Judicial Corruption, The Right to a Fair Trial, and the Application of Plain Error Review: Requiring Clear and Convincing Evidence of Actual Prejudice or Should We Settle For Justice in the Dark?

Thomas M. DiBiagio*

Table of Contents

I. Introduction 596

II. Background 599
A. *The Crime and Evidence of Guilt* 599
B. *The Corrupt Practice* 601
C. *The Contention That the Defendants Were Denied a Fair Trial* 602
D. *The Challenge in the Federal Courts* 603
E. *Supreme Court* 608

III. Discussion 610
A. *Introduction* 610
B. *Structural Defects* 612
C. *Constitutional Trial Errors* 613
D. *The Application of Plain Error Review to Collateral Judicial Corruption Claims* 619
1. *Prejudice That is Merely Speculative is Insufficient to Vacate a Criminal Conviction Amply Supported by the Evidence* 620
2. *As in Ineffective Assistance of Counsel Claims, Absent Actual Prejudice, the Adversary Balance is not Necessarily Upset* 620

* Assistant U.S. Attorney for the District of Maryland. The views and opinions expressed in this Article are solely those of the author and do not reflect those of the U.S. Department of Justice. B.A. 1982, Dickinson College; J.D. 1985, University of Richmond.

3. To Ensure the Public's Interests in Safety and Judicial Integrity, Actual Prejudice Must be Shown 621
4. Impunity from Prosecution 621
E. Distinguishing Direct Corruption Claims From Collateral Corruption Claims: Cartalino v. Washington 623
F. There Was An Insufficient Factual Basis To Warrant Further Discovery 624

IV. Conclusion 627

I. Introduction

Public confidence in the criminal justice system is founded on two equally compelling interests. First, the criminal process must protect the public by punishing those individuals who commit crimes. Second, it must afford the person accused of a crime a fair trial.[1] The fairness, integrity, and public reputation of the criminal process is maintained by the precise and consistent interpretation and application of two organizing principles. The first set of principles involves a set of enumerated constitutional safeguards.[2] The second set of principles involves the application of the general concept of fundamental fairness or due process.[3] The combined design of the specific protections set forth in the Sixth Amendment and

---

1. *See* Irvin v. Dowd, 366 U.S. 717, 728 (1961) (overturning a conviction on the grounds that the accused did not receive a fair and impartial trial under the Due Process Clause of the Fourteenth Amendment). In his concurrence to *Irvin*, Justice Frankfurter explained:

> More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure.

Id. at 729 (Frankfurter, J., concurring).

2. *See* U.S. CONST. amend. IV (prohibiting unreasonable search and seizure); U.S. CONST. amend. V (right against compelled self-incrimination); U.S. CONST. amend. VI (right to effective assistance of counsel in criminal prosecutions; right to a public trial by an impartial judge and jury; right to cross-examine adverse witnesses; right to a speedy trial; and right to compel the production of defense witnesses); U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment).

3. *See* U.S. CONST. amend. V (right to due process of law).

Due Process Clause is to ensure that the adversarial balance is maintained and that the defendant is afforded a fair opportunity to present a defense to the charged offense.[4]

The Supreme Court recently reviewed a case of collateral judicial corruption involving bribes to secure acquittals and otherwise favorable results for the defendant in extrinsic trials.[5] In 1981, William Bracy and Roger Collins were convicted by a jury in Illinois state court of committing an execution-style triple murder.[6] The defendants were subsequently sentenced to death.[7] Their conviction and sentence were affirmed by the Illinois Supreme Court.[8] The defendants then embarked to overturn their conviction and sentence through state postconviction proceedings. The defendants' conviction and sentence were once again affirmed by the Illinois Supreme Court.[9] Four years after defendants' state postconviction remedies were exhausted, the trial judge was convicted in federal district court of corruption charges.[10] The evidence at trial showed that the judge had taken bribes from defendants in five collateral or extrinsic criminal cases to ensure an acquittal or otherwise favorable result for the defendant in each case.[11] This corrupt practice occurred over a period of six years.[12] As a result, twelve years after the jury convicted them of murder, the defendants filed habeas petitions in federal district court seeking a new trial.[13]

There was no evidence that the corrupt judge, Thomas Maloney, solicited or accepted a bribe to ensure a conviction in the defendants'

---

4. *See* United States v. Scheffer, 118 S.Ct. 1261, 1274 n.16 (1998) (Stevens, J., dissenting) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.") (internal quotations and citations omitted); Montana v. Egelhoff, 518 U.S. 37, 63 (1996) (O'Connor, J., dissenting) ("Due process demands that a criminal defendant be afforded a fair opportunity to defend against the State's accusations.").

5. *See* Bracy v. Gramley, 520 U.S. 899, 909 (1997) (holding that the petitioner, who was convicted before a judge who was himself later convicted of taking bribes from defendants in criminal cases, showed "good cause" for discovery on his due process claim of actual bias in petitioner's own case).

6. *See id.* at 900-01.

7. *See id.* at 900.

8. *See* People v. Collins, 478 N.E.2d 267, 289 (Ill. 1985).

9. *See* People v. Collins, 606 N.E.2d 1137, 1145 (Ill. 1992).

10. *See* United States v. Maloney, 71 F.3d 645, 665 (7th Cir. 1995) (affirming the judgment of conviction).

11. *See id.* at 650.

12. *See id.* at 650-52.

13. *See* United States *ex. rel.* Collins v. Welborn, 868 F. Supp. 950, 958 (N.D. Ill. 1994).

case.[14] In addition, although it had been twelve years since the defendants were convicted, the defendants failed to identify even a single discretionary ruling by the trial judge that would suggest that the corrupt practice was present or furthered in the trial so as to deny them a fair opportunity to present a defense to the charged offenses.[15] However, the defendants contended that the trial judge was necessarily lenient toward those who bribed him and correspondingly harsh towards Bracy and Collins as well as all other defendants who did not engage in the corrupt practice.[16] If actual prejudice were required to be shown, the defendants requested that the district hold the petition, in essence, *sub curia* and that they be permitted to engage in discovery in order to further examine the record for evidence that the trial judge acted to cover up, compensate for, or in any way further the corrupt practice in their case.[17]

The district court rejected the defendants' contention and request for discovery.[18] The defendants repeated their assertion and request for discovery on appeal.[19] The Seventh Circuit rejected their contention and request.[20] In an opinion written by Chief Judge Richard A. Posner, the appellate court refused to accept the defendants' interpretive leap.[21] The court held that because the defendants had not shown actual prejudice from the record that was available for scrutiny, they were not denied a fair trial and were not entitled to discovery to pursue the claim further.[22] The Supreme Court granted Bracy's petition for certiorari on the question of permitting discovery and reversed the Seventh Circuit.[23] In a unanimous opinion written by Chief Justice William H. Rehnquist, the Court held that the judicial corruption reflected by the trial judge's acceptance of bribes in five collateral criminal cases, coupled with a suggestion that the trial judge may have acted to further the corrupt practice in Bracy's case with the deliberate appointment of his trial counsel, warranted granting the defendant discovery.[24] However, by not specifying whether a collateral judicial corruption claim represents a structural defect or a constitutional

---

14. *See id.* at 990.
15. *See id.* at 991.
16. *See id.* at 990-91.
17. *See id.*
18. *See id.*
19. *See* Bracy v. Gramley, 81 F.3d 684, 688-89 (7th Cir. 1996).
20. *See id.* at 696.
21. *See id.* at 690.
22. *See id.* at 690-91.
23. *See* Bracy v. Gramley, 520 U.S. 899, 910 (1997). Collins filed a separate petition for certiorari. *See* Collins v. Welborn, 117 S. Ct. 2450, 2450 (1997). The Supreme Court took no action on his petition, and it was held pending the outcome of Bracy's petition. *See id.*
24. *See id.* at 906-09.

trial error, the Supreme Court left unclear the appendage issue of the appropriate standard of review.

A criminal conviction before a trial judge who accepts a bribe to secure a criminal judgment represents a structural defect in the trial process. Under these circumstances, there is a presumption that the defendant has been denied a fair opportunity to present a defense to the charged offense. The criminal trial, thus, cannot reliably serve its function as a vehicle for any determination of guilt or innocence, and any criminal punishment will not be regarded as fundamentally fair. Alternatively, a conviction supported by the evidence but before a trial judge who has accepted bribes in extrinsic or collateral cases—"collateral corruption"—does not necessarily represent a structural defect. Under these circumstances, the prejudice is speculative. Absent a finding of actual prejudice, neither the Sixth Amendment nor due process compel that the criminal judgment be vacated. As a result, the application of plain error review, which considers whether the corrupt practice actually denied a defendant a fair opportunity to present a defense to the charged offense, is appropriate to collateral corruption claims. To hold otherwise would serve only to create a culture of impunity from punishment and fashion justice in the dark.

II. Background

A. The Crime and Evidence of Guilt

In July of 1981, William Bracy and his codefendant, Roger Collins, were tried together and convicted by a jury in the Circuit Court for Cook County, Illinois for their role in an execution-style triple murder committed in November of 1980.[25] The trial judge, Thomas Maloney, sentenced both of the defendants to death.[26] At trial, the state produced accomplice testimony showing that the victims had been bound and taken from an apartment, driven to a Chicago viaduct, and there shot to death with pistols and a shotgun.[27] The state corroborated this testimony with two witnesses who saw the defendants, their accomplice, and the victims leave the apartment building the night of the murder, and who noticed that the victims appeared to have been bound and gagged.[28] A third witness

25. The defendants were convicted of armed robbery, aggravated kidnapping, and murder. *See* People v. Collins, 478 N.E.2d 267, 272 (Ill. 1985).

26. *See id.*

27. *See id.*

28. *See id.* at 273.

testified that prior to the crime, Bracy possessed two of the weapons used in the murders.[29] Finally, the accomplice's testimony was further corroborated at trial when the state detailed that after his arrest, the accomplice directed the police to the location of the murder weapons.[30]

On appeal, Bracy and Collins raised eleven challenges to their conviction and sentence.[31] Included among these challenges were claims that the defendants were denied effective assistance of counsel and that the trial court erred when it denied a motion for continuance.[32] All of these contentions were rejected by the Illinois Supreme Court and the defendants' conviction and death sentence were affirmed.[33] After the defendants had exhausted their direct appeal, they petitioned for postconviction relief.[34] The petition was denied by the circuit court and the defendants appealed.[35] On appeal, the defendants raised eight separate challenges to their conviction and sentence.[36] Included among these contentions was

---

29. *See id.* at 273-74.

30. *See id.* The facts regarding the crimes committed by the defendant are set forth in three published state appellate and federal court opinions. *See* Bracy v. Gramley, 81 F.3d 684, 687 (7th Cir. 1996); United States *ex. rel.* Collins v. Welborn, 868 F. Supp. 950, 959-63 (N.D. Ill. 1994); People v. Collins, 478 N.E.2d 267, 72-276 (Ill. 1985). The opinions are uniformly flawed in their lack of narrative design. Nowhere in these reported opinions is there an explanation of why the victims were executed.

31. On direct appeal, the defendants assigned error as follows: (1) insufficiency of the evidence; (2) that the trial court erred in admitting hearsay statements; (3) that the trial court erred in failing to suppress photographs seized by the police from a garbage bag;
(4) that they were denied a fair trial because the jury was allowed to hear evidence and argument that certain prosecution witnesses had been relocated or were in protective custody; (5) that the trial court erred when it permitted the prosecution to impeach defense witnesses on collateral matters; (6) that they were denied effective assistance of counsel; (7) that comments made by the prosecution denied them a fair trial; (8) that they were denied a fair trial and an impartial jury by the presence on the jury of the wife of a judge who had sentenced Bracy for a prior conviction; (9) that they were denied a fair trial because the death qualification—that is, the willingness to consider the death penalty—of prospective jurors resulted in a conviction-prone jury; (10) that the district court erred in denying their motion for a continuance; and (11) that the Illinois death penalty statute was unconstitutional. *See Collins*, 478 N.E.2d at 267-88.

32. *See id.* at 282-83, 286-87.

33. *See id.*

34. *See* People v. Collins, 606 N.E.2d 1137, 1139 (Ill. 1992).

35. *See id.*

36. The defendants raised the following collateral attacks to their conviction and sentence: (1) that they were denied a fair trial and an impartial jury by the presence on the jury of the wife of an appellate court judge who had sentenced Bracy in an earlier conviction; (2) that the prosecution improperly used peremptory challenges to systematically exclude prospective black jurors from sitting on the jury; (3) that they were denied effective assistance of counsel; (4) that the Illinois death penalty statute was unconstitutional; (5) that they were denied a fair trial because the death qualification—that is, the willingness to consider the death penalty—of prospective jurors resulted in a conviction-prone jury; (6) that the prosecution knowingly used

the argument that Bracy and Collins were denied effective assistance of counsel.[37] The Illinois Supreme Court again rejected the defendants' contentions and affirmed the judgment of conviction and death sentence.[38]

B. The Corrupt Practice

Twelve years after the jury convicted the defendants of murder and they were sentenced to death, the trial judge, Thomas Maloney, was convicted in federal court of conspiracy, racketeering, extortion, and obstruction of justice.[39] Maloney had been a trial judge in the Circuit Court for Cook County for seventeen years and had presided over 6000 cases.[40] The evidence at trial showed that Maloney had accepted bribes in five cases over a six-year period.[41] First, the government presented evidence that in 1980, Maloney accepted a $2000 bribe to acquit a defendant of murder.[42] In that case, Maloney suppressed the defendant's confession and then acquitted him of murder at a bench trial held in May 1981.[43] Second, the government presented evidence at a bench trial in August 1991 that Maloney had accepted a bribe and acquitted three New York gang members of murdering a rival in Chicago's Chinatown.[44] In that case, Maloney found a dying declaration unreliable and acquitted the defendants of murder.[45] Third, the government presented evidence that in 1982, Maloney accepted a $2300 payment to sentence a defendant in a fraud case to probation.[46] Fourth, the government presented evidence that the trial judge had accepted between $4000 and $5000 in 1982 to convict a defendant of voluntary manslaughter rather than felony murder.[47] Fifth, the government showed that Maloney accepted a $10,000 bribe in 1986 to acquit two Chicago gang members of a double murder.[48] In this case, however, Maloney had second thoughts, returned the bribe, convicted the

---

perjured testimony; (7) that certain arguments made by the prosecution at trial were improper and prejudicial; and (8) that the trial court erred in denying their requests for funds to hire a private investigator and leave to file subpoenas. *See id.*

37. *See id.* at 1142.

38. *See id.* at 1145.

39. *See* United States v. Maloney, 71 F.3d 645, 649-50 (7th Cir. 1995).

40. *See* Bracy v. Gramley, 520 U.S. 899, 901 (1997); Bracy v. Gramley, 81 F.3d 684, 689 (7th Cir. 1996).

41. *See Maloney*, 71 F.3d at 650-52.

42. *See id.* at 650.

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.* at 650-51.

47. *See id.* at 651.

48. *See id.*

defendants, and sentenced them to death.[49]

C. *The Contention That the Defendants Were Denied a Fair Trial*

The defendants' trial took place in 1981, after Maloney had taken a bribe in two criminal cases.[50] It was undisputed that the defendants did not bribe or offer to bribe the trial judge.[51] It was also undisputed that the Maloney did not solicit a bribe from the defendants.[52] In addition, although the defendants were convicted more than twelve years prior, the defendants were unable to unearth any ruling by the trial judge that indicated that he was biased against the defendants.[53] Nevertheless, Bracy and Collins argued that Maloney was necessarily prosecution-oriented in cases in which he was not bribed in order to cover-up the fact that he had accepted bribes from defendants in two unrelated or collateral cases.[54] More specifically, the defendants' theory was that the corrupt practice was furthered in cases where Maloney did not take a bribe in three ways: (1) to avoid suspicion that he was corrupt; (2) to cancel any negative impression that his acquittals in the corrupt cases might make on the voters; and (3) to advertise his franchise and, thereby, encourage defendants to participate in the corrupt practice or fear retaliation.[55] In sum, the defendants' contention was that the judge's corrupt practice of taking bribes to acquit or otherwise render a favorable verdict for a defendant in the collateral cases not only rendered him biased against the government in those prosecutions, but also induced a "compensatory bias" against defendants who did not participate in the corrupt practice.[56] Maloney was biased in this latter, compensatory sense, the defendants argued, to deflect suspicion that he was taking bribes in other cases.[57] The defendants also argued that, if there were no presumption of prejudice, they should be permitted to conduct discovery regarding Maloney's record of judgments and rulings in other cases.[58]

---

49. *See id.*

50. *See* Bracy v. Gramley, 520 U.S. 899, 907 n.9 (1997).

51. *See* Bracy v. Gramley, 81 F.3d 684, 688 (7th Cir. 1996).

52. *See* United States *ex. rel.* Collins v. Welborn, 868 F. Supp. 950, 990 (N.D. Ill. 1994).

53. It must be emphasized that a total of fifteen trial errors were twice reviewed by the state appellate courts and the defendants were unable to prevail on a single claim.

54. *See Bracy*, 81 F.3d at 688.

55. *See id.*

56. *See* Bracy v. Gramley, 520 U.S. 899, 905 (1997).

57. *See id.*

58. The defendants requested that they be permitted to review the sealed transcript of Maloney's federal criminal trial; review the federal prosecutor's materials in the Maloney case; depose persons associated with Maloney; and search Maloney's rulings for a pattern of

D. The Challenge in the Federal Courts

Four months after Maloney was convicted, the defendants filed habeas petitions and presented their judicial corruption argument, along with eighteen other grounds for relief in federal district court in the Northern District of Illinois.[59] The district court rejected all of the defendants' contentions and they appealed.[60] The defendants repeated their contention on appeal.[61] The Court of Appeals for the Seventh Circuit affirmed the district court by a divided vote.[62] In an opinion written by Chief Judge Richard Posner, the court conceded that the corrupt practice created the "appearance of impropriety," but stated that this alone did not render the trial fundamentally unfair.[63] The court reasoned that it was possible that the corrupt practice was inculcated into the defendants' trial, but found that in the absence of evidence to the contrary, the theory was not "sufficiently compelling" to justify presuming actual prejudice in cases other than those in which the judge was actually bribed.[64] As for the defendants' request for discovery, the court held that absent facts from the available record that indicated that Maloney was biased in the defendants' case, there was no showing of "good cause" to justify affording the defendants an opportunity to pursue discovery.[65] In any event, the court added, because the defendants had failed to uncover any evidence that suggested actual prejudice, "the probability is slight that a program of depositions aimed at crooks and their accomplices . . . will yield such evidence."[66] The court first found that the evidence of guilt was compelling, and that there was "no basis for doubting the guilt" of the defendants.[67] The court held that this was significant

---

pro-prosecution bias. *See id.* at 902.

59. In addition to the judicial corruption argument, the following grounds for relief were advanced in the district court: (1) the exclusion of African-Americans from the jury; (2) the use of accomplice testimony; (3) prosecutorial misconduct; (4) sufficiency of the evidence; (5) illegal search; (6) judge's wife on the jury; (7) ineffective assistance of counsel; (8) death qualified jurors; (9) denial of continuance for sentencing hearing;
(10) death penalty instructions; (11) death penalty statute unconstitutional; (12) trial by judges who accepted bribes; (13) use of fabricated physical evidence; (14) failure to grant a severance; (15) impeachment evidence; (16) *Brady* claim; (17) punishment alternatives; (18) involuntary confession; (19) impeachment with silence; and (20) loss of common law record. *See* United States *ex. rel.* Collins v. Welborn, 868 F. Supp. 950, 967-93 (N.D. Ill. 1994).

60. *See* Bracy v. Gramley, 81 F.3d 684, 687 (7th Cir. 1996).

61. *See id.*

62. *See id.* at 696.

63. *See id.* at 690.

64. *See id.*

65. *See id.* at 690-91.

66. *See id.* at 691.

67. *See id.* at 687.

> because, with a few exceptions, a person convicted in a state court may not obtain an order for a new trial from a federal court on the basis of constitutional errors committed at the trial unless the errors resulted in actual prejudice, or, equivalently, unless they substantially influenced the verdict, or, in other words, were likely to have made the difference between conviction and acquittal.[68]

The defendants argued that the collateral judicial corruption claim was one of those excepted grounds where there was a presumption of prejudice.[69] The court disagreed and held that the defendants were required to show that the judicial corruption upset the adversarial balance in their case.[70] The court recognized that in cases where the judicial corruption was directly implicated in the criminal trial under review, there would be a structural defect in the trial mechanism warranting a presumption of prejudice.[71] However, where, as in the defendants' trial, the contention was that the corrupt practice was not directly implicated, there was only an appearance of bias which, as a matter of law, was insufficient to upset the verdict.[72] The court explained that an appearance of impropriety is insufficient because "it provides only a weak basis for supposing the original trial an unreliable test of the issues presented for decision in it."[73] Distilled to its essentials, the court's opinion stated that an appearance of bias arising from the judicial corruption in the other cases was insufficient, as a matter of law, to support a presumption of prejudice; that is, an appearance of bias did not per se upset the adversarial balance and render the defendants' trial fundamentally unfair.

Chief Judge Posner acknowledged the presence of judicial corruption in the prior and subsequent criminal trials.[74] However, the court rejected the defendants' interpretive leap that this corrupt practice necessarily was inculcated into other trials.[75] Thus, the court refused to infer an inherent compensatory bias in cases not involving a bribe. The court then found that the defendants' assertion supported only an appearance of bias that was insufficient to warrant a new trial:

> The argument that a judge who accepts bribes in some cases is corrupt in all is not a sufficiently compelling empirical proposition to persuade us to treat this case as if Judge Maloney

---

68. *Id.* at 688 (internal citations omitted).
69. *See id.*
70. *See id.*
71. *See id.*
72. *See id.*
73. *See id.* at 688-89.
74. *See id.* at 688.
75. *See id.*

> had taken a bribe from the government to convict. If the argument is rejected, ours is a case in which there is merely an appearance of impropriety in the judge's presiding, and an appearance of impropriety does not constitute a denial of due process.[76]

The court not only found that the defendant's theory was "conjecture"[77] but also reasoned that the opposite inference was as likely:

> While a corrupt judge might decide to tilt sharply to the prosecution in cases in which he was not taking bribes—to right the balance as it were—it is equally possible that he would fear that by doing so he would create a pattern of inconsistent rulings that would lead people to suspect he was on the take.[78]

The court also found that in the balance, an automatic reversal of a conviction should be applied circumspectly due to the cost to society of overturning guilty verdicts.[79] The court found that absent a showing of actual prejudice, what remained was simply an "abstract interest in procedural fairness."[80] Vindication of this interest was not sufficiently compelling to warrant upsetting the criminal convictions.[81] In addition, the court expressed a practical concern that granting a new trial without requiring a defendant to show prejudice would establish a dangerous precedent, resulting in unnecessarily vacating numerous criminal convictions.[82] The court explained: "Accepting Collins's contention would require a new trial in *every* case, jury and nonjury, capital and noncapital, in which a judge later found to be corrupt had presided and the defendant had been convicted, even though the judge had not been bribed by the prosecutor."[83]

The court also rejected the defendants' request for discovery and held that the evidence necessary to sustain a claim of judicial bias, if it existed, was available in the public record.[84] The court noted: "If none of these public sources of information has yielded any evidence of bias in our case—and none has—the probability is slight that [engaging in discovery] . . . will yield such evidence."[85] The court explained:

> Some of Maloney's rulings went against the defendants and

---

76. *Id.* at 690.
77. *Id.* at 688.
78. *Id.* at 689-90.
79. *See id.* at 689.
80. *Id.*
81. *See id.*
82. *See id.*
83. *Id.*
84. *See id.* at 690-91.
85. *Id.* at 691.

> obviously those are the ones they complain about, but they have not shown that there were so few rulings in their favor that the judge must have been biased in favor of the government. To show this would not have required an investigation, but merely a review of the transcript of the trial. It is unlikely that the specific rulings of which the defendants complain either were the product of a corrupt backward bending in the government's favor or influenced the jury's verdict. The Supreme Court of Illinois did not find any errors in the rulings.[86]

Judge Ilana D. Rovner filed a dissenting opinion and wrote that the defendants were entitled to a new trial regardless of whether or not they could prove that Maloney's corrupt practice had a "discernible effect" on the adversarial balance.[87] Judge Rovner found that the adjudicative reliability of the trial judge was fatally compromised by the collateral corruption.[88] She strongly disagreed with the majority's imposition of an evidentiary burden on the defendants and explained that: "By demanding proof that Maloney's corruption either had or likely had an identifiable impact on the petitioners' trial, we fail to come to grips with the gravity of Maloney's offense and the constitutional imperative that the accused be tried before a judge of integrity and impartiality."[89]

Judge Rovner found Maloney's corruption appalling and sufficient to warrant automatic reversal.[90] She reasoned that Maloney's corrupt practice so infected the integrity and fairness of the cases before him as to warrant a new trial.[91] The judge found enough in the record to suggest that there was a pattern of corruption that affected Maloney's conduct as a trial judge.[92] Thus, the corrupt practice tainted not only those cases in which Maloney had accepted a bribe, but was inculcated into those in which he had not. She explained that:

---

86. *Id.* at 690. The court concluded its opinion by acknowledging the stain of judicial corruption on the integrity of the judicial system:

> We do not make light of judicial corruption. It has tainted the judicial system of Illinois, *caused unjust acquittals*, jeopardized convictions, tarnished the legal profession, and raised profound doubts not only about the state's method of selecting judges but also about the entire political culture of the state. But in the circumstances of this case, corruption is not a constitutional ground for vacating the petitioners' convictions.

Id. at 691 (emphasis added).

87. *See id.* at 702-03 (Rovner, J., dissenting).

88. *See id.* at 704 (Rovner, J., dissenting).

89. *Id.* at 700 (Rovner, J., dissenting).

90. *See id.* at 694-703 (Rovner, J., dissenting).

91. *See id.* at 697-99 (Rovner, J., dissenting).

92. *See id.* (Rovner, J., dissenting).

> [W]ithout proof that he followed that [corrupt] practice in *this* case, [the majority] reason, Bracy and Collins have no claim. But when the trial judge is tainted by a pervasive conflict of interest—in other words, one not limited to a particular litigant or type of case—evidence that the taint had a discernible effect on a given case is unnecessary.[93]

As for the request for discovery, Judge Rovner submitted that it was unlikely that the corrupt practice was encapsulated within the five criminal trials.[94] Therefore, the defendants should be afforded an opportunity to find and present whatever evidence there may be to establish any practice Maloney may have followed.[95] In disagreeing with the majority's view, Judge Rovner was not content in speculating that the trial judge was probably not biased in the defendant's case:

> Without giving Bracy and Collins the opportunity to present that evidence . . . their claim of conflict can only be resolved on the basis of speculation, as my colleagues agree. In view of the grave and structural nature of the petitioners' claim, not to mention the fact that this is a capital case, which "magnifies the appearance of impropriety," the petitioners are entitled to more from us.
>
> . . . .
>
> . . . We cannot simply assume that the "probability is slight" that discovery will yield Bracy and Collins anything. Let them try. If their discovery proves fruitless, we can at least take comfort in the knowledge that we have given them every opportunity to prove that Maloney's corruption deprived them of a fair trial. We cannot, after all, have it both ways: we cannot criticize Bracy and Collins for speculation and at the same time deprive them of the chance to render their theory anything more. I understand that Illinois has an interest in the finality of its judgments, and allowing the discovery that the petitioners seek would, if nothing else, portend a significant delay in the implementation of their death sentences. But having left Bracy and Collins to the mercies of a corrupt judge, the State should not be heard to complain in this matter.[96]

93. *Id.* at 698 (Rovner, J., dissenting) (internal citations omitted).
94. *See id.* at 697-99 (Rovner, J., dissenting).
95. *See id.* (Rovner, J., dissenting).
96. *Id.* at 698-99 (Rovner, J., dissenting).

E. Supreme Court

Bracy and Collins then filed separate petitions for certiorari to the U.S. Supreme Court.[97] The Court granted Bracy's petition on the question of permitting discovery[98] and reversed.[99] In a unanimous opinion written by Chief Justice William Rehnquist, the Court held that the record establishing judicial corruption in the other criminal trials, coupled with an inference or suggestion that the corrupt practice may have been furthered in the defendant's case with the deliberate appointment of the Bracy's trial counsel, warranted granting the defendant discovery.[100] The Court observed that if Bracy proved that the trial judge furthered the corrupt practice by inducing a compensatory bias against defendants who did not bribe him, such bias would unquestionably support a finding that the adjudicative reliability of the judge was fatally compromised and warrant the reversal of the judgment of conviction.[101] The Court explained:

> A judge who accepts bribes from a criminal defendant to fix that defendant's case is "biased" in the most basic sense of that word, but his bias is directed against the State, not the defendant. Petitioner contends, however, that Maloney's taking of bribes from some criminal defendants not only rendered him biased against the *State* in those cases, but also induced a sort of compensatory bias against *defendants* who did *not* bribe Maloney. Maloney was biased in this latter, compensatory sense, petitioner argues, to avoid being seen as uniformly and suspiciously "soft" on criminal defendants . . . . [D]ifficulties of proof aside, there is no question that, if it could be proved, such compensatory, camouflaging bias on Maloney's part in petitioner's own case would violate the Due Process Clause of the Fourteenth Amendment.[102]

---

97. *See* Bracy v. Gramley, 520 U.S. 899, 903 (1997).

98. *See id.*; *see also* Linda Greenhouse, *Justices Hear Case of Killers Tried Before Corrupt Judge*, N.Y. TIMES, Jan. 11, 1997, at A8. The Court took no action as to Collins's petition. The Court framed the question as follows:

> Whether a habeas petitioner who was convicted of a capital offense and sentenced to death in a trial before a judge who admittedly accepted bribes in other contemporaneous criminal cases is entitled to discovery to support his claim that he was denied the right to a trial before an impartial judge.

Id.

99. *See Bracy*, 520 U.S. at 903; *see also* Linda Greenhouse, *Supreme Court to Let Inmate Try to Show Judicial Corruption*, N.Y. TIMES, June 10, 1997, at A28.

100. *See Bracy*, 520 U.S. at 909.

101. *See id.* at 905.

102. *Id.*

The Court then held that although the defendant may be unable to ultimately obtain evidence sufficient to support a finding in his favor on the merits, the possibility that he was denied a fair trial as part of the corrupt practice warranted granting him the opportunity to engage in discovery.[103] In contrast to the Seventh Circuit, the Court ruled that Bracy had shown more than an appearance of bias.[104] The Court found that there was at least an inference that the corrupt practice was furthered in the defendant's case.[105] The Court based this finding on two points. First, the Court found that Maloney's corrupt practice certainly upset the adversarial balance against the prosecution in the criminal cases where he accepted a bribe.[106] Second, the Court found that the trial judge may have deliberately appointed the defendant's trial counsel to prejudice Bracy's case and to further the corrupt practice in the case under review.[107] The Court relied on four factual assertions in support of this finding. First, the defendant's trial attorney was appointed by the trial judge.[108] Second, trial counsel was a former law partner of Maloney's.[109] Third, this attorney was not only familiar with the corrupt practice, but had actually participated in it prior to being appointed to represent the defendant.[110] Fourth, trial counsel announced that he was ready for trial just a few weeks after his appointment and requested no additional time before trial to prepare for the penalty phase of the case.[111] Drawing on these four factual assertions, the Court found credible the defendant's theory that Maloney may have deliberately appointed this attorney with the understanding that counsel would not hinder a prompt trial, so that the defendant's case could camouflage bribe negotiations being conducted in two other murder cases.[112] The Court conceded as a possibility the Seventh Circuit's prediction that Bracy "will be unable to obtain evidence sufficient to support a finding of actual judicial bias in the trial of his case."[113]

---

103. *See id.* at 909.
104. *See id.*
105. *See id.*
106. *See id.*
107. *See id.*
108. *See id.* at 907.
109. *See id.*
110. *See id.*
111. *See id.* at 907-08.
112. *See id.* at 908.
113. *Id.* After ruling in *Bracy*, the Court acted on Collins's petition. The Court granted Collins's petition for certiorari, vacated the judgment, and remanded the case in light of *Bracy*. Collins v. Welborn, 117 S. Ct. 2450, 2450 (1997). There was no assertion that Collins's trial counsel was deliberately appointed in furtherance of the corrupt practice. Therefore, the dubious factual predicate relied on by the Court was not applicable to Collins.

III. Discussion

A. Introduction

With the aggressive use of racketeering, mail and wire fraud, and obstruction of justice charges by federal prosecutors, primarily against state trial judges, federal and state courts will be confronted with an increased number of habeas petitions and postconviction motions filed by defendants who were convicted before these corrupt judges, seeking a new trial on the grounds of collateral judicial corruption.[114] Similar to claims of jury tampering, these petitions and motions will rarely involve assertions that the trial judge was bribed by the prosecution in order to secure a conviction.[115] Setting aside the precinct of claims involving an actual bribe to convict, the welt of these petitions will mirror the compensatory bias contention raised in *Bracy*. The question then becomes determining the burden of proof on a defendant asserting a collateral corruption claim and the appropriate standard of review. More precisely stated, the question is whether a collateral judicial corruption claim, based on bribes to acquit or otherwise render favorable verdicts *for the defendant* in extrinsic cases, should be considered either a structural defect in the trial which warrants per se reversal or a constitutional trial error which triggers plain error review. By not reaching the question of whether a collateral judicial corruption claim represents a structural defect, the Supreme Court in *Bracy* left unclear the appendage issue of the burden of proof and appropriate standard of review.[116]

As a result, the Court has simply arbitrarily granted a convicted murderer a windfall which he does not deserve.

114. A collateral corruption claim, as opposed to a direct corruption claim, is one in which the judge has accepted bribes in other cases to ensure an acquittal or conviction, but not for the case under review.

115. It is possible that someone other than the prosecution, such as the victim, the victim's family, or the individual who actually committed the charged offense would attempt to bribe the trial judge in order to obtain a conviction.

116. Although the Supreme Court granted certiorari solely on the question of discovery, it indicated that, on the merits, the collateral corruption alone may not be enough to warrant a new trial. *See* Bracy v. Gramley, 520 U.S. 899, 909 (1997). In addition, in reporting that the Supreme Court had granted certiorari in *Bracy*, Linda Greenhouse of the *New York Times* found it significant that the Court had framed the issue in terms of a discovery question, commenting: "Evidently, the Justices do not find the fact of Judge Maloney's racketeering conviction sufficient to establish bias pervasive enough to warrant reversal of the conviction. If they did, they would not have posed the question of whether Mr. Bracy is entitled to a legal process to find more evidence." Greenhouse, *supra* note 98.

In *Chapman v. California*,[117] the Supreme Court rejected the argument that trial errors of constitutional dimension necessarily require reversal of criminal convictions.[118] Consequently, not all claims asserting a denial of a fair trial are considered structural defects that compel per se reversal. The Supreme Court has divided these claims into two precincts. First, the Court has identified a narrow set of constitutional defects that impeach the trial structure and, thus, warrant per se reversal. The Supreme Court has limited these structural defects to a discrete class of claims that reflect a swollen or obvious injustice and render the entire trial process fundamentally unfair.[119] The Court has designated the remaining welt of constitutional claims as errors that impinge on the trial process.[120] Accordingly, errors that impinge on the trial process trigger plain or harmless error review and warrant reversal only if, in the context of the evidence of guilt, a defendant can demonstrate actual prejudice.[121]

The question translates into a simple proposition: In the balance,

---

117. 386 U.S. 18 (1967).

118. *See id.* at 22-24.

119. *See, e.g.*, Sullivan v. Louisiana, 508 U.S. 275 (1993) (denial of the right to a jury verdict of guilt beyond a reasonable doubt); Vasquez v. Hillery, 474 U.S. 254 (1986) (unlawful exclusion of grand jurors of defendant's race); McKaskle v. Wiggins, 465 U.S. 168 (1984) (denial of the right to self-representation at trial); Waller v. Georgia, 467 U.S. 39 (1984) (denial of the right to a public trial); Gideon v. Wainwright, 372 U.S. 335 (1963) (total deprivation of the right to counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (trial before a judge having a pecuniary interest in conviction); United States v. Canady, 126 F.3d 353 (2d Cir. 1997) (failure to publicly announce a decision in open court following a criminal bench trial).

120. *See, e.g.*, California v. Roy, 519 U.S. 2 (1996) (failure to instruct jury on an element of the charged offense); Arizona v. Fulminante, 499 U.S. 279 (1991) (the admission of a coerced confession); Kentucky v. Whorton, 441 U.S. 786 (1979) (failure to instruct the jury of the presumption of innocence); United States v. Bagley, 473 U.S. 667 (1985) (failure to disclose material, exculpatory evidence by the government); *see also* Sherman v. Smith, 89 F.3d 1134, 1137-38 (4th Cir. 1996) (en banc) (collecting cases), *cert. denied*, 117 S.Ct. 765 (1997).

121. Harmless error and plain error are functionally equivalent, except that under the plain error standard the defendant carries the burden. *See* United States v. Hastings, 134 F.3d 235, 240 (4th Cir. 1998); FED. R. CRIM. P. 52; *see also* United States v. Wiles, 102 F.3d 1043, 1055 (10th Cir. 1996) (observing that the core analysis under both harmless and plain error doctrine is effect of error on the reliability of the judgment). Under harmless error review, a defendant is entitled to reversal of his conviction unless the government can establish that the error does not affect the defendant's substantial rights. *See* United States v. Olano, 507 U.S. 725, 732 (1993); *see also Hastings*, 134 F.3d at 240. In contrast, under plain error review, to compel the reversal of his conviction, a defendant must show that the error actually affected the outcome of the proceedings. *See id.*; *see also Roy*, 519 U.S at 5. Because the constitutional error arising from a collateral corruption would be an intervening event realized after trial, it fits within plain error review. *See* United States v. Knoll, 116 F.3d 994, 1000-01 (2d Cir. 1997).

does the claim of collateral judicial corruption reflect an obvious injustice that renders the trial process fundamentally unfair, or is the claim one which can be cured or mitigated by the weight of the evidence of guilt and absence of evidence of actual prejudice? Prejudice in these cases would be measured by whether the corrupt practice upset the adversarial balance such as to deny the defendant a fair opportunity to present a defense to the charged offense.

B. Structural Defects

A structural defect is a unique constitutional error and obvious injustice that renders the entire trial process fundamentally unfair. Thus, structural defects compel extraordinary intervention. In these cases, the convictions must be reversed without regard to the weight of the evidence of guilt or actual prejudice because "[w]ithout these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."[122]

In *Sullivan v. Louisiana*,[123] the defendant was convicted of murder and sentenced to death.[124] The trial judge gave an instruction that included an unconstitutional definition of reasonable doubt.[125] The Supreme Court reversed the defendant's conviction and held that the instruction amounted to a structural defect that rendered the trial fundamentally unfair.[126] Thus, the defect compelled that the defendant's conviction be reversed regardless of the weight of the evidence indicating guilt or prejudice. The Court recognized that certain fair trial claims may be deemed harmless in terms of their effect on the fact finding process at trial.[127] However, the Court found that the erroneous jury instruction in the case under review nullified any legitimate belief that there had been a finding by the jury of guilt beyond a reasonable doubt.[128] Accordingly, the Court reasoned that to allow the defect to be cured would dispense with

---

122. Rose v. Clark, 478 U.S. 570, 577-78 (1986) (citations omitted).

123. 508 U.S. 275 (1993).

124. *See id.* at 277.

125. *See id.*

126. *See id.* at 281-82.

127. *See id.* at 278-79.

128. *See id.* at 281. The Court reasoned: "Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly [a structural defect in the constitution of the trial mechanism], the jury guarantee being a basic protection whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. *Id.* (internal citations and quotations omitted).

the right to a fair trial.[129]

C. *Constitutional Trial Errors*

"Criminal defendants in this country are entitled to a fair, but not a perfect trial."[130] With this in mind, the Supreme Court has recognized that most errors do not automatically render a trial unfair and, thus, may be harmless. This common sense approach was recently demonstrated by the Court in *Johnson v. United States*,[131] where the Court continued to narrowly define those claims that warrant automatic reversal. In *Johnson*, the defendant was convicted of perjury.[132] At trial, the government presented ample evidence of guilt.[133] At the conclusion of the case, the district court, in accordance with the law at the time, "instructed the jury that the element of materiality was a question for the judge to decide, and that he had determined that the defendant's statements were material."[134] Because the trial judge had followed the law at the time, there was no objection.[135] The defendant was convicted, but before her appeal, the Supreme Court held that the materiality of a false statement must be decided by a jury rather than a trial judge.[136] On appeal, the defendant argued that the district court's failure to submit materiality to the jury represented a structural defect in the trial and rendered her conviction invalid.[137] In a unanimous opinion, the Supreme Court disagreed, applied the harmless error analysis, and affirmed the conviction.[138] The Court reasoned that the error could be cured where an evaluation of the weight of evidence revealed an absence of prejudice.[139] The Court then

---

129. *See id.*

130. Sherman v. Smith, 89 F.3d 1134, 1137 (4th Cir. 1996).

> "[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial," and the Constitution does not demand one. This focus on the fairness, rather than on perfection, protects society from individuals who have been duly and fairly convicted of crimes, thereby promoting "public respect for the criminal process."

Id. (quoting United States v. Hastings, 461 U.S. 499, 508 (1983); Delaware v. Van Arsdale, 475 U.S. 673, 681 (1986)).

131. 520 U.S. 461 (1997).

132. *See id.* at 464.

133. *See id.*

134. *Id.*

135. *See id.*

136. *See id.* (discussing United States v. Gaudin, 515 U.S. 506 (1995)).

137. *See id.*

138. *See id.* at 469-70.

139. *See id.*

reviewed the defect in this context. The Court agreed with the Eleventh Circuit that the evidence supporting materiality was "overwhelming."[140] Accordingly, the Court held that the error did not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings."[141] Chief Justice Rehnquist explained that, in fact, "the reversal of a conviction such as this . . . would have that effect. 'Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.'"[142]

The Supreme Court has held that the erroneous admission of a coerced confession represents a trial error, and thus, the application of the harmless error analysis is appropriate. In *Arizona v. Fulminante*,[143] the defendant was convicted of murder and sentenced to death.[144] During the trial, the government introduced the defendant's confession.[145] On appeal, the defendant claimed that his confession was coerced and sought a new trial.[146] The Court found that the confession was coerced,[147] but did not reverse his conviction.[148] The Court held that the admission of an involuntary confession triggered the harmless error analysis, because it was only a trial error:

> Since this Court's landmark decision in *Chapman v. California*, in which we adopted the general rule that a constitutional error does not automatically require reversal of a conviction, the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless.
>
> . . . .
>
> . . . The common thread connecting these cases is that each involves "trial error"—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. In applying harmless-error analysis to these many different constitutional violations, the Court has been faithful to the belief that the harmless-error doctrine is essential to preserve the "principle that the central purpose of a criminal

140. *See id.* at 470.
141. *Id.* (internal quotation marks omitted).
142. *Id.* (quoting R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50 (1970)).
143. 499 U.S. 279 (1991).
144. *See id.* at 284.
145. *See id.*
146. *See id.*
147. *See id.* at 285-88.
148. *See id.* at 302.

> trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error."[149]

The Court then weighed the improperly admitted evidence against the properly admitted evidence and found that the conviction was amply supported by the evidence.[150] Therefore, the admission of the tainted evidence did not materially affect the verdict.[151]

The Supreme Court has held that ineffective assistance of counsel represents a trial error, and thus, to upset the judgment of conviction, a defendant must show prejudice; that is, the defendant must show that counsel's error rendered the proceedings unreliable and fundamentally unfair. In *Lockhart v. Fretwell*,[152] the defendant was convicted of capital felony murder.[153] During the penalty phase, the prosecution relied on two aggregating factors.[154] One of these factors was that the murder was committed for pecuniary gain.[155] Counsel for the defendant failed to object.[156] The defendant was eventually sentenced to death.[157] On appeal, the defendant argued that the state impermissibly relied on the pecuniary gain as an aggravating factor.[158] The Arkansas Supreme Court declined to consider the defendant's assignment of error because trial counsel had failed to object at the sentencing proceeding.[159] The defendant then filed a petition in federal court seeking habeas relief and argued that counsel's failure to object denied him effective assistance of counsel and the opportunity to challenge the state's reliance on one of the aggravating factors.[160] The Court held that because counsel's failure to object did not render the sentencing proceeding unreliable or fundamentally unfair, the defendant was not denied effective assistance of counsel.[161] The Court reasoned that to grant a defendant a new trial where counsel's error did not materially affect the verdict would "grant the defendant a

149. *Id.* at 306-08 (quoting Delaware v. Van Arsdale, 475 U.S. 673, 681 (1986)).

150. *See id.* at 310-12.

151. *See also* Pope v. Netherlands, 113 F.3d 1364, 1371 (4th Cir. 1997) (refusing to reverse a capital murder conviction based on the prosecution's use of perjured testimony).

152. 506 U.S. 364 (1993).

153. *See id.* at 366.

154. *See id.*

155. *See id.*

156. *See id.* at 367.

157. *See id.* at 366.

158. *See id.* at 367.

159. *See id.*

160. *See id.* at 367.

161. *See id.* at 372 (applying Strickland v. Washington, 466 U.S. 688 (1984)).

windfall to which the law does not entitle him."[162] The Court set forth a detailed analysis of why a showing of prejudice was integral to an ineffective assistance of counsel claim, concluding that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective."[163]

The Court reasoned that because the defendant had failed to show that counsel's failure to make the objection upset the adversarial balance, the sentencing proceeding was not rendered unreliable or fundamentally unfair.[164] Accordingly, the defendant was not denied effective assistance of counsel.[165]

The Eleventh Circuit has held that the failure of the trial court to instruct the jury on an essential element of the charged offense reflects a trial error, and thus, the application of the harmless error rule is appropriate. In *United States v. Rogers*,[166] the defendant was charged with the unlawful possession of a machine gun.[167] At trial, the district court failed to instruct the jury on an essential element of the offense.[168] The defendant was convicted and he appealed.[169] The Eleventh Circuit held that the application of the harmless error analysis was appropriate and affirmed.[170] The court acknowledged that "the district court committed an error of a constitutional dimension when it declined to instruct the jury on an essential element,"[171] but rejected the defendant's contention that the failure was per se reversible.[172] The Eleventh Circuit reasoned that the application of the harmless error analysis was appropriate because the defect did not materially affect the verdict.[173] The court explained that:

---

162. *Id.* at 370.

163. *Id.* at 369. In his dissent, Justice Stevens linked the prejudice requirement of the ineffective assistance of counsel claims to the adversarial balance: "Absent competent counsel ready and able to subject the prosecution's case to the crucible of meaningful adversarial testing, there can be no guarantee that the adversarial system will function properly to produce just and reliable results." *Id.* at 377. (Stevens, J., dissenting).

164. *See id.* at 371-72.

165. *See also* United States v. Wilson, 116 F.3d 1066, 1083 (5th Cir. 1997) (finding the admission of a nontestifying defendant's confession violated the Confrontation Clause, but withstood harmless error analysis).

166. 94 F.3d 1519 (11th Cir. 1996), *cert. granted*, 117 S.Ct. 1841 (1997). The Supreme Court subsequently dismissed the writ on the grounds that the record failed to present the question on appeal. *See* Rogers v. United States, 118 S.Ct. 673, 677 (1998).

167. *See Rogers*, 94 F.3d at 1522.

168. *See id.* at 1523.

169. *See id.*

170. *See id.* at 1527.

171. *Id.* at 1524.

172. *See id.* at 1525-26.

173. *See id.* at 1525.

> We would be hard pressed to conclude that incomplete jury instructions exemplify a "structural defect[] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards." Instead, we liken the error before us to other "trial errors which occur 'during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented.'" Of particular relevance here are those cases dealing with the application of harmless error analysis to constitutionally defective jury instructions.[174]

The court then determined that the instructional omission was harmless error because the jury had found certain predicate facts that were so closely related to the omitted element that no rational jury could have found those facts without also finding the element of the offense omitted by the instruction.[175]

In *Sherman v. Smith*,[176] the defendant was convicted in state court in Maryland of killing his mother and adopted father.[177] He was then sentenced to two consecutive terms of life imprisonment by the trial court.[178] The defendant subsequently filed a habeas petition seeking to overturn his conviction on the ground that during the trial, one of the jurors visited the crime scene.[179] The defendant contended that this claim constituted a structural defect in the trial that warranted automatic reversal of his conviction.[180] The Fourth Circuit rejected the defendant's assertion, characterized the claim as trial error, and affirmed his conviction.[181] The court first recognized that structural defects typically affect the entire conduct of the trial and cautioned against an expansive view of structural defects which would allow for per se reversals:

> Correctly applied, harmless error and structural error

---

174. *Id.* (internal citations omitted) (quoting Arizona v. Fulminante, 499 U.S. 279, 309 (1991); Sullivan v. Louisiana, 508 U.S. 275, 281 (1993)); *see also* Peck v. United States, 106 F.3d 450, 457 (2d Cir. 1997) (holding that the failure to instruct the jury of the elements of the offense is harmless error where a rational jury would have found that element from the evidence). In *Arnold v. Evatt*, 113 F.3d 1352 (4th Cir. 1997), the trial court gave the jury an implied malice instruction that unconstitutionally shifted the burden of proof from the prosecution to the defendant. *See id.* at 1356. The Fourth Circuit refused to automatically reverse the conviction and applied the harmless error analysis. *See id.* at 1357. The court then affirmed the conviction after finding that the instruction did not have an injurious effect or influence on the verdict. *See id.*

175. *See id.* at 1526-27.

176. 89 F.3d 1134 (4th Cir. 1996).

177. *See id.* at 1135.

178. *See id.*

179. *See id.* at 1136.

180. *See id.* at 1137.

181. *See id.* at 1142-43.

> analyses produce identical results: unfair convictions are reversed while fair convictions are affirmed. Expanding the list of structural errors, however, is not mere legal abstraction. It can be a dangerous endeavor. There is always the risk that a sometimes-harmless error will be classified as structural, thus resulting in the reversal of criminal convictions obtained pursuant to a fair trial. Given this risk, judges should be wary of prescribing new errors requiring automatic reversal. Indeed, before a court adds a new error to the list of structural errors (and thereby requires the reversal of *every* criminal conviction in which the error occurs), the court must be certain that the error's presence would render *every* such trial unfair.
>
> . . . .
>
> . . . After all, our criminal justice system represents a balance between the rights of accused persons and the need for public safety. This balance is best expressed in the notion of a fair, but not a perfect, criminal trial. When an error is misclassified as one requiring automatic reversal, the balance is upset, and proceedings that in reality are perfectly fair are discarded in the name of an elusive systemic perfection.[182]

The court characterized a juror visit to a crime scene as a "discrete moment[] in the course of an otherwise fair trial."[183] Therefore, because the juror visit did not infect the entire conduct of the trial, the claim did not constitute a structural defect and the application of the harmless error analysis was appropriate.[184]

These cases represent more than a series of evocative vignettes. The decisions in *Johnson*, *Lockhart*, *Rogers* and *Sherman* do not stand for the indurate proposition that the weight and sufficiency of the evidence

---

182. *Id.* at 1138.

183. *Id.*

184. *See id.* at 1138-40.; *see also* United States v. Mackey, 114 F.3d 470, 474 (4th Cir. 1997) (rejecting the per se reversal of a wire fraud conviction where some jurors were permitted to remain to perform research on the evidence after jury deliberations had ended for the day).

In an arresting dissent to *Sherman*, Judge Francis D. Murnaghan, Jr. wrote that, in his view, the claim clearly reflected a structural defect that rendered the trial fundamentally unfair:

> Even if the information gleaned could be called harmless because it did not substantially influence the jury's verdict, the independent investigation undermined the integrity of the trial and thus the jury's decision. The harmful and truly the structural nature of the juror's unauthorized and undisclosed visit to the [crime scene] becomes clear with the realization that [the defendant] was, as a consequence, deprived of his right to cross-examine the undisclosed witness.

See Sherman, 89 F.3d at 1149 (Murnaghan, J., dissenting).

strip a defendant of his right to a fair trial. Rather, the collective precedent furthered in these cases is that the integrity of the criminal process is maintained by judicial restraint and pragmatic maturity that narrowly defines the precinct of structural defects that warrant per se reversal. More particularly, these cases demonstrate the virtue of harmless and plain error review. By reviewing the error in the context of the weight of the evidence of guilt and evaluating whether it caused actual prejudice, unfair convictions are reversed while fair convictions are affirmed. The result is that the correct balance between the rights of the accused and the interest of public safety is maintained, thereby furthering public respect for the integrity of the criminal process.

D. The Application of Plain Error Review to Collateral Judicial Corruption Claims

The Seventh Circuit's decision in *Bracy* presents a studied statement of the two contrasting views on the question of the appropriate standard of review to be applied to a claim of collateral judicial corruption. The majority opinion by Chief Judge Posner asserted that to set aside a conviction, a defendant must show actual prejudice.[185] The dissenting view expressed by Judge Rovner argued that the defendant is entitled to a new trial regardless of actual prejudice because the corrupt practice rendered all of the verdicts presided over by a corrupt judge unreliable and fundamentally unfair.[186] Although Judge Rovner's rationale may provide moral comfort, it overstates the fundamental interest at stake and expresses an excessively overreaching view of the right to a fair trial. Contrary to Judge Rovner's view, requiring actual prejudice is a fair and reasonable application of the law.

> [Plain error review] is essential to preserve the "principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error."[187]

Plain error review, therefore, is particularly appropriate to collateral corruption claims for four reasons. First, prejudice that is merely speculative is insufficient to vacate a criminal conviction amply supported by the evidence. Second, as in ineffective assistance of counsel claims,

---

185. *See* Bracy v. Gramley, 81 F.3d 684, 688 (7th Cir. 1996).

186. *See id.* at 700-03 (Rovner, J., dissenting).

187. Arizona v. Fulminante, 499 U.S. 279, 307-08 (1991) (quoting Delaware v. Van Arsdale, 475 U.S. 673, 681 (1986)).

absent actual prejudice, the adversary balance is not necessarily upset. Third, to overcome direct public safety interests, actual prejudice must be shown. Fourth, reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and furthers public cynicism of the criminal process by unnecessarily institutionalizing impunity—freedom from punishment. Accordingly, to establish plain error, a defendant must demonstrate collateral corruption. Once this is shown, the defendant would need to show actual prejudice—that the collateral corruption deprived him a fair opportunity to present a defense to the charged offense and thus affected the outcome of the criminal proceeding. The sum of these elements involves a determination of whether the proceedings against the defendant resulted in a fair and reliable determination of guilt.

1. Prejudice That is Merely Speculative is Insufficient to Vacate a Criminal Conviction Amply Supported by the Evidence.—Criminal convictions amply supported by the evidence should not be disturbed to vindicate collateral interests. Judge Rovner's view is not terminally discredited. There clearly is value in recognizing certain interests or principles, unrelated to the truth-seeking function of the trial, that trump the public safety interest. The acceptance of a bribe by a trial judge to secure a conviction or an acquittal is one of them. Judicial corruption arising from the actions taken in extrinsic criminal cases, without more, is not. The logical distinction between the two is particularly compelling. In the first instance, it is reasonable to infer that the integrity of the criminal process has been subverted regardless of actual prejudice. In the latter, the prejudice is merely speculative. The defendant must show clear and convincing evidence that the corrupt practice actually deprived him of a fair opportunity to present a defense to the charged offense. Imposing this burden of proof is particularly appropriate when the collateral corruption involves the acceptance of bribes to acquit or otherwise render a favorable judgment for the defendant. This proposition may appear to be uncongenial to some; however, in the balance, upsetting a conviction without a showing of actual prejudice is simply justice in the dark.

2. As in Ineffective Assistance of Counsel Claims, Absent Actual Prejudice, the Adversary Balance is not Necessarily Upset.—There is a direct analogy between collateral judicial corruption claims and ineffective assistance of counsel claims. The focal point of both is the maintenance of the adversary balance. Each claim represents a class of cases that in the extreme, present a fundamental problem meriting treatment as a structural defect. That is, each claim reflects a breakdown or defect in the adversarial process that renders the resulting trial fundamentally unfair and

the verdict suspect. The question then becomes one of degree.

In the context of ineffective assistance of counsel claims, the Supreme Court has recognized a class of cases that do not fall within the precinct of cases warranting automatic reversal. To warrant a new trial in these cases, a defendant must show: (1) deficient performance; and (2) prejudice, meaning that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.[188] Similarly, the class of cases warranting a new trial based on collateral judicial corruption should be distinguished from the precinct of cases involving direct corruption and compelling automatic reversal. In these collateral corruption cases, the defendant must demonstrate: (1) judicial corruption; and (2) prejudice, meaning that the corrupt practice as reflected in the trial court's discretionary rulings upset the adversarial balance between defense and prosecution so as to deny a defendant a fair opportunity to present a defense.

3. To Ensure the Public's Interests in Safety and Judicial Integrity, Actual Prejudice Must be Shown.—Permitting per se new trials based on collateral corruption claims clearly will produce fallout that would be out of proportion to the burden imposed on the public and prosecution. Automatically overturning criminal convictions based on a claim of collateral corruption will have a chilling effect on future judicial corruption prosecutions. If the consequence of a judicial corruption prosecution is to upset hundreds of murder, rape, robbery, and other violent crime convictions, regardless of whether the corrupt practice upset the adversarial balance in the trial under review, then judicial corruption prosecutions will be forfeited in favor of preserving these convictions. The result simply takes the notion of a fair criminal process into a ditch. Alternatively, automatically overturning such convictions would unnecessarily undermine the public's confidence in the criminal justice process, because criminal convictions will be upset without justification, providing a windfall to convicted defendants at the expense of public safety. This will serve only to foster impunity from punishment and public distrust.

4. Impunity from Prosecution.—Upsetting a criminal conviction based solely on collateral corruption is not founded on a conclusion that the criminal process was unfair, that the truth seeking function of the trial was defective, or that the criminal judgment was unreliable. Rather, the justification is a value judgment that vacating the conviction is necessary to maintain public confidence in the integrity of the criminal process. In

188. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

fact, the opposite result is achieved. Vacating a criminal conviction based on collateral corruption without a showing of actual prejudice serves only to create a culture of impunity from punishment. As a consequence, rather than strengthening public confidence in the integrity of the criminal process, this remedy needlessly erodes it.

Impunity from prosecution undermines the legitimacy of the criminal process in two primary ways. First, it generates the most chilling and intimidating sense of fear and despair in the community. Impunity subjects the public to a criminal class prone to banal brutality and who act without remorse or fear. Second, it frustrates the legitimacy of law enforcement by sending a message that brutal behavior will be tolerated. The result is public corruption marked by law enforcement complicity in criminal conduct and extreme law enforcement action devoid of any sense of restraint and accountability. At its full maturity, impunity from punishment creates cities that are rife with abductions, armed robberies, and other street violence, and institutionalizes torture and corruption in the police force.[189]

---

189. This raw criminality is now occurring in Mexico. A recent *New York Times* described the situation there:

> Time and again, civic leaders, human rights groups, newspapers and opposition figures have begged Mexico's President, Ernesto Zedillo, to address the increasing violence. Yet murder after murder remains unsolved. The perpetrators, often boasting of Government protection, go unpunished.
>
> . . . .
>
> . . . There seems to be no will to investigate and solve any crimes. In Mexico City today, less than 2 percent of all crimes committed lead to jail terms. Organized crime, like kidnapping, is flourishing, in some cases carried out by current or former police officers . . . . Bank robberies in Mexico City have increased twelvefold since 1993, and violent street muggings have risen 82 percent since 1994, making Mexico City one of the world's most dangerous cities.

Juan Enriquez, *Why Mexico's Massacre Was No Surprise*, N.Y. TIMES, Dec. 27, 1997, at A33. *See also* Sam Dillon, *Police-Kidnapper Links Seen in Mexico*, N.Y. TIMES, Feb. 10, 1998, at A3 (describing official complicity with kidnappers); Sam Dillon, *5 Freed in Killing of American in Mexico*, N.Y. TIMES, Jan. 6, 1998, at A6; Sam Dillon, *Mexico Editor Hurt In Ambush; His Bodyguard And Gunman Die*, N.Y. TIMES, Nov. 28, 1997, at A6 (describing attack on newspaper editor covering narcotics traffickers); Sam Dillon, *A Toll of 'Disappearances' In Mexico's War On Drugs*, N.Y. TIMES, Oct. 7, 1997, at A1 (describing pattern of abductions and killings of people suspected of being drug traffickers); Julia Preston, *Five Reporters Assaulted In Mexico In Efforts To Intimidate Them*, N.Y. TIMES, Sept. 21, 1997, at A11 (describing attack on five news reporters covering police corruption); Anthony DePalma, *Main Witness In Mexico Drug Scandal Is Shot And Wounded*, N.Y. TIMES, July 28, 1997, at A6 (describing an attack on a principal witness in corruption prosecution of chief of anti-drug forces); Sam Dillon, *Senior Mexican Drug Prosecutor Is Killed By Gunman In Tijuana*, N.Y. TIMES, Jan. 6, 1997, at A3 (reporting assassination of senior prosecutor

E. Distinguishing Direct Corruption Claims From Collateral Corruption Claims: Cartalino v. Washington

One month after the Supreme Court's decision in *Bracy*, the Seventh Circuit applied *Bracy* and distinguished between direct and collateral corruption claims. In *Cartalino v. Washington*,[190] John Cartalino and his codefendant were indicted and charged with murder.[191] They were tried together.[192] Cartalino elected a jury trial, and his codefendant elected a court trial.[193] Cartalino was convicted, and his codefendant was acquitted.[194] After the conviction was affirmed, Cartalino presented evidence that his codefendant had bribed the trial judge.[195] Cartalino filed a habeas petition in federal court seeking a new trial.[196] Unlike Maloney, the trial judge was never prosecuted.[197] However, Cartalino's codefendant admitted that he had bribed the trial judge.[198] Cartalino also showed that the objective of the corrupt practice was to see that Cartalino was convicted of the crime.[199] The district court denied the petition and he appealed.[200]

In a majority opinion written by Chief Judge Posner, the court properly rejected the notion that harmless error review could be applied to a direct corruption claim.[201] The court held that a criminal defendant's right to be tried before an impartial judge "is not subject to the harmless-error rule, so it doesn't matter how powerful the case against the defendant was or whether the judge's bias was manifested in rulings adverse to the defendant."[202] Relying on *Bracy*, the court also seemed to indicate that harmless error review should apply to collateral judicial corruption claims. The court reasoned that:

> [T]he fact that a judge is bribed in some cases does not establish that he was not impartial in others. That a judge who takes bribes to acquit defendants in some cases may have an incentive in others to throw the book at the defendant in order to avoid

---

investigating drug related killings).

190. 122 F.3d 8 (7th Cir. 1997).
191. *See id.* at 9.
192. *See id.*
193. *See id.*
194. *See id.*
195. *See id.*
196. *See id.*
197. *See id.*
198. *See id.*
199. *See id.* at 10.
200. *See id.* at 9.
201. *See id.* at 9-10.
202. *Id.* at 9-10.

> charges of being soft on criminals is not proof that he was not impartial in the criminal cases in which he was not bribed.[203]

The court found that the assertion of a direct intent to see that Cartalino was convicted of the crime, if true, amounted to a direct corruption claim and, thus, bias on the part of the trial judge.[204] The case was therefore remanded for a determination of whether the intent of the bribe was to bring about an acquittal of the codefendant and the conviction of Cartalino.[205] In her concurring opinion, Judge Rovner reiterated her stance in *Bracy* and wrote that a collateral corruption claim taints all convictions and is sufficient to establish actual bias.[206]

F. There Was An Insufficient Factual Basis To Warrant Further Discovery

The Supreme Court's decision to grant Bracy an opportunity to pursue discovery was based on a finding that his trial counsel may have been deliberately appointed to further the corrupt practice.[207] This allegation, which the Court found "not supported by any solid evidence" on the record,[208] coupled with the collateral corruption, was the sole basis for the Court's conclusion that Bracy had shown "good cause" for discovery.[209] The collateral corruption alone was not sufficient to warrant discovery.[210] The Court underscored this point:

> We emphasize, though, that petitioner supports his discovery request by pointing not only to Maloney's conviction for bribetaking in other cases, but also to additional evidence [the deliberate appointment of trial counsel] . . . that lends support to his claim that Maloney was actually biased *in petitioner's own case*.[211]

It follows that absent the Court's finding that the corrupt practice may have been furthered in Bracy's trial with the appointment of trial counsel, Bracy's request for discovery would have been denied. As a result, after sixteen years and six reviews, the conviction and sentence would have become final.

The credibility of the Court's factual finding that there may have

---

203. *See id.* at 10 (internal citations omitted).
204. *See id.*
205. *See id.* at 10-11.
206. *See id.* at 11 (Rovner, J., concurring).
207. *See* Bracy v. Gramley, 520 U.S. 899, 909 (1997).
208. *Id.* at 908.
209. *See id.* at 909.
210. *Id.*
211. *Id.*

been bias in Bracy's trial was impaired because the argument was not advanced in the three years that the assertion was being pressed in federal district or circuit court. In the district court, the defendants' argument regarding possible bias was confined to the compensatory prejudice theory.[212] The defendants repeated the identical contention before the Seventh Circuit.[213] In both arguments, the defendants claimed that the corrupt practice was injected into their trial through the trial judge's discretionary rulings and not through the appointment of trial counsel.[214] Bracy repeated this argument before the Supreme Court.[215] However, the Supreme Court elected not to adopt this argument. Rather, the Court chose to fashion a factual predicate that, according to the Court, suggested that the corrupt practice was furthered in the defendant's trial.[216] If there was ever a suggestion supported by the record that Bracy's trial counsel was appointed deliberately to further the corrupt practice, counsel in the district court and Seventh Circuit would certainly have said so.

The Supreme Court found that trial counsel may have been deliberately appointed to represent the defendant at trial with the understanding that he would not seek a continuance.[217] Although not stated, implicit in this finding is that Bracy was denied effective assistance of counsel and that a continuance would have been material to the verdict. However, the claim of ineffective assistance of counsel was specifically rejected by the Illinois Supreme Court on two occasions. First, on direct appeal, both Bracy and Collins complained that they were denied effective

---

212. *See* United States *ex. rel.* Collins v. Welborn, 868 F. Supp. 950, 990 (N.D. Ill. 1994).

213. *See* Bracy v. Gramley, 81 F.3d 684, 688 (7th Cir. 1996). The failure of the defendants to identify even one discretionary ruling that suggested that the corrupt practice was injected into the trial may have had a strong influence on the Court's decision not to embrace Bracy's theory and to fashion a different factual predicate. The defendant had three years to examine the record that was available. As Judge Rovner pointed out in her dissent:

> [T]here were plenty of issues that implicated Judge Maloney's discretion and thus his ability to influence the case against Bracy and Collins: the credibility questions presented by the [defendants'] motion to suppress key evidence; the bolstering of prosecution witnesses; the collateral impeachment of defense witnesses; improper prosecution argument to the jury; the denial of a continuance prior to the sentencing hearing; and the refusal to sever the sentencing hearings.

Id. at 701 n.3 (Rovner, J., dissenting). All of these decisions could have been relied on by the defendant to support a contention of judicial bias. However, the defendant was not able to point to a single ruling by the trial judge that would suggest that the corrupt practice was furthered in his trial and altered the adversarial balance.

214. *See id.* at 690; *Collins*, 848 F. Supp. at 990.

215. *See Bracy*, 520 U.S. at 905.

216. *See id.* at 906-09.

217. *See id.* at 908.

assistance of counsel.[218] The defendants claimed that trial counsel failed to impeach the accomplice testimony with prior inconsistent statements from the grand jury testimony and that counsel was ineffective when he failed to strike from the jury the wife of a judge who had sentenced Bracy on a prior armed robbery conviction.[219] The Illinois Supreme Court not only rejected these claims, but articulated that trial counsel had mounted a full defense to the charges: "[T]he record indicates that both attorneys were experienced criminal lawyers. They conducted vigorous cross-examination, raised countless objections, adequately presented the alibi defenses, and in all respects sought to protect the interests of their clients."[220]

Second, the defendants essentially repeated the claim in the state postconviction petition.[221] Again, the contention that they were denied effective assistance of counsel was rejected by the Illinois Supreme Court.[222] These finding by the Illinois Supreme Court, which were ignored by the U.S. Supreme Court, do not support the contention that there was a conspiracy to railroad the defendants' conviction through the criminal process.[223]

The Supreme Court also found it significant that trial counsel failed to seek a continuance before trial.[224] Yet, trial counsel made two requests for a continuance prior to sentencing.[225] Both were denied by Maloney.[226] Apparently, the Court believed these requests were not meaningful because they were made presentencing, rather than pretrial.[227] This argument, however, was implicitly rejected by the Illinois Supreme Court when it explained why Maloney did not abuse his discretion in denying the motion for a continuance:

> On appeal the defendants conjecture as to what the trial attorney

---

218. *See* People v. Collins, 478 N.E.2d 267, 282 (Ill. 1985).

219. *See id.*

220. *Id.* at 283.

221. *See* People v. Collins, 606 N.E.2d 1137, 1141 (Ill. 1992).

222. Many of the claims set forth in the defendants' post conviction appeal in connection with their ineffective assistance of counsel claims merely repeated the arguments that were rejected on direct appeal. Accordingly, these claims were barred by res judicata. The defendants failed to support the remaining assertions of ineffective assistance of counsel with any specific acts, failures, or omissions on the part of trial counsel. *See id.* at 1142-43.

223. Ineffective assistance of counsel claims were also pressed in, and subsequently rejected by, the district court, *see* United States *ex. rel.* Collins v. Welborn, 868 F. Supp. 950, 985-86 (N.D. Ill. 1994), and the Seventh Circuit, *see* Bracy v. Gramley, 81 F.3d 684, 691 (7th Cir. 1996).

224. *See* Bracy v. Gramley, 520 U.S. 899, 907-08 (1997).

225. *See id.* at 908 n.10.

226. *See id.*

227. *See id.*

> might have done had they been granted the continuance. However, the defendants do not point to any matters that were not available at the time of the hearing that would have become available had the continuance been granted. The fact that there were other strategies available to the trial attorneys which were not pursued does not mean that the attorneys were unprepared.[228]

Finally, the Supreme Court's factual foundation for the claim of direct bias is further impeached by the reality of the joint trial. Bracy and Collins were tried together.[229] There was no allegation that Collins's trial attorney was appointed in furtherance of the corrupt practice. As a practical consequence, therefore, it is unlikely that the aim of the appointment of Bracy's trial attorney was in furtherance of the corrupt practice. If, as the Supreme Court contends, Bracy's trial counsel was deliberately appointed to ensure a conviction and send a "compensatory message" to the criminal defense bar and the voters, this intrigue was pursued without regard to the outcome of the case against his codefendant. Thus, viewed in context, Maloney apparently failed to fully orchestrate the alleged scheme. Accordingly, it is unlikely that the aim of the appointment of Bracy's trial counsel was in furtherance of the corrupt practice.[230]

IV. Conclusion

Negotiating the turbulence between the right to a fair trial and the interest in ensuring the safety of the community implicates a profound judgment about the way in which the criminal laws should be enforced and justice administered. These are deeply felt matters and are reflected in the select safeguards in place to maintain the adversarial balance between the defense and prosecution.

The right to a fair trial is not a second or third order of concern. A criminal conviction before a trial judge who accepts a bribe to secure a

---

228. People v. Collins, 478 N.E.2d 267, 287 (Ill. 1985).

229. *See id.* at 271.

230. The Court's decision that Bracy had met his threshold burden for discovery is also contrary to its own recent precedent. In *United States v. Armstrong*, 517 U.S. 456 (1996), the Supreme Court considered the showing necessary for a defendant to be entitled to discovery on a claim based on selective prosecution. The Court found that to be entitled to discovery the defendant must produce credible evidence indicating that similarly situated defendants were not prosecuted. *See id.* at 470. Clearly in *Bracy*, the defendant did not produce credible evidence that the corrupt practice was present, furthered, or prejudicial. In fact, the Supreme Court conceded that the attorney appointment conspiracy claim was only a "theory" and not supported by any tangible evidence that the trial lawyer participated in any such plan. *See Bracy*, 520 U.S. at 908.

conviction is extravagantly flawed. Thus, a new trial is warranted regardless of actual prejudice. The reason is that, under these circumstances, the corrupt practice reflects a swollen injustice that upsets the adversarial balance and deprives a defendant of a fair opportunity to present a defense to the charged offense.[231] On the other hand, an otherwise valid criminal conviction before a trial judge who has not accepted a bribe in the case under review, but has accepted bribes in extrinsic or collateral cases does not necessarily represent a structural defect rendering the entire trial process fundamentally unfair. Under these circumstances, the claim of prejudice is speculative.[232] Absent clear and convincing evidence to the contrary, the adjudicative reliability of the proceeding is not presumptively compromised.[233] To hold otherwise would further unravel the public trust in the integrity of the criminal process by unnecessarily upsetting convictions and granting windfalls to defendants. This is simply justice in the dark without regard to consequence. The end result is apt to be a culture of impunity from punishment and greater public cynicism.

The application of plain error review demonstrates the value of fixed objectives. In considering whether to upset a criminal conviction, plain error review takes into account the judge's discretionary rulings in the context of the evidentiary corridor of the case. Accordingly, to warrant a new trial on the ground of collateral judicial corruption, a defendant must show actual prejudice by clear and convincing evidence—that the corrupt practice had an injurious effect on the adversarial balance so as to deprive him of a fair opportunity to present a defense to the charged offense. This showing, coupled with the readily provable collateral corruption, would be sufficient to find that the adjudicative reliability of the criminal trial was

---

231. An acquittal before a trial judge who accepted a bribe to secure a conviction is equally unacceptable and warrants a retrial. Under these circumstances, the adversarial balance has been upset, the prosecution has been denied a fair opportunity to present evidence that the defendant committed the charged offense, and the trial process is rendered fundamentally unfair. Accordingly, the prosecution should be entitled to a new trial where an actual bribe is involved to secure an acquittal. Retrials under these circumstances should not be barred by double jeopardy. The purpose of the Double Jeopardy Clause is to preclude the state from abusing its prosecution powers, not to grant windfalls to a defendant for his own misconduct. *See* People v. Aleman, 667 N.E.2d 615 (Ill. App. Ct. 1996) (permitting retrial after defendant's acquittal procured by bribery of judge), *cert. denied*, 117 S. Ct. 986 (1997).

232. *Compare* Dyer v. Calderon, 151 F.3d 970, 973 n.2 (9th Cir. 1998) ("The presence of a biased juror cannot be harmless error.")

233. A bright line rule that sets a form of "corruption dew point" by comparing the number of collateral bribes to the overall number of criminal cases before the corrupt judge is not appropriate. The issue is not the collateral corruption cases but rather the prejudicial effect of the corrupt practice in the case under review.

fatally compromised and to warrant the reversal of the judgment of conviction.