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New Jersey Goes Its Own Way

The virtues of state law remedies for federal constitutional violations

In *State v. Franklin*, 184 N.J. 516 (2005), a unanimous New Jersey Supreme Court assumed without any explanation that it had the authority to deem a violation of the Sixth Amendment principle announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), per se reversible error. This assumption was significant in two respects. First, a federal court surely would have found the Sixth Amendment violation harmless and denied Franklin a remedy. Second, many state courts assume that they are obligated to deny a remedy if a federal court would do so in identical circumstances. Relying on basic federalism principles, this article explains why state courts are not obligated to obey a federal law of remedies in adjudicating federal constitutional violations and why state courts have every right, as a matter of state law, to remedy a federal constitutional violation that a federal

court would find harmless.

A jury convicted Allan Franklin of passion-provocation manslaughter stemming from the death of his estranged wife's paramour. Although the victim indisputably died from gunshot wounds, the jury acquitted Franklin of all weapons-related offenses with which he was charged, including those alleging possession of a firearm for an unlawful purpose. At a pre-*Apprendi* sentencing hearing, the Law Division applied the extended-term provisions of the Graves Act as written and doubled Franklin's maximum sentence from 10 to 20 years based on its finding, by a preponderance of the evidence, that Franklin had possessed a firearm during the homicide.

After unsuccessfully pursuing his *Apprendi* claim on direct appeal, Franklin filed a Post Conviction Relief petition renewing his Sixth Amendment claim instead of filing an application for a writ of habeas corpus. The Law Division found the claim procedurally barred, and the Appellate Division affirmed. Relying on federal precedent finding *Apprendi* errors amenable to harmless-error review, the Appellate Division concluded, in the alternative, that any Sixth Amendment error was harmless beyond a reasonable doubt given the overwhelming evidence that

Franklin had possessed a firearm.

The New Jersey Supreme Court ultimately granted Franklin's petition for certification. In a unanimous opinion by Justice Barry Albin, the New Jersey Supreme Court found the procedural bar inapplicable and held that the Law Division had, in fact, violated Franklin's Sixth Amendment rights by imposing an extended-term sentence based on judge-made findings under the preponderance standard. Although the Court agreed with the Appellate Division that there was "overwhelming, perhaps indisputable" evidence of Franklin's firearms possession, it disagreed with the Appellate Division's conclusion that the error could be deemed harmless. Citing only to a case decided under the New Jersey Constitution, *State v. Anderson*, 127 N.J. 191 (1992), the Court explained that "[o]n appellate review, we cannot find that the State satisfied an element of an offense that was never presented to the jury." *Franklin*, 184 N.J. at 535.

Although *Franklin* was decided in the context of a collateral attack, the Court's holding now requires all New Jersey courts to treat a violation of the Sixth Amendment's jury trial guaranty as per se reversible on direct appeal as well. States, to be sure, are obligated to afford a defendant remedy on direct appeal unless the state proves that the federal constitutional violation was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1963). But federal precedent almost uniformly holds that *Apprendi* errors are not per se reversible and, instead,

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are amenable to *Chapman*-style harmless-error analysis. See, e.g., *United States v. Henry*, 282 F.3d 242, 2251-51 (3d Cir. 2002) (“we have previously concluded that an *Apprendi* error is not a structural defect, but instead, is subject to harmless...error analysis”) (citing *Neder v. United States*, 527 U.S. 1 (1999) (finding Sixth Amendment violation harmless beyond a reasonable doubt because evidence of omitted element was overwhelming and largely undisputed)).

Some state courts, to be sure, have recently held that *Apprendi* errors are indeed structural as a matter of Sixth Amendment law. See, e.g., *State v. Allen*, 615 S.E.2d 256, 266-72 (N.C. 2005) (citing *State v. Hughes*, 110 P.3d 192, 204-08 (Wash. 2005)) (both noting that *Neder* is inapplicable to *Apprendi* errors). But it is difficult to imagine that our Supreme Court rested its judgment on such an important Sixth Amendment holding without saying so explicitly. This is especially so given that the parties and their amici explicitly addressed this issue (including the applicability of *Hughes* and *Allen*) in their briefing.

Since it is unlikely that the decision to afford *Franklin* a remedy rested on federal-law grounds, *Franklin* implicitly assumed that a state court may deem a federal constitutional error “structural” as a matter of state law and afford a remedy without any analysis of prejudice even though federal precedent almost uniformly holds that the violation in question is not structural and, instead, amenable to review under *Chapman*’s harmless-beyond-a-reasonable-doubt standard. The Illinois Supreme Court, by contrast, has held (also implicitly) that state courts are obligated to obey federal precedent holding that *Apprendi* errors are amenable to harmless-error review. *People v. Thurow*, 786 N.E.2d 1019 (Ill. 2003) (“the decision in *Neder* says what it says, and absent a Supreme Court holding to the contrary, we are bound to follow *Neder*”). Obviously, *Franklin* and *Thurow* cannot peaceably coexist. As it turns out, *Franklin* got it right.

Thurow appears to rely on the following syllogism: (1) *Chapman* oblig-

ates both state and federal prosecutors to prove that a federal constitutional violation was harmless beyond a reasonable doubt to avoid a reversal; (2) the U.S. Supreme Court in *Neder* applied *Chapman* to a Sixth Amendment violation and denied the defendant a remedy; (3) therefore, state courts are obligated (perhaps by the Supremacy Clause) to deny a remedy whenever a state prosecutor can prove that a Sixth Amendment error was harmless beyond a reasonable doubt. There are two critical (albeit understandable) flaws in the foregoing syllogism.

First, it incorrectly assumes that *Chapman* not only sets a “floor” for remedying federal constitutional errors, but also imposes a ceiling. Second, and relatedly, the syllogism incorrectly assumes that a state court’s power to remedy a federal constitutional violation derives from federal, not state, law. The confusion producing both of these flawed assumptions is understandable, and flows in large part from *Chapman* itself. As my friend Professor Coombs has argued convincingly in his most recent article, it is difficult to understand how *Chapman* could have dictated a particular standard of review to state appellate courts when states are not constitutionally obligated to afford defendants with any direct review of their criminal convictions. Russell M. Coombs, “A Third Parallel Primrose Path: The Supreme Court’s Repeated, Unexplained, and Still Growing Regulation of State Courts’ Criminal Appeals,” 2005 Mich. State L. Rev. 541, 590-96 (2005).

But regardless of whether *Chapman* was wrongly decided, the Supreme Court has never suggested that its power to require state courts to afford a remedy when the state cannot satisfy the *Chapman* standard implies the power to require state courts to deny a remedy whenever a state can satisfy the *Chapman* standard, and with good reason. State law creates the state courts, and state laws or court rules provide defendants with the right to litigate federal constitutional challenges, either on direct review or collateral attack.

Thus, although *Chapman* provides a minimum harmless-error standard below which state appellate courts may not deviate, state courts are and should be perfectly free to remedy federal constitutional violations regardless of whether a federal court, applying *Chapman*, would do so.

Franklin provides a useful illustration. The rules governing Post Conviction Relief provide that a claim is “cognizable” if based on any of four listed grounds, including “[s]ubstantial denial in the conviction proceedings of defendant’s rights under the Constitution of the United States[.]” R. 3:22-2(a). Because the rules do not define the term “substantial denial,” it is up to the New Jersey courts to determine when a “denial” is sufficiently “substantial” to require a remedy. The Appellate Division concluded that the Sixth Amendment violation that produced *Franklin*’s extended-term sentence was not sufficiently substantial by resorting to federal-court precedent holding that *Apprendi* errors can be considered harmless if the evidence of the omitted sentence-enhancing fact is overwhelming or undisputed. Our Supreme Court, however, invoked its own precedent holding that violations of the jury trial guaranty are per se reversible error, easily meeting the “substantial denial” standard set out in R. 3:22-2(a). In so doing, the Court implicitly (but correctly) recognized that state law ultimately controlled the question whether *Franklin* was entitled to remedy.

The Allan *Franklin* story has two morals. First, settled federalism principles make it perfectly appropriate for state courts to depart from federal precedent by deeming a Sixth Amendment violation per se reversible as a matter of state law. The only consequence of that departure in *Franklin* was the reduction of a state-court sentence that a federal court would not have disturbed. Reasonable people may question the New Jersey Supreme Court’s decision to afford *Franklin* a remedy, but the more important lesson is that nothing in the federal Constitution required the New Jersey

Supreme Court to deny Franklin a remedy merely because a federal court, adjudicating an identical claim under identical facts, would have found the Sixth Amendment violation harmless.

Second, if this article is correct that the Supreme Court in *Franklin* invoked its prerogative, under state law, to afford Franklin a remedy that the federal Constitution did not require, the Court ran an extraordinary risk when it failed

to say so explicitly. Since 1983, the U.S. Supreme Court has undermined state sovereignty by presuming that ambiguous state-court judgments rest on federal-law grounds. *Michigan v. Long*, 463 U.S. 1032 (1983). Thus, the New Jersey Attorney General conceivably could have sought a writ of certiorari on the ground that that the New Jersey Supreme Court erroneously concluded that the Sixth Amendment compelled it

afford Franklin a remedy. Had our Supreme Court made clear that its decision rested on the state law of remedies, the U.S. Supreme Court would have lacked jurisdiction to review the judgment. See *State v. Stanton*, 176 N.J. 75, 118 (2003) (Albin, J. dissenting) (“we are not bound to take bad advice, and when our state’s interests are not advanced by federal precedent, we must go our own way.”). ■