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Plain Error but No Plain Future: North Carolina's Plain Error Review After *State v. Lawrence*[*]

INTRODUCTION

There's nothing plain about plain error. In February 2013, the United States Supreme Court handed down its most recent opinion on the federal plain error standard. The Court held that, when a criminal defendant fails to object at trial to what was not yet error but became error by the time the defendant's case reached the court of appeals, the case can still be reversed and remanded because of plain error.[1] The result may be fair but an eerie question lingers: How can there be plain error reversal if no one actually made a plain error?

Such bizarre questions are not uncommon in plain error jurisprudence. At one point, the federal standard had fallen into such disrepute that one scholar labeled it a "Gorilla rule," a standard so unfixed that it may have been a "roving commission for appellate judges to seek out and correct error wherever it can be found."[2] Such questions may be like reading Franz Kafka's *The Castle*,[3] a project unfinished and perhaps unfinishable, but this Recent Development proceeds with the assumption that they are worth asking.

Thankfully, some concepts surrounding the standard are plainer than others. Plain error review is a product of the judiciary's duty to ensure justice. The adversarial model is useful to courts for ensuring just results because the opposing litigants are normally presumed to highlight the flaws in their opponents' arguments through timely objections.[4] Normally, when there is no objection, any error is waived on appeal.[5] But where the life and liberty of a criminal defendant are

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1. *See* Henderson v. United States, 133 S. Ct. 1121, 1124–25 (2013).

2. Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1052 (1987).

3. FRANZ KAFKA, THE CASTLE (Ritchie Robertson, ed., Anthea Bell trans., Oxford Univ. Press 2009) (1926). Although first published in 1926, Kafka died two years before, without finishing the book. *Id.* at xxvii.

4. *See* State v. Lawrence, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (recognizing that the adversarial model allows the justice system to achieve its central objective of determining the defendant's guilt or innocence without placing an undue burden on the trial judge).

5. *Id.* (noting "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court" (internal quotation marks omitted)).

on the line, justice sometimes requires the court to step in and "protect the defendant."[6] The justification for the judiciary's leniency is an interest not only in justice but also in the appearance of justice.[7] Courts that conduct plain error review have relaxed the rules of appellate procedure, taking into consideration both individual outcomes and the general integrity of the judicial system.[8]

There is a consensus on the general need for the leniency of plain error review, but courts have struggled to fashion a rule that can be consistently applied. The need to "alleviate the potential harshness of preservation rules"[9] seems compelling when life and liberty are at stake. Despite the need, "a clear, conceptual definition of the rule has remained somewhat elusive."[10] Attempts to clarify the plain error standard have given the "distinct impression that 'plain error' is a concept appellate courts have found impossible to define, save that they know it when they see it."[11]

The Supreme Court of North Carolina's recent opinion in *State v. Lawrence*[12] attempted to clarify the nature and application of plain error review. Explaining that the court's role is "to provide guidance and clarification when the law is unclear or applied inconsistently," the court undertook to "promote more uniform application of the law" by clarifying the application of plain error review in North Carolina's appellate courts.[13]

Lawrence was the first major revision of the plain error standard since North Carolina adopted it in 1983.[14] This Recent Development gauges the success of *State v. Lawrence* in clarifying the plain error standard. The analysis proceeds in five parts. Part I identifies the need for clarification in the plain error standard that existed before *Lawrence*, and Part II explains the decision in *Lawrence*. Part III identifies the elements of the plain error review that *Lawrence*

6. 3B CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE § 856, at 547 (4th ed. 2013).

7. *Id.* at 548 ("It is important that justice be done but it is also important that justice seem to be done.").

8. *Id.* at 545–49.

9. *Lawrence*, 365 N.C. at 514, 723 S.E.2d at 332 (citing State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

10. *Id.* at 507 n.2, 723 S.E.2d at 327 n.2.

11. WRIGHT & HENNING, *supra* note 6, at 546–47.

12. 365 N.C. 506, 723 S.E.2d 326 (2012).

13. *Id.* at 511–12, 723 S.E.2d at 330.

14. *Id.* at 511, 723 S.E.2d at 330 ("We are mindful that this Court has not issued a doctrinal statement regarding the plain error standard of review in almost thirty years."). North Carolina first adopted the plain error rule in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). *See infra* Part I.

changed and the elements that *Lawrence* left untouched. Part IV evaluates the success and shortcomings of the decision, and Part V concludes with some final thoughts on the future of plain error review in North Carolina. This Recent Development argues that, overall, *Lawrence* was needed and has updated North Carolina's plain error standard to approximate the federal standard. At the same time, it has fallen short of its stated goal of clarification by leaving the requirements for proving plain error muddled. Yet, in a surprising move, the court's opinion in *Lawrence* laid the groundwork for expanding plain error review, making it the default type of review for unpreserved errors in criminal trials.

I. THE NEED FOR CLARIFICATION

Eighty-seven years after the United States Supreme Court first instituted plain error review,[15] and forty-seven years after the Court's first major clarification of plain error review in *United States v. Atkinson*,[16] the Supreme Court of North Carolina introduced plain error review into the state's jurisprudence in *State v. Odom*.[17] As discussed below, *Odom* has shown some resiliency, but time has also taken its toll. In particular, at least three factors affected the vitality of *Odom*: (1) the federal standard purportedly adopted by *Odom* was itself unclear; (2) the United States Supreme Court changed the federal standard for plain error review upon which *Odom* had relied;[18] and (3) the North Carolina Court of Appeals began to depart from the *Odom* standard when reviewing for plain error.[19]

The *Odom* court claimed to adopt the plain error rule as it was then applied by the Fourth Circuit. The *Odom* court found the plain error standard from *United States v. McCaskill*[20] particularly instructive:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error,

15. *See* Wiborg v. United States, 163 U.S. 632, 659 (1896) ("[W]e may properly take notice of what we believe to be a plain error, although it was not duly excepted to.").

16. 297 U.S. 157 (1936). *Atkinson* contained the federal judiciary's first explanation of the nature of plain error review. The Court held that the federal appellate courts could take notice of unpreserved errors in criminal cases when the errors were "obvious" or "otherwise seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 160.

17. 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

18. *See infra* notes 25–31 and accompanying text.

19. *See infra* notes 32–37 and accompanying text.

20. 676 F.2d 995 (4th Cir. 1982).

> something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," *or* "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," *or* the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " *or* where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" *or* where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."[21]

The *Odom* court implied that it was adopting *McCaskill*'s plain error rule in full,[22] but perhaps perceiving that one rule, rather than five, would better guide the court of appeals, the *Odom* court selected as the thrust of plain error review whether an unpreserved error had a "probable impact on the jury's finding of guilt."[23] Although the Supreme Court of North Carolina in *Odom* did not cite to *Atkinson*, it noted that the Federal Rule of Criminal Procedure that had codified federal plain error review was virtually identical to the North Carolina rule.[24]

After the Supreme Court of North Carolina articulated the *Odom* test, the United States Supreme Court changed the federal standard, attempting to give plain error review a straighter spine than the rule given in a case like *McCaskill*.[25] In *United States v. Olano*,[26] the Court used a mostly three-prong analysis, putting the burden on defendants to prove there was "error," that it was "plain" or "clear,"

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21. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (second, third, fourth, and fifth emphasis added) (quoting *McCaskill*, 676 F.2d at 1002).

22. *Id.*

23. *Id.* at 661, 300 S.E.2d at 379 (citing United States v. Jackson, 569 F.2d 1003 (7th Cir. 1978)). It seems likely that the *Odom* court relied upon *McCaskill* rather than *Atkinson* to avoid any suggestion that plain error review had an application in a civil context. *See infra* note 61 and accompanying text (explaining that North Carolina limits plain error review to criminal cases, unlike the federal judiciary). *Compare* United States v. Atkinson, 297 U.S. 157, 158 (1936) (involving a government contracts dispute), *with McCaskill*, 676 F.2d at 996 (reviewing a bank robbery conviction). In applying this rule, the *Odom* court concluded that the error did not amount to plain error because the State's "corroborated" evidence was relatively stronger than the defendant's "uncorroborated" testimony. *Odom*, 307 N.C. at 661–62, 300 S.E.2d at 379. Thus, the defendant would have been convicted absent the error. *Id.*

24. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. At that time, the federal plain error rule was codified in Rule 30 of the Federal Rules of Criminal Procedure. *See id.*

25. As demonstrated by the quote of the federal rule from *McCaskill*, *see supra* text accompanying note 21, *Atkinson* itself had undergone significant change in the hands of the federal courts of appeals. It is the *Atkinson* standard that *Lawrence* adds to North Carolina's plain error rule. *See infra* notes 55–59 and accompanying text.

26. 507 U.S. 725 (1993).

and that it "affect[ed] substantial rights."[27] The Court also stated that the power of plain error review was "permissive, not mandatory,"[28] such that a reviewing court "should not exercise [its] discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' "[29] Four years later, in *Johnson v. United States*,[30] the Court again explained the rule and made clear that the reviewing court cannot reverse an unpreserved error unless the defendant proves four elements: "(1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."[31]

In the thirty years since *Odom*, the North Carolina Court of Appeals has drifted from the rule set out in *Odom*, sometimes combining it with standards of review used for preserved errors.[32] For example, in *State v. Blizzard*,[33] the court of appeals noted that it was reviewing only for plain error because the alleged error in the jury instructions was unpreserved from the trial court.[34] Yet, the court of appeals then cited, as the standard of review, that the defendant needed to show not only that an error occurred in the jury instructions, but that "such error was likely, in light of the entire charge, to mislead the jury."[35] While this rule was similar to the rule set out in *Odom*, its genesis is actually in "harmless error,"[36] which applies only to preserved errors.[37]

By 2012, *Odom* was showing its age. With the federal standard taking an entirely different shape, and given the court of appeals' reliance on its own standards for plain error review rather than the

27. *Id.* at 732, 734.

28. *Id.* at 735.

29. *Id.* at 732 (quoting United States v. Young, 470 U.S. 1, 15 (1985)).

30. 520 U.S. 461 (1997).

31. *Id.* at 466–67 (alteration in original) (citation omitted) (internal quotation marks omitted).

32. *See, e.g.*, State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) ("[T]he Court of Appeals applied an incorrect formulation of the plain error standard of review.").

33. 169 N.C. App. 285, 610 S.E.2d 245 (2005).

34. *Id.* at 296, 610 S.E.2d at 253.

35. *Id.* at 296–97, 610 S.E.2d at 253 (quoting Bass v. Johnson, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002)).

36. Caldwell v. S. Ry. Co., 218 N.C. 63, 72, 10 S.E.2d 680, 685 (1940). *Caldwell* was decided over four decades before the North Carolina Supreme Court adopted plain error review in its 1983 *Odom* decision.

37. *Lawrence*, 365 N.C. at 512–13, 723 S.E.2d at 330–31.

standard in *Odom*, the need for clarification in North Carolina's plain error jurisprudence was "plain."

II. *STATE V. LAWRENCE*

In 2012, the Supreme Court of North Carolina decided to use *State v. Lawrence* as a vehicle to clarify the foundation and application of the plain error standard. The defendant David Lawrence was convicted on two counts each of attempted robbery with a dangerous weapon, attempted kidnapping, attempted breaking and entering, and conspiracy to commit robbery with a dangerous weapon.[38] The defendant was approached by a group of out-of-state residents who planned to rob a suspected drug dealer by attacking his girlfriend.[39] The group planned to rob the dealer's girlfriend as she took her child to school in the morning by throwing gasoline on her and then threatening both to shoot her and set her on fire.[40] As the members of the group took their places in the morning, watchful neighbors reported their furtive behavior to the police.[41] The early arrival of a police car surprised the group, though they disbanded before they could be apprehended.[42]

Undeterred, the group returned the next evening.[43] The defendant planned to ambush the girlfriend as she returned home and walked to her door.[44] Fortunately for the girlfriend, a neighbor spotted the defendant, called the police, and confronted the defendant with a pistol; the defendant fled.[45] The group tried to disband but was arrested by the police that night, except for the defendant, who was arrested four months later in Mississippi.[46]

At trial, when the court instructed the jury on conspiracy to commit robbery with a dangerous weapon, the judge "erroneously omitted the element that the weapon must have been used to endanger or threaten the life of the victim."[47] The trial court repeated

38. *Id.* at 510, 723 S.E.2d at 329.
39. *Id.* at 508, 723 S.E.2d at 328.
40. *Id.* at 508–09, 723 S.E.2d at 328.
41. *Id.* at 509, 723 S.E.2d at 328.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 509, 723 S.E.2d at 329.
46. *Id.* at 510, 723 S.E.2d at 329.
47. *Id.* The State conceded the error on appeal. *Id.*

the erroneous instruction when the jury asked for clarification.[48] Trial counsel made no timely objection to any of these jury instructions.[49]

On appeal, a unanimous panel of the North Carolina Court of Appeals reversed the conviction and remanded the case for a new trial, holding that the erroneous jury instruction amounted to plain error.[50] The court explained that the plain error standard requires the defendant to show "that the jury was misled or that the verdict was affected by [the] instruction" and that "*such error was likely, in light of the entire charge, to mislead the jury.*"[51] The court found that the jury's request for clarification was "persuasive evidence that the trial court's instruction mislead [sic] the jury in regards to the State's burden of proof."[52]

The Supreme Court of North Carolina then granted discretionary review to determine whether the court of appeals applied the correct plain error standard and whether the alleged error was plain error.[53] After discarding the standard applied by the court of appeals,[54] the supreme court laid out the plain error standard. The court noted that "[f]or error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial."[55] To prove fundamental error, "a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty."[56] Additionally, "because plain error is to be 'applied cautiously and only in the exceptional case,' the error will often be one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' "[57]

Applying this new rule, the court reviewed the evidence from trial. The court unanimously held that the error did not rise to the level of plain error because the evidence against the defendant was so "overwhelming and uncontroverted" that it could not be shown that, "absent the error, the jury probably would have returned a different

48. *Id.* at 511, 723 S.E.2d at 329.

49. *Id.*

50. *See id.*; State v. Lawrence, 210 N.C. App. 73, 91–92, 706 S.E.2d 822, 836 (2011), *rev'd*, 365 N.C. 506, 723 S.E.2d 326 (2012).

51. *Lawrence*, 210 N.C. App. at 89, 706 S.E.2d at 834 (alteration in original) (quoting State v. Blizzard, 169 N.C. App. 285, 296–97, 610 S.E.2d 245, 253 (2005)).

52. *Id.* at 91, 706 S.E.2d at 836.

53. *Lawrence*, 365 N.C. at 506–07, 723 S.E.2d at 327.

54. *Id.* at 507–08, 723 S.E.2d at 327–28.

55. *Id.* at 518, 723 S.E.2d at 334.

56. *Id.* (internal quotation marks omitted).

57. *Id.* (alteration in original) (quoting State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

verdict. Thus, he cannot show the prejudicial effect necessary to establish that the error was a fundamental error."[58] The court also observed that "the error in no way seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings."[59]

III. CONTINUITY AND CHANGE

Responding to the need for clarification of the plain error review, the Supreme Court of North Carolina's opinion in *Lawrence* retained elements of the existing plain error review from *Odom*, but it also set out important changes. For instance, the *Lawrence* court continued to focus on the probable impact of the error on the jury's verdict. Yet, the language from *Lawrence* departed from *Odom* in several important respects. The following subsections explore the elements of *Odom* that remain intact after *Lawrence* and the possible areas of change effected or foreshadowed by *Lawrence*.

A. Continuity

Although *Lawrence* signaled changes in both the reach of plain error review and its basic formulation, it kept much of the plain error doctrine enunciated by *Odom* and its progeny. Many of the prerequisites to receive plain error review are the same. First, defendants must still prove that an actual error occurred.[60] Second, unlike the federal standard, North Carolina courts review for plain error in criminal cases only.[61] Third, and again unlike the federal standard, which appears to apply to any type of error,[62] the North Carolina standard "is normally limited to instructional and

58. *Id.* at 519, 723 S.E.2d at 335.

59. *Id.*

60. *Id.* at 515, 723 S.E.2d at 332 (citing United States v. Olano, 507 U.S. 725, 732–33 (1993)).

61. *Compare id.* at 507 n.1, 723 S.E.2d. at 327 n.1 ("In North Carolina, plain error review has no application to appeals in civil cases."), *with* FED. R. CIV. P. 51(d)(2) ("A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights."). The approach taken by North Carolina courts has been noted with approval by commentators because the due process concerns in criminal matters are substantially weightier than in civil matters. *See* Martineau, *supra* note 2, at 1055–56.

62. *See* WRIGHT & HENNING, *supra* note 6, at 574–75 ("There would seem to be no error to which plain error review would not apply, however, some have suggested that errors in sentencing, unraised below, should be reviewed with a less deferential standard as the costs of resentencing are lower than the costs of retrial. No exception for sentencing errors appears in either the [plain error rule] or the Court's cases interpreting the rule." (footnote omitted)).

evidentiary error."[63] The Supreme Court of North Carolina has specifically refused to extend the rule to unpreserved statements made during jury voir dire,[64] and the North Carolina Court of Appeals has refused to review some types of sentencing errors for plain error.[65] Finally, on appeal, criminal defendants must "specifically and distinctly contend[]" that the errors "amount to plain error."[66]

More importantly, the focus of plain error review still seems to be whether the error had a probable impact on the jury's verdict. Once the defendant meets the prerequisites, he still bears the burden of demonstrating that the error at trial amounted to plain error.[67] As in federal court,[68] North Carolina's plain error standard focuses primarily on whether the error was prejudicial to the defendant, which is the same as demonstrating that the error "had a probable impact on the jury's finding that the defendant was guilty."[69] Thus, in North Carolina's plain error jurisprudence, "prejudice" and "probable impact" are synonymous.

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63. *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333 (citing State v. Wiley, 355 N.C. 592, 615, 565 S.E.2d 22, 39–40 (2002)); *see also* Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 179, 222 & n.223 (2012) (citing *State v. Lawrence* and explaining that North Carolina is one of about eight states that narrows plain error review to certain types of errors); *infra* text accompanying notes 115–21. It is worth noting that the language in *Lawrence* suggests the possibility of plain error review in other contexts, even though the case cited for this prerequisite, *State v. Wiley*, was significantly more categorical. *See* State v. Wiley, 355 N.C. 592, 615, 565 S.E.2d 22, 39–40 (2002) ("Additionally, this Court has held that plain error analysis applies only to jury instructions and evidentiary matters . . . .").

64. *See Wiley*, 355 N.C. at 615–16, 565 S.E.2d at 39–40 ("[T]his Court . . . has specifically declined to extend application of the plain error doctrine to situations where a party failed to object to statements made by the other party during jury *voir dire*.").

65. *See, e.g.*, State v. Oakes, No. COA11-979, 2012 WL 121212, at *4 (N.C. Ct. App. Jan. 17, 2012) (declining plain error review of alleged inappropriate comments by the trial judge during sentencing); State v. Holder, No. COA05-414, 2006 WL 539369, at *1 (N.C. Ct. App. Mar. 7, 2006) (declining plain error review of a re-sentencing hearing). *But see* N.C. GEN. STAT. § 15A-1446(d)(18) (2011) (automatically preserving for review many different types of errors, including sentencing errors where "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law").

66. N.C. R. APP. P. 10(a)(4); *see also Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333. It is also worth noting that defendants gain no advantage by claiming there were multiple errors such that the effect of the error was compounded, creating plain error. *See* State v. Moore, 366 N.C. 100, 108, 726 S.E.2d 168, 174 (2012) ("Defendant also argues that the trial court's other alleged errors 'compounded the plain error here.' We disagree that errors can be 'compounded' under plain error review.").

67. *See Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333.

68. *See* WRIGHT & HENNING, *supra* note 6, at 561 ("In most claims of plain error, the outcome turns on whether or not prejudice can be demonstrated.").

69. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (internal quotation marks omitted).

Lawrence explains how to apply this standard, noting that prejudice is determined "after examination of the entire record."[70] In application, courts consider the totality of evidence against a defendant, as well as evidence offered by the defendant.[71] If the reviewing court determines that the jury's verdict would have been the same regardless of the error, then the court may characterize the evidence against the defendant as "overwhelming."[72] "Overwhelming" evidence appears to preclude any "probable impact."[73]

When the trial court makes an instructional error such as failing to mention a required element of the crime, the reviewing court takes an elemental approach to determine whether there is "overwhelming" evidence of the erroneously omitted element. In *Lawrence*, the court considered such an error. When charging the jury on the elements of conspiracy to commit robbery with a dangerous weapon, the trial court erred when it "omitted the element that the weapon must have been used to endanger or threaten the life of the victim."[74] To determine whether this error had a probable impact on the jury's verdict, the court reviewed the record to see what evidence supported this element. The court noted that the jury had been correctly instructed on the elements of attempted robbery with a dangerous weapon and therefore assumed that every element from that offense was met.[75] The court then appeared to assume that none of the elements of the erroneous charge—conspiracy to commit robbery with a dangerous weapon—were met.[76] But after comparing the elements of these two crimes, the court concluded that the erroneous charge only contained one additional element: that defendant "entered into an agreement" to commit robbery with a dangerous weapon.[77]

The court then cataloged the evidence in the record that would support this missing element. It noted testimony by "multiple witnesses," including co-conspirators, describing the group's efforts to "kidnap, threaten, and rob" the victim.[78] Those co-conspirators also

70. *Id.*
71. *See id.* at 519, 723 S.E.2d at 334–35.
72. *See id.* at 519, 723 S.E.2d at 334.
73. *See infra* notes 79–83 and accompanying text.
74. *Lawrence*, 365 N.C. at 510, 723 S.E.2d at 329.
75. *Id.* at 519, 723 S.E.2d at 334.
76. *See id.*
77. *Id.*
78. *Id.*

testified that the defendant "knew what was going on."[79] The evidence showed that the defendant also knew each part of the plan.[80] Therefore, the court concluded, "[i]n light of the overwhelming and uncontroverted evidence, defendant cannot show that, absent the error, the jury probably would have returned a different verdict."[81]

This approach models the form set by *Odom*. *Odom*, finding no plain error, had not used the word "overwhelming," but had instead juxtaposed the State's "corroborated" evidence against the defendant's own "uncorroborated testimony" that was contradicted by the State's witnesses and the defendant's impeachment.[82] Just a few years after *Odom*, the Supreme Court of North Carolina began finding that "overwhelming evidence against [a] defendant" can "prevent[] the error complained of from rising to the level of 'plain error' within the meaning of . . . *State v. Odom*."[83]

This approach is also not unique to North Carolina. The United States Supreme Court has found that errors do not rise to the level of plain error when the evidence of an element missing due to an erroneous jury instruction is still "overwhelming." For example, in *Johnson v. United States*, the district court erred in not submitting the issue of materiality, an element of perjury, to the jury.[84] However, the error did not rise to the level of plain error because "the evidence supporting materiality was '*overwhelming*' . . . [and] was essentially uncontroverted at trial and has remained so on appeal."[85] Differing from the North Carolina cases, however, the United States Supreme Court made this holding under the fourth prong of its analysis, finding that the "overwhelming" evidence barred any conclusion that the instructional error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings."[86] The *Lawrence* court

79. *Id.* (internal quotation marks omitted).

80. *Id.* at 519, 723 S.E.2d at 334–35.

81. *Id.* at 519, 723 S.E.2d at 335.

82. State v. Odom, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983).

83. State v. Walker, 316 N.C. 33, 40, 340 S.E.2d 80, 84 (1986) (citing State v. Black, 308 N.C. 736, 303 S.E.2d 804 (1983); *Odom*, 307 N.C. at 655, 300 S.E.2d at 375); *see also* State v. Williams, 315 N.C. 310, 328, 338 S.E.2d 75, 86 (1986) ("In this case, our review of the entire record convinces us that this error does not constitute 'plain error' entitling the defendant to a new trial. The State presented overwhelming evidence of the defendant's guilt.").

84. *See* Johnson v. United States, 520 U.S. 461, 463, 467 (1997).

85. *Id.* at 470 (emphasis added) (footnote omitted) (citation omitted).

86. *Id.* at 469–70 (quoting United States v. Olano, 507 U.S. 725, 736 (1993)) (internal quotation marks omitted). The Court went on to conclude that it would be the reversal, in the face of overwhelming evidence, that would seriously affect the "fairness, integrity or public reputation of judicial proceedings." *Id.*

noted this difference in approach.[87] So it appears that in North Carolina, "overwhelming evidence" weakens defendants' arguments more on the probable impact prong than on the judicial integrity prong.

Overall, *Lawrence* stands as a rightful heir to *Odom*; the Supreme Court of North Carolina sought jurisprudential refinement, not revolution. However, the changes suggested by *Lawrence* are not insignificant.

B. Change

Lawrence instituted two main changes in the plain error doctrine. The first and most obvious difference is the addition of another "prong" in the plain error analysis. Although North Carolina's plain error review focuses on the error's probable impact on the jury verdict, the *Lawrence* court also noted that "because plain error is to be 'applied cautiously and only in the exceptional case,' the error will *often* be one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' "[88] Unfortunately, the court's addition of "often" makes it unclear whether the harm to judicial proceedings is a separate requirement that calls for independent analysis or whether it is a general statement of the purpose of the plain error review. This ambiguity and its consequences are examined further below.[89]

The second change added more justification and context for the plain error rule. *Odom* noted the "potential harshness" of appellate forfeiture rules.[90] *Lawrence* explained that the central purpose of a criminal trial is to "decide the factual question of the defendant's guilt or innocence."[91] To effect this, the American legal system relies on the "adversarial model."[92] This model requires timely objections by the parties to help the judge, "a neutral decisionmaker," ensure justice.[93] To encourage timely objections, the legal system treats preserved and unpreserved errors differently, giving the advantage on appeal to the defendant who notifies the trial court of a potential

87. *See* State v. Lawrence, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) ("The standard recognized in *Atkinson* is unlikely to be satisfied, however, when evidence of the defendant's guilt is overwhelming.").

88. *Id.* at 518, 723 S.E.2d at 334 (alteration in original) (emphasis added) (citation omitted) (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378).

89. *See infra* Part IV.B.

90. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

91. *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330 (internal quotation marks omitted).

92. *Id.*

93. *Id.*

error.[94] By reaffirming *Odom*,[95] the court also seemed to adopt that case's *raison d'être* for the plain error rule, an aversion to harsh forfeiture rules[96] that could interfere with "the factual question of the defendant's guilt or innocence."[97]

IV. EVALUATING *LAWRENCE*

Lawrence aimed to clarify the plain error doctrine. In many respects, *Lawrence* was a success, in part by building on the probable impact prong and diving deeper into the rationale for plain error review. However, the addition of the second prong has created new issues that the court will need to address.

A. Where Lawrence *Succeeds*

Lawrence's first success is in continuing the "overwhelming evidence" framework within the probable impact analysis.[98] This continuity is important because the framework appears to proceed from the central purpose of the criminal trial, resolving "the factual question of the defendant's guilt or innocence."[99] If a reviewing court ignores the error and still finds that evidence against a defendant is "overwhelming," then the justification for plain error review does not exist. Without a probable impact on the jury's verdict, the harsh preservation rules of appellate procedure have harmed nothing.[100]

A post-*Lawrence* disagreement at the Supreme Court of North Carolina over the plain error standard has reinforced this framework. In *State v. Towe*,[101] the court found error in the trial court's admission of an expert's conclusory testimony that a juvenile victim had been sexually abused.[102] Noting that the "case turned on the credibility of the victim, who provided the only direct evidence against defendant,"[103] the majority examined the expert's testimony and found "that [the expert's] testimony [had] stilled any doubts the jury might have had about the victim's credibility or defendant's culpability, and thus had a probable impact on the jury's finding that

94. *Id.*
95. *See id.* at 518, 723 S.E.2d at 334.
96. *See* State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).
97. *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330 (internal quotation marks omitted).
98. *See supra* Part III.A.
99. *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330 (internal quotation marks omitted).
100. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378.
101. 366 N.C. 56, 732 S.E.2d 564 (2012).
102. *Id.* at 56–57, 732 S.E.2d at 564–65.
103. *Id.* at 63, 732 S.E.2d at 568.

defendant is guilty."[104] However, the dissent argued that the majority was undermining *Lawrence* because the expert's "statement was clarified and its impact mitigated on cross-examination."[105] Moreover, reviewing this one statement of the expert in light of the entire record, the dissent determined that "the State [had] presented *overwhelming* evidence of defendant's guilt."[106] In this case, only one member of the court disagreed with this particular application of the framework, and more importantly, the entire court agreed on the general nature of the analysis.

Moreover, it appears that the Supreme Court of North Carolina has effectively caught the attention of the court of appeals on this point, causing the intermediate court to adopt this framework. For example, the supreme court remanded *State v. Boyd*[107] for the sole purpose of applying the *Lawrence* standard.[108] The case involved a jury instruction for second-degree kidnapping that erred by permitting a removal theory not supported by the evidence or bill of indictment.[109] The majority could not "discern from the record whether all twelve jurors convicted Defendant on [the correctly] instructed theories," and because there was "zero evidence (much less 'overwhelming and uncontroverted evidence') that Defendant 'removed' the victim," the error amounted to plain error.[110] Yet the dissent thought that the "evidence against defendant was 'overwhelming' and much was uncontroverted,"[111] such that the omission of several words from the jury instruction would "make no difference at all in the result."[112] Other post-*Lawrence* cases at the court of appeals have likewise focused on the distinction between

104. *Id.* at 64, 732 S.E.2d at 569.

105. *Id.* at 67, 732 S.E.2d at 571 (Newby, J., dissenting).

106. *Id.* (emphasis added).

107. 366 N.C. 210, 739 S.E.2d 838 (2012).

108. *See* State v. Boyd, __ N.C. App. __, __, 730 S.E.2d 193, 193–94, *cert. and discretionary review denied*, __ N.C. __, 734 S.E.2d 859 (2012), *and rev'd*, __ N.C. __, 742 S.E.2d 798 (2013) (per curiam) (reversing course, deciding the case, and adopting the dissenting opinion from *Boyd*, __ N.C. App. at __, 730 S.E.2d. at 198 (Stroud, J., dissenting)).

109. *Id.* at __, 730 S.E.2d at 197–98 (majority opinion). The trial court instructed the jury that it could find the defendant guilty of second-degree kidnapping if it found that the defendant removed the victim from one place to another without his consent. *See id.* at __, 730 S.E.2d at 195–96. However, this removal theory of kidnapping was not supported by the evidence in the case or entered into the bill of indictment. *See id.* at __, 730 S.E.2d at 196–97.

110. *Id.* at __, 730 S.E.2d at 197–98.

111. *Id.* at __, 730 S.E.2d at 199 (Stroud, J., dissenting) (citing State v. Lawrence, 365 N.C. 506, 519, 723 S.E.2d 326, 335 (2012)).

112. *Id.* at __, 730 S.E.2d at 201.

overwhelming evidence and probable impact.[113] Again, although there is occasional disagreement in the result, the method of analysis is certain.

Along with helping lower courts distinguish between overwhelming evidence and probable impact, *Lawrence* explores the foundation of plain error review more richly. This discussion gives courts going forward the needed jurisprudential foundation to determine whether to expand or maintain the scope of plain error review. *Lawrence* clarified plain error in part by contrasting it with other types of error. Though prejudice is an element of both harmless error and plain error, the *Lawrence* court distinguished the other defining characteristics of the two concepts in North Carolina jurisprudence.[114] As noted above,[115] *Lawrence* also clarified the justifications for the plain error rule.

With these pieces in place, the Supreme Court of North Carolina is in a better position to consider expanding plain error review, or at least justify a refusal to extend it by referring to the purpose of the doctrine. For example, the *Lawrence* court noted that "plain error review in North Carolina is *normally* limited to instructional and evidentiary error."[116] Curiously, it cited *State v. Wiley*[117] for this proposition, even though *Wiley*'s rule was much more categorical: "[T]his Court has held that plain error analysis applies *only* to jury instructions and evidentiary matters."[118] Thus, *Lawrence* seems to suggest that the court would at least consider expanding the doctrine.

113. *See, e.g.*, State v. Vasquez, No. COA12-346, 2012 WL 4879576, at *5 (N.C. Ct. App. Oct. 16, 2012) ("As stated in the facts above, and in light of the overwhelming evidence presented at trial that supported Defendants' convictions for assault with a deadly weapon inflicting serious injury, we hold that, even if the jury had been instructed on any lesser included offenses, Defendants have failed to prove that the jury probably would have reached a different verdict[.]" (alteration in original) (internal quotation marks omitted)); State v. Guy, No. COA12-197, 2012 WL 2896388, at *6 (N.C. Ct. App. July 17, 2012) ("Given the overwhelming evidence of defendant's guilt propounded at trial by the State, we perceive no likelihood that the result of the trial based on the instructions would have been any different had the trial court read a different charge."); State v. Crank, No. COA12-101, 2012 WL 2552279, at *3 (N.C. Ct. App. July 3, 2012) ("However, we need not decide whether Defendant or the State has the better of this dispute given that a thorough review of the record demonstrates that the evidence of Defendant's guilt was overwhelming, so that Defendant would not be entitled to relief even if the trial court erred by allowing the admission of the challenged evidence.").

114. *See Lawrence*, 365 N.C. at 512–14, 723 S.E.2d at 330–32 (distinguishing structural error, or error per se, from plain error).

115. *See supra* Part III.B.

116. *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333 (emphasis added) (citing State v. Wiley, 355 N.C. 592, 615, 565 S.E.2d 22, 39–40 (2002)).

117. 355 N.C. 592, 565 S.E.2d 22 (2002).

118. *Id.* at 615, 565 S.E.2d at 39–40 (emphasis added).

An expansion would be a move toward the majority rule that plain error review is the default method of review for unpreserved errors in criminal proceedings.[119]

If *Lawrence* remains honest to the ultimate purpose of criminal proceedings, to resolve the "factual question of the defendant's guilt or innocence,"[120] there seems to be no reason *not* to extend the plain error rule into some new territory, including inappropriate comments made by prosecutors during opening statements and closing arguments. In these situations, unpreserved error could affect the jury's ability to determine the defendant's guilt because of inappropriate arguments. In such cases, plain error would merely be the default standard of review for unpreserved errors. However, in some pre-trial proceedings, like jury voir dire,[121] or after trial, like sentencing,[122] guilt or innocence is not the question to be asked, and so the justification of *Lawrence* would not suffice. Thus, it is with some irony that, although *Lawrence* provided a more complete theory of plain error, it suggests that the current set of applications is incomplete. Greater clarity in the foundations of the doctrine works to unsettle and expand the application of the doctrine.

B. Where Lawrence *Falls Short*

Because *Lawrence* added a second, judicial harm "prong" into the plain error calculation, it is not clear what future fact permutations may hold. This new prong now says that plain error

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119. *See generally* Weigand, *supra* note 63, at 222 (noting that North Carolina is one of "only about eight . . . states refusing to adopt [a plain error rule] or otherwise limiting any plain error review to death penalty cases or erroneous jury instruction claims").

120. *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330 (internal quotation marks omitted).

121. *See* State v. Chapman, 359 N.C. 328, 347, 611 S.E.2d 794, 811 (2005) (refusing to extend plain error review to jury voir dire); State v. Cummings, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000) (same).

122. There seems to be some tension between the supreme court and the court of appeals on the application of plain error review to sentencing. The supreme court has explicitly refused to review sentencing proceedings for plain error. *See, e.g.*, State v. Golphin, 352 N.C. 364, 460, 533 S.E.2d 168, 230–31 (2000) ("[W]e note [defendant] concedes he did not object to joinder for sentencing or renew a previous motion to sever.... [Defendant] argues, however, the trial court's error amounts to plain error pursuant to [N.C. R. APP. P.] 10(c)(4). However, plain error review is limited to errors in a trial court's jury instructions or a trial court's rulings on admissibility of evidence. This Court has previously declined to extend plain error review to other issues, and we decline to do so now." (citation omitted)). But the court of appeals, even after *Golphin*, has explicitly reviewed sentencing proceedings for plain error. *See, e.g.*, State v. Valentine, No. COA01-523, 2002 WL 857556, at *2–3 (N.C. Ct. App. May 7, 2002) (reviewing sentencing proceedings for plain error). *But see* State v. Pouncy, No. COA03-407, 2004 WL 743779, at *2 (N.C. Ct. App. Apr. 6, 2004) (refusing to review sentencing proceedings for plain error).

"often" harms judicial proceedings, departing from the federal standard. That *Lawrence* declined to explain the second prong compounds the ambiguity.

1. How Often is "Often"?

Whereas the federal courts *always* require an error that seriously affects the fairness, integrity, or public reputation of judicial proceedings, the *Lawrence* court concluded that plain error would "often," but not necessarily, involve such harm.[123] *Lawrence* left it unclear what could meet this prong—and whether it is even a prong at all.

The Supreme Court of North Carolina has not clarified how the judicial harm inquiry differs from the probable impact prong. The *Lawrence* court conducted no legal analysis under this prong, but merely concluded that it was not met: "In addition, the error in no way seriously affects the fairness, integrity, or public reputation of judicial proceedings."[124] The words "[i]n addition" do suggest, however, that the conclusion is at least somewhat independent of the probable impact analysis. A few months after the *Lawrence* decision, in *State v. Towe*, the court concluded that "the erroneous admission of expert testimony that impermissibly bolstered the victim's credibility" had a probable impact on the jury's verdict.[125] The victim's testimony, which was bolstered by the expert's erroneously-admitted testimony, was "the only direct evidence against defendant."[126] "As a result," the court determined, it was "also persuaded that this error is one that 'seriously affects the fairness, integrity, [and] public reputation of judicial proceedings.' "[127] The *Towe* analysis appears to combine the two prongs because the court made its conclusion on the judicial harm prong "[a]s a result" of its probable impact analysis. The dissent focused entirely on the lack of probable impact, with no mention of harm to judicial proceedings.[128]

123. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. This ambiguity may have been a necessary result of having a unanimous doctrinal statement. Though just enough votes may have been there for a clearer standard—perhaps the federal standard, requiring both probable impact and harm to judicial proceedings—the court may have desired a greater consensus on such a major doctrinal issue. Regardless of the court's internal machinations, clarity would require the court to explain what constitutes harm to judicial proceedings.

124. *Id.* at 519, 723 S.E.2d at 335.

125. State v. Towe, 366 N.C. 56, 62–63, 732 S.E.2d 564, 568 (2012).

126. *Id.* at 63, 732 S.E.2d at 568.

127. *Id.* (alteration in original) (quoting *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335).

128. *See id.* at 67, 732 S.E.2d at 571 (Newby, J., dissenting).

A review of the Supreme Court of North Carolina's plain error cases from *Odom* to *Lawrence* shows that the focus has always been on probable impact.[129] There does not appear to be any case conducting an independent analysis of whether an error seriously affected the fairness, integrity, or public reputation of judicial proceedings. And yet *Lawrence* suggests without elaboration that the two elements need not concur.[130]

Federal cases decided before *Lawrence* could help distinguish between the prongs. In *Puckett v. United States*,[131] the United States Supreme Court attempted to explain the difference. While explaining the four-prong analysis from *United States v. Olano*, the Court noted that the third prong, requiring that the error affected the defendant's substantial rights, ordinarily means that the defendant must demonstrate that the error " 'affected the outcome of the district court proceedings.' "[132] The Court noted that the fourth, judicial harm prong "is meant to be applied on a case-specific and fact-intensive basis," and as such, a "*per se* approach" is "flawed."[133] Where the error affected the outcome of the trial court proceedings, "countervailing factors in particular cases" may prevent the error from being reversed on appeal.[134]

The Court found just such a circumstance with the defendant in *Puckett*. The district court had, in violation of defendant's rights,[135] allowed the government to renege on a plea bargain that required the defendant to plead guilty to two crimes in exchange for the government agreeing that the defendant had accepted responsibility for his crimes and requesting the lowest end of the sentencing

129. Shortly after *Odom* announced the plain error rule, the court issued another opinion indicating that there could be no plain error where there was no probable impact on the jury's verdict. *See* State v. Black, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983) ("We do not believe that there is a reasonable probability that the evidence that defendant worked in an adult bookstore for approximately ten days 'tilted the scales' in favor of his conviction by the jury."). Shortly before *Lawrence* clarified the plain error rule, the court issued an opinion also indicating that plain error analysis depends upon probable impact. *See* State v. Phillips, 365 N.C. 103, 130, 711 S.E.2d 122, 142 (2011) ("Moreover, we conclude that even if the jury had been so instructed, no reasonable probability exists that the jury would have reached a different verdict or recommended a different sentence."), *cert. denied*, 132 S. Ct. 1541 (2012).

130. *See infra* Part IV.B.2.

131. 556 U.S. 129 (2009).

132. *Id.* at 135 (quoting United States v. Olano, 507 U.S. 725, 734 (1993)).

133. *Id.* at 142 (internal quotation marks omitted).

134. *Id.* at 142–43.

135. *Id.* at 136. Plain error review in federal court is not limited to instructional and evidentiary errors. *See supra* note 62 and accompanying text.

guideline level.[136] After pleading guilty pursuant to the plea agreement, but before he was sentenced, the defendant committed another crime, to which he confessed.[137] At sentencing, the government requested that the defendant receive no reduction in sentence for accepting responsibility, and the district court agreed.[138] On review, the Supreme Court appeared to argue that, even if the other prongs were met in this case, the defendant could not prove the fourth prong because of "countervailing factors."[139]

Thus, the Court traditionally inquires: If the unpreserved error at trial were left uncorrected on appeal, would that error harm the fairness, integrity, or public reputation of judicial proceedings? But sometimes, to answer this question, the Supreme Court considers the hypothetical effect of *not* correcting the error: If the unpreserved error were reversed on appeal, would that reversal itself harm the fairness, integrity, or public reputation of judicial proceedings? Though similar, the inquiries are not logical equivalents. Rather, the Court considers the consequences of the alternative disposition to balance the relative effect on the judicial system.[140]

The *Lawrence* court seemed aware of this type of analysis for the federal standard's fourth prong, but related it back to whether or not the evidence against a defendant is "overwhelming." In explaining the federal standard, the *Lawrence* court noted that

> for an appellate court to intervene, a fourth prong must be satisfied: The error must "seriously affect the fairness, integrity or public reputation of judicial proceedings." While a miscarriage of justice, most often meaning actual innocence, would likely satisfy this standard, an error may also satisfy the standard "independent of the defendant's innocence." The standard recognized in *Atkinson* is unlikely to be satisfied, however, when evidence of the defendant's guilt is

136. *Puckett*, 556 U.S. at 131.

137. *Id.* at 131–32.

138. *Id.* at 132–33.

139. *Id.* at 143 ("Given that he obviously did not cease his life of crime, receipt of a sentencing reduction for *acceptance of responsibility* would have been so ludicrous as itself to compromise the public reputation of judicial proceedings.").

140. *See* Nguyen v. United States, 539 U.S. 69, 88 (2003) (Rehnquist, C.J., dissenting) ("On this record, there is no basis for concluding that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. No miscarriage of justice will result from deciding not to notice the plain error here.").

overwhelming.[141]

Although the United States Supreme Court has found "overwhelming" evidence of guilt to bar a defendant's success on the fourth, judicial harm prong, the Supreme Court of North Carolina has typically considered overwhelming evidence under the probable impact analysis. Whether searching for "overwhelming" evidence of guilt or the potentially harmful effects of reversal, the search for harm to judicial proceedings appears to proceed on a "case-specific and fact-intensive"[142] basis. This is a confusing result for a court that was aware of the federal four-prong standard for plain error and yet chose not to adopt it, and it leaves the value of this prong unexplained.

2. The Lack of Future Guidance

Along with failing to clarify when—if ever—the judicial harm prong applies, *Lawrence* also falls short by offering little guidance to lower courts on how they are to apply plain error review. If probable impact and harm to the judicial system are separate analyses, then there are four possible results a reviewing court in North Carolina could reach once it finds a cognizable, unpreserved error. First, the court could determine that neither prong is met. Like in *Lawrence*, this means that the error does not rise to the level of plain error.[143] Second, the reviewing court could find that both prongs are met. Technically, this only gives the reviewing court *permission* to find plain error, but does not *mandate* a finding of plain error. In both the North Carolina and federal courts, once the requirements are met, reversal still lies in the discretion of the reviewing court.[144] Despite this caution, it seems exceedingly unlikely that any court would conclude both that an error affected the outcome in a particular trial *and* harmed the judicial system generally, yet take no action within its

141. State v. Lawrence, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citations omitted) (quoting United States v. Olano, 507 U.S. 732, 736–37 (1993)). Further, the court in *Lawrence* cited *United States v. Cotton*, 535 U.S. 625 (2002), for the proposition that " '[t]he real threat then to the fairness, integrity, and public reputation of judicial proceedings would be if [the defendant], despite the overwhelming and uncontroverted evidence [of guilt],' had the conviction overturned on appeal." *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333 (alteration in original) (quoting *Cotton*, 535 U.S. at 634).

142. *Puckett*, 556 U.S. at 142.

143. *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335.

144. *Compare id.* at 518, 723 S.E.2d at 334 ("[P]lain error is to be applied cautiously and only in the exceptional case." (internal quotation marks omitted)), *with Olano*, 507 U.S. at 735 ("Rule 52(b) [the federal plain error rule] is permissive, not mandatory.").

authority to correct the error. This conclusion accords with the Supreme Court of North Carolina's result in *State v. Towe*.[145]

The more difficult question arises in the third and fourth scenarios, considered below, when only one prong is met, but not both. For example, can an unpreserved error have had such a probable impact on the jury's guilty verdict that, absent the error, the jury would have reached a different verdict, *but not also* seriously affect the fairness, integrity, or public reputation of judicial proceedings? And is it possible for the reverse to happen—for an error to constitute a major harm to the judicial system without also having a probable impact on the jury's guilty verdict? So far, no North Carolina case has clarified what happens when these prongs conflict, but *Lawrence* creates this possibility.[146]

The federal plain error rule separates these two inquiries at the doctrinal level, but there appears to be some sense that, as applied, it is a distinction without a difference. North Carolina has been guided by, though not wholly deferential to, federal plain error doctrine. The United States Supreme Court more clearly separates the probable impact of an error from the harm to the judicial system.[147] Where the error probably affected the outcome at trial (the third federal prong), but the evidence against the defendant was otherwise "overwhelming," the Court has found that there was no harm to judicial proceedings (the fourth federal prong) because the true "miscarriage of justice" would be the reversal of the conviction.[148]

The federal courts of appeals have not always found the distinction so straightforward. For example, after the United States Supreme Court issued *United States v. Booker*,[149] holding that judicial fact-finding was unconstitutional when the district courts were mandated to follow the Federal Sentencing Guidelines, "thousands of federal prisoners across the nation filed direct appeals requesting resentencing hearings in light of *Booker* and the new discretionary Guidelines scheme."[150] The federal circuits have split three ways over application of plain error review in these cases, and this split has focused on the third and fourth prongs of the federal plain error

145. *See* State v. Towe, 366 N.C. 56, 63, 732 S.E.2d 564, 568 (2012).

146. *See supra* Part III.B.

147. *See supra* notes 26–31 and accompanying text.

148. Johnson v. United States, 520 U.S. 461, 470 (1997) (internal quotation marks omitted).

149. 543 U.S. 220 (2005).

150. Amber K. Rutledge, *Plain Error? The Supreme Court's Refusal to Resolve the Circuit Split in* Booker *Pipeline Appeals and the Resulting "Geographic Crazyquilt,"* 55 DRAKE L. REV. 233, 241 (2006).

rule.[151] Some circuits have held that the judicial harm prong is not met unless the criminal defendant could prove that he could or would receive a lesser sentence on remand.[152] Others have taken the opposite approach, presuming the invalidity of pre-*Booker* sentences so that failing to remand these types of appeals for resentencing "could adversely affect the fairness and integrity of the proceedings."[153] And yet other circuits have abbreviated the analysis of the fourth prong, since if "the District Court's error was prejudicial, the error would 'seriously affect[] the fairness, integrity, or public reputation of judicial proceedings.' "[154] The latter necessarily followed from the former because " '[i]t is a miscarriage of justice to give a person an illegal sentence that increases his punishment, just as it is to convict an innocent person.' "[155]

All of these approaches are reasonable. There seems to be some support in North Carolina case law for collapsing the prongs, as in the third class of *Booker* cases. In *Towe*, the Supreme Court of North Carolina rested its judicial harm analysis on its probable impact analysis. Having found the "prejudicial effect necessary to establish that the error was a fundamental error," the *Towe* court concluded, "[*a*]*s a result*, we are also persuaded that this error is one that seriously affects the fairness, integrity, [and] public reputation of judicial proceedings."[156] Similarly, in its analysis of the federal standard, the *Lawrence* court implied that a miscarriage of justice tends to follow a finding of probable impact.[157] Such seems to be the implication of the court's statement that "[t]he standard recognized in *Atkinson* is unlikely to be satisfied ... when evidence of the defendant's guilt is overwhelming."[158] However, a complete equation of the prongs is not consistent with *Lawrence*'s rule that the two "often" concur because it would change the frequency to "always."[159] It may be to *Lawrence*'s credit that it did not close the door to

151. *Id.* at 242.

152. *See, e.g.*, United States v. Gonzalez-Huerta, 403 F.3d 727, 738–39 (10th Cir. 2005).

153. United States v. Davis, 407 F.3d 162, 165 (3d Cir. 2005).

154. United States v. Coles, 403 F.3d 764, 767 (D.C. Cir. 2005) (alteration in original) (quoting Johnson v. United States, 520 U.S. 461, 467 (1997)).

155. *Id.* (quoting United States v. Paladino, 401 F.3d 471, 483 (7th Cir. 2005)).

156. State v. Towe, 366 N.C. 56, 63, 732 S.E.2d 564, 568 (2012) (emphasis added) (citations omitted) (internal quotation marks omitted).

157. *See* State v. Lawrence, 365 N.C. 506, 517–18, 723 S.E.2d 326, 334 (2012).

158. *Id.* at 516, 723 S.E.2d at 333 (citing United States v. Cotton, 535 U.S. 625, 634 (2002)).

159. *See supra* notes 123–30 and accompanying text.

unusual fact patterns in the future, but this has created a gap of ambiguity.

It would be theoretically possible for a court to find plain error when an error did not have a probable impact on the result at trial, but nonetheless affected the fairness, public reputation, or integrity of judicial proceedings. One possible context for finding plain error in such a situation could be in the case of judicial misconduct where probable impact could be a subordinate concern. For example, the Maryland Court of Appeals has found plain error where the judge who presided over the trial proceedings "acted like a co-prosecutor."[160] The defendant was not set free but had his case remanded for a new trial before a different judge.[161] Such a use of plain error review seems reasonable in order to protect the overall public confidence in the judiciary, though it is less related to a criminal defendant's actual "guilt or innocence."[162] Additionally, in explaining the federal standard, the *Lawrence* court suggested that the harm-to-the-judicial-system test could be met with proof of "actual innocence."[163] This is reasonable because our justice system requires only a fair trial, not a perfect one.[164] And even when the process is spotless, mistakes happen.

Beyond judicial misconduct, however, it is less clear whether there can be plain error without probable impact. *Lawrence* suggests that probable impact is usually, if not always, required: defendants "must" show that the error was fundamental, and this "must" be proven by demonstrating "probable impact."[165] Since the federal standard applies to seemingly endless types of unpreserved errors,[166] interesting applications of the miscarriage of justice prong sometimes arise.[167] However, in North Carolina, plain error only applies to evidentiary and instructional errors.[168] Unlike some other types of

160. Diggs v. State, 973 A.2d 796, 799 (Md. 2009).

161. *Id.* at 816.

162. *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330 (internal quotation marks omitted).

163. *Id.* at 516, S.E.2d at 333.

164. United States v. Lutwak, 344 U.S. 604, 619 (1953).

165. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (internal quotation marks omitted).

166. *See generally* WRIGHT & HENNING, *supra* note 6 (recognizing that there "would seem to be no error to which plain error review would not apply").

167. *See, e.g.*, Nguyen v. United States, 539 U.S. 69, 70 (2003). The United States Supreme Court, in a five-to-four decision, found plain error in appellate proceedings, without a showing of prejudice, where a non-Article III judge sat on a court of appeals panel. *See id.* at 69–70; *see also* WRIGHT & HENNING, *supra* note 6, at 576 (discussing this "unusual case").

168. *See supra* note 63 and accompanying text.

errors,[169] these two are particularly related to the verdict ultimately rendered by the jury. Absent particularly egregious and disreputable comments by the trial judge on a defendant's evidence, or otherwise foolish remarks during the jury charge, it is difficult to imagine any case involving plain error with harm to the judicial system, but with no probable impact. At best, where the impact of the error on the jury verdict is unclear, or could go either way, a finding of serious harm to the reputation of judicial proceedings could tilt the analysis in the defendant's favor. This imprecision in the law would be less bothersome if it cut the other way. It seems that probable impact is always required for plain error, but harm to the judicial system only "often" coincides with plain error.

3. A Path Forward

Lawrence is imprecise. It might be one prong; it might be two; it might be one and a half. The court of appeals is still uneasy with the plain error rule. Since *Lawrence*, the Supreme Court of North Carolina has explicitly remanded cases to the court of appeals just to apply the newly clarified plain error standard.[170] Despite the supreme court's persistence, however, some panels of the court of appeals have insisted on applying *Odom*, rather than *Lawrence*, as the preeminent statement on plain error—even six months after *Lawrence*.[171] Either some panels of the court of appeals forgot that the plain error standard was updated in *Lawrence*, or some have found *Lawrence* itself unhelpful in clarifying anything in *Odom*.

The judicial harm prong purports to be a possible limit on the strength of the probable impact prong. The opposite may have been more sensible, allowing reversal in the exceptional case where the error harmed the judicial proceedings, but probable impact was absent, inapplicable, or unclear. Thus, harm to judicial proceedings could have served as an alternate basis for finding plain error. If the

169. *See* United States v. Padilla, 415 F.3d 211 (1st Cir. 2005). In *Padilla*, a majority of the First Circuit found no plain error under the third and fourth prongs of *Johnson* where the district court erroneously delegated to a probation officer the discretion to subject defendant to an unlimited number of drug tests. *See id.* at 220–23. However, the dissent found the third, prejudice prong inapplicable to this type of error because it was not possible to "assess the likelihood that a known outcome would have occurred even without the error." *Id.* at 226 (Lipez, J., dissenting). The dissent would have found the fourth, miscarriage of justice prong sufficient and satisfied because of the "larger, institutional consequences of the error." *Id.* at 229.

170. *See, e.g.*, State v. Boyd, 366 N.C. 210, 739 S.E.2d 838 (2012) (allowing the State's petition for discretionary review "for the limited purpose of remanding to the Court of Appeals for the application of plain error review pursuant to *State v. Lawrence*").

171. *See, e.g.*, State v. Miles, __ N.C. App. __, __, 733 S.E.2d 572, 575 (2012).

words of *Lawrence* are to be given any reasonable meaning, this interpretation must be rejected because judicial harm is, if anything, a limit and not an expansion on plain error review.

But perhaps *Lawrence*'s judicial harm prong is no more than a warning that the plain error rule is not a "roving commission for appellate judges to seek out and correct error wherever it can be found."[172] It is a reminder to future courts that the burden for proving plain error is on the defendant, and that if the "adversarial model"[173] is to work, plain error reversals are warranted only in the "exceptional case."[174] If *Lawrence* is to have a future, this must surely be it. Otherwise, the judicial harm prong is an answer in search of a question.

CONCLUSION

The "probable impact" of *Lawrence* on North Carolina's plain error jurisprudence is not clear. On the one hand, *Lawrence* signals a limitation on plain error review by adding a second "prong," requiring probable impact and harm to the judicial system. Yet this prong is required "often," not always, and even when it applies, its application in the North Carolina courts has not been decided. But on the other hand, *Lawrence* provided a justification and limiting principle that would permit plain error review of trial errors beyond evidentiary and instructional failures.[175]

That *State v. Lawrence* has more clearly explained North Carolina's plain error rule than its predecessor, *State v. Odom*, is "plain." *Lawrence* explains the importance of plain error review to the entire criminal justice system, and explains the connection of plain error with other types of error recognized in North Carolina. Additionally, *Lawrence* has provided the justification for bringing North Carolina into harmony with the rest of the nation by making plain error review the default level of review for unpreserved errors at trial.

But *Lawrence* is not without its own challenges, and the next chapters of plain error review remain unwritten. First, although *Lawrence* is clearer than *Odom*, *Lawrence* is not so extreme as to overturn previous cases, and courts in the future may find it difficult

172. Martineau, *supra* note 2, at 1052.

173. State v. Lawrence, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012).

174. *Id.* at 518, 723 S.E.2d at 334 (quoting State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

175. *See supra* notes 116–22 and accompanying text.

to appreciate how *Lawrence* modifies plain error review in North Carolina. Second, the fact that *Lawrence* provides the justification for expanding plain error review could lead to the North Carolina Court of Appeals suggesting new uses for the rule. Third, *Lawrence* has unnecessarily muddled the doctrine by adding a "half" element such that an error's probable impact on the jury's verdict should "often" be accompanied with harm to the judicial system itself. Because its use differs from the federal standard, the state court of appeals seems less likely to write that chapter of the plain error doctrine. If this prong is to be given a voice of its own, it will likely be up to the Supreme Court of North Carolina to do so.

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