
COMMENT

CLASSIFYING CONSTRUCTIVE AMENDMENT AS TRIAL OR STRUCTURAL ERROR

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INTRODUCTION

Federal courts guarantee the right to a fair, but not to an error-free, trial.¹ When an error occurs, courts must balance the benefit of correcting the error against the judicial system’s interests in efficiency (including minimizing the costs of a retrial) and finality (including maintaining public confidence in judicial decisions).² Traditionally, efficiency and finality have carried less weight than fairness in the criminal context because criminal sanctions may result in imprisonment and greater social stigma than civil sanctions.³ Yet, even in criminal cases, some constitutional errors are harmless and do not justify reversal of the trial outcome.⁴ The category of errors known as trial errors can be harmless if the government can show beyond a reasonable doubt that they did not contribute to the verdict.⁵ Other errors,

¹ See FED. R. CRIM. P. 52(a) (requiring appellate courts to disregard “[a]ny error, defect, irregularity, or variance that does not affect substantial rights”).

² See Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 121 (1988) (discussing the effect of reversal in terms of “the finality of the trial outcome and . . . an added expenditure of judicial resources”); see also *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (“The harmless-error doctrine . . . promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.”).

³ See Stacy & Dayton, *supra* note 2, at 137 (“As our . . . commitment to the availability of habeas corpus attests, finality and efficiency concerns carry relatively less sway in criminal cases than they do in civil cases—a product of a criminal defendant’s countervailing liberty interest.” (footnote omitted)).

⁴ See *Chapman v. California*, 386 U.S. 18, 22 (1967) (holding that some constitutional errors may be “so unimportant and insignificant” that, even in a criminal case, they are harmless and do not require “automatic reversal of the conviction”).

⁵ See *id.* at 24; see also *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (stressing that the test for harmlessness “is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error”).

called structural errors, are so damning to the fairness of a trial that they warrant automatic reversal.⁶ Structural errors account for a small subset of all errors, and even most constitutional errors are trial errors, subject to harmless error review.

This Comment examines the concept of structural error and the merit of classifying one particular error—constructive amendment of an indictment—as a structural error. Constructive amendment “occurs when either the government (usually during its presentation of evidence and/or its argument), the court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented by the grand jury.”⁷

Supreme Court doctrine provides a reasonable foundation for finding that constructive amendment is a structural error. Nonetheless, the Court’s understandable hesitation to expand the category of structural errors, as well as the malleability of the structural error doctrine, makes it more likely that constructive amendment will be classified as a trial error.

In Part I, I spell out the four interpretations of *Arizona v. Fulminante*, the case in which the Supreme Court distinguished structural error from trial error. I critique each interpretation’s ability to explain structural error descriptively (by articulating why the Court has classified errors as it has) and prescriptively (by identifying the features of errors that are not conducive to harmless error analysis). I conclude that none of the four interpretations provides an independently satisfactory account of structural error, although each interpretation identifies features that many, though not all, structural errors share. In other words, each interpretation points to features that constitute a family resemblance among structural errors.

In Part II, I apply *Fulminante* to constructive amendment. I explore the relationship between structural error and plain error review, and critique certain circuit courts’ treatment of constructive amendment as structural error only when the defendant preserves the objec-

⁶ See *Arizona v. Fulminante*, 499 U.S. 279, 306-12 (1991).

⁷ *United States v. Floresca*, 38 F.3d 706, 710 (4th Cir. 1994) (en banc); *accord* *United States v. Blanchard*, 542 F.3d 1133, 1143 (7th Cir. 2008) (“Constructive amendment of an indictment occurs where the permissible bases for conviction are broadened beyond those presented to the grand jury.”); *United States v. Hien Van Tieu*, 279 F.3d 917, 921 (10th Cir. 2002) (“A constructive amendment occurs when the Government, through evidence presented at trial, or the district court, through instructions to the jury, broadens the basis for a defendant’s conviction beyond acts charged in the indictment.”).

tion at trial, not when the case arises on plain error review. After surveying the divergent approaches that the circuits apply to constructive amendment on plain error review, I apply *Fulminante's* four interpretations and find that constructive amendment resembles identified structural errors in numerous ways. I conclude, however, that despite a pre-*Fulminante* Supreme Court holding giving constructive amendment a status that seems structural under the *Fulminante* framework,⁸ today's Supreme Court is unlikely to classify constructive amendment as structural error because of the Court's reluctance to expand that category of error. Assuming that courts will continue to treat constructive amendment as a trial error, I therefore propose that courts considering constructive amendment on plain error review employ a rebuttable presumption of prejudice when the burden of proving the content of jury deliberations would otherwise rest with the defendant.

I. DISTINGUISHING BETWEEN TRIAL AND STRUCTURAL ERRORS

The Supreme Court has recognized a narrow set of rights that, if denied, are structural errors: the rights to counsel⁹ and to counsel of choice,¹⁰ the right of self-representation,¹¹ the right to an impartial judge,¹² freedom from racial discrimination in grand jury selection,¹³ the right to a public trial,¹⁴ and the right to accurate reasonable-doubt jury instructions.¹⁵ By contrast, the list of trial errors is extensive.¹⁶

⁸ See *infra* notes 80-81 and accompanying text (explaining the decision in *Stirone v. United States*, in which the Court deemed constructive amendment a violation of a "substantial right").

⁹ See *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963) (reversing a felony conviction of a defendant who lacked counsel without analyzing the prejudice that the deprivation caused).

¹⁰ See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (deeming deprivation of counsel of choice a structural error).

¹¹ See *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (finding harmless error analysis inapplicable to deprivation of the right to self-representation because exercising the right increases the chance of a guilty verdict).

¹² See *Tumey v. Ohio*, 273 U.S. 510, 534 (1927) (holding that trial before a biased judge "necessarily involves a lack of due process").

¹³ See *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (presuming prejudice where discriminatory grand jury selection undermined "the objectivity of those charged with bringing a defendant to judgment").

¹⁴ See *Waller v. Georgia*, 467 U.S. 39, 49 (1984) ("[T]he defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee.").

¹⁵ See *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) (finding that, because of an inadequate reasonable-doubt instruction, no actual jury verdict had been rendered

While the list of structural errors has remained consistent, the Supreme Court's methods of distinguishing between trial and structural error have fluctuated.

A. *Four Readings of Fulminante*

In *Fulminante*, the Supreme Court provided a theoretical explanation for the dichotomy between the trial errors and structural errors that it had identified in prior cases. The closely divided Court then held that the admission of a coerced confession was a trial error, subjecting it to harmless error analysis.¹⁷ The majority used three different descriptions of the structural error category, and subsequent opinions reveal a fourth possible reading of *Fulminante's* characterization of structural error. In this Section, I explain these four readings and address the conceptual weaknesses of each. I conclude that no single reading provides a satisfactory explanation of structural error.

1. The Framework Approach

One characterization of structural error in *Fulminante* focused on "structural defects in the constitution of the trial mechanism," which the Court also described as "structural defect[s] affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."¹⁸ The policy underlying this "framework approach" is sensible: the parties need not debate whether the error affected the outcome, because the defect permeated the trial structure itself. Because trial structure dictates trial outcome, judges can fairly presume that the error affected substantial rights.

Despite its intuitive appeal, the framework approach has two major problems. First, the framework approach cannot explain why er-

and the court could thus not apply harmless error analysis to determine whether the error affected the verdict).

¹⁶ See *Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991) (declaring that "most constitutional errors can be harmless" and naming sixteen examples of trial error).

¹⁷ See *id.* at 310 (explaining that the admission of a coerced confession is similar to other constitutional violations that the Court had previously classified as trial errors).

¹⁸ *Id.* at 309-10. Of the varied definitions in *Fulminante*, the framework approach seems most faithful to the Court's prior decision in *Chapman v. California*, 386 U.S. 18, 22 (1967), where it said that some constitutional errors may not require reversal if they are "unimportant and insignificant." See David McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401, 1415-16 (1997) (describing the framework approach as a revival of *Chapman*).

rors that are similar in their relation to the trial framework are classified differently. For example, *Fulminante* cited a case in which the “denial of a defendant’s right to be present at trial” was classified as a trial error.¹⁹ Admittedly, a defendant’s absence from trial may not affect the substance of proceedings like the denial of counsel would, so this simple distinction may explain why the former is a trial error while the latter is a structural error.

The defendant’s absence, however, is part of the broader framework of who may be present at the trial. Characterized in this way, the right to be present at trial is analogous to the denial of a public trial, which the Supreme Court has deemed structural.²⁰ If any difference exists, the defendant’s presence seems more basic to the trial framework in an adversarial system than does the presence of nonparty observers. Given the similarity of those two errors in terms of the framework of a trial and the trial’s audience, the framework approach cannot explain the divergence in outcomes between cases involving these errors. Even though the right to be present as a defendant is less central to the trial framework than the right to an attorney, it is not less central to the trial framework than the right to a public trial.

Second, there does not seem to be a principled distinction between a procedural right and a component of the trial framework. The Court treats structural and trial errors as conceptually separate categories by drawing a bright-line distinction in their treatment on review: structural errors generate automatic reversal, while trial errors do not. The framework approach, however, provides only differences of degree between the two types of error.²¹ It is challenging to find a bright-line distinction in *Fulminante* because the case does not explain when an error that is procedural in nature becomes a part of the trial framework. Virtually any procedural right—and the Constitution affords many—can be described as affecting the framework of a trial, because procedure is the primary ingredient of the framework. One way to resolve the ambiguity is to conclude that all procedural errors are structural errors. Such a conclusion, though, contradicts the

¹⁹ *Fulminante*, 499 U.S. at 307 (citing *Rushen v. Spain*, 464 U.S. 114, 117-18 & n.2 (1983) (per curiam)).

²⁰ See *supra* note 14 and accompanying text.

²¹ Cf. Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 162-63 (1991) (arguing that the distinction between trial and structural errors, as the *Fulminante* Court explained them, is one of degree).

Court's statement in *Fulminante* that "most constitutional errors can be harmless."²² Because most constitutional errors do not justify automatic reversal, a theory of structural error must distinguish between procedural rights that merit automatic reversal and those that do not. The framework approach does not do so. Consequently, the framework approach is an inadequate means of separating errors into distinct categories for the purpose of appellate review.

Together, these arguments demonstrate the inadequacies of the framework approach both as a historical explanation of the Court's decisions and as a theoretical tool for deciding future cases.

2. The Evidentiary Approach

The *Fulminante* Court observed that, unlike a structural error, a trial error may "be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."²³ A reviewing court can weigh the import of a trial error against the other evidence that was introduced at trial to determine the effect that the error had on the proceedings and whether the error was harmless. For example, while an appellate court can weigh the effect of a wrongly introduced piece of evidence against the other evidence to determine its overall impact, an incorrect jury instruction or the denial of counsel of choice is more difficult to compare. Motivating this "evidentiary approach" is an appealing proposition: if a court cannot quantitatively assess the effect of an error, then the specific factual situation in which the error occurs should be irrelevant. Consequently, the evidentiary character of the error ought to determine whether the court should reverse a conviction. In addition, the inability to weigh the evidence means that the parties would have nothing to argue on appeal to establish or dispute the prejudice that an error caused. The explanation is closely related to the basic justification for structural errors: they require *automatic* reversal in part because their consequences are difficult to assess. It also accounts for the many violations relating to erroneous admission or exclusion of evidence that the Court has called trial errors.²⁴

²² *Fulminante*, 499 U.S. at 306.

²³ *Id.* at 307-08.

²⁴ *See id.* at 306-07 (reciting Supreme Court jurisprudence considering trial errors as, among others, the "erroneous exclusion of defendant's testimony regarding the circumstances of his confession," the "admission of identification evidence" or "the out-of-court statement of a nontestifying codefendant in violation of the Sixth

Classifying all weighable errors as trial errors, however, makes the category of structural errors too narrow. Even some structural errors are amenable to quantitative assessment on occasion. For example, a court could quantitatively assess the amount of harm in a case involving a prejudiced judge if the prejudice were isolated to a distinct action and the prosecution presented other substantial evidence of guilt. Similarly, the error of denying representation to an attorney-defendant could be quantified on review using ineffective assistance of counsel doctrine. Because these errors do not always evade quantitative assessment, the evidentiary approach dictates that they are trial errors.²⁵ The Supreme Court, however, has identified prejudiced judges and denial of counsel as archetypes of structural error.²⁶ Therefore, despite its conceptual appeal, the evidentiary approach cannot explain why the Supreme Court has found some errors to be structural.

3. The Timing Approach

The *Fulminante* majority claimed that the previously recognized trial errors “occurred during the presentation of the case to the jury.”²⁷ This “timing approach” designates more errors as trial errors than the evidentiary approach does because voir dire, opening and closing statements, and jury instructions involve the presentation of the case to the jury but not the introduction of evidence.²⁸ The appeal of this approach rests in its simplicity, as well as in its recognition of the distinction between factual issues that are within the domain of the jury and procedural decisions that are more fundamental to the structure of a trial.

Nonetheless, the timing approach is the weakest of the four approaches. Its most substantial doctrinal difficulty is its inability to explain why certain jury instructions are categorized as trial errors while

Amendment Confrontation Clause,” the admission of a “confession obtained in violation of *Massiah v. United States*,” and the “admission of evidence obtained in violation of the Fourth Amendment” (citations omitted)).

²⁵ See Ogletree, *supra* note 21, at 165 (“[M]ost constitutional errors can be weighed meaningfully against the total evidence . . . [O]ne can only wonder whether it is only a matter of time before the Chief Justice’s two paradigmatic ‘structural errors’—biased judges and lack of counsel—are subjected to the harmless error rule.”).

²⁶ See *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963), for the right to counsel and *Tumey v. Ohio*, 273 U.S. 410 (1927), for the right to an impartial judge, and counting both as structural).

²⁷ *Fulminante*, 499 U.S. at 307.

²⁸ McCord, *supra* note 18, at 1414.

others are categorized as structural errors.²⁹ *Fulminante* cited numerous cases in which erroneous jury instructions were trial errors,³⁰ for example, but two years later, the Court held in *Sullivan v. Louisiana* that a defective reasonable-doubt jury instruction was a structural error.³¹ The dissenting opinion in *Fulminante* recognized that this inconsistency existed even at the time that *Fulminante* was decided.³² Despite the difference in their importance to the trial, defective reasonable-doubt instructions occur at the same point in a trial as other erroneous instructions, so a timing approach cannot explain the difference in outcome.

In addition, the timing approach shows most clearly how the trial/structural error dichotomy serves as a poor proxy for the seriousness of an error. In this context, seriousness relates to the gravity of the error and to the value of the right infringed, independent of the importance of the right for ensuring accuracy. Many errors that occur outside the presentation of the case to a jury can be minor, and dubbing each one structural would create a flood of reversals that would strain the court system.³³ At the same time, errors made during the presentation to the jury can be serious. Thus, there is no intrinsic relation between timing and the seriousness of an error.

Many authors have criticized *Fulminante* (and harmless error analysis generally) for the mismatch between errors that are structural and errors that are serious: they claim that *Fulminante* and its progeny collapse the value of rights into a question of accuracy, excluding other values by which an error might be considered serious.³⁴ Even if the

²⁹ See *id.* at 1427 (recognizing that “the viability of the durational definition” is “seriously undermined” insofar as “jury instructions are clearly within the durational parameter”).

³⁰ See *Fulminante*, 499 U.S. at 306-07 (identifying numerous examples, including jury instructions that were overbroad at sentencing, that allowed for an erroneous conclusive presumption, that provided for an erroneous rebuttable presumption, that failed to instruct on the presumption of innocence, and that misstated an element of the offense).

³¹ 508 U.S. 275, 281 (1993).

³² See *Fulminante*, 499 U.S. at 291 (White, J., dissenting) (observing the conflict between treating failure to instruct the jury on presumption of innocence as a trial error while treating failure to instruct on the reasonable-doubt standard as a structural error).

³³ See McCord, *supra* note 18, at 1415 (“[T]o define all errors that occur outside the durational definition’s boundaries as reversible per se would expand that category, contrary to the Court’s prevailing philosophy of treating almost all error as harmless . . .”).

³⁴ See Linda E. Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 GA. L. REV. 125, 139 (1993) (explaining how, when applying the harmless error doctrine, the Supreme Court “equat[es] a ‘fair’ trial with

authors are correct in their descriptive claim, it is an open question whether the lack of correlation between the trial/structural error dichotomy and seriousness is problematic.

The authors' criticism requires two assumptions. First, all errors past some threshold of seriousness must warrant reversal, even when they have no effect on the reliability of a proceeding. Justifying this assumption requires answering the most basic question about reversal: when should fairness or other procedural values trump efficiency and finality? While the critics may be right that the Court has removed procedural values from the plain and harmless error doctrines, the degree to which this is problematic is not obvious without answering the more basic question.

Second, structural error must be the appropriate category by which to achieve the result of automatic reversal. This assumption is simpler, although Justice Alito has questioned whether structural and trial error, considered together, constitute an exhaustive catalog of errors and distinct categories.³⁵ If other categories of error can be exempt from harmless error analysis, then classifying serious errors as structural errors is unnecessary to achieve the result of automatic reversal. Doing so, moreover, sacrifices conceptual clarity to the extent

one that correctly determines guilt or innocence" to the exclusion of valuing a procedure or right as an end in itself); Ogletree, *supra* note 21, at 162, 169-71 (arguing that the *Fulminante* distinction "fail[s] by virtue of its insufficient recognition of other values in our criminal justice system," such as the value of public respect for the legal system and restraining government from abusing human rights); Stacy & Dayton, *supra* note 2, at 88-89 ("The Court's theory of harmless error . . . is predicated on a conception of a fair trial that incorporates only the value of factual accuracy."); Steven M. Shepard, Note, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180, 1207-08 (2008) (explaining the structural rights to a public trial, racially unbiased grand jury selection, and self-representation as based on the grounds of transparency, antidiscrimination, and autonomy, respectively, rather than on accuracy). *But see* Neder v. United States, 527 U.S. 1, 7 (1999) (asserting that structural errors are "so intrinsically harmful as to require automatic reversal (*i.e.*, [they] 'affect substantial rights') without regard to their effect on the outcome").

³⁵ See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 159 (2006) (Alito, J., dissenting) (interpreting *Fulminante* as describing "two poles of constitutional error" and as muddying any clear delineation between or exclusivity of the categories, although emphasizing the need to use automatic reversal cautiously). The majority of the current Court does not share Justice Alito's view. See *id.* at 149 n.4 (majority opinion) (observing that "it is hard to read [*Fulminante*] as doing anything other than dividing constitutional error into two comprehensive categories").

that a primary characteristic of a structural error is the difficulty of determining the effect of the error.³⁶

Regardless of the resolution of the debate about the connection between an error's seriousness and its categorization as structural, the jury-instructions objection reveals that the timing approach is an inadequate method for generalizing about the features of structural error.

4. The Reliability Approach

In *Neder v. United States*, the Supreme Court described structural errors as those that “necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.”³⁷ Similarly, in *Sullivan*, the Court characterized structural error as the violation of “a ‘basic protectio[n]’ . . . without which a criminal trial cannot reliably serve its function.”³⁸ This “reliability approach” is not explicitly mentioned in *Fulminante*,³⁹ and it can be viewed as a fourth approach, distinct from the three described in that case. Alternatively, because the Court mentioned *basic* protections and *fundamental* unfairness, the reliability approach can be read as a refinement of the framework approach, where “framework” encapsulates what is basic or fundamental to a trial. Thus, a combined framework-reliability approach would classify an error as structural if it affected the framework of a proceeding in a way that necessarily rendered its outcome unreliable.

The reliability approach clarifies some aspects of the framework approach, but it does so at the cost of making the theory of structural error too narrow. The emphasis on reliability explains why denying a defendant's right to be present at her trial is a trial error (because the denial does not affect substantive attributes such as the jury's deliberation and verdict),⁴⁰ while denying the defendant's right to counsel is a structural error (because the lack of an attorney negatively impacts the adversarial system responsible for producing reliable outcomes).⁴¹

³⁶ See *infra* note 114 and accompanying text (discussing whether structural errors are important errors or errors with unclear effects).

³⁷ 527 U.S. 1, 9 (1999).

³⁸ *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (alteration in original) (citation omitted).

³⁹ See *Shepard*, *supra* note 34, at 1206 (identifying the Court's fourth test for structural error).

⁴⁰ See *Rushen v. Spain*, 464 U.S. 114, 118 n.2 (1983) (per curiam) (“[T]he right to be present during all critical stages of the proceedings and the right to be represented by counsel, . . . [like] most constitutional rights, are subject to harmless-error analysis . . .”).

⁴¹ See *Gideon v. Wainwright*, 372 U.S. 335, 337, 345 (1963).

The reliability approach also has the benefit of clarifying which rights are so essential to a trial that they constitute its framework: those rights that necessarily affect reliability.

However, very few errors *necessarily* render a trial unreliable. Even the most egregious of the traditionally structural errors, such as the refusal to appoint counsel, might not undermine the reliability of the outcome, depending on the facts of the case and the qualifications of the defendant who is forced to represent herself. In this respect, the reliability approach renders the framework approach too narrow to explain why the Court classified such errors as structural.

B. *The Aftermath: Confusion About the Four Approaches*

Since *Fulminante*, the Supreme Court has equivocated among the various approaches to structural error. In 1993, the Court issued a pair of decisions that shed light on the trial/structural error dichotomy. *Sullivan v. Louisiana*, which held that a constitutionally deficient reasonable-doubt instruction cannot be a harmless error, mentioned the timing, evidentiary, and reliability approaches.⁴² *Brecht v. Abrahamson*, which held that using post-Miranda warning silence to impeach a defendant is a trial error, referred to the timing, evidentiary, and framework approaches.⁴³ Notably, *Brecht* situated trial and structural errors on a “spectrum of constitutional errors,”⁴⁴ lending credence to the view that there is no bright-line distinction between the categories.

Subsequently, in *Neder v. United States*, the Court held that omitting an undisputed element of an offense from jury instructions was a trial error.⁴⁵ The Court employed the framework and reliability approaches, noting that trial errors “do[] not *necessarily* render a criminal trial fundamentally unfair,” but omitted evidentiary and timing concerns.⁴⁶ The Court also short-circuited what otherwise might have been an expansive definition of structural error. It abandoned as inconsistent with prior precedent the broad language in *Sullivan* that said, “[T]he question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon

⁴² 508 U.S. at 280-81.

⁴³ 507 U.S. 619, 629-30 (1993).

⁴⁴ *Id.* at 629.

⁴⁵ 527 U.S. 1, 15 (1999).

⁴⁶ *Id.* at 8-12.

which . . . harmless-error scrutiny can operate.”⁴⁷ While omitting an element of an offense from jury instructions removes the complete jury verdict upon which harmless error operates, the error does not “vitiat[e] [] all the jury’s findings,” so it is not structural.⁴⁸

More recently, in *United States v. Gonzalez-Lopez*, the Court recognized the denial of counsel of choice as a structural error.⁴⁹ Applying the framework, evidentiary, and timing approaches, the Court ignored reliability and, in response to the dissent’s prominent use of that approach, stated that the dissent’s “single, inflexible criterion . . . that only those errors that always or necessarily render a trial fundamentally unfair and unreliable are structural” was an inaccurate reading of precedent.⁵⁰ The Court noted that “‘fundamental unfairness’ . . . has not been the only criterion [for structural error]” and offered the irrelevance of harmlessness as another criterion.⁵¹ The latter criterion did not factor into the decision, however. The majority instead emphasized the “difficulty of assessing” the impact of the denial of counsel of choice because of its “unquantifiable and indeterminate” consequences.⁵²

C. Alternatives: Reconciling the Four Approaches

The relationship among the approaches remains unclear, and the more recent cases demonstrate the Supreme Court’s continuing struggle to resolve the issue. The Court’s fluid discussion of the three approaches in *Fulminante*, plus the Court’s supposed summary of *Fulminante* in putting forth the reliability approach, suggests that the Court intended its various descriptions to define the same, unitary concept.⁵³ Using the approaches in tandem, however, generates contradictory results. Treating each as sufficient but not necessary leaves the Court with a test that is too broad for the same reasons that each individual approach can be overbroad. Similarly, the tests cannot be

⁴⁷ *Id.* at 11 (quoting *Sullivan*, 508 U.S. at 280).

⁴⁸ *Id.* (quoting *Sullivan*, 508 U.S. at 281).

⁴⁹ 548 U.S. 140, 150 (2006).

⁵⁰ *Id.* at 149 n.4 (emphasis omitted).

⁵¹ *Id.* The Court described a prior case in which it held the denial of the right to self-representation subject to automatic reversal because the right increases the risk of a guilty verdict. *Id.* (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984)). The framework approach would also consider this error to be structural because it fundamentally alters the framework of who is present at a trial. See *supra* subsection I.A.1.

⁵² *Gonzalez-Lopez*, 548 U.S. at 149 n.4, 150.

⁵³ See McCord, *supra* note 18, at 1412 (arguing that the majority intended its three interpretations to be a unitary definition).

necessary but insufficient, because some of the approaches are too narrow. While it did not mention these concerns, the Court acknowledged in *Gonzalez-Lopez* that it had emphasized different approaches in different cases, based on the facts of the cases.⁵⁴ While the Court's depiction is an accurate statement of its past practices, it gives the impression that the decision about which approach to employ is unprincipled and, therefore, unpredictable and manipulable.

Short of overruling *Fulminante*, the best way to reconcile the approaches is to view each one as isolating a cluster of recurring features—family resemblances—that some but not all structural errors share.⁵⁵ For example, an error that affects the framework of the trial and that occurs outside presentation to the jury might be structural, while another error that meets neither of those criteria could nevertheless be structural if it satisfies one or two of the other approaches. While no one feature unites all structural errors, the four approaches carve out a paradigmatic case and identify strands of similarity within the set of structural errors. This interpretation explains the coexistence of four approaches that can produce contrary results.

Justice Alito adopted an analogous strategy in his dissent in *Gonzalez-Lopez*, where he called the two types of errors “poles” on a continuum and described “[t]he touchstone of structural error [as] fundamental unfairness and unreliability,”⁵⁶ elsewhere characterized as “the difficulty of assessing the effect of the error.”⁵⁷ While Justice Alito's characterization of the “poles” invokes a sliding scale between structural and trial errors that the other Justices seem to reject,⁵⁸ a family-resemblance relationship is consistent with a categorical divide between structural and trial errors. Even though the category of structural error may lack the necessary and sufficient conditions that typically accompany definitions, an error is still determinably structural or trial, with no middle ground. The dichotomy matches the bright-line distinction between the treatment of structural and trial errors on review.

⁵⁴ See *Gonzalez-Lopez*, 548 U.S. at 149 n.4 (declining to employ “fundamental unfairness,” even though it “was the determining factor” in *Neder*, because it “has not been the only criterion” that the Court has used).

⁵⁵ See generally LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 66-67 (G.E.M. Anscombe trans., 3d ed. 1968) (1958) (introducing the idea of family resemblance in the context of the meaning of language).

⁵⁶ 548 U.S. at 159 (Alito, J., dissenting).

⁵⁷ *Id.* at 149 n.4 (majority opinion).

⁵⁸ See *supra* note 35.

Unfortunately, a family-resemblance relationship between the approaches cannot satisfy the need to supply lower courts with clear tests. A lower court will face a wide variety of errors that match at least one, but not all, of the *Fulminante* approaches, and if a structural error need not possess a set number of the features, the court is left with an unguided choice about whether a particular error is structural. The elasticity of family resemblance might permit either classification. Without a theory for what errors have a sufficient number of features to be classified as structural, the explanation of structural error is wanting, and results will be unpredictable and inconsistent. Furthermore, the approaches may vary in importance based on context, but *Fulminante* does not specify which contexts bring which approaches into the fore. Where the factors point in opposing directions, *Fulminante* and its progeny provide no guidance.⁵⁹

On the other hand, this level of ambiguity may be acceptable. Courts, including the Supreme Court, tolerate multifactor balancing tests and ambiguous rules when necessary and sufficient conditions are impractical. For example, the *Polaroid* test for trademark infringement uses eight factors, none of which is required,⁶⁰ while the *Mathews v. Eldridge* test for due process requires examination of three factors with no indication of their weight.⁶¹ Determining whether a particular error bears a family resemblance to an established category of structural error is not more difficult than the question of how many *Polaroid* factors must be met or how to weigh the *Mathews* factors. In addition, the Court has provided more guidance for the identification of structural error than it has for some other open-ended standards. Consider the totality of the circumstances test used to adjudge probable cause,⁶² or the reasonable person standard for determining wheth-

⁵⁹ See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972-81 (1987) (describing problems with implementing balancing tests).

⁶⁰ See *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961) (describing the claim's success as the "function of many variables" and including a nonexclusive list of eight).

⁶¹ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (requiring courts to consider the plaintiff's interest; the risk of an erroneous deprivation of such interest, as well as the increased accuracy that the proposed safeguards would provide; and the government's interest, including the costs of those safeguards); see also Aleinikoff, *supra* note 59, at 982-83 (discussing the Court's application of the *Mathews* test).

⁶² See, e.g., *Ornelas v. United States*, 517 U.S. 690, 695-96 (1996) (acknowledging the inability to articulate with precision, much less reduce to legal rules, the meaning of probable cause and reasonable suspicion because "[t]hey are commonsense, non-

er a suspect is in custody for *Miranda* purposes.⁶³ These tests do not provide any factors, and yet the Court finds them adequately clear for lower courts to apply. In comparison, even when read as establishing a family-resemblance test, *Fulminante* dictates the factors that a court should consider.⁶⁴ Thus, while not a model of clarity, a family-resemblance test may provide adequate guidance.

A family-resemblance test gets at the problem of structural error better than the other approaches, which do not map onto the concept of structural error with any accuracy. The Court's current method is less desirable because it purports to follow distinctions like timing, which, in reality, do not guide the Court's decisions. Until the Court reconciles the approaches or declares which are more decisive, a family-resemblance relationship seems to be the most plausible account of the persistence of divergent approaches. Errors that satisfy all four approaches are the most likely to be considered structural, but an error can still be structural even if it satisfies only one of the approaches.

II. CASE STUDY: CONSTRUCTIVE AMENDMENT

To better understand the *Fulminante* approaches, this Part considers their application to the particular error of constructive amendment. First, I explain what counts as a constructive amendment and what makes the error troubling. Second, I critique the circuit courts' treatment of constructive amendment, which differs according to whether or not plain error review applies. Third, I survey the ways that circuit courts have dealt with constructive amendment within the trial/structural error dichotomy when the issue arises on plain error review. While most circuits have considered the problem, few appreciate the various readings of *Fulminante* and all the aspects of the trial/structural error distinction. Fourth, I analyze constructive amendment under each of the *Fulminante* approaches. I conclude that constructive amendment displays many features that the *Fulminante* approaches identify as demarcating structural errors but that the Supreme Court's understandable hesitance to expand the category

technical conceptions that deal with . . . factual and practical considerations" (internal quotation marks omitted)).

⁶³ See, e.g., *Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004) (stating the reasonable person test).

⁶⁴ Cf. Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 28 (2000) (classifying multifactor balancing tests as standards but acknowledging that they are "more rule-like than requirements of 'reasonableness'").

makes it unlikely that the Court will deem constructive amendment structural. The malleability of the purportedly unitary *Fulminante* test gives the Court the leeway to hold that constructive amendment is only a trial error. Finally, I argue that courts should strike a balance between placing the burden on the defendant and deeming constructive amendment a structural error. I propose that courts employ a rebuttable presumption that constructive amendment affects substantial rights.

A. *The Problem of Constructive Amendment*

An indictment is constructively amended when a prosecutor or judge broadens the possible grounds for conviction beyond what the indictment specified. For example, one court found a constructive amendment when a defendant was charged with possession of cocaine and methamphetamine but the government presented evidence about possession of marijuana and the judge instructed the jury that it could convict on the basis that the defendant possessed any controlled substance.⁶⁵ Even though the statute under which the defendant was charged could apply to any controlled substance, the charges themselves did not include marijuana.⁶⁶ The marijuana evidence and judge's instructions thus broadened the basis for conviction beyond what the indictment stated. Similarly, courts have found constructive amendment when jury instructions expanded the basis for conviction from resisting arrest by means of a firearm to resisting arrest generally,⁶⁷ and when an indictment charged the defendant with misbranding drugs by repackaging them while the government's evidence spoke to misbranding drugs by virtue of not keeping them sterile.⁶⁸

Courts have not adopted a uniform definition of constructive amendment. Some courts impose a heightened requirement that there be a "*substantial likelihood* that the defendant may have been convicted of an offense other than the one charged by the grand jury."⁶⁹ Under this test, the mere fact that the court or prosecutor broadened the basis for conviction is insufficient; a defendant is also

⁶⁵ United States v. Wozniak, 126 F.3d 105, 109 (2d Cir. 1997).

⁶⁶ *Id.* at 109-10.

⁶⁷ United States v. Nuñez, 180 F.3d 227, 230 (5th Cir. 1999).

⁶⁸ United States v. Milstein, 401 F.3d 53, 65 (2d Cir. 2005) (per curiam).

⁶⁹ *Wozniak*, 126 F.3d at 109 (emphasis added) (citation omitted); *accord* United States v. Johnston, 353 F.3d 617, 623-24 (8th Cir. 2003) (per curiam); United States v. Prince, 214 F.3d 740, 757 (6th Cir. 2000); United States v. Moore, 198 F.3d 793, 796 (10th Cir. 1999).

required to show that she suffered a substantial likelihood of being convicted for a different offense due to the error. The arguments in this Comment are equally applicable to cases falling under that heightened “substantial likelihood” definition.

Other jurisdictions define constructive amendment liberally, as any alteration that results in a conviction for an action not included in the indictment, including a *narrowing* of the possible basis for conviction.⁷⁰ The underlying concerns about a broadened basis for conviction are distinct and more troubling than those for a narrowed basis of conviction.⁷¹ This Comment therefore excludes from consideration the set of cases where a constructive amendment narrowed the possible basis of conviction.

A constructive amendment is distinct from—and more severe than—a variance, in which “the circumstances alleged in the indictment to have formed the context of the defendant’s actions differ in some way nonessential to the conclusion that the crime must have been committed.”⁷² In other words, a constructive amendment changes the charges, while a variance changes the method of proving the charges.

Constructive amendment undermines two constitutional rights. First, it violates the Grand Jury Clause of the Fifth Amendment. When an indictment is constructively amended, a defendant can be convicted of charges that were not presented to a grand jury, thereby contravening the Fifth Amendment.⁷³ Without a grand jury, “prosecution beg[ins] by arms of the Government without the consent of fellow cit-

⁷⁰ See, e.g., *United States v. Thomas*, 274 F.3d 655, 670 (2d Cir. 2001) (en banc) (defining constructive amendment as “presentation of evidence or . . . actions of the court” that generate “a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment” (internal quotation marks omitted)).

⁷¹ See *infra* text accompanying note 75 (describing the issue of notice, which is of concern only when the basis for conviction is broadened).

⁷² *United States v. Floresca*, 38 F.3d 706, 709 (4th Cir. 1994) (en banc); cf. *Thomas*, 274 F.3d at 670 (describing a variance as occurring “when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment,” yet failing to mention the inessential nature of the changes (quoting *United States v. Frank*, 156 F.3d 332, 337 n.5 (2d Cir. 1998) (per curiam))).

⁷³ See U.S. CONST. amend. V (requiring the indictment of a grand jury for a felony conviction). The Grand Jury Clause has not been incorporated against the states. See *Hurtado v. California*, 110 U.S. 516, 534-35 (1884); *Wilson v. Lindler*, 8 F.3d 173, 174 (4th Cir. 1993) (en banc) (per curiam), *rev’g* 995 F.2d 1256 (4th Cir. 1993).

izens.”⁷⁴ Even though a jury of one’s peers ultimately convicts the defendant whether or not a grand jury exists, the absence of the prior procedural check removes the layer of protection that the Grand Jury Clause seeks to provide. Second, constructive amendment is inconsistent with a defendant’s Sixth Amendment right “to be informed of the nature and cause of the accusation.”⁷⁵ An indictment gives defendants notice of the charges against them, but a defendant is not on notice of constructive changes, which undermines the defendant’s ability to prepare an adequate defense.

In addition, constructive amendment opens the door for two other potential problems. First, constructive amendment makes defendants vulnerable to repeat prosecutions for the same offense. If a defendant is convicted of a crime that was not mentioned in her indictment, a later grand jury might indict the defendant for the very same crime.⁷⁶ Second, ambiguity about the source of a conviction generates a similar problem for appeals. As the Supreme Court has observed, a mismatch between indictment and conviction “enables [the] conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture.”⁷⁷ The ambiguity about what facts served as the basis for conviction gives the government leeway to change explanations after conviction and thereby disable the defendant’s attempted appeal.

⁷⁴ *Thomas*, 274 F.3d at 670; *see also* *Wood v. Georgia*, 370 U.S. 375, 390 (1962) (describing the grand jury as “standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will”).

⁷⁵ U.S. CONST. amend. VI.

⁷⁶ *See* *United States v. Folks*, 236 F.3d 384, 390 (7th Cir. 2001) (observing that one function of the Grand Jury Clause is “to insure that the defendant is not subject to a second prosecution” (internal quotation marks omitted)); *United States v. Vavlitis*, 9 F.3d 206, 210 (1st Cir. 1993) (noting that “[m]idtrial amendments are deemed prejudicial” partly in order “to prevent reprosecution for the same offense”). While *vulnerability* to repeat prosecutions is not a constitutional problem, an actual repeat prosecution would violate the Double Jeopardy Clause. *See* U.S. CONST. amend. V (“[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .”).

⁷⁷ *Russell v. United States*, 369 U.S. 749, 766 (1962).

B. Preserved Objections and Plain Error Review

Preserved structural errors merit automatic reversal.⁷⁸ When a defendant fails to preserve error via a proper objection, appellate courts employ a plain error standard for review. Notably, the additional requirements of plainness and discretionary judgment prevent courts from using automatic reversal on plain error review.⁷⁹ However, if an error is structural, then the “affects substantial rights” prong of plain error review should be presumptively satisfied. Because circuit courts already recognize that constructive amendment is a structural error when the error is preserved, they should also recognize that the error affects substantial rights on plain error review. This Section explores the relationship between structural error and plain error review.

On review of a preserved objection to constructive amendment, the Supreme Court has held that constructive amendment should result in automatic reversal without regard to harmless error analysis. In *Stirone v. United States*, decided thirty-one years prior to *Fulminante*, the Supreme Court reversed a conviction where the indictment charged the defendant with obstructing shipments of sand to Pennsylvania but the prosecutor argued that the defendant obstructed shipments of steel from Pennsylvania.⁸⁰ The Court asserted that the error was “far too serious to be . . . dismissed as harmless error” and described the right to a grand jury judgment as a “substantial right.”⁸¹ Because the burden of persuading a court that a constitutional error was harmless rests with the government, the modern effect of *Stirone* is to make the presumption of prejudice un rebuttable.

⁷⁸ See *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (listing errors that “will always invalidate the conviction”).

⁷⁹ Cf. *United States v. Young*, 470 U.S. 1, 16 n.14 (1985) (deeming a per se approach to plain error review, based on the satisfaction of the plainness prong alone, to be “flawed” because plain error review has multiple requirements).

⁸⁰ 361 U.S. 212, 213-15 (1960). There is some dispute about whether *Stirone* was a case of constructive amendment at all, and it may be better explained as a variance. See *United States v. Brandao*, 539 F.3d 44, 61 n.11 (1st Cir. 2008) (acknowledging the government’s argument that *Stirone* involved a variance but declining to address it). If *Stirone* did involve a variance, the fact that the Supreme Court found it not subject to harmless error review makes it more likely that the Court would find constructive amendment a structural error, because the concerns involved with constructive amendment are more severe. See *supra* notes 72-77 and accompanying text (explaining concerns such as notice and repeat prosecution, and suggesting that they are less relevant in the variance context, when the indictment and its amendment vary only in method of proof and not in an ultimate legal conclusion).

⁸¹ *Stirone*, 361 U.S. at 217, 219.

However, when the Supreme Court lists past examples of structural error, it never includes *Stirone*.⁸² One possible explanation is that, because the case was pre-*Chapman*, the Court was reluctant to find any constitutional errors harmless. Under this theory, constructive amendment might receive different treatment if it were considered today. The Supreme Court made a similar observation in *Hedgpeth v. Pulido*, where it discredited reliance on two pre-*Chapman* cases as the basis for thinking that an instructional error may have been structural.⁸³ Nevertheless, in cases of direct review from a preserved error, the twelve circuit courts that have considered the issue continue to apply *Stirone* to deem constructive amendment a structural error.⁸⁴

On plain error review, when a defendant has failed to object to constructive amendment, *Stirone* does not control.⁸⁵ Automatic reversal is not appropriate because the defendant must prove the additional requirements of plain error.⁸⁶ In fact, when the error is not preserved, the circuits are split on whether constructive amendment is (1) structural error, (2) trial error that is per se prejudicial, (3) trial error that is presumptively prejudicial but subject to rebuttal, or (4) simply trial error. The Supreme Court has not had occasion to decide whether constructive amendment is presumptively prejudicial or whether it is an instance of structural error.⁸⁷ However, if the concerns about notice and grand jury approval justify treating constructive amendment as a structural error on harmless error review, then courts

⁸² See *United States v. Allen*, 406 F.3d 940, 944 (8th Cir. 2005) (en banc) (“Notably absent from [*Fulminante*’s] list of structural defects is the type of defective indictment at issue in *Stirone*”); *United States v. Floresca*, 38 F.3d 706, 713 n.17 (4th Cir. 1994) (en banc) (observing that, in the cases about errors not subject to harmless error review, the Court has not mentioned *Stirone*).

⁸³ 129 S. Ct. 530, 532 (2008) (per curiam).

⁸⁴ See *Floresca*, 38 F.3d at 711 & n.12, 712 (collecting cases that demonstrate consensus and reaching the same result, thereby making it “unanimous among the circuits” that constructive amendment is conclusively presumed to be prejudicial if it is properly preserved).

⁸⁵ See *United States v. Brandao*, 539 F.3d 44, 61 (1st Cir. 2008) (noting that *Stirone* did not involve plain error review and that “the difference between harmless error and plain error review is a meaningful one”).

⁸⁶ See *infra* note 107 and accompanying text.

⁸⁷ See *United States v. Cotton*, 535 U.S. 625, 632-33 (2002) (“[W]e need not resolve whether respondents satisfy [the third] element of the plain-error inquiry, because even assuming respondents’ substantial rights were affected, the error [of constructive amendment] did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.”).

on plain error review should consider the prejudice prong of *United States v. Olano*⁸⁸ presumptively satisfied, easing the defendant's burden.

According to *Olano*, the definition of plain error is (1) an error that (2) is plain and (3) affects substantial rights.⁸⁹ If all three requirements are satisfied, then the reviewing court (4) may judge whether the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings" such that the court should exercise discretion to correct the error.⁹⁰ Plain error review is stricter than harmless error review because of the addition of the plainness prong and discretionary judgment and because, unlike in harmless error cases, the defendant bears the burden of persuasion.⁹¹

Despite these differences, the analysis used in the *Fulminante* elaboration of structural errors can inform the assessment of what affects substantial rights under the third prong of *Olano*'s plain error review. This approach is sensible because the statutory source of harmless error analysis maps onto the statutory source of plain error review. The notion of harmless error that *Fulminante* explicates has its origins in Federal Rule of Criminal Procedure 52(a), which states that harmless error is an error that does not "affect substantial rights."⁹² Federal Rule of Criminal Procedure 52(b), addressing plain error, also refers to "substantial rights." The key nuance is that the phrase serves a different function in each subsection: Rule 52(a) bars error correction if the error does *not* affect substantial rights, whereas Rule 52(b) permits error correction only if the error *does* affect substantial rights.⁹³ This difference is the basis for the distinct burdens of persuasion based on whether or not a defendant preserved an objection. Structural error, however, functions as a decisive finding that renders burdens of persuasion moot. Thus, the case law about what constitutes a structural

⁸⁸ 507 U.S. 725 (1993).

⁸⁹ *Id.* at 735.

⁹⁰ *Id.* at 736 (alteration in original) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

⁹¹ See *United States v. Turner*, 474 F.3d 1265, 1275-76 (11th Cir. 2007) (articulating the differences in purpose and application between harmless error and plain error).

⁹² FED. R. CRIM. P. 52(a).

⁹³ See *Olano*, 507 U.S. at 734 ("When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called 'harmless error' inquiry—to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.").

error should be useful for determining whether an error affects substantial rights under the third prong of plain error review.

This approach is also conceptually coherent. Structural error guarantees reversal when it is difficult or impossible to isolate an error's prejudicial effect because the error undercuts the reliability of the judicial proceeding.⁹⁴ Similarly, when a court conducts plain error review and an error has the features of a structural error, it is difficult or impossible to demonstrate prejudice.

The Third, Fourth, and Ninth Circuits have held that structural errors by their nature satisfy the third *Olano* prong.⁹⁵ Other courts have engaged in substantially similar analyses. For example, the First Circuit has held that it "need not consider the strength of the [remaining] evidence" to conclude that a structural error to which the defendant did not object affected substantial rights and thus satisfied the third *Olano* prong.⁹⁶ Although the Supreme Court has not decided the issue,⁹⁷ it acknowledged some relationship between structural errors and the third *Olano* prong in *Johnson v. United States*.⁹⁸ The Court assumed *ad arguendo* that "failure to submit materiality to the jury" satisfied the third *Olano* prong but found for the government on the fourth prong.⁹⁹ The "affecting substantial rights" discussion operated on the assumption that, if the error were structural, then it affected substantial rights.¹⁰⁰

⁹⁴ See *United States v. Mojica-Baez*, 229 F.3d 292, 309 (1st Cir. 2000) ("These 'structural errors' require that convictions . . . be set aside without any examination of prejudice because, among other things, it would be well-nigh impossible to determine the amount of harm."). *But see infra* note 114 (acknowledging ambiguity over the purpose of addressing structural error).

⁹⁵ See *United States v. Recio*, 371 F.3d 1093, 1101 (9th Cir. 2004) ("[A] finding of structural error satisfies the third prong of the *Olano* test."); *United States v. Adams*, 252 F.3d 276, 285-86 (3d Cir. 2001) (finding that the presence of a structural error exempts the appellant from needing to prove prejudice); *United States v. David*, 83 F.3d 638, 647 (4th Cir. 1996) (finding that a structural error "satisfies *Olano's* third prong" without additional analysis).

⁹⁶ *United States v. Colon-Pagan*, 1 F.3d 80, 82 (1st Cir. 1993).

⁹⁷ See *United States v. Brandao*, 539 F.3d 44, 61 (1st Cir. 2008) ("[T]he Supreme Court has never specifically resolved the more sophisticated question of whether a structural error necessarily affects substantial rights . . ." (internal quotation marks omitted)).

⁹⁸ 520 U.S. 461 (1997).

⁹⁹ *Id.* at 469-70.

¹⁰⁰ See *id.* at 468-69 (noting the petitioner's argument that "if an error is so serious as to defy harmless-error analysis, it must also 'affect[t] substantial rights,'" but declining to explore the issue (alteration in original)).

Finding that constructive amendment is structural should be sufficient ground for a court to conclude that it affects substantial rights, because structural errors by their nature undercut the reliability of a trial. Whether or not a defendant objected to the error makes no difference in the status of the error as structural. If an error is structural, it affects substantial rights, even on plain error review.¹⁰¹

C. Current Circuit Court Views

Despite their consensus that constructive amendment is a structural error when the defendant objects to it, the circuit courts treat constructive amendment on plain error review in four distinct ways: (1) as a structural error, (2) as a per se prejudicial trial error, (3) as a presumptively prejudicial trial error that is subject to rebuttal, or (4) as a trial error with no special presumption. This Section surveys their approaches.

1. Structural Error in the Fourth Circuit

The Fourth Circuit is the most generous toward defendants who did not object to constructive amendment, treating it as a structural error that establishes per se prejudice for purposes of the third *Olano* prong.¹⁰² In *United States v. Floresca*, the court analogized constructive amendment to the defective reasonable-doubt instruction in *Sullivan*, arguing that “it is ‘utterly meaningless’ to posit that any rational grand jury *could* or *would* have indicted Floresca [on the indicted charge], because it is plain that this grand jury *did not*.”¹⁰³ Despite the Supreme Court’s repudiation of the *Sullivan* analysis in *Neder*,¹⁰⁴ the Fourth Circuit continues to cite the holding of *Floresca* with approval.¹⁰⁵

The *Floresca* court expressed uncertainty about whether classifying the error as structural was sufficient to justify reversal without regard

¹⁰¹ If an error is not structural, it may still affect substantial rights, but the inquiry depends on facts particular to the case rather than on the character of the error itself.

¹⁰² See *United States v. Floresca*, 38 F.3d 706, 713 (4th Cir. 1994) (en banc) (“[E]rror occasioned by constructive amendments . . . must affect substantial rights.”).

¹⁰³ *Id.* at 712.

¹⁰⁴ See *supra* notes 47-48 and accompanying text (explaining the Court’s rejection of its prior holding).

¹⁰⁵ See, e.g., *United States v. Foster*, 507 F.3d 233, 242 (4th Cir. 2007) (quoting *Floresca* for the proposition that constructive amendment “must be corrected on appeal even when not preserved by objection”); *United States v. Mingo*, 237 F. App’x. 860, 863 (4th Cir. 2007) (per curiam) (same).

for *Olano*, so it proceeded to the *Olano* analysis.¹⁰⁶ The Supreme Court later closed this question in *Johnson v. United States*, which explained that the Court has “no authority” to make an exception to Rule 52, and therefore to the application of *Olano*, even though the petitioner in *Johnson* had argued that an error in his trial was structural.¹⁰⁷ No matter how strong the case for structural error and the relationship between structural error and the prejudice prong, a defendant must satisfy the remaining *Olano* prongs as well.

The *Floresca* court did not rely on its argument for why the error was structural to demonstrate that it was also prejudicial. Instead, the court concluded that, because *Stirone* stated that the error affects substantial rights,¹⁰⁸ constructive amendment is necessarily prejudicial under the third prong. The court concluded that *Olano* does not require a showing of prejudice in every case, noting *Olano*’s statement that “[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome.”¹⁰⁹ Thus, in the Fourth Circuit’s view, constructive amendment is a structural error that per se satisfies the third *Olano* prong.

2. Per Se Prejudice in the Second Circuit

In *United States v. Thomas*, the Second Circuit applied plain error review to constructive amendment and held that the error is per se prejudicial.¹¹⁰ The court, sitting en banc, stressed the importance of a grand jury as a “buffer or referee between the Government and the people” and noted the impropriety of speculating about what a grand jury might have done if given the chance.¹¹¹ While the court cited *Stirone* repeatedly, it did not rely on it as controlling precedent. The decision did not refer to the *Fulminante* line of cases, but its analysis is closest to the framework approach because it isolates the indictment

¹⁰⁶ See *Floresca*, 38 F.3d at 712.

¹⁰⁷ See *Johnson v. United States*, 520 U.S. 461, 466, 469 (1997) (holding that, even if the structural quality of an error is relevant to whether the error affected substantial rights, that fact does not permit a court to forego the application of *Olano*).

¹⁰⁸ See *Stirone v. United States*, 361 U.S. 212, 219 (1960).

¹⁰⁹ *Floresca*, 38 F.3d at 713 (quoting *United States v. Olano*, 507 U.S. 725, 735 (1993)).

¹¹⁰ 274 F.3d 655, 666, 670 (2d Cir. 2001) (en banc). The circuit has reiterated this holding in other decisions. See, e.g., *United States v. Delano*, 55 F.3d 720, 729 (2d Cir. 1995) (collecting cases and observing that “[w]e repeatedly have held that constructive amendments of an indictment are *per se* violations of the Fifth Amendment that require reversal even without a showing of prejudice”).

¹¹¹ *Thomas*, 274 F.3d at 670 (internal quotation marks omitted).

as a basic feature of a trial and finds that constructive amendment is per se prejudicial.¹¹²

In the context of plain error review, the distinction between structural error and per se prejudice is not meaningful. One conceptual difference is that courts correct structural errors *regardless* of prejudice,¹¹³ while a presumption supposes without specific proof that there *is* prejudice. Consequently, while structural error could encompass errors that are not arguably or presumptively prejudicial but that are too important for prejudice to matter, a presumption may not be conceptually equipped to explain such errors. It is doubtful that the structural error category embraces rights that are important but not presumptively prejudicial,¹¹⁴ so there is probably no difference. More importantly, per se prejudice and structural error produce the same result on plain error review: definitive satisfaction of *Olano's* third prong.¹¹⁵ The *Fulminante* approaches used by the Supreme Court to identify structural error are more well-defined than haphazard per se rules. If the *Fulminante* approaches succeed in isolating errors the effects of which are difficult to quantify, however, then the *Fulminante* approaches should produce the same result as a per se rule.

Further, although the Ninth Circuit always reversed convictions premised on constructive amendment prior to *Olano*, it has since expressed hesitation about the soundness of its rule following *Olano*, which gave courts discretion to grant relief under its fourth prong.¹¹⁶ Given its prior rule and the fact that its hesitation relates only to the fourth prong, it seems likely that the Ninth Circuit will follow a rule similar to the Second Circuit's and deem the third prong satisfied.

¹¹² See *id.* at 670-71.

¹¹³ See *Olano*, 507 U.S. at 735 (recognizing the possibility of "a special category of forfeited errors that can be corrected regardless of their effect on the outcome").

¹¹⁴ Compare *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006) ("[A]s we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error."), with *id.* at 159 (Alito, J., dissenting) ("The touchstone of structural error is fundamental unfairness and unreliability."). While the Court mentions "unfairness and unreliability" with some frequency, many critics have offered convincing evidence that the Court ignores fairness unless it relates to reliability. See *supra* note 34 (explaining that the Supreme Court's harmless error and structural error jurisprudence does not consider the importance of the right at stake).

¹¹⁵ *United States v. Brandao*, 539 F.3d 44, 58 (1st Cir. 2008).

¹¹⁶ See *United States v. Dipentino*, 242 F.3d 1090, 1095 (9th Cir. 2001) ("[W]e find it unnecessary in this case to consider whether a constructive amendment always requires reversal, even under plain error review [after *Olano*], because we conclude that the defendants were prejudiced by the constructive amendment.").

3. Rebuttable Presumption of Prejudice in the Third Circuit

In *United States v. Syme*, the Third Circuit held that constructive amendment warrants a rebuttable presumption of prejudice that satisfies the third prong of *Olano*.¹¹⁷ The court noted that the grand jury protection is “a basic right” due to its constitutional basis and that “it is very difficult for a defendant to prove prejudice resulting from most constructive amendments to an indictment” because a jury could have convicted the defendant on any number of theories.¹¹⁸

The court persuasively answered the concern that its ruling might result in widespread sandbagging, that is, defendants “failing to object to an error at the trial level in order to keep an issue for appeal as insurance in the event they are convicted.”¹¹⁹ Constructive amendments are “a narrowly defined category of errors, which arise relatively infrequently” compared to variances, thereby minimizing any cause for concern.¹²⁰ Moreover, even with the Third Circuit’s relatively generous rule, the discretionary fourth prong of *Olano* gives judges the ability to stop defendants from abusing the rule if the judges suspect sandbagging.¹²¹

Because the government did not rebut the presumption of prejudice, the court did not have occasion to reach the question of whether constructive amendment is a structural error. In dicta, the court stated that “it is doubtful that constructive amendments are structural errors” because Supreme Court cases listing structural errors omit *Stirone*.¹²² The court admitted that constructive amendments “are per se reversible under harmless error review”¹²³ and stated that, if they were structural errors, it would “assume they would constitute per se reversible error even under plain error review.”¹²⁴ Because *Johnson* requires that all errors to which the defendant did not object pass the *Olano* test to justify reversal,¹²⁵ the court would apparently adopt a per se rule

¹¹⁷ See *United States v. Syme*, 276 F.3d 131, 154 (3d Cir. 2002) (“[W]e will apply in the plain error context a rebuttable presumption that constructive amendments are prejudicial (and thus that they satisfy the third prong of plain error review).”).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 154 n.9.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 155 n.10.

¹²³ *Id.* at 136.

¹²⁴ *Id.* at 155 n.10.

¹²⁵ See *supra* note 107 and accompanying text.

of prejudice for the third *Olano* prong, rather than a rebuttable presumption, if constructive amendment were structural.

4. Straightforward Plain Error Analysis in Other Circuits

The First,¹²⁶ Fifth,¹²⁷ Seventh,¹²⁸ and D.C.¹²⁹ Circuits have all held that constructive amendment is subject to plain error analysis and that no presumption of prejudice, rebuttable or otherwise, applies. The courts have used several arguments to reach this conclusion.

First, some courts presume that plain error review requires the defendant to show prejudice, no matter the error involved.¹³⁰ While this method is simple, it holds little weight if there is any compelling justification for treating constructive amendment as structural error. Second, the Fifth Circuit is especially concerned with the sort of sandbagging that the Third Circuit addressed in *Syme*, though the two protections that the Third Circuit mentioned should diminish this fear

¹²⁶ See *United States v. Brandao*, 539 F.3d 44, 60 (1st Cir. 2008) (“We . . . apply the standard prejudice evaluation to constructive amendment claims on plain error review and do not presume prejudice.”).

¹²⁷ See *United States v. Fletcher*, 121 F.3d 187, 193 (5th Cir. 1997) (“Following *Olano* . . . we have discretion to correct a *Stirone* error—an error that, prior to *Olano*, would have required reversal *per se*.”), *abrogated on other grounds by* *United States v. Longoria*, 298 F.3d 367, 373-74 & n.9 (5th Cir. 2002) (en banc) (per curiam), *as recognized in* *United States v. Robinson*, 367 F.3d 278, 286 n.11 (5th Cir. 2004).

¹²⁸ See *United States v. Trennell*, 290 F.3d 881, 886 (7th Cir. 2002) (reviewing a defendant’s complaint that the jury instructions constructively amended the indictment for plain error because the defendant did not object to the instructions at trial); *United States v. Remsza*, 77 F.3d 1039, 1044 (7th Cir. 1996) (holding that, even if jury instructions constructively amended the indictment, they must be reviewed for plain error).

¹²⁹ See *United States v. Lawton*, 995 F.2d 290, 294 (D.C. Cir. 1993) (using plain error review because the defendant did not object to the constructive amendment). In practice, the D.C. Circuit seems to protect defendants more than its sister circuits that place the burden on the defendant. In *Lawton*, the court required that the defendant prove prejudice but found the burden met because the constructive amendment made it a “distinct possibility” that the defendant was convicted for actions that did not constitute a federal offense. *Id.* *Lawton* utilizes the same black-box argument that justifies treating constructive amendment as structural. While nominally placing the burden of persuasion on the defendant, the D.C. Circuit seems to require only a minimal amount of proof: the mere possibility of an error. See *id.*

¹³⁰ See *Remsza*, 77 F.3d at 1044 (stating that although *Olano* suggested in dicta that some constitutional errors may be so damaging to the judicial process that no prejudice needs to be shown to correct them, constructive amendment must be prejudicial to be reversed in the Seventh Circuit); *Lawton*, 995 F.2d at 294 (“Because *Lawton* did not object on this ground in the district court, our review is for plain error.”).

substantially.¹³¹ Third, some circuits have defined constructive amendment so broadly as to include the narrowing of the indictment. Under such a construction, some constructive amendments do not necessarily undermine reliability or fairness.¹³² While there is nothing objectionable about this approach, it leaves open the possibility that errors falling under the narrower definition of constructive amendment deserve special treatment. Fourth, and most persuasively, the Supreme Court is hesitant to expand the category of structural error so long as the most rudimentary framework of an impartial adjudicator and counsel is present.¹³³ For every expansion of the category of structural error, more cases will result in reversible error, undermining efficiency and finality. From the perspective of likely outcome, this argument is the most persuasive, even though it fails to address the significance of constructive amendment and the appropriate balance between error correction on one hand and efficiency and finality on the other. In other words, the argument makes no attempt to resolve the normative question of whether constructive amendment

¹³¹ See *Fletcher*, 121 F.3d at 193 (declining to hold that constructive amendment requires per se reversal because, “[w]ere we to so hold, no rational defense counsel would ever object to the erroneous instruction . . . [for] defense counsel would also know that a conviction would necessarily be reversed on appeal”); see also *supra* notes 119-22 and accompanying text (discussing the Third Circuit’s reply to the sandbagging concern).

¹³² See, e.g., *United States v. Brandao*, 539 F.3d 44, 61 (1st Cir. 2008) (explaining that its broad definition means that not all constructive amendments generate prejudice); see also *Fletcher*, 121 F.3d at 193 & n.6 (explaining that the defendant did not suffer prejudice when the degree of robbery on which the jury was instructed included all of the elements on which he was indicted plus one, such that the prosecution was held to a higher standard of proof than in the indictment, but acknowledging that this was not “the typical case” of constructive amendment because the basis for conviction was narrowed).

¹³³ See *Neder v. United States*, 527 U.S. 1, 8 (1999) (acknowledging that structural error applies to “a very limited class of cases” (internal quotation marks omitted)); *Johnson v. United States*, 520 U.S. 461, 466 (1997) (“We [have] cautioned against any unwarranted expansion of Rule 52(b) . . . because it would skew the Rule’s careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.” (internal quotation marks omitted)); *United States v. Olano*, 507 U.S. 725, 735 (1993) (“Normally, although perhaps not in every case, the defendant must make a specific showing of prejudice”); *Rose v. Clark*, 478 U.S. 570, 579 (1986) (“[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis.”); see also *Brandao*, 539 F.3d at 60 (observing that the Supreme Court is “increasingly wary of recognizing new structural errors”).

should be considered a structural error. Despite this fact, the category of structural errors is, and will probably remain, small.

D. *Applying the Four Fulminante Approaches*

While some circuits have endeavored to apply *Fulminante* to assess whether constructive amendment is a structural error,¹³⁴ their analysis suffers from the Supreme Court's failure to provide clear guidance about the various *Fulminante* approaches. This Section attempts to supplement their analysis by applying each *Fulminante* approach to constructive amendment. Constructive amendment shares many features of structural errors that the *Fulminante* approaches identify, but it does not share enough features to satisfy the high standards that the Court has set for structural error classification.

1. The Framework Approach Applied to Constructive Amendment

Floresca employed the framework approach: constructive amendment nullifies the jury verdict such that the appellate court cannot determine whether the error affected the verdict.¹³⁵ But now that the Supreme Court has abandoned the portion of *Sullivan* on which this argument relies,¹³⁶ the relationship between constructive amendment and the framework of a trial must lie elsewhere.

Constructive amendment is centrally related to the framework of a trial. Among the most basic features of a trial that prescribe its structure are the charges, which guide the decision about what evidence should be presented, and the jury instructions, which dictate how the jury deliberates over the charges.¹³⁷ A constructive amendment causes a mismatch between these basic features, upsetting the framework of

¹³⁴ See *supra* Section II.C.

¹³⁵ See *supra* notes 102-10 and accompanying text.

¹³⁶ See *supra* notes 47-48 and accompanying text (describing the Court's retreat from the strong rule of *Sullivan*).

¹³⁷ The Supreme Court treats instructional errors nearly universally as trial errors. See *Neder*, 527 U.S. at 9-10 (collecting cases in which the Court found instructions that were improper to be trial error); *Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991) (listing six examples in which instructional errors are trial errors). *But see Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993) (deeming defective reasonable-doubt instructions structural error). However, this fact sheds little light on the status of constructive amendment. While constructive amendment often involves a defect with the instructions given to a jury, the difficulty is not that the instructions misstate the law but that they do not match the indictment. The concern that constructive amendment will undercut notice is distinct from any concerns associated with instructional errors.

the trial. It is difficult to isolate a precise reason why, beyond its violation of basic procedural rights, constructive amendment is framework-related. This difficulty, however, stems from the ambiguities of the framework approach itself, not from applying the approach to constructive amendment.¹³⁸

Three counterarguments are possible. First, one might argue that constructive amendment is not a structural error if the jury effectively duplicates the function of the grand jury; the framework of a trial is still intact so long as either entity has performed the relevant function. This counterargument, however, is unlikely to succeed: First, the Supreme Court generally shies away from classifying a particular right as “unnecessary” by focusing on whether the right’s larger purpose has been satisfied by another means. For example, in *Gonzalez-Lopez*, the Court said that the Sixth Amendment requirement of counsel of choice “commands, not that a trial be fair, but that a particular guarantee of fairness be provided.”¹³⁹ Thus, even though a trial jury cannot find a defendant guilty of an offense unless a grand jury had sufficient proof to charge the defendant with the offense, the procedural right to a grand jury is required. Second, while this criticism’s merit depends on an overlap between the functions of the trial jury and the grand jury, the overlap is incomplete. Grand juries perform a distinct function in that they provide notice to defendants of the charges against them. A grand jury indictment also enhances clarity, thereby curbing repeat prosecution for the same offense and appellate court affirmations on grounds different than those upon which the jury convicted the defendant.¹⁴⁰ Therefore, because the right to a grand jury indictment is independently important and serves unique functions, there is still reason to think that constructive amendment affects the trial framework.

A second counterargument is that a grand jury is not sufficiently important to a fair trial to be a component of the trial framework. In fact, the Supreme Court has not incorporated the Grand Jury Clause against the states,¹⁴¹ which suggests that an accurate indictment is not an essential, framework-level feature of a trial. Indeed, all of the other

¹³⁸ See *supra* subsection I.A.1 (criticizing the framework approach for its inability to differentiate procedure from framework).

¹³⁹ 548 U.S. 140, 146 (2006).

¹⁴⁰ See *supra* notes 73-77 and accompanying text (discussing the important functions of the grand jury).

¹⁴¹ See *supra* note 73.

structural errors affect rights that attach in state proceedings.¹⁴² One way to sidestep this criticism is to broaden the argument: a grand jury indictment may not be essential, but a court system must provide some advance statement of charges. This broader right to notice of accusations has been incorporated.¹⁴³ A criminal information could satisfy the demand for notice as well as a grand jury indictment would, but when the federal system chooses to use grand jury indictments, the grand jury must provide notice to the defendant of the charges against her.

Third, whether constructive amendment affects the framework of the trial may depend on the manner and extent to which the amendment alters the indictment. An error that affects the framework of a trial only when certain facts coexist is not a structural error.¹⁴⁴ For example, an amendment might broaden the basis of conviction to include behavior that is part of the same factual nexus, behavior so intimately related to the charge that the defendant believed it was part of the indictment, or facts that she had anticipated and contested during trial. This critique highlights a difficulty with the framework approach: even the most basic error may not affect the trial framework, depending on the facts of the case. Nonetheless, the difficulty in exceptional cases afflicts constructive amendment no more than it afflicts the archetypal structural errors. Additionally, when the error arises on plain error review, the discretionary prong of *Olano* gives courts the ability to screen out cases of constructive amendment that fit the profile of a trial error. Consequently, this criticism should not prevent constructive amendment from being classified as a structural error.

Given the general weakness of the critiques and the critiques' reliance on the problems with the framework approach itself, there is

¹⁴² See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 161-62 (1968) (holding that denial of the right to a jury trial for a serious state crime was reversible error); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (extending the right to assistance of counsel to the states and holding that its denial constitutes reversible error); *In re Oliver*, 333 U.S. 257, 273 (1948) (ruling that denial of the right to a public trial for a state crime violated due process). Although the right to a grand jury is not incorporated, racial discrimination in the selection of a grand jury is considered structural error because of the broader prohibitions on discrimination applicable to the states. See *Vasquez v. Hillery*, 474 U.S. 254, 262 (1986) (“[T]he criminal defendant’s right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded.”).

¹⁴³ See *In re Oliver*, 333 U.S. at 273.

¹⁴⁴ See *supra* text accompanying note 37.

good reason to classify constructive amendment as a structural error under the framework approach.

2. The Evidentiary Approach Applied to Constructive Amendment

Under the evidentiary approach, a variance is a trial error because it alters the depiction of a nonessential, circumstantial element of the crime. On appeal, a judge can determine whether the error affected the jury decision, because the error results from introduction of a particular piece of evidence that may be weighed against the other evidence.

In contrast, there is a strong argument that constructive amendment is a structural error under the evidentiary approach. The Third Circuit's argument in *Syme* is apt: because a jury may convict on a variety of theories, proving that constructive amendment is prejudicial is typically "very difficult" because no one outside the jury is certain about whether the error influenced the jury's decision.¹⁴⁵ A jury might convict for the reason specified in the indictment, but it might also convict based on the broader scope of evidence or the erroneously provided instruction. Because the jury may have convicted on an improper basis, a reviewing court cannot weigh the error against other evidence without supplanting the role of the jury. The difficulty of knowing the content of jury deliberations thus shows why the evidentiary approach provides the strongest case for classifying constructive amendment as a structural error.

One hurdle for this argument is that, in rare cases, the error is weighable. For example, when a jury delivers a special verdict that clarifies its theory of why the defendant is guilty, the verdict removes any ambiguity about the reason for conviction.¹⁴⁶ Given the *Neder* argument that an error is structural based on its necessary qualities, not its contingent qualities,¹⁴⁷ this counterargument may be a reason that constructive amendment is not a structural error. However, constructive amendment raises this issue in a distinct context because the error

¹⁴⁵ United States v. *Syme*, 276 F.3d 131, 154 (3d Cir. 2002). See generally FED. R. EVID. 606(b) (forbidding inquiry into jury deliberations).

¹⁴⁶ See, e.g., United States v. *Hien Van Tieu*, 279 F.3d 917, 921 (10th Cir. 2002) (finding no constructive amendment where a defendant was charged with possessing a "firearm with ammunition" under a statute criminalizing possession of a "firearm or ammunition," as the special verdict form revealed unanimity on possession of a firearm).

¹⁴⁷ See *supra* notes 37, 144, and accompanying text (explaining the Court's stance in *Neder*). But see *infra* text accompanying note 151 (discussing how the Court softened the strict requirements of *Neder* in *Gonzalez-Lopez*).

is necessarily unfair and incapable of being weighed against other evidence *unless* certain contingent facts exist. Again, on plain error review, the discretionary prong of *Olano* enables courts to refuse to provide relief if extraordinary facts make the jury's deliberative process clear. Absent a special verdict, the evidentiary approach cuts in favor of treating the error as structural.

3. The Timing Approach Applied to Constructive Amendment

Whether constructive amendment is a structural error under the timing approach depends on how the error is framed. The error of omission from the indictment occurs prior to the presentation of the case to the jury, implying that the error is structural. The error of commission occurs during the presentation of evidence or instructions to the jury. While there is room for debate over what counts as "presentation to the jury," instructing the jury almost certainly falls in that category, indicating that it is trial error. Thus, the result of the timing approach hinges on which frame of view is most accurate.¹⁴⁸

The error of commission frame of view is preferable because, in a case of constructive amendment, the indictment is not erroneous. Rather, it is the subsequent deviation from the indictment that constitutes an error. Although constructive amendment is possible only by reference to the earlier indictment, there would be no error if the earlier indictment were followed precisely. As a result, the error occurs during the presentation of the case to the jury. This fact fatally undercuts the contention that constructive amendment is a structural error under the timing approach. Nevertheless, it may not completely defeat a claim of structural error given that the Supreme Court has classified a jury instruction as a structural error when it fit the structural error profile under other approaches.¹⁴⁹

¹⁴⁸ It is conceivable that the error could consist of two actions that take place at different times. But if both frames of view are equally plausible, then this approach would catalog the error as both trial and structural, which is nonsensical under the *Fulminante* dichotomy. Therefore, I assume that one view must be more accurate and that the more accurate view determines the outcome of the timing approach.

¹⁴⁹ See *supra* text accompanying notes 45-48 (discussing the retreat from *Sullivan* and the timing approach).

4. The Reliability Approach Applied to Constructive Amendment

Constructive amendment undercuts the reliability of a trial in two ways that are closely connected to the functions of the grand jury. First, the absence of a grand jury screening the government's charges might undermine the reliability of the trial jury's decision of guilt. Despite the jury's verdict of guilt, a court should not assume that the grand jury would have issued an indictment.¹⁵⁰ Even if a grand jury is not especially effective at enhancing the reliability of the verdict because of its lower standard of proof, it still has some purpose in providing citizen input into the government's decision to prosecute, which can enhance reliability through social consensus.

Second, a defendant who does not have notice of the bases for her charge is prone to present a less adequate defense, which in turn renders the adversarial system a less reliable producer of accurate determinations of guilt. While a defendant might eventually be put on notice when the government presents evidence beyond the scope of the indictment or when the judge instructs the jury, such notice is inadequate because the defendant might not have time to prepare an effective rebuttal. Thus, constructive amendment undermines reliability.

* * *

Treating constructive amendment as structural error is sensible under all approaches except the timing approach. The best method by which to advocate for structural error classification is employment of the *Gonzalez-Lopez* language that rejects the view that “*only* those errors that *always* or *necessarily* render a trial fundamentally unfair and unreliable are structural.”¹⁵¹ This method bypasses some of the difficulties arising from the rare but possible instances in which the typical problems with constructive amendment do not apply. Highlighting the approaches under which constructive amendment seems most akin to

¹⁵⁰ Cf. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (declining to engage in “speculative inquiry into what might have occurred in an alternate universe” where a defendant was not deprived of counsel). The type of speculative inquiry that *Gonzalez-Lopez* disclaimed is analogous to imagining that a grand jury would have reached the same result as a jury in the trial itself. Moreover, the existence of overlap between procedural protections that enhance reliability is no reason to dispense with one protection.

¹⁵¹ *Id.* at 149 n.4.

a structural error could suffice, depending on which approaches the Court wishes to emphasize.

Nevertheless, the Supreme Court is reluctant to expand the category of structural error,¹⁵² and it consistently excludes *Stirone* from the list of past structural errors.¹⁵³ Consequently, it seems improbable that the Court will classify constructive amendment as a structural error.

E. *Benefits of Using a Rebuttable Presumption of Prejudice*

Because the Court will probably not hold that constructive amendment is a structural error, it will remain difficult for defendants to prove prejudice from a constructive amendment. When a defendant has preserved her objection, the harmless error doctrine already places the burden on the government to show that the error was not harmless,¹⁵⁴ thus functioning as a rebuttable presumption that the error was prejudicial. Giving the government the burden of proof is an effective way to protect defendants in the face of the unknowns that typically accompany constructive amendment. Correspondingly, when defendants fail to properly object to a constructive amendment, courts should adopt a rebuttable presumption that the third *Olano* prong is satisfied, as the Third Circuit has done. This Section explains the merits and function of a rebuttable presumption of prejudice.

A rebuttal presumption of prejudice for the third prong of *Olano* is not unprecedented, even outside the Third Circuit. *Olano* left open the possibility of a rebuttable prejudice standard,¹⁵⁵ although later cases have not considered the applicability of rebuttable prejudice after finding that an error is nonstructural.¹⁵⁶ Some circuits employ presumptions of prejudice in other contexts in which proving prejudice is uniquely difficult, including cases on appeal at the time *United States v. Booker* made the Federal Sentencing Guidelines advisory¹⁵⁷ and cases in

¹⁵² See *supra* note 133 and accompanying text.

¹⁵³ See *supra* note 82 and accompanying text.

¹⁵⁴ See *United States v. Turner*, 474 F.3d 1265, 1276 (11th Cir. 2007) (explaining the difference between plain error and harmless error review).

¹⁵⁵ See *United States v. Olano*, 507 U.S. 725, 735 (1993) (leaving room for, but not addressing, “a special category of forfeited errors that can be corrected regardless of their effect on the outcome”—i.e., structural errors—in addition to “those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice”).

¹⁵⁶ See, e.g., *Neder v. United States*, 527 U.S. 1, 8-15 (1999).

¹⁵⁷ See, e.g., *United States v. Davis*, 407 F.3d 162, 165 (3d Cir. 2005) (en banc) (“[W]here mandatory sentencing was governed by an erroneous scheme[,] prejudice

which a district court violates a defendant's right of allocution and there is "any possibility" that, but for the error, the defendant would have received a lesser sentence.¹⁵⁸ When alternate jurors participate in deliberations, some courts allow the possibility of prejudice to satisfy the appellant's burden of persuasion on the issue of prejudice,¹⁵⁹ which functions in the same way as a presumption of prejudice.

A presumption of prejudice is appropriate for cases of constructive amendment that arise on plain error review. Without access to the black box of the jury, it is impossible to know whether a jury convicted a defendant on the narrow basis of the indicted charge or on the erroneously broadened basis. Under a traditional plain error approach, the insurmountable burden of proving prejudice rests with the defense. Courts should take the middle ground by treating constructive amendment as presumptively prejudicial. In cases where there is determinably no prejudice, the government will easily rebut the presumption. For example, the government could point to a special verdict form refuting the defendant's claim that she was convicted of an uncharged offense. The government might also rebut the presumptive prejudice in cases in which the defendant must have been on notice—e.g., cases in which the amendment is intimately connected to the charged conduct, the amendment is based on the same

can be presumed."); *United States v. Barnett*, 398 F.3d 516, 528-29 (6th Cir. 2005) (holding that a presumption of prejudice was appropriate because proving prejudice would require complex speculation about the court's behavior). Other circuits have adopted different approaches. See Deborah S. Nall, Comment, *United States v. Booker: The Presumption of Prejudice in Plain Error Review*, 81 CHI-KENT L. REV. 621, 635-37 (2006) (explicating three broad approaches to dealing with direct review of *Booker* error). See generally *United States v. Booker*, 543 U.S. 220, 265-67 (2005) (holding that the mandatory Federal Sentencing Guidelines violated the Sixth Amendment).

¹⁵⁸ *United States v. Luepke*, 495 F.3d 443, 451 (7th Cir. 2007); accord *United States v. Reyna*, 358 F.3d 344, 352 (5th Cir. 2004) (en banc) (presuming prejudice when the defendant's right to allocution was violated); *United States v. Adams*, 252 F.3d 276, 287 (3d Cir. 2001) ("[W]e should presume prejudice when a defendant shows a violation of the right and the opportunity for such a violation to have played a role in the . . . sentencing decision.").

¹⁵⁹ See, e.g., *Manning v. Huffman*, 269 F.3d 720, 725 n.2 (6th Cir. 2001) ("[S]trict evidentiary prohibitions against inquiring into the mental processes of the jury would make it almost impossible for a defendant to show that an alternate juror in fact prejudiced his case."); cf. *United States v. Acevedo*, 141 F.3d 1421, 1424 (11th Cir. 1998) (assuming that the presence of alternates during deliberations prejudiced the jury because the judge instructed them to participate and even allowed one to become the foreman); *United States v. Ottersburg*, 76 F.3d 137, 139-40 (7th Cir. 1996) (finding prejudice because the alternates presumptively followed the judge's instruction to deliberate with the jury).

factual nexus as the charged conduct, and the defendant deployed a well-researched defense on the issue. The opportunity for rebuttal ensures that exceptional cases—cases where constructive amendment was not problematic—do not result in a windfall to the defendant. *Olano*'s discretionary prong provides an additional safeguard to ensure just outcomes.¹⁶⁰ At the same time, the presumption effectively compensates for the difficulty of proof by resolving the ambiguity in favor of the defendant, a result that is especially appropriate for a constitutional-level error.

CONCLUSION

The Supreme Court has not provided a unified framework for analyzing which errors are amenable to harmless error analysis. *Fulminante* purports to accomplish this objective, but it is subject to four competing interpretations. Although a family-resemblance treatment of the *Fulminante* approaches captures the salient features of each method, taken together they have no logical structure and provide little guidance for lower courts. Until the Supreme Court replaces *Fulminante* with a more fine-grained means of assessing the applicability of harmless error analysis, courts that confront constructive amendment on plain error review should presume, subject to rebuttal, that the error affected substantial rights. Even when the defendant does not object to the error, it is unfair to make her prove the unknown content of jury deliberations to protect her constitutional right to notice of the charges against her. A rebuttable presumption that constructive amendment affects substantial rights accommodates the similarities of constructive amendment and recognized structural errors—particularly the difficulty of proving prejudice—while affording courts the flexibility to not reverse on the basis of an error that, in light of the circumstances, is insignificant.

¹⁶⁰ Cf. *United States v. Noel*, No. 07-2468, 2009 WL 2835428, at *18 (7th Cir. Sept. 4, 2009) (Williams, J., dissenting) (“Shifting [the] burdens of proof alone does not disrupt the Supreme Court’s attempts to limit the expansion of structural errors.”).