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Jeffrey Canja
Michigan State University College of Law

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INTRODUCTION

In *Neder v. United States*[1] the Supreme Court considered "whether and under what circumstances, the omission of an element [of a crime] from the judge's charge to the jury can be harmless error" or whether a rule of per se reversal is required when a conviction results following such an error.[2] The defendant, Neder, had been convicted in federal district court of filing a false income tax return.[3] At trial the judge instructed the jury that the materiality of Neder's false statements, an element of the crime, was a question for the court not to be considered by the jury.[4] Following Neder's conviction but prior to his appeal, the Supreme Court in *United States v. Gaudin*[5] held that such an instruction amounts to a violation of a defendant's Fifth Amendment due process right and Sixth Amendment right to a jury trial.[6] The Court of Appeals for the Eleventh Circuit, nevertheless, subsequently affirmed Neder's conviction. The Eleventh Circuit acknowledged that a *Gaudin* error occurred but held that the error was subject to harmless error analysis and was, in fact, harmless.[7]

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[1] 527 U.S. 1 (1999)
[2] *Neder*, 527 U.S. at 7. The Court also addressed a second question of whether materiality is an element of certain federal fraud statutes. *See id.*
[3] *See id.* at 6 (Neder was also convicted of other related fraud offenses).
[4] *See id*
[5] 515 U.S. 516 (1995).
[6] *See Gaudin*, 515 U.S. at 522-23.
[7] *See* United States v. Neder, 136 F.3d 1459, 1465 (1998).

The Supreme Court affirmed, agreeing that this type of error *was* amenable to harmless error analysis[8] and that, on the facts of the case, the error was harmless.[9] The Court then went on to announce a broad new test, or a new formulation of existing tests, for determining when a constitutional error is harmless: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?"[10] The decision continues the Court's modern trend of granting appellate courts increasing discretion in determining when the violation of a defendant's constitutional rights at trial is harmless.

This note will review the development of the Court's constitutional harmless error doctrine and some of the controversies it has engendered. Next, this note will examine *Neder* in the context of the prior cases. Finally, circuit court decisions since *Neder* will be examined in an attempt to determine the significance of the decision and the current state of constitutional harmless error jurisprudence across the circuits.

BACKGROUND

The doctrine of harmless error in the United States developed in the early twentieth century as a response to a widespread feeling that too many criminal convictions were being reversed on appeal due to inconsequential technical errors.[11] Voicing a common concern, one trial judge complained that appellate courts towered over criminal trials as "impregnable citadels of technicality."[12] In 1919, after long deliberation on the problem, Congress passed a harmless

[8] *See Neder*, 527 U.S. at 15.
[9] *See id.* at 17.
[10] *Id.* at 18.
[11] *See, e.g.*, Kotteakos v. United States, 328 U.S. 750, 758-60 (1946).
[12] *Kotteakos*, 328 U.S. at 759.

error statute providing that, on appeal, courts shall examine the entire record "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."[13] The statute does not distinguish between constitutional and non-constitutional errors; however, prior to the Supreme Court's 1967 decision in *Chapman v. California*,[14] in virtually every criminal case in which the Court found constitutional error adverse to the defendant, the conviction was reversed without consideration of harmlessness.[15]

In *Chapman* however, the Court held that some types of constitutional error do not require a conviction reversal if the reviewing court finds the error harmless beyond a reasonable doubt.[16] In applying this standard, the Court asked whether the prosecution had proven "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"[17] (hereinafter referred to as the "*Chapman* test" or the "contribute to the verdict test"). Even though the case against the *Chapman* defendants was "reasonably strong" the Court found it impossible to say that the prosecution had proven beyond a reasonable doubt that the error did not contribute to the verdict and so reversed the convictions.[18]

As applied in *Chapman*, the "contribute to the verdict" test is relatively restrictive of judicial discretion in that the reviewing court does not ignore any error which might have been a contributing factor to the jury's decision even though the case against the defendant may have

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[13] Act of February 26, 1919 ch. 40, 40 Stat. 1181, Judicial Code §269, 28 U.S.C. §391 (1919) (current version at 28 U.S.C. §2111 (1996)).
[14] 386 U.S. 18 (1967).
[15] *See, e.g., Chapman*, 386 U.S. at 42 (Stewart, J., concurring) ("[T]his Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless'"). Justice Harlan noted two exceptions to this rule: Motes v. United States, 178 U.S. 458 (1900), and Snyder v. Massachusetts, 291 U.S. 97 (1934). *See id.* at 50 n.3 (Harlan, J., dissenting).
[16] *See Chapman*, 386 U.S. at 24. The error at issue in *Chapman* was comment by the prosecutor on the defendants' failure to testify, a violation of the Fifth Amendment right against compelled self incrimination. *See id.* at 19-20.
[17] *See id.* at 24-26.

been otherwise strong. The *Chapman* test, however, was just the first of several tests subsequently formulated by the Court to meet the "beyond a reasonable doubt" harmless error standard.[19]

Additionally, although the Court found harmless error analysis to be appropriate for some constitutional errors, it also noted that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."[20] Like the various tests used to determine harmlessness, the types of errors that might be harmless have changed as the Court developed its constitutional harmless error doctrine. The balance of this section looks at this development of the Court's harmless error doctrine in the context of particular types of error. This is not intended to be a comprehensive review of Supreme Court cases touching on constitutional harmless error. Instead, it is intended to outline the development of various tests used to determine harmlessness and to illustrate the trend toward greater judicial discretion in making the determination.

Confrontation Clause Errors[21]

In 1968, a year after *Chapman* was decided, the Supreme Court in *Bruton v. United States*[22] held that a defendant's Sixth Amendment right to confront witnesses is violated by the admission, in a joint trial, of a non-testifying codefendant's confession implicating the

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[18] *See id.* at 24-25.

[19] In his dissenting opinion in *Chapman*, Justice Harlan noted that "members of this Court have used a variety of verbal formulae in deciding questions of harmless error in federal cases . . . . And the circuit courts have been equally varied in their expressions" *Id.* at 53 (Harlan, J., dissenting). Cases subsequent to *Chapman* clearly continue this trend.

[20] *Id. at* 23. The Court identifies the right against use of coerced confessions, right to counsel, and trial before an impartial judge as three examples. *See id.* at 24 n.8.

[21] In perhaps the only pre-*Chapman* decision finding a constitutional error harmless, the Court in Motes v. United States, 178 U.S. 458 (1900), held that a denial of the defendant's right to cross examine a witness against him was harmless in light of the fact that the defendant had confessed in open court.

[22] 391 U.S. 123 (1968).

defendant.[23] In three subsequent cases, the court considered whether *Bruton* violations can be harmless errors.

In the first of these cases, *Harrington v. California*,[24] the petitioner Harrington had, along with his three codefendants, been convicted of attempted robbery and first degree murder in California state court. At trial, the confessions of all three of the codefendants were admitted though only one took the stand.[25] The confessions of the two non-testifying codefendants implicated Harrington by placing him at the scene of the crime, a fact which other witnesses had also testified to.[26] On appeal, the Supreme Court affirmed the conviction, finding the *Bruton* violation to be harmless beyond a reasonable doubt. The Court conceded that the erroneously admitted evidence did have some evidentiary value in that it was corroborative of other testimony but concluded that the error was nonetheless harmless because the case against *Harrington* was otherwise overwhelming.[27] The test announced in *Harrington* essentially looks at two factors as judged by the Court's review of the appellate record: 1) whether the improperly admitted evidence was cumulative of properly admitted evidence, and 2) whether the properly admitted evidence of guilt was overwhelming.

Although the Court in *Harrington* claimed to have reaffirmed *Chapman*,[28] it did not ask whether the error contributed to the verdict and in fact rejected the idea that "we must reverse if we can imagine a single juror whose mind might have been made up because of [the codefendants'] confessions and who otherwise would have remained in doubt and

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[23] *See Bruton*, 391 U.S. at 137.
[24] 395 U.S. 250 (1969).
[25] *See Harrington*, 395 U.S. at 252.
[26] *See id.* at 253-54.
[27] *See id.* at 254.
[28] *See id.*

unconvinced."[29] Instead, the Court based its decision "on our own reading of the record . . . , the probable impact of the two confessions on the minds of an average jury,"[30] and the "overwhelming" nature of the case against *Harrington*. Because of this change in focus, the *Harrington* test gives the appellate courts greater leeway to ignore constitutional errors,[31] a fact noted by Justice Brennan. In a dissent joined by Chief Justice Burger and Justice Marshall, Justice Brennan argued that the majority had overruled *Chapman*[32] and substantially weakened the protection of constitutional rights in the process.[33]

Despite the views of the dissent, the Court relied on *Harrington* to decide its next *Bruton* case, *Schneble v. Florida*,[34] three years later. In *Schneble*, the defendant, together with his codefendant Snell, was tried and convicted of murder in Florida state court.[35] Schneble told the police two stories, first that he was not present when Snell alone committed the murder and second that he had been present and had tried to strangle the victim before Snell had shot her in the head.[36] At trial, Snell's confession was admitted along with both of Schneble's. Snell's confession implicated Schneble by stating that Schneble had never been away from the crime scene during the time in question.[37] This conflicted with Schneble's first story but was

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[29] *Id.*
[30] *Harrington,* 395 U.S. at 254
[31] *See* Gregory Mitchell, Comment, Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review, 82 CALIF. L. REV. 1335 (1994).
[32] *See id.* at 255 (Brennan, J., dissenting)
[33] *Id.* Justice Brennan stated:

> *Chapman*, then, meant no compromise with the proposition that a conviction cannot constitutionally be based to any extent on constitutional error. The Court today by shifting the inquiry from whether the constitutional error contributed to the conviction to whether the untainted evidence provided 'overwhelming' support for the conviction puts aside the firm resolve of *Chapman* and makes that compromise

[34] 405 U.S. 427 (1972).
[35] *See Schneble*, 405 U.S. at 427-28.
[36] *See id.* at 429
[37] *See id.*

consistent with the second. Additionally, there was other independent evidence which tended to corroborate Schneble's second confession.[38]

On these facts, the Court held that if a *Bruton* violation had occurred, it had been harmless.[39] The Court reasoned that the jury must have relied on Schneble's second confession and, therefore, that confession constituted overwhelming evidence of guilt of which Snell's confession was, at most, corroborative.[40] Thus, based on its "own reading of the record,"[41] the Court "conclude[d] that the minds of an average jury would not have found the State's case significantly less persuasive had the testimony as to Snell's admission been excluded."[42] As in *Harrington*, the Court appeared to reject the "contribute to the verdict" test, stating that "judicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior."[43]

In dissent, Justice Marshall, joined by Justices Brennan and Douglas, argued that because there was no way for the Court to know what judgments the jury had made with respect to Schneble's second confession, it was impossible to say that the error did not contribute to the conviction.[44] The dissent also argued that the decision represented an unwarranted extension of the *Harrington* test to a much less definitive fact situation.[45]

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[38] *See id.* at 431. Schneble argued that the second confession was involuntary and the judge instructed the jury that it should disregard any statements it found to have been involuntary. *See id.* at 434 (Marshall, J., dissenting).
[39] *See Schneble*, 405 U.S. at 428.
[40] *See id.* at 431.
[41] *Id.* at 432.
[42] *Id.*
[43] *Id.* at 431-32.
[44] *See id.* at 434-35 (Marshall, J., dissenting).
[45] *See id.* at 433 (noting that in *Harrington* the improperly admitted evidence was merely cumulative of Harrington's own undisputed admission that he had been present at the scene).

A year after *Schneble*, the Court again considered a *Bruton* violation in *Brown v. United States*.[46] In *Brown*, two codefendants were jointly tried and convicted of transporting stolen goods and conspiracy to transport stolen goods in interstate commerce.[47] Both defendants made confessions, and, at trial, the prosecutor introduced into evidence, over the defendants' objections, portions of each defendant's confession which implicated the other.[48] The court of appeals found a *Bruton* violation but, citing *Harrington*, concluded it was harmless in light of other overwhelming evidence.[49] The Supreme Court agreed, stating that "the testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury."[50]

The Court's next Confrontation Clause harmless error case, *Davis v. Alaska*,[51] did not involve a *Bruton* violation. Rather, the defendant was precluded by a protective order from cross examining a juvenile witness for bias.[52] The Alaska Supreme Court affirmed the conviction on the grounds that the trial court had allowed some cross examination that indirectly touched on the potential bias of the witness and that this been sufficient to satisfy the defendant's right to cross examine the witness.[53]

The Supreme Court disagreed and reversed the conviction without mention of *Harrington*, *Chapman*, or harmless error. Instead, the Court appeared to treat the right to cross examine a witness for bias as one of the rights that, in the words of *Chapman*, is "so basic to a

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[46] 411 U.S. 223 (1973).
[47] *See Brown*, 411 U.S. at 224.
[48] *See id.* at 225-26.
[49] *See id.* at 226.
[50] *Id.* at 231.
[51] 415 U.S. 308 (1974).
[52] *See Davis*, 415 U.S. at 310-11.
[53] *See id.* at 314-15.

fair trial that [its] infraction can never be treated as harmless error."[54] The Court held that "Petitioner was . . . denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'"[55] Twelve years later, however, in *Delaware v. Van Arsdall*,[56] the Court held that denial of the right to cross examine a witness for bias, though a constitutional violation, was not per se harmful.

In *Van Arsdall*, the defendant was convicted in Delaware state court of the murder of Doris Epps. The murder had occurred in the apartment of Daniel Pregent following a New Year's Eve party.[57] Van Arsdall admitted to being in the apartment at the time of the murder but claimed Pregent was the murderer.[58] One of the prosecution's witnesses was Fleetwood, a neighbor, who testified that he had seen Van Arsdall in Pregent's apartment around the time of the murder, a fact Van Arsdall himself admitted.[59] Van Arsdall attempted to impeach Fleetwood by inquiring into whether the government had dropped a pending drunk driving charge against him in exchange for his testimony. The trial judge, however, barred this line of questioning on Rule 403 grounds.[60]

On appeal, the Delaware Supreme Court reversed the conviction, finding that the trial judge had violated the defendant's rights under the Confrontation Clause. Further, citing to *Davis*, the court held that "a blanket prohibition against exploring potential bias through cross-examination is a per se error" that is not subject to harmless error analysis.[61] The State appealed

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[54] *Chapman*, 386 U.S. at 23.
[55] *Davis*, 415 U.S. at 318.
[56] 475 U.S. 673 (1986).
[57] *See Van Arsdall*, 475 U.S. at 674.
[58] *See id.* at 677.
[59] *See id.* at 675-76.
[60] *See id.* at 676.
[61] *Id.* at 677-78.

the decision to the United States Supreme Court arguing that the Delaware Supreme Court was in error in not analyzing the Confrontation Clause violation for harmlessness.

The Supreme Court agreed with the State and remanded the case for a harmless error determination.[62] In apparent conflict with *Davis*, the Court aligned the Confrontation Clause error at issue with the *Bruton* violations of *Harrington*, *Schneble* and *Brown*, which can be deemed harmless.[63] In determining whether the error was in fact harmless, however, the Court did not simply rely on the two factors emphasized in the *Harrington* line of cases (i.e., whether the erroneously admitted evidence was cumulative and whether the untainted evidence of guilt was overwhelming).[64] Instead the Court set out five factors to be considered in making a harmlessness determination:

> These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.[65]

This five-factor test is the last word from the Supreme Court on harmless error in the specific context of a Confrontation Clause violation.[66]

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[62] *See Van Arsdall*, 475 U.S. at 677-78.

[63] *See id.* at 682. The Court stated that *Davis* had not held that denial of the right to cross for bias was immune to harmless error analysis. Rather, the Court explained *Davis* as an application of the *Chapman* "contribution to the conviction" test for harmlessness. *See id.* at 683.

[64] *See id.* at 682 n.5 (describing the two prongs of the *Harrington* test).

[65] *Id.* at 684. On remand, the Delaware Supreme Court did not apply the five factor test. Instead, it applied a state test and found the error not harmless. The state test is not clearly set out by the court but it considers the effect of the error on the verdict in light of the significance of the error and whether the untainted evidence of guilt was overwhelming.
Van Arsdall v. Delaware, 524 A.2d 3 (Del. 1987).

[66] Writing in dissent, Justice Marshall argued that the type of Confrontation Clause violation in *Van Arsdall* was conceptually distinct from a *Bruton* violation and *should* be subject to a per se reversal rule stating "I would simply hold that *Davis* mandates reversal whenever the prosecution puts a witness on the stand but the court does not permit the defense to cross-examine concerning relevant potential bias." *Van Arsdall*, 475 U.S. at 688 (Marshall, J., dissenting). Justice Marshall's approach would have made it unnecessary for the Court to attempt to distinguish the

Coerced Confessions

Prior to *Chapman*, the introduction of an involuntary confession against a defendant in a criminal trial in violation of the Due Process Clause of the Fifth or Fourteenth Amendments had consistently been treated as grounds for automatic reversal.[67] Illustrative of this fact are *Payne v. Arkansas*[68] and *Haynes v. Washington.*[69]

In *Payne*, the defendant had confessed to murder under a threat of potential mob violence communicated to him by the police chief.[70] The confession was admitted at trial over the defendant's objection and the defendant was subsequently convicted of murder.[71] The Arkansas Supreme Court found the confession to be voluntary and affirmed the conviction.[72] On appeal, the Supreme Court found the confession to be the product of coercion and reversed.[73] The Court rejected the State's argument that the conviction should be affirmed because there was sufficient untainted evidence to support the verdict, stating "where . . . a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession."[74]

Haynes was a very similar case. The defendant was charged with robbery of a gas station. He made an initial oral confession almost immediately after being questioned by the

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clear language of *Davis*. The rejection of this approach is consistent with the trend toward greater appellate discretion in the matter of constitutional harmless error.

[67] *See, e.g., Chapman*, 386 U.S. at 42 (Stewart, J., dissenting). "When involuntary confessions have been introduced at trial, the Court has always reversed convictions regardless of other evidence of guilt." *Id.*

[68] 356 U.S. 560 (1958).

[69] 373 U.S. 503 (1963).

[70] *See Payne*, 356 U.S. at 565.

[71] *See id.* at 566.

[72] *See id.* at 561.

[73] *See id.* at 568-69.

[74] *Id.* at 568. *See also, id.* at 562 n.1 (describing "the settled view of this Court that the admission in evidence over objection of a coerced confession vitiates a judgment of conviction.").

police and a second written confession after about 17 hours of detention.[75] Both confessions were admitted and Haynes was convicted.[76] On appeal, the Supreme Court found the written confession to be involuntary[77] and, as in *Payne*, vacated the judgment without consideration of harmless error. [78] The Court again rejected any reliance on other evidence stating: "[i]ndeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence has left little doubt of the truth of what the defendant had confessed."[79]

Subsequent cases supported the idea that admission of an involuntary confession mandated an automatic reversal. In *Chapman*, the Court cited to *Payne* to illustrate the proposition that admission of a coerced confession violated a right "so basic to a fair trial that [its] violation can never be treated as harmless error."[80] Similarly, in *Rose v. Clark*,[81] the Court stated that the error in *Payne* "aborted the basic trial process" and thus mandated automatic reversal.[82]

Despite this seemingly conclusive language, the Court, in *Arizona v. Fulminante*,[83] reversed its position and held that admission of an involuntary confession can be harmless error. In *Fulminante*, the defendant was convicted of murder primarily on the strength of two confessions that were admitted at trial over his objection.[84] On appeal, Fulminante argued that

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[75] *See Haynes*, 373 U.S. at 505-06.
[76] *See id.* at 506.
[77] *See id.* at 515.
[78] *See id.* at 520.
[79] *Id. at* 518 (quoting Rogers v. Richmond, 365 U.S. 534 (1961)).
[80] *Chapman*, 386 U.S. at 23.
[81] 478 U.S. 570 (1986).
[82] *Rose*, 478 U.S. at 578 n.6.
[83] 499 U.S. 279 (1991).
[84] *See Fulminante*, 499 U.S. at 284.

the first confession was involuntary and the second was also tainted because it was the fruit of the first.[85] The Arizona Supreme Court agreed that the first confession was involuntary but initially applied the *Harrington* test and found the error to be harmless.[86] On Fulminante's motion for reconsideration, however, the Arizona court ruled that United States Supreme Court precedent established that an admission of an involuntary confession could never be considered harmless and reversed the conviction.[87]

The Supreme Court affirmed the decision but on different grounds. The Court held that admission of an involuntary confession *was* subject to harmless error analysis[88] but that in this case the error was not harmless.[89] In finding the error harmful, the Court rejected the Arizona Supreme Court's initial determination of harmlessness under the *Harrington* test and instead appeared to apply the *Chapman* test.[90] Concluding that Fulminante's first confession may have indeed contributed to his conviction, the Court affirmed the reversal of his conviction.[91]

Additionally, Chief Justice Rehnquist, writing for a majority, attempted to impose some structure on the Court's earlier decisions regarding whether a given error was subject to the harmless error rule of *Chapman*. Chief Justice Rehnquist wrote that errors could be classified as either "trial errors" or "structural errors". Trial errors are those that "occur[] during the presentation of the case to the jury," such as erroneous evidentiary rulings.[92] These errors are subject to harmless error review because their effect can supposedly be quantitatively evaluated

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[85] *See id.*
[86] *See id.*
[87] *See id.*
[88] *See id.* at 303.
[89] See id. at 302.
[90] *See id.* at 296-302.
[91] *See Fulminante*, 499 U.S. at 302.
[92] *Fulminante*, 499 U.S. at 307-08.

in relation to all the evidence presented.[93] Structural errors on the other hand, such as a biased judge, affect the entire framework of the trial and thus can never be deemed harmless.[94] Contrary to the view expressed in *Chapman*, the Court characterized the admission of a coerced confession as a "classic trial error" and thus subject to harmless error analysis.[95]

Griffin Violations

In addition to the admission of a coerced confession, the Fifth Amendment may be violated by the imposition of a penalty for a defendant's exercise of the right to remain silent. In *Griffin v. California*,[96] the Court held that adverse comment at trial by the prosecution on a criminal defendant's decision not to testify constituted such an unconstitutional penalty on the defendant's exercise of his rights under the Fifth Amendment and Fourteenth Amendments.[97] As with other pre-*Chapman* constitutional errors, the Court reversed the conviction in *Griffin* without mention of harmless error.[98] Two years later, a *Griffin* violation was the error at issue in *Chapman*, and in that case the Court found it to be subject to harmless error analysis and applied the "contribute to the verdict" test.[99]

A *Griffin* violation was also at issue in the subsequent case of *United States v. Hasting*.[100] In *Hasting*, the defendants were convicted of kidnapping and other offenses in federal district court.[101] Because of the *Griffin* violation, the Court of Appeals for the Seventh Circuit reversed

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[93] *See id.*
[94] *See id.* at 309-10.
[95] *See id.* at 309.
[96] 380 U.S. 609 (1965).
[97] *See Griffin*, 380 U.S. at 613-15.
[98] *See id.* at 615.
[99] *See supra*, at pp. 2-3.
[100] 461 U.S. 499 (1983)
[101] *See Hasting*, 461 U.S. at 501-03.

the conviction without applying harmless error analysis.[102] On appeal by the Government, the Supreme Court reiterated that a *Griffin* violation was subject to harmless error analysis[103] and found the violation in question to be harmless.[104] Despite citations to *Chapman* throughout the case, however, the Court did not mention the "contribute to the verdict" test but instead relied on the fact that there was overwhelming evidence of guilt in making its harmlessness determination.[105]

Denial of Right to Counsel

In *Johnson v. Zerbst*,[106] the Supreme Court held that, under the Sixth Amendment, in all criminal prosecutions in federal courts a defendant has a right to be represented by counsel. This holding was extended to state courts in *Gideon v. Wainwright*.[107] In *Chapman*, the Court described this right to counsel as "so basic to a fair trial that [its] infraction can never be treated as harmless error."[108] In *Fulminante*, the Court reiterated that the complete denial of the right to counsel is a structural error which would defy harmless error analysis.[109] The question of a *partial* denial of the right to counsel has been approached differently in several post-*Chapman* cases.

In *United States v. Wade*,[110] and its companion case, *Gilbert v. California*,[111] the Court held that the denial of counsel to a suspect at a post-indictment corporeal lineup is a Sixth

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[102] *See id.* at 503. The Court stated that application of harmless error doctrine "would impermissibly compromise the clear constitutional violation of the defendants' Fifth Amendment rights." *Id.*
[103] *See id.* at 509.
[104] *See id.* at 512
[105] *See Hasting*, 461 U.S. at 512.
[106] 304 U.S. 458 (1938).
[107] 372 U.S. 335 (1963).
[108] *Chapman*, 386 U.S. at 23.
[109] *See Fulminante*, 499 U.S. at 309.
[110] 388 U.S. 218 (1967).
[111] 388 U.S. 263 (1967).

Amendment violation but that the admission of such identification evidence at trial may be harmless error.[112] The Court suggested no particular test for harmlessness other than the general *Chapman* standard of harmlessness beyond a reasonable doubt.[113] Similarly, in *Coleman v. Alabama*,[114] the Court held that the denial of counsel at the defendant's preliminary hearing was constitutional error and remanded for a harmlessness review without specifying any particular test beyond citing to *Chapman*.[115]

In *Milton v. Wainwright*,[116] the defendant, Milton, after being indicted and obtaining counsel, made incriminating statements to a police officer posing as his cell mate. Over Milton's objection, the officer testified to these statements at trial and Milton was convicted of murder.[117] Subsequent to Milton's conviction, the Supreme Court held that this type of questioning violated the defendant's Sixth Amendment right to assistance of counsel and Milton's case reached the Court on habeas corpus review.[118] The Court applied the *Harrington* test and held that if a Sixth Amendment violation had occurred it was harmless beyond a reasonable doubt.[119] Four Justices dissented and argued that the error was not harmless under the *Chapman* test that should have been applied.[120]

In *Moore v. Illinois*,[121] the defendant had been denied counsel at his preliminary hearing, and during the hearing he was identified by the victim. The prosecution subsequently used this identification at the trial. The Court concluded that a violation of the defendant's constitutional

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[112] *See e.g., Gilbert*, 388 U.S. at 272-74.
[113] *See id.* at 274.
[114] 399 U.S. 1 (1970).
[115] *See Coleman*, 399 U.S. 1 at 9-11.
[116] 407 U.S. 371 (1972).
[117] *See Milton*, 407 U.S. at 371-72.
[118] *See id.* at 372.
[119] *See id.* at 372-73, *see also id.* at 375-76 (noting that the challenged confession was cumulative of other confessions).
[120] *See id.* at 382-84 (Stewart, J., dissenting).

right to counsel had occurred but that the error was subject to review for harmlessness. The Court reversed the conviction and remanded for harmless error analysis, but, as in *Gilbert*, did not specify any particular harmlessness test to apply other than citing to *Chapman*. On remand, the Court of Appeals for the Seventh Circuit applied a modified *Harrington* test and found the error to be harmless,[122] and the Supreme Court denied certiorari.[123]

Subsequently, in *Satterwhite v. Texas*,[124] the defendant in a capital case had been denied counsel at a psychiatric examination intended to evaluate his future dangerousness.[125] The defendant was convicted at a jury trial, and the contested psychiatric testimony was admitted in a subsequent penalty proceeding at which the same jury determined that a death sentence was appropriate.[126] The state appellate court conceded that a Sixth Amendment error occurred but found the error harmless on the grounds that the other untainted evidence would have been sufficient to support the death penalty determination in the minds of an average jury.[127] On appeal, the Supreme Court rejected this test for harmlessness and instead strictly applied the *Chapman* test, asking "whether the state has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"[128] After reviewing the evidence, the

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[121] 434 U.S. 220 (1977).

[122] Moore v. Illinois, 577 F.2d 411, 413 (7th Cir. 1978). The Seventh Circuit stated that it was unlikely that the jury had "attached any crucial significance" to the erroneously admitted identification because the pre-trial identification was cumulative of a subsequent in-court identification, the suggestiveness of the pre-trial identification had been exposed at trial by the defense, and finally, other evidence corroborated the victim's in-court identification. *See Moore*, 577 F.2d at 413.

[123] Moore v. Illinois, 440 U.S. 919 (1979).

[124] 486 U.S. 249 (1988).

[125] *See Satterwhite*, 486 U.S. at 251. In Estelle v. Smith, 451 U.S. 454 (1981), the Court held that such a denial was a violation of the defendant's Sixth Amendment right to counsel. See id.

[126] *See id.* at 253.

[127] *See id.*

[128] *Satterwhite*, 486 U.S. at 258-59.

Court concluded that it was impossible to say that, beyond a reasonable doubt, the sentencing jury had not been influenced by the contested testimony and so reversed the death sentence.[129]

Fourth Amendment Search and Seizure Violations

In *Fahy v. Connecticut*,[130] the Court applied a precursor of the *Chapman* test to find that the admission of evidence obtained through an illegal search and seizure was not harmless error. The Court stated that "we are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of."[131] Instead, the Court asked whether the challenged evidence might have contributed to the conviction.[132] Although the Court declined at that time to rule on whether a constitutional error might be harmless, the *Fahy* test served as the basis for the test subsequently elucidated in *Chapman*.

Following *Chapman*, the Court has held that Fourth Amendment violations can be harmless error. In *Chambers v. Maroney*,[133] the Court ruled that bullets admitted at trial as evidence against the defendant might have been the product of an illegal search, but if so, the admission was harmless error.[134] The Court did not explain its reasoning behind this conclusion but it offered a citation to *Harrington* rather than *Chapman* or *Fahy*.[135]

Jury Instruction Errors

The Court has addressed a number of constitutional errors that have occurred in the jury instruction area and has endorsed different harmlessness tests in the process. In *Sandstrom v.*

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[129] *See id.* at 260.
[130] 375 U.S. 85 (1963).
[131] *Fahy*, 375 U.S. at 86.
[132] *See id.* ("The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.").
[133] 399 U.S. 42 (1970).
[134] *See Chambers*, 399 U.S. at 52-53.
[135] *See id.*

Montana,[136] the Court held that instructing the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts," violates the defendant's due process right to have every element of a crime proved beyond a reasonable doubt.[137] The Court did not consider whether the error might be harmless but remanded the case for consideration of that issue.[138] On remand, the Montana Supreme Court found the error not harmless under the *Fahy/Chapman* "contribute to the verdict" test.[139]

Four years later, in *Connecticut v. Johnson*,[140] in response to disagreement in the lower courts on the question,[141] the Court squarely addressed whether a *Sandstrom* violation can be harmless but provided no definitive answer. In *Johnson*, the Connecticut Supreme Court had reversed the defendant's convictions due to a *Sandstrom* violation.[142] The Connecticut court did not consider harmlessness, however, apparently on the grounds that such errors could never be considered harmless.[143] The state appealed to the Supreme Court and argued that, under *Chapman*, analysis for harmlessness was mandatory.[144] In a plurality decision, the Court affirmed the decision but was unable to reach a majority view on whether a *Sandstrom* violation can be harmless error.

Four Justices analyzed the effect of a *Sandstrom* violation in the context of the *Chapman* test and concluded that, except when the defendant concedes the issue of intent, the nature of a

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[136] 442 U.S. 510 (1979).
[137] *Sandstrom*, 442 U.S. at 513.
[138] *See id.* at 526-27.
[139] *See Montana v. Sandstrom*, 603 P.2d 244, 245 (Mont. 1979).
[140] 460 U.S. 73 (1983).
[141] *See Johnson*, 460 U.S. at 75.
[142] *See id.* at 79-80.
[143] *See id.* at 81.
[144] *See id.* Justice Stevens who provided the fifth vote to affirm, argued that while *Chapman* stands for the proposition that a constitutional error may be harmless, a state may, as a matter of state law, adopt a rule of per se reversal regardless of the practice in the federal courts. In Justice Stevens' view, the state had not even presented a federal question.

Sandstrom violation is such that a reviewing court could never be confident that the improper presumption did not contribute to the jury's verdict, regardless of other evidence against the defendant.[145] On the other hand, four dissenting Justices rejected any per se rule of reversal. The dissenters effectively merged the *Chapman* "contribute to the verdict" test with the *Harrington* test and argued that whether or not an error contributed to the verdict can be determined by an appraisal of the weight of the other evidence against the defendant.[146]

The Court's indecision resulted in continuing conflict in the lower courts, and three years later the Court again tackled the *Sandstrom* question in *Rose v. Clark*.[147] In *Rose*, the jury had been instructed that a homicide is presumed to be malicious.[148] Relying on the fact that the defendant had contested, and not conceded, the issue of intent, the lower court, as in *Johnson*, had held that the *Sandstrom* error could not be considered harmless regardless of the weight of other evidence.[149] On appeal, the Supreme Court found this type of burden-shifting instruction to be amenable to harmless error analysis. The Court implicitly rejected the application of the "contribute to the verdict" test or any other particular harmlessness test. Rather the Court suggested that the appellate court should simply make its own evaluation of the case, stating, "[w]here a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed."[150] The Court went on to explain that the nature of some crimes was such that "no rational jury would need to rely on an erroneous presumption to find malice."[151] *Rose* appears to

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[145] *See id.* at 85-88
[146] *See Johnson*, 460 U.S. at 94-95 (Burger, C.J., dissenting).
[147] 478 U.S. 570, 572 n.1 (1986).
[148] *See Rose*, 478 U.S. at 574.
[149] *See id.* at 575-76.
[150] *Id.* at 579.
[151] *Id.* at 581 n.10. On remand, the Court of Appeals for the Sixth Circuit found the error harmless. The court applied a multi factor *Van Arsdall* type analysis and concluded, "we can say

represent a new level of appellate discretion in finding constitutional errors harmless and it directly foreshadows the approach subsequently adopted in *Neder*.

Writing in dissent, Justice Blackmun, joined by two other Justices argued that the effect on the jury of a burden-shifting presumption can never be determined by an appellate court and so, under *Chapman*, should never be deemed harmless.[152] Additionally, the dissent raised an issue that has reared its head in many subsequent jury instruction cases. Justice Blackmun argued that although the Court had concluded that the defendant's Fifth Amendment due process right to have every element of the crime proven beyond a reasonable doubt could be adequately satisfied by harmless error analysis, the Court had disregarded the defendant's Sixth Amendment right to have that determination made by a jury of his peers.[153] The majority's response was that almost any trial error affects "the terms under which the jury considers the defendant's guilt or innocence and therefore [might] theoretically impair[] the defendant's interest in having a jury decide his case," but that if this interest were to prevail, it would essentially invalidate all harmless error analysis.[154]

In *Pope v. Illinois*,[155] the Court considered a different type of jury instruction error. Two defendants had been convicted in state court on charges of obscenity. However, the jury instruction had improperly stated the third prong of the obscenity test promulgated by the Supreme Court in *Miller v. California*.[156] Consequently, on appeal the Court found the jury

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on the basis of the whole record, that beyond a reasonable doubt the jury would have found it unnecessary to rely on the presumption mentioned in the trial court's instruction." Clark v. Rose, 822 F.2d 596, 600 (6th Cir. 1987).

[152] *See id.* at 593-94 (Blackmun, J., dissenting).

[153] *See Rose*, 478 U.S. at 590 (Blackmun, J., dissenting).

[154] *Id.* at 582 n.11. This argument seems to ignore the possibility of using the *Chapman* test as the sole determinant of harmlessness.

[155] 481 U.S. 497 (1987).

[156] 413 U.S. 15 (1973). *See Pope*, 413 U.S. at 498-99

instruction to be unconstitutional.[157] Nevertheless, relying on *Rose*, the Court found the error to be subject to harmless error analysis[158] and remanded for a harmlessness determination.[159] As in *Rose*, the Court disavowed the "contribute to the verdict" test, stating that "[t]he problem with the instructions . . . is that the jury could have been impermissibly aided or constrained in finding the relevant element of the crime . . . . By leaving open the possibility that [the] conviction can be preserved despite the instructional error, we do no more than we did in Rose."[160] The Court also re-addressed the Sixth Amendment issue, stating "to the extent that cases prior to *Rose* may indicate that a conviction can never stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof . . . , after *Rose*, they are no longer good authority."[161]

A *Sandstrom* violation was at issue in *Carella v. California*.[162] In a per curiam opinion, the Court reiterated that a *Sandstrom* violation is subject to harmless error analysis and remanded for harmlessness determination.[163] Justice Scalia,[164] in a concurring opinion joined by three other Justices, returned to the Sixth Amendment jury trial question raised by Justice Blackmun in *Rose*. Justice Scalia argued that whenever a jury is instructed to apply a mandatory conclusive presumption as to an element of a crime, or when an element of a crime is misdescribed such that the jury never properly considers the actual element, then the defendant's right to a jury

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[157] *See id.* at 501.
[158] *See id.* at 502.
[159] *See id.* at 504. On remand, the Illinois appellate court found the error harmless based on its own evaluation of the evidence. "As the obscenity of the magazines is obvious from the materials themselves, we conclude that no rational juror, if properly instructed, could have found value in the magazines in question and, therefore, the improper instruction constituted harmless error." Illinois v. Morrision, 515 N.E. 2d. 356, 362 (Ill. App. 1987).
[160] *Id.* at 503 n.7.
[161] *Id.*
[162] 491 U.S. 263 (1989).
[163] *See Carella*, 491 U.S. at 267.
[164] Justice Scalia joined the Court shortly after the *Rose* decision.

determination of guilt on each element of the crime has been violated and the "typical form" of harmless error analysis is inappropriate.[165] Justice Scalia essentially argued that, in these situations, a strict application of the *Chapman* "contribute to the verdict" test is required, whereas application of the *Harrington* test would be appropriate in typical harmless error analysis.[166] Because the Court had not made this distinction in *Rose* when it suggested that an appellate court can simply review a case on its own to decide if an error was harmless, he called the *Rose* decision "ambiguous"[167] and stated his view that the *Rose* approach only applied with rebuttable presumption errors and not with conclusive presumption or misdescribed element errors.[168] Four years later, Justice Scalia's views carried the day in another major jury instruction case, *Sullivan v. Louisiana*.[169]

The question raised in *Sullivan* was whether an erroneous reasonable doubt jury instruction (a *Cage* error[170]) was subject to harmless error analysis. Contrary to the ultimate state court decision in *Cage* itself, the *Sullivan* Court held that a *Cage* violation was "structural error" that could never be deemed harmless.[171] Writing for the Court, Justice Scalia explained that, under *Chapman*, harmless error analysis was based on an analysis of whether an error contributed to a guilty verdict. When a jury has been wrongly instructed as to reasonable doubt,

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[165] *See id.* at 267-71 (Scalia, J., concurring).
[166] See id.
[167] See id. at 267.
[168] *See id.* at 267-71.
[169] 508 U.S. 275 (1993).
[170] In Cage v. Louisiana, 498 U.S. 39 (1990), the Court had held that a jury instruction which defined reasonable doubt in terms of "grave uncertainty," "substantial doubt," and "moral certainty" violated the defendant's constitutional due process rights by overstating the level of doubt required to acquit. *See Cage*, 498 U.S. at 40-41. The Court reversed the conviction and remanded for further proceedings not inconsistent with its opinion. *See id.* at 41. On remand, the Louisiana Supreme Court, relying on *Rose v. Clark*, and citing overwhelming evidence of guilt, found the instruction error harmless, *See* Louisiana v. Cage, 583 So. 2d 1125, 1128 (La. 1991), and the United States Supreme Court denied certiorari. Cage v. Louisiana, 502 U.S. 874 (1991).
[171] *See Sullivan*, 508 U.S. at 281-82.

however, there is no proper jury verdict and thus there is no "object . . . upon which harmless-error scrutiny can operate."[172] Consequently, the Court mandated a per se rule of reversal for *Cage* errors.

The decision in *Sullivan* appeared to indicate that the Court was giving greater deference to a defendant's Sixth Amendment right to a jury trial in harmless error matters–a stance that would seem to support a return to the *Chapman* test and a move away from the more discretionary tests such as *Harrington*, *Van Arsdall*, *Rose*, or a general sufficiency of the evidence test. However, nine years later, in *Neder v. United States*,[173] the Court held that the complete omission of an element of a crime from the jury's charge may be harmless despite the fact that it clearly violates a defendant's right to a trial by jury. Additionally, the Court set out yet another test for determining whether a constitutional error is harmless, a test that appears to give appellate courts as much or more discretion to review the appellate record to determine guilt as any test previously endorsed by the Court.

THE DECISION

In *Nederv. United States*,[174] the defendant was convicted in federal district court of various fraud offenses, including two counts of filing a false income tax return.[175] Although the materiality of the false statements on Neder's tax returns was an element of the offense, the trial court instructed the jury not to consider the issue and, subsequently, outside the presence of the jury, the court made its own finding that the false statements were material in light of the evidence.[176] On appeal, the Court of Appeals for the Eleventh Circuit concluded that, under relevant Supreme Court precedent, the omission of the materiality element was constitutional

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[172] *Id.* at 280
[173] 527 U.S. 1 (1999).
[174] 527 U.S. 1 (1999).
[175] *See Neder*, 527 U.S. at 6.

error.[177] However, the court held that the omission was harmless beyond a reasonable doubt because Neder had not contested the issue of materiality at trial.[178] To resolve conflict within the circuit courts, the Supreme Court granted certiorari to address "whether and under what circumstances, the omission of an element from the judge's charge to the jury can be harmless error."[179]

Before the Supreme Court, Neder argued that an element-omission error in a jury's charge can never be considered harmless. Relying on the logic of *Sullivan*, he argued that because the jury had never considered the materiality element of the crime, there was no proper jury verdict on which harmless error analysis could operate.[180] The Court conceded that *Sullivan* did provide support for Neder's position[181] but explained that if Neder's argument were accepted it would mandate automatic reversal not only for element-omission errors but also any error of misdescription of an element. The Court reasoned that regardless of whether an element of a crime is misdescribed or completely withheld from the jury, the result is that the jury never

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[176] *See id.* at 6. This was the existing practice in the circuit at that time. *See id.*
[177] *See id.* at 6-7. The Eleventh Circuit relied on United States v. Gaudin, 515 U.S. 506 (1995), in which the Supreme Court held that a similar failure to submit the question of materiality to the jury violated the defendant's rights under the Fifth and Sixth Amendments to have a jury find each element of the charge against him beyond a reasonable doubt. *See Gaudin*, 515 U.S. at 509-511.
[178] *See* United States v. Neder, 136 F.3d 1459, 1465 ("Because materiality was not in dispute with respect to Neder's tax fraud offense, the district court's *Gaudin* error 'did not contribute to the verdict obtained.'").
[179] *Neder*, 527 U.S. at 7. A second question addressed by the Court in connection with other charges against the defendant was "whether materiality is an element of the federal mail fraud, wire fraud and bank fraud statutes." *Id.*
[180] *See id.* at 11.
[181] *See id.*

makes a true finding on the actual element.[182] Consequently, in the Court's view, a per se rule of reversal would be inconsistent with established precedent such as *Pope* and *Carella*.[183]

Although the Court relied on precedent to support the decision, earlier cases, in fact, suggest that omission of an element from the jury's consideration should result in per se reversal. For example, in his concurring opinion in *Sullivan*, Chief Justice Rehnquist clearly distinguished errors of misdescription of an element from the complete omission of an element. Chief Justice Rehnquist stated that one reason why the misdescription errors of *Rose* and *Sullivan* should be "amenable to harmless-error analysis" is that "neither error removed an element of the offense from the jury's consideration."[184] Similarly, in *Rose v. Clark*, the Court explained that "because a presumption does not remove [an issue] from the jury's consideration,"[185] a *Sandstrom* violation was not "equivalent to a directed verdict for the state."[186] The Court further noted that such an error was "distinguishable from other instructional errors that prevent a jury from considering an issue."[187] This was the same language earlier used by Justice Powell in his dissenting opinion in *Connecticut v. Johnson*, a dissent joined by Justices Rehnquist and O'Connor.[188] Consequently, rather that being consistent with precedent, the *Neder* decision can be seen as another case of mandating harmless error review over what were previously considered "structural" errors.

Neder also argued that an element omission error could not be considered harmless because any time an appellate court makes a finding of guilt as to an element of a crime based

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[182] *See id.* at 11-12.
[183] *See id. Pope* and *Carella* held that element misdescription errors may be harmless. *See supra.* at pp. 22-22.
[184] *Sullivan*, 508 U.S. at 283 (Rehnquist, C.J., concurring).
[185] *Rose*, 478 U.S. at 580 n.8.
[186] *Id.* at 580.
[187] *Id.* at 580 n.8.
[188] *See Johnson*, 460 U.S. at 96 n.3 (Powell, J., dissenting).

solely its own evaluation of the evidence, there is a direct denial of the right to a jury trial that could be equated to a directed verdict of guilty.[189] The Court rejected this argument, again on the grounds that such a view was inconsistent with prior precedent.[190] The Court made two points in this context: first, that "our course of constitutional adjudication has not been characterized by [an] 'in for a penny, in for a pound' approach,"[191] meaning that an appellate determination of a single element of an offense had not previously been treated as a directed verdict of guilty; and second, and probably more to the point, the Court simply did not treat the Sixth Amendment question as an independent issue, but rather said that at its heart, this argument was simply a re-hash of Neder's basic argument that element omission errors should be considered per se harmful.[192] The Court squarely held that a partial violation of a defendant's right under the Sixth Amendment to have a jury determine his guilt may be harmless error.[193]

The Court also addressed the fact that the *Sullivan* decision, finding a defective reasonable doubt instruction to be per se harmful might seem inconsistent with a subsequent decision in which a complete failure to instruct on an element can be harmless.[194] The majority conceded that the two decisions might not be logically consistent, but, again made the argument that the Court was constrained by precedent.[195] In a nod to pragmatism, the Court noted that experience, rather than logic, might be "the life of the law."[196]

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[189] *See id.* at 17. Justice Scalia forcefully argued the same point in a dissenting opinion stating, "Harmless error review applies only when the jury actually renders a verdict, that is, when it has found the defendant guilty of all the elements of the crime." *Id.* at 38 (Scalia, J., dissenting).
[190] *See Neder*, 527 U.S. at 17-18.
[191] *Id.* at 17 n.2.
[192] *See id.*
[193] *See id.* at 12-13.
[194] *See id.* at 15.
[195] *See id.*
[196] *Id.*

Turning to the question of whether the error was harmless in Neder's case, the Court applied a two-pronged test: "where a reviewing court concludes beyond a reasonable doubt that the omitted element was [1] uncontested and [2] supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless."[197] Because Neder had not contested materiality at the trial and the government's evidence of materiality was seen as overwhelming, the Court found the error harmless.[198] This test is well-suited to meet the pragmatic concern expressed by the Court, that is, that if a new trial had been ordered, it would not have been focused on the issue of materiality, because Neder had no arguments to make on that score.[199] Rather, a retrial would have focused on "contested issues on which the jury was properly instructed [in the original trial]."[200] A reversal then would simply have given Neder a second bite of the apple, with all its attendant use of court resources.

The Court went on, however, to describe yet another test for harmlessness, one broad enough to accommodate jury instruction errors as well as other violations of the Fifth and Sixth Amendments.[201] The Court stated that "the harmless error inquiry must be . . . [i]s it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." [202] Although this inquiry was presented as an explication of the *Chapman* standard of "harmless beyond a reasonable doubt," the Court did not address the relationship of this new test to existing tests. As for applying the test, the Court stated only that a thorough examination of

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[197] *Id.* at 17.
[198] *See id.* at 16. Neder's defense was that the unreported funds at issue were loan proceeds and not income.
[199] *See id.* at 15.
[200] *Id.*
[201] *See id.* at 18.
[202] *Neder*, 527 U.S. at 18.

the record may be required,[203] and also that the two-pronged test earlier described was one way of meeting the broader test.[204]

The broader *Neder* test appears to grant greater discretion to appellate courts. It does not ask the subjective question of whether an error may have affected an actual jury verdict; instead, it asks the objective question of whether the error would have swayed a "rational" jury. For example, if the defendant is improperly barred from presenting a defense later considered implausible by the reviewing court, the error could be considered harmless under the "reasonable jury" standard without consideration of whether the defendant's jury, which heard all the evidence and observed all the witnesses, might have been swayed.

Neder then sets out two harmlessness tests. Like *Chapman*, which set out a broader standard for constitutional error harmlessness - "harmless beyond a reasonable doubt"- as well as a narrower test for meeting that standard - the "contribute to the verdict" test - *Neder* sets out a broad harmlessness inquiry as well as the narrower two-pronged test which satisfies the broader standard. As with *Chapman*, the *Neder* Court did not specifically address whether other tests might also satisfy the broader standard or whether the broader standard may be cited by appellate courts as a test in itself. The two *Neder* tests apparently simply increase the options available to appellate courts when deciding the harmlessness question.

Shortly after *Neder*, the Court held in *Apprendi v. New Jersey*,[205] that any facts, other than prior convictions, that increase the penalty for a crime beyond the statutory maximum, must be treated as elements of the crime and be found by a jury beyond a reasonable doubt.[206] Any scheme that treats such facts as "sentencing factors" to be decided by a judge based on a

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[203] *See id.* at 19.
[204] *See id.*
[205] 120 S. Ct. 2348 (2000).
[206] *See Apprendi*, 120 S. Ct. at 2362-63.

preponderance of the evidence standard, is a violation of the defendant's constitutional due process and jury trial rights.[207] Although the Court remanded the case in *Apprendi* without mention of harmless error,[208] in at least three subsequent cases circuit courts have held that *Apprendi* errors are subject to harmless error analysis and have applied *Neder* in two of those three cases.[209]

Summary

The history of the Supreme Court's constitutional harmless error jurisprudence shows a general trend of granting appellate courts greater discretion in finding constitutional error harmless. This occured in three ways. First, the Court expanded the types of errors that can be subject to harmless error analysis. *Chapman* initiated the process by abolishing the rule of per se reversal for most constitutional errors, and the Court continued the trend in the post-*Chapman* era by reclassifying selectively as trial errors what were previously viewed as structural errors.

Second, the Court set out increasingly loose tests for determining when an error is harmless beyond a reasonable doubt. Beginning with the relatively restrictive *Chapman* test, the Court moved to the more discretionary *Harrington* test, and then to the still looser *Van Arsdall*, *Rose*, and *Neder* tests.

Finally, by allowing all the various tests to exist simultaneously, the Court has created a whole range of harmlessness inquiries from which the appellate courts can choose. Rather than asking which result meets the test, the question may be which test best fits the desired result. The next section of this paper surveys fifty-five post-*Neder* circuit court cases and their treatment of the constitutional harmless error doctrine.

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[207] *See id.* at 2363; 2355.

[208] As of 12/5/00, the case on remand had not been reported.

CIRCUIT COURT SURVEY

The Supreme Court decided *Neder v. United States*[210] in June of 1999. In the ensuing eighteen months, there have been enough cases involving constitutional harmless error in the circuit courts to get at least a preliminary look at how *Neder* is being interpreted and applied as well as the general state of constitutional harmless error jurisprudence in the post-*Neder* environment. The following information is based on a survey of fifty-five circuit court cases containing fifty-nine harmlessness decisions.[211] The cases were selected via a Westlaw search using search terms such as "harmless error" and "constitutional" in various combinations with the names of key Supreme Court cases such as *Chapman*, *Harrington*, and *Neder*. The attached exhibits list and summarize all the surveyed cases.

The cases show that, to date, *Neder* has been relied on almost exclusively in cases of jury instruction error. And when this type of error occurs, *Neder* is the predominant test of harmless error applied. Of the twenty cases surveyed in which a jury instruction error was challenged, the courts relied primarily on a *Neder* test in all but six cases. In those six cases, the court made a determination that the error was harmless based on its own evaluation of the weight of the evidence. Within the remaining fourteen cases however, the *Neder* test is not uniformly applied. In eight of the cases, the courts essentially applied the two-pronged test and in six cases the courts essentially applied only the broader *Neder* standard.

With just two exceptions, *Neder* was applied only in connection with jury instruction errors. In *United States v. Rhynes*,[212] the trial court excluded the defendant's sole witness in

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[209] *See* Ex. C.
[210] 527 U.S. 1 (1999).
[211] Four of the cases contained rulings on two errors each.
[212] 218 F.3d 310 (4th Cir. 2000).

order to sanction the defendant's attorney.[213] On appeal, the Fourth Circuit concluded this was a violation of the defendant's Sixth Amendment right to call witnesses and found the error not harmless under the *Neder* two-pronged test.[214] In *United States v. Salimova*,[215] hearsay had been improperly admitted under the co-conspirator statement exception. Without actually citing to *Neder*, the Ninth Circuit applied a test that appears to be a slight re-wording of the broad *Neder* test.[216] Under this test, the court found both harmless and harmful errors in the case.

In addition to the question of which *Neder* harmless error test to apply, there have been some other differences in how *Neder* is applied in circuit court decisions. In *United States v. Jackson*,[217] the Second Circuit read the broader *Neder* standard to say that, in omitted element cases, even when the record contains evidence which would rationally support a finding in favor of the defendant with respect to the omitted element, the appellate court must then make its own determination as to whether the verdict would have been the same absent the error.[218] This appears to be the most expansive interpretation of *Neder* at this time.

In *United States v. Gracidas-Ulibarry*[219] the defendant was an alien convicted of attempted illegal re-entry into the U.S. The trial court denied the defendant's request for a jury instruction that intent to re-enter was an element of the crime. Even though the defendant contested intent, claiming he was asleep in the car when the attempted border crossing occurred, the Ninth Circuit found the error harmless under the *Neder* two-pronged test, because the

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[213] *See Rhynes*, 218 F.3d at 312.
[214] *See id.* at 323.
[215] No. 98-50502, 2000 WL 297397 (9th Cir. 2000).
[216] The court stated "Absent the inadmissible hearsay, the record does not contain evidence that could have led a jury to conclude beyond a readable doubt that appellant was implicated . . . ." *See Salimova*, 2000 WL 297397 at 1.
[217] 196 F.3d 393 (2d Cir 1999). *Jackson* was a well-publicized case involving the defendant's claim that she was comedian Bill Cosby's daughter.
[218] *See Jackson*, 196 F.3d at 386.
[219] 231 F.3d 1188 (9th Cir. 2000).

government's evidence was uncontested and overwhelming. Thus, as applied in this case, the "uncontested" prong of the *Neder* test refers to the prosecutor's evidence, rather than the omitted element itself.

In *Lanier v. United States*,[220] the Seventh Circuit specifically held that the broad *Neder* standard superseded the *Chapman* "contribute to the conviction" test.[221] As originally issued, this decision found an element-omission error harmless under the broad *Neder* standard. However, four months later, the court issued an amended opinion[222] in which the decision is supported by the *Neder* two-pronged test. The amended opinion retains the language rejecting the *Chapman* test however, and the Seventh Circuit appears to be the only appellate court to date make this type of statement. Subsequent to the amended opinion, the Seventh Circuit has applied *Neder*,[223] *Van Arsdall*[224] and a general weight of the evidence test[225] in harmless error cases.

In addition to insight about the jury instruction/*Neder* cases, the circuit court survey reveals two other areas of consistency. First, the *Van Arsdall* test is used exclusively in connection with Confrontation Clause errors, and, together with similar multi-factor balancing tests, it accounts for about half of the Confrontation Clause decisions. The second consistency relates to the outcomes of the various tests. The "contribute to the verdict" test resulted in a finding of harm (i.e., the conviction was reversed) in eight of the eleven cases in which it was applied. On the other hand, application of the *Harrington* test or related weight of the evidence tests resulted in a finding of harmless error (affirming the conviction) in all sixteen cases in

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[220] 205 F.3d 958 (7th Cir. 2000).
[221] "[T]his [the contribute to the verdict test] is not the proper test. In *Neder*, the Court announced the standard for harmless error review." *Lanier*, 205 F. 3d at 964.
[222] 220 F.3d 833 (7th Cir. 2000).
[223] *See* United States v. Walls, Nos. 99-1942, 99-1943, 2000 WL 1146610 (7th Cir. 2000).
[224] *See* United States v. Castelan, 219 F.3d 690 (7th Cir. 2000)

which this test was applied. The *Van Arsdall* and related multi-factor balancing tests resulted primarily in affirming convictions (twelve of fifteen cases). These test outcomes parallel results observed in an earlier survey by Gregory Mitchell, conducted in 1994, following the *Sullivan* decision.[226] The *Neder* test has had more balanced results. Of the seventeen *Neder* cases in the survey, there were six reversals and eleven affirmations.

Aside from the areas discussed above, the survey reveals little consistency or predictability as to how a court will approach the harmlessness inquiry, either within a circuit or within a particular type of error. For example, in the five surveyed cases in which a *Griffin* error or related Fifth Amendment violation occurred, the courts applied different harmlessness tests. *In United States v. Meza de Jesus*,[227] the trial court, in sentencing the defendant, had drawn an adverse inference from the defendant's failure to testify.[228] Because this inference contributed to the sentence, the Ninth Circuit found the error harmful.[229] *In United States v. Romero-Felix*,[230] another Ninth Circuit case, the prosecutor had improperly commented on the defendant's post-arrest, pre-*Miranda* silence and the court found the error harmless in light of overwhelming evidence of guilt and the implausibility of the defendant's story.[231] In *United States v. Triplett*,[232] the issue was a *Griffin* violation[233] and the Eighth Circuit applied a three-factor balancing test similar to the *Van Arsdall* test to find the error harmless.[234] A *Griffin* violation

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[225] *See* United States v. Wesela, 223 F.3d 656 (7th Cir. 2000).
[226] *See Mitchell, supra* note 30.
[227] 217 F.3d 638 (9th Cir. 2000).
[228] *See Meza de Jesus*, 217 F.3d at 644.
[229] *See id.* at 645.
[230] No. 99-50628, 2000 Lexis 15358 (9th Cir. 2000).
[231] *See Romero-Felix*, 2000 Lexis 15358 at 5.
[232] 195 F.3d 990 (8th Cir. 1999).
[233] *See Triplett*, 195 F.3d at 996.
[234] *See id.* at 997-98.

was also at issue in *United States v. Rahseparian*,[235] and the Tenth Circuit found the error harmless under the *Chapman* test.[236] Finally, in *United States v. Moreno*,[237] the prosecutor made an improper comment on the defendant's invocation of the right to counsel.[238] The Fifth Circuit applied its own three-factor test and relied primarily on overwhelming evidence of guilt to find the error harmless.[239]

Similarly, different tests were applied in the three surveyed cases involving *Bruton* violations. The Fourth Circuit applied the *Chapman* test and found the error not harmless,[240] the Fifth Circuit found the error harmless in light of the weight of the evidence of guilt,[241] and the Eighth Circuit balanced the weight of the evidence of guilt against the prejudicial effect of the error, concluding that the error was not harmless.[242]

Two of the surveyed cases involved partial denials of the right to counsel. In *United States v. Roney*,[243] the petitioner was denied appointed counsel to assist with his motion to set aside a conviction. The Eighth Circuit found this error to be not harmful because it likely contributed to the denial of the motion.[244] In *United States v. LaBare*,[245] jailhouse informants had elicited information from the defendant in violation of his right to counsel and the

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[235] 231 F.3d 1267 (10th Cir. 2000).
[236] *See Rahseparian*, 231 F.3d at 1275-76.
[237] 185 F.3d 465 (5th Cir. 1999).
[238] *See Moreno*, 185 F.3d at 473.
[239] *See id.* at 475.
[240] *See* United States v. Hensley, No. 99-4615, 2000 WL 331610 (4th Cir. 2000).
[241] *See* United States v. Lage, 183 F.3d 374 (5th Cir. 1999)
[242] *See* United States v. Al Musquit, 191 F.3d 928 (8th Cir. 1999).
[243] 205 F.3d 1061 (8th Cir. 2000).
[244] *See Roney*, 205 F.3d at 1063.
[245] 191 F.3d 60 (1st Cir. 1999).

informants testimony was admitted at trial.[246] The First Circuit found the error harmless given the strength of the government's case.[247]

Finally, in the 20 non-*Bruton* cases involving Confrontation Clause violations, the circuit courts, in addition to the *Van Arsdall* test noted above, applied the *Chapman* test, the broad *Neder* test, weight of the evidence tests, and combinations thereof.[248]

In sum, the survey shows that the circuit courts exercise great discretion in making the harmlessness determination. While in about half of the surveyed decisions (30/59), the courts applied one of the specific tests delineated by the Supreme Court, only about one-third of this half (eleven cases) reflected application of the restrictive *Chapman* test. In the remaining half, the courts essentially made their own review of the evidence, or their own determination of what verdict a reasonable jury would have hypothetically reached.

CONCLUSION

If the late nineteenth century , when even minor technical errors in an indictment might serve to produce a conviction reversal, is seen as the highpoint for appellate protection of the defendant, then it seems the pendulum is still swinging in the opposite direction. While the *Sullivan* decision appeared to indicate that the pendulum was cresting, *Neder* may indicate that the highpoint for constitutional error harmlessness has not yet been reached.

In his dissenting opinion in *Chapman v. California*, Justice Harlan objected to the idea that constitutional errors require any type of heightened harmlessness review, stating:

> Holding, as is done today, that a special harmless-error rule is a necessary remedy for a particular kind of error revives the unfortunate idea that appellate courts must act on particular errors rather than decide on reversal by an evaluation of the entire proceeding

[246] *See LaBare*, 191 F.3d at 64.
[247] *See id.* at 66.
[248] *See* Ex. B.

> to determine whether the cause as a whole has been determined according to properly applicable law.[249]

Justice Harlan downplayed the potential of any threat to constitutional guarantees, arguing that if a serious problem developed it could be dealt with appropriately.[250]

The history of the Supreme Court's post-*Chapman* constitutional harmless error jurisprudence seems to indicate that the Court is coming around to Justice Harlan's viewpoint. There has clearly been a trend towards less protection for constitutional guarantees and greater leeway granted to appellate courts to make their own review of the entire trial record in determining if an error was harmful. Whether the Court's trend is based on pragmatic considerations of judicial resources and a need for finality or whether it is rooted in the Justices' psychology or social or political philosophies is beyond the scope of this paper at this time. It seems clear though that a majority of the Court views harmless error analysis not as a limited doctrine to be sparingly applied to protect convictions in certain constitutional error situations but rather, as a generally applicable means of preserving convictions despite the presence of any of a broad range of constitutional errors.

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[249] *See Chapman*, 386 U.S. at 49 (Harlan, J., dissenting).
[250] *See id.* at 50-51.

Circuit Court Survey - Exhibit A **Alphabetical Sort**

Name	Cite	Error	Test Used	Result
U.S. v. Al Musquit	191 F.3d 928 (8th Cir. 1999)	Bruton	Balancing test	Reversed
U.S. v. Balsam	203 F.3d 72 (1st Cir. 2000)	Interstate commerce element omitted	Neder - 2 prong	Affirmed
U.S. v. Beardslee	197 F.3d 378 (9th Cir. 1999)	D not allowed to cross on W's probation	Van Arsdall	Affirmed
U.S. v. Becker	230 F.3d 1224 (10th Cir. 2000)	Prejudicial hearsay improperly admitted	Balancing test	Affirmed
U.S. v. Beckman	222 F.3d 512 (8th Cir. 2000)	Impeachment for bias barred	Contribute to verdict	Reversed
U.S. v. Beckman	222 F.3d 512 (8th Cir. 2000)	D's cross of DEA agent restricted	Contribute to verdict	Reversed
U.S. v. Bowman	215 F.3d 951 (9th Cir. 2000)	Co-D's hearsay admitted under 801(d)(2)(E)	Van Arsdall	Affirmed
U.S. v. Brown	1999 Lexis 28475 (4th Cir. 1999)	D not allowed to cross on W's plea deal	Van Arsdall	Affirmed
U.S. v. Brown	202 F.3d 691 (4th Cir. 2000)	Element omitted (Richardson violation)	Neder - 2 prong	Reversed
U.S. v. Casanova-Gomez	1999 WL 644740 (10th Cir. 1999)	Co-D's hearsay admitted under 801(d)(2)(E)	Weight of the evidence	Affirmed
U.S. v. Castelan	219 F.3d 690 (7th Cir. 2000)	Co-D's hearsay admitted under 804(b)(3)	Van Arsdall	Affirmed
U.S. v. Colon-Munoz	192 F.3d 210 (1st Cir. 1999)	Failure to instruct on materiality element	Neder standard	Affirmed
U.S. v. Cornett	195 F.3d 776 (5th Cir. 1999)	Hearsay admitted under 801(d)(2)(E)	Chapman	Reversed
U.S. v. Corrigan	2000 WL 991699 (4th Cir. 2000)	Failure to instruct on materiality element	Neder - 2 prong	Affirmed
U.S. v. Davis	202 F.3d 212 (4th Cir. 2000)	Aggravating factor withheld from jury	Neder - 2 prong	Affirmed
U.S. v. Eads	191 F.3d 1206 (10th Cir. 1999)	Failure to instruct on knowledge element	Weight of the evidence	Affirmed
U.S. v. Edward J.	224 F.3d 1216 (10th Cir. 2000)	D excluded from rendering of the verdict	Chapman	Affirmed
U.S. v. Edwards	211 F.3d 1355 (11th Cir. 2000)	D not allowed to cross on W's plea deal	Balancing test	Affirmed
U.S. v. Escobar-De Jesus	187 F.3d 148 (1st Cir. 1999)	Element omitted (Richardson violation)	Neder standard	Affirmed
U.S. v. Feliciano	223 F.3d 102 (2d Cir. 2000)	D excluded from voir dire	Contribute to verdict	Affirmed
U.S v. Foster	2000 WL 1481161 (5th Cir. 2000)	Refusal to charge jury on materiality element	Weight of the evidence	Affirmed
U.S. v. Fullerton	187 F.3d 587 (6th Cir. 1999)	Improper witness vouching by P	Balancing test	Affirmed
U.S. v. Fullerton	187 F.3d 587 (6th Cir. 1999)	Fruit of illegal arrest admitted (D's pager)	Weight of the evidence	Affirmed
U.S. v. Gallego	191 F.3d 156 (2nd Cir. 2000)	Hearsay admitted	Weight of the evidence	Affirmed
U.S. v. Gomez	191 F.3d 1214 (10th Cir. 1999)	Co-D's hearsay admitted under 804(b)(3)	Contribute / Weight of ev.	Reversed
U.S. v. Gracidas-Ulibarry	231 F.3d 1188 (9th Cir. 2000)	Failure to instruct on intent element	Neder - 2 prong	Affirmed
U.S. v. Harvey	2000 WL 727746 (9th Cir. 2000)	Failure to instruct on knowledge element	Weight of the evidence	Affirmed
U.S. v. Helbling	209 F.3d 226 (3rd Cir. 2000)	Prosecutorial misconduct - argument	Balancing test	Affirmed
U.S. v. Hensley	2000 WL 331610 (4th Cir. 2000)	Bruton violation	Chapman	Reversed
U.S. v. Hunerlach	197 F.3d 1059 (11th Cir. 1999)	Hearsay admitted	Weight of the evidence	Affirmed
U.S. v. Jackson	196 F.3d 393 (2d Cir. 1999)	Failure to instruct on wrongfulness element	Neder standard	Affirmed
U.S. v. LaBare	191 F.3d 60 (1st Cir. 1999)	Massiah - jailhouse snitch testimony	Weight of the evidence	Affirmed
U.S. v. Lage	183 F.3d 374 (5th Cir. 1999)	Bruton	Harrington	Affirmed
Lanier v. U.S.	220 F.3d 833 (7th Cir. 2000)	Element omitted (Richardson violation)	Neder - 2 prong	Affirmed
U.S. v. Long	190 F.3d 471 (6th Cir. 1999)	Element omitted (Richardson violation)	Weight of the evidence	Affirmed
U.S. v. Manske	186 F.3d 770 (7th Cir. 1999)	D not allowed to cross on bias & bad acts	Van Arsdall	Reversed
U.S. v. Martin	2000 WL 33526 (10th Cir. 2000)	Improper identification ev.	Weight of the evidence	Affirmed
U.S. v. Meza de Jesus	217 F.3d 638 (9th Cir. 2000)	D's sentence enhanced 9 levels by judge	Contribute to sentence	Reversed

Name	Cite	Error	Test Used	Result
U.S. v. Meza de Jesus	217 F.3d 638 (9th Cir. 2000)	Ct. drew adverse inference from D's silence	Contribute to sentence	Reversed
U.S. v. Moreno	185 F.3d 465 (5th Cir. 1999)	P comment on D's invoking right to counsel	Balancing test	Affirmed
U.S. v. Nealy	232 F.3d 825 (11th Cir. 2000)	Apprendi violation	Neder standard	Affirmed
U.S. v. Nordby	2000 WL 1277211 (9th Cir. 2000)	Apprendi violation	Neder - 2 prong	Reversed
U.S. v. Oliverio	1999 WL 958490 (9th Cir. 1999)	Failure to instruct on knowledge element	Neder - 2 prong	Affirmed
U.S. v. Rahseparian	231 F.3d 1267 (10th Cir. 2000)	Griffin violation	Chapman	Affirmed
U.S. v. Rhynes	218 F.3d 310 (4th Cir. 2000)	D's sole witness excluded as atty. sanction	Neder - 2 prong	Reversed
U.S. v. Romero-Felix	2000 Lexis 15358 (9th Cir. 2000)	Comment by P on D's post-arrest silence	Weight of the evidence	Affirmed
U.S. v. Roney	205 F.3d 1061 (8th Cir. 2000)	D denied counsel on motion to set aside	Contribute to verdict	Reversed
U.S. v. Salimova	2000 WL 297397 (9th Cir. 2000)	Hearsay admitted under 801(d)(2)(E)	Neder standard	Reversed
U.S. v. Salimova	2000 WL 297397 (9th Cir. 2000)	Hearsay admitted under 801(d)(2)(E)	Neder standard	Affirmed
U.S. v. Sharma	190 F.3d 220 (3rd Cir. 1999)	Failure to instruct on materiality element	Weight of the evidence	Affirmed
U.S. v. Sheppard	219 F.3d 766 (8th Cir. 2000)	Apprendi violation	Weight of the evidence	Affirmed
U.S. v. Swan	224 F.3d 632 (7th Cir. 2000)	Deficient RICO jury instruction	Neder standard	Reversed
U.S. v. Taylor	1999 WL 617896 (4th Cir. 1999)	Hearsay admitted under 804(b)(3)	Van Arsdall	Affirmed
U.S. v. Thomas	2000 WL 912610 (10th Cir. 2000)	Trial ct. refused to fund D's fingerprint expert	Weight of the evidence	Affirmed
U.S. v. Torgerson	2000 Lexis 24893 (9th Cir. 2000)	Potential bias of key gov't W suppressed	Van Arsdall	Reversed
U.S. v. Torres-Ortega	184 F.3d 1128 (10th Cir. 1999)	Hearsay admitted under 801(d)(1)(A)	Van Arsdall	Affirmed
U.S. v. Triplett	195 F.3d 990 (8th Cir. 1999)	P commented on D's silence	Balancing test	Affirmed
U.S. v. Walls	2000 WL 1146610 (7th Cir. 2000)	Jury charge omitted possession element	Neder standard	Reversed
U.S. v. Wesela	223 F.3d 656 (7th Cir. 2000)	Hearsay admitted under 803(2)	Weight of the evidence	Affirmed

Circuit Court Survey - Exhibit B "Test Used" Sort

Name	Cite	Error	Test Used	Result
U.S. v. Hensley	2000 WL 331610 (4th Cir. 2000)	Bruton violation	Chapman	Reversed
U.S. v. Cornett	195 F.3d 776 (5th Cir. 1999)	Hearsay admitted under 801(d)(2)(E)	Chapman	Reversed
U.S. v. Edward J.	224 F.3d 1216 (10th Cir. 2000)	D excluded from rendering of the verdict	Chapman	Affirmed
U.S. v. Rahseparian	231 F.3d 1267 (10th Cir. 2000)	Griffin violation	Chapman	Affirmed
4				
U.S. v. Beckman	222 F.3d 512 (8th Cir. 2000)	Impeachment for bias barred	Contribute to verdict	Reversed
U.S. v. Beckman	222 F.3d 512 (8th Cir. 2000)	D's cross of DEA agent restricted	Contribute to verdict	Reversed
U.S. v. Gomez	191 F.3d 1214 (10th Cir. 1999)	Co-D's hearsay admitted under 804(b)(3)	Contribute / Weight of ev.	Reversed
U.S. v. Feliciano	223 F.3d 102 (2d Cir. 2000)	D excluded from voir dire	Contribute to verdict	Affirmed
U.S. v. Meza de Jesus	217 F.3d 638 (9th Cir. 2000)	D's sentence enhanced 9 levels by judge	Contribute to sentence	Reversed
U.S. v. Meza de Jesus	217 F.3d 638 (9th Cir. 2000)	Ct. drew adverse inference from D's silence	Contribute to sentence	Reversed
U.S. v. Roney	205 F.3d 1061 (8th Cir. 2000)	D denied counsel on motion to set aside	Contribute to verdict	Reversed
7				
U.S. v. Lage	183 F.3d 374 (5th Cir. 1999)	Bruton	Harrington	Affirmed
1				
U.S. v. Gallego	191 F.3d 156 (2nd Cir. 2000)	Hearsay admitted	Weight of the evidence	Affirmed
U.S. v. Wesela	223 F.3d 656 (7th Cir. 2000)	Hearsay admitted under 803(2)	Weight of the evidence	Affirmed
U.S. v. Casanova-Gomez	1999 WL 644740 (10th Cir. 1999)	Co-D's hearsay admitted under 801(d)(2)(E)	Weight of the evidence	Affirmed
U.S. v. Hunerlach	197 F.3d 1059 (11th Cir. 1999)	Hearsay admitted	Weight of the evidence	Affirmed
U.S. v. Thomas	2000 WL 912610 (10th Cir. 2000)	Trial ct. refused to fund D's fingerprint expert	Weight of the evidence	Affirmed
U.S. v. Martin	2000 WL 33526 (10th Cir. 2000)	Improper identification ev.	Weight of the evidence	Affirmed
U.S. v. Sharma	190 F.3d 220 (3rd Cir. 1999)	Failure to instruct on materiality element	Weight of the evidence	Affirmed
U.S v. Foster	2000 WL 1481161 (5th Cir. 2000)	Refusal to charge jury on materiality element	Weight of the evidence	Affirmed
U.S. v. Long	190 F.3d 471 (6th Cir. 1999)	Element omitted (Richardson violation)	Weight of the evidence	Affirmed
U.S. v. Sheppard	219 F.3d 766 (8th Cir. 2000)	Apprendi violation	Weight of the evidence	Affirmed
U.S. v. Harvey	2000 WL 727746 (9th Cir. 2000)	Failure to instruct on knowledge element	Weight of the evidence	Affirmed
U.S. v. Eads	191 F.3d 1206 (10th Cir. 1999)	Failure to instruct on knowledge element	Weight of the evidence	Affirmed
U.S. v. Romero-Felix	2000 Lexis 15358 (9th Cir. 2000)	Comment by P on D's post-arrest silence	Weight of the evidence	Affirmed
U.S. v. LaBare	191 F.3d 60 (1st Cir. 1999)	Massiah - jailhouse snitch testimony	Weight of the evidence	Affirmed
U.S. v. Fullerton	187 F.3d 587 (6th Cir. 1999)	Fruit of illegal arrest admitted (D's pager)	Weight of the evidence	Affirmed
15				
U.S. v. Brown	1999 Lexis 28475 (4th Cir. 1999)	D not allowed to cross on W's plea deal	Van Arsdall	Affirmed
U.S. v. Taylor	1999 WL 617896 (4th Cir. 1999)	Hearsay admitted under 804(b)(3)	Van Arsdall	Affirmed

Name	Cite	Error	Test Used	Result
U.S. v. Castelan	219 F.3d 690 (7th Cir. 2000)	Co-D's hearsay admitted under 804(b)(3)	Van Arsdall	Affirmed
U.S. v. Manske	186 F.3d 770 (7th Cir. 1999)	D not allowed to cross on bias & bad acts	Van Arsdall	Reversed
U.S. v. Torgerson	2000 Lexis 24893 (9th Cir. 2000)	Potential bias of key gov't W suppressed	Van Arsdall	Reversed
U.S. v. Bowman	215 F.3d 951 (9th Cir. 2000)	Co-D's hearsay admitted under 801(d)(2)(E)	Van Arsdall	Affirmed
U.S. v. Beardslee	197 F.3d 378 (9th Cir. 1999)	D not allowed to cross on W's probation	Van Arsdall	Affirmed
U.S. v. Torres-Ortega	184 F.3d 1128 (10th Cir. 1999)	Hearsay admitted under 801(d)(1)(A)	Van Arsdall	Affirmed
8				
U.S. v. Al Musquit	191 F.3d 928 (8th Cir. 1999)	Bruton	Balancing test	Reversed
U.S. v. Becker	230 F.3d 1224 (10th Cir. 2000)	Prejudicial hearsay improperly admitted	Balancing test	Affirmed
U.S. v. Edwards	211 F.3d 1355 (11th Cir. 2000)	D not allowed to cross on W's plea deal	Balancing test	Affirmed
U.S. v. Helbling	209 F.3d 226 (3rd Cir. 2000)	Prosecutorial misconduct - argument	Balancing test	Affirmed
U.S. v. Fullerton	187 F.3d 587 (6th Cir. 1999)	Improper witness vouching by P	Balancing test	Affirmed
U.S. v. Moreno	185 F.3d 465 (5th Cir. 1999)	P comment on D's invoking right to counsel	Balancing test	Affirmed
U.S. v. Triplett	195 F.3d 990 (8th Cir. 1999)	P commented on D's silence	Balancing test	Affirmed
7				
U.S. v. Rhynes	218 F.3d 310 (4th Cir. 2000)	D's sole witness excluded as atty. sanction	Neder - 2 prong	Reversed
U.S. v. Balsam	203 F.3d 72 (1st Cir. 2000)	Interstate commerce element omitted	Neder - 2 prong	Affirmed
U.S. v. Corrigan	2000 WL 991699 (4th Cir. 2000)	Failure to instruct on materiality element	Neder - 2 prong	Affirmed
U.S. v. Brown	202 F.3d 691 (4th Cir. 2000)	Element omitted (Richardson violation)	Neder - 2 prong	Reversed
U.S. v. Davis	202 F.3d 212 (4th Cir. 2000)	Aggravating factor withheld from jury	Neder - 2 prong	Affirmed
Lanier v. U.S.	220 F.3d 833 (7th Cir. 2000)	Element omitted (Richardson violation)	Neder - 2 prong	Affirmed
U.S. v. Nordby	2000 WL 1277211 (9th Cir. 2000)	Apprendi violation	Neder - 2 prong	Reversed
U.S. v. Oliverio	1999 WL 958490 (9th Cir. 1999)	Failure to instruct on knowledge element	Neder - 2 prong	Affirmed
U.S. v. Gracidas-Ulibarry	231 F.3d 1188 (9th Cir. 2000)	Failure to instruct on intent element	Neder - 2 prong	Affirmed
9				
U.S. v. Salimova	2000 WL 297397 (9th Cir. 2000)	Hearsay admitted under 801(d)(2)(E)	Neder standard	Reversed
U.S. v. Salimova	2000 WL 297397 (9th Cir. 2000)	Hearsay admitted under 801(d)(2)(E)	Neder standard	Affirmed
U.S. v. Colon-Munoz	192 F.3d 210 (1st Cir. 1999)	Failure to instruct on materiality element	Neder standard	Affirmed
U.S. v. Escobar-De Jesus	187 F.3d 148 (1st Cir. 1999)	Element omitted (Richardson violation)	Neder standard	Affirmed
U.S. v. Jackson	196 F.3d 393 (2d Cir. 1999)	Failure to instruct on wrongfulness element	Neder standard	Affirmed
U.S. v. Walls	2000 WL 1146610 (7th Cir. 2000)	Jury charge omitted possession element	Neder standard	Reversed
U.S. v. Swan	224 F.3d 632 (7th Cir. 2000)	Deficient RICO jury instruction	Neder standard	Reversed
U.S. v. Nealy	232 F.3d 825 (11th Cir. 2000)	Apprendi violation	Neder standard	Affirmed
8				

Circuit Court Survey - Exhibit C **Type of Error Sort**

Name	Cite	Error	Test Used	Result
U.S. v. Hensley	2000 WL 331610 (4th Cir. 2000)	Bruton violation	Chapman	Reversed
U.S. v. Cornett	195 F.3d 776 (5th Cir. 1999)	Hearsay admitted under 801(d)(2)(E)	Chapman	Reversed
U.S. v. Beckman	222 F.3d 512 (8th Cir. 2000)	Impeachment for bias barred	Contribute to verdict	Reversed
U.S. v. Beckman	222 F.3d 512 (8th Cir. 2000)	D's cross of DEA agent restricted	Contribute to verdict	Reversed
U.S. v. Gomez	191 F.3d 1214 (10th Cir. 1999)	Co-D's hearsay admitted under 804(b)(3)	Contribute / Weight of ev.	Reversed
U.S. v. Lage	183 F.3d 374 (5th Cir. 1999)	Bruton	Harrington	Affirmed
U.S. v. Gallego	191 F.3d 156 (2nd Cir. 2000)	Hearsay admitted	Weight of the evidence	Affirmed
U.S. v. Wesela	223 F.3d 656 (7th Cir. 2000)	Hearsay admitted under 803(2)	Weight of the evidence	Affirmed
U.S. v. Casanova-Gomez	1999 WL 644740 (10th Cir. 1999)	Co-D's hearsay admitted under 801(d)(2)(E)	Weight of the evidence	Affirmed
U.S. v. Hunerlach	197 F.3d 1059 (11th Cir. 1999)	Hearsay admitted	Weight of the evidence	Affirmed
U.S. v. Brown	1999 Lexis 28475 (4th Cir. 1999)	D not allowed to cross on W's plea deal	Van Arsdall	Affirmed
U.S. v. Taylor	1999 WL 617896 (4th Cir. 1999)	Hearsay admitted under 804(b)(3)	Van Arsdall	Affirmed
U.S. v. Castelan	219 F.3d 690 (7th Cir. 2000)	Co-D's hearsay admitted under 804(b)(3)	Van Arsdall	Affirmed
U.S. v. Manske	186 F.3d 770 (7th Cir. 1999)	D not allowed to cross on bias & bad acts	Van Arsdall	Reversed
U.S. v. Torgerson	2000 Lexis 24893 (9th Cir. 2000)	Potential bias of key gov't W suppressed	Van Arsdall	Reversed
U.S. v. Bowman	215 F.3d 951 (9th Cir. 2000)	Co-D's hearsay admitted under 801(d)(2)(E)	Van Arsdall	Affirmed
U.S. v. Beardslee	197 F.3d 378 (9th Cir. 1999)	D not allowed to cross on W's probation	Van Arsdall	Affirmed
U.S. v. Torres-Ortega	184 F.3d 1128 (10th Cir. 1999)	Hearsay admitted under 801(d)(1)(A)	Van Arsdall	Affirmed
U.S. v. Al Musquit	191 F.3d 928 (8th Cir. 1999)	Bruton	Balancing test	Reversed
U.S. v. Becker	230 F.3d 1224 (10th Cir. 2000)	Prejudicial hearsay improperly admitted	Balancing test	Affirmed
U.S. v. Edwards	211 F.3d 1355 (11th Cir. 2000)	D not allowed to cross on W's plea deal	Balancing test	Affirmed
U.S. v. Salimova	2000 WL 297397 (9th Cir. 2000)	Hearsay admitted under 801(d)(2)(E)	Neder standard	Reversed
U.S. v. Salimova	2000 WL 297397 (9th Cir. 2000)	Hearsay admitted under 801(d)(2)(E)	Neder standard	Affirmed
23				
U.S. v. Edward J.	224 F.3d 1216 (10th Cir. 2000)	D excluded from rendering of the verdict	Chapman	Affirmed
U.S. v. Feliciano	223 F.3d 102 (2d Cir. 2000)	D excluded from voir dire	Contribute to verdict	Affirmed
U.S. v. Meza de Jesus	217 F.3d 638 (9th Cir. 2000)	D's sentence enhanced 9 levels by judge	Contribute to sentence	Reversed
U.S. v. Thomas	2000 WL 912610 (10th Cir. 2000)	Trial ct. refused to fund D's fingerprint expert	Weight of the evidence	Affirmed
U.S. v. Martin	2000 WL 33526 (10th Cir. 2000)	Improper identification ev.	Weight of the evidence	Affirmed
U.S. v. Helbling	209 F.3d 226 (3rd Cir. 2000)	Prosecutorial misconduct - argument	Balancing test	Affirmed
U.S. v. Fullerton	187 F.3d 587 (6th Cir. 1999)	Improper witness vouching by P	Balancing test	Affirmed
U.S. v. Rhynes	218 F.3d 310 (4th Cir. 2000)	D's sole witness excluded as atty. sanction	Neder - 2 prong	Reversed
8				
U.S. v. Sharma	190 F.3d 220 (3rd Cir. 1999)	Failure to instruct on materiality element	Weight of the evidence	Affirmed
U.S v. Foster	2000 WL 1481161 (5th Cir. 2000)	Refusal to charge jury on materiality element	Weight of the evidence	Affirmed

Name	Cite	Error	Test Used	Result
U.S. v. Long	190 F.3d 471 (6th Cir. 1999)	Element omitted (Richardson violation)	Weight of the evidence	Affirmed
U.S. v. Sheppard	219 F.3d 766 (8th Cir. 2000)	Apprendi violation	Weight of the evidence	Affirmed
U.S. v. Harvey	2000 WL 727746 (9th Cir. 2000)	Failure to instruct on knowledge element	Weight of the evidence	Affirmed
U.S. v. Eads	191 F.3d 1206 (10th Cir. 1999)	Failure to instruct on knowledge element	Weight of the evidence	Affirmed
U.S. v. Balsam	203 F.3d 72 (1st Cir. 2000)	Interstate commerce element omitted	Neder - 2 prong	Affirmed
U.S. v. Corrigan	2000 WL 991699 (4th Cir. 2000)	Failure to instruct on materiality element	Neder - 2 prong	Affirmed
U.S. v. Brown	202 F.3d 691 (4th Cir. 2000)	Element omitted (Richardson violation)	Neder - 2 prong	Reversed
U.S. v. Davis	202 F.3d 212 (4th Cir. 2000)	Aggravating factor withheld from jury	Neder - 2 prong	Affirmed
Lanier v. U.S.	220 F.3d 833 (7th Cir. 2000)	Element omitted (Richardson violation)	Neder - 2 prong	Affirmed
U.S. v. Nordby	2000 WL 1277211 (9th Cir. 2000)	Apprendi violation	Neder - 2 prong	Reversed
U.S. v. Oliverio	1999 WL 958490 (9th Cir. 1999)	Failure to instruct on knowledge element	Neder - 2 prong	Affirmed
U.S. v. Gracidas-Ulibarry	231 F.3d 1188 (9th Cir. 2000)	Failure to instruct on intent element	Neder - 2 prong	Affirmed
U.S. v. Colon-Munoz	192 F.3d 210 (1st Cir. 1999)	Failure to instruct on materiality element	Neder standard	Affirmed
U.S. v. Escobar-De Jesus	187 F.3d 148 (1st Cir. 1999)	Element omitted (Richardson violation)	Neder standard	Affirmed
U.S. v. Jackson	196 F.3d 393 (2d Cir. 1999)	Failure to instruct on wrongfulness element	Neder standard	Affirmed
U.S. v. Walls	2000 WL 1146610 (7th Cir. 2000)	Jury charge omitted possession element	Neder standard	Reversed
U.S. v. Swan	224 F.3d 632 (7th Cir. 2000)	Deficient RICO jury instruction	Neder standard	Reversed
U.S. v. Nealy	232 F.3d 825 (11th Cir. 2000)	Apprendi violation	Neder standard	Affirmed
20				
U.S. v. Rahseparian	231 F.3d 1267 (10th Cir. 2000)	Griffin violation	Chapman	Affirmed
U.S. v. Meza de Jesus	217 F.3d 638 (9th Cir. 2000)	Ct. drew adverse inference from D's silence	Contribute to sentence	Reversed
U.S. v. Romero-Felix	2000 Lexis 15358 (9th Cir. 2000)	Comment by P on D's post-arrest silence	Weight of the evidence	Affirmed
U.S. v. Moreno	185 F.3d 465 (5th Cir. 1999)	P comment on D's invoking right to counsel	Balancing test	Affirmed
U.S. v. Triplett	195 F.3d 990 (8th Cir. 1999)	P commented on D's silence	Balancing test	Affirmed
5				
U.S. v. Roney	205 F.3d 1061 (8th Cir. 2000)	D denied counsel on motion to set aside	Contribute to verdict	Reversed
U.S. v. LaBare	191 F.3d 60 (1st Cir. 1999)	Massiah - jailhouse snitch testimony	Weight of the evidence	Affirmed
2				
U.S. v. Fullerton	187 F.3d 587 (6th Cir. 1999)	Fruit of illegal arrest admitted (D's pager)	Weight of the evidence	Affirmed
1				

Circuit Court Survey - Exhibit D **Circuit Sort**

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U.S. v. Balsam	203 F.3d 72 (1st Cir. 2000)	Interstate commerce element omitted	Neder - 2 prong	Affirmed
U.S. v. Colon-Munoz	192 F.3d 210 (1st Cir. 1999)	Failure to instruct on materiality element	Neder standard	Affirmed
U.S. v. Escobar-De Jesus	187 F.3d 148 (1st Cir. 1999)	Element omitted (Richardson violation)	Neder standard	Affirmed
U.S. v. LaBare	191 F.3d 60 (1st Cir. 1999)	Massiah - jailhouse snitch testimony	Weight of the evidence	Affirmed
4				
U.S. v. Gallego	191 F.3d 156 (2nd Cir. 2000)	Hearsay admitted	Weight of the evidence	Affirmed
U.S. v. Feliciano	223 F.3d 102 (2d Cir. 2000)	D excluded from voir dire	Contribute to verdict	Affirmed
U.S. v. Jackson	196 F.3d 393 (2d Cir. 1999)	Failure to instruct on wrongfulness element	Neder standard	Affirmed
3				
U.S. v. Helbling	209 F.3d 226 (3rd Cir. 2000)	Prosecutorial misconduct - argument	Balancing test	Affirmed
U.S. v. Sharma	190 F.3d 220 (3rd Cir. 1999)	Failure to instruct on materiality element	Weight of the evidence	Affirmed
2				
U.S. v. Hensley	2000 WL 331610 (4th Cir. 2000)	Bruton violation	Chapman	Reversed
U.S. v. Brown	1999 Lexis 28475 (4th Cir. 1999)	D not allowed to cross on W's plea deal	Van Arsdall	Affirmed
U.S. v. Taylor	1999 WL 617896 (4th Cir. 1999)	Hearsay admitted under 804(b)(3)	Van Arsdall	Affirmed
U.S. v. Rhynes	218 F.3d 310 (4th Cir. 2000)	D's sole witness excluded as atty. sanction	Neder - 2 prong	Reversed
U.S. v. Corrigan	2000 WL 991699 (4th Cir. 2000)	Failure to instruct on materiality element	Neder - 2 prong	Affirmed
U.S. v. Brown	202 F.3d 691 (4th Cir. 2000)	Element omitted (Richardson violation)	Neder - 2 prong	Reversed
U.S. v. Davis	202 F.3d 212 (4th Cir. 2000)	Aggravating factor withheld from jury	Neder - 2 prong	Affirmed
7				
U.S. v. Cornett	195 F.3d 776 (5th Cir. 1999)	Hearsay admitted under 801(d)(2)(E)	Chapman	Reversed
U.S. v. Lage	183 F.3d 374 (5th Cir. 1999)	Bruton	Harrington	Affirmed
U.S v. Foster	2000 WL 1481161 (5th Cir. 2000)	Refusal to charge jury on materiality element	Weight of the evidence	Affirmed
U.S. v. Moreno	185 F.3d 465 (5th Cir. 1999)	P comment on D's invoking right to counsel	Balancing test	Affirmed
4				
U.S. v. Fullerton	187 F.3d 587 (6th Cir. 1999)	Improper witness vouching by P	Balancing test	Affirmed
U.S. v. Long	190 F.3d 471 (6th Cir. 1999)	Element omitted (Richardson violation)	Weight of the evidence	Affirmed
U.S. v. Fullerton	187 F.3d 587 (6th Cir. 1999)	Fruit of illegal arrest admitted (D's pager)	Weight of the evidence	Affirmed
3				
U.S. v. Wesela	223 F.3d 656 (7th Cir. 2000)	Hearsay admitted under 803(2)	Weight of the evidence	Affirmed
U.S. v. Castelan	219 F.3d 690 (7th Cir. 2000)	Co-D's hearsay admitted under 804(b)(3)	Van Arsdall	Affirmed

Name	Cite	Error	Test Used	Result
U.S. v. Manske	186 F.3d 770 (7th Cir. 1999)	D not allowed to cross on bias & bad acts	Van Arsdall	Reversed
Lanier v. U.S.	220 F.3d 833 (7th Cir. 2000)	Element omitted (Richardson violation)	Neder - 2 prong	Affirmed
U.S. v. Walls	2000 WL 1146610 (7th Cir. 2000)	Jury charge omitted possession element	Neder standard	Reversed
U.S. v. Swan	224 F.3d 632 (7th Cir. 2000)	Deficient RICO jury instruction	Neder standard	Reversed
6				
U.S. v. Beckman	222 F.3d 512 (8th Cir. 2000)	Impeachment for bias barred	Contribute to verdict	Reversed
U.S. v. Beckman	222 F.3d 512 (8th Cir. 2000)	D's cross of DEA agent restricted	Contribute to verdict	Reversed
U.S. v. Al Musquit	191 F.3d 928 (8th Cir. 1999)	Bruton	Balancing test	Reversed
U.S. v. Sheppard	219 F.3d 766 (8th Cir. 2000)	Apprendi violation	Weight of the evidence	Affirmed
U.S. v. Triplett	195 F.3d 990 (8th Cir. 1999)	P commented on D's silence	Balancing test	Affirmed
U.S. v. Roney	205 F.3d 1061 (8th Cir. 2000)	D denied counsel on motion to set aside	Contribute to verdict	Reversed
6				
U.S. v. Torgerson	2000 Lexis 24893 (9th Cir. 2000)	Potential bias of key gov't W suppressed	Van Arsdall	Reversed
U.S. v. Bowman	215 F.3d 951 (9th Cir. 2000)	Co-D's hearsay admitted under 801(d)(2)(E)	Van Arsdall	Affirmed
U.S. v. Beardslee	197 F.3d 378 (9th Cir. 1999)	D not allowed to cross on W's probation	Van Arsdall	Affirmed
U.S. v. Salimova	2000 WL 297397 (9th Cir. 2000)	Hearsay admitted under 801(d)(2)(E)	Neder standard	Reversed
U.S. v. Salimova	2000 WL 297397 (9th Cir. 2000)	Hearsay admitted under 801(d)(2)(E)	Neder standard	Affirmed
U.S. v. Meza de Jesus	217 F.3d 638 (9th Cir. 2000)	D's sentence enhanced 9 levels by judge	Contribute to sentence	Reversed
U.S. v. Harvey	2000 WL 727746 (9th Cir. 2000)	Failure to instruct on knowledge element	Weight of the evidence	Affirmed
U.S. v. Nordby	2000 WL 1277211 (9th Cir. 2000)	Apprendi violation	Neder - 2 prong	Reversed
U.S. v. Oliverio	1999 WL 958490 (9th Cir. 1999)	Failure to instruct on knowledge element	Neder - 2 prong	Affirmed
U.S. v. Gracidas-Ulibarry	231 F.3d 1188 (9th Cir. 2000)	Failure to instruct on intent element	Neder - 2 prong	Affirmed
U.S. v. Meza de Jesus	217 F.3d 638 (9th Cir. 2000)	Ct. drew adverse inference from D's silence	Contribute to sentence	Reversed
U.S. v. Romero-Felix	2000 Lexis 15358 (9th Cir. 2000)	Comment by P on D's post-arrest silence	Weight of the evidence	Affirmed
12				
U.S. v. Gomez	191 F.3d 1214 (10th Cir. 1999)	Co-D's hearsay admitted under 804(b)(3)	Contribute / Weight of ev.	Reversed
U.S. v. Casanova-Gomez	1999 WL 644740 (10th Cir. 1999)	Co-D's hearsay admitted under 801(d)(2)(E)	Weight of the evidence	Affirmed
U.S. v. Torres-Ortega	184 F.3d 1128 (10th Cir. 1999)	Hearsay admitted under 801(d)(1)(A)	Van Arsdall	Affirmed
U.S. v. Becker	230 F.3d 1224 (10th Cir. 2000)	Prejudicial hearsay improperly admitted	Balancing test	Affirmed
U.S. v. Edward J.	224 F.3d 1216 (10th Cir. 2000)	D excluded from rendering of the verdict	Chapman	Affirmed
U.S. v. Thomas	2000 WL 912610 (10th Cir. 2000)	Trial ct. refused to fund D's fingerprint expert	Weight of the evidence	Affirmed
U.S. v. Martin	2000 WL 33526 (10th Cir. 2000)	Improper identification ev.	Weight of the evidence	Affirmed
U.S. v. Eads	191 F.3d 1206 (10th Cir. 1999)	Failure to instruct on knowledge element	Weight of the evidence	Affirmed
U.S. v. Rahseparian	231 F.3d 1267 (10th Cir. 2000)	Griffin violation	Chapman	Affirmed
9				
U.S. v. Hunerlach	197 F.3d 1059 (11th Cir. 1999)	Hearsay admitted	Weight of the evidence	Affirmed

Name	Cite	Error	Test Used	Result
U.S. v. Edwards	211 F.3d 1355 (11th Cir. 2000)	D not allowed to cross on W's plea deal	Balancing test	Affirmed
U.S. v. Nealy	232 F.3d 825 (11th Cir. 2000)	Apprendi violation	Neder standard	Affirmed
3				