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Blowing Away the Smoke: Revealing the Harm in *State v. Gaddis*'s Harmless Error Analysis*

For over fifty years, indigent defendants have had a due process right to a free transcript of previous court proceedings if they show that (1) such a transcript would help in their current trial or appeal, and (2) no available alternatives exist. Can a court deny a defendant's request for a transcript with no discussion of either of these factors? In State v. Gaddis*, the Supreme Court of North Carolina said yes—at least so long as the State presented "overwhelming evidence of guilt," such that the erroneous transcript denial was "harmless." This Recent Development argues that such a maneuver cheapens not only the right to a transcript, but the notion of a fair trial itself. It suggests that courts should instead treat erroneous denial of a transcript as structural error.*

INTRODUCTION

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[1] This oft-repeated phrase provides the rationale underlying indigent criminal defendants' entitlement to a transcript of their previous trial.[2] First articulated in *Griffin v. Illinois*,[3] this right was grounded in principles of fairness and equal justice under the law running as far back as the Magna Carta.[4] A transcript can so significantly affect a defendant's ability to mount an actual defense that the *Griffin* Court placed the right to a transcript in the same company as the rights to notice, hearing, and assistance of counsel.[5] So at what point can a right so steeped in our fundamental principles of fairness be cast aside in favor of judicial efficiency? The harmless error doctrine provides a deceptively simple, yet ultimately unsatisfactory answer: at the point when the State presents "overwhelming evidence of guilt."[6]

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1. Griffin v. Illinois, 351 U.S. 12, 19 (1956).
2. *See id.* at 18–19.
3. 351 U.S. 12 (1956). *Griffin* specifically discussed the right to a transcript in the context of preparing for appeal, *see id.* at 18–19, but later cases expanded it to cover transcripts of previous mistrials, *see, e.g.*, Britt v. North Carolina, 404 U.S. 226, 227 (1971).
4. *See Griffin*, 351 U.S. at 16–17.
5. *See id.* at 17–19.
6. *See, e.g.*, State v. Gaddis, 382 N.C. 248, 253, 876 S.E.2d 379, 383 (2022) (quoting State v. Bunch, 363 N.C. 841, 845–46, 689 S.E.2d 866, 869 (2010)).

In *State v. Gaddis*,[7] an indigent defendant sought, and was denied, a free copy of the transcript of his previous mistrial.[8] The Supreme Court of North Carolina was called to answer whether the trial court erred in denying his request.[9] Though the trial court failed to conduct an analysis under *Britt v. North Carolina*,[10] a well-established test that determines whether providing a transcript is necessary,[11] the *Gaddis* court did not reach that issue.[12] Instead, it held that the trial court's failure to provide a free trial transcript, even if erroneous, was not prejudicial in light of the "overwhelming evidence of [the] defendant's guilt."[13] This Recent Development will discuss how *Gaddis* highlights the difficulty with applying the "overwhelming evidence" standard in situations that directly implicate criminal defendants' ability to present their cases and develop evidentiary records, and how doing so co-opts the role of the jury in evaluating the reliability of evidence.

Part I will discuss the background and relevant facts of *Gaddis*. Part II will discuss two competing theories of the harmless error doctrine, and Part III will discuss the ramifications of the "overwhelming evidence" standard on the rights of criminal defendants. Finally, Part IV will argue that courts should refrain from applying the harmless error doctrine to erroneous denials of trial transcripts.

I. BACKGROUND OF *STATE V. GADDIS*

Richard Gaddis was charged with, among other things, driving while impaired.[14] The State of North Carolina's case against him relied on eyewitness testimony by civilians and police placing him in the driver's seat of an erratically driven truck, a blood alcohol test result over the legal limit, and recorded footage of Gaddis claiming he owned the truck and was driving it.[15] Gaddis did not contest that he was intoxicated when he was found; rather, the critical issue at trial was whether he had been driving the vehicle he was found in.[16] The first

7. 382 N.C. 248, 876 S.E.2d 379 (2022).

8. *Id.* at 249–50, 876 S.E.2d at 380.

9. *Id.* at 249, 876 S.E.2d at 380.

10. 404 U.S. 226 (1971).

11. *Id.* at 227 (holding that whether an indigent defendant has a "claim of right to a free transcript," depends on "(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript").

12. *See Gaddis*, 382 N.C. at 251–52, 876 S.E.2d at 381–82.

13. *Id.* at 254–55, 876 S.E.2d at 383.

14. *Id.* at 249, 876 S.E.2d at 380. Gaddis was also charged with "driving while his license was revoked for an impaired driving offense, driving without a valid registration, and driving without a displayed license plate." *Id.* All of his charges were dependent on his having driven the vehicle in question. *See id.*

15. *Id.* at 250–51, 876 S.E.2d at 380–81.

16. *Id.* at 262, 876 S.E.2d at 388 (Earls, J., dissenting).

case resulted in a mistrial due to a hung jury.[17] Before the second trial, Gaddis's court-appointed counsel from the first trial withdrew.[18] The trial court appointed a new attorney.[19] The same prosecutor tried both cases.[20]

In preparation for the new trial, Gaddis requested a copy of the trial transcript.[21] Under the test established in *Britt*, if he showed the transcript was "needed for an effective defense," he was entitled to a free copy as a result of his indigency.[22]

Gaddis argued that a transcript was needed so his new counsel could prepare for and address the State's eyewitness testimony.[23] Unlike the prosecutor, Gaddis's attorney was not present for the first trial.[24] Without the transcript, he had no reliable way to know how the State's witnesses would testify, nor could he "stick them to" statements they made at the first trial.[25] This was particularly important for the State's two civilian witnesses, who were the only sources of direct evidence that Gaddis was driving the vehicle in question.[26] In the first trial, one civilian witness was allegedly unable to discern the number, race, gender, or identity of the people in the truck.[27] The other civilian allegedly saw Gaddis in the driver's seat, but never saw him driving.[28] Gaddis also argued that a transcript was necessary to alleviate the State's information advantage, since the prosecutor could adjust their strategy based on information from the first case.[29]

The trial court summarily denied Gaddis's request for a transcript, and "[n]either the record nor the transcript of the subsequent proceedings

17. *Id.* at 249, 876 S.E.2d at 380 (majority opinion).

18. *Id.*

19. *Id.*

20. *Id.* at 257, 876 S.E.2d at 385 (Earls, J., dissenting).

21. *Id.* at 249–50, 876 S.E.2d at 380 (majority opinion).

22. Britt v. North Carolina, 404 U.S. 226, 227 (1971). In determining whether a transcript is needed, courts consider "(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript." *Id.*; *see also* State v. Matthews, 295 N.C. 265, 289, 245 S.E.2d 727, 741 (1978). Whether the outcome of *Gaddis* would differ had the trial court correctly applied *Britt* is outside the scope of this Recent Development. The focus of this piece is on the implications of using the harmless error doctrine to determine that the transcript was not necessary for a fair trial.

23. *Gaddis*, 382 N.C. at 251–52, 876 S.E.2d at 381.

24. *See id.* at 249, 876 S.E.2d at 380. Moreover, Gaddis's new lawyer "did not even know he had been appointed as Gaddis's defense counsel until two weeks before the new trial." *Id.* at 262, 876 S.E.2d at 388 (Earls, J., dissenting).

25. *Id.* at 257, 876 S.E.2d at 385.

26. *Id.* at 250–51, 876 S.E.2d at 380–81 (majority opinion).

27. *Id.* at 260, 876 S.E.2d at 386 (Earls, J., dissenting).

28. *Id.* This witness did testify that Gaddis was "on the accelerator trying to get out of the ditch" when they approached him, *id.*, although neither the majority nor the dissent made much of that facet of his testimony.

29. *Id.* at 257–58, 262–63, 876 S.E.2d at 385, 388.

indicate[d] that the trial court considered the *Britt* test."[30] Though Gaddis attempted to emphasize the discrepancies in the eyewitness testimony, he was forced to call his lawyer from the first trial to the stand as an impeachment witness, with little success.[31] Gaddis was convicted of all charges at the second trial.[32]

Under North Carolina law, a violation of a defendant's constitutional right is considered "prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt."[33] The Supreme Court of North Carolina interpreted this provision to mean that "the presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt."[34] The court then concluded that the evidence against Gaddis was so overwhelming that any error that may have occurred due to the trial court denying him a transcript was harmless.[35] The court held that even if Gaddis had a transcript, his potential ability to impeach the State's witnesses would not outweigh the failed blood alcohol test coupled with the video evidence of his admission.[36] The court conclusively stated that even if Gaddis had been given the transcript and been able to contest the witnesses' testimony with everything at his disposal, "the jury verdict would have been the same."[37] In so doing, the court plucked from the jury any power to determine the weight and credibility of the evidence presented at trial.

II. COMPETING THEORIES OF HARMLESS ERROR

Scholarship about when a constitutional error can be said to be "harmless" tends to break down into two rough theories: (1) the "effect on the jury" theory,

30. *Id.* at 253, 876 S.E.2d at 382 (majority opinion).

31. *See id.* at 263–64, 876 S.E.2d at 388–89 (Earls, J., dissenting) (explaining that testimony from Gaddis's former counsel "was not equivalent to a transcript" because "[t]he prosecutor convincingly argued that [she], like all people, was susceptible to bias and the limits of memory"). Distressingly, this forced reliance upon the fallible memory of counsel—or other substandard substitutes for a transcript—is exactly what the Court rejected in *Britt* when it articulated the test the trial court here ignored. *See* Britt v. North Carolina, 404 U.S. 226, 229 (1971) ("We have repeatedly rejected the suggestion that in order to render effective assistance, counsel must have a perfect memory or keep exhaustive notes of the testimony given at trial. Moreover, we doubt that it would suffice to provide the defendant with limited access to the court reporter during the course of the second trial.").

32. *Gaddis*, 382 N.C. at 251, 876 S.E.2d at 381.

33. N.C. GEN. STAT. § 15A-1443(b) (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the Gen. Assemb.).

34. *Gaddis*, 382 N.C. at 253, 876 S.E.2d at 383 (quoting State v. Bunch, 363 N.C. 841, 845–46, 689 S.E.2d 866, 869 (2010) (cleaned up)).

35. *Id.* at 254, 876 S.E.2d at 383.

36. *See id.* ("Even if defendant had the transcript of the prior trial . . . there still existed overwhelming evidence of defendant's guilt.").

37. *See id.* (quoting State v. Lawrence, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012)).

and (2) the "overwhelming evidence" theory.[38] The "effect on the jury" theory focuses on the nature and significance of the error itself within the context of the trial.[39] Under this theory, an error is only harmless if it did not contribute to the jury's deliberations and eventual verdict.[40] The "overwhelming evidence" theory focuses more on the other evidence admitted at trial.[41] Under this theory, if the evidence untainted by error would "all but compel . . . a guilty verdict" from any jury, even one which had the error occur before it, the error is harmless.[42]

In practice, this distinction is not so cut and dry. These theories have considerable overlap, and courts are rarely clear and consistent about which one they are applying. Some courts even use a hybrid of the two approaches.[43] The hybrid approach uses the presence of "overwhelming evidence" to support an inference that the jury, presumptively behaving rationally, was unaffected by any procedural defects when it reached its verdict.[44] No matter what theory a court applies, it must determine that an error was harmless "beyond a reasonable doubt."[45]

In *Neder v. United States*,[46] the Supreme Court came down—albeit narrowly—on the side of the "overwhelming evidence" theory.[47] North Carolina courts, while occasionally discussing things in terms of the "effect on the jury," have done the same.[48] The following cases are illustrative of the practice.

In *State v. Bunch*,[49] the Supreme Court of North Carolina applied the above-described hybrid of the two harmless error theories.[50] The trial court in

38. *See* Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 KAN. L. REV. 309, 318–19 (2002) (discussing competing theories of harmlessness with respect to erroneously admitted evidence).

39. *See id.* at 318.

40. *See id.*

41. *See id.* at 319.

42. *See id.*

43. *See id.* at 332 ("[T]he conceptual overlap between effect on the jury and overwhelming evidence . . . makes it relatively easy to elide from one test to the other.").

44. *See id.* at 328–29.

45. *See* Neder v. United States, 527 U.S. 1, 15–16 (1999).

46. 527 U.S. 1 (1999).

47. *See id.* at 17–18; Cooper, *supra* note 38, at 333 ("[T]he overwhelming evidence standard for harmless error has won a clear, if narrow, victory.").

48. *See, e.g.*, State v. Bunch, 363 N.C. 841, 845, 689 S.E.2d 866, 869 (2010) (citing *Neder*, 527 U.S. at 19); State v. Autry, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988) ("[T]his Court has held that the presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." (citing State v. Brown, 306 N.C. 151, 164, 293 S.E.2d 569, 578 (1982))).

49. 363 N.C. 841, 689 S.E.2d 866 (2010).

50. *See id.* at 844–49, 689 S.E.2d at 869–71 ("[H]armless error analysis under *Neder* is twofold: (1) if the element is uncontested and supported by overwhelming evidence, then the error is harmless, but (2) if the element is contested and the party seeking retrial has raised sufficient evidence to support a contrary finding, the error is not harmless.").

Bunch deviated from the pattern instructions for felony murder and failed to instruct the jury that in order to convict it must find that (1) "the defendant killed the victim with a deadly weapon," and (2) the "defendant's act was a proximate cause of the victim's death."[51] However, largely uncontroverted testimony by codefendants and surviving victims placed the defendant at the scene of the crime and identified him as the person who shot the deceased victim.[52] The court held that the evidence proving the omitted elements was so strong as to "forestall[] any notion that [their] omission contributed to [the] defendant's conviction."[53]

In *State v. Kitchen*,[54] the North Carolina Court of Appeals applied the "overwhelming evidence" standard outright.[55] The defendant there was convicted of driving while impaired and argued that the trial court erred "by denying his motion to suppress his medical records, which contained his blood alcohol concentration level" and was allegedly obtained in violation of the Fourth Amendment.[56] Uncontested evidence of the defendant's intoxication included multiple field sobriety tests, a positive breathalyzer sample, and testimony from police officers trained in identifying intoxication who observed the defendant on the night of his offense.[57] The court did not discuss whether the jury in this case may have actually been influenced by the admission of the records.[58] Instead, the court found no prejudicial error, concluding that the copious evidence of the defendant's intoxication was strong enough to permit a jury to convict under state law[59] even if his medical records showing intoxication had been suppressed.[60]

51. *Id.* at 846 & n.1, 689 S.E.2d at 869–70 & n.1 (quoting 1 N.C.P.I. Crim. 206.14 (Apr. 2003)).

52. *Id.* at 848–49, 689 S.E.2d at 871.

53. *Id.* at 849, 689 S.E.2d at 871. The defendant presented evidence to controvert this testimony, but the court considered it "insubstantial at best." *Id.* at 848–49, 689 S.E.2d at 871. The defendant's theory of the case seemed to be premised primarily on his not being at the scene of the crime at all. *See id.* at 849, 689 S.E.2d at 871. As such, the contested facts had little to do with the particulars of either element omitted from the jury instructions (killing victim with a deadly weapon and proximate causation of victim's death). That said, the *Bunch* court did not actually draw that distinction, instead focusing largely on the strength of the State's case relative to the defendant's. *See id.* at 848–49, 689 S.E.2d at 871.

54. 283 N.C. App. 282, 872 S.E.2d 580 (2022).

55. *See id.* at 292, 872 S.E.2d at 587.

56. *Id.*

57. *Id.* at 293–94, 872 S.E.2d at 588.

58. *See id.* at 294–95, 872 S.E.2d at 587–88.

59. The relevant state law in this case, N.C. GEN. STAT. § 20-138.1 (2020), allowed a determination of impairment to be made without showing a blood alcohol test. *Kitchen*, 283 N.C. App. at 293, 872 S.E.2d at 587–88 (citing State v. Perry, 254 N.C. App. 202, 209, 802 S.E.2d 566, 572 (2017)). The opinion of a trained police officer was "sufficient evidence of a defendant's impairment" so long as the officer's determination was "not based solely on the odor of alcohol." *Id.* at 293, 872 S.E.2d at 588 (quoting *Perry*, 254 N.C. App. at 209, 802 S.E.2d at 572).

60. *Kitchen*, 283 N.C. App. at 295, 872 S.E.2d at 588.

Bunch and *Kitchen* demonstrate typical applications of harmless error analysis. Though the language courts use to indicate applying one theory over another is often malleable, what courts ultimately do is take a close look at the evidence in the context of the trial and ostensibly use a combination of logic and common sense to reach a conclusion about whether the defendant would have been found guilty had the law been followed to the letter in their trial.

III. PROBLEMS WITH THE HARMLESS ERROR DOCTRINE

Both approaches to harmless error are subject to dangerous pitfalls. The "effect on the jury" standard requires an appellate court to simulate a jury—either the particular jury in a given case or a hypothetical "reasonable jury."[61] This presents, in essence, a near-impossible counterfactual problem: How can an appellate court, which lacks knowledge of the particular jury and whose only exposure to the evidence presented at trial is the cold record on appeal, be certain beyond a reasonable doubt what evidence did or did not affect the jury's determination?[62]

The problems presented by the "overwhelming evidence" standard are sharper still. Under this standard, the question of harmlessness cannot truly be related to the deliberations of a jury at all—under even the best of circumstances, it amounts to an appellate court coming to its own determination about the implications and weight of the evidence and the correct outcome of the trial.[63] If a court concludes that an error is harmless in light of the overwhelming weight of the evidence, such that all the other evidence presented was enough to establish guilt beyond a reasonable doubt, there is little to distinguish its conclusion from anything other than a determination of guilt based on the evidence.[64]

This once again implicates practical concerns, given that an appellate court is far removed from the actual presentation of the evidence it must weigh. But worse still, the "overwhelming evidence" theory approach raises constitutional problems. The role of determining guilt in criminal trials belongs unambiguously to the jury (or more generally, the finder of fact), not the

61. *See* Cooper, *supra* note 38, at 329–32 (questioning whether appellate courts are well-equipped to simulate the decision-making processes of juries, whether particular or in the aggregate).

62. *See id.* at 329–30.

63. *See id.* at 335–39 (citing Neder v. United States, 527 U.S. 1, 31–32, 37 (1999) (Scalia, J., dissenting)) (arguing that for both evidentiary errors and erroneous jury instructions, a finding of harmlessness based on "overwhelming evidence" collapses into something akin to a directed verdict in favor of the government); *see also* State v. Bunch, 363 N.C. 841, 852, 689 S.E.2d 866, 873 (2010) (Edmunds, J., concurring in part and dissenting in part) ("[W]hen erroneous and incomplete instructions have left an unguided, unchecked, and aroused jury to its own devices, mere strength of evidence provides an inadequate basis for a reliable verdict. If it did, we could dispense with the formality of trials.").

64. *See* Cooper, *supra* note 38, at 339.

court.[65] One could argue that harmless error review of this sort is appropriate when an appellate court is "*confirming* [a] jury's verdict"[66] rather than "*making a judgment that the jury has never made*."[67] But a rule like this just obscures what is happening when a court applies the "overwhelming evidence" standard. The court is weighing the evidence, without regard for what weight the jury in the case, or any hypothetical jury, would or even could have given it.

The majority opinion in *Gaddis* puts this problem with the "overwhelming evidence" standard in stark relief. The opinion itself provides little actual legal analysis on issues relevant to the holding.[68] It merely states the rule, restates the facts that support the State's case, and concludes that said case was so strong that "any error was harmless beyond a reasonable doubt."[69] Aside from repeated conclusory statements, the court did not provide any reason for *why* this evidence should be so overwhelming as a matter of law, especially as it concerns the factual question at the heart of the case—whether Gaddis was driving the truck.[70] Nor did it address the fact that as strong as the evidence on that factor may have been, it was not enough to convict in the first trial.[71] The majority opinion also ignored factual inconsistencies in other pieces of evidence it treated as unambiguously favorable to the State's case, such as Gaddis's supposed "admission" recorded by police officers.[72] At the same time, it brushed off the

65. *Neder*, 527 U.S. at 32 (Scalia, J., dissenting) ("[*T*]*he Constitution does not trust judges to make determinations of criminal guilt*."); *see* U.S. CONST. amend. VI; Rose v. Clark, 478 U.S. 570, 578 (1986) (holding that a directed verdict by a trial court would never be a harmless error because of the Sixth Amendment's "clear command to afford jury trials in serious criminal cases" (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968))).

66. *Neder*, 527 U.S. at 38 (Scalia, J., dissenting). Under Justice Scalia's distinction, this would be a case where a jury has viewed improper evidence but has been properly instructed on the elements of a crime, as opposed to a case where a jury has not been instructed on an element of a crime, and therefore cannot be said to have considered it.

67. *Id.*

68. The majority did devote some time to a discussion of the standard under which a denial of a transcript should be analyzed, but this is best understood as dicta; the court never reached the issue of whether the trial court's denial was proper, dismissing the error as harmless instead. *See* State v. Gaddis, 382 N.C. 248, 252–53, 876 S.E.2d 379, 382 (2022).

69. *Id.* at 254, 876 S.E.2d at 383.

70. *See id.* In fact, much of the evidence the court cited to support its balancing of the evidence, such as Gaddis's conduct after the crash, the observations and recordings made by police officers, and the blood alcohol test, *see id.*, had little bearing on whether Gaddis was driving the truck.

71. *See id.* at 256, 876 S.E.2d at 384 (Earls, J., dissenting).

72. *Compare id.* at 254, 876 S.E.2d at 383 (majority opinion) ("[Gaddis] admitted that he was the driver of the vehicle when it was wrecked."), *with id.* at 264, 876 S.E.2d at 389 (Earls, J., dissenting) ("[T]he trial court . . . refused to instruct the jury that Gaddis's comment was an admission of guilt. The majority's finding to the contrary is a dramatic overreading.").

potential impact of a transcript on Gaddis's ability to make his case or the value of any potential impeachment.[73]

Courts across the country have considered a transcript of a previous mistrial a "reasonably necessary" tool for an effective defense.[74] For any case, a mistrial transcript is plainly useful "as a discovery device in preparation for trial[] and as a tool at the trial itself for the impeachment of prosecution witnesses."[75] Furthermore, an accessible transcript prevents counsel from needing to "have a perfect memory or keep exhaustive notes" of every court appearance in order to render effective assistance.[76] Moreover, the entitlement to a transcript, unlike other procedural rights, has direct material impacts on a defendant's ability to present their case.[77]

Despite the recognized value of a transcript, the *Gaddis* majority's analysis of the evidence largely discounted any impeachment Gaddis was able to achieve or otherwise might have achieved had he been granted a transcript.[78] It similarly did not address the value a transcript might have provided to Gaddis's new lawyer in the trial preparation phase or how that could have affected the overall balance of the evidence.[79] By declaring that the State's case, irrespective of Gaddis's diminished ability to contest the eyewitness testimony, was sufficient to show guilt beyond a reasonable doubt, the court placed its own interpretation of the facts above that of not just the jury in the case, but *any* jury who could have heard the case and weighed the evidence another way.

73. *See id.* at 254, 876 S.E.2d at 383 (majority opinion) ("Although able to impeach Porcello's testimony . . . , [Gaddis's former lawyer] could not, and did not, impeach Daniel's testimony. There is no indication that Daniel made any inconsistent statements."). The majority conflated, without justification, Gaddis's attempt to impeach Porcello using testimony by his previous lawyer with a hypothetical impeachment via trial transcript. *See id.* at 263–64, 876 S.E.2d at 388–89 (Earls, J., dissenting) (explaining that testimony from Gaddis's former counsel "was not equivalent to a transcript" because "[t]he prosecutor convincingly argued that [she], like all people, was susceptible to bias and the limits of memory").

74. *See* United States v. Rosales-Lopez, 617 F.2d 1349, 1355–56 (9th Cir. 1980) (collecting cases), *aff'd*, 451 U.S. 182 (1981).

75. Britt v. North Carolina, 404 U.S. 226, 228 (1971).

76. *Id.* at 229.

77. To appreciate this distinction, compare the right to a transcript with the right of a defendant to be present in the courtroom. *See, e.g.*, Rushen v. Spain, 464 U.S. 114, 117 (1983) (recognizing a fundamental right to "personal presence at all critical stages of [a] trial"). Though each is important, the availability of a transcript can dramatically change the effectiveness of one litigation strategy over another, whereas the presence or absence of the defendant will likely not affect the conduct of their counsel or their ability to present evidence.

78. *See Gaddis*, 382 N.C. at 254, 876 S.E.2d at 383. The court also did not distinguish between the evidence of defendant's drunkenness and the evidence of him driving the truck, treating them as equally incontrovertible even though the latter was clearly contested at trial, and would have been further contested had defendant's right to a transcript not been violated. *Compare id.* ("[D]efendant admitted that he was the driver of the vehicle when it was wrecked."), *with id.* at 264, 876 S.E.2d at 389 (Earls, J., dissenting) ("[T]he trial court . . . refused to instruct the jury that Gaddis's comment was an admission of guilt. The majority's finding to the contrary is a dramatic overreading.").

79. *See id.* at 254, 876 S.E.2d at 383 (majority opinion).

All this is not to say that *Gaddis* misapplied the precedent. Using "overwhelming evidence" of guilt to determine harmless error has clear roots in the case law, both in North Carolina[80] and at the federal level.[81] Instead, by concluding that no rational jury could fail to convict on the evidence provided, even when one did just that a few months prior,[82] the *Gaddis* court revealed the hollowness in the *Neder* majority's promise that "a reviewing court making this harmless-error inquiry does not . . . 'become in effect a second jury.'"[83]

IV. STRUCTURAL ERROR

In light of the problems caused by applying the harmless error doctrine in cases like *Gaddis*, erroneous denials of a trial transcript to an indigent defendant should be considered structural error. Structural errors are those for which harmless error analysis is categorically impossible and inappropriate.[84] In North Carolina, structural errors are reversible per se.[85]

This approach is helpful because it addresses the problems raised by the *Gaddis* decision while not sweeping so broad as to cast aside the practice of harmless error analysis generally. Despite its issues, the harmless error doctrine is still useful. It ensures that the occasional insignificant misstep by a court does not necessitate a whole new trial. After all, the machine of justice is built and operated by humans. Mistakes will happen. "The harmless-error doctrine recognizes that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence."[86] This purpose would be frustrated if every trivial mistake, even those which had little or no bearing on the culpability of the defendant, led to a dismissal or mistrial. Regardless of what happened at Gaddis's trial, nobody wants to share the road with the person driving that truck.

Moreover, justice can only be effectively served when the courts run efficiently. In North Carolina, cases are backed up in the tens of thousands, and there are hardly enough attorneys to try them.[87] This backup causes further problems down the line, as many defendants languish in pretrial detention (at

80. *See, e.g.*, State v. Bunch, 363 N.C. 841, 845–48, 689 S.E.2d 866, 869–71 (2010) (discussing the "overwhelming evidence that the defendant caused the victim's death").

81. Neder v. United States, 527 U.S. 1, 17–19 (1999).

82. *See Gaddis*, 382 N.C. at 249, 254, 876 S.E.2d at 380, 383.

83. *Neder*, 527 U.S. at 19 (quoting ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 21 (Ohio State Univ. Press 1970)).

84. *See* Arizona v. Fulminante, 499 U.S. 279, 309 (1991) ("These are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards.").

85. State v. Garcia, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004).

86. *Gaddis*, 382 N.C. at 253, 876 S.E.2d at 383 (quoting State v. Malachi, 371 N.C. 719, 734, 821 S.E.2d 407, 418 (2018)).

87. *See* Sarah Nagem, *A Low Bar*, ASSEMBLY (Sept. 13, 2022), https://www.theassemblync.com/politics/courts/a-low-bar-in-the-nc-courts/ [https://perma.cc/R5FU-3ER4].

significant cost to taxpayers) and witnesses' memories fade.[88] A prosecution that is abandoned for lack of time or resources might be a victory for the defendant, but it is no victory for truth or justice. Despite its issues, abandoning harmless error cannot be the solution.

Defining erroneous transcript denials as structural error would not necessarily fix those efficiency problems, though it might adjust the incentives at play to ensure that denials, problematic or otherwise, almost never occur.[89] It is, however, a more constrained, efficient, and practicable solution than a wholesale abandonment of harmless error.

The question of how and why to distinguish between "structural error" and "trial error" has vexed many a court and commentator.[90] Categorically exempting certain issues from harmless error review runs the risk of overcorrecting and failing outright to correct the efficiency issues the harmless error doctrine is meant in part to address.[91] It might also undermine "public respect for the criminal process" by emphasizing the "virtually inevitable presence of immaterial error" over the "underlying fairness of the trial" itself.[92] And an overbroad concept of structural error might lead to courts instead defining rights themselves narrowly to avoid overenforcement.[93]

Even taking these concerns into consideration, erroneous denial of a trial transcript is still significant enough to warrant designation as a structural error. An error is structural when "it 'affect[s] the framework within which the trial

88. *See id.*

89. *See* discussion *infra* notes 112–13 and accompanying text (describing the potential on-the-ground consequences of structural error for erroneous transcript denials).

90. *See, e.g.*, John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 HOUS. L. REV. 59, 101–02, 108 n.261 (2016) ("[W]hether the Court believes that an error bears with sufficient directness on the trial framework to qualify as 'structural' has proved to be no more predictable than whether the pre-1937 Court thought that activity bore with sufficient directness on interstate commerce to bring it within Congress's regulatory power."); Roger A. Fairfax, *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2040–51 (2008).

91. A similar issue plagues the alternate theory of harmless error that focuses on the "effect on the jury." Since appellate courts are unfamiliar with the jury in any particular case they review, they might instead consider whether a hypothetical reasonable jury would be affected by the error. *See* Cooper, *supra* note 38, at 331–32. But they would be hard-pressed to find that a reasonable jury would not consider relevant evidence and was therefore unaffected. *Id.* As this would once again result in a substantial number of reversals, judges might be compelled to use the presence of "overwhelming evidence as a proxy . . . for a conclusion that the jury was unaffected by the error." *Id.* at 328. Doing so essentially collapses the distinction between the "overwhelming evidence" and "effect on the jury" standards. *See id.* at 332.

92. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986); *see also* ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50 (Ohio State Univ. Press 1970) ("[Per se] [r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.").

93. Greabe, *supra* note 90, at 108 & n.262 ("*Fulminante*'s requirement that structural errors be automatically reversed has had the negative collateral consequence of causing lower courts to define structural rights too narrowly.").

proceeds,' rather than being 'simply an error in the trial process itself.'"[94] The U.S. Supreme Court has recently outlined three ways in which that may be the case: (1) when "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," (2) when "the effects of the error are simply too hard to measure," or (3) when "the error always results in fundamental unfairness."[95] Erroneous denial of a trial transcript fits into the second and third categories.

The detrimental effects of a denied trial transcript are as difficult to quantify as the benefits of providing one. For proof of this, look no further than the *Gaddis* opinion itself. The majority understandably focused on the effect of a transcript as a means of impeaching the State's witnesses and minimizes the significance it could have had in light of the other evidence.[96] The dissent, in return, pointed out certain discrepancies in the eyewitness testimony that could have been developed more strongly had Gaddis's lawyer had access to the transcript.[97] While they purportedly weighed the evidence, both sides seemingly disregarded that the presentation and cross-examination of that evidence was incomplete as a result of the transcript's absence.[98] Instead of examining a record forged in the "crucible of cross-examination"[99] that ensures evidence is reliable, the court was reviewing a record that necessarily reflected the better resources and preparation afforded the State.

Moreover, a transcript can serve more purposes than just aiding cross-examination. Gaddis's lawyer also intended to use the transcript to prepare for trial and understand the arguments at play.[100] The transcript would have levelled the playing field between Gaddis's lawyer and the prosecutor, who had already tried the case once and could "learn from her mistakes and 'go after [the] case in a different fashion.'"[101] The potential effects of that kind of preparedness are substantial. One can easily imagine completely shifting their strategy upon

94. Weaver v. Massachusetts, 137 S. Ct. 1899, 1902–03 (2017) (alterations in original) (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)).

95. *Id.* at 295–96.

96. State v. Gaddis, 382 N.C. 248, 254, 876 S.E.2d 379, 383 (2022).

97. *Id.* at 259–60, 876 S.E.2d at 386 (Earls, J., dissenting).

98. *See id.* at 254, 876 S.E.2d at 383 (majority opinion) (listing the "overwhelming evidence" against Gaddis); *id.* at 264–66, 876 S.E.2d at 389–90 (Earls, J., dissenting) (attacking the weight the majority assigned to other evidence, such as Gaddis's proximity to the truck, inebriation, and purported "admission"). The majority briefly addressed the potential for impeachment of the eyewitnesses, although mainly to dismiss that it was relevant for one or possible for the other. *See id.* at 254, 876 S.E.2d at 383 (majority opinion). The dissent's critique focused more on the inconclusiveness of the other relevant evidence. *See id.* at 264–66, 876 S.E.2d at 389–90 (Earls, J., dissenting). Neither opinion really wrangled with the fact that their analyses compared the weight of the evidence to a nonexistent trial that could have gone completely differently on a key issue.

99. Crawford v. Washington, 541 U.S. 36, 61 (2004).

100. *Gaddis*, 382 N.C. at 262–63, 876 S.E.2d at 388 (Earls, J., dissenting).

101. *Id.* at 262, 876 S.E.2d at 388 (quoting Gaddis's lawyer on his rationale for seeking a transcript).

seeing, in detail, the strengths and weaknesses of their opponent's argument. No surprise, then, that numerous courts have used this rationale to find structural error in the erroneous denial of a transcript.[102]

The erroneous denial of a transcript also "always results in fundamental unfairness."[103] Ultimately, the procedural right to a transcript is about providing indigent defendants with the same tools to defend themselves that defendants with more resources would have.[104] A defendant with resources could simply buy a transcript and all the benefits that come with one. An indigent defendant can only rely on the entitlement created by *Griffin* and its progeny and is done a great injustice when a court fails to even apply the test created by those cases. Such a defendant is put at an immediate disadvantage for no reason other than their indigency.

To put a further finer point on the absurdity this doctrine creates, consider that there is no question whatsoever about whether the *prosecution* is entitled to a transcript of the previous trial as a matter of fairness or anything else.[105] Even assuming the prosecution pays for that transcript the same as a solvent defendant, that money comes out of the State's coffers.[106] Why, then, does an indigent defendant, whose defense and prosecution alike are funded by taxpayer dollars, need to jump through procedural hoops and face potential summary denial? Protection of the State's resources cannot justify that.

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102. *See, e.g.*, People v. Jenkins, 187 N.E.3d 111, 121 (Ill. App. Ct. 2020) (quoting United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006)) (finding that a denial to provide a trial transcript would have consequences on defense preparation that are "necessarily unquantifiable and indeterminate" and was therefore a structural error); People v. Hosner, 538 P.2d 1141, 1147–48 (Cal. 1975); Kennedy v. Lockyer, 379 F.3d 1041, 1053–55 (9th Cir. 2004) (stating that complete denial of a transcript was likely a structural error, and further holding that harmless error analysis was inappropriate under the circumstances at hand); United States v. Pulido, 879 F.2d 1255, 1259 (5th Cir. 1989) (same); Martin v. Rose, 525 F.2d 111, 113 (6th Cir. 1975) (same); *cf.* State v. McNeill, 33 N.C. App. 317, 323–24, 235 S.E.2d 274, 277–78 (1977) (finding no prejudicial error from a denied transcript, but arguing that it was "rare" that that should be the case given the utility of a transcript); State v. Reid, 312 N.C. 322, 323–24, 321 S.E.2d 880, 881 (1984) (per curiam) (ordering a new trial for erroneous denial of a trial transcript without discussion of whether the error was harmless); State v. Tyson, 220 N.C. App. 517, 519–20, 725 S.E.2d 97, 99 (2012) (same); United States v. Talbert, 706 F.2d 464, 468–471 (4th Cir. 1983) (same); Turner v. Malley, 613 F.2d 264, 266–67 (10th Cir. 1979) (same); *Ex Parte* Davis, 38 So. 3d 706, 712–13 (Ala. 2009) (same).

103. *See* Weaver v. Massachusetts, 137 S. Ct. 1899, 1903 (2017).

104. *See* Griffin v. Illinois, 351 U.S. 12, 18–19 (1956).

105. Before the North Carolina Court of Appeals, the State asserted "it was unable to effectively impeach [Gaddis's former attorney's] testimony because of the lack of transcript." State v. Gaddis, 278 N.C. App. 524, 527, 862 S.E.2d 239, 241 (2021). But the trial court record belies the ineffectiveness of the State's impeachment effort. *See Gaddis*, 382 N.C. at 263, 876 S.E.2d at 388 (Earls, J., dissenting). And this argument is merely blowing smoke; if it wanted one, the State could have obtained such a transcript at any point in the month and a half between the two trials. *See id.* at 249–50, 876 S.E.2d at 380 (majority opinion) (describing the timing of the two trials).

106. *See* Britt v. North Carolina, 404 U.S. 226, 235 (1971) (Douglas, J., dissenting) (recognizing that prosecutors will rely upon a "similar document" to a mistrial transcript "supplied at the State's expense," and that this further emphasizes the value of such a document to defense counsel).

With that said, classifying an error as structural is the exception, not the rule.[107] Courts hold a strong presumption against finding structural error when "the defendant had counsel and was tried by an impartial adjudicator."[108] This presumption has led the U.S. Supreme Court to find no structural error even where substantial interruptions to the defendant's cross-examination rights occurred.[109]

In this doctrinal context, it may be a stretch to argue that the denial of a transcript is a more substantial infringement on a defendant's access to a fair trial than the complete denial of a line of cross-examination, especially in a situation where, like in *Gaddis*, a defendant was able to attempt impeachment (albeit unsuccessfully). But it bears repeating that a transcript is valuable for more than just holding a witness to their previous statements,[110] and the consequences of the denial are trickier to pin down. Moreover, an error may be structural "even if [it] does not lead to fundamental unfairness *in every case*."[111]

It is also worth considering what calling erroneous transcript denial structural error might entail for courts in practice. Courts might, as a matter of policy, simply provide transcripts to all defendants upon request. Even now, some appellate courts encourage this exact policy as a matter of fairness and efficiency.[112] Or if a defendant's request is truly frivolous and wasteful of the court's time and resources, *Britt* still provides a backstop upon which the court may rest its denial.[113] Though at first blush this classification appears to be strong medicine, it would hardly impose an inordinate analytical burden on the courts. On the other side of the balance, this classification would protect indigent defendants from having an important part of their potential defense ripped away with nary a word of justification.

107. Rose v. Clark, 478 U.S. 570, 578–79 (1986) (citing United States v. Hasting, 461 U.S. 499, 509 (1983)); *see also* Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one.").

108. *Rose*, 478 U.S. at 579.

109. *See Van Arsdall*, 475 U.S. at 684 (finding no structural error when trial court denied defendant opportunity to impeach witness for bias).

110. *See Britt*, 404 U.S. at 228 (collecting cases and agreeing with the dissent as to the value of a transcript to defense counsel).

111. Weaver v. Massachusetts, 137 S. Ct. 1899, 1903 (2017) (emphasis added) (citing United States v. Gonzales-Lopez, 548 U.S. 140, 149 n.4 (2006)). The doctrine surrounding structural error has gotten somewhat more forgiving since *Van Arsdall*, although the extent of that change is well outside the scope of this Recent Development.

112. *See, e.g.*, State v. McNeill, 33 N.C. App. 317, 323, 235 S.E.2d 274, 277–78 (1977) ("Henceforth, if the State intends to retry an indigent defendant after a mistrial, the defendant, upon his timely request, should be provided with the effective use of the trial transcript."); United States v. Pulido, 879 F.2d 1255, 1259 (5th Cir. 1989) ("[I]t makes little sense to encourage the denial of transcripts . . . where . . . the costs of providing them would be minimal.").

113. *Britt*, 404 U.S. at 227. Typical review of *Britt* issues is for abuse of discretion. *See* State v. Matthews, 295 N.C. 265, 290, 245 S.E.2d 727, 742 (1978). A trial court that actually considers the *Britt* factors is thus unlikely to face reversal.

CONCLUSION

The right to a determination of guilt by a jury after a fair trial is foundational to our democracy.[114] And the right to a fair trial is meaningless if one's ability to argue before and present evidence to a jury is determined in part by their financial resources.[115] Allowing a procedural protection of that right—which directly affects the jury's ability to determine the reliability of evidence—to be deemed harmless upon review, simply because the court believes the State's evidence is too strong to support anything other than a guilty verdict, diminishes the meaning of that procedural protection. Beyond that, it diminishes the right to a jury trial itself. The doctrine giving indigent defendants a right to a trial transcript is one layer in the "crucible of cross-examination"[116] that ensures evidence presented at trial is reliable. Giving it anything but the strongest protection would compromise the very structure of our justice system.

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114. *See* U.S. CONST. amend. VI.

115. *See* Griffin v. Illinois, 351 U.S. 12, 18–19 (1956).

116. Crawford v. Washington, 541 U.S. 36, 61 (2004).

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