Appeal and Error: *Flores v. State*–Navigating the Murky Waters of Harmless Error Review

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NOTES

Appeal and Error: *Flores v. State* — Navigating the Murky Waters of Harmless Error Review

I. Introduction

"Justice" has been defined in as many ways as there are people who have aspired to that office. Supreme Court Justice Learned Hand defined the concept as the "tolerable accommodation of the conflicting interests of society."¹ According to this definition, the concept of justice must encompass the interests of the innocent to go free, the interests of society to hold the guilty accountable, and the interests of every person who stands accused, guilty or innocent, to a fair trial.²

Over the course of a century, these competing ideals have weathered much social change.³ Policies advocating defendants' due process rights now face the growing concern that criminal cases are litigated for too many years.⁴ Bowing to public pressure to curb excessive appeals,⁵ appellate courts have relied on the harmless error doctrine to avoid reversing convictions for errors which do not harm the substantial rights of the defendant.⁶

The doctrine's application in the midst of such conflict has charted a "wayward course,"⁷ resembling the wanderings of the heroes of Homer's *Odyssey*,⁸ who continually lost their way at sea. Many courts and commentators have acknowledged the increasing trend of reviewing courts' reliance on harmless error.⁹ Confusion

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4. See Linda E. Carter, Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied, 28 GA. L. REV. 125, 126 (1993); see also Janet Naylor & Todd Spangler, Maryland's Gas Chamber Awaits, Idle for Three Decades, WASH. TIMES, Sept. 11, 1992, at B6 (contending that current system allows prisoners to delay their fate by "seemingly endless string of appeals").
5. See Kenneth R. Brown, Constitutional Harmless Error or Appellate Arrogance, 6-JAN UTAH B.J. 18, 18-19 (1993).
6. See ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 15 (1970) (adopting language of federal statute to define "harmless" as errors which do not "affect the substantial rights of the parties"); see also Jay E. Heit, Note, State v. Schuster: South Dakota Expands the Harmless Error Rule to Allow Coerced Confessions, 39 S.D. L. REV. 635, 647-50 (1994) (describing doctrine as allowing review courts to avoid setting aside the conviction for errors which had little likelihood of altering the outcome of the trial).
9. See, e.g., Tom Stacy & Kim Dayton, Rethinking Harmless Constitutional Error, 88 COLUM. L. REV. 511.
persists, however, concerning when harmless error analysis should be applied\(^9\) and which tests should be administered.\(^1\)

On February 13, 1995, in *Flores v. State*,\(^2\) the Oklahoma Court of Criminal Appeals deviated from the course of increasing harmless error application. Under the *Flores* decision, an instruction directing the jury to presume the defendant "not guilty," rather than instructing the jury that the defendant was presumed innocent, was deemed not harmless.\(^3\) Further, the court concluded that this error violated the defendant's constitutional and statutory rights.\(^4\) Therefore, this error could never be found harmless, regardless of the evidence suggesting the guilt of the defendant.\(^5\)

This note will first explore the historical development of the harmless error doctrine, especially in relation to concepts as fundamental as the presumption of innocence. Second, the facts of *Flores* will be presented as well as an analysis of the court's holdings. Third, the rationale of the judges writing concurring opinions to the order denying a rehearing which categorized the defective jury instruction as "harmful per se" will be scrutinized. Fourth, the implications of the original *Flores* decision will be discussed. Finally, judicial and legislative alternatives will be examined and evaluated.

**II. History of the Harmless Error Doctrine**

The doctrine of harmless error dates back to eighteenth century England. At that time, trial error required reversal only when it resulted in an incorrect verdict. Concern for defendants' rights prompted the Exchequer Rule,\(^6\) which required an automatic reversal for any error. Gradually the public grew dissatisfied with seemingly endless appeals. In response, Parliament passed harmless error legislation, attempting to curb the lengthy appeals process while still acknowledging defendants' rights.\(^7\) Under the new legislation, a new trial could not be ordered without a

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11. See id. at 828.
13. See id. at 562. "In the instant case, the jury was instructed that Appellant was presumed to be not guilty rather than presumed innocent." Id.; see also Flores v. State, 899 P.2d 1162, 1163 (Okla. Crim. App.) (Order Denying Rehearing) (Chapel, J., concurring), cert. denied, 116 U.S. 548 (1995).
14. See Flores, 896 P.2d at 559.
15. See Flores, 899 P.2d at 1165 (Order Denying Rehearing).
17. See Steven H. Goldberg, Harmless Error: Constitutional Sneak Thief, 71 J. CRIM. L. & CRIMINOLOGY 421, 422 (1980) (noting that the Judicature Act of 1873 was Parliament's response to the Exchequer Rule, which resulted in more retrials than new trials); see also TRAYNOR, supra note 6, at 8-9. The Judicature Act of 1873 provided that technical errors at trial would not create reversal. Instead, the court must find that a "substantial wrong" had been committed at trial. Id.
showing of some substantial wrong.\textsuperscript{18}

America followed suit in adopting the Exchequer Rule\textsuperscript{19} but was reluctant to accept the harmless error doctrine.\textsuperscript{20} As in England, reviewing courts in the United States encountered much criticism for lengthy appeals.\textsuperscript{21} Eventually, public demands persuaded Congress to pass a federal harmless error statute.\textsuperscript{22} Like its English counterpart, this statute precluded reversal when the denial of a substantial right caused no injury to the litigant.\textsuperscript{23}

Initially, the United States Supreme Court applied harmless error analysis only to nonconstitutional errors.\textsuperscript{24} The test for "harm" analyzed the error's effect on the jury's verdict rather than the evidence pointing to the defendant's guilt.\textsuperscript{25} However, the Court's landmark decision of \textit{Chapman v. California}\textsuperscript{26} broadened the doctrine's reach to include federal constitutional errors.

Recognizing that some constitutional errors may be "so unimportant and insignificant"\textsuperscript{27} to be deemed harmless, the Court in \textit{Chapman} set forth a two-pronged test. The threshold step required reviewing courts to determine whether the constitutional error was susceptible to harmless error analysis.\textsuperscript{28} The second step addressed whether the state proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."\textsuperscript{29}

Over the next thirty years, the Supreme Court refined the parameters for each of these factors. In \textit{Arizona v. Fulminante},\textsuperscript{30} the Court provided further guidance for

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\item \text{See Traynor, supra note 6, at 8-9.}
\item \text{See Ogletree, supra note 3, at 156. In discussing the history of the Exchequer Rule in England, Ogletree notes that "[a] parallel development occurred in the United States. American courts adopted the rule of automatic reversal as part of their common law inheritance from England." Id.}
\item \text{See Greabe, supra note 10, at 822.}
\item \text{See Wayne R. LaFave & Jerold H. Israel, \textit{Criminal Procedure} § 26.6, at 257 (1984).}
\item \text{See Act of May 24, 1949, Pub. L. No. 72, § 110, 63 Stat. 89, 105 ("On the hearing of any appeal . . ., the court shall give judgment after an examination of the record without regard to errors or defects which do not effect the substantial rights of the parties."); see also Fed. R. Crim. P. 52(a) (providing that defects, irregularities or variances which do not affect substantial rights of the parties should be disregarded).}
\item \text{See Act of May 24, 1949, § 110, 63 Stat. at 105.}
\item \text{See, e.g., Kotzeakos v. United States, 328 U.S. 750, 763-64 (1946).}
\item \text{386 U.S. 18 (1967).}
\item \text{Id. at 22.}
\item \text{See id. at 20-22. "[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Id. at 22; see also Charles F. Campbell, Jr., \textit{An Economic View of Developments in the Harmless Error and Exclusionary Rules}, 42 Baylor L. Rev. 499, 505 (1990) (acknowledging that in \textit{Chapman} the Court neglected to provide adequate guidance for assessing when constitutional errors are subject to harmless error analysis and when error requires automatic reversal).}
\item \text{Chapman, 386 U.S. at 24; see also id. at 23 n.8 (noting that at least three exceptions remained to constitutional error subject to harmless error analysis: one, use of coerced confession; two, deprivation of a right to an attorney; and three, trial before a biased tribunal); see also Brown, supra note 5, at 18.}
\item \text{499 U.S. 279 (1991). The \textit{Fulminante} Court found that coerced confessions would be subject}
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assessing whether a constitutional error was subject to harmless error analysis. The Court defined this threshold inquiry as dividing constitutional errors into two types: trial errors and structural errors. 31

"Trial error" occurs during the presentation of the case to the jury. The impact of this error on the mind of the jury may be weighed against all of the other evidence presented at trial. Therefore, "trial errors" are subject to harmless error review. 32 In contrast, a "structural error" influences the entire structure of the trial mechanism. The error's impact on the verdict is not clearly assessable nor is it capable of comparison with the weight of the evidence against the accused. As a result, these errors defy analysis by a harmless error standard. Examples of structural errors include the denial of counsel and the bias of a judge. 33

Furthermore, the Court has shifted its focus in determining what constitutes "harmlessness beyond a reasonable doubt." In addition to the Chapman analysis, which evaluates whether the constitutional error "did not contribute to the verdict," 34 the Court has set forth two other tests. First, in Harrington v. California, 35 the Court asked whether the evidence of the defendant's guilt was so overwhelming that the error would not have changed the result of the trial. 36 Second, the Court in Delaware v. Van Arsdell 37 created a hybrid of the Chapman and the Harrington tests by balancing both the effect of the error and the weight of all admissible evidence. 38

These two cases signaled a new perspective in harmless error analysis. Under Chapman, courts focused solely on the prejudicial nature of the error. 39 In contrast, the modifications in Harrington and Van Arsdell redirected courts to evaluate the nonerroneous evidence pointing to the defendant's guilt. 40 Consequently, the variety

to harmless error analysis. See id. at 280.
31. See id.
32. See id.
33. See id.
34. Chapman, 386 U.S. at 24.
38. See id. at 684. Circuit courts applying a hybrid test include: United States v. Veltmann, 6 F.3d 1483, 1500 (11th Cir. 1993) (finding error not harmless); United States v. McMahon, 938 F.2d 1501, 1505-06 (1st Cir. 1991) (holding error harmless); United States v. Copley, 938 F.2d 107, 110 (8th Cir. 1991) (holding error harmless); United States v. Thompson, 908 F.2d 648, 652-53 (10th Cir. 1990) (holding the error not harmless); United States v. Lang, 904 F.2d 618, 625-27 (11th Cir. 1990) (holding the error harmless).
39. Chapman, 386 U.S. at 24 ("Certainly error, Constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.").
40. See Ogletree, supra note 3, at 159 (citing United States v. Hasting, 461 U.S. 499, 509 (1983) (holding that "it [was] the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including constitutional violations"); Rose v. Clark, 478 U.S. 570, 578 (1986) (noting that "while there are some errors to which Chapman does not apply, they are the exception and
of tests applied to determine harmlessness has created discontinuity and confusion among the lower courts.  

By 1967, all fifty states had adopted some form of the harmless error doctrine. 42 Oklahoma recognized this doctrine prior to statehood. 43 Early forms of the state harmless error statute required "examination of the entire record" by the appellate court. 44 Eventually, the Oklahoma Court of Criminal Appeals accepted the Chapman test. 45 However, ambiguity persists concerning when a constitutional error should be subjected to harmless error analysis and which standard should be applied to prove harmlessness beyond a reasonable doubt. 46 Moreover, conflict continues to arise surrounding the application of this doctrine to nonconstitutional violations. 47 

In its denial of rehearing in Flores v. State, 48 the Oklahoma Court of Criminal Appeals addressed whether harmless error analysis applied to an erroneous presumption of innocence jury instruction. 49 The majority categorized this error as automatically reversible but failed to identify a cognizable test by which other substantial violations could be analyzed. 50 Although narrowing the scope of the harmless error doctrine for defective presumption of innocence jury instructions, Flores may have done little to correct the doctrine's "wayward course."

III. Statement of the Case

Jose Flores strangled Sheila Ann Brown and disposed of her body in a trash dumpster. 51 The simplicity of the facts, however, has been obscured by the ensuing procedural history. The case has moved through four phases: the trial by jury, the defendant's appeal to the Oklahoma Court of Criminal Appeals, the State's petition for rehearing, and the State's petition to the United States Supreme Court for writ of


42 See Ogletree, supra note 3, at 157.

43 See Simpson v. State, 876 P.2d 690, 697 (citing Morris v. Territory, 99 P. 760 (Okla. 1909)).


46 The Oklahoma Court of Criminal Appeals, over the course of five decades, has employed the "overwhelming evidence test," the "contribute to the verdict" test, a hybrid of these two, the "impact on the mind of the jury" test, and an "impact . . ." test combined with a "contribute to the verdict" test. Each of these tests has been employed in each of the last five decades without the court clearly distinguishing when to utilize a given test. See infra note 201.

47 In Simpson v. State, 876 P.2d 690, 705-06 (Okla. Crim. App. 1995), the dissent disagreed with the majority that nonconstitutional errors required a standard of review other than Chapman.


49 See id. at 1163 (Order Denying Rehearing) (further explaining the court's holding in the original opinion, Flores v. State, 896 P.2d 558 (Okla. Crim. App. 1995)).

50 See id.

51 See id.
certiorari.
Flores was tried by jury for the crime of murder in the first degree in the District Court of Tulsa County. The jury found him guilty of first degree murder and recommended punishment of life without parole. Flores appealed.

On appeal, the Oklahoma Court of Criminal Appeals discussed two errors. First, the trial court should not have departed from the standard instruction requiring the state to prove "each element of the crime beyond a reasonable doubt." Second, because the trial court gave an erroneous jury instruction on the presumption of innocence, reversal was required. The following discussion focuses on the resolution of the second issue.

The instruction as administered read as follows:

You are instructed that the defendant is presumed to be not guilty of the crime charged against him . . . unless his guilt is established by evidence beyond a reasonable doubt and that presumption of being not guilty continues . . . unless every material allegation . . . is proven by evidence beyond a reasonable doubt.

In contrast, the Oklahoma Uniform Jury Instruction Criminal No. 903 provides: "The defendant(s) [is] [are] presumed innocent of the crime(s), and the presumption continues unless . . . you are convinced of [his] [her] guilt beyond a reasonable doubt." Judge Strubhar, author of the majority opinion, recognized the trial judge's deviation from Oklahoma law as error. Reasoning that the defective jury instruction lessened the burden of proof, the majority found that the error constituted a "substantial violation of a constitutional or statutory right" and was not "harmless beyond a reasonable doubt." Judge Lumpkin concurred with the majority that the error in this case constituted reversible error. However, he disagreed with the majority's standard of review. The majority applied the Chapman harmless error standard for constitutional violations. This standard evaluates whether the error was "harmless beyond a reasonable doubt." In contrast, Judge Lumpkin looked to the harmless error standard for nonconstitutional violations. The test for nonconstitutional errors determines whether the reviewing court had "'grave doubts' [that] the error . . . did not have a 'substantial influence' on the outcome of the trial.

52. See Flores, 896 P.2d at 559.
54. See Flores, 896 P.2d at 559.
55. See id. at 558.
56. See id. at 562-63.
57. See id. at 559.
58. Id. at 560.
59. Id. at 560 n.1 (alterations in original).
60. See id. at 560.
61. Id. at 560-61.
62. Id. at 563 (Lumpkin, J., concurring) (citing Simpson v. State, 876 P.2d 690, 702 (Okla. Crim. App. 1994)).
Upon reversal, the State of Oklahoma filed a petition for rehearing with the Oklahoma Court of Criminal Appeals. While the court found that the complaints raised in the petition did not merit rehearing, conflict arose concerning the future application of the original *Flores* opinion. As a result, four of the judges wrote opinions. Dissenting Judges Johnson and Lumpkin contended that similar statutory violations in other cases should be subjected to harmless error analysis on a case-by-case basis. Conversely, the concurring opinions of Judge Strubhar and Judge Chapel argued that *Flores* would automatically reverse all cases involving the defective "presumption of innocence" jury instruction.

After the Oklahoma Court of Criminal Appeals denied a rehearing, the State of Oklahoma petitioned the United States Supreme Court for writ of certiorari. The Supreme Court denied certiorari without comment, declining to address whether this error is amenable to harmless error review. Thus, the four opinions accompanying the order denying the rehearing remain the primary source of guidance for determining how the court will apply *Flores* in the future. The following discussion examines the arguments set forth in these four opinions and evaluates the contention that all cases involving the defective presumption of innocence jury instruction require automatic reversal.

**IV. Flores Rationale: Applying a Harmful Per Se Standard**

The courts have been called upon to reconcile the competing goals of procedural fairness and the finality of judgments. While each goal represents a valid social interest, commentators have emphasized the dangers of the opposing goals when taken to extremes. For example, the protection of a defendant's rights could lead to endless appeals for the guilty. On the other hand, an emphasis on swift and final judgments could sacrifice the rights of the accused to a fair trial.

Courts have resolved this dilemma in favor of freeing the guilty rather than risking the wrongful conviction of the innocent. Uncertainty has persisted, however, in determining when and how to apply a harmless error analysis to achieve a just balance of these interests. The court in *Flores* faced a similar conflict. While the

64. See id. at 1163.
65. See id. at 1170 (Johnson, P.J., dissenting); id. at 1173 (Lumpkin, J. dissenting).
66. See id. at 1168 (Strubhar, J., concurring specially); id. at 1164 (Chapel, V.P.J., concurring specially).
68. See *Brown*, supra note 5, at 18 (describing how the "results oriented" doctrine could permit unreasonable searches and seizures and coerced confessions); see also *Greabe*, supra note 10, at 830 (analyzing a case which emphasized the state's interest in finality of convictions, comity, federalism, and the prominence of the trial and which held the violation of the accused's Miranda rights to be harmless error).
70. See *Saltzburg*, supra note 7, at 998 (describing the history of harmless error as instable and uncertain); see also *Carter*, supra note 4, at 134 (discussing interpretational problems for "harm" when the state's interest in a correct result has been met).
court unanimously agreed that the error in Flores required reversal, controversy later arose concerning the decision's application to other cases. In response, Judge Strubh and Judge Chapel, in separate concurring opinions to the order denying a rehearing, presented three reasons for categorizing the defective jury instruction as harmful per se.

First, the defective instruction violated the "fundamental" principle of the presumption of innocence. Second, in analyzing the defective instruction, the state harmless error statute governs rather than the more liberal federal standard. Third, the role of the court in appellate review is to act with restraint yet still to protect against governmental violations of constitutional safeguards. Each of these arguments will be evaluated in turn.

A. Violation of a Fundamental Principle

The first argument addressed the nature of the right which was violated. The concurring opinions described the presumption of innocence as fundamental to our system, based upon two lines of reasoning. First, the presumption of innocence is a fundamental principle based upon jurisprudential traditions. Second, the presumption of innocence is fundamental because it is a companion principle to the constitutional guarantee that in criminal cases the State must persuade the jury of the defendant's guilt "beyond a reasonable doubt.

Categorizing a principle as fundamental is significant because the violation of a fundamental error denies the defendant of due process and requires reversal of the conviction. As a result, history has helped define the boundaries of the fundamental concepts of liberty. For instance, courts have described fundamental concepts as those which are rooted in the traditions and collective conscious of the people. In

72. Judge Chapel claims that dismissing this error as harmless would undermine crucial tenets of our democratic society. See id. at 1168 (Chapel, V.P.J., concurring specially). Judge Strubharg contends that it would "eviscerate" a fundamental principle to our system. See id. (Strubharg, J., concurring specially).
73. See id. at 1164 (Chapel, V.P.J., concurring specially).
74. See id. at 1169 (Strubharg, J., concurring specially); id. at 1164 (Chapel, J., concurring specially) (refraining from "judicially legislating" an amendment to the harmless error statute); id. at 1165 n.5 (Chapel, V.P.J., concurring specially) (noting that "it is not the business of this Court to sit as a super-jury. It is our business to see that the trial courts follow the law. And, if they do not follow the law, it is our sworn duty to reverse them however difficult or unpopular it may be to do so").
75. See id. at 1168 (Strubharg, J., concurring specially) (describing the presumption of innocence as a "principle so fundamental to our system").
76. See id. (Strubharg, J., concurring specially).
77. For example, Judge Strubharg, who wrote a concurring opinion with the order denying the rehearing, authored the original Flores decision. See Flores v. State, 896 P.2d 558, 561 (1995) (citing Coffin v. United States, 156 U.S. 432, 453 (1895) (describing the presumption of innocence as axiomatic and elementary)).
78. See Flores, 899 P.2d at 1169 (Strubharg, J., concurring specially).
79. See Sevils v. Stat., 651 N.E.2d 278, 282 (Ind. Ct. App. 1995) (defining a fundamental error as one "so blatant and prejudicial, that if not corrected, it would deny the defendant due process").
80. See Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (upholding principles of due process
addition, those principles which are frequently repeated in common law jurisprudence are upheld as fundamental.\(^1\) Ultimately, courts have determined that fundamental principles form the foundation for all of our civil and political institutions.\(^2\)

Similarly, the concurring judges properly relied upon jurisprudential tradition as the guidepost for evaluating the principle of presumption of innocence. For more than a century, courts have revered the principle of the presumption of innocence as "undoubted law, axiomatic and elementary."\(^3\) However, in the same generation that these words were first written, a well-known Justice noted: "It is greatly to be feared that the so-called presumption of innocence in favor of the prisoner at the bar is a pretence, a delusion, and empty sound. It ought not to be, but — it is."\(^4\) Nevertheless, the presumption of innocence has maintained its place of prominence, at least in principle.\(^5\) Over the years, courts have continued to refer to this principle as the "touchstone of American criminal jurisprudence,"\(^6\) the "cornerstone of Anglo-Saxon justice,"\(^7\) and an essential component of a fair trial.\(^8\)

However, century-old theory does not always translate to modern-day method. In practice, the presumption of innocence is generally recognized as a shorthand description of the right of the accused to prove nothing until the prosecution has "taken up its burden and produced evidence and effected persuasion."\(^9\) This brand of innocence generally connotes a mere reminder for jurors of the burden of proof allocated to the state.\(^10\) Therefore, courts and jurors rarely assume that the accused is innocent in fact.\(^11\)

One nationwide survey has revealed that over 50% of the participants felt that a criminal defendant should be required to take the stand to prove his innocence.\(^12\) As

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81. See Solem v. Helm, 463 U.S. 277, 284-85 (1983) (verifying a principle as fundamental because it is "deeply rooted and frequently repeated in common-law jurisprudence").
82. See Hebert v. Louisiana, 272 U.S. 312, 316 (1926) (holding as fundamental those concepts which "lie at the base of all our civil and political institutions").
83. See Flores, 896 P.2d at 561 (citing Coffin v. United States, 156 U.S. 432, 453 (1895)).
85. See George P. Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 Yale L.J. 880, 880 nn.1-3 (1968) (noting the universal praise for the presumption of innocence, illustrated by numerous statutes and international declarations on human rights). But see United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) (Hand, J.) ("Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.").
90. See LeRoy Pernell, The Reign of the Queen of Hearts: The Declining Significance of the Presumption of Innocence, 37 CleV. St. L. Rev. 393, 393-94 (1989) (discussing the erosion of the presumption of innocence principle in the early 1970s to become simply a rule of evidence which allows the defendant to stand mute at trial).
91. See Laube, supra note 84, at 350-51.
92. See Philip D. Bush & John M. Stuart, The Future of Voir Dire in Minnesota: Fair Juries or
no surprise, juries in criminal cases have been confused even when the jury instructions were adequate.\(^93\) In one instance, a jury viewed a videotape of a pattern jury instruction stating that the defendant should be presumed innocent until proven guilty and without needing to present any evidence to prove his innocence.\(^94\) Only 50% of the jury understood that the defendant did not need to prove his innocence to be acquitted.\(^95\)

Even advocates of the fundamental principle of the presumption of innocence have contributed to the confusion. Justice Thurgood Marshall noted: "[O]ur fundamental principles of justice declare that the defendant is as innocent on the day before his trial as he is on the morning after his acquittal."\(^96\) However, this statement is inaccurate. A defendant is presumed to be innocent before trial and, upon acquittal, is found to be "not guilty." According to Justice Marshall, the jury instruction in *Flores*, which directed the jury to presume the defendant "not guilty," would not be error at all.

Of course, the increasingly common mistake of interpreting "innocence" as merely a means of allocating the burden of persuasion to the state does not merit subjecting its violation to harmless error analysis. Failing to presume the defendant to be innocent in fact would call into question the fundamental fairness of the trial.\(^97\) As a result, the courts of various states have recognized the presumption of innocence as a fundamental doctrine of American jurisprudence.\(^98\) In these states, the failure to adequately charge the jury concerning the defendant's presumption of innocence requires a new trial.\(^99\)

In addition to relying on jurisprudential tradition, the concurring opinions in the *Flores* denial of rehearing linked the statutory protection of presumption of innocence to the due process clause as a "companion principle."\(^100\) The concurring judges reasoned that a defective instruction concerning the presumption of innocence diluted

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\(^94\) See id.

\(^95\) See id.


\(^97\) See LaFave, supra note 84, at 348; see also Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 404 (1970) (urging a "commitment to the proposition that a man who stands accused of crime is no less entitled than his accuser to freedom and respect as an innocence member of the community").


\(^99\) See Dennard, 454 S.E.2d at 630.

\(^100\) See Flores v. State, 899 P.2d 1162, 1169 (Okla. Crim. App.) (Order Denying Rehearing) (Strubhar, J., concurring specially), cert. denied, 116 S. Ct. 548 (1995); see also id. at 1164 (Chapel, V.P.J., concurring specially) (arguing that defective presumption of innocence jury instruction is harmful per se, because due process is "one solid, immutable principle which must be preserved and protected").
or lessened the "burden of proof beyond a reasonable doubt," thereby denying what has been deemed a constitutional guarantee.\textsuperscript{101}

This reasoning is consistent with the United States Supreme Court decisions which defined fundamental principles as those grounded in the concept of due process.\textsuperscript{103} Like Oklahoma, other state courts have viewed the presumption of innocence as a necessary component of due process.\textsuperscript{104} However, the United States Supreme Court has refused to mandate a presumption of innocence instruction.\textsuperscript{105} In \textit{Kentucky v. Whorton}, the Court determined that an omission of the instruction would not require a reversal if the accused was not deprived of "due process of law in light of the totality of the circumstances."\textsuperscript{106} \textit{Whorton} affirmed the Court's position in an earlier decision that the particular phrase "presumption of innocence" was not mandatory as long as other due process requirements were met.\textsuperscript{107} Specifically, a criminal trial must afford the accused the right to be proven guilty beyond a

\textsuperscript{101} \textit{Id.} at 1166 (Chapel, V.P.J., concurring specially) (noting that the presumption of not guilty instruction diluted defendant's constitutional rights to be found guilty beyond a reasonable doubt); \textit{see also id.} at 1168 (Strubhar, J., concurring specially) ( remarking that even the dissenting judges agreed that erroneous instruction lessened the burden of proof).

\textsuperscript{102} \textit{See In re Winship}, 397 U.S. 358, 364 (1970) (establishing that Due Process Clause requires proof beyond reasonable doubt of every fact necessary to constitute the charged crime); \textit{see also Sullivan v. Louisiana}, 508 U.S. 275, 281-82 (1993) (holding an instructional error of a misdescription of the burden of proof not subject to harmless error review).


\textsuperscript{104} \textit{See State v. Adams}, 623 A.2d 42, 52 (Conn. 1993) (equating presumption of innocence instructional errors with burden of proof and elements of offense which are constitutional in nature); \textit{Dennard v. State}, 454 S.E.2d 629, 630 (Ga. Ct. App. 1995) (holding in all criminal cases tried upon plea of not guilty, the presumption of innocence is a fundamental doctrine of American jurisprudence and failure to adequately charge the jury is an error requiring a new trial); \textit{People v. Cross}, 650 N.E.2d 1047, 1055 (Ill. App. Ct. 1995) (noting defendants fundamental right to presumption of innocence); \textit{People v. Goss}, 521 N.W.2d 312, 324 (Mich. 1994) (Brickley, J., concurring) (contending that error infringing upon presumption of innocence deprives defendant of fair trial and is therefore due process violation). Compare the above cases with \textit{Sevits v. State}, 651 N.E.2d 278, 282 (Ind. Ct. App. 1995) (holding error not reversible error and contending that presumption of innocence not intended to shield the guilty but for the protection of the innocent to guard against conviction of unjustly accused), and \textit{People v. Hawthorne}, 841 P.2d 118, 137 (Cal. 1992) (finding due process not mandating use of particular phrase presumption of innocence as long as court's charge to jury conveys substance of principle).


\textsuperscript{106} 441 U.S. 786 (1979).

\textsuperscript{107} \textit{Id.} at 790. "[S]uch a failure must be evaluated in light of the totality of the circumstances — including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant features — to determine whether the defendant received a constitutionally fair trial." \textit{Id.} at 789.

reasonable doubt, and the defendant must be judged solely by evidence adduced at trial.\textsuperscript{109}

Judge Chapel's concurring opinion distinguished \textit{Whorton} from \textit{Flores} based on the facts.\textsuperscript{110} Rather than merely omitting the instruction, the trial judge in \textit{Flores} instructed the jury to presume the defendant "not guilty."\textsuperscript{111} Unlike the error in \textit{Whorton}, such an instruction could produce jury confusion concerning any correct instruction on the reasonable doubt rule.

While the Supreme Court has yet to rule on a defective presumption of innocence instruction, some commentators have suggested that this error is distinct from an omission and should be beyond the bounds of harmless error.\textsuperscript{112} Regardless of the Supreme Court's silence on this issue, Oklahoma law requires an adequate jury instruction on the presumption of innocence. Therefore, the next question addressed by the concurring opinions was the source of law governing the application of the harmless error doctrine.

\textbf{B. State Harmless Error Law Governs Rather Than Federal Law}

Judge Chapel's concurring opinion presented a second argument which emphasized the source of law governing the harmless error doctrine and the state statute mandating the presumption of innocence jury instruction. Judge Chapel's concurring opinion contended that the dissenting judges mistakenly followed the more liberal federal standards rather than the state harmless error statute.\textsuperscript{113} For almost a century, this state statute has permitted reversal for "substantial violations of a statutory or constitutional right."\textsuperscript{114}

However, in analyzing which violations are substantial, Oklahoma courts have explicitly incorporated much of the federal harmless error doctrine into state case law.\textsuperscript{115} For instance, the state courts have adopted the federal standards for non-

\begin{itemize}
\item \textsuperscript{109} See id. "While use of the particular phrase 'presumption of evidence' — or any other form of words — may not be constitutionally mandated, the Due Process Clause of the Fourteenth Amendment must be held to safeguard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Id. at 790-91.
\item \textsuperscript{110} See \textit{Flores}, 899 P.2d at 1166 (Order Denying Rehearing) (Chapel, V.P.J., concurring specially).
\item \textsuperscript{111} See id. (Chapel, V.P.J., concurring specially).
\item \textsuperscript{112} See Laufer, supra note 84, at 398 (urging state courts to restore the importance of the presumption of innocence by reexamining harmless error application to defective and omitted presumption of innocence instructions).
\item \textsuperscript{113} See \textit{Flores}, 899 P.2d at 1164 (Order Denying Rehearing) (Chapel, V.P.J., concurring specially).
\item Judge Chapel could have been referring to Judge Lumpkin's proposition that the federal standard for nonconstitutional errors set forth in \textit{United States v. Rivera}, 900 F.2d 1462, 1469 (10th Cir. 1990), was the appropriate standard rather than the \textit{Chapman} test which has been explicitly adopted by Oklahoma courts for constitutional errors. \textit{Simpson v. State}, 876 P.2d 690, 702 (Okla. Crim. App. 1994), appeared to adopt the federal standard for nonconstitutional errors. See infra note 116. Apparently, Judge Chapel believes that either \textit{Simpson} did not adopt the \textit{Rivera} standard for all nonconstitutional errors or that the error was a constitutional violation. See infra note 119.
\item \textsuperscript{115} See \textit{Fickens v. State}, 885 P.2d 678, 682 (Okla. Crim. App. 1994) (applying the federal courts' "contribute to the verdict" test for harmless error analysis of constitutional errors); \textit{Simpson v. State}, 876
\end{itemize}
constitutional and some constitutional errors. In fact, Judge Chapel has described the statute as codifying the Chapman v. California harmless error analysis. Thus, Oklahoma courts have regularly applied federal law in "determining the scope, the method, and the application of harmless error analysis."

While some of the federal decisions which are more restrictive of defendants' due process rights have not been directly accepted, federal case law has provided guidance in formulating the framework for the state harmless error doctrine. Ironically, in assessing whether the defective jury instruction in Flores was susceptible to harmless error analysis, both the concurring and the dissenting opinions bolstered their positions with analogies to United States Supreme Court decisions. The concurring opinions compared the rights that were violated, whereas the dissenting opinions focused on the violation itself.


See Bartell v. State, 881 P.2d 92, 99 (Okla. Crim. App. 1994) (holding that due to overwhelming evidence of guilt, admission of a videotape into evidence at trial, though violating defendant's Sixth Amendment right to confrontation, was harmless beyond a reasonable doubt).

386 U.S. 18 (1967).


Flores, 899 P.2d at 1175 (Lumpkin, J., dissenting); see also Cooper v. State, 889 P.2d 293, 308 (Okla. Crim. App. 1995) (commenting that the state "is empowered to use federal law in analyzing questions of state law").

The Oklahoma Court of Criminal Appeals, for instance, has not passed on whether coerced confessions are subject to harmless error analysis.

Judge Chapel compared the purposes underlying the presumption of innocence instructions mentioned in Kentucky v. Wharton, 441 U.S. 786 (1978), but distinguished an omission from a defective instruction. See Flores, 899 P.2d at 1165-66 (Chapel, V.P.J., concurring specially) (citing Kentucky v. Whorton, 441 U.S. 786, 790-91 (1978) (Stewart, J., dissenting) (opining that the omission of presumption of innocence instruction is subject to harmless error review)). Judge Strubhar compared the right to presumption of innocence with the right to reasonable doubt standard in criminal trials. See id. at 1168 (Strubhar, J., concurring specially) (citing Sullivan v. Louisiana, 113 S. Ct. 2078, 2082-83 (1993) (holding a misdescription of the burden of proof to be a structural error, not subject to harmless error review)). Judge Lumpkin's dissent compared the defective jury instruction to an omitted instruction, when the burden of proof instruction was adequate. See id. at 1175 (Lumpkin, J., dissenting) (citing Kentucky v. Whorton, 441 U.S. 786, 788-89 (1978) (refraining from constitutionally mandating a presumption of innocence instruction in every case)). Judge Lumpkin's dissent also distinguished the misdescription of the burden of proof from the defect in the presumption of innocence instruction. See id. at 1174 (Lumpkin, J., dissenting) (citing Sullivan v. Louisiana, 113 S. Ct. 2078 (1993) (holding the failure to give an adequate "beyond a reasonable doubt instruction" not subject to harmless error analysis)).

The concurrences compared the presumption of innocence instruction to the "beyond a reasonable doubt" instruction. For a discussion of a comparison of the presumption of innocence and the beyond a reasonable doubt standard, see generally Scott E. Sundby, The Reasonable Doubt Rule and the Meaning of Innocence, 40 Hastings L.J. 457 (1989).

The dissent compared a defective instruction with an omitted instruction of presumption of innocence, when the burden of proof standard was adequately described in both cases. See Flores v. State, No. F-93-977, 1995 WL 500467, at *11 (Okla. Crim. App. June 27, 1995).
Regardless of which approach is preferable, both the dissenting and the concurring opinions looked to federal law for guidance in interpreting a state statute. Of course, the state courts have discretion in formulating a state harmless error doctrine which affords greater rights to the accused than the constitutional minimum. Therefore, the real issue is not whether to apply federal law but rather how to apply the state harmless error standard.

C. The Role of the Court in Appellate Review

Both Judge Chapel's and Judge Strubhar's concurring opinions presented a third argument which centered on the role of the court in appellate review. The court's conflict concerning the application of the harmless error doctrine led the dissenting and the concurring opinions in *Flores* to reach opposite conclusions. The different outcomes, however, stemmed from contrasting views on the court's role in appellate review. Judge Lumpkin's dissent identified the purpose of a trial by jury as fairness, measured by the jury's attainment of an "accurate result." The concurring opinions, on the other hand, focused on the accuracy of the trial process. In addition, the concurring opinions advocated a role of judicial restraint based on the reviewing court's relationship with the following four entities: the legislature, the trial court, the trial judge, and the state political mechanism.

1. Role of the Court in Relation to the Legislature

When faced with uncertainty in statutory construction, courts traditionally have strived to fashion law in accordance with the intent of the legislature. Further, judge-made criminal laws have been disfavored. In recent generations, jurists and scholars have proposed that the Supreme Court, as well as other reviewing courts, should play a significant role in defining public policy. In *Flores*, Judge Chapel's concurring opinion to the order denying a rehearing voiced reservations against following the more recent and more expansive practices of the Court, both in terms of judicial activity and in applying the harmless error analysis to violations of substantial rights.

126. See *Flores*, 899 P.2d at 1163 (Order Denying Rehearing).
130. See Sanford Levinson, The Court of Today and the Lessons of History, in Roger G. McCloskey, The American Supreme Court 207 (2d ed. 1994). The author noted that "[t]here had grown up a generation of jurists and scholars convinced that the Court's judges were conscious molders of policy and that the Constitution had left open many questions about its own meaning, including the question of the Court's proper role." Id.; see also John W. Poulos, The Judicial Philosophy of Roger Traynor, 46 Hastings L.J. 1643, 1708-10 (1995) (analyzing the realists view that promoted a symbiotic relationship between the court and the legislature).
131. See *Flores*, 899 P.2d at 1164 (Order Denying Rehearing) (Chapel, V.P.J., concurring specially).
Judge Chapel argued for judicial restraint in appellate review, giving deference to statutes enacted by "the citizens of Oklahoma, speaking through the State Legislature." His concurring opinion suggested that the citizens are free to pursue their goals of altering these statutes at the legislative level if they so choose. Further, he reasoned that the court is not free to "abort the law by judicial fiat." 

Likewise, Judge Lumpkin's dissent advocated judicial self-restraint. However, he proposed that the Flores majority's interpretation of the harmless error statute violated the underlying legislative intent. Judge Lumpkin pointed to the legislative dictates preferring the affirmation of convictions when the error could not possibly have affected the outcome of the trial.

While Judge Lumpkin's dissent indicated that Flores should have included an applicable standard for a "substantial violation," the majority interpreted the harmless error statute textually. Though some commentators view the court's duty as formulating a workable definition for "substantial," the courts of other jurisdictions have similarly interpreted such statutes. In any event, the Oklahoma courts have explicitly applied the federal terminology in defining a "substantial violation" as one which so affects the entire structure of the trial as to defy harmless error analysis.

2. Role of the Court in Relation to the Jury

Although the United States Supreme Court has not definitively selected one harmless error standard, the Harrington v. California "overwhelming-evidence" test previously described is commonly applied. One problem with subjecting errors to this type of harmless error analysis is that it generally places a reviewing court in the awkward role of factfinder. As dispassionate arbiters of the law, appellate courts are poor finders of fact. For example, the reviewing court would be unable to discern the error's effect on the mind of the juror without hearing or seeing the live testimony.

132. Id. at 1167 (Chapel, V.P.J., concurring specially).
133. See id. at 1168 (Chapel, V.P.J., concurring specially).
134. Id. at 1167 (Chapel, V.P.J., concurring specially).
135. See id. at 1172 (Lumpkin, J., dissenting) (noting the legislative principles of finality of convictions and fairness at trial).
136. See id. at 1171 (Lumpkin, J., dissenting) (citing Rose v. Clark, 478 U.S. 570, 577 (1986) (recognizing the central purpose of the trial as the factual question of the defendant's guilt)).
137. See id. at 1177 (Lumpkin, J., dissenting).
141. See Mitchell, supra note 41, at 1342-45.
142. See Brown, supra note 5, at 19 (noting that appellate courts are in the "worst possible position" to determine the facts). Proponents of harmless error doctrine claim that such an analysis "reflects deference to the trial-level sentence" and that "review for harmless error is almost a routine undertaking of appellate courts." Clemons v. Mississippi, 494 U.S. 738, 773 n.23 (1990) (Brennan, J., concurring in part and dissenting in part).
Another criticism of such second-guessing is that the appellate court would be usurping the role of the jury, skewing the delicate balance between the trial and appellate roles.143 A prominent United States Supreme Court Justice has similarly argued that "it is not the appellate court's function to determine guilt or innocence."144 Rather, the appellate court must evaluate the "impact of the thing done wrong on the minds of the other men, not on one's own, in the total setting."145

In Flores, the court refused to assume the role of factfinder.146 When such a substantial error had influenced the jury's decision making, the reviewing court's evaluation of the error's impact on the minds of the jurors would amount to pure speculation. The automatic reversal of such errors will undoubtedly extend the lengthy appeals process for criminal trials containing an erroneous jury instruction. However, the reversals protect the jury's role, thus ensuring the defendants of due process rights to a trial by a fair and impartial jury.147

3. Role of the Appellate Court in Relation to the Trial Court

Courts and commentators have recognized the government's preference for the Harrington "overwhelming-evidence" test.148 While this standard is neither clear nor necessarily strict, the government can argue for truth seeking rather than discussing error which is often attributable to its own actions.149 In Flores, Judge Strubhar's concurring opinion rejected the dissent's proposition that a defective presumption of innocence jury instruction should ever be subjected to the "overwhelming error" test.150 The practical result of finding the error harmful per se is holding the lower court and its officers accountable for the error which they themselves may inject into the trial. In effect, neither judicial sloppiness nor purposeful shortcuts concerning the defendant's presumption of innocence would be permitted.

143. See Carter, supra note 4, at 140 (noting that our system of law is based on lay jurors as factfinders and the appellate courts as reviewing errors of law); see also Goldberg, supra note 17, at 429 (contending that an appellate court defies common sense when stepping outside its tradition role of review court and attempts to operate as factfinder).


145. Id. (Stevens, J., concurring).

146. The court, instead, reversed and remanded the case so that the evidence could be weighed by the appropriate finders of fact in a criminal trial, the jury. See Flores, 899 P.2d at 1166 (Order Denying Rehearing) (Chapel, V.P.J., concurring specially) (reasoning that the jury was biased by the erroneous instruction and were therefore not impartial finders of fact); see also id. at 1168 (Strubhar, J., concurring specially) (refusing to engage in pure speculation as to what a reasonable jury would have done).

147. See Brown, supra note 5, at 19 (arguing for expansion of errors not subject to Harmless Error Review "in order to give substance to the Sixth Amendment right to jury trial").

148. See Mitchell, supra note 41, at 1365.

149. See id. at 1356 (citing Williams v. Florida, 399 U.S. 78, 100 (1970) (recognizing that lay jury is designed to prevent oppression by government)).

150. See Flores, 899 P.2d at 1168 (Strubhar, J., concurring specially); see also id. at 1165, 1167 (Chapel, V.P.J., concurring specially) (sending a message to trial judges to follow the law).
Commentators have recognized the reviewing court as, at the very least, a "neutral" referee, which ensures that each party play by the rules. Similarly, the concurring opinions in Flores described the appellate court's role as a shield against governmental violations of constitutional and statutory safeguards. Thus, while refraining from actively offending either the legislative intent or the jury's findings, the court assumed a defensive stance in protecting the due process rights of the accused.

4. Role of the Court in Relation to the Political Mechanism

In an era when Supreme Court Justices are often viewed as political pawns, their state court counterparts, who are not afforded the same security of a lifetime appointment, could be influenced by voters. In addition, the increasing crime rate has spurred public demand for swift convictions. The public's dissatisfaction with lengthy appeals has, in turn, pressured appellate courts to liberally apply the harmless error doctrine.

Similarly, Judge Strubhar's concurring opinion recognized the temptation to allow public opinion to sway the court. The oath of the court is as an impartial interpreter of the laws rather than as elected representative. However, the fact that under Oklahoma law each candidate to the bench is subject to approval by popular vote for retention could place a judge in a position of compromise. When popular opinion runs counter to the preservation of a fundamental right such as the presumption of innocence, each judge is required by oath to uphold that right even at the expense of losing a seat on the bench.

V. Ramifications of Flores

In Oklahoma, as well as in most states, the scope of the harmless error doctrine as it applies to a specific constitutional error in a criminal trial may be evaluated according to the two components set forth in Chapman v. California. However, under Flores, defective presumption of innocence jury instructions will never reach the second step but will be automatically reversed. Despite this clear ruling,

151. See Levinson, supra note 130, at 219.
152. See Flores, 899 P.2d at 1169 (Strubhar, J., concurring specially).
153. See Carter, supra note 4, at 126.
154. See Flores, 899 P.2d at 1169 (Strubhar, J., concurring specially); see also id. at 1165 (Chapel, V.P.J., specially concurring) (noting that the court has a sworn duty to reverse trial courts if they do not follow the law).
155. See id. at 1169 (Strubhar, J., concurring specially) ("Each member of this Court has sworn an oath to uphold the law and apply it without regard to public opinion, retention elections, and the number of cases affected.")
157. See Okla. Const. art. 15, § 1 (providing oath of office for all public officers).
158. 386 U.S. 18 (1967); see Daniel Meltzer, Harmless Error and Constitutional Remedies, 61 U. Chi. L. Rev. 1, 11 (1994) (noting that all state courts have been assumed to be obliged to apply Chapman when reviewing criminal convictions). The Chapman test is the following: first, determine whether the constitutional error is subject to harmless error review; and second, determine whether the error is harmless beyond a reasonable doubt. See Chapman, 386 U.S. at 20-24; see also Greabe, supra note 10, at 826.
159. See Flores, 899 P.2d at 1168 (Strubhar, J., concurring specially). Recognizing that the
Flores provides little light to guide the future decisions of the court in regard to other statutory errors of constitutional import. Further, this decision possibly could be interpreted to establish a standard of harmless error analysis contrary to prior Oklahoma law.160

A. Flores and Harmless Error Analysis Under Prior Oklahoma Law

The majority in the original Flores opinion appeared to follow the well-established Chapman test.161 Application of this standard could cloud the distinction between clearly constitutional errors and statutory errors which have constitutional import. In Flores, the court recognized that an instruction on the presumption of innocence is not constitutionally required in every case.162 However, the defective presumption of innocence instruction was deemed to have diluted the burden of proof, which is constitutionally mandated to be "beyond a reasonable doubt" in criminal cases.163 Thus, the majority in the original decision reasoned that this error resulted in a "denial of Appellant's constitutional and statutory rights."164

Judge Lumpkin's concurrence to the original Flores opinion rejected categorizing this error as constitutional.165 In Simpson v. State,166 the court applied the federal standard for nonconstitutional error.167 In contrast to the Chapman constitutional

concurring judges reasined that such an error can be harmless if the evidence of guilt is overwhelming, Judge Strubhar contended, "This surely cannot be. If the instruction is this case lessens the burden of proof, an identical instruction in another case must also have the same effect regardless of the evidence of guilt." Id. (Strubhar, J., concuring specially).

160. In Simpson v. State, 876 P.2d 690, 702 (Okla. Crim. App. 1994), the court distinguished between constitutional and nonconstitutional errors in applying harmless error analysis. For nonconstitutional errors, the court advocated a test which analyzed whether the court had grave doubts that the error had a substantial influence on the outcome of the trial. See id. Courts in the future could interpret Flores as eliminating the distinction between the tests for nonconstitutional and constitutional errors, since the error in Flores was defined as nonconstitutional.


162. See Flores, 899 P.2d at 1165 (Order Denying Rehearing) (Chapel, V.P.J., concurring specially) (citing Kentucky v. Whorton, 441 U.S. 786, 789 (1978)).

163. See id. (Chap-l, V.P.J., concurring specially).

164. Flores, 896 P.2d at 559.

165. See id. at 563 (Lumpkin, J., concurring in result).


167. See id. at 702.

Appellant has not raised a constitutional error; he has raised an error which occurred as a result of the court's failure to adhere to the dictates of a state statute. We have not addressed this particular aspect to any appreciable extent. . . . In United States v. Rivera, . . . the appellatc court noted that in non-constitutional situations, an error is harmless unless it has a 'substantial influence' on the outcome, or leaves the reviewing court in 'grave doubt' as to whether it has such an effect. . . . We believe this to be a fair standard and use it here. . . . Therefore, we hold the error of the trial court . . . does not mandate reversal in this case. We do so because we have no 'grave doubts' this failure had a 'substantial influence' on the outcome of the trial.

Id.
error test.\textsuperscript{168} Simpson held a nonconstitutional error harmless unless it had a "substantial influence" in the outcome or leaves the reviewing court in "grave doubt."\textsuperscript{169} Additionally, Simpson placed the burden on the defendant, rather than the state, to show the error and that injury resulted.\textsuperscript{170}

The impact of Flores on Simpson's standard of review for nonconstitutional errors is not clear. Lower courts could read Flores as categorizing the defective jury instruction as solely a statutory violation. The practical effect of such an interpretation would mean applying the Chapman test uniformly for both statutory and constitutional errors.

On the other hand, it could be that the majority ingeniously connected a statutory violation of presumption of innocence with the established constitutional right of a burden of proof beyond a reasonable doubt. Under this interpretation, Flores would neither invalidate the nonconstitutional harmless error analysis under Simpson nor read between the lines of United States Supreme Court decisions by inventing a new constitutional mandate.

Ultimately, Flores does not explicitly revise existing Oklahoma standards of harmless error review. However, the decision does appear to limit Simpson's nonconstitutional harmless error analysis by removing from its reach such errors which indirectly affect constitutional rights. Therefore, at the very least, Flores could leave lower courts confused about when or if to apply the various harmless error tests under Oklahoma law.

B. Flores and the Future of the Harmless Error Doctrine

Although the concurring opinions to the order denying the rehearing affirmed that the defective presumption of innocence jury instruction requires an automatic reversal,\textsuperscript{171} the majority opinion was not so clear. Two defects in the original Flores opinion left the door open to erroneous interpretations.

First, the majority applied the Chapman test\textsuperscript{172} yet reasoned that "we must now determine whether the error is harmless beyond a reasonable doubt or goes to the foundation of the case constituting a substantial violation of a constitutional or statutory right."\textsuperscript{173} Under Chapman, however, harmlessness becomes a factor only once an error has been determined to be amenable to harmless error analysis.\textsuperscript{174} Thus, courts in the future could look to Flores as subjecting the defective jury

\textsuperscript{169} See Simpson, 876 P.2d at 702 (citing United States v. Rivera, 900 F.2d 1462, 1469 (10th Cir. 1990)).
\textsuperscript{170} See id. at 701.
\textsuperscript{171} See Flores, 896 P.2d at 1164 (Order Denying Rehearing) (Chapel, V.P.J., concurring specially) ("A minority, however, has concluded that in some cases, if proof of guilt is sufficiently strong and there are no additional errors, this instructional error can be deemed harmless. I find this kind of analysis alarming.").
\textsuperscript{172} See Chapman, 386 U.S. at 21-22.
\textsuperscript{173} Flores, 896 P.2d at 560.
\textsuperscript{174} See Chapman, 386 U.S. at 22. "We conclude the there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Id.
instruction to harmless error review. The practical effect is that courts could distinguish Flores if the state proves that a similar error is "harmless beyond a reasonable doubt."175

Second, in the original Flores opinion, the majority reasoned that the "actual impact of the instruction . . . on the judgment of the jurors is difficult to determine."176 The "impact in the mind of the jury" has been a means of assessing the harmlessness of an error which has already crossed the Chapman threshold.177 Again, Flores could be mistakenly read by lower courts as subjecting this error to the two-step analysis but finding it harmless.

Judge Strubhar's concurring opinion denying rehearing attempted to cure these defects by defining this error as "structural."178 This terminology referenced a United States Supreme Court decision which categorized errors as either "structural" or "trial" and held that structural errors, in contrast to trial errors, are never susceptible to harmless error analysis.179 The original Flores opinion, however, neglected to place this error in either category, appearing instead to apply the second step of the Chapman test as the threshold.

Despite clarifying that the defective jury instruction is harmful per se, Judge Strubhar's concurring opinion could have clouded the judgment of lower courts by the discussion of "plain error." Judge Strubhar contended that "it is unfortunate that the dissent now finds the need to retreat from the original Flores decision in the wake of several reversals based on the plain error found in this case."180 Further, Judge Strubhar summarized the concurring opinion with: "The trial court's erroneous instruction altering the presumption of innocence to a presumption of not guilty amounts to plain error."181

Simpson v. State182 defined "plain error" as error deserving of review on appeal even though it was not preserved through timely objection at trial.183 Simpson disposed of the possibility that all plain errors would require automatic reversal and held that plain error may be found harmless.184 Therefore, the Flores reversal could not have been based solely on plain error unless Simpson were overturned. Since the

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175. Flores, 896 P.2d at 560 (citing Chapman v. California, 386 U.S. 18, 21-22 (1967)).
176. Id. at 561.
177. See United States v. Hill, 901 F.2d 880, 884-85 (10th Cir. 1990) (using the "probable impact in the minds of the average jury" test established in Harrington v. California, 395 U.S. 250, 254 (1969), as a measure for determining whether error is harmless beyond a reasonable doubt).
178. See Flores, 899 P.2d at 1168 (Order Denying Rehearing) (Strubhar, J., concurring specially) (citing Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) (holding defective burden of proof instruction to be structural and therefore outside the bounds of harmless error review)).
180. Flores, 899 P.2d at 1169 (Order Denying Rehearing) (Strubhar, J., concurring specially); Id. at 1165 ("A majority of this Court is convinced that Flores must be applied to all other cases.").
181. Id. (Strubhar, J., concurring specially).
183. See id. at 693.
original Flores opinion cited Simpson twice, the majority obviously did not intend to displace the precedent concerning the meaning of plain error or its susceptibility to harmless error review. Thus, while indicating that the court may be attempting to narrow the scope of harmless error analysis, Flores could create confusion concerning the doctrine's application.

VI. Judicial and Legislative Alternatives in Applying the Harmless Error Analysis

The majority in the original Flores opinion refused to judicially legislate a definition for "substantial violation" in the harmless error statute, preferring instead a textual interpretation. Judicial and legislative alternatives remain which could provide more predictability in assessing when and how to apply this doctrine as well as prevent instructional errors at trial.

A. Judicial Alternatives and Judicial Duty

In Flores, the majority may have been sending a message to the Oklahoma Legislature to revise the harmless error statute to account for competing public policies. Other courts have not relied so stringently on their elected representatives to formulate a framework within which the substance of violations may be evaluated. For example, Texas has a harmless error rule, which codified Chapman's "contribute to the verdict test." In applying this rule, the Texas court has attempted to maintain a balance of its policies by providing factors with which other reviewing courts can work.

However, the Oklahoma Court of Criminal Appeals could pursue options which would provide greater uniformity within the existing standards of harmless error review while maintaining the majority's stance of judicial restraint. For instance,

185. See Flores, 896 P.2d at 560 (citing Simpson as authority for plain error review and for application of state harmless error statute).

186. See Flores, 899 P.2d at 1164 (Order Denying Rehearing) (Chapel, V.P.J., concurring specially). In Simpson, Judge Lumpkin, the author of the majority opinion, noted that the Oklahoma Supreme Court had defined "substantial" in the harmless error context as "matter of substance as distinguished from matter of mere form." Simpson, 876 P.2d at 694 (quoting Davis v. Williams, 76 P.2d 251, 252 (Okla. 1938)).

187. In his concurrence to the order denying the rehearing, Judge Chapel defended the majority's refusal to "judicially legislate" a standard for when an error is a "substantial violation." If the citizens of this State wish to alter our statutory requirement that juries in criminal trials be instructed that defendants are presumed innocent until proven guilty, they are free to pursue their goals at the State legislative level. In the meantime, trial judges are bound by the rules which the people have enacted.

Flores, 899 P.2d at 1167-68 (Order Denying Rehearing) (Chapel, V.P.J., concurring specially). For a discussion about these conflicting policies determining the outcome of a trial, see Carter, supra note 4, at 139.

188. See Goff, supra note 138, at 1590-91 (citing TEX. R. App. P. 81(b)(2) (1986)).

189. See id. The Texas rule provides: "If the appellate record in a criminal case reveals error in the proceedings below, the appellate court shall reverse the judgment under review, unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment." TEX. R. App. P. 81(b)(2) (1986).

190. See Goff, supra note 138, at 1590-91.

191. Judge Strubhar urged: "Over our history our principles have slowly, through our efforts, grown
the court could clarify its position regarding the specific tests for constitutional and nonconstitutional errors. *Simpson* could be explicitly reaffirmed to apply to nonconstitutional errors192 while the *Chapman* standard could be retained for constitutional errors.193

Alternatively, the harmless error statute could be formally interpreted as codifying *Chapman*. Like the Texas harmless error rule, the tests for constitutional and nonconstitutional violations would be identical. Adopting a uniform standard would eliminate any necessity for judicial slight of hand in categorizing an error. Therefore, the court could focus on whether an error passed the *Chapman* threshold and should be subject to harmless error analysis.

To answer the threshold question in *Chapman*, Oklahoma courts have adopted the federal court's distinction between trial errors and structural errors.194 However, the majority in the original *Flores* opinion did not mention this test nor even attempt to categorize the violated jury instruction as structural.195 As an additional source of confusion, the question of "harmlessness beyond a reasonable doubt" has presented lower courts with a variety of inconsistently applied standards. The United States Supreme Court has provided three tests to assess harmlessness: the *Chapman* "contribute to the verdict" test,196 the *Harrington v. California*197 "overwhelming-
evidence" test,\(^{198}\) and the *Delaware v. Van Arsdell*\(^{199}\) "balancing" test, which considers both the effect of the error and the weight of guilt.\(^{200}\)

Oklahoma courts have applied these three tests to criminal cases in each of the last five decades.\(^{201}\) No apparent trend has emerged in Oklahoma case law regarding when and why to favor one test over another. However, studies conducted in other states have indicated that the *Harrington* test results in a greater number of convictions affirmed\(^{202}\) whereas the *Chapman* test produces a greater number of reversals.\(^{203}\) The *Van Arsdell* test has been noted for its inconsistent and unpredictable results.\(^{204}\) Review courts enjoy great discretion in choosing which of these tests to apply. "In effect, a court's choice between the *Chapman*, *Harrington*, and *Van Arsdell* tests may determine freedom or imprisonment, life or death."\(^{205}\)

In *Flores*, the court sidestepped this dilemma by automatically reversing all presumption of innocence jury instructions. However, in the future, the Oklahoma Court of Criminal Appeals could systematically identify the criteria for choosing a harmlessness test under the given circumstances. Without such guidelines, the court could easily indulge in the same judicial abuse so criticized both by the concurrences and the dissent in *Flores*.\(^{206}\)

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198. See id. at 251-54.
200. See id. at 684.
202. See Mitchell, *supra* note 41, at 1349 (recognizing that twenty of twenty recent cases applying the "overwhelming-evidence" test resulted in finding harmless error). Because the *Harrington* test requires less stringent and more involved review of the trial record, it tends to favor the prosecution. *See id.* at 1364.
203. *See id.* at 1349. Only one of seventeen recent cases applying the "contributes to the verdict" test resulted in a finding of harmless error. *See id.* The *Chapman* test imposes a stricter standard of review and focuses on the error, thus tending to favor the defendant. *See id.* at 1364.
204. *See id.* at 1350. "[A] large gray area exists as to what proof suffices to declare an error harmless under *Van Arsdell.*" *Id.* at 1360.
205. *Id.* at 1369.
206. Judge Chapel in his concurrence to the denial of a rehearing warned against "the danger in allowing individuals in positions of power to follow their own personal beliefs rather than the law." *Flores*, 899 P.2d at 1166 (Order Denying Rehearing) (Chapel, V.P.J., concurring specially). Judge Lumpkin in his dissent to the denial of a rehearing criticized judgments arising out of personal feeling rather than a sense of the law. *See id.* at 1172 (Lumpkin, J., dissenting) ("Personal distaste for the action of a single individual . . . should not cause the bending of a rule of law.").
B. Legislative Alternatives in Harmless Error Analysis

While lower courts continue to unevenly apply a variety of harmless error standards, most of the fifty state harmless error statutes are relatively similar. Unfortunately, with few exceptions, many of these statutes are similarly vague. As a result, courts have exercised broad discretion in defining a workable harmless error doctrine.

Alternatively, legislatures could amend state harmless error statutes to provide greater specificity and, therefore, consistency. The harmless error statutes of other jurisdictions could give guidance in determining which party bears the burden of proof, what that party must prove, and what the reviewing court should consider in assessing whether the burden has been met.

The Oklahoma harmless error statute provides:

No judgment shall be set aside or new trial granted by any appellate court of this state . . . on the ground of misdirection of the jury or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right. 207

As in many states, Oklahoma's harmless error statute presumes that the conviction will be upheld. 208 The Oklahoma statute places the burden on neither the appellant nor the state and makes no distinction between criminal and civil cases. 209 This statute was cited in Flores, yet the court quoted the federal standard for constitutional errors of whether the state proved the error "harmless beyond a reasonable doubt." 210 While the court could justify using the federal standard as a means of disproving a "substantial violation," Flores failed to address why the burden has shifted to the state for a nonconstitutional plain error. 211

The language of the Oklahoma statute parallels the harmless error legislation of the states which presume errors to be harmless. Among those states, though, the harmless error statutes do not provide identical means by which the appellant may rebut the presumption of harmlessness. Most of these statutes present at least one of two recurring themes as a measurement for harm: miscarriage of justice 212 and prejudice in respect to a substantial right. 213

210. See Flores, 896 P.2d at 560.
211. In Simpson, the court placed the burden on the appellant for nonconstitutional plain error. See Simpson, 876 P.2d at 701 n.13.
The Oklahoma harmless error statute clearly adopted the miscarriage of justice theme by directly incorporating this phrase into the statute. *Flores* failed to mention whether the violation of the appellant's right to be presumed innocent amounted to a miscarriage of justice. However, the court's reasoning in *Flores* closely resembled the definition of a judge in another jurisdiction who broadly interpreted "miscarriage of justice":

When we speak of administering justice in criminal cases, . . . we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to the defendants shall be respected.214

In addition, the Oklahoma harmless error statute provides a "substantial violation of a statutory or constitutional right" as a measurement of the error's harm to the appellant.215 The court in *Flores* applied the statute's language in form. However, the majority's reasoning in the original *Flores* opinion is similar in substance to the "prejudice in respect to a substantial right" theme.216 As a result, the court looked to the right that was violated, rather than the substantiality of the violation, in assessing whether the error was subject to harmless error analysis.

The Oklahoma statute does not expressly define the terms "miscarriage of justice" and "substantial violation." Rather, the statute leaves discretion to the "opinion of the reviewing court."217 One practical result is that reviewing courts inconsistently apply a variety of tests for measuring harm. On the other hand, the statutory language also permits the court to formulate distinct tests for constitutional and statutory errors while applying the same broad principles to avoid a "miscarriage of justice" or a "substantial violation" of the appellant's rights.

Of course, the Oklahoma legislature could amend the harmless error statute to both acknowledge separate tests for constitutional and statutory errors as well as direct the reviewing court to the applicable test of harm in either case. Greater specificity could reduce the risk of inconstancy and, thus, the possibility that certain tests are applied arbitrarily to achieve a certain judgment. However, such specificity might not account for the variety of possible errors in the proceedings, resulting in both tying the reviewing court's hands and creating a mountain of new legislation.

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216. The majority focused on the principle of the presumption of innocence as "undoubted law, axiomatic, and elementary." *Flores*, 896 P.2d at 561 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). Further, the majority classed the presumption of innocence as "one of two 'great cardinal maxims.'" *Id.* (quoting *Miller v. State*, 106 P. 538, 539 (Okla. Crim. App. 1910)).

In sum, the solution to the harmless error doctrine’s wayward course may lie in discerning the lesser of two evils, the risk that the court will apply arbitrary standards of review and the risk that more restrictive legislation could ignore the harm of errors not yet considered in this jurisdiction. Some commentators have promoted the alternative of courts retaining discretion in determining the applicable harmless error test while giving greater specificity to uniform jury instructions.\textsuperscript{218} Therefore, stare decisis\textsuperscript{219} would provide the boundaries of discretion in applying harmless error tests while alternative jury instructions could be devised to better encompass the concept of the presumption of innocence.

\textbf{VII. Conclusion}

On appeal, few errors escape the reach of harmless error review. However, in \textit{Flores}, the court refused to apply the harmless error doctrine to the violation of a right as fundamental as the presumption of innocence. In effect, cases involving the erroneous jury instruction of presumption of innocence are automatically reversible, regardless of the evidence supporting the defendant’s guilt.

Despite the subsequent clarification in the order denying the rehearing, the original \textit{Flores} opinion remains confusing. The majority failed to articulate that the erroneous jury instruction was reversible per se and would, therefore, be outside the scope of harmless error review in all future cases. The ambiguity in \textit{Flores} could leave courts in conflict over when and how to apply the harmless error doctrine to similarly substantial nonconstitutional violations.

Ideally, the Oklahoma Court of Criminal Appeals should amend its original opinion in \textit{Flores} so that it says what the court actually means. If it fails to do so, courts will be called upon in the future to clarify the standards of review for constitutional and nonconstitutional errors. Additionally, identifying cognizable tests could provide greater consistency among decisions as well as reduce the tendency toward personal preferences of decision makers.

Without a clear test, \textit{Flores} sheds little light to guide appellate courts in determining which violations of fundamental rights are susceptible to harmless error analysis. In \textit{Flores}, the Oklahoma Court of Criminal Appeals narrowed the reach of harmless error review. However, while the court may have changed the direction of the "wayward course," the doctrine of harmless error is still far from home.

\textit{Jeannie Pinkston}

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218. See Laufer, supra note 84, at 415-19 (providing examples of model jury instructions on presumption of innocence and suggesting that factual innocence is capable of definition).

219. "Stare decisis" is defined as: "[R]ule by which common law courts 'are slow to interfere with principles announced in . . . former decisions . . . ." BARRON'S LAW DICTIONARY 461 (Steven H. Gifis ed., 3d ed. 1991)