242. *Id.* at 1022.

243. *Id.* For a description of the writ of habeas corpus, see *supra* note 116.

244. *See Babb*, 719 F.3d at 1025. Specifically, the first instruction failed because it did not provide independent definitions for "deliberation" and "premeditation." *See id.* at 1028.

245. 994 P.2d 700 (Nev. 2000).

degree murder by expanding and separating the premeditation, deliberation, and willfulness prongs, applied to the defendant because her conviction was not final at the time *Byford* was decided.[246] The district court conducted a harmless error review and found that the error in the first instruction was not harmless because the court had "grave doubt" as to whether the jurors had relied on the valid felony murder theory.[247] The State appealed the district court's judgment.[248]

The Ninth Circuit reversed the district court's holding, though it determined that the state court holding contained an error subject to harmless error review.[249] The court emphasized that harmless error review was appropriate under *Pulido* despite the fact that the defendant had been convicted pursuant to a general verdict.[250] The Ninth Circuit explained that it was unnecessary to determine whether the jury would have nonetheless convicted the defendant had it been properly instructed, because the court determined, with reasonable probability, that the jury had found the defendant guilty under the valid felony murder theory. Accordingly, the erroneous premeditation instruction[251] did not have a substantial effect on the jury's decision.[252] The court emphasized that it was not holding that the jury *could* have convicted the defendant based on the valid felony murder theory, but rather, under its interpretation of *Pulido*, that it was reasonably certain that the jury *had* convicted the defendant on the valid theory, and

246. *Babb*, 719 F.3d at 1025, 1033.

247. *Id.* at 1025.

248. *Id.*

249. *Id.* at 1033.

250. *Id.* at 1033–34. The district court had concluded that the alternative theory error was not harmless in large part because of the jury's general verdict. *Id.* at 1033. The Ninth Circuit emphasized that "[g]eneral verdict forms can further blur an already opaque decisionmaking process, leaving us with the sort of grave doubt that prevents us from concluding an error was harmless." *Id.* at 1035 (citation omitted).

251. The Ninth Circuit rejected the district court's finding as to the state court's first error that it had subjected to harmless error review, but agreed with its holding as to the second ground. *Id.* at 1028, 1030. The Ninth Circuit disagreed with the district court's first ground because the Nevada Supreme Court had determined that the controlling case, which required the government to meet its burden of proof as to the deliberation and premeditation elements separately, was a change in law rather than a clarification of the law. *Id.* at 1029. While a clarification requires that the state vacate a conviction—even if it has been affirmed on appeal—a change in the law does not. *Id.* at 1028 (citing Fiore v. White, 531 U.S. 225, 228 (2001)). It is a question of state law whether a term in a statute is a distinct element for purposes of proving a crime that has an independent definition. *Id.* at 1029 (citing Schad v. Arizona, 501 U.S. 624, 636 (1991)).

252. *Id.* at 1035. The court made this determination based on the rationale that to convict the defendant of the felony murder theory the jury only needed to find that: (1) the defendant was guilty of robbery; and (2) the victim was killed during the perpetration of the robbery. *Id.* at 1034. The jury had found the defendant guilty of robbery, and the court determined that based on the evidence there was "no doubt" the victim had been killed during the robbery. *Id.* The court also relied on the fact that the prosecution had focused almost exclusively on the felony-murder theory. *Id.* Thus, the court declared that the "overwhelming evidence supporting the felony murder theory" led it to "be reasonably certain that no juror convicted Babb based on premeditation." *Id.* The Ninth Circuit pointed out that there was "no way to be absolutely certain what leads a juror to a particular decision." *Id.* at 1033 n.9. Moreover, the court emphasized that absolutely certainty was not required, as that was not the Supreme Court standard under *Pulido*. *Id.*

thus the erroneous instruction did not have a substantial impact on the conviction.[253]

In *Del Toro v. Martel*,[254] the defendant was convicted of a number of offenses, including stalking and first-degree burglary.[255] The defendant eventually filed a federal petition for a writ of habeas corpus, which a court in the Central District of California granted.[256] The defendant alleged that he was entitled to relief due to the trial court's erroneous burglary instruction to the jury.[257] To commit burglary, the defendant must have entered the home in furtherance of committing a felony (the "predicate offense").[258] The defendant claimed the instruction was erroneous because two of the predicate offenses provided—stalking and attempted witness dissuasion—were legally invalid.[259] Because the jury had returned a general verdict, the defendant contended that it was unclear upon which felony offenses the jury had relied.[260]

A court in the Central District of California applied *Pulido* to determine whether the alleged alternative theory jury instruction error was harmless.[261] The court explained that even if there had been an error in the jury instructions with respect to certain burglary theories, "substantial evidence" existed to support the valid alternative burglary theories, which the defendant did not challenge.[262] Moreover, the court emphasized that a "reasonable juror *could have found*" that the defendant "possessed the intent to stalk, criminally threaten, and dissuade [the victim]."[263] Consequently, the court held that because such a finding was sufficient to support the defendant's conviction, any error in the alternative theories was harmless.[264]

2. Fifth Circuit

The Fifth Circuit also places a lesser burden on the government to defend a conviction by requiring a showing that "the record contains evidence that

253. *Id.* at 1035.
254. No. SA-CV-09-0554, 2010 WL 4718796 (C.D. Cal. Oct. 4, 2010).
255. *Id.* at *1. The facts, which are adopted largely from the California Court of Appeals opinion on direct review, reveal that the defendant on multiple occasions assaulted the victim, both verbally and physically, and also entered her home without her consent. *Id.* at *2–4.
256. *Id.* at *1. For an explanation of the writ of habeas corpus, see *supra* note 116.
257. *Del Toro*, 2010 WL 4718796, at *2, *17 (citation omitted).
258. *Id.* at *17. The burglary instruction provided by the district court stated: "[e]very person who enters any building with the specific intent to commit the felony crime[s] of stalking, criminal threats, dissuading a witness[,] or attempting to dissuade a witness is guilty of the crime of burglary." *Id.*
259. *Id.*
260. *Id.*
261. *Id.* at *19.
262. *Id.*
263. *Id.* (emphasis added).
264. *Id.* at *19–20.

could rationally lead to [an acquittal] with respect to the [valid theory of guilt]."[265]

In *United States v. Skilling*, the defendant, the former CEO of Enron Corporation, was charged with, among other things, one count of conspiracy,[266] resulting from his efforts to fraudulently manipulate Enron's financial statements to affect its share price and so mislead investors.[267] The jury instructions allowed the jury to convict the defendant of conspiracy under a number of theories, including securities fraud and honest services fraud.[268] The jury subsequently returned a general verdict finding the defendant guilty of conspiracy.[269]

The defendant appealed, and the Supreme Court ultimately invalidated the applicability of the honest services theory of conspiracy to the defendant's case.[270]

On remand, the Fifth Circuit emphasized that though the jury may have relied on the invalid honest services fraud theory, this only revealed that an alternative theory error had occurred, which did not necessarily mandate reversal.[271] Following a review of the record, the Fifth Circuit concluded that, beyond a reasonable doubt, the jury's verdict would have been the same absent the erroneous instruction, because the jury was presented with "overwhelming evidence" of the defendant's conspiracy to commit securities fraud.[272]

The Fifth Circuit stressed that it conducted its analysis in line with the alternative theory error analysis set forth in, and endorsed by, *Pulido*, which does not require that a jury necessarily find facts establishing guilt on a valid theory for an alternative theory error to be harmless.[273] In doing so, the court highlighted the difference between its line of analysis and the analysis seemingly followed by the circuits placing a heavier burden on the government. The court concluded that the error was nonetheless harmless

265. United States v. Skilling, 638 F.3d 480, 482 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1905 (2012) (quoting Neder v. United States, 527 U.S. 1 (1999)) (emphasis added). The Fifth Circuit noted that prior to *Pulido* it had applied an "impossible to tell" standard of harmless error review. *Id.* at 482 n.1 (citing United States v. Howard, 517 F.3d 731, 736 (5th Cir. 2008)). It emphasized that this standard was derived from *Yates v. United States*, 354 U.S. 298 (1957), and thus was invalid following *Pulido*. *Id.* The *Yates* standard is a part of the *Stromberg* line of cases—which was developed when constitutional errors required automatic reversal—and holds that a general verdict must be set aside when "it is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates*, 354 U.S. at 312; *see also Skilling*, 638 F.3d at 482 n.1.

266. *Skilling*, 638 F.3d at 481.

267. *Id.* at 488. The defendant's efforts included: making misleading statements to Enron's board of directors, transferring losses from one division of Enron to the financial statements of another division so that the struggling division would appear more profitable, and representing a certain division to investors as low-risk, when in fact most of its profits were derived from "highly volatile trading operations." *Id.* at 484–85 & 484 n.4.

268. *Id.* at 481.

269. *Id.* The defendant was also convicted of twelve counts of securities fraud, five counts of making false representations to auditors, and one count of insider trading. *Id.*

270. *See id.* (citation omitted).

271. *Id.* at 483.

272. *Id.*

273. *See id.* at 482.

because "the jury had the option to rely on a pure honest services theory to convict Skilling" that had "no effect on the strength of the evidence going to the other alleged fraudulent schemes and on whether that evidence satisfies the *Neder* standard."[274]

III. DETERMINING THE CORRECT STANDARD: WHAT AMOUNTS TO "SUBSTANTIAL AND INJURIOUS"?

As Justice Traynor noted, harmless error review is "one of the most complex" tasks for reviewing courts.[275] In their review, courts must not only first determine and then interpret the applicable legal standard but also subsequently engage in a fact-specific inquiry of the record. While the circuit courts appear to have differing interpretations of the harmless error review standard as applied to alternative theory errors, all face general verdicts making it difficult to know how the jury came to its conclusion. Accordingly, this section first examines the costs and benefits of using special verdicts in situations involving alternative theory jury instructions. Special verdicts would provide a reviewing court with a clearer indication of the basis for the jury's verdict, thus making the question of whether an error is harmless easier to answer regardless of the standard applied.

This section then homes in on the distinctions that have resulted from the circuit courts' diverging interpretations of the harmless error standard as applied to alternative theory errors and proposes a possible solution to the conflict.

A. An Alternative Possibility: Requiring Special Verdicts in Cases Involving Alternative Theory Errors

The juries in the cases examined in this Note convicted their respective defendants pursuant to general verdicts.[276] Each respective reviewing court then engaged in an oftentimes elaborate and extensive inquiry to attempt to deduce how the jury arrived at its decision to convict the defendant. If the jury had been required to render a special verdict, however, the reviewing court could have more easily located the error, and thus, its effect.[277] The inquiry would then be far more straightforward because the court would have in its arsenal additional specific information as to the jury's conclusion—most relevantly for purposes of this Note—knowledge as to

274. *Id.* *United States v. Holley*, 23 F.3d 902 (5th Cir. 1994), and *United States v. Saks*, 964 F.2d 1514 (5th Cir. 1992), are Fifth Circuit cases that set out standards similar to the higher burden circuits, which hold that "an alternative-theory error is harmless if the jury, in convicting on an invalid theory of guilt, necessarily found facts establishing guilt on a valid theory." *Id.* The court noted that Skilling's codefendant, Ken Lay, another former CEO and chairman of Enron, was charged with several counts of honest services fraud. *Id.* at 483. It is unclear to what extent the Court's narrowing of honest services fraud would have had on Lay's case, as Lay died prior to his sentencing, and thus his conviction was vacated. United States v. Lay, 456 F. Supp. 2d 869, 875 (S.D. Tex. 2006).

275. *See supra* note 72 and accompanying text.

276. *See supra* Part II.

277. *See supra* notes 53–55 and accompanying text.

which theory of guilt the jury had relied upon to convict the defendant.[278] The court, at the outset of its review, could then entirely disregard an erroneous instruction if the jury did not rely on that instruction to convict the defendant.

Furthermore, requiring a special verdict would make jury instructions more specific, potentially making them easier to understand.[279] Additionally, because a jury rendering a special verdict provides answers to specific questions as opposed to delivering a finding of "guilty" or "not guilty" (in a criminal proceeding), the jury's determinations are less likely to be tainted by subconscious bias or prejudice toward a defendant.[280] This would, in turn, bolster societal confidence in juries' verdicts.[281]

Finally, implementing a system that requires more frequent use of special verdicts would not only provide the benefits just discussed to both the jury and court, but may also promote uniformity among the circuits. The difference between the higher burden and lower burden circuits would fall away if it were obvious whether or not the jury had relied on the erroneous instruction.

Nonetheless, the general verdict comes with its own set of advantages, which make it unrealistic to expect increased use of special verdicts as a solution to the problem of the circuits' differing interpretations. Whereas the special verdict may create more opportunity for probing on appeal in an unsettled or changing area of the law, the general verdict limits the scope for unnecessary retrials by ensuring that the jury does not return inconsistent responses (as is possible where a special verdict form includes multiple questions) and implying findings in favor of the prevailing party on contested issues.[282] Moreover, the general verdict may be considered clearer to the jury because it is easier to understand that the conclusion reached must be either for or against the defendant. Thus, the general verdict may promote more expedient, efficient deliberations, whereas the special verdict may lead to longer deliberations and more hung juries. Therefore, it is ultimately unlikely that the special verdict form will displace the more traditional general verdict approach, which is supported by the prevalent ideology that the jury's function is to provide "man-on-the-street justice" rather than specific and complex findings intended for professionals.[283] Accordingly, it is necessary to examine the existing circuit split in greater detail to find a possible solution.

278. *See supra* Part I.A.3.
279. *See supra* notes 69–71 and accompanying text.
280. *See supra* notes 47–48 and accompanying text.
281. *See supra* Part I.A.3.
282. *See supra* notes 57–58 and accompanying text.
283. *See supra* note 60 and accompanying text.

B. Who Has It Right?: Differentiating the Circuits' Conflicting Applications of the Harmless Error Review Standard to Alternative Theory Errors

Because of the multitude of elements that factor into a court's determination as to whether an error is harmless, such as the type of error in the jury instruction,[284] the reasons for the courts' diverging interpretations are not simply complex but often opaque.

Moreover, it is not entirely clear whether some of the circuits that impose a heavier burden on the government to defend an error as harmless do so merely because it would not have made a difference had they applied a lesser burden.[285] Indeed, given the fact that most errors are found to be harmless,[286] it could be argued that the standard applied is a matter of lesser importance that has little impact on the actual result reached in a particular case. It is also possible that the courts may manipulate the standard applied in order to reach desired results, and that a court that normally imposes a higher burden on the government might in fact revert to a less demanding interpretation if necessary to find an error harmless.

Despite the fact that the results of the two different approaches may often be the same, however, there is a real difference between them. The Fifth Circuit (which is a circuit that imposes a less demanding burden on the government to defend an error as harmless) has made clear that it is of the view that there are at least two harmless error standards that can apply, and that one standard imposes a heavier burden on the government to prove harmlessness than the other.[287]

The impact of imposing a higher burden on the government is clear from an examination of some of the cases discussed in this Note. For example, had the Tenth Circuit required what the Fifth Circuit requires to reverse a conviction for being not harmless, the defendant-appellant's conviction in *McKye* may have been affirmed. Under the interpretation of the harmless error standard endorsed by the Fifth Circuit in *United States v. Skilling*, for example, the Tenth Circuit would have required a showing that the evidence contained in the record "could rationally lead to" an acquittal under the valid theory of guilt in order to reverse the conviction.[288] The Fifth Circuit explained that "overwhelming evidence" to support the conviction of the defendant on the valid theory is sufficient to find an error harmless.[289] Applying this interpretation to *McKye*, where the government contended

284. *Compare* United States v. Skilling, 638 F.3d 480, 482 (5th Cir. 2011) (instructional error due to change in the law), *with* United States v. McKye, 734 F.3d 1104, 1110 (10th Cir. 2013) (instructional error due to erroneous finding that question was a question of law rather than a mixed question of fact and law). *See supra* notes 167–78, 265–74 and accompanying text. The type of offense for which the defendant was convicted may be relevant as well, as moral judgment may be a subconscious element at play.

285. *See, e.g.*, *supra* Part II.A.3–4.

286. *See supra* note 9 and accompanying text.

287. *See supra* notes 273–74 and accompanying text.

288. *Skilling*, 638 F.3d at 482 (quoting Neder v. United States, 527 U.S. 1 (1999)); *see supra* note 265 and accompanying text.

289. *See Skilling*, 638 F.3d at 483; *see also supra* note 272 and accompanying text.

that the record contained "ample" evidence for conviction, the Fifth Circuit likely would have found the alternative theory error harmless even though the Tenth Circuit did not.[290] This may be in part because the Tenth Circuit was not adequately presented with the relevant evidence (though the government's brief did provide at least provide a direct citation to the record).[291]

While assessing cases from the less demanding circuits is not as illuminating because most errors are found to be harmless,[292] the examination is still worthwhile, not least because the Fifth Circuit in *Skilling* expressly explained that it was not applying a harmless error standard that placed a heavier burden on the government. For example, in *Babb* and *Del Toro*, imposing a heavier burden on the government to prove the respective errors were harmless may have resulted in granting relief to the defendants.[293] In *Babb*, the Ninth Circuit held the jury instruction error harmless, finding that it was "reasonably certain" that the jury had convicted the defendant on the valid theory of guilt.[294] In *Del Toro*, the court held the jury instruction harmless, finding that "substantial evidence" existed to support the valid theory and that a "reasonable juror *could have found*" the defendant had the requisite intent to support the alternative theory.[295]

Examining these two cases in a circuit that imposed a heavier burden on the government would likely have led to the opposite result, in favor of relief to the defendants. Under the Seventh Circuit's standard as stated in *Sorich*, for example, courts look to determine whether "the trial evidence was such that the jury *must have* convicted the [defendants] on both theories."[296] This was clearly not the case in *Babb* and *Del Toro*, based on the courts' opinions.[297]

Ultimately, therefore, imposing a heavier burden on the government to defend an error as harmless does make a difference (and is the more tenable position under *Pulido*).[298] The government should carry the burden of proof of showing that the error was harmless,[299] because it has significantly more resources than most defendants.[300] Fairness to the defendant is particularly compelling, as there are many elements of the review process that cut against the defendant, as noted by several commentators.[301] Thus, imposing a more demanding standard on the government at this stage ensures maximum fairness in favor of the defendant.

---

290. *See supra* note 176 and accompanying text.
291. *See supra* notes 176–77 and accompanying text.
292. *See supra* note 9 and accompanying text.
293. *See supra* Part II.B.1.
294. *See supra* note 253 and accompanying text.
295. *See supra* note 263 and accompanying text.
296. *See supra* note 230 (emphasis added).
297. *See supra* Part II.B.1.
298. Hedgpeth v. Pulido, 555 U.S. 57, 58 (2008) (per curiam).
299. *See supra* note 100 and accompanying text.
300. *See supra* notes 133–34 and accompanying text.
301. *See supra* notes 126–35 and accompanying text.

Commentators have found that federal appellate-level reversal rates have decreased over time and this may be tied to the fact that appellate courts are spending less time reviewing district court decisions.[302] Judge Posner has argued that: "[T]he less time an appellate court spends on a case the more likely it is simply to affirm the district court."[303] Another commentator has noted that lower reversal rates indicate a "level of affinity" between district and circuit court judges that could undermine the independence of the reviewing court's assessment.[304] Siding with those circuits that impose a higher burden on the government to defend a conviction is therefore the most appropriate means of resolving the conflict among the circuits when it comes to harmless error review in the context of alternative theory jury instructions.

CONCLUSION

The current state of alternative theory error is problematic because the diverging tests among the circuit courts create the potential for inconsistent relief for defendants on appeal. Benefits, such as improved clarity, likely would not outweigh the costs of requiring juries to provide a special verdict rather than a general verdict of "guilty" or "not guilty." Consequently, it is necessary to choose one standard from among the diverging circuit court interpretations of *Pulido* in order to ensure consistency. Imposing a more demanding burden on all reviewing courts will not only promote uniformity but also will safeguard the rights of defendants and, therefore, is the more appropriate choice.

302. *See supra* notes 126–27 and accompanying text.
303. *See supra* note 128 and accompanying text.
304. *See supra* note 132 and accompanying text.