

NOTES

BRECHT V. ABRAHAMSON: HARD JUSTICE FOR STATE PRISONERS?

On April 1, 1975, the defendant, a former police officer, kidnapped a 16 year-old girl while she was waiting to pick up her school-teacher mother.¹ At gunpoint, he handcuffed the girl and took her to his home, with the intention of raping her.² After noticing the young girl looking around the house, as if she were trying to memorize every detail, the defendant took the young girl to a secluded spot and fatally shot her in the head with a .357 pistol.³ The defendant left the girl's body where it fell and drove to the outskirts of the town, where he abandoned the girl's car on the highway, hazard lights flashing, and hitchhiked to town.⁴

During the defendant's trial for capital murder, the State introduced expert testimony indicating that the victim had bruises on her wrists from handcuffs and that a .357 bullet killed her.⁵ Other testimony showed that the defendant possessed handcuffs with traces of blood of the same type as the victim's.⁶ The State also introduced testimony of witnesses that linked the defendant to the area near the abandoned car. In addition, the State introduced a witness that testified that the defendant sexually assaulted her in a secluded area at gunpoint in 1975.⁷ Finally, in closing arguments, the State made reference to the defendant's post-*Miranda* silence to impeach the defendant's testimony that he killed the victim accidentally.

¹ *Vanderbilt v. Collins*, 994 F.2d 189, 191 (5th Cir. 1993). The facts presented are partially based on *Vanderbilt*, *Id.*

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Vanderbilt*, 994 F.2d at 191.

⁷ *Id.* at 193.

The jury found the defendant guilty of first degree murder. On appeal, the defendant claimed that reference to his post-*Miranda* silence was a constitutional error requiring reversal. The appellate court set aside the conviction, holding that the State failed to prove that the error was harmless beyond a reasonable doubt. The state supreme court reversed, concluding that the error was harmless. The defendant petitioned for habeas review in the federal district court, reasserting his claim that the error required reversal of his conviction.

The proper harmless error standard that the federal court should apply is a question that the United States Supreme Court only recently resolved.⁸ Prior to 1993, the federal court would likely have applied the same harmless error standard on habeas review as applied by the state courts on direct review.⁹ Thus, it is unpredictable how the federal court would judge the impact of the error. This partially fictional fact pattern, however, reflects real case examples and continues to arouse societal concern over judicial deference to state criminals.¹⁰ This concern is particularly salient in today's high crime era.¹¹ Accordingly, societal demand for finality of convictions grows stronger.¹² In contrast, legal commentators criticize the United States Supreme Court's apparent efforts to promote the finality of judgments and principles of federalism by limiting the availability of collateral review and broadening the application of harmless error.¹³ Consistent with commentators' observations, harmless error analysis and federal habeas corpus historically evolved in different directions: harmless error experienced expansive application in the twentieth century,¹⁴ while federal habeas

⁸ *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993).

⁹ See *Yates v. Evett*, 111 S. Ct. 1884, 1892 (1991) (*Chapman* harmless error applied on habeas review of constitutional error); *Rose v. Clark*, 478 U.S. 570, 578, 579 (1986) (*Chapman* harmless error applied on habeas review of constitutional error); *Chapman v. California*, 386 U.S. 18, 24 (1967) ("harmless beyond a reasonable doubt" harmless error standard adopted on direct review of constitutional error).

¹⁰ See Lisa S. Spickler, Casenote, *Brecht v. Abrahamson: Another Step Toward Evisceration of Habeas Corpus*, 27 U. RICH. L. REV. 549, 550 (1993).

¹¹ FBI, *Crime in the U.S.*, 1989 UNIFORM CRIME REPORTS 71. According to reports by the Federal Bureau of Investigation, law enforcement agencies made an estimated 14.3 million arrests in 1989 nationwide for all criminal infractions except traffic violations. *Id.* Over a five year period, 1985-1989, total offenses increased 14%; total violent crimes increased 34%; and property crime arrests increased 13%. *Id.* For the decade, 1980-1989, arrests for all offenses increased 28%; violent arrests increased 35%; and property crime arrests increased 15%. *Id.*

¹² See Spickler, *supra* note 10, at 549.

¹³ *Id.* at 549-50; see also J. Thomas Sullivan, "Reforming" Federal Habeas Corpus: The Cost to Federalism; the Burden for Defense Counsel; and the Loss of Innocence, 61 UMKC L. REV. 291, 291-92 (1992).

¹⁴ See *infra* notes 29-103 and accompanying text.

corpus was progressively limited.¹⁵ Although these doctrines are generally addressed independently, the United States Supreme Court faced these doctrines simultaneously in 1993, in *Brecht v. Abrahamson*, when it addressed the question of which harmless error standard to apply on federal habeas review of constitutional error.¹⁶

In *Brecht*, the Court held that a state prisoner must prove that a constitutional error substantially influenced the jury's verdict in order to reverse a conviction on habeas review.¹⁷ Prior to this decision, a conviction warranted reversal if the state failed to prove that the constitutional error was harmless beyond a reasonable doubt, i.e., there was no reasonable possibility that the error contributed to the conviction.¹⁸ The *Brecht* Court emphasized the policies of finality and federalism underlying collateral review and adopted the more lenient "substantial and injurious effect or influence" requirement for federal habeas proceedings.¹⁹ Although commentators and members of the Court itself predict an exponential decline in the cases of federal habeas relief at the expense of upholding the "truth,"²⁰ the *Brecht* Court, as well as society,²¹ asserts the importance of finality of state judgments and the different role of federal habeas review.²²

This Note examines the *Brecht* decision in light of the history and underlying policies of federal habeas review and harmless error analysis and challenges commentators' strong criticisms. Section I examines the historical development of harmless error analysis.²³ Section II examines the history of federal habeas corpus.²⁴ Section III discusses two United States Supreme Court cases that address both harmless error and habeas review simultaneously.²⁵ Section IV sets out a detailed analysis of *Brecht v. Abrahamson*.²⁶ Section V discusses commentators' criticisms of *Brecht v. Abrahamson*.²⁷ Finally, Section VI tests the merits of com-

¹⁵ See *infra* notes 104-69 and accompanying text.

¹⁶ 113 S. Ct. at 1713-14, 1719.

¹⁷ *Id.* at 1714, 1722.

¹⁸ *Chapman v. California*, 386 U.S. 18, 24 (1967).

¹⁹ *Brecht*, 113 S. Ct. at 1721-22.

²⁰ See Spickler, *supra* note 10, at 549-50; see also *Brecht*, 113 S. Ct. at 1730 (O'Connor, J., dissenting).

²¹ See Spickler, *supra* note 10, at 549.

²² *Brecht*, 113 S. Ct. at 1720, 1721.

²³ See *infra* notes 29-103 and accompanying text.

²⁴ See *infra* notes 104-69 and accompanying text.

²⁵ See *infra* notes 170-94 and accompanying text.

²⁶ See *infra* notes 195-329 and accompanying text.

²⁷ See *infra* notes 330-69 and accompanying text.

mentators' criticisms and analyzes the potential impact of the *Brecht* Court's decision on society and future habeas litigation.²⁸

I. THE DEVELOPMENT OF THE HARMLESS ERROR RULE: AN EXPANSION FROM NONCONSTITUTIONAL ERROR TO CONSTITUTIONAL ERROR

The harmless error rule has deep roots in American jurisprudence.²⁹ Early American courts adopted the automatic reversal rule from their English ancestors which required automatic reversal following even the most technical error at trial.³⁰ This automatic reversal rule spurred societal demand for some type of harmless error review.³¹ In an attempt to discourage reversals, Congress established a harmless error rule in 1919,³² now embodied in Federal Rule of Criminal Procedure 52(a).³³ According to commentators, the underlying rationale for the harmless error rule was to foster economies and judicial efficiency by avoiding reversal of convictions for small errors or defects that had little, if any, likelihood of changing the result of the trial.³⁴ Thus, the harmless error rule allowed courts to look beyond the mere existence of a procedural error and determine whether the error had any bearing on the merits of the case and on the jury's verdict.³⁵ By 1967, all 50 states had adopted some form of harmless error rule.³⁶ Initial

²⁸ See *infra* notes 370-403 and accompanying text.

²⁹ See Charles J. Ogletree, Jr., Comment, *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 156 (1991); see also ROBERT J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 3 (1970) (discussion of history of harmless error rule in English and American jurisprudence).

³⁰ See, e.g., *Williams v. State*, 27 Wis. 402, 402, 403 (1871) (reversed because indictment stated that offense was "against the peace of the State" instead of "against the peace and dignity of the State"); TRAYNOR, *supra* note 29, at 3 (citing *People v. Vice*, 21 Cal. 345 (1863) (reversing a robbery conviction because indictment failed to state that property did not belong to defendant)).

³¹ Ogletree, *supra* note 29, at 156.

³² *Id.* at n.37 (citing Act of February 26, 1919, ch. 48, 40 Stat. 1181). The current version is codified in 28 U.S.C. § 2111 (1989) which states: "[O]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

³³ FED. R. CRIM. P. 52(a). Rule 52(a) states that "[a]ny error, defect, irregularity or variance which does not affect substantial rights should be disregarded." *Id.*

³⁴ Ogletree, *supra* note 29, at 157.

³⁵ *Id.*

³⁶ *Id.*; see *Chapman v. California*, 386 U.S. 18, 22 (1967) (stating that harmless error statutes or rules were present in every state and that Congress had established that such errors should not result in a judgment reversal).

Supreme Court held that federal courts have the power and duty to provide the remedy of release for those deprived of their freedom without due process, despite procedural default incurred by the petitioner during state proceedings.¹²⁰ *Fay* arose out of a murder trial in which the State admitted the defendant's coerced statements.¹²¹ Although the defendant failed to object to the admissibility of his statements at trial, he later petitioned for federal habeas review on the ground that it was reversible error to convict him on the basis of his coerced confession.¹²² The United States District Court for the Southern District of New York dismissed the defendant's application for habeas review and the defendant appealed.¹²³ The United States Court of Appeals for the Seventh Circuit reversed and ordered the conviction set aside.¹²⁴

The United States Supreme Court granted habeas review and concluded that the petitioner's failure to appeal his murder conviction within the state system did not deny him access to federal courts under habeas review.¹²⁵ The Court reasoned that notions of finality alone cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty are not to be denied without full opportunity for plenary judicial review.¹²⁶ Moreover, the Court held that forfeiture of remedies does not warrant the unconstitutional conduct by which a conviction may be obtained.¹²⁷ Thus, commentators argue, the Court significantly expanded the availability of habeas relief by holding that federal courts may grant habeas relief on a federal claim which could not be heard on direct review because of procedural default.¹²⁸

Cases, 61 UMKC L. REV. 599, 602 (1993); Janet Seiberg, *The Great Writ Wronged? Ex-Boxer Weighs in amid Local Brail over Habeas Corpus Reform*, CONN. LAW TRIBUNE, Nov. 15, 1993, at 1.

¹²⁰ *Fay v. Noia*, 372 U.S. 391, 426-27, 438 (1963). The Court did, however, grant federal judges the discretion to deny relief where a petitioner has deliberately sought to subvert or evade orderly adjudication of federal defenses in the state courts. *Id.* at 433.

¹²¹ *Id.* at 395-96.

¹²² *Noia v. Fay*, 183 F. Supp. 222, 226 (S.D.N.Y. 1961), *rev'd*, 300 F.2d 345 (2d Cir. 1961), *aff'd*, 372 U.S. 391, 441 (1963).

¹²³ *Fay*, 183 F. Supp. at 227.

¹²⁴ *Noia v. Fay*, 300 F.2d 345, 365 (1961), *aff'd*, 372 U.S. 391 (1963).

¹²⁵ *Fay*, 372 U.S. at 426.

¹²⁶ *Id.* at 424. The Court noted that there was respectable common law authority for the proposition that habeas was available to remedy any kind of governmental restraint contrary to federal law. *Id.* at 405.

¹²⁷ *Id.* at 428.

¹²⁸ Daniel, *supra* note 119, at 602; Seiberg, *supra* note 119.

mentators' criticisms and analyzes the potential impact of the *Brecht* Court's decision on society and future habeas litigation.²⁸

I. THE DEVELOPMENT OF THE HARMLESS ERROR RULE: AN EXPANSION FROM NONCONSTITUTIONAL ERROR TO CONSTITUTIONAL ERROR

The harmless error rule has deep roots in American jurisprudence.²⁹ Early American courts adopted the automatic reversal rule from their English ancestors which required automatic reversal following even the most technical error at trial.³⁰ This automatic reversal rule spurred societal demand for some type of harmless error review.³¹ In an attempt to discourage reversals, Congress established a harmless error rule in 1919,³² now embodied in Federal Rule of Criminal Procedure 52(a).³³ According to commentators, the underlying rationale for the harmless error rule was to foster economies and judicial efficiency by avoiding reversal of convictions for small errors or defects that had little, if any, likelihood of changing the result of the trial.³⁴ Thus, the harmless error rule allowed courts to look beyond the mere existence of a procedural error and determine whether the error had any bearing on the merits of the case and on the jury's verdict.³⁵ By 1967, all 50 states had adopted some form of harmless error rule.³⁶ Initial

²⁸ See *infra* notes 370-403 and accompanying text.

²⁹ See Charles J. Ogletree, Jr., Comment, *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 156 (1991); see also ROBERT J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 3 (1970) (discussion of history of harmless error rule in English and American jurisprudence).

³⁰ See, e.g., *Williams v. State*, 27 Wis. 402, 402, 403 (1871) (reversed because indictment stated that offense was "against the peace of the State" instead of "against the peace and dignity of the State"); TRAYNOR, *supra* note 29, at 3 (citing *People v. Vice*, 21 Cal. 345 (1863) (reversing a robbery conviction because indictment failed to state that property did not belong to defendant)).

³¹ Ogletree, *supra* note 29, at 156.

³² *Id.* at n.37 (citing Act of February 26, 1919, ch. 48, 40 Stat. 1181). The current version is codified in 28 U.S.C. § 2111 (1988) which states: "[O]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

³³ FED. R. CRIM. P. 52(a). Rule 52(a) states that "[a]ny error, defect, irregularity or variance which does not affect substantial rights should be disregarded." *Id.*

³⁴ Ogletree, *supra* note 29, at 157.

³⁵ *Id.*

³⁶ *Id.*; see *Chapman v. California*, 386 U.S. 18, 22 (1967) (stating that harmless error statutes or rules were present in every state and that Congress had established that such errors should not result in a judgment reversal).

application of harmless error, however, was limited to cases involving nonconstitutional error.³⁷

A. *Harmless Nonconstitutional Error: Kotteakos v. United States*³⁸

The United States Supreme Court first applied federal harmless error rules to cases involving nonconstitutional error.³⁹ In 1946, in *Kotteakos v. United States*, the United States Supreme Court applied the harmless error rule and held that the standard for determining non-constitutional harmless error is whether the error had a "substantial and injurious effect or influence" in determining the jury's verdict.⁴⁰ In *Kotteakos*, the United States District Court for the District of Illinois convicted the defendants of a single general conspiracy based on evidence proving, not one, but eight or more conspiracies of the same type executed through a common key figure.⁴¹ The United States Court of Appeals for the Second Circuit affirmed the convictions.⁴² The United States Supreme Court granted certiorari and concluded that the admission of the additional conspiracies substantially influenced the jury and that, consequently, the error was not harmless.⁴³

In adopting the substantial injury standard, the Court reasoned that the primary goal of nonconstitutional harmless error analysis is to substitute judgment for automatic application of rules.⁴⁴ The Court further reasoned that this substitution is necessary in order to balance the need to protect against arbitrary action and essential unfairness with the need to prevent abusive use of procedural loopholes when fairly convicted.⁴⁵ The Court specifically acknowledged that such an

³⁷ Ogletree, *supra* note 29, at 157; see *Kotteakos v. United States*, 328 U.S. 750, 765 (1946) (example of case involving nonconstitutional error).

³⁸ 328 U.S. at 750.

³⁹ Ogletree, *supra* note 29, at 157; see *Kotteakos*, 328 U.S. at 765, 776.

⁴⁰ *Kotteakos*, 328 U.S. at 775, 776.

⁴¹ *Id.* at 752. The conspiracy charge alleged that the defendants had sought to induce various financial institutions to grant credit upon applications containing false and fraudulent information. *Id.* The prosecution established proof of the conspiracy charge against each defendant through proof of several conspiracies. *Id.* at 755. The indictment, however, charged each defendant with only a single conspiracy. *Id.* at 755. The several conspiracies presented all related to Simon Brown, who pleaded guilty and was the common and key figure in all illegal transactions proven. *Id.* at 753, 754-55. The participants in the different conspiracies were, on the whole, except for Brown, different persons who did not know or have anything to do with one another. *Id.* at 754.

⁴² *United States v. Lekacos*, 151 F.2d 170, 174 (2d Cir. 1945), *rev'd sub nom. United States v. Kotteakos*, 328 U.S. 750 (1946).

⁴³ *Kotteakos*, 328 U.S. at 750, 765, 771, 776.

⁴⁴ *Id.* at 760.

⁴⁵ *Id.*

analysis is fact specific and should be applied to the entire record.⁴⁶ The Court further stated that the harmless error inquiry does not rely on whether the jury was right in their judgment, regardless of the error or its effect upon the verdict.⁴⁷ Rather, the Court stated that the primary focus is what effect the error actually had or is reasonably considered to have had on the jury's decision.⁴⁸ Thus, the Court held that if the reviewing court could not state with reasonable certainty that the judgment was not substantially influenced by the error, it is impossible to conclude that substantial rights were not affected.⁴⁹

B. *Harmless Constitutional Error*: *Chapman v. California*⁵⁰

Although *Kotteakos* reserved application of harmless error analysis to nonconstitutional error, the United States Supreme Court, over twenty years later, applied the harmless error rule to constitutional error.⁵¹ In 1967, in *Chapman v. California*, the United States Supreme Court held that the standard for determining whether a conviction must be set aside is whether the error was harmless beyond a reasonable doubt.⁵² In *Chapman*, the State's attorney, prosecuting defendants on charges of burglary, kidnapping, and murder, commented upon the defendants' refusal to testify at trial and made inferences to the jury of their guilt therefrom.⁵³ The jury found the defendants guilty of all charges.⁵⁴ On appeal to the California Supreme Court, the court admitted that the petitioners had been denied their Fifth Amendment right against self-incrimination by the prosecution's comments on their elected silence.⁵⁵ Nevertheless, the court affirmed the lower court's

⁴⁶ *Id.* at 762, 764.

⁴⁷ *Id.* at 764.

⁴⁸ *Kotteakos*, 328 U.S. at 764.

⁴⁹ *Id.* at 764-65.

⁵⁰ *Chapman v. California*, 386 U.S. 18 (1967).

⁵¹ *Id.* at 22.

⁵² *Id.* at 24.

⁵³ *Id.* at 18-19. The State's attorney relied on Article I, § 13 of the California Constitution to comment upon the defendant's refusal to testify at trial. *Id.* at 19. Article I, § 13 provides in relevant part that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." CAL. CONST. art. I, § 13.

⁵⁴ *Chapman*, 386 U.S. at 18-19.

⁵⁵ *People v. Teale*, 63 Cal. 2d 178, 196, 197 (1965), *rev'd sub nom.* *Chapman v. California*, 386 U.S. 18 (1967). Prior to the defendants' appeal, the United States Supreme Court in 1965, in *Griffin v. California*, held Article I, § 13 of the California Constitution invalid on the ground that it placed a penalty on the exercise of an individual's right not to be compelled to be a witness against himself, guaranteed by the Fifth Amendment to the United States Constitution. 380 U.S. 609, 613, 615 (1965) (Fifth and Fourteenth Amendments forbid comments by prosecution on

conviction after applying the California Constitution's harmless error provision, which forbids reversal unless the court concludes that the error complained of resulted from a miscarriage of justice.⁵⁶

The United States Supreme Court granted certiorari and reversed, holding that a federal constitutional error may only be considered harmless when the state proves that the error was harmless beyond a reasonable doubt.⁵⁷ The *Chapman* Court placed the burden of proving harmless error on the beneficiary of the error.⁵⁸ Specifically, the Court required the State to prove that there was no reasonable possibility that the prosecutor's actions might have contributed to the conviction for the error to be held harmless.⁵⁹ The Court affirmatively refused to adopt the petitioner's argument that *all* federal constitutional errors must always be regarded as harmful, requiring reversal.⁶⁰ The Court emphasized, however, that some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error.⁶¹

Justice Black, writing for the majority, set out the opinion in four steps.⁶² First, the Court stated that where a federal right is violated, federal law, rather than state law, should apply.⁶³ Second, the Court stated that, in some cases, some constitutional errors are so unimportant that they may be deemed harmless.⁶⁴ Justice Black reasoned that such a rule prevents small or uninfluential errors at trial from serving as a basis for reversal.⁶⁵ Third, the Court preferred the federal harmless error rule over state harmless error rules.⁶⁶ Finally, in applying the harmless error rule to the facts of the case, the Court reasoned that

accused's silence and by court that silence is evidence of guilt). This became known as a *Griffin* error.

⁵⁶ *Teale*, 63 Cal. 2d at 197; see CAL. CONST. art. VI, § 4 1/2. Section 4 1/2 states in pertinent part:

No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless after examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

CAL. CONST. art. VI, § 4 1/2.

⁵⁷ *Chapman*, 386 U.S. at 20, 24.

⁵⁸ *Id.* at 24.

⁵⁹ *Id.* at 23 (citing *Fahny v. Connecticut*, 375 U.S. 85 (1963)).

⁶⁰ *Id.* at 21-22.

⁶¹ *Id.* at 23. The Court cited three instances of error that can never be held harmless: 1) coerced confession; 2) right to counsel; and 3) impartiality of a judge. *Id.* at 23 n.8.

⁶² *Chapman*, 386 U.S. at 21-26.

⁶³ See *id.* at 21.

⁶⁴ *Id.* at 22.

⁶⁵ *Id.*

⁶⁶ See *id.* at 23-24.

the prosecution's reference to the defendants' silence and decision not to testify could be no more considered harmless than the introduction against a defendant of a coerced confession.⁶⁷ Thus, the United States Supreme Court rejected the automatic reversal principle and sanctioned application of the harmless error rule to constitutional error.⁶⁸

C. *Post-Chapman Harmless Error: An Expansion of Constitutional Harmless Error*

During the post-*Chapman* era, state and federal courts adopted the principle that all constitutional error is not harmful error, and thus, applied the harmless error rule to a variety of constitutional errors.⁶⁹ In 1969, in *Harrington v. California*, the United States Supreme Court reaffirmed *Chapman* and held that a conviction will be maintained if the evidence is so "overwhelming" that the constitutional violation was "harmless beyond a reasonable doubt."⁷⁰ *Harrington* arose out of a murder trial of four men in which one defendant was implicated in the murder by two co-defendants.⁷¹ The trial court admitted the co-defendants' confessions although they refused to take the stand, and thus, violated the defendant's Sixth Amendment right to confrontation.⁷² On appeal, the California Court of Appeals affirmed the conviction on the grounds that the defendant's own confession sustained the finding of guilt, irrespective of the co-defendants' confessions.⁷³ The California Supreme Court denied the defendant's petition for a rehearing.⁷⁴ The United States Supreme Court granted certiorari and affirmed the conviction on the grounds that the error was harmless beyond a reasonable doubt.⁷⁵

In determining whether the error was harmless, the Court focused on the duplicative or cumulative nature of the excluded evidence.⁷⁶ The Court analyzed whether the properly admitted evidence tended to prove the same case as the erroneously admitted evidence.⁷⁷ The

⁶⁷ *Chapman*, 386 U.S. at 24-26.

⁶⁸ *See id.* at 22.

⁶⁹ *See, e.g., Arizona v. Fulminante*, 111 S. Ct. 1246, 1264 (1991) (coerced confession); *United States v. Hastings*, 461 U.S. 499, 508 (1983) (*Griffin* error).

⁷⁰ *Harrington v. California*, 395 U.S. 250, 254 (1969).

⁷¹ *Id.* at 252-53.

⁷² *Id.* at 252.

⁷³ *People v. Bosby*, 64 Cal. Rptr. 159, 163 (Cal. Ct. App. 1967), *aff'd sub nom. Harrington v. California*, 395 U.S. 250 (1969).

⁷⁴ *Harrington*, 395 U.S. at 252.

⁷⁵ *Id.* at 252, 254.

⁷⁶ *Id.* at 254.

⁷⁷ *Id.* at 253-54.

Harrington Court concluded that the properly admitted evidence was so "overwhelming" that the admission of the co-defendants' confessions, although erroneous, was "harmless beyond a reasonable doubt."⁷⁸ Thus, consistent with *Chapman*, the Court held that a Sixth Amendment violation does not require reversal if the evidence is so overwhelming that the error is harmless beyond a reasonable doubt.⁷⁹

In 1983, in *United States v. Hastings*, the United States Supreme Court reaffirmed the principle expressed in *Chapman*, that all constitutional errors do not require reversal.⁸⁰ The *Hastings* Court held that a reviewing court may not avoid harmless error analysis by asserting its supervisory power as a justification for reversal of criminal convictions.⁸¹ In *Hastings*, the United States District Court for the Southern District of Illinois convicted the defendants of kidnapping, transporting women across state lines for immoral purposes and conspiracy to commit those offenses.⁸² On appeal, the United States Court of Appeals for the Seventh Circuit reversed the defendants' conviction because the prosecutor referred to defendants' failures to testify at trial in violation of the Fifth and Fourteenth Amendments.⁸³ The United States Supreme Court granted certiorari and reversed.⁸⁴

In faulting the Seventh Circuit for failing to apply harmless error analysis, the Supreme Court reasoned that the reviewing court has a duty to consider the trial record as a whole and to ignore errors that are harmless beyond a reasonable doubt, including most constitutional violations.⁸⁵ The Court justified this duty on the grounds that conservation of judicial resources and the prompt administration of justice required that reviewing courts remain unburdened by inconsequential error.⁸⁶ The Court further stated that a conviction should be affirmed if the reviewing court concludes that, on the whole record, the error was harmless beyond a reasonable doubt.⁸⁷ Thus, the *Hastings* Court

⁷⁸ *Id.* at 254.

⁷⁹ See *Harrington*, 359 U.S. at 252, 254.

⁸⁰ See *United States v. Hastings*, 461 U.S. 499, 508-09 (1983).

⁸¹ *Id.* at 505.

⁸² *Id.* at 501-03.

⁸³ *United States v. Hastings*, 660 F.2d 301, 303 (7th Cir. 1981), *rev'd*, 461 U.S. 499, 512 (1983). In *Griffin v. California*, the Court held that prosecutorial comment on the failure of the accused to testify at trial violates the defendant's Fifth Amendment privilege against self-incrimination. 380 U.S. 609, 613, 615 (1965).

⁸⁴ *Hastings*, 461 U.S. at 500, 512.

⁸⁵ *Id.* at 509.

⁸⁶ *Id.*

⁸⁷ *Id.* at 509 n.7.

reaffirmed *Chapman* and held that such an error does not require automatic reversal.⁸⁸

Commentators argue that the expansion of harmless error analysis culminated in 1991, in *Arizona v. Fulminante*.⁸⁹ In *Fulminante*, the United States Supreme Court held that an appellate court must apply harmless error analysis to *all* constitutional trial errors and must uphold a conviction if the court deems the error to be harmless beyond a reasonable doubt.⁹⁰ In *Fulminante*, the State obtained a conviction based on a coerced confession in violation of the Due Process Clause of the Fifth Amendment.⁹¹ In determining that harmless error analysis should apply, the Court divided errors into two types: trial error and structural defects.⁹² The Court defined trial errors as errors in the trial process occurring in the presentation of the case to the jury.⁹³ The Court reasoned that errors of this type are subject to harmless error analysis because they can be quantitatively assessed.⁹⁴ Alternatively, the Court defined structural defects as errors that require automatic reversal because they affect the framework and conduct of the trial.⁹⁵

Conversely, in a dissenting opinion, Justice White, joined by Justices Marshall, Blackmun and Stevens, faulted the majority for failing to follow the consistent line of authority which prohibits use of a defendant's coerced confession against him at trial.⁹⁶ Justice White argued that, in addition to the untrustworthy nature of coerced confessions, admission of such evidence is forbidden because it offends the principles underlying the United States adversarial system: a system that requires the state to establish guilt by evidence "independently and freely secured" and not from the defendant's own mouth.⁹⁷ Thus, the *Fulminante* dissenters expressed concern over the potential effects of the majority's expansive application of harmless error analysis on the American judicial system.⁹⁸ Nevertheless, commentators note that

⁸⁸ See *id.* at 508-09, 512.

⁸⁹ See Karina Pergament, *Arizona v. Fulminante: Romanticizing Coerced Confessions*, 69 DENV. U. L. REV. 153, 166 (1992); Jason Cenicola, Comment, *Arizona v. Fulminante: Accusation or Inquisition?*, 27 NEW ENG. L. REV. 383, 383 (1992).

⁹⁰ See *Arizona v. Fulminante*, 111 S. Ct. 1246, 1264 (1991).

⁹¹ *Id.* at 1251.

⁹² *Id.* at 1264, 1265.

⁹³ *Id.* at 1264.

⁹⁴ *Id.*

⁹⁵ *Fulminante*, 111 S. Ct. at 1265. The Court cited several instances of error that can never be considered harmless: 1) right to counsel; 2) impartiality of judge; 3) right to self-representation; 4) right to public trial; 5) unlawful exclusion of members of defendant's race from grand jury. *Id.* at 1265.

⁹⁶ *Id.* at 1257 (White, J., dissenting).

⁹⁷ *Id.* at 1256 (White, J., dissenting).

⁹⁸ See *id.* (White, J., dissenting).

the *Fulminante* majority's holding significantly expanded the scope of constitutional harmless error analysis.⁹⁹

In sum, the Court continued to generally apply the "harmless beyond a reasonable doubt" standard to evaluate the effect of constitutional error following the *Chapman* decision.¹⁰⁰ Concurrently, the Court adopted and reaffirmed the principle that all constitutional errors do not require reversal.¹⁰¹ In *Fulminante*, the Court created separate categories of errors and declared all trial type errors subject to harmless error analysis.¹⁰² The *Fulminante* Court, however, distinguished structural errors and held this category of error subject to automatic reversal.¹⁰³

II. HISTORY OF FEDERAL HABEAS CORPUS REVIEW

Similar to the harmless error rule, the writ of habeas corpus originated in English common law and was received into American law in the colonial period.¹⁰⁴ American courts adopted the writ as a procedural safeguard for personal liberty.¹⁰⁵ For most of American history, however, collateral review was quite limited.¹⁰⁶ For example, the Judiciary Act of 1789 limited the jurisdiction of the federal courts to issue writs only when persons were held in federal custody.¹⁰⁷ It was not until 1867 that Congress passed the Judiciary Act which gave both federal and state prisoners the opportunity to challenge their confinement in federal court.¹⁰⁸

⁹⁹ See Pergament, *supra* note 89, at 166; Cenicola, *supra* note 89, at 383.

¹⁰⁰ See, e.g., *Fulminante*, 111 S. Ct. at 1265; *Hastings*, 461 U.S. at 508-09; *Harrington*, 395 U.S. at 253-54.

¹⁰¹ See, e.g., *Fulminante*, 111 S. Ct. at 1264-65; *Hastings*, 461 U.S. at 509.

¹⁰² *Fulminante*, 111 S. Ct. at 1264-65.

¹⁰³ See *id.* at 1264.

¹⁰⁴ *Fay v. Noia*, 372 U.S. 391, 400 (1963). Habeas corpus was given explicit recognition in the federal Constitution, which provides in relevant part: "The principles of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

¹⁰⁵ William J. Sheils, *Nonretroactivity on Habeas Corpus: Whittling at the Great Writ*, 24 SUFFOLK U. L. REV. 744, 745 (1990).

¹⁰⁶ *Brecht v. Abrahamson*, 944 F.2d 1363, 1372 (7th Cir. 1991), *aff'd*, 113 S. Ct. 1710, 1723 (1993).

¹⁰⁷ *Id.* at 1372. Section 14 of the Judiciary Act provides in relevant part: "Either of the justices of the Supreme Court, as well as judges of the district courts, shall have the power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment." Judiciary Act of 1789, ch. 20, 1 Stat. 73, 81-82 (codified at 28 U.S.C. §§ 1-1631 (1988)). In *Ex parte Dorr*, the United States Supreme Court, construing the Judiciary Act, held that the federal common law writ of habeas corpus did not extend to state prisoners. 44 U.S. 103, 105 (1845); see also *Fay v. Noia*, 372 U.S. 391, 409 (1963).

¹⁰⁸ *Brecht v. Abrahamson*, 944 F.2d 1363, 1372 (7th Cir. 1991); see Federal Habeas Corpus

Early application of the Judiciary Act confined the reach of federal courts to questions of jurisdiction over prisoners by trial courts.¹⁰⁹ Accordingly, in 1915, in *Frank v. Mangum*, the United States Supreme Court denied a writ of habeas corpus because the state court had given the case full review within its jurisdiction.¹¹⁰ Thus, under *Frank*, habeas relief was not available to state prisoners if the state tribunal had proper jurisdiction, regardless of how egregious the trial error.¹¹¹ Federal courts, therefore, deferred to state court judgments and did not review state decisions even for reasonableness.¹¹²

The United States Supreme Court finally abandoned this limitation in 1942 in *Waley v. Johnston*.¹¹³ In *Waley*, the Court abandoned the fiction of the jurisdictional limitation and expressly acknowledged that the writ was available to consider constitutional claims as well as questions of jurisdiction.¹¹⁴

Although scholars argue that *Waley* dramatically expanded federal courts' habeas jurisdiction,¹¹⁵ it was not until 1953, in *Brown v. Allen*, that the United States Supreme Court first sanctioned the application of habeas corpus to state adjudications of federal law.¹¹⁶ In *Brown*, the Court rejected the principle of absolute deference to state judgments and held that federal constitutional challenges raised by state prisoners were cognizable on federal habeas review.¹¹⁷ Thus, after *Brown*, even if the claim had been fully and fairly adjudicated by the state judiciary, the federal habeas court could redetermine it.¹¹⁸

A. Expansion of Federal Habeas Corpus: *Fay v. Noia*

According to commentators, the breadth of federal habeas review reached its height in 1963, in *Fay v. Noia*.¹¹⁹ In *Fay*, the United States

Act of 1867, ch. 28, 14 Stat. 385, 385 (current version codified at 28 U.S.C. §§ 2241-55 (1988)). Section 2254(a) provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (1988).

¹⁰⁹ See *Brecht v. Abrahamson*, 944 F.2d 1363, 1372 (7th Cir. 1991).

¹¹⁰ *Frank v. Mangum*, 237 U.S. 309, 335-36 (1915).

¹¹¹ *Brecht*, 944 F.2d at 1372.

¹¹² *Wright v. West*, 112 S. Ct. 2482, 2487 (1992).

¹¹³ See *Waley v. Johnston*, 316 U.S. 101, 104, 105 (1942); see also Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 495 (1963).

¹¹⁴ *Waley*, 316 U.S. at 104-05.

¹¹⁵ See Bator, *supra* note 113, at 495; see also *Brecht v. Abrahamson*, 944 F.2d 1363, 1372 (7th Cir. 1991).

¹¹⁶ See *Wright*, 112 S. Ct. at 2486-87; Sheils, *supra* note 105, at 749-50.

¹¹⁷ See *Wright*, 112 S. Ct. at 2487 (citing *Brown v. Allen*, 344 U.S. 443, 449 (1953)).

¹¹⁸ See Sheils, *supra* note 105, at 749-50.

¹¹⁹ Kris Teena Daniel, Note, *Sawyer v. Whitley: The Deadly Game of Procedures in Death Penalty*

Supreme Court held that federal courts have the power and duty to provide the remedy of release for those deprived of their freedom without due process, despite procedural default incurred by the petitioner during state proceedings.¹²⁰ *Fay* arose out of a murder trial in which the State admitted the defendant's coerced statements.¹²¹ Although the defendant failed to object to the admissibility of his statements at trial, he later petitioned for federal habeas review on the ground that it was reversible error to convict him on the basis of his coerced confession.¹²² The United States District Court for the Southern District of New York dismissed the defendant's application for habeas review and the defendant appealed.¹²³ The United States Court of Appeals for the Seventh Circuit reversed and ordered the conviction set aside.¹²⁴

The United States Supreme Court granted habeas review and concluded that the petitioner's failure to appeal his murder conviction within the state system did not deny him access to federal courts under habeas review.¹²⁵ The Court reasoned that notions of finality alone cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty are not to be denied without full opportunity for plenary judicial review.¹²⁶ Moreover, the Court held that forfeiture of remedies does not warrant the unconstitutional conduct by which a conviction may be obtained.¹²⁷ Thus, commentators argue, the Court significantly expanded the availability of habeas relief by holding that federal courts may grant habeas relief on a federal claim which could not be heard on direct review because of procedural default.¹²⁸

Cases, 61 UMKC L. REV. 599, 602 (1993); Jaret Seiberg, *The Great Writ Wronged? Ex-Boxer Weighs in amid Local Brawl over Habeas Corpus Reform*, CONN. LAW TRIBUNE, Nov. 15, 1993, at 1.

¹²⁰ *Fay v. Noia*, 372 U.S. 391, 426-27, 438 (1963). The Court did, however, grant federal judges the discretion to deny relief where a petitioner has deliberately sought to subvert or evade orderly adjudication of federal defenses in the state courts. *Id.* at 433.

¹²¹ *Id.* at 395-96.

¹²² *Noia v. Fay*, 183 F. Supp. 222, 226 (S.D.N.Y. 1960), *rev'd*, 300 F.2d 345 (2d Cir. 1961), *aff'd*, 372 U.S. 391, 441 (1963).

¹²³ *Fay*, 183 F. Supp. at 227.

¹²⁴ *Noia v. Fay*, 300 F.2d 345, 365 (1961), *aff'd*, 372 U.S. 391 (1963).

¹²⁵ *Fay*, 372 U.S. at 426.

¹²⁶ *Id.* at 424. The Court noted that there was respectable common law authority for the proposition that habeas was available to remedy any kind of governmental restraint contrary to federal law. *Id.* at 405.

¹²⁷ *Id.* at 428.

¹²⁸ Daniel, *supra* note 119, at 602; Seiberg, *supra* note 119.

B. *Cutbacks on Federal Habeas Corpus*

The expansion of habeas corpus, however, was short-lived.¹²⁹ In 1976, in *Stone v. Powell*, the United States Supreme Court held that a state prisoner is not entitled to habeas relief where evidence obtained in an unconstitutional search or seizure was introduced at trial, if the state provided a "full" and "fair" opportunity to assert the violation during the state proceedings.¹³⁰ In so holding, the Court recognized that it was limiting the scope of federal habeas review of Fourth Amendment violations.¹³¹

In *Stone*, petitioners sought habeas relief after exhausting state procedures to remedy the admissibility of evidence obtained from an allegedly unlawful search and seizure at trial.¹³² In determining whether federal habeas review should remain available for Fourth Amendment claims, the Court employed a cost-benefit analysis.¹³³ The Court reasoned that the benefit of deterrence offered by habeas review was minimal as compared with the costs.¹³⁴ In a footnote, the Court stated that resort to habeas review on a nonconstitutional claim, such as the exclusionary rule, intrudes on important values of American government, including the efficient use of judicial resources, finality in criminal proceedings, and federalism.¹³⁵ Thus, the Court held that state prisoners are not entitled to habeas review if provided a full and fair opportunity to litigate their Fourth Amendment claims in the state system.¹³⁶

Moreover, commentators argue that the United States Supreme Court took a further step toward narrowing availability of habeas review one year after *Stone*.¹³⁷ In 1977, in *Wainwright v. Sykes*, the United States Supreme Court held that a state procedural default would prevent federal review unless the defendant could demonstrate both ex-

¹²⁹ Seiberg, *supra* note 119.

¹³⁰ *Stone v. Powell*, 428 U.S. 465, 482, 494 (1976).

¹³¹ *Id.* at 494.

¹³² *Id.* at 470, 472-73.

¹³³ *Id.* at 489.

¹³⁴ *Id.* at 493. The Court noted that the incremental deterrence that might occur from the availability of the remedy during habeas proceedings is remote and speculative. *Id.* at 493. Alternatively, the Court articulated the numerous costs of habeas review for Fourth Amendment claims, including: deflection of the truth-finding process; diversion from the central question of guilt or innocence; and the exclusion of relevant evidence. *Id.* at 490.

¹³⁵ *Stone*, 428 U.S. at 491 n.31 (citing *Schneekloth v. Bustamonte*, 412 U.S. 218, 259 (1976) (Powell, J., concurring)).

¹³⁶ *Id.* at 482, 494.

¹³⁷ Seiberg, *supra* note 119.

ternal cause and actual prejudice resulting from the procedural default, or could establish the necessity of review to prevent a fundamental miscarriage of justice.¹³⁸ In *Sykes*, the defendant failed to make a timely objection to the admissibility of his inculpatory statements as required under Florida law.¹³⁹ The state courts denied defendant's claim that he did not make a voluntary waiver of his *Miranda* rights prior to his inculpatory statements.¹⁴⁰ Thereafter, the defendant petitioned the Supreme Court for habeas relief.¹⁴¹

In denying habeas review, the Court adopted a "cause" and "prejudice" test.¹⁴² The Court reasoned that *Fay v. Noia* accorded too little respect to state procedure.¹⁴³ In contrast, the Court declared that the "cause" and "prejudice" test gave greater respect to state rules and afforded an adequate guarantee that federal habeas courts will not be barred from hearing claims involving an actual miscarriage of justice.¹⁴⁴ In applying this test, the Court denied defendant's habeas petition on two grounds.¹⁴⁵ First, the defendant failed to explain his failure to object to the admission of his statements at trial.¹⁴⁶ Second, the defendant failed to demonstrate either cause or actual prejudice.¹⁴⁷ Thus, the Court held that a state procedural default will prevent federal habeas review unless the defendant demonstrates cause and actual prejudice from the default.¹⁴⁸ Consequently, at least one commentator notes that the *Sykes* holding evidenced a retreat from the expansive language of *Fay*.¹⁴⁹

In 1989, in *Teague v. Lane*, the United States Supreme Court held that federal habeas courts may not retroactively apply new rules of criminal procedure.¹⁵⁰ In *Teague*, an all-white jury convicted the petitioner, a black man, of attempted murder, armed robbery and aggravated battery.¹⁵¹ The Court rejected petitioner's request that the Court

¹³⁸ *Wainwright v. Sykes*, 433 U.S. 72, 87, 90-91 (1977).

¹³⁹ *See id.* at 86-87.

¹⁴⁰ *Id.* at 75.

¹⁴¹ *Id.* at 74.

¹⁴² *Id.* at 87, 90-91.

¹⁴³ *See Sykes*, 433 U.S. at 88.

¹⁴⁴ *Id.* at 90-91.

¹⁴⁵ *Id.* at 91.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Sykes*, 433 U.S. at 87.

¹⁴⁹ Seiberg, *supra* note 119.

¹⁵⁰ *Teague v. Lane*, 489 U.S. 288, 310 (1989).

¹⁵¹ *Id.* at 292-93. During jury selection for petitioner's trial, the prosecution used all ten of its peremptory challenges to exclude black jurors. *Id.* at 293. Consequently, petitioner motioned for a mistrial, which the trial court denied. *Id.*

adopt a new rule of criminal procedure by applying the Sixth Amendment's fair cross-section requirement to the petit jury.¹⁵² The Court distinguished direct and collateral review and reasoned that new rules of criminal procedure should generally not apply retroactively to cases on collateral review.¹⁵³ The Court stated that application of constitutional rules not in existence at the time a conviction becomes final would seriously undermine notions of comity and finality, principles which are primary in determining the proper scope of habeas review.¹⁵⁴ Thus, the Court adopted a general rule of nonretroactivity for cases on collateral review.¹⁵⁵

Finally, in 1991, in *Coleman v. Thompson*, the United States Supreme Court overruled *Fay v. Noia* and further restricted access to the writ of habeas corpus.¹⁵⁶ Consistent with *Sykes*, the *Coleman* Court held that federal habeas courts generally may not review a state court's denial of a prisoner's constitutional claim if the state court's decision was based on an independent and adequate state procedural default.¹⁵⁷ In *Coleman*, after petitioner was convicted of capital murder, a state habeas court ruled against him on numerous federal constitutional claims that he failed to raise on direct appeal.¹⁵⁸ Subsequently, petitioner sought federal habeas review after his state appeal was dismissed on the ground that notice of the appeal was untimely.¹⁵⁹ In barring Coleman's claim for federal habeas review, the Court reasoned that comity and federalism concerns require that states' interests and competency be respected by federal courts.¹⁶⁰ Thus, the Court asserted that states must have the first opportunity to correct their own mistakes.¹⁶¹

The Court preserved, however, a litigant's access to federal habeas review under certain circumstances.¹⁶² The Court stated that if the petitioner shows "cause" for the default and that actual "prejudice" resulted from the abuse of federal law, the petitioner may have access

¹⁵² *Id.* at 299.

¹⁵³ *Id.* 305-06 (citing *Mackay v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part)).

¹⁵⁴ *See id.* at 305-06 (citing *Mackay*, 401 U.S. at 682 (Harlan, J., concurring in part and dissenting in part)).

¹⁵⁵ *Teague*, 489 U.S. at 310.

¹⁵⁶ *See Coleman v. Thompson*, 111 S. Ct. 2546, 2564-65 (1991).

¹⁵⁷ *Id.* at 2565.

¹⁵⁸ *Id.* at 2552.

¹⁵⁹ *Id.* at 2552-53. The United States Court of Appeals for the Fourth Circuit concluded that, by virtue of the dismissal of petitioner's state habeas appeal, petitioner had procedurally defaulted his federal claims. *Id.* at 2553.

¹⁶⁰ *Id.* at 2554-55, 2568.

¹⁶¹ *Coleman*, 111 S. Ct. at 2555.

¹⁶² *Id.* at 2565.

to federal habeas review.¹⁶³ In the alternative, the Court stated that if the petitioner can show that a miscarriage of justice will result if his claim is barred, federal habeas review may be granted.¹⁶⁴ Thus, the Court held that federal habeas review is barred in all cases in which a state prisoner has defaulted his federal claims pursuant to an independent and adequate state procedural rule, unless the petitioner can demonstrate "cause" and "prejudice."¹⁶⁵

The Court in *Brown v. Allen* and *Fay v. Noia* rejected the principle of absolute deference to state judgments and provided state prisoners with access to federal habeas review to judge the reasonableness of state court decisions.¹⁶⁶ This access, according to the Court in *Fay*, was essential to preserve litigants' full opportunity for plenary judicial review.¹⁶⁷ In *Sykes*, *Stone*, *Teague* and *Coleman*, however, the Court carved out exceptions to full plenary review, and thus, limited litigants' access to federal habeas corpus review.¹⁶⁸ In creating these exceptions, the Court relied on principles of finality and federalism to justify the limited access.¹⁶⁹

III. APPLICATION OF HARMLESS ERROR IN FEDERAL HABEAS PROCEEDINGS: *ROSE AND YATES*¹⁷⁰

Although the harmless error and habeas corpus doctrines developed separately,¹⁷¹ the United States Supreme Court faced these doctrines simultaneously on two occasions.¹⁷² Although neither case specifically raised the question of the appropriate harmless error analysis to be applied on federal habeas review of constitutional error, the Court applied the *Chapman* standard in both controversies.¹⁷³ Under *Chapman*, the State must prove that a constitutional error was harmless beyond a reasonable doubt to avoid reversal of a conviction.¹⁷⁴ Prior to

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* The Court also held that an attorney's error causing default on habeas review does not prove "cause," because a prisoner does not have a constitutional right to counsel to pursue an appeal in state habeas proceedings. *Id.* at 2568.

¹⁶⁶ *Wright v. West*, 112 S. Ct. 2482, 2486-87 (1992) (citing *Brown v. Allen*, 344 U.S. 443 (1953)); *Fay v. Noia*, 372 U.S. 391, 426, 438 (1963).

¹⁶⁷ *Fay*, 372 U.S. at 424.

¹⁶⁸ See *supra* notes 129-65 and accompanying text.

¹⁶⁹ See *supra* notes 129-65 and accompanying text.

¹⁷⁰ *Yates v. Evett*, 111 S. Ct. 1884 (1991); *Rose v. Clark*, 478 U.S. 570 (1986).

¹⁷¹ See *supra* notes 129-69 and accompanying text.

¹⁷² See *Yates*, 111 S. Ct. at 1884; *Rose*, 478 U.S. at 570.

¹⁷³ See *Yates*, 111 S. Ct. at 1892; *Rose*, 478 U.S. at 578-79.

¹⁷⁴ *Chapman v. California*, 386 U.S. 18, 24 (1967).

Rose v. Clark and *Yates v. Evett*, state and federal courts applied *Chapman* harmless error analysis on direct review only.¹⁷⁵ Although the United States Supreme Court applied *Chapman* harmless error analysis on federal habeas review in *Rose* and *Yates*, the Court's holding in both cases narrowly addressed whether harmless error should even apply to the particular error.¹⁷⁶

First, in 1986, in *Rose v. Clark*, the United States Supreme Court on federal habeas review held that harmless error analysis is strongly presumed to apply where a defendant was represented by counsel and tried before an impartial adjudicator.¹⁷⁷ In *Rose*, the trial judge instructed the jury that it was the defendant's burden to disprove malice on his first and second degree murder charges.¹⁷⁸ The defendant petitioned for writ of habeas review to the United States District Court for the Middle District of Tennessee on the ground that the unconstitutional burden-shifting instruction was reversible error.¹⁷⁹ The district court granted habeas review and the United States Court of Appeals for the Sixth Circuit affirmed.¹⁸⁰ The United States Supreme Court granted habeas review to determine whether an unconstitutional burden-shifting instruction at trial could ever be harmless error.¹⁸¹

In deciding this question, the *Rose* Court reasoned that while there are some errors to which harmless error does not apply, they are the exception and not the rule.¹⁸² Moreover, the Court noted that the harmless error doctrine recognizes that the central purpose of a criminal trial is to decide the factual question of guilt or innocence, and thus, the focus is on the underlying fairness of the trial and not the presence of an immaterial error.¹⁸³ The Court emphasized, however, that such an analysis requires a consideration of the entire record before a conviction may be reversed.¹⁸⁴ Having decided that harmless

¹⁷⁵ See, e.g., *Arizona v. Fulminante*, 111 S. Ct. 1246, 1264 (1991) (applied *Chapman* harmless error standard on direct review); *United States v. Hastings*, 461 U.S. 499, 508-09 (1983) (same); *Harrington v. California*, 395 U.S. 250, 253-54 (1969) (same); *Chapman*, 386 U.S. at 24 (harmless error standard applied on direct review).

¹⁷⁶ See *Yates*, 111 S. Ct. at 1892; *Rose*, 478 U.S. 582; see also *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1718 (1993) (proper harmless error standard on habeas review addressed for the first time).

¹⁷⁷ *Rose v. Clark*, 478 U.S. 570, 578, 579 (1986).

¹⁷⁸ *Id.* at 574.

¹⁷⁹ *Clark v. Rose*, 611 F. Supp. 294, 295 (M.D. Tenn. 1984), *aff'd*, 762 F.2d 1006 (6th Cir. 1985) (unpublished opinion), *vacated*, 478 U.S. 570, 584 (1986).

¹⁸⁰ *Rose v. Clark*, 762 F.2d 1006 (6th Cir. 1985) (unpublished opinion), *vacated*, 478 U.S. 570, 584 (1986).

¹⁸¹ *Rose*, 478 U.S. at 572.

¹⁸² *Id.* at 578.

¹⁸³ *Id.* at 577.

¹⁸⁴ *Id.* at 583.

error should apply to the unconstitutional burden-shifting error, the Court stated that *Chapman* harmless error analysis, as the existing federal harmless error standard, should be used to determine the effect of the error.¹⁸⁵ Thus, the Court held that challenged jury instructions are to be reviewed under the "harmless beyond a reasonable doubt" standard.¹⁸⁶

Consistent with *Rose*, in 1991, in *Yates v. Evett*, the United States Supreme Court on federal habeas review held that a challenge to constitutionally erroneous jury instructions would be evaluated under the "harmless beyond a reasonable doubt" standard articulated in *Chapman*.¹⁸⁷ In *Yates*, the trial judge instructed the jury to presume malice from the use of a deadly weapon in violation of the Due Process Clause.¹⁸⁸ Having concluded that the instructions were constitutionally erroneous, the Court followed *Rose* and stated that the effect of the instructions was subject to review under *Chapman*.¹⁸⁹ The Court emphasized that the primary issue for the reviewing court is whether the jury rested its verdict on the presumed fact beyond a reasonable doubt.¹⁹⁰ In applying the harmless error rule, the Court held that the erroneous burden-shifting jury instructions were not harmless beyond a reasonable doubt.¹⁹¹

Although both *Rose* and *Yates* involved application of the *Chapman* standard to constitutional trial errors on habeas review, neither case specifically addressed the question of the proper harmless error standard to be employed.¹⁹² Rather, the United States Supreme Court held, in both cases, that harmless error analysis applies to unconstitutional burden-shifting jury instructions.¹⁹³ In *Brecht v. Abrahamson*, however, the United States Supreme Court squarely addressed for the first time the question of the proper harmless error standard to apply on habeas review of constitutional error.¹⁹⁴

¹⁸⁵ *Id.* at 579-80, 582.

¹⁸⁶ *Rose*, 478 U.S. at 582.

¹⁸⁷ *Yates v. Evett*, 111 S. Ct. 1884, 1892 (1991).

¹⁸⁸ *Id.* at 1891.

¹⁸⁹ *See id.* at 1892.

¹⁹⁰ *Id.* at 1893. The *Yates* Court faulted the Supreme Court of South Carolina because they failed to apply the *Chapman* test as formulated. *Id.* at 1894. Rather, the South Carolina court sought merely to determine whether it was beyond a reasonable doubt that the jury could have found it unnecessary to rely on the unconstitutional presumption to maintain a conviction. *Id.* at 1894.

¹⁹¹ *Id.* at 1897.

¹⁹² *Yates*, 111 S. Ct. at 1892; *Rose*, 478 U.S. 578-79; *see* *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1718 (1993) (proper harmless error standard on habeas review addressed for the first time).

¹⁹³ *Yates*, 111 S. Ct. at 1892; *Rose*, 478 U.S. at 579-80, 582.

¹⁹⁴ *Brecht*, 113 S. Ct. at 1718.

IV. ABANDONMENT OF THE *CHAPMAN* STANDARD ON COLLATERAL REVIEW: *BRECHT V. ABRAHAMSON*¹⁹⁵

In 1993, in *Brecht v. Abrahamson*, the United States Supreme Court readopted the *Kotteakos* standard and held that federal habeas relief may only be granted where constitutional trial error had a "substantial and injurious effect or influence in determining the jury's verdict."¹⁹⁶ In *Brecht*, the State made reference to the defendant's post-*Miranda* silence at defendant's first degree murder trial in violation of the Due Process Clause of the Fourteenth Amendment [hereinafter "*Doyle* error" or "*Doyle*"].¹⁹⁷ In determining the appropriate harmless error standard to apply to the controversy, the *Brecht* Court emphasized that the federal habeas statute is silent as to the applicable standard.¹⁹⁸ As such, the Court asserted that it is for the judiciary to determine what harmless error standard should apply on collateral review of a federal habeas claim.¹⁹⁹ Employing a cost-benefit analysis, the Court distinguished collateral and direct review in federal habeas cases of constitutional error, and reasoned that the *Kotteakos* standard is better tailored to the nature and purpose of collateral review than the *Chapman* standard.²⁰⁰ Moreover, the Court reasoned that *Kotteakos*' harmless error analysis is less onerous and better promotes the considerations underlying federal habeas jurisprudence.²⁰¹ Accordingly, the Court held that federal habeas relief is warranted only where constitutional error had a substantial influence on the jury's decision.²⁰²

Petitioner, Todd A. Brecht, was released from a Georgia prison to the custody of his sister and her husband, Molly and Roger Hartman, after being convicted of felony theft.²⁰³ After his release, Mr. Brecht resided with the Hartmans at their home in Wisconsin before entering a halfway house.²⁰⁴ During this period of time, Mr. Brecht's behavior caused considerable tension between him and Mr. Hartman.²⁰⁵ Shortly

¹⁹⁵ 113 S. Ct. 1710 (1993).

¹⁹⁶ *Id.* at 1722.

¹⁹⁷ *Id.* at 1717. In *Doyle v. Ohio*, the Supreme Court held that the state may not undermine the implications of the *Miranda* warnings by using a suspect's right to silence against him or her at trial to imply guilt. 426 U.S. 610, 619 (1976).

¹⁹⁸ *Brecht*, 113 S. Ct. at 1718.

¹⁹⁹ *Id.* at 1719.

²⁰⁰ *Id.* at 1719-22.

²⁰¹ *Id.* at 1722.

²⁰² *Id.*

²⁰³ *Brecht*, 113 S. Ct. at 1714.

²⁰⁴ *Id.*

²⁰⁵ *Id.* Mr. Hartman, a local district attorney, disapproved of Mr. Brecht's heavy drinking and homosexual activities, as well as his past criminal behavior. *Id.* Accordingly, Mr. Hartman explicitly

after his arrival, Mr. Brecht, after drinking, fatally shot Mr. Hartman in the back while shooting cans with a rifle in the backyard.²⁰⁶ After the shooting, Mr. Brecht fled the scene.²⁰⁷

After fleeing, Mr. Brecht drove the decedent's car into a ditch.²⁰⁸ When a police officer stopped to offer assistance, Mr. Brecht informed him that his sister was aware that his car was stuck and she had called a tow truck.²⁰⁹ After he hitched a ride to Wiona, Minnesota, the Minnesota police took him into custody.²¹⁰ After being informed that he was being held for the shooting of Mr. Hartman, Mr. Brecht replied that "it was a big mistake" and asked to talk with "somebody that would understand [him]."²¹¹ The Minnesota police returned Mr. Brecht to Wisconsin.²¹² At his arraignment, Mr. Brecht received his *Miranda* warnings and was charged with first degree murder.²¹³

At trial in the Circuit Court for Buffalo County, the defendant, Mr. Brecht, testified that he shot Mr. Hartman accidentally.²¹⁴ During cross-examination and over the objections of defense counsel, the State asked the defendant whether he told anyone prior to trial that the shooting was accidental, to which the defendant replied, "No."²¹⁵ The State offered evidence of defendant's motive, as well as extrinsic evidence tending to contradict the defendant's story.²¹⁶ During closing arguments, the State argued that the defendant's testimony was undermined by the fact that he failed to secure assistance for Mr. Hartman, fled the scene immediately after the shooting, and lied to the police officer who offered him assistance when he was stuck in the ditch.²¹⁷ Further, the State argued that the petitioner had failed to mention anything about the shooting being an accident to either the officer

prohibited Mr. Brecht from drinking and engaging in homosexual activities while residing in his home. *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* Mr. Brecht fled the scene in Mrs. Hartman's vehicle. *Id.*

²⁰⁸ *Brecht*, 113 S. Ct. at 1714.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Brecht*, 113 S. Ct. at 1714.

²¹⁴ *Id.* The petitioner testified that the gun discharged when he fell while running toward the stairs to replace the gun in an upstairs room where he found it. *Id.* Petitioner further testified that he left the scene in Mrs. Hartman's car because he panicked when he saw Mr. Hartman at his neighbor's door. *Id.*

²¹⁵ *Id.* at 1715.

²¹⁶ *Id.* The State offered extrinsic evidence regarding the path the bullet traveled through Mr. Hartman's body (horizontal to slightly downward) and the location where the rifle was found after the shooting (outside). *Id.*

²¹⁷ *Id.* at 1714.

that found him in the ditch, the man who gave him a ride to Wiona, or the officers who arrested him.²¹⁸ Finally, the State made several references to petitioner's post-*Miranda* silence.²¹⁹ The jury found the petitioner guilty of first degree murder and he was sentenced to life imprisonment.²²⁰ The defendant appealed on the ground that the State's reference to his post-*Miranda* silence at trial was reversible error.²²¹

The Wisconsin Court of Appeals set aside the conviction on the ground that the State's reference to the petitioner's post-*Miranda* silence violated the Due Process Clause of the Fourteenth Amendment and was sufficiently prejudicial to require reversal.²²² The State of Wisconsin sought review of this reversal.²²³ The Wisconsin Supreme Court agreed that the State's use of the defendant's post-*Miranda* silence constituted a *Doyle* error, but reinstated the conviction on the ground that it was harmless beyond a reasonable doubt under *Chapman*.²²⁴ The Wisconsin Supreme Court reasoned that the State's improper reference to the defendant's post-*Miranda* silence was infrequent and that the State's evidence of guilt was substantial.²²⁵

The defendant then filed a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the District of Wisconsin, claiming that the State's reference to his post-*Miranda* silence constituted reversible error.²²⁶ The district court set aside the conviction and held that the *Doyle* error was not harmless beyond a reasonable doubt.²²⁷ The district court found that the State's evidence of guilt was not overwhelming.²²⁸ In addition, the court noted that the State's

²¹⁸ *Brecht*, 113 S. Ct. at 1714-15.

²¹⁹ *Id.* at 1715. During closing argument, the State urged the jury to "remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence. . . ." *Id.* at 1715 n.2. The State also referenced petitioner's pre-trial silence when stating, "He sits back here and sees all of our evidence go in and then he comes out with this crazy story. . . ." *Id.* The State further stated, "I know what I'd say [had I been in petitioner's shoes], I'd say 'hold on, this was a mistake, this was an accident, let me tell you what happened,' but he didn't say that did he. No, he waited until he hears our story." *Id.*

²²⁰ *Id.* at 1715.

²²¹ *Id.*

²²² *Id.* (citing *Wisconsin v. Brecht*, 405 N.W.2d 718, 723 (Wis. Ct. App. 1987)).

²²³ See *Brecht*, 113 S. Ct. at 1715.

²²⁴ *Id.* (citing *Wisconsin v. Brecht*, 421 N.W.2d 96, 104 (Wis. 1988)).

²²⁵ *Id.* at 1715 (citing *Wisconsin v. Brecht*, 421 N.W.2d 96, 104 (Wis. 1988)). The Court grounded its assertion that the State's references to petitioner's post-*Miranda* silence were infrequent on the fact that these references comprised less than two pages of a 900-page manuscript, or a few minutes in a four-day trial in which twenty-five witnesses testified. *Id.*

²²⁶ *Id.*

²²⁷ *Id.* (citing *Brecht v. Abrahamson*, 759 F. Supp. 500 (W.D. Wis. 1991)).

²²⁸ *Brecht*, 113 S. Ct. at 1715.

reference to petitioner's post-*Miranda* silence, although infrequent, was crucial to petitioner's defense because his defense rested on his credibility.²²⁹ Thus, the court held that the State's error required reversal.²³⁰

The United States Court of Appeals for the Seventh Circuit reversed, holding that the appropriate standard for federal habeas harmless error review of a *Doyle* error was whether the error had a "substantial and injurious effect or influence" in determining the jury's verdict under *Kotteakos*.²³¹ The Seventh Circuit reasoned that the *Chapman* harmless error standard does not apply in reviewing a *Doyle* error on federal habeas review because of the prophylactic nature of the *Doyle* rule.²³² The court noted that the need for *Doyle* stems from the implicit assurance that flows from *Miranda* warnings, which are not themselves part of the Constitution.²³³ The court reasoned, therefore, that the *Doyle* rule is prophylactic and is designed to protect another prophylactic rule from misuse.²³⁴ The court concluded that *Doyle* is far removed from protecting the innocent, and thus, does not require the strict enforcement that the *Chapman* standard creates.²³⁵ Accordingly, the court held that the more lenient *Kotteakos* standard applies on collateral enforcement of prophylactic rules.²³⁶ Applying the *Kotteakos* standard, the Seventh Circuit concluded that petitioner was not entitled to relief.²³⁷ The court reasoned that the petitioner failed to prove the State's use of his post-*Miranda* silence had a substantial and injurious effect on the jury's verdict.²³⁸ Thus, the Seventh Circuit held that the error was harmless and reinstated the conviction.²³⁹

The United States Supreme Court, affirming the Seventh Circuit by a five to four decision, held that the standard set out in *Kotteakos* is the proper harmless error standard for collateral review of constitu-

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Brecht v. Abrahamson*, 944 F.2d 1363, 1375 (7th Cir. 1991) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1947)), *aff'd*, 113 S. Ct. 1710 (1993). The Seventh Circuit also held that a state court's decision to allow the jury to hear statements regarding petitioner's homosexuality deserves deference. *See id.* at 1367.

²³² *Id.* at 1370, 1374.

²³³ *Id.*

²³⁴ *Id.* at 1370.

²³⁵ *Id.* at 1374.

²³⁶ *Brecht v. Abrahamson*, 944 F.2d 1363, 1375 (7th Cir. 1991). The court supported the adoption of a different standard for collateral review on the grounds that issues of finality and federalism govern the scope of collateral review. *See id.* at 1372.

²³⁷ *Id.* at 1376.

²³⁸ *Id.*

²³⁹ *Id.*

tional error.²⁴⁰ The Court stated that this standard requires a finding that the error had a substantial and injurious effect or influence on the jury's determination before federal habeas relief may be granted.²⁴¹ In so holding, the Court adopted the same standard applied by the Seventh Circuit, but relied on different reasoning.²⁴² Writing for the majority, Chief Justice Rehnquist followed a five-step analysis to support the Court's holding.²⁴³

First, the Court rejected the Seventh Circuit's prophylactic characterization of the *Doyle* rule.²⁴⁴ Instead, the Court characterized *Doyle* error as a due process violation falling squarely within the trial error categorization, and thus, amenable to constitutional harmless error analysis.²⁴⁵ Second, consistent with precedent, the *Brecht* Court assigned itself the role of determining the appropriate harmless error standard for federal habeas claims in the face of congressional silence.²⁴⁶ Third, the Court distinguished direct review and collateral review.²⁴⁷ The Court emphasized that it was not bound by *Chapman* under *stare decisis* since *Chapman* came before the Court on direct review.²⁴⁸ Fourth, using a cost-benefit analysis, the Court determined that the *Kotteakos* standard better serves the goals underlying federal habeas review of constitutional trial error.²⁴⁹ Finally, applying the *Kotteakos* standard, the Court concluded that the *Doyle* error in the case before it did not substantially influence the jury's verdict.²⁵⁰

The *Brecht* Court began its analysis by holding that the State's reference to petitioner's post-*Miranda* silence for impeachment purposes was a violation of the Due Process Clause of the Fourteenth Amendment.²⁵¹ Rejecting the Seventh Circuit's prophylactic characterization of *Doyle*, the Court explained that *Doyle* is not simply a further extension of the *Miranda* prophylactic rule.²⁵² Rather, the Court stated, *Doyle* represents a constitutional protection rooted in fundamental fairness and due process concerns.²⁵³ Accordingly, the Court

²⁴⁰ *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1713-14, 1722 (1993).

²⁴¹ *Id.* at 1714, 1722.

²⁴² *Id.* at 1716-17.

²⁴³ *Id.* at 1713, 1717-22.

²⁴⁴ *Id.* at 1717.

²⁴⁵ *Brecht*, 113 S. Ct. at 1717.

²⁴⁶ *Id.* at 1719.

²⁴⁷ *Id.* at 1719-20.

²⁴⁸ *See id.* at 1718.

²⁴⁹ *Id.* at 1721-22.

²⁵⁰ *Brecht*, 113 S. Ct. at 1722.

²⁵¹ *Id.* at 1716-17.

²⁵² *Id.* at 1717.

²⁵³ *Id.*

concluded that whenever the prosecution uses a defendant's post-*Miranda* silence for impeachment purposes at trial, there exists a constitutional error because due process is violated.²⁵⁴ Drawing upon this characterization, the Court asserted that *Doyle* error falls squarely within the category of constitutional trial error because it involves an error in the trial process occurring during the presentation of the case to the jury.²⁵⁵ Thus, in contrast to the Seventh Circuit, the *Brecht* Court concluded that *Doyle* error is a constitutional trial error and is thus amenable to harmless error analysis under *Fulminante*.²⁵⁶

Second, the *Brecht* Court asserted responsibility for determining which harmless error standard should apply on collateral review of constitutional error.²⁵⁷ The Court rejected petitioner's argument that the Court should construe Congress's failure to enact legislation as legislative disapproval of a less stringent harmless error standard on collateral review.²⁵⁸ The Court reasoned that since the language of the federal habeas statute is silent as to harmless error analysis, it is the role of the Court to fill in the gaps as it has done throughout history.²⁵⁹ Thus, the Court assumed the role of determining the appropriate standard.²⁶⁰

Next, in formulating this new standard, the Court distinguished direct and collateral review.²⁶¹ The Court defined direct review as a principal right, as distinguished from federal habeas review which the Court described as a secondary and limited right.²⁶² Specifically, the Court defined direct review as the principal avenue for challenging a conviction, resulting in a final and legal judgment which attaches to the conviction and sentence.²⁶³ Conversely, the Court asserted that federal habeas proceedings have historically been regarded as an extraordinary remedy for those who have been grievously wronged.²⁶⁴ Thus, the Court inferred that federal habeas review is reserved as a proceeding of last resort.²⁶⁵ The Court noted that an error that may

²⁵⁴ *Id.*

²⁵⁵ *Brecht*, 113 S. Ct. at 1717.

²⁵⁶ *See id.*

²⁵⁷ *Id.* at 1719.

²⁵⁸ *Id.* at 1718-19.

²⁵⁹ *Id.* at 1719. The federal habeas corpus statute permits federal courts to entertain a habeas petition on behalf of a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws and treaties of the United States," 28 U.S.C. § 2254(a) (1988), and directs the court to "dispose of the matter as law and justice require." 28 U.S.C. § 2243 (1988).

²⁶⁰ *Brecht*, 113 S. Ct. at 1719.

²⁶¹ *Id.* at 1719-20.

²⁶² *Id.* at 1719.

²⁶³ *Id.*

²⁶⁴ *Id.* The Court stated that it is not the role of federal courts to relitigate state trials. *Id.*

²⁶⁵ *See Brecht*, 113 S. Ct. at 1719-20.

justify direct appeal will not necessarily support collateral attack on a final judgment.²⁶⁶ The Court justified this distinction by noting the different standards historically applied on federal habeas review versus direct review.²⁶⁷

The *Brecht* Court articulated several reasons for distinguishing direct and collateral review.²⁶⁸ The Court noted the states' interest in the finality of convictions that have survived direct review within the state court system.²⁶⁹ In addition, the Court emphasized issues of federalism and comity as support for the distinction.²⁷⁰ The Court stated that federal intrusion through collateral attack on the states' primary authority, interest and competency in defining and enforcing criminal law undermines states' sovereignty and frustrates states' attempts to preserve constitutional rights.²⁷¹ Finally, the Court noted that liberal habeas availability undermines the prominence of the trial itself and encourages habeas petitioners to relitigate their claims on collateral review.²⁷²

Fourth, the Court evaluated the costs of applying the *Chapman* standard on collateral review to determine which application, *Chapman* or *Kotteakos*, better advanced the policies underlying collateral review.²⁷³ The Court emphasized the importance of states' sovereignty.²⁷⁴ The Court noted that states are completely competent and fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*.²⁷⁵ Thus, in light of principles of federalism and comity, the Court reasoned that it would be redundant and illogical to require federal habeas courts to engage in an identical approach to harmless error review that *Chapman* requires state courts to engage in on direct review.²⁷⁶ Moreover, the Court affirmatively

²⁶⁶ *Id.* at 1720.

²⁶⁷ *Id.* For example, while new rules always have retroactive application to criminal cases on direct review, they seldom have retroactive application to criminal cases on federal habeas review. *Id.*; see also *Stone v. Powell*, 428 U.S. 465, 494 (1976) (Fourth Amendment search and seizure violations are not subject to habeas review as long as litigant had a full and fair opportunity to litigate them at state trial or on direct review); *Pennsylvania v. Finley*, 481 U.S. 551, 555, 558-59 (1987) (Constitution guarantees right to counsel on direct review, while there is no right to counsel on collateral review).

²⁶⁸ *Brecht*, 113 S. Ct. at 1720-21.

²⁶⁹ *Id.* at 1720.

²⁷⁰ *Id.* at 1720.

²⁷¹ *Id.*

²⁷² *Id.* at 1720-21.

²⁷³ *Brecht*, 113 S. Ct. at 1721-22.

²⁷⁴ *Id.* at 1721.

²⁷⁵ *Id.* at 1721.

²⁷⁶ *Id.*

rejected petitioner's argument that application of the *Chapman* harmless error standard on collateral review is necessary to deter state courts from relaxing constitutional safeguards and to discourage prosecutors from committing such errors.²⁷⁷ The Court reasoned that deterrence is not necessary because of the existing presumption of state competence and integrity.²⁷⁸

The Court stated that an additional cost of applying *Chapman* on collateral review is that it would undermine states' competency and interest in finality.²⁷⁹ Specifically, the Court stated that overturning final and presumptively correct convictions on collateral review because the state cannot prove that an error is harmless under *Chapman* undermines states' important interest in finality and infringes on state sovereignty over criminal matters.²⁸⁰ The Court further reasoned that the *Chapman* standard is at odds with the limited availability of habeas relief to litigants "grievously wronged" because *Chapman* mandates relief merely because there is a "reasonable possibility" that the error contributed to the jury's verdict.²⁸¹ Moreover, the *Brecht* Court identified the numerous and significant social costs associated with retrying defendants whose convictions have been set aside.²⁸² The costs articulated by the Court included expenditure of additional time and resources, erosion of memory and dispersion of witnesses accompanying the passage of time which make obtaining conviction on retrial more difficult, and frustration of societal interest in prompt and efficient administration of justice.²⁸³

After identifying the costs of applying the *Chapman* standard, the *Brecht* Court concluded that the "less onerous" *Kotteakos* harmless error standard should be applied in evaluating constitutional error on collateral review.²⁸⁴ Given the overwhelming costs of applying the *Chapman* harmless error standard, the Court reasoned that the *Kotteakos* standard is better tailored to the nature and purpose of collateral review.²⁸⁵ The Court noted that it would be more likely to promote the policies underlying federal habeas review.²⁸⁶ The Court further reasoned that the *Kotteakos* standard is a more appropriate standard be-

²⁷⁷ *Id.*

²⁷⁸ *See Brecht*, 113 S. Ct. at 1721.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Brecht*, 113 S. Ct. at 1721.

²⁸⁴ *Id.* at 1722.

²⁸⁵ *Id.* at 1721-22.

²⁸⁶ *Id.* at 1722.

cause it is grounded in the federal harmless error statute and will provide federal courts with an existing body of case law.²⁸⁷ Thus, the *Brecht* Court held that a defendant must prove that constitutional trial error had a "substantial and injurious effect or influence" in determining the jury's verdict to warrant federal habeas relief.²⁸⁸

Finally, applying the *Kotteakos* standard, the *Brecht* Court held that the prosecution's reference to petitioner's post-*Miranda* silence for impeachment purposes at trial did not substantially influence the jury's verdict.²⁸⁹ The Court reasoned that the State's evidence of guilt was weighty, if not overwhelming, and references to petitioner's post-*Miranda* silence were infrequent as compared to the extensive and permissive references to petitioner's pre-*Miranda* silence.²⁹⁰ Moreover, the Court emphasized that the State presented other evidence of petitioner's guilt, including motive.²⁹¹ Accordingly, the *Brecht* Court affirmed the Seventh Circuit's judgment and denied petitioner habeas relief because the *Doyle* error did not substantially influence the jury's verdict.²⁹²

In a concurring opinion, Justice Stevens agreed with the majority that the *Kotteakos* harmless error standard should govern collateral review of constitutional trial error.²⁹³ Justice Stevens wrote separately, however, to emphasize that the *Kotteakos* standard does not differ significantly from the *Chapman* standard and sufficiently protects litigants' rights.²⁹⁴ Specifically, Justice Stevens argued that application of either the *Kotteakos* or *Chapman* standard relies on judgment and, therefore, these two applications do not differ significantly.²⁹⁵ Although Justice Stevens conceded that the *Kotteakos* standard is less stringent than the *Chapman* standard, he reasoned that it is the quality of the judgment and not the phrasing of the standard that is of significance.²⁹⁶

²⁸⁷ *Id.* The federal harmless error statute provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the entire record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (1988).

²⁸⁸ *Brecht*, 113 S. Ct. at 1722. The Court, however, did not preclude the possibility of habeas relief in the absence of substantial influence on the jury's verdict in an unusual case involving a particularly egregious trial error. *Id.* at 1722 n.9.

²⁸⁹ *Id.* at 1722. In lieu of remanding the case for retrial to determine whether the *Doyle* error had a substantial influence on the jury's verdict, the *Brecht* Court addressed the question because the Seventh Circuit had already applied the *Kotteakos* standard on review. *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.* at 1722-23.

²⁹³ *Brecht*, 113 S. Ct. at 1723 (Stevens, J., concurring).

²⁹⁴ *Id.* at 1723-25 (Stevens, J., concurring).

²⁹⁵ *Id.* at 1724-25 (Stevens, J., concurring).

²⁹⁶ *Id.* (Stevens, J., concurring).

Justice Stevens further emphasized that the *Kotteakos* standard requires the reviewing court to evaluate the error in the context of the entire record.²⁹⁷ Thus, the reviewing court must make a *de novo* examination of the trial.²⁹⁸ Applying the *Kotteakos* standard, Justice Stevens concluded that in his judgment the *Doyle* error that occurred at petitioner's trial did not have a substantial influence in determining the jury's verdict.²⁹⁹

In a dissenting opinion, Justice White, joined by Justice Blackmun and Justice Souter, criticized the majority for expanding application of the *Kotteakos* harmless error standard beyond *Doyle* error to all constitutional trial error.³⁰⁰ Specifically, Justice White argued that because all trial errors are subject to harmless error analysis under *Fulminante* and that most constitutional errors are trial errors, the majority's holding effectively "ousted *Chapman* from habeas review of state convictions."³⁰¹ Thus, Justice White noted, a state court determination that a constitutional trial error is harmless beyond a reasonable doubt has become, in effect, foreclosed from review by lower federal courts by way of habeas corpus.³⁰²

Justice White further argued that habeas jurisprudence should not be turned into a "confused patchwork" in which the same constitutional right is treated differently depending on whether its vindication is sought on direct or collateral review.³⁰³ Justice White argued that adopting the *Kotteakos* standard for collateral harmless error review creates an illogical disparate treatment of constitutional error cases.³⁰⁴ Specifically, White explained that the new, more lenient *Kotteakos* standard adopted by the *Brecht* majority would foreclose relief if a litigant failed to obtain relief on direct review.³⁰⁵

Justice White acknowledged that the application of different standards between direct and collateral review finds precedential support only in *Stone v. Powell*.³⁰⁶ Justice White argued, however, that the majority's holding is not supported by *Stone*'s reasoning, because in that case the Court's decision was premised on the nonconstitutional nature of the exclusionary rule.³⁰⁷ Conversely, Justice White noted, the

²⁹⁷ *Id.* at 1724 (Stevens, J., concurring).

²⁹⁸ *Brecht*, 113 S. Ct. at 1724 (Stevens, J., concurring).

²⁹⁹ *Id.* at 1725 (Stevens, J., concurring).

³⁰⁰ *Id.* at 1725, 1727 (White, J., dissenting).

³⁰¹ *Id.* at 1727 (White, J., dissenting).

³⁰² *Id.* (White, J., dissenting).

³⁰³ *Brecht*, 113 S. Ct. at 1728 (White, J., dissenting).

³⁰⁴ *Id.* at 1725 (White, J., dissenting).

³⁰⁵ *Id.* (White, J., dissenting).

³⁰⁶ *Id.* at 1726 (White, J., dissenting).

³⁰⁷ *Id.* (White, J., dissenting).

Brecht majority explicitly rejected the Seventh Circuit's prophylactic characterization of the *Doyle* rule, emphasizing the constitutional basis of *Doyle* under due process.³⁰⁸ Accordingly, Justice White criticized the majority's holding as illogical since it created disparate standards, preserving the *Chapman* standard as appropriate for constitutional harmless error on direct review and at the same time creating a separate standard for collateral review.³⁰⁹

Moreover, Justice White argued that the majority's decision is at odds with the congressional intent that habeas review deter both prosecutors and courts from disregarding their constitutional responsibilities.³¹⁰ Specifically, Justice White reasoned that habeas review acts as a deterrent by providing an incentive for trial and appellate courts to conduct their proceedings in a manner consistent with existing constitutional standards.³¹¹ White disagreed with the majority's presumption that prosecutors and courts will uphold the Constitution and perform their duties correctly.³¹²

In contrast to Justice White, Justice O'Connor, in a separate dissenting opinion, found no fault with the majority's distinction between collateral and direct review.³¹³ Justice O'Connor also found no fault with the majority's application of different, more lenient standards to resolve claims on habeas than on direct review.³¹⁴ Similar to Justice White, however, Justice O'Connor criticized the majority for expanding the *Kotteakos* harmless error standard to *all* trial errors.³¹⁵ She stated that restraint should be the controlling factor when the Court makes decisions regarding the writ of habeas corpus due to its nature as a fundamental safeguard against unlawful custody.³¹⁶ Moreover, Justice O'Connor stated that she was not convinced that federalism, finality and fairness counseled against applying *Chapman* uniformly.³¹⁷ Consequently, Justice O'Connor asserted that she would continue to apply *Chapman* on direct and collateral review.³¹⁸

Supporting her opinion to maintain the *Chapman* standard, Justice O'Connor argued that the *Kotteakos* standard failed to provide the

³⁰⁸ *Brecht*, 113 S. Ct. at 1726-27 (White, J., dissenting).

³⁰⁹ *See id.* at 1727-28 (White, J., dissenting).

³¹⁰ *Id.* at 1727 (White, J., dissenting).

³¹¹ *See id.* (White, J., dissenting).

³¹² *Id.* (White, J., dissenting).

³¹³ *Brecht*, 113 S. Ct. at 1728 (O'Connor, J., dissenting).

³¹⁴ *Id.* (O'Connor, J., dissenting).

³¹⁵ *Id.* at 1730-31 (O'Connor, J., dissenting).

³¹⁶ *Id.* at 1728 (O'Connor, J., dissenting).

³¹⁷ *Id.* at 1729 (O'Connor, J., dissenting).

³¹⁸ *Brecht*, 113 S. Ct. at 1729 (O'Connor, J., dissenting).

same assurance of reliability as *Chapman*.³¹⁹ She explained that under the more lenient *Kotteakos* standard, the Court increases the likelihood that a conviction will be preserved despite an error that actually affected the reliability of the trial.³²⁰ Justice O'Connor reasoned that since the *Kotteakos* standard is more lenient than *Chapman*, the burden to prove harmless error is lower, and thus, there is a greater probability that an error with the potential to undermine verdict accuracy will be declared harmless.³²¹ In such a case, Justice O'Connor argued, prisoners have been grievously wronged and ought not bear the greater risk of uncertainty that the majority imposes on them by its holding.³²² Moreover, Justice O'Connor argued that the majority's comment in footnote nine, which leaves open the possibility of applying the *Chapman* standard in unusual cases, will cause prisoners to plead their cases under this exception.³²³ Justice O'Connor acknowledged, however, that since the Court reserves only the possibility of an exception, parties must address whether there exists an exception at all.³²⁴

Finally, Justice O'Connor criticized the majority's cost-benefit analysis.³²⁵ She argued that, contrary to the majority's assertion, the *Kotteakos* standard will increase litigation and simultaneously decrease efficiency.³²⁶ Specifically, she noted that the majority's potential narrow exception will inspire prisoners to argue both that the exception exists and that their cases fall within its parameters.³²⁷ Further, Justice O'Connor asserted that the majority failed to demonstrate that the *Kotteakos* standard will minimize social costs and ease the burden of conducting harmless error review.³²⁸ She noted that while *Kotteakos* is somewhat more lenient than the *Chapman* standard and may permit more errors to pass uncorrected, it merely reduces the number of cases in which relief will be granted and does not decrease the burden of identifying those cases that warrant such relief.³²⁹

³¹⁹ *Id.* at 1730 (O'Connor, J., dissenting). Justice O'Connor argued for application of the *Chapman* standard because it provides reliability. *Id.* at 1729-30 (O'Connor, J., dissenting). Specifically, she argues that proof of harmlessness beyond a reasonable doubt sufficiently restores confidence in the verdict's reliability so that the conviction may stand despite the error. *Id.* at 1730 (O'Connor, J., dissenting).

³²⁰ *Id.* (O'Connor, J., dissenting).

³²¹ See *id.* at 1729-30 (O'Connor, J., dissenting).

³²² *Id.* at 1730 (O'Connor, J., dissenting).

³²³ *Brecht*, 113 S. Ct. at 1731 (O'Connor, J., dissenting).

³²⁴ *Id.* (O'Connor, J., dissenting).

³²⁵ See *id.* (O'Connor, J., dissenting).

³²⁶ *Id.* (O'Connor, J., dissenting).

³²⁷ *Id.* (O'Connor, J., dissenting).

³²⁸ *Brecht*, 113 S. Ct. at 1731-32 (O'Connor, J., dissenting).

³²⁹ *Id.* at 1731 (O'Connor, J., dissenting). Justice O'Connor explained that the *Kotteakos*

V. COMMENTATORS' CRITICISMS OF THE *BRECHT* DECISION

In August, 1993, the National Law Journal described the *Brecht* decision as the "most significant" of the Supreme Court's 1993 decisions involving the structure of federal habeas corpus proceedings.³³⁰ Thus, it is not surprising that the *Brecht* decision aroused significant attention and opposition in the legal community.³³¹ Commentators' primary criticisms consist of four arguments: (1) the *Brecht* decision represents further evisceration of habeas corpus;³³² (2) the *Brecht* decision requires a showing of actual prejudice and shifts the burden of proof;³³³ (3) the *Brecht* decision contributes to judicial waste;³³⁴ and (4) the *Brecht* decision opens the door to constitutional mischief.³³⁵ These four arguments fault the *Brecht* majority for adopting the *Kotteakos* standard on habeas review by focusing on the negative effects of the decision.³³⁶ Thus, commentators' criticisms of the *Brecht* decision are primarily outcome-oriented.³³⁷ The first three of these arguments, however, focus on the impact of *Brecht* on habeas review.³³⁸ In contrast, the fourth argument focuses on the effect *Brecht* may have on direct review proceedings.³³⁹

A. *Evisceration of Habeas Corpus Argument*

Some commentators assert that the *Brecht* Court's holding reflects another step toward evisceration of habeas corpus.³⁴⁰ Specifically, these commentators predict that adoption of the "watered-down" *Kotteakos* harmless error standard on habeas review makes it more difficult for a petition of habeas corpus to be granted upon a constitutional error.³⁴¹

standard is unlikely to lighten the load on the federal judiciary, because under *Kotteakos*, the courts must still review the entire record, conduct their review *de novo*, and decide whether they have sufficient confidence that the verdict would have remained unchanged even if the error had not occurred. *Id.* (O'Connor, J., dissenting).

³³⁰ Eric M. Freedman, *Tinkering with the Machinery in Capital Cases*, NAT'L L.J., Aug. 23, 1993, Supp. 12.

³³¹ See, e.g., Spickler, *supra* note 10; Linda Greenhouse, *Overview of the Term: The Court's Counterrevolution Comes in Fits and Starts*, N.Y. TIMES, July 4, 1993, § 4, at 1; Seiberg, *supra* note 119.

³³² See *infra* notes 340-45 and accompanying text.

³³³ See *infra* notes 346-56 and accompanying text.

³³⁴ See *infra* notes 357-61 and accompanying text.

³³⁵ See *infra* notes 362-69 and accompanying text.

³³⁶ See *infra* notes 340-69 and accompanying text.

³³⁷ See *infra* notes 340-61 and accompanying text.

³³⁸ See *infra* notes 340-61 and accompanying text.

³³⁹ See *infra* notes 362-69 and accompanying text.

³⁴⁰ Spickler, *supra* note 10, at 549-50, 572; Sullivan, *supra* note 13, at 307.

³⁴¹ Spickler, *supra* note 10, at 549-50; Sullivan, *supra* note 13, at 307.

At least one commentator describes this alleged effect as unsurprising in light of the Supreme Court's trend toward diluting the harmless error standard as a means to eviscerate habeas corpus.³⁴² Commentators' concern focuses primarily on what they argue is a loss to individual rights.³⁴³ Opponents criticize the *Brecht* majority for failing to abate judicial efficiency problems underlying habeas corpus review as the Court intended, and argue instead, the decision severely undermines individual constitutional rights protected by traditional habeas review.³⁴⁴ Thus, this argument views the *Brecht* decision as a limit on federal habeas review accessibility and as a loss to constitutional rights.³⁴⁵

B. Actual Prejudice and Burden-Shifting Argument

Supplementing the concern that *Brecht* limits accessibility to habeas review, some commentators predict an impact on the granting of habeas relief because of the burden *Brecht* places on habeas petitioners.³⁴⁶ This criticism is expressed in two distinct interpretations of the *Brecht* decision.³⁴⁷ One interpretation is that the *Brecht* decision requires a showing of actual prejudice before an error may be considered harmless.³⁴⁸ The second interpretation construes *Brecht* as shifting the burden of proving harmless error to the petitioner.³⁴⁹

Commentators argue that the *Brecht* decision requires a showing of "actual prejudice" before an error may be considered harmful.³⁵⁰ They draw this conclusion from Chief Justice Rehnquist's language in *Brecht* where he states that "[h]abeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'"³⁵¹ Thus, commentators argue that the standard adopted by the *Brecht* Court is even more lenient than "substantial and

³⁴² Spickler, *supra* note 10, at 549-50, 573.

³⁴³ See Spickler, *supra* note 10, at 549-50, 573-74; Sullivan, *supra* note 13, at 307.

³⁴⁴ Spickler, *supra* note 10, at 549-50, 573; Sullivan, *supra* note 13, at 307.

³⁴⁵ See Spickler, *supra* note 10, at 549-50, 573-74; Sullivan, *supra* note 13, at 307.

³⁴⁶ See J. Thomas Sullivan, *A Practical Guide to Recent Developments in Federal Habeas Corpus for Practicing Attorneys*, 25 ARIZ. ST. L.J. 317, 346 (1993); GREENHOUSE, *supra* note 331; Seiberg, *supra* note 119.

³⁴⁷ See Sullivan, *supra* note 346, at 346-47; Greenhouse, *supra* note 331; Seiberg, *supra* note 119.

³⁴⁸ Sullivan, *supra* note 346, at 346; Seiberg, *supra* note 119.

³⁴⁹ See Sullivan, *supra* note 346, at 346; Greenhouse, *supra* note 331.

³⁵⁰ Sullivan, *supra* note 346, at 346; Seiberg, *supra* note 119.

³⁵¹ *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993).

injurious effect or influence," and in effect, requires "actual prejudice."³⁵²

Other commentators similarly emphasize the burden imposed on the habeas petitioner by the *Brecht* decision.³⁵³ They assert that the *Brecht* decision shifts the burden of proving harmless error from the state to the petitioner.³⁵⁴ These commentators assert that the *Brecht* decision not only raises the threshold standard of demonstrating harmless error, but forces this burden on the habeas petitioner.³⁵⁵ At least one commentator characterizes this shift in the burden of proof as a defeat to state prisoners.³⁵⁶

C. Judicial Waste Argument

Another outcome-oriented argument advanced by at least one *Brecht* opponent is that the "watering-down" of the harmless error standard on collateral review will contribute to judicial waste.³⁵⁷ Specifically, she predicts that while the number of habeas cases will decrease, direct appeals occurring prior to a petition for writ of habeas corpus will remain.³⁵⁸ Thus, she asserts that the *Brecht* decision will not promote judicial efficiency, but will only create more waste.³⁵⁹ Additionally, she argues that federal courts will continue to be backlogged on collateral review, because although the *Kotteakos* standard is more lenient, federal courts are still required to review the entire record *de novo*.³⁶⁰ Consequently, this opponent asserts that the *Brecht* majority failed to alleviate efficiency problems of habeas review as intended, and merely exacerbated the problem of judicial waste.³⁶¹

D. Open Door Argument

In contrast to the evisceration, actual prejudice/burden-shifting and judicial waste arguments, some commentators criticize the *Brecht*

³⁵² See Sullivan, *supra* note 346, at 346; Seiberg, *supra* note 119.

³⁵³ Sullivan, *supra* note 346, at 346; Greenhouse, *supra* note 331.

³⁵⁴ Sullivan, *supra* note 346, at 346; Greenhouse, *supra* note 331.

³⁵⁵ See Sullivan, *supra* note 346, at 346; Greenhouse, *supra* note 331. These commentators apparently rely on Chief Justice Rehnquist's dicta that "[h]abeas petitioners . . . are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht*, 113 S. Ct. at 1722.

³⁵⁶ Greenhouse, *supra* note 331.

³⁵⁷ Spickler, *supra* note 10, at 572.

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 572-73.

³⁶⁰ *Id.*

³⁶¹ *Id.*

decision because of its potential effect on direct review proceedings.³⁶² Specifically, some commentators argue that by introducing an entirely new standard of review for federal habeas cases, *Brecht* "opens the door to constitutional mischief."³⁶³ These scholars predict that lowering the harmless error standard on habeas review will encourage prosecutors to introduce questionable evidence at trial and attempt to implement the *Kotteakos* harmless error standard on direct appeal if their actions are challenged.³⁶⁴ Thus, opponents anticipate that the *Brecht* decision will reach beyond the confines of habeas corpus proceedings and will ultimately govern harmless error analysis on direct review as well.³⁶⁵

Thus, although recent, the *Brecht* decision has aroused considerable attention and opposition in the legal community.³⁶⁶ Commentators who assert evisceration and actual prejudice/burden-shifting arguments focus primarily on the effect *Brecht* will have on habeas petitioners themselves.³⁶⁷ Others, who argue that *Brecht* will cause judicial waste, emphasize that the Court's reasoning is inconsistent with the actual effect of *Brecht*.³⁶⁸ Finally, commentators who assert the "open door" argument express concern over the potential overreaching nature of *Brecht*.³⁶⁹

VI. THE SCOPE OF FEDERAL HABEAS REVIEW AFTER *BRECHT* V. ABRAHAMSON

Although commentators' criticisms of the *Brecht* decision appear facially valid, a careful reading of the *Brecht* decision indicates many of these criticisms are without merit. While the *Brecht* majority advanced reasons for adopting the *Kotteakos* standard of harmless error which do not necessarily flow from the *Brecht* decision, the Court's remaining arguments for its decision are sound and prudent. Both the *Brecht* majority's reasoning and United States Supreme Court precedent refute the validity of commentators' criticism of the *Brecht* decision.

³⁶² William J. Greenhalgh & Jennifer A. DeMarrais, *Criminal Law in a State of Flux*, N.J. L.J., Aug. 23, 1993, at 21.

³⁶³ Greenhalgh & DeMarrais, *supra* note 362.

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ See *supra* notes 340-65 and accompanying text.

³⁶⁷ See *supra* notes 340-56 and accompanying text.

³⁶⁸ See *supra* notes 357-61 and accompanying text.

³⁶⁹ See *supra* notes 362-68 and accompanying text.

A. *Brecht Distinguishes Direct and Collateral Review Policies*

Commentators' characterization of the *Brecht* decision as an "evisceration of habeas corpus" fails to acknowledge the distinction between direct and collateral proceedings.³⁷⁰ As the *Brecht* Court stated, principles of comity and finality underlie habeas review and thus, are quite distinct from direct review principles.³⁷¹ Contrary to Justice White's assertions, this distinction is not new to American jurisprudence.³⁷² For example, in *Stone v. Powell* and *Teague v. Lane*, the United States Supreme Court specifically noted the differing purposes of direct and collateral review.³⁷³ Because of this distinction, it is illogical and a waste of judicial resources, as the *Brecht* Court noted, to employ the same test on both direct and collateral review.

Additionally, applying the same test on direct and collateral review inherently questions the competence of state courts to preserve constitutional rights. Employing the same standard on direct and collateral review allows federal courts to freely intrude on states' authority to define and enforce criminal law. This intrusion frustrates principles of federalism and comity. In contrast, employing the *Kotteakos* standard on habeas review promotes, rather than frustrates, the principles underlying habeas review. Specifically, use of the less stringent *Kotteakos* standard recognizes habeas review as a secondary and limited right and acknowledges state competence in vindicating and preserving constitutional rights.

The *Kotteakos* standard raises the threshold for habeas relief from that required under *Chapman*, which is consistent with the goal of preserving final judgments that survive direct review within the state court system. Because habeas petitioners have full opportunity to exhaust state review remedies, it is appropriate to impose a less stringent standard in habeas cases of constitutional error to promote finality of judgments. Thus, the *Brecht* decision does not eviscerate habeas corpus or individual rights, but rather, appropriately reflects the extreme and limited nature of habeas review.

B. *Commentators' Misreadings of the Brecht Decision*

While the evisceration argument fails to acknowledge the distinction between direct and collateral proceedings, this argument, as well as the actual prejudice/burden-shifting arguments, also reflects a mis-

³⁷⁰ See *supra* notes 340-45 and accompanying text.

³⁷¹ *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1720-21 (1993).

³⁷² See *supra* notes 303-09 and accompanying text.

³⁷³ E.g., *Teague v. Lane*, 489 U.S. 288, 305-06 (1989).

reading of the *Brecht* decision. Specifically, these arguments seemingly reflect commentators' knee-jerk reaction to the decision and its potential impact on individual rights. These arguments, however, predict injuries to habeas petitioners that do not flow from the *Brecht* decision.

First, commentators' arguments that the *Kotteakos* harmless error standard limits accessibility of habeas review of constitutional error lack merit.³⁷⁴ While the *Brecht* Court's decision imposes a less stringent standard on habeas review of constitutional error, it does nothing to limit accessibility.³⁷⁵ In fact, accessibility is the one issue on which the *Brecht* majority's reasoning fails. Specifically, the *Brecht* majority reasoned that the *Kotteakos* standard eases the burden imposed on the judicial system from habeas review.³⁷⁶ This reasoning implies that fewer habeas petitions on constitutional error will be granted after *Brecht*. The *Brecht* decision, however, does not impact whether a petition for habeas review on constitutional error will be granted; rather, the decision impacts whether habeas relief should be awarded. Thus, post-*Brecht* accessibility of habeas review remains unchanged.

While accessibility remains unchanged, the number of habeas petitions on constitutional error may, in fact, decline as a result of *Brecht*. Specifically, the *Brecht* decision may act as a deterrent for raising frivolous constitutional error claims. Because the *Kotteakos* standard is less stringent, i.e., it requires a lower standard of proof to establish harmless error than under *Chapman*, petitioners may be daunted from proceeding to habeas review after direct review proceedings have been exhausted and unsuccessful. In other words, if a petitioner fails on direct review to show harmful error under *Chapman*, he or she may be dissuaded from seeking habeas review under the less stringent *Kotteakos* standard. Thus, the *Brecht* majority's prediction that applying the *Kotteakos* standard on habeas review will ease judicial burdens may be correct given the potential deterrent effect of the *Brecht* decision.

Similar to the limited accessibility argument, commentators' suggestion that the *Brecht* holding requires that a habeas petitioner make a showing of "actual prejudice" is inconsistent with the *Brecht* opinion.³⁷⁷ In his opinion, Chief Justice Rehnquist stated that "[h]abeas petitioners . . . are not entitled to relief based on trial error unless they can establish that it resulted in 'actual prejudice,'"³⁷⁸ using the term "actual prejudice" as a term of art, rather than an actual standard. The

³⁷⁴ See *supra* notes 340-45 and accompanying text.

³⁷⁵ See *Brecht*, 113 S. Ct. at 1722.

³⁷⁶ See *id.* at 1721, 1722.

³⁷⁷ See *supra* notes 346-56 and accompanying text.

³⁷⁸ *Brecht*, 113 S. Ct. at 1722.

Brecht Court specifically held that the *Kotteakos* harmless error standard should apply on habeas review of constitutional error.³⁷⁹ This standard requires a showing of "substantial and injurious effect or influence" to overturn a conviction.³⁸⁰ Thus, something less than actual prejudice is required.

Finally, the argument that *Brecht* requires a habeas petitioner to assume the burden of proving substantial injury is not entirely accurate.³⁸¹ In his opinion, Chief Justice Rehnquist stated in dicta that habeas petitioners are "not entitled to relief unless they can establish that [the trial error] resulted in 'actual prejudice.'"³⁸² While this dicta is persuasive, it is not positive law and does not specifically address to whom the burden of proof should be allocated.

Further, the *Brecht* majority specifically held that *Kotteakos* harmless error analysis would apply on habeas review of constitutional error.³⁸³ Referring back to the *Kotteakos* decision reveals that the appropriate burden for constitutional harmless error analysis rests with the state.³⁸⁴ Specifically, in *Kotteakos* the Court stated that the burden of proving a harmful technical error rests with the party asserting the error.³⁸⁵ In contrast, the *Kotteakos* Court stated that the beneficiary of the error bears the burden of proving that the error was harmless where the error affects the substantial rights of the litigant.³⁸⁶ Because constitutional error would never fall within the scope of "technical" error, the state bears the burden of demonstrating harmlessness under *Kotteakos*. Thus, interpreting the *Brecht* Court's ambiguous burden of proof dicta in light of *Kotteakos* requires the state to bear the burden of proving constitutional harmless error. Accordingly, lower courts will likely impose the burden of proof on the state.

Thus, several commentators advanced arguments which reflect a misreading of *Brecht* and predict consequences that realistically do not flow from the decision. While concern for habeas petitioners' rights underlies these arguments, a careful analysis of the *Brecht* decision indicates habeas petitioners' burden after *Brecht* is more modest than these opponents suggest. Accordingly, the *Brecht* decision has less of an impact than commentators predict.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ See *supra* notes 353-56 and accompanying text.

³⁸² *Brecht*, 113 S. Ct. at 1722.

³⁸³ *Id.*

³⁸⁴ *Kotteakos v. United States*, 328 U.S. 750, 760 (1946).

³⁸⁵ *Id.*

³⁸⁶ *Id.*

C. *The Limited Impact of Brecht on Habeas Petitioners*

While *Brecht* will likely result in habeas petitioners losing some cases that they previously would have won, the impact of the *Brecht* decision on habeas corpus and individual rights is more limited than commentators predict. Recent case law supports this modest impact.³⁸⁷ Specifically, federal cases applying *Kotteakos* harmless error analysis to nonconstitutional error illustrate that defendants enjoy a substantial degree of success in satisfying the "substantial and injurious effect or influence" test.³⁸⁸ Post-*Brecht* constitutional error cases suggest that the same pattern will continue.³⁸⁹ Moreover, the *Brecht* majority limited its holding to trial-type errors, as opposed to structural errors considered so fundamental to the fairness of the trial that reversal is automatic.³⁹⁰ Recent additions to the non-exclusive list of structural errors announced in *Fulminante* indicate that structural errors will conceivably overwhelm in number and importance those that will be defined as trial errors.³⁹¹

Moreover, in footnote nine of the *Brecht* opinion, the Court left open the possibility of a narrow exception to *Brecht* in cases of particularly egregious error.³⁹² In such cases, the Court noted that habeas relief may be granted even if the error did not substantially influence the jury's verdict.³⁹³ While the Court only left open the *possibility* of such an exception, footnote nine offers an additional vehicle for potential relief.

³⁸⁷ See, e.g., *Stoner v. Sowders*, 997 F.2d 209, 213, 214 (6th Cir. 1993) (Confrontation Clause violation that occurred when deposition testimony was admitted in lieu of live testimony was not harmless error under *Kotteakos*); *Cumbe v. Singletary*, 991 F.2d 715, 717, 725 (11th Cir. 1993) (state court's erroneous allowing of five-year-old victim to testify before television camera outside of courtroom was not harmless error under *Kotteakos*).

³⁸⁸ See, e.g., *United States v. Alonzo*, 991 F.2d 1422, 1427 & n.7 (8th Cir. 1993) (trial court's error in admitting co-conspirator's hearsay statement that he owed his source \$2,000 for purchase of two ounces of cocaine was not harmless error under *Kotteakos*); *United States v. Morris*, 988 F.2d 1335, 1337, 1343 (4th Cir. 1993) (error in allowing prosecutor to cross-examine defendant's wife regarding her prior assertion of marital privilege in declining to testify before grand jury was not harmless error under *Kotteakos*); *United States v. Gordon*, 987 F.2d 902, 909 (2d Cir. 1993) (erroneous admission of other act evidence was not harmless error under *Kotteakos* in prosecution for conspiring to import cocaine).

³⁸⁹ See, e.g., *Stoner*, 997 F.2d at 213, 214 (Confrontation Clause violation that occurred when deposition testimony was admitted in lieu of live testimony was not harmless error under *Kotteakos*); *Cumbe*, 991 F.2d at 717, 725 (state court's erroneous allowing of five-year-old victim to testify before television camera outside of courtroom was not harmless error under *Kotteakos*).

³⁹⁰ *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1717, 1722 (1993).

³⁹¹ For example, in 1993, in *Sullivan v. Louisiana*, the United States Supreme Court added constitutionally deficient reasonable-doubt instructions to its non-exclusive list of structural errors. 113 S. Ct. 2078, 2080, 2082-83 (1993).

³⁹² *Brecht*, 113 S. Ct. at 1722 n.9.

³⁹³ *Id.*

D. *The Limited Impact of Brecht on Habeas Courts*

Similar to the limited impact of *Brecht* on habeas petitioners, it provides a moderate impact on habeas proceedings as well. Because *Brecht* does not affect accessibility to habeas review, the decision will likely only contribute modest relief to habeas courts. It will not, however, increase judicial waste as at least one commentator predicts.³⁹⁴ As this commentator argues, *Brecht* will not affect the number of direct appeals, nor was it intended to have such an effect. Thus, *Brecht* does not foster greater judicial waste; rather, *Brecht*, at the very least, maintains the status quo. Furthermore, the *Brecht* decision may actually relieve habeas courts' dockets by acting to deter frivolous habeas petitions. Nevertheless, even if the *Brecht* decision merely maintains the status quo, the other pragmatic and policy reasons for the decision discussed previously support the veracity of the *Brecht* decision.

Moreover, the narrow exception in footnote nine seems more consistent with the overall reasoning of the *Brecht* majority when viewed in light of *Brecht's* policy considerations, rather than under a judicial efficiency perspective. As Justice O'Connor argued, footnote nine leaves the door open to increased litigation because petitioners must prove both that an exception exists and that their case falls within its parameters.³⁹⁵ In other words, a petitioner must argue that even if a trial error did not substantially influence the jury's verdict, habeas relief is required because of the unusually egregious nature of the error. Additionally, the petitioner must prove that the constitutional error at his or her trial is such an error. Thus, the litigation is made increasingly complicated and time consuming. From an efficiency perspective, as Justice O'Connor asserted, this exception is unsupported.³⁹⁶ In contrast, however, the exception is wholly consistent with the *Brecht* majority's attempt to adopt a harmless error standard that both advances the policies underlying collateral review and protects individuals' constitutional rights.³⁹⁷

Thus, in general, the consequences of the *Brecht* decision on habeas petitioners and habeas courts are much more limited than commentators predict. After *Brecht*, a litigant has full opportunity to appeal a conviction through direct proceedings and has full access to habeas review if direct proceedings are exhausted. Further, a litigant who is grievously wronged will still obtain relief under *Brecht*.

³⁹⁴ See *supra* notes 357-61 and accompanying text.

³⁹⁵ *Brecht*, 113 S. Ct. at 1731 (O'Connor, J., dissenting).

³⁹⁶ *Id.* (O'Connor, J., dissenting).

³⁹⁷ *Brecht*, 113 S. Ct. at 1722.

E. *Direct Review Proceedings After Brecht*

While *Brecht* has only a modest impact on habeas petitioners and habeas courts, it has relatively no effect on direct proceedings. Thus, commentators' argument that *Brecht* "opens the door to constitutional mischief" by introducing an entirely new standard of review on federal habeas cases is completely unjustified.³⁹⁸ The *Brecht* majority adopted the *Kotteakos* standard for habeas corpus cases because it better advanced the policies underlying habeas review.³⁹⁹ The Court acknowledged in *Brecht* that the *Chapman* standard continues to apply on direct review because direct review is different from collateral review.⁴⁰⁰ Nowhere in the *Brecht* decision did the Court intimate that the standard on direct review of constitutional error should change. Thus, commentators' predictions that the *Brecht* decision will ultimately govern harmless error on direct review have no basis and lack support.

F. *Brecht Reflects Society's Demand for Finality*

Finally, the *Brecht* decision reflects society's desperate attempt to preserve the finality of judgments. As the amount of crime in this country increases, people are becoming increasingly concerned with ensuring that crimes do not go unpunished and that criminals are not free to harm other victims.⁴⁰¹ The *Brecht* decision, in effect, reflects this concern by raising the threshold for relief after state remedies have been exhausted. The decision, however, does not place an undue burden on a litigant, but rather, balances the costs to society in overturning a conviction against a litigant's individual rights. After *Brecht*, a litigant has full opportunity to appeal a conviction through direct proceedings and has full access to habeas review if direct proceedings are exhausted. Further, a litigant who is grievously wronged will still obtain relief under *Brecht*; while the litigant with a frivolous claim will not. Thus, the *Brecht* decision does not give precedence to society's interest in ensuring verdicts are not overruled. Rather, the decision reflects societal concerns, while fully protecting a litigant's individual rights.

³⁹⁸ See *supra* notes 362-69 and accompanying text.

³⁹⁹ *Brecht*, 113 S. Ct. at 1722.

⁴⁰⁰ *Id.* at 1717-18 (*Brecht* Court narrowly decided proper standard on habeas review and left *Chapman* harmless error to govern direct review).

⁴⁰¹ Spickler, *supra* note 10, at 549.

VII. CONCLUSION

In 1993, in *Brecht v. Abrahamson*, the United States Supreme Court held that federal habeas relief may only be granted where constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict."⁴⁰² In so holding, the Court adopted the *Kotteakos* standard for harmless error on collateral review and preserved the *Chapman* harmless error standard for direct review.⁴⁰³ While commentators predict a significant loss to habeas petitioners as a result of the *Brecht* decision, a careful analysis of this decision reveals that its impact is only modest.⁴⁰⁴ Furthermore, the decision reflects society's and states' demand for finality of judgments by raising the threshold for proving an error harmful after exhausting direct review proceedings. The decision does not, however, give precedence to society's and states' concerns. Rather, the *Brecht* decision balances these concerns with the equally important concern over protecting litigants' individual rights. Thus, a litigant advancing a meritorious claim will still obtain relief, while the litigant with a frivolous claim will not.

ROBIN A. COLOMBO

⁴⁰² *Brecht*, 113 S. Ct. at 1722.

⁴⁰³ See *id.* at 1721-22.

⁴⁰⁴ See *infra* notes 340-56 and accompanying text.