

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

VOLUME 15/NUMBER 2
FALL 2014

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THE JOURNAL OF
APPELLATE PRACTICE
AND PROCESS
DEVELOPMENT OF THE LAW

SWEEPING DOWN THE PLAIN: A MODERN RULE FOR
DIRECT REVIEW IN OKLAHOMA CRIMINAL APPEALS*

Bryan Lester Dupler**

The overriding purposes of the Oklahoma Court of Criminal Appeals on direct review are like those of most appellate courts: (1) affording proper relief for harmful violations of the rules of the game¹ and (2) minimizing future errors through precedents.² This paper proposes a rule for

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1. I use the shorthand "rules of the game" throughout this paper to denote the entire substantive and procedural corpus of criminal and constitutional law that regularly concerns the courts and counsel.

2. Oklahoma's modern harmless-error statute, to which I refer throughout this paper, is 20 O.S.2011, § 3001.1 (providing that no judgment "shall be set aside or new trial granted . . . on the ground of misdirection of the jury or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error . . . has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right"). That statute's earliest predecessor was O.S. 1893, § 5330 (providing that "[o]n an appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties"). Foundational decisions addressing harmless error in Oklahoma include *Thomas v. State*,

modernizing direct review³ of errors in Oklahoma criminal appeals in order to further those purposes. The new rule would better define the errors cognizable by the Court on direct review; abolish plain-error review of unpreserved errors in favor of *Strickland* analysis; and codify a uniform legal standard of harmful effect (i.e., prejudice) warranting appellate relief.

Direct review is simply the first stage of appellate review after a criminal conviction. The Court at this stage weighs the merits of two general classes of alleged errors: errors “preserved” by timely objection on specific grounds in the court below; and “plain” (a.k.a. fundamental)⁴ errors, waived (or

164 P. 995, 997 (Okla. Crim. App. 1917) (“[T]he province of an appellate court is to determine questions of law and to establish principles of law by which fair and impartial trials may be had.”); *Brown v. State*, 132 P. 359, 374 (Okla. Crim. App. 1913), *overruled on other grounds*, *Buis v. State*, 792 P.2d 427 (Okla. Crim. App. 1990) (“If verdicts are to be set aside when they are clearly right upon the evidence simply because the trial court on the spur of the moment, and in the haste of the trial, may have made some errors in its instructions or rulings which could not reasonably have altered the verdict before an honest and intelligent jury, then the enforcement of law would become a farce and courts would become the protectors of criminals.”); *Fowler v. State*, 126 P. 831, 833 (Okla. Crim. App. 1912) (“[T]his court must give judgment without regard to technical errors or defects or exceptions which do not affect the substantial rights of the parties.”); and *Martin v. Territory*, 78 P. 88 (Okla. Terr. 1904) (“Criminal cases should be reviewed by appellate courts with the idea of promoting justice, and not for the purpose of determining as to whether there is some technical error by which the defendant may be aided in thwarting just punishment for his crime. A defendant has a right to a fair and impartial trial, and to be protected by every safeguard of the law; but when these are afforded him, and the evidence establishes his guilt, no technical error which has not affected the result of the trial should be made a means of escape. . . . In other words, appellate courts are established for the promotion of justice, and the correction of mistakes which deprive one or the other of the parties of some substantial right.”).

3. “Direct” here includes review in all regular appeals from capital, felony, and misdemeanor convictions; pre-trial juvenile and youthful offender certifications and reverse-certifications; delinquency adjudications; revocation and acceleration appeals from suspended or deferred sentencing, including drug and mental health court terminations; and re-sentencing appeals. *See generally* R. Ct. Crim. App. 1.2, 22 O.S.Supp.2013, Ch. 18, App. Matters of collateral review, such as post-conviction relief and habeas corpus, and extraordinary forms of relief such as mandamus and prohibition, are beyond the scope of this paper.

4. At least since the seminal re-appraisal of Oklahoma’s plain/fundamental error doctrine twenty years ago in *Simpson v. State*, 876 P.2d 690 (Okla. Crim. App. 1994), the Court has expressed an obvious preference for the modern term “plain” error (maintaining consistency with the Legislature’s use of “plain error” in the Oklahoma Evidence Code, 12 O.S.2011, § 2104) over the more historic “fundamental” error, while recognizing that “this Court in the past has interpreted the terms ‘plain error,’ ‘fundamental error’ and ‘substantial right’ to connote the same meaning.” *Simpson*, 876 P.2d at 695. Whatever the

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forfeited),⁵ and thus insulated from ordinary review by defense counsel's failure to timely object.⁶ The Court has developed over time a fairly specific description of error and its harmful, reversible subclasses. Preserved or not, error is a deviation from law, a breach of the underlying rules of the game.⁷ Plain error (1) is unpreserved—that is, forfeited or waived—error that (2) is obvious from the record and (3) affects the outcome of the proceeding.⁸ The harmless-error statute and longstanding case law dictate that only harmful (which is to say prejudicial) errors, those affecting the outcome of the relevant proceedings, warrant reversal, modification of judgment or sentence, or remand for re-sentencing.⁹

Preserved error is generally reversible when it "has probably resulted in a miscarriage of justice, or constitutes a

term, the "plain" or "fundamental" error doctrine "allows an appellant to get before this Court a complaint which would otherwise be completely waived." *Id.* at 700.

5. Likewise, the Court has used the term "waived" to describe "what happens when an appellant fails to make a timely assertion of a right," while recognizing that "waive" is more often associated with "intentional relinquishment or abandonment of a known right." *Simpson*, 876 P.2d at 694 n. 1 (emphasis in original). The Court recognized that "the more appropriate term would be a 'forfeiture' of a right by *unintentionally* failing to make a timely assertion." *Id.* (citing *United States v. Olano*, 507 U.S. 725, 733 (1993)) (emphasis in original).

6. *Simpson*, 876 P.2d at 692–93 (acknowledging and restating prior law providing that failure to object with specificity, giving trial court an opportunity to cure any error, waives appellate review unless "fundamental error"). *Simpson* and the cases on which it relies fully set forth the origins and major concepts of plain error as a doctrine that is codified in early case law, statutes, and the Oklahoma Evidence Code that allows review of errors not preserved through objection "in the same manner" as preserved error, and that is subject to harmless-error analysis, in itself and in combination with other preserved and unpreserved errors. *Id.* at 692–702.

7. *Simpson*, 876 P.2d at 694 (citing *Olano*).

8. *Hogan v. State*, 139 P.3d 907, 923 (Okla. Crim. App. 2006).

9. *Simpson*, 876 P.2d at 695 (prior cases refer to not only error, but error plus "injury" as necessary to reverse a conviction, defining "injury" as "an error which affected the result" (quoting *Ryan v. State*, 129 P. 685, 687 (Okla. Crim. App. 1913) ("By 'injury' is meant 'effect upon the result'")). The Court in *Simpson* concluded that "[w]hatever the label, an error which has no bearing on the outcome of the trial will not mandate a reversal," *id.*, and pointed out that "[o]bviously, the weaker the evidence . . . the less likely the error is to be harmless," *id.* at 698 (comparing *Foster v. State*, 141 P. 449 (Okla. Crim. App. 1914) (syllabus) (when evidence is strong, conviction will not be set aside, though error would require reversal in a doubtful case) with *Mayberry v. State*, 79 P.2d 1027, 1029 (Okla. Crim. App. 1938) (holding that if evidence is weak and unsatisfactory, the record should be free from prejudicial error to avoid reversal)).

substantial violation of a constitutional or statutory right.”¹⁰ In plain-error doctrine, the Court has sought to avoid a “draconian” rule of total forfeiture of serious error, on the one hand, and the misguided approach of reversing “every time an error might prejudice a case,” on the other.¹¹ The prejudice standard for plain error is therefore “prejudice/injury plus,”¹² effectively meaning that a remedy for harmful plain error remains discretionary with the appellate court, not mandatory.¹³ Only “very” injurious plain errors that compromise important judicial values—errors that “seriously affect the fairness, integrity or public reputation of judicial proceedings”—warrant relief.¹⁴

10. 20 O.S.2011, § 3001.1. “Structural” errors not subject to harmless-error review are an exception. *Robinson v. State*, 255 P.3d 425, 428 (Okla. Crim. App. 2011) (noting that structural-error doctrine, which applies where the violation is “of a right granted by the Constitution, rather than a violation of due process by failure to afford a right granted by state statute,” and which requires automatic reversal, applies to “a limited class” of constitutional errors). Appellants must generally demonstrate that state-law errors were harmful under the miscarriage-of-justice standard set forth in 20 O.S.2011, § 3001.1, while the State must establish that any federal constitutional errors found are harmless beyond a reasonable doubt. *Barnard v. State*, 290 P.3d 759, 764–65 (Okla. Crim. App. 2013) (reviewing failure to instruct jury on element of offense for plain error due to lack of objection, but applying harmless-beyond-a-reasonable-doubt standard due to constitutional violation) (citing *Chapman v. Cal.*, 386 U.S. 18 (1967) and *Neder v. United States*, 527 U.S. 1 (1999)).

11. *Simpson*, 876 P.2d at 700.

12. No less an authority than Dean Wigmore explained that

[a]ppellate courts ordinarily are chary of claims of plain error because of their fear that they are being made unwitting accomplices to defense counsel who deliberately forgo the making of an objection in the hope that the trial court will unwittingly commit reversible plain error. To guard against such abuse of the adversary process, appellate courts insist that the error at trial to have been quite clear and obvious despite the absence of any objection. Furthermore, as a practical matter, the party claiming plain error will carry a far greater burden in convincing an appellate court that the error, even if “obvious,” was prejudicial.

... This principle of “prejudice plus” is sometimes enshrined in a formal rule.

1 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 18, 796 (4th ed. 1983) (citations omitted).

13. *Simpson*, 876 P.2d at 702. The *Simpson* Court also noted that unless a more rigorous standard of prejudice was required for plain error, the “failure to object coupled with the allegation of plain error on appeal would give an Appellant more favorable review of this issue than in an instance where an objection was properly lodged.” *Id.* at 699.

The only tactical reason to object in such a regime would be to avoid a reversible error in the trial court, a strategy that few, if any, defense lawyers would willingly employ in the long run. Every successful objection would reduce the trial court’s potential errors by one (objection to preserve error would be unnecessary), and thus compromise chances for reversal on appeal when conviction is likely (i.e., in most cases).

14. *Id.* at 700–01 (quoting *Olano*).

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Effective defense lawyers strive to formulate timely motions and interpose contemporaneous objections seeking compliance with the rules of the game, resulting either in the desired relief or the preservation of trial-court error.¹⁵ The tactical penalty for failure to object is a finding of waiver, and in ethical as well as constitutional terms, it is possibly ineffective representation as well.¹⁶ So competent trial counsel raise formal challenges to the investigations, the charges, the procedures, the evidence, and the trial tactics of the opposition, theoretically offering a robust opportunity for the trial court's discovery, and timely correction, of its (or the State's) errors.¹⁷

Trial and appellate counsel these days are rarely one and the same; and the latter are rarely content to assert a handful of errors preserved by the former. Appellate lawyers typically raise the errors preserved below and their own allegations that someone violated the rules of the game, the latter both as freestanding assignments of plain error and as corresponding allegations of ineffective assistance of counsel.¹⁸ Indeed, appellate counsel sometimes assert plain error without raising

15. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION 170-71 (3d ed. 1991) (setting out Defense Standard 4-3.6) [hereinafter ABA STANDARDS]. Recognizing that "[m]any important rights of the accused can be protected and preserved only by prompt legal action," Defense Standard 4-3.6 directs counsel to "take all necessary action to vindicate such rights," and also to

consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

Id.

16. See Okla. R. Prof. Conduct 1.1 (requiring "competent" representation); *Strickland v. Washington*, 466 U.S. 668 (1984) (holding that a criminal defendant's sixth amendment right to counsel is violated when a trial attorney's performance is unreasonably deficient if there is a reasonable probability that, but for the deficient performance, the result would have been different).

17. *Bias v. United States*, 53 S.W. 471, 475 (Ind. Terr. 1899) ("One of the objects of making an exception specific and certain is that the judge of the trial court shall have it pointed to him, that he may correct it then and there, or at least have an opportunity to do so.").

18. See *Roy v. State*, 152 P.3d 217, 227 (Okla. Crim. App. 2006) (noting that appellate counsel "simply restates claims made elsewhere in his brief—casting the claims as ineffective assistance claims, in an attempt to avoid the problem of waiver").

ineffectiveness at all,¹⁹ though the approach is at best contradictory, and perhaps its own kind of ineffective assistance.²⁰ Coupled with their sixth amendment cousins or not, allegations of plain error today comprise perhaps the greatest number of claims presented for review.

Broadly speaking, on direct review of preserved claims, the Court applies the rules of the game and the deviation-injury archetype.²¹ Review of plain error, supposedly a distinct analytical exercise, is strikingly similar: judging the alleged error according to rules of the game (obvious deviation or not?);²² assessing its probable impact on the proceeding

19. See *McIntosh v. State*, 237 P.3d 800, 802–03 (Okla. Crim. App. 2010) (addressing unpreserved claim of error in trial court’s instruction on sentencing range, with no apparent corresponding claim of ineffective assistance).

20. See *State v. Crislip*, 785 P.2d 262, 269 (N.M. 1989) (Hartz, J., concurring) (“Perhaps as a practical matter every reversal predicated on plain error is a consequence of ineffective assistance of counsel”); *Cannon v. Mullin*, 383 F.3d 1152, 1174 (10th Cir. 2004) (“given appellate counsel’s willingness to raise so many (24) other alleged errors, we find it striking that appellate counsel never argued that trial counsel had been ineffective for not objecting Often, even ordinarily, one would expect a claim of ineffective assistance to accompany a claim of plain error”) (citations omitted); ABA STANDARDS, *supra* note 15, at 246 (Standard 4-8.6(a): “If defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case did not provide effective assistance, he or she should not hesitate to seek relief for the defendant on that ground”).

21. *Neloms v. State*, 274 P.3d 161, 164–66 (Okla. Crim. App. 2012) (finding admission of other-crimes evidence in violation of state statute to be harmless error); *Webster v. State*, 252 P.3d 259, 280–81 (Okla. Crim. App. 2011) (finding that admission of gruesome photographs was not unfairly prejudicial); *Ball v. State*, 173 P.3d 81, 91–92 (Okla. Crim. App. 2007) (finding that error in the denial of defense instructions did not warrant reversal as it had not “probably resulted in a miscarriage of justice”).

22. See *Faulkner v. State*, 260 P.3d 430, 431–33 (Okla. Crim. App. 2011) (reviewing, as plain error, whether assistant district attorney’s participation in prosecution of former client violated due process, and finding that harmful error required reversal). The Court in *Malone v. State*, 293 P.3d 198 (Okla. Crim. App. 2013) explained the process:

[T]he first step of plain error review of a claim of prosecutorial misconduct is to determine whether the prosecutor’s comments constitute an actual error. . . . The second step is to determine whether the error is plain on the record. . . . Only if the appellant has shown the existence of an actual error plain on the record do we turn to the third step of the analysis. . . . The third step is to determine whether the appellant has shown that the prosecutor’s misconduct affected his substantial rights . . . review[ing] the entire record to determine whether the cumulative effect of improper comments by the prosecutor . . . so infected the defendant’s trial that it was rendered fundamentally unfair.

Id. at 212 (citations omitted).

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(affected or not?);²³ and when necessary, asking if the gravity of an error warrants an exception to forfeiture (“serious” effect on fairness, integrity, public reputation, or not?).²⁴ Unless the claims are mooted by a dispositive remedy for one or more preserved or plain errors,²⁵ the Court also addresses corresponding criticisms of trial representation in *Strickland* parlance, asking whether trial counsel harmed the client’s position by forfeiting one or more serious violations of the rules of the game (committing errors “so serious” that the lawyer ceased to function as effective counsel, creating a reasonable probability that, but for the lawyer’s error, the outcome would have been different).²⁶

23. See *Barnard*, 290 P.3d at 764 (holding that the only way to determine whether the omission of the element from the jury instruction affected substantial rights “is to evaluate the error for its effect on the jury verdict”); *Hanson v. State*, 206 P.3d 1020, 1028 (Okla. Crim. App. 2009) (finding that appellant “must show that obvious error affected his substantial rights, that is the error affected the outcome of the proceeding”).

24. As the Court articulated the plain-error prejudice analysis in *Barnard*:

[T]his Court does not automatically reverse, however, upon a finding of plain or obvious error. . . . [T]he error must have been one that affected the outcome of the proceeding. . . . Even then, we will only correct the error if the error seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice.

Barnard, 290 P.3d at 769 (internal quotation marks and citations omitted). However, in *McIntosh*, where the Court found plain error in the instructions on the sentencing range for the crime, it concluded that the sentence must be modified because “we have no basis to conclude that this jury would have imposed the same thirty year sentence had it been properly instructed on the twelve year minimum,” which is to say because the error affected the outcome. 237 P.3d at 803. The Court made no separate mention of whether this plain error seriously affected the fairness, integrity, or public reputation of the proceedings, though we may safely assume that it believed so.

25. See *Roy*, 152 P.3d at 226–27 (finding that the failure to instruct the jury on the 85% Rule relating to the amount of time a life-sentenced defendant might spend in prison, and improper comments by the prosecutor, were plain errors requiring relief; that corresponding claims of ineffectiveness were moot; and consequently that court “need not decide whether counsel’s failure to seek an instruction regarding the 85% Rule constituted ineffective assistance”); *Burton v. State*, 204 P.3d 772, 777 (Okla. Crim. App. 2009) (related claim of ineffective assistance was mooted by court’s conclusion that search was illegal).

26. The discussion in *Grissom v. State*, 253 P.3d 969 (Okla. Crim. App. 2011) is fairly representative of the *Strickland* analysis of a host of forfeited claims already rejected in plain-error analysis:

In Propositions Ten and Eleven . . . Appellant argues that counsel was ineffective in failing to request proper instructions, failing to object to inadmissible evidence and improper arguments, and in failing to discover and utilize additional mitigating evidence of Appellant’s alleged dementia or brain damage resulting from alcoholism and head injuries.

Despite these distinct analytical exercises, in the Court's direct review of typical claims, functional equivalencies pervade both its rule-deviation assessments and its determinations of resulting harm. Respecting the standards of harm (our real focus here), the essential notion involved in the injury, substantial-right, and miscarriage-of-justice standards of harm is that the error or errors affected the result. Preserved or not, errors that affected the result almost invariably appear serious to the Court in their adverse impact on the judicial values of fairness, integrity, and public reputation of proceedings, though it sometimes dispenses with saying so.²⁷ And counsel's failure to preserve any serious error would ordinarily warrant constitutional relief under *Strickland*, except that plain-error review usually beats *Strickland* analysis to the punch.²⁸

With regard to counsel's failure to object to allegedly inadmissible evidence and improper jury instructions, and to request different instructions at trial, our conclusions that the evidence was properly admitted at trial, and that erroneous jury instructions did not result in prejudicial error, foreclose any claim of ineffectiveness based on these omissions.

Id. at 994.

27. Thus, the Court has noted that unlawful double punishment for a single offense "would undoubtedly bring the fairness and integrity of the entire trial into serious question." *Barnard*, 290 P.3d at 769. In both *McIntosh*, see note 24, *supra*, and *Faulkner*, see note 22, *supra*, the Court found harmful plain error without expressly saying whether it "seriously" affected the fairness, integrity or public reputation of the proceedings, though it undoubtedly believed so, which suggests how readily the conclusion of harm follows upon a finding of a serious deviation from the rules of the game.

28. The relationship between plain-error review and *Strickland* analysis manifests in at least three ways. In a neutral sense, a conclusion that reversible plain error has occurred usually moots any related claim of ineffective assistance based on the failure to object. *See, e.g., Roy*, 152 P.3d at 226-27. In a negative sense, a finding that no plain error occurred typically dooms a claim of ineffective counsel based on the same alleged act or omission. *Coddington v. State*, 142 P.3d 437, 461 (holding that failure to show plain error foreclosed any finding of *Strickland* prejudice in related challenge to counsel's failure to object); *Hancock v. State*, 155 P.3d 796, 825 (Okla. Crim. App. 2007) ("There is no plain error. For the same reason, Appellant suffered no prejudice from counsel's failure to object."); *Young v. State*, 191 P.3d 601, 611 (Okla. Crim. App. 2008) (finding "that the prosecutor's challenged remarks did not rise to the level of plain error," and that "Appellant was therefore not prejudiced by counsel's failure to object") (citing *Hancock*). In a positive sense, no case appears to suggest this equivalency quite so directly as the recent opinion in *Levering v. State*, 315 P.3d 392, 395 (Okla. Crim. App. 2013) (using plain-error analysis and also remanding in light of "strong possibility" that trial counsel was ineffective).

Levering is atypical because either finding—harmful plain error or *Strickland* prejudice—effectively dictated the same result and remedy. Similar cases include *Hagos v. People*, 288 P.3d 116, 123 (Colo. 2012) (Eid, J., concurring in judgment) ("Because, in my

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The reasons for the conceptual overlap are humane and historic. Plain-error doctrine developed decades before the Supreme Court's decision in *Strickland* (or even *Gideon*²⁹), and counterbalanced a harsh rule of waiver, protecting defendants from counsel's failure to object to really harmful errors. Today's post-*Gideon*, post-*Strickland* sixth amendment compels appellate courts to discharge the same protective function through application of the *Strickland* framework to alleged errors in counsel's representation. And regardless of the analytical jargon used, the judicial conscience recoils from the specter of a wrongful conviction or illegal punishment resulting from erroneous trial-court proceedings.³⁰ That's just bad, under any standard.

The proposed new rule retains the sound policy of plenary direct review, while rationalizing its approach to preserved and unpreserved errors. It affords

- review of preserved non-constitutional errors according to the substantial-right/affected-the-outcome standard drawn from the Oklahoma harmless-error statute,³¹ *Simpson*, and earlier cases;
- review of sufficiency of the evidence to support the judgment or order appealed;

view, there is no appreciable difference between the two prejudice standards, the court of appeals was correct in its determination that defendant's ineffective assistance claim fails for the same reason his plain error claim failed on direct review—that is, because he has failed to show that the error contributed to his conviction"); *Crislip*, 785 P.2d 262 (reversing on an ineffective-assistance claim).

29. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that indigent criminal defendant charged with felony has a constitutional right to appointed counsel).

30. As Justice Jackson famously said, "The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error." Robert H. Jackson, *Advocacy before the Supreme Court*, 25 *TEMPLE L.Q.* 115, 119 (1951). Having found an error, the humane judicial conscience is perhaps doubly inclined to perceive some form of prejudice. Only through careful and impartial examination of the facts are misguided technical reversals avoided, though some critics of the appellate courts despair of "harmless error" and seem to wish it otherwise. See generally, e.g., Charles S. Chapel, *The Irony of Harmless Error*, 51 *OKLA. L. REV.* 501 (1998) (offering deeply skeptical analysis of harmless-error doctrine by former Presiding Judge of Oklahoma Court of Criminal Appeals, and emphasizing author's assessment that error analysis should focus on nature of alleged violation of defendant's rights rather than possible effect of error on trial).

31. 20 O.S.2011, section 3001.1.

- review of legality of the sentence;³² and
- review of preserved federal constitutional errors according to the “harmless beyond a reasonable doubt” standard.³³

The rule abolishes plain-error review of forfeited claims as a matter of course, leaving in its place a review of ineffective-assistance claims according to clearly established federal law. As a final and appropriate failsafe, the rule provides the option for the Court to notice and remedy plain errors on its own motion.³⁴

These changes eliminate the cumbersome process of categorizing and reviewing claims of preserved error, plain error, and ineffective counsel according to rhetorically distinct, but fundamentally equivalent, standards of harm. A unitary standard of harm—or prejudice, if you like—requiring a showing that any error “affected the result” ensures adequate relief for preserved, harmful errors. For serious errors forfeited

32. Sufficiency of the evidence, statutory and constitutional claims of multiple punishment, and other excessive- or illegal-sentencing claims, which arise more directly from the entry of judgment and sentence, are often reviewed without reference to preservation requirements. *E.g.*, *Davis v. State*, 268 P.3d 86, 111 (Okla. Crim. App. 2011) (sufficiency of the evidence); *Neloms*, 274 P.3d at 169–71 (excessive sentence); *but see Barnard*, 290 P.3d at 769 (addressing § 11 multiple-punishment and double-jeopardy claims and finding reversible plain error, as double punishment errors would “bring the fairness and integrity of the entire trial into serious question”).

33. *Chapman v. Calif.*, 386 U.S. 18, 24 (1967). The automatic reversal accorded to structural errors is implied in the requirement of a harmless-error analysis compliant with clearly established federal law. *Ariz. v. Fulminante*, 499 U.S. 279, 294–95 (1991) (White, Marshall, Blackmun & Stevens, JJ.) (defining structural errors that require automatic reversal).

34. As Judge Lumpkin observed in *Simpson*, reversal in such instances should probably be “hen’s teeth rare.” *Simpson*, 876 P.2d at 700. Nevertheless, it happens. Appellant in a recent unpublished case was convicted of possession of a firearm after juvenile delinquency adjudication and given a consecutive six-year prison term. Counsel challenged the sufficiency of the evidence to show the adjudication was final, a claim with little or no merit under controlling law. Examination of the only exhibit supporting the adjudication showed no evidence of the nature of the delinquent act, though the statute required proof that it be for a crime that would be felony if committed by an adult. The prosecutor, defense counsel, the trial court, and appellate counsel did not notice this complete failure of the State’s only proof. The Court reversed the conviction with instructions to dismiss. *Dan v. State*, No. F-2011-1047 (Okla. Crim. App. Feb. 25, 2013) (unpublished).

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by counsel's failure to object, *Strickland's* equivalent standard of prejudice ensures a proper remedy, drawing all harmful, forfeited errors within its protective sweep. The remaining errors are technical, harmless, and warrant no relief under either standard.

The Court's historic and settled policy, to award relief where errors (preserved or plain, alone or in combination) affect the outcome, is a good one.³⁵ Yet the Court needlessly sifts factually identical, forfeited claims through both plain-error review and the *Strickland* test, rarely, if ever, arriving at conflicting results.³⁶ Plain-error review occasionally short-circuits (which is to say moots) what would otherwise be a *Strickland*-based finding that counsel was ineffective for failing to object; but the Court's continued plain-error review of forfeited claims probably detracts from a proper constitutional focus on trial counsel's performance. *Strickland* and the Sixth Amendment should be the modern ramparts against counsel's unreasonable forfeiture of harmful errors at trial.

However forcefully preserved, trial errors generally warrant no relief without a convincing showing of harm.³⁷ And no truly

35. *Jenkins v. State*, 161 P.2d 90, 105-06 (Okla. Crim. App. 1945) ("Two things must concur before this court will set aside the judgment of a lower court: First, there must be error in the proceedings of the lower court; second, it must appear from the record that the defendant has suffered some injury from such error. This is our settled policy.") (citing *Byers v. Territory*, 103 P. 532 (Okla. Crim. App. 1909)).

36. Whether the substantial-right/miscarriage-of-justice standard of harm for preserved error is identical in practice to the plain-error prejudice/injury-plus standard (as I maintain here), is academic. Direct review of preserved claims under that affected-the-result standard and *Strickland* review of forfeited claims will both continue as before. The important point is that plain error's prejudice/injury-plus standard of harm and *Strickland's* standard of prejudice are effectively one and the same, meaning that we can do without resort to plain-error review in all but the rarest cases. See *supra* note 34 for that rarest of cases.

37. The per curiam opinion on rehearing in *Byers*, written in the unmistakable voice of Chief Judge Henry Furman, who was before ascending to the bench a celebrated criminal-defense lawyer, shows a court coming somewhat grudgingly to this recognition long ago:

This brings us to consider the question as to whether the doctrine of harmless error is founded in justice, and supported by reason, and as to whether it should be enforced by the courts. All lawyers will agree that there is such a thing as error without injury. But few, if any, of them will admit that the doctrine of harmless error should be applied to any of their cases. It required the passage of over six years before a member of this court [i.e., Furman himself] could realize that this doctrine had been properly applied to one of his cases. The more we reflect upon the doctrine of harmless error the more clearly we will see that it is in strict harmony with the philosophy of the law, and that its recognition and

harmful errors, preserved or forfeited, alone or in combination, can weather a conscientious application of the deviation-injury regime for preserved errors or *Strickland*'s two-pronged inquiry for forfeited ones. *Strickland* renders the plain-error doctrine a well-meaning, but archaic, distraction. The Court can ensure fairness without it by firmly enforcing the rules of the game and the right to competent counsel.

enforcement by the appellate court is absolutely necessary for the administration of justice.

Byers, 103 P. at 534.

APPENDIX

PROPOSED TEXT OF NEW R. CT. CRIM. APP. 3.12A
22 O.S. SUPP., CH. 18, APP.

1. In appeals filed pursuant to sections I(D)(5), II, VII, IX, and XI of these Rules, the Court shall review all propositions of error properly presented in the parties' appellate briefs concerning:

- a. any decision, ruling, instruction, finding of fact or law, or other allegedly erroneous act or omission, as to which the party or party's counsel made a timely request for relief or a contemporaneous objection which was granted or denied by the trial court;
- b. sufficiency of the evidence to support the judgment or order appealed;
- c. any claim that trial counsel's representation was constitutionally ineffective under clearly established federal law;
- d. any claim that the punishment is illegal, excessive, cruel and/or unusual.

No grounds for relief other than those enumerated in Parts 1(a)-(d) of this Rule shall be reviewed in such appeals, except the Court shall conduct mandatory review of a capital sentence as required by law. Review of unpreserved claims or issues for plain error is abolished.

If the Court finds that one or more errors have affected the outcome of the proceeding that is the subject of such an appeal, the Court shall reverse or modify the judgment or sentence, or order a new trial, re-sentencing, or other appropriate relief. If the Court finds that one or more errors affecting a party's rights under the Constitution of the United States have occurred, it shall reverse or modify the judgment or sentence, unless it finds the error or errors harmless under clearly established federal law.

2. In certiorari appeals filed pursuant to section IV of these Rules, the Court shall review all propositions of error properly presented in the parties' appellate briefs concerning:

- a. whether the plea was knowing, intelligent, and voluntary;
- b. whether the court had jurisdiction of the person and subject matter;³⁸
- c. any claim that trial counsel's representation was constitutionally ineffective under clearly established federal law; and,
- d. any claim that the punishment is illegal, excessive, cruel and/or unusual.

No grounds for relief other than those enumerated in Parts 2(a)-(d) of this Rule shall be reviewed, except that the Court shall conduct mandatory review of a capital sentence as required by law. Any other review of unpreserved claims or issues for plain error is abolished.

If the Court finds that one or more errors have affected the outcome of the proceeding, the Court shall reverse or modify the judgment or sentence, or order a new trial, re-sentencing, or other appropriate relief. If the Court finds that one or more errors affecting a party's rights under the Constitution of the United States have occurred, it shall reverse or modify the judgment or sentence, unless it finds the error or errors harmless under clearly established federal law.

On its own motion, the Court may take notice of plain errors affecting substantial rights, and may grant any appropriate relief.



38. *Cox v. State*, 152 P.3d 244, 247 (Okla. Crim. App. 2006) ("On certiorari review of a guilty plea, our review is limited to two inquiries: (1) whether the guilty plea was made knowingly and voluntarily; and (2) whether the district court accepting the guilty plea had jurisdiction to accept the plea.").