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A MATTER OF LIFE AND DEATH: REVISING THE HARMLESS ERROR STANDARD FOR HABEAS CORPUS PROCEEDINGS

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Abstract: Since 1967, federal courts have conducted harmless error analysis to determine whether to uphold a prisoner's conviction notwithstanding a constitutional error committed at the prisoner's trial. A review of the development of the harmless error doctrine reveals how the U.S. Supreme Court and federal courts have solidified a rational impact test to determine harmlessness. More recently, the U.S. Supreme Court has moved away from a clearly defined test with respect to errors alleged by habeas corpus petitioners. This Comment analyzes the obstacles faced by habeas petitioners in establishing a magnitude of error sufficient for reversal under the newer doctrine. It also reveals the difficulty lower courts have in applying the newer doctrine, as illustrated by a recent Ninth Circuit decision, *Rice v. Wood*. The Comment proposes a collateral-review harmless error standard that balances a defendant's right to a fair trial with a state's interests in finality of convictions.

"Only when the law is the soul of fairness can it truly be the soul of reason."[1]

Justice Roger Traynor

Consider the story of prisoners A *and* B. *A federal district court jury convicts prisoner* A *of first-degree murder and kidnapping. Across the street in the county courthouse, a jury convicts prisoner* B *of a separate first-degree murder and kidnapping. In both trials, the trial judge erroneously admitted the defendant's coerced confession. Prisoner* A *appeals to the circuit court of appeals, which reverses his conviction on the ground that the constitutional error was not harmless. Prisoner* A *receives a new trial that results in a hung jury. The federal prosecutor decides not to retry him a third time. Meanwhile, after an unsuccessful appeal to the state supreme court, prisoner* B *petitions for a writ of habeas corpus to the same federal district court that convicted prisoner* A. *The district court denies the writ. On review, the circuit court of appeals finds that the constitutional error in prisoner* B*'s trial was harmless. The court of appeals affirms his conviction and death sentence. Prisoner B dies by lethal injection.*

In arriving at two different conclusions, the court of appeals adhered to the U.S. Supreme Court's mandate for harmless error review with

1. Roger Traynor, *The Riddle of Harmless Error* (1970).

respect to direct appeals and collateral review. The story of prisoners *A* and *B* demonstrates the intersection along the road of criminal justice where federalism and finality confront an individual's constitutional rights. At this intersection, a court offers one defendant greater constitutional protections than those offered to another, even when the two defendants have been charged with indistinguishable offenses.

The U.S. Supreme Court introduced harmless constitutional error thirty years ago in *Chapman v. California*.[2] In *Chapman*, the Court held that some constitutional errors in criminal trials are harmless so long as the reviewing court declares beyond a reasonable doubt that the error did not contribute to the verdict obtained.[3] This standard did not distinguish between federal prisoners appealing from convictions on direct review and state prisoners petitioning a federal court for a writ of habeas corpus, otherwise known as collateral review. Every defendant was entitled to reversal of his or her conviction if a reviewing court could not declare that the assigned error was harmless beyond a reasonable doubt.[4]

Twenty-six years later, in *Brecht v. Abrahamson*,[5] the Court established a new harmless error standard for prisoners petitioning for habeas corpus. Citing the 1946 case of *Kotteakos v. United States*,[6] the *Brecht* Court held that on habeas review a court had to declare an error harmless unless the error had a substantial and injurious effect or influence on the jury's verdict.[7] Thus, *Brecht* established two standards for harmless error analysis in federal courts, depending on whether the appeal was direct or collateral. Applying the collateral appeal standard in *Rice v. Wood*,[8] the Ninth Circuit Court of Appeals held that receiving the death sentence in habeas petitioner David Lewis Rice's absence was harmless constitutional error because it had not substantially and injuriously impacted the jury's decision to impose death.[9]

Part I of this Comment describes the development of the harmless error doctrine and the emergence of two standards affecting direct and collateral review. Part II analyzes the harmless error doctrine's

2. 386 U.S. 18 (1967).

3. *Id.* at 24.

4. *See, e.g.*, Rose v. Clark, 478 U.S. 570, 584 (1986) (remanding habeas petitioner's case to Sixth Circuit Court of Appeals for determination of whether trial error was harmless beyond reasonable doubt).

5. 507 U.S. 619 (1993).

6. 328 U.S. 750 (1946).

7. *Brecht*, 507 U.S. at 637–38.

8. 77 F.3d 1138 (9th Cir.), *cert. denied*, 117 S. Ct. 191 (1996).

9. *Id.* at 1145.

deficiencies for habeas corpus proceedings, as illustrated by the Ninth Circuit's 1996 decision in *Rice v. Wood*. Finally, Part III proposes a clear, fair standard for assessing harmlessness, which balances the competing interests that impact habeas corpus proceedings.

I. THE DOCTRINE OF HARMLESS CONSTITUTIONAL ERROR

A. Chapman v. California *and the Birth of Harmless Constitutional Error*

Federal courts have applied harmless error analysis in various forms since 1919, when Congress enacted a statute instructing trial and appellate courts to disregard "technical" errors that did not affect substantial rights of a party.[10] Congress enacted this law amending the Judicial Code at least in part because of popular dissatisfaction with perceived abuses of the judicial system.[11] In 1944, the courts adopted Federal Rule of Criminal Procedure 52(a), which instructed trial courts to disregard errors that do not affect substantial rights of a party.[12] In 1949, Congress enacted the current harmless error statute, 28 U.S.C. section 2111,[13] which complemented the court rule in providing guidelines for reviewing errors in criminal trials. By removing the word "technical" from its description of errors to be scrutinized, section 2111 broadened the type of errors reviewable. The statute continued to require that appellate courts affirm convictions if an error did not "affect the substantial rights of the parties."[14] Neither section 2111 nor its predecessors addressed whether a constitutional error could be deemed not to affect substantial rights of a party.

In *Chapman v. California*,[15] the U.S. Supreme Court announced that a conviction should be upheld if the reviewing court finds the constitutional error so unimportant or insignificant that it may, consistent with the Constitution, be deemed harmless.[16] The *Chapman* majority noted that constitutional violations such as denial of counsel,

10. Judicial Code § 269, 40 Stat. 1181 (1919) (repealed 1944).

11. *See Kotteakos*, 328 U.S. at 759 n.13.

12. Fed. R. Crim. P. 52(a).

13. 28 U.S.C. § 2111 (1994). The 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 record without regard to errors or defects which do not affect the substantial rights of the parties." § 2111.

14. § 2111.

15. 386 U.S. 18 (1967).

16. *Id.* at 22.

admission of a coerced confession, and denial of the right to an impartial judge are so basic to a fair trial that their infraction can never be treated as harmless.[17] In *Chapman*, a trial judge allowed a prosecutor to make improper comments to the jury regarding the silence of the defendant, who had refused to testify under the Fifth Amendment privilege against self-incrimination.[18] The U.S. Supreme Court declined to adopt a rule that all federal constitutional errors require automatic reversal.[19] Rather, the Court held that the error of allowing prejudicial comments by a prosecutor regarding a defendant's Fifth Amendment silence falls among those errors amenable to harmless error review.[20] The Court applied a test for harmless error that it had developed in a recent nonconstitutional error case: whether there was a reasonable possibility that the error complained of might have contributed to the conviction.[21] After a defendant has raised the error on appeal, the reviewing court must find beyond a reasonable doubt that the error did not contribute to the verdict obtained.[22] In Chapman's case, the U.S. Supreme Court found the error was not harmless.[23]

Writing for the Court, Justice Black justified the extension of harmless error review to constitutional errors by noting the longtime existence of harmless error statutes and rules, adopted both by Congress and by all fifty states, none of which on their face distinguished between constitutional errors and errors of state law or federal statute.[24] These harmless error statutes and rules served a useful purpose by blocking reversal for small errors or defects that had little, if any, likelihood of having changed the result of the trial.[25] As Justice Powell wrote in *Rose v. Clark*,[26] the harmless error doctrine recognizes that the purposes of a criminal trial are to decide the factual question of the defendant's guilt or innocence and to promote public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the

17. *Id.* at 23 n.8 (citing Gideon v. Wainwright, 372 U.S. 335 (1963); Payne v. Arkansas, 356 U.S. 560 (1958); Tumey v. Ohio, 273 U.S. 510 (1927)).

18. *Id.* at 19.

19. *Id.* at 21–22.

20. *Id.* at 24.

21. *Id.* (quoting Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963)).

22. *Id.*

23. *Id.*

24. *Id.* at 22.

25. *Id.*

26. 478 U.S. 570 (1986).

virtually inevitable presence of immaterial error.[27] These points were not lost on *Chapman*'s early commentators, who noted that the harmless error doctrine contributed to public confidence by discouraging litigants from abusing the trial process to obtain reversals on appeal.[28]

In *Delaware v. Van Arsdall*,[29] the Court listed several factors to be considered in determining whether an error is harmless under the *Chapman* test. These factors include the overall strength of the prosecution's case, the importance of the erroneously admitted evidence to the prosecution's case, whether the evidence was cumulative, the presence or absence of evidence corroborating or contradicting the erroneous material, and, where the error involves denial of the defendant's opportunity to impeach a witness, the extent of cross-examination otherwise permitted.[30] In *Van Arsdall*, the U.S. Supreme Court remanded the case so that the Delaware Supreme Court could apply these factors to the constitutional error of denying a defendant the right to cross-examine a witness for bias.[31]

B. Expanding Harmless Error Analysis with a Threshold Test

In addition to applying the *Chapman* test to a variety of constitutional errors,[32] the U.S. Supreme Court has attempted to clarify whether *Chapman*'s list of constitutional errors that could never be held harmless was exclusive or merely illustrative. In *Rose v. Clark*, the Court held that so long as a defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis.[33] The Court

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27. *Id.* at 577.

28. *See, e.g.*, Traynor, *supra* note 1 ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.").

29. 475 U.S. 673 (1986).

30. *Id.* at 684.

31. *Id.*

32. *See, e.g.*, Pope v. Illinois, 481 U.S. 497, 503–04 (1987) (erroneous jury instruction misstating element of offense); Rose v. Clark, 478 U.S. 570, 579–80 (1986) (erroneous jury instruction on presumption of malice); *Van Arsdall*, 475 U.S. at 679–81 (failure to permit cross-examination concerning witness bias); Rushen v. Spain, 464 U.S. 114, 118 (1983) (per curiam) (denial of right of presence at trial); United States v. Hasting, 461 U.S. 499, 508–09 (1983) (improper comment on defendant's Fifth Amendment refusal to testify); Moore v. Illinois, 434 U.S. 220, 231–32 (1977) (admission of witness identification obtained in violation of right to counsel); Milton v. Wainwright, 407 U.S. 371, 377–78 (1972) (admission of confession obtained in violation of right to counsel); Chambers v. Maroney, 399 U.S. 42, 52–53 (1970) (admission of evidence obtained in violation of Fourth Amendment).

33. *Clark*, 478 U.S. at 579.

emphasized that although there are some errors that can never be held harmless, such errors are the exception and not the rule.[34] Rather, the Court repeated its prior statement that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one."[35] Until its decision in *Arizona v. Fulminante*,[36] the Court left unresolved the method by which the circuit and district courts should identify constitutional errors subject to automatic reversal versus those errors amenable to harmless error review.

In *Arizona v. Fulminante*, the U.S. Supreme Court fashioned a threshold test for determining when to apply *Chapman* harmless error analysis. The Arizona Supreme Court had reversed and remanded defendant Fulminante's conviction and death sentence for murder on the ground that the trial court's erroneous admission of Fulminante's coerced confession required automatic reversal.[37] Although the U.S. Supreme Court affirmed the state court's decision,[38] a plurality of the Court also held that a trial court's erroneous admission of a coerced confession should be subjected to harmless error analysis.[39] Writing in one of two majority opinions, Chief Justice Rehnquist instructed courts to inquire whether an error was a "classic trial error" or a "structural defect" to decide whether to apply harmless error analysis.[40] On one hand, if the reviewing court finds the error to be a classic trial error, then the court may apply harmless error analysis.[41] The Court defined classic trial errors as errors that affect a specific part of the trial and are capable of being quantitatively assessed.[42] In other words, classic trial error affects only part of a trial rather than the entire framework of the

34. *Id.* at 577–78.

35. *Id.* at 579.

36. 499 U.S. 279 (1991). *Fulminante* was marked by an unusual split. In Chief Justice Rehnquist's opinion for the Court, five justices found that admission of a coerced confession can be harmless error. *Id.* at 310. In Justice White's opinion for the Court, a different grouping of five justices held that the error was not harmless. *Id.* at 296. Thus, both White and Rehnquist wrote majority opinions and dissenting opinions.

37. *See* State v. Fulminante, 778 P.2d 602 (Ariz. 1988), *aff'd*, 499 U.S. 279 (1991). The Arizona Supreme Court found initially that admission of the coerced confession was harmless error because of the overwhelming evidence adduced at trial of Fulminante's guilt. *Id.* at 610–11. Upon the defendant's motion for reconsideration, the court ruled that the U.S. Supreme Court's precedent precluded the use of harmless error analysis in the case of a coerced confession. *Id.* at 627.

38. *See Fulminante*, 499 U.S. at 302.

39. *Id.* at 310.

40. *Id.* at 309–10.

41. *Id.* at 307–08.

42. *Id.*

proceedings and occurs during presentation of the case to the jury.[43] On the other hand, if the reviewing court finds the constitutional error to be structural in nature, then harmless error analysis is inappropriate, and the conviction must be reversed automatically.[44] Structural errors are errors affecting the entire process from beginning to end, defying analysis by harmless error standards.[45] For example, the absence of counsel for a criminal defendant or the presence on the bench of a judge who is not impartial affect the entire conduct of a trial from beginning to end.[46] The *Fulminante* Court concluded that a coerced confession was a classic trial error that was harmless under harmless error analysis.[47] In the end, the *Fulminante* rule did not break new ground as much as it attempted to solidify the Court's previously intuitive approach to the threshold of harmless error analysis.[48]

C. *Rejecting the* Chapman *Harmless Error Standard for Federal Habeas Proceedings*

1. Brecht v. Abrahamson *Establishes a New Standard for Harmlessness*

In *Brecht v. Abrahamson*,[49] the U.S. Supreme Court rejected *Chapman*'s standard of harmless error analysis when reviewing errors on collateral appeal.[50] From the *Chapman* decision in 1967 until *Brecht* in 1993, it fell upon a prosecutor to establish beyond a reasonable doubt

43. *Id.* at 310.

44. *Id.* at 308–09.

45. *Id.* at 309.

46. *Id.* at 309–10.

47. *Id.* at 309. In his dissenting opinion, joined by Justices Marshall, Blackmun, and Stevens, Justice White decried the application of harmless error analysis to admissions of coerced confessions as overruling a "vast body of precedent without a word" and in so doing dislodging "one of the fundamental tenets of our criminal justice system." *Id.* at 289 (White J., dissenting).

48. David Robinson, a professor of criminal law at the George Washington University National Law Center, stated in an interview that *Fulminante* "made only a rather modest change in preexisting law." *See* Martin Tolchin, *Defense Lawyers Assail Court Ruling on Coerced Confessions*, N.Y. Times, Mar. 28, 1991, at B10.

49. 507 U.S. 619 (1993).

50. *Id.* at 638.

that the error complained of was harmless.[51] In *Brecht*, the Court departed from this unwavering rule.[52]

Brecht involved a man convicted and sentenced to life imprisonment for first-degree murder in a Wisconsin state court.[53] During trial, the State made repeated references to the defendant's post-Miranda-warning silence as suggestive of guilt.[54] The Wisconsin Court of Appeals set aside the conviction on the ground that the references to Brecht's silence violated due process and were sufficiently prejudicial to require reversal.[55] The Wisconsin Supreme Court reinstated the conviction and death sentence, applying the *Chapman* standard and concluding that the error was harmless beyond a reasonable doubt.[56] A federal district court disagreed, setting aside the conviction on habeas review.[57] The Seventh Circuit Court of Appeals reversed the district court writ,[58] holding that the proper standard of harmless error analysis on collateral review was that set forth in *Kotteakos v. United States*.[59]

Kotteakos stated that the proper standard of review was whether the violation had a substantial and injurious effect or influence on the verdict.[60] Although validating the harmless error statute and rule operating at that time,[61] the *Kotteakos* Court analyzed a factual context distinguishable from *Brecht*. Defendant Kotteakos and two co-conspirators were convicted in a federal district court of obtaining loans under the National Housing Act by false and fraudulent statements.[62] The trial court erred in allowing the government to string together for common trial at least eight separate conspiracies to violate the National Housing Act.[63] After the Second Circuit Court of Appeals affirmed the

51. *See* Chapman v. California, 386 U.S. 18, 24 (1967) ("Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.").

52. 507 U.S. 619.

53. *Id.* at 625.

54. *Id.* at 624–25.

55. *See* State v. Brecht, 405 N.W.2d 718, 723 (Ct. App. 1987), *aff'd*, 421 N.W.2d 96, 104–06 (Wis. 1988).

56. *See Brecht*, 421 N.W.2d at 104–06.

57. *See* Brecht v. Abrahamson, 759 F. Supp. 500, 501 (W.D. Wis.), *rev'd*, 944 F.2d 1363 (7th Cir. 1991), *aff'd*, 507 U.S. 619, 639 (1993).

58. *See Brecht*, 944 F.2d at 1375.

59. *Id.* (citing Kotteakos v. United States, 328 U.S. 750 (1946)).

60. *Kotteakos*, 328 U.S. at 776.

61. *Id.* at 757–59 (citing Fed. R. Crim. P. 52(a) and Judicial Code § 269 (repealed 1944)).

62. *Id.* at 752.

63. *Id.* at 758.

convictions,[64] the U.S. Supreme Court granted certiorari and held that it was likely that the error had a substantial and injurious effect or influence in determining the verdicts.[65] Thus, the *Kotteakos* standard evolved in the context of a nonconstitutional error on direct appeal, in contrast to *Brecht*'s context of a constitutional error on collateral appeal.

Granting certiorari in *Brecht*, the U.S. Supreme Court agreed with the Seventh Circuit's adoption of the *Kotteakos* standard for harmlessness in habeas cases.[66] The Court found first that, under the *Fulminante* threshold test, improper use of the defendant's silence was trial error amenable to harmless error analysis.[67] Second, the Court held that the *Kotteakos* harmless error standard, rather than the *Chapman* standard, applies in determining whether habeas relief must be granted for a classic trial error.[68] The Court concluded that Brecht was not entitled to habeas relief because the improper use of his post-Miranda silence did not have a substantial and injurious effect or influence on the verdict.[69]

In justifying the *Brecht* rule, the Court emphasized the necessity of limiting federal habeas proceedings to further states' interests in finality of convictions that have survived direct review within state court systems.[70] The writ of habeas corpus has been regarded as an extraordinary remedy,[71] granted only to "persons whom society has grievously wronged and for whom belated liberation is little enough compensation."[72] Prisoners may petition for habeas corpus only after exhausting the principal avenue for challenging their convictions.[73] In

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

65. *See Kotteakos*, 328 U.S. at 776.

66. Brecht v. Abrahamson, 507 U.S. 619, 637–38 (1993).

67. *Id.* at 629.

68. *Id.* at 638. In a footnote, the Court stated that its holding does not foreclose the possibility that a deliberate and especially egregious trial error, or one that is combined with a pattern of prosecutorial misconduct, might warrant grant of habeas relief even if it did not substantially influence the jury's verdict. *Id.* at 638 n.9.

69. *Id.* at 639.

70. *Id.* at 635.

71. *Id.* at 633.

72. *Id.* at 634 (quoting Fay v. Noia, 372 U.S. 391, 440–41 (1963)).

73. *See* 28 U.S.C. § 2254(b) (1994). The statute provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or there is either an absence of available State corrective process, or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

§ 2254(b).

view of the writ's limited application, the U.S. Supreme Court has stated the policy concerns of finality and judicial economy,[74] as well as public confidence,[75] as justifying the *Brecht* standard for collateral review.

One policy concern is that state courts have an interest in the "finality" of their convictions. A presumption of finality and legality attaches to the conviction and sentence so that federal courts do not become forums to relitigate state trials.[76] This finality interest evolved from the federalism principle that federal intrusion into state criminal trials frustrates both a state's sovereign power to punish offenders and its good-faith attempts to honor constitutional rights.[77] Additionally, state courts occupy the best vantage point to identify the effect of a constitutional trial error.[78] Recognizing this presumption of finality, the Supreme Court has applied different standards on collateral review than would be applied on direct review to constitutional matters.[79] In *Brecht*, the Court extended this different treatment of habeas petitioners to harmless error analysis.[80] Federal courts are not required to employ the same standards for evaluating constitutional claims on collateral attack as the standards required of state courts.[81]

Regarding the interests of judicial economy, increased filings in the courts of appeals during recent decades suggest the difficulty the judicial system has had in keeping pace with society's litigiousness.[82] If nothing else, affirmances may seem like a wise use of judicial resources where defendants appear to be guilty despite a denial of their Sixth Amendment rights, an admission of a coerced confession, an erroneous jury instruction regarding an element of the crime, or some other constitutional error. Little appears to be gained by retrial, and appellate judges may have in mind their colleagues in the district court who do not want their cases returned for additional proceedings.[83] Moreover, a

74. *See Brecht*, 507 U.S. at 637–38.

75. *See* Kotteakos v. United States, 328 U.S. 750, 759 (1946).

76. Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

77. *See Brecht*, 507 U.S. at 636 (citing Rushen v. Spain, 464 U.S. 114, 120 (1983) (per curiam)).

78. *Id.* at 635.

79. *Id.* at 634.

80. *Id.* at 636.

81. *See* Brecht v. Abrahamson, 944 F.2d 1363, 1371 (7th Cir. 1991) (citing Stone v. Powell, 428 U.S. 465 (1976)), *aff'd*, 507 U.S. 619, 639 (1993).

82. *See* Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1191 (1995) (citing statistics showing filings in courts of appeals increased 218% from 1972 to 1992).

83. *Id.*

federal judge in a habeas proceeding may feel even more uncomfortable infringing upon a state's sovereignty over criminal matters.[84]

Finally, even appointed federal judges may feel pressure from declining public confidence in the judicial system when convictions are reversed because of mere technicalities.[85] A specific example of this type of public pressure is the recent war on drugs. The nationwide problems of drug use and trafficking and related violence have generated intense pressure on law enforcement agencies and prosecutors to convict defendants accused of such crimes.[86] Public pressure may extend to federal judges when they confront a defendant who clearly appears to be guilty of a drug-related crime, yet whose trial included a significant legal error.[87] In sum, the war on drugs exemplifies the way public confidence may have contributed to the *Brecht* test's expansion of harmless error analysis.[88]

2. O'Neal v. McAninch *Clarifies the Degree of Certainty*

In *Brecht*, the U.S. Supreme Court instituted the "substantial and injurious" standard but avoided defining the degree of certainty appellate courts should have when deciding to uphold or overturn convictions based on that standard. Under *Chapman* the inquiry was separable into two questions: (1) whether there was a reasonable possibility that a constitutional error contributed to the verdict;[89] and (2) whether a reviewing court believed this beyond a reasonable doubt.[90] *Brecht* provided a test only for the first of *Chapman*'s two prongs, replacing the contribution-to-conviction standard with a substantial-and-injurious standard.[91]

Two years after *Brecht*, the U.S. Supreme Court addressed the issue of what degree of certainty a reviewing court must possess to uphold or overturn a conviction on the ground of constitutional error. In *O'Neal v.*

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84. *See generally Brecht*, 507 U.S. at 637.

85. *See* Kotteakos v. United States, 328 U.S. 750, 759 (1946) (remarking that prior to enactment of federal harmless error statute, "[s]o great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had thus been obtained").

86. *See* Edwards, *supra* note 82, at 1191.

87. *Id.*

88. *Id.*

89. Chapman v. California, 386 U.S. 18, 23 (1967) (quoting Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963)).

90. *Id.* at 24.

91. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

McAninch,[92] the Court stated that when a reviewing judge is in "grave doubt" about an error's impact on the verdict, the judge should deem the error not harmless and reverse the conviction.[93] The Sixth Circuit Court of Appeals had held that petitioner O'Neal failed to carry the burden of establishing a substantial and injurious effect or influence of an erroneous jury instruction.[94] Vacating the decision,[95] the U.S. Supreme Court defined "grave doubt" as occurring when the judge feels "in virtual equipoise" regarding the error's harmlessness.[96] More precisely, when the likelihood that an error had a substantial and injurious effect or influence on the verdict reaches a state of equilibrium with the likelihood that it was harmless, the judge must rule in favor of the petitioner.[97] In petitioner O'Neal's case, the district court's writ of habeas corpus was proper if there was grave doubt about the constitutionally deficient jury instruction.[98]

Whatever its virtues in addressing the policy questions raised by *Brecht*,[99] *O'Neal*'s harmless error legacy is that the possibility of an error's impact upon a verdict must be far higher than *Chapman*'s "reasonable doubt" requirement, rising almost to the level of complete ambivalence.[100] By requiring this degree of certainty, the *Brecht-O'Neal* standard provides that habeas petitioners win only if they establish grave doubt about the substantial and injurious effect a constitutional error had on their convictions.[101] For a direct appeal from a district court conviction, meanwhile, an appellate court must declare beyond a reasonable doubt that the error did not contribute to the verdict obtained.[102]

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92. 115 S. Ct. 992 (1995).

93. *Id.* at 994.

94. O'Neal v. Morris, 3 F.3d 143, 147 (6th Cir. 1993), *vacated sub nom.* C'Neal v. McAninch, 513 U.S. 432 (1995).

95. *O'Neal*, 115 S. Ct. at 999.

96. *Id.* at 994.

97. *Id.* Webster's defines equipoise as (1) a state of equilibrium, or (2) counterbalance. *Webster's Ninth New Collegiate Dictionary* 421 (1984).

98. *O'Neal*, 115 S. Ct. at 994.

99. *Id.* at 998 (writing that grave doubt standard possessed "certain administrative virtues" such as avoiding need for judges to read lengthy records to determine prejudice in every habeas case).

100. *Id.* at 994.

101. *Id.*; *see* Brecht v. Abrahamson, 507 U.S. 619, 637–38 (1993).

102. Chapman v. California, 386 U.S. 18, 23–24 (1967).

II. ANALYSIS OF HARMLESS ERROR REVIEW IN HABEAS PROCEEDINGS

An examination of harmless error analysis requires a dual approach. One approach is a macro-level discussion of the current harmless error standard's effectiveness in federal courts. This macro-level approach reveals defects in the *Brecht-O'Neal* standard that render it fundamentally unfair to habeas petitioners. These defects result in attempts to recharacterize errors to avoid applying harmless error analysis. A second approach is a micro-level analysis of the way the *Brecht-O'Neal* standard operated in a single case. A recent Ninth Circuit decision illustrates the standard's defects and suggests the need for reform.

A. Deficiencies in the Brecht *Standard for Harmless Error Review in Habeas Proceedings*

Brecht thwarts rational decisions regarding constitutional error in two ways. First, it replaces *Chapman*'s assessment of an error's impact on the verdict with an inquiry as to whether the error meets the substantial and injurious level. The degree of certainty prescribed by the U.S. Supreme Court for this test fosters excessive appellate activism and places a burden upon a collateral petitioner to establish what, if any, harm the constitutional violation caused to the verdict. Second, *Brecht* forces habeas petitioners and even some appellate courts to recharacterize errors as "structural" rather than "trial" error to avoid altogether harmless error review.

1. Analytical Consequences of the Brecht-O'Neal *Degree of Certainty*

The *Brecht-O'Neal* standard disadvantages a habeas petitioner by requiring a lesser degree of certainty before a federal court denies the petition. By themselves, the *Brecht* and *Chapman* impact standards differ only in semantics rather than substance.[103] The door remains open for abuse by appellate courts, however, in view of the muddled degree of certainty for determining whether the substantial and injurious effect or influence standard has been met. Major implications follow from this flaw. Its higher tolerance for error subverts factual reliability rather than achieving it, even as it purports to further truth interests through a

103. *See* Edwards, *supra* note 82, at 1179.

disguised return to an overwhelming evidence of guilt test. It fosters excessive appellate activism by displacing the jury's role as arbiter of facts. Finally, *Brecht* shifts a burden onto habeas petitioners to establish an injurious effect of the constitutional error.

a. Subverting Factual Reliability to Finality Interests

The inadequate guidance provided to federal judges regarding an appropriate degree of certainty subverts reliability interests to finality interests. *Chapman* instructed courts to inquire whether an error could have contributed to the verdict obtained; even if the impact were slight, the reviewing court should overturn the conviction unless it could declare the error harmless beyond a reasonable doubt.[104] One rationale for *Chapman* is that it vindicated both the rights of the defendant and the factual question of the defendant's guilt or innocence. According to the Court, it is the central purpose of criminal trials to resolve the latter.[105] If a constitutional error impacts the verdict, even minimally, then the defendant's trial has been contaminated and the jury's factual determination of the defendant's guilt or innocence is less reliable.

Although it promotes finality interests, the *Brecht* standard undermines the factual reliability of error-infected convictions. In her dissent in *Brecht*, Justice O'Connor wrote:

> I am not persuaded that the *Kotteakos* standard offers an adequate assurance of reliability. . . . By tolerating a greater probability that an error with the potential to undermine verdict accuracy was harmful, the Court increases the likelihood that a conviction will be preserved despite an error that actually affected the reliability of the trial.[106]

Thus, it is difficult to reconcile the Court's desire for factual reliability in applying the *Chapman* test with its tolerance of significant errors under *Brecht*. The Ninth Circuit applied the grave doubt test in *Roy v. Gomez*,[107] a habeas proceeding involving a petitioner convicted of robbery and first-degree murder. The court of appeals held that an erroneous jury instruction omitting an element of the crime was not harmless because the reviewing court could not gauge the effect of the

104. *Chapman*, 386 U.S. at 24.

105. Arizona v. Fulminante, 499 U.S. 279, 308 (1991).

106. *Brecht*, 507 U.S. at 653 (O'Connor, J., dissenting).

107. 81 F.3d 863 (9th Cir.), *vacated sub nom.* California v. Roy, 117 S. Ct. 337, 339 (1996) (per curiam).

error on the jury's verdict; therefore, a conscientious judge could only be "in grave doubt as to the harmlessness of the error."[108] Viewing the Ninth Circuit's decision as improperly modifying *Brecht*, the U.S. Supreme Court vacated the decision and reiterated the higher degree of doubt required by *O'Neal* for a reviewing court to overturn a conviction.[109]

Federal courts' willingness to overlook convictions contaminated by error under *Brecht-O'Neal* suggests the continuation of an overwhelming evidence of guilt test for harmless error.[110] Specifically, a solid circumstantial case against a defendant renders all but the most severe constitutional violations insubstantial and uninjurious.[111] The notion that overwhelming evidence of guilt should override constitutional errors has persisted nevertheless in U.S. Supreme Court cases such as *Rose v. Clark*,[112] in which Chief Justice Burger's concurring opinion provided a list of the evidence against the defendant and stated that this evidence should have been sufficient for a finding of guilt notwithstanding any error.[113] Circuit courts also have continued to employ the overwhelming-evidence test.[114] As one U.S. Supreme Court Justice has noted, this kind of analysis, which measures the harmlessness of error according to the weight of the evidence that the prosecution

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108. *Id.* at 868 (quoting O'Neal v. McAninch, 115 S. Ct. 992, 995 (1995)).

109. *Roy*, 117 S. Ct. at 338–39.

110. *See* Harrington v. California, 395 U.S. 250, 254 (1969) (framing harmless error test in terms of whether "overwhelming" untainted evidence existed in record to support defendant's conviction); *see also* Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 Cal. L. Rev. 1335, 1364 (1994) (noting that courts utilizing *Harrington* test rarely reverse convictions).

111. By contrast, under *Chapman*, overwhelming evidence of guilt is theoretically irrelevant. In *Chapman*, the Court suggested that harmless error analysis should not consist of an overwhelming evidence test. *See* Chapman v. California, 386 U.S. 18, 23 (1967).

112. 478 U.S. 570, 584 (1986).

113. *Clark*, 478 U.S. at 584 (Burger, C.J., concurring).

114. *See, e.g.*, Price v. Shillinger, No. 95-8066, 1996 U.S. App. LEXIS 28866 (10th Cir. Nov. 4, 1996), at *9–*10 (holding that although "the [coerced] confession of a defendant is probably the most probative and damaging evidence that can be admitted against him, . . . the weight of the prosecution's evidence supports a conclusion that [the testimony] did not have a 'substantial and injurious effect or influence in determining the jury's verdict'"); Pope v. Zenon, 69 F.3d 1018, 1025 (9th Cir. 1995) (holding that admission of coerced confessions was harmless, in part, because of "mountain of damning circumstantial evidence"); United States v. Disla, 805 F.2d 1340, 1347 (9th Cir. 1986) (holding error harmless despite some evidence of defendant's innocence because "government presented overwhelming evidence"); Flittie v. Solem, 775 F.2d 933, 944 (8th Cir. 1985) ("It is unlikely that [the error] had a major impact on the jury . . . . The whole record shows overwhelming independent evidence to support the conviction.").

stacks against a defendant, erodes the individual rights and liberties that elevate our system of justice.[115]

b. Displacing the Jury as Arbiter of the Facts

Applying the *Brecht-O'Neal* standard, a reviewing court also usurps the role of the jury in its inquiry into how substantial or injurious an effect the error had on the verdict. One reason this usurpation is improper is that appellate courts are not competent to conduct so rigorous a factual inquiry. Even the *Kotteakos* court cautioned against appellate intrusion upon the jury's domain.[116] Review under *Brecht* ignores the jury's better position to assess the evidence.[117] It continues the trend of appellate judges placing themselves in jurors' shoes,[118] to hold constitutional errors harmless either if there is overwhelming evidence of the defendant's guilt or if the jury otherwise reached the "correct result."[119]

Another reason the *Brecht* standard's invasion into the jury's province is improper is that it violates the U.S. legal system's traditional roles for juries and appellate judges. The importance of the jury can be traced to the U.S. Constitution, where the Framers provided specifically for jury trials in all criminal proceedings.[120] Jury trials comprise the heart of the criminal justice system, in part, because a defendant expects to receive judgment from a panel of peers and not from a panel of experienced jurists who may have different conceptions of guilt and innocence.[121] Particularly in cases involving coerced confessions or the erroneous admission of other emotionally-charged evidence, where only complex factual assessments may reveal the magnitude of the error's effect,

115. *Harrington*, 395 U.S. at 256 (Brennan, J., dissenting).

116. Kotteakos v. United States, 328 U.S. 750, 763 (1946) ("[I]t is not the appellate court's function to determine guilt or innocence. . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out.").

117. *See, e.g.*, Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794) ("It may not be amiss . . . to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court, to decide.").

118. *See, e.g.*, California v. Roy, 117 S. Ct. 337 (1996) (per curiam) (holding that erroneous jury instruction that omitted crime's element was harmless unless reviewing court expressed grave doubt about jury's verdict embracing missing element).

119. *See* Traynor, *supra* note 1, at 49–50; *see also* Bundy v. Florida, 479 U.S. 894, 897 (1986) (Marshall, J., dissenting from denial of certiorari); Rose v. Clark, 478 U.S. 570, 584 (1986) (Burger, C.J., concurring); State v. Watkins, 547 P.2d 810, 822 (Kan. 1976).

120. "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." U.S. Const. art. III, § 2, cl. 3.

121. *See* Mitchell, *supra* note 110, at 1354–55.

appellate courts seize the opportunity to affirm a conviction simply because the judges themselves think the verdict was correct based the facts.[122] The U.S. Supreme Court has not clearly delineated discretionary guidelines for appellate courts undertaking these factual assessments in an expanded discretionary role.[123]

c. *Shifting the Burden onto Habeas Corpus Petitioners*

The third major implication of the *Brecht-O'Neal* standard is that habeas petitioners carry a burden to establish the harm caused by the system's violation of their constitutional rights. From its inception, the harmless error doctrine has placed a burden upon one party to establish an error's harmlessness. The *Chapman* and *Brecht-O'Neal* standards avoid explicit references to burdens of proof. In practice, however, the U.S. Supreme Court and federal courts have placed a burden upon prosecutors under the *Chapman* standard and upon habeas corpus petitioners under the *Brecht-O'Neal* standard.

The Court's opinions imply that *Chapman* imposes a burden upon the prosecution to come forward with proof that a constitutional error did not contribute to the verdict obtained. The Court acknowledged in *Chapman* that a constitutional error—admitting highly prejudicial evidence or comments—imposed on someone other than the defendant a burden to show the error's harmlessness.[124] On its face, the *Chapman* test prescribes the "beyond a reasonable doubt" burden with which criminal prosecutors are familiar.[125] Just as a jury must declare a defendant's guilt beyond a reasonable doubt to convict, a reviewing court must declare an error's harmlessness beyond a reasonable doubt to uphold that conviction.[126] In *Arizona v. Fulminante*, determining an

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122. *See* Mary Coombs, *Constable Given Free Reign in* Fulminante, Bostick, *et al. as High Court Blunders*, N.J. L.J., Aug. 29, 1991, at 72.

123. Edwards noted that it is difficult for appellate judges to adhere to an analytical framework when evidence of guilt is overwhelming. *See* Edwards, *supra* note 82, at 1191–92 ("In such circumstances, it is by far the simpler and more natural course to construct a jurisprudence that cares only for punishment of the guilty, and, accordingly, to discount all errors that fail to cast doubt upon our own perceptions of culpability.").

124. Chapman v. California, 386 U.S. 18, 24 (1967). Justice Black added: "It is for that reason that the original common-law harmless error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." *Id.*

125. *Id.*

126. *Id.* (noting that although appellate judges ordinarily do not have task of applying "reasonable doubt" test, its adoption would provide more workable standard for deciding whether to affirm conviction).

error's harmlessness hinged on whether the prosecution "met its burden of demonstrating" that the admission of a coerced confession did not contribute to the conviction.[127]

The Court has changed positions regarding the potential burden imposed upon a habeas petitioner under the *Brecht-O'Neal* harmless error test. In *Brecht*, the Court held that petitioners are not entitled to habeas relief unless "they can establish" that the constitutional trial error had a substantial and injurious effect or influence on the verdict.[128] In *O'Neal*, the Court rejected the role of burden-shifting in habeas proceedings.[129] Rather than managing an evidentiary burden, an appellate judge must apply the *Brecht* harmlessness standard directly to the available facts in the record.[130]

Notwithstanding the Court's *O'Neal* directive, federal courts continue to impose a burden upon petitioners to present affirmative evidence of harm.[131] At least two reasons explain the continued imposition of a burden. First, a tension exists between the harmless error doctrine and the traditional rule regarding a habeas petitioner who claims actual innocence as the ground for the petition. Under the latter rule, a state court judgment is set aside only when the prisoner meets a burden of proving that his or her confinement violates a fundamental liberty right.[132] Second, a conflict exists between *O'Neal* and the rule that a

127. 499 U.S. 279, 295–96 (1991) (citing *Chapman*, 386 U.S. at 26).

128. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750 (1946)).

129. O'Neal v. McAninch, 115 S. Ct. 992, 995 (1995).

130. *Id.* ("In such a case, we think it conceptually clearer for the judge to ask directly, 'Do I, the judge, think that the error substantially influenced the jury's decision?' than for the judge to try to put the same question in terms of proof burdens.").

131. *See, e.g.*, Rice v. Wood, 77 F.3d 1138, 1145 (9th Cir.) ("Petitioner has proffered no evidence . . . that any of the jurors displayed the least discomfort with the process pursuant to which the verdict was received."), *cert. denied*, 117 S. Ct. 191 (1996); Thompson v. Borg, 74 F.3d 1571, 1575 n.1 (9th Cir.), *cert. denied*, 117 S. Ct. 227 (1996) ("[U]nder *Brecht* 'petitioners now face a greater burden' than they had [under *Chapman*] . . . and 'must now show that the alleged error had a substantial and injurious effect or influence in determining the jury's verdict.'") (quoting Jeffries v. Blodgett, 5 F.3d 1180, 1190 (9th Cir. 1993)); Tapia v. Roe, No. C95-0607 MMC (OEW), 1996 U.S. Dist. LEXIS 18316, at *8 n.3 (N.D. Cal. Dec. 4, 1996) ("[P]etitioners now face a greater burden under the *Brecht* standard . . . ."); Rodriguez v. Marshall, No. C94-1718-LEW, 1996 U.S. Dist. LEXIS 3150, at *18 (N.D. Cal. Mar. 7, 1996) ("[T]he petitioner still bears the heavy burden of proving that there was actual prejudice as a result of the trial error."); Grune v. Thoubboron, 91 Civ. 3655 (SS), 1995 U.S. Dist. LEXIS 3722, at *8 (S.D.N.Y. Mar. 23, 1995) ("The habeas petitioner bears the burden of proving that trial errors have caused actual prejudice.").

132. *See* Simmons v. Blodgett, 910 F. Supp. 1519, 1526 (W.D. Wash. 1996) (quoting McKenzie v. McCormick, 27 F.3d 1415 (9th Cir. 1994)), *aff'd*, No. 96-35095, 1997 WL 129023 (9th Cir. Mar. 24, 1997).

prisoner bears the burden of establishing that a constitutional error occurred at all.[133] The continuing presence of a burden upon petitioners bears out fears that *Brecht* presents a most formidable obstacle to obtaining habeas corpus relief based on constitutional claims.[134]

2. *Recharacterizing Errors To Avoid Applying the* Brecht *Standard.*

In view of their burden to establish a substantial and injurious effect to the degree of "equipoise," habeas petitioners have tried to avoid undertaking harmless error analysis at all. As a starting point, the threshold test of *Arizona v. Fulminante* becomes crucial. If a reviewing court recognizes an error as a classic trial error, then it is subject to harmless error analysis.[135] If the error is a structural defect, then *Brecht* does not apply and the court automatically reverses the conviction.[136] Petitioners and courts have struggled not only with the distinction between these two characterizations, but also with fact patterns that fit neither.

The most common attempted recharacterization is that an error is structural rather than trial error.[137] Whether an error rises to the level of a defect in the trial mechanism results in a purely quantitative inquiry. Neither the U.S. Supreme Court nor the district or appellate courts, however, specify the quantitative point at which an error ceases to be "trial" and enters the realm of "structural," possibly because of an inherent impossibility of performing such a task upon fact-dependent inquiries. For example, the Court has deemed one erroneous jury

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133. *See, e.g., id.* at 1527 (denying writ because petitioner failed to establish that constitutional error had occurred).

134. *See* Bennett L. Gershman, *The Gate Is Open But the Door Is Locked: Habeas Corpus and Harmless Error*, 51 Wash. & Lee L. Rev. 115, 125 (1994).

135. *See* Arizona v. Fulminante, 499 U.S. 279, 307–08 (1991).

136. Brecht v. Abrahamson, 507 U.S. 619, 629–30 (1993).

137. At least nine cases within the past two years involved a habeas petitioner's attempt to recharacterize an error as structural. *See* Samuel v. Duncan, No. 95-56380, 1996 U.S. App. LEXIS 18542, at *4–*5 (9th Cir. July 8, 1996) (denial of competency hearing); Rice v. Wood, 77 F.3d 1138, 1142 (9th Cir.) (en banc) (absence at death verdict), *cert. denied*, 117 S. Ct. 191 (1996), Sherman v. Smith, 89 F.3d 1134, 1138 (4th Cir. 1996) (unauthorized juror visit to crime scene), *cert. denied*, 117 S. Ct. 765 (1997); Williams v. Calderon, 52 F.3d 1465, 1476 (9th Cir. 1995) (jury instruction); Hegler v. Borg, 50 F.3d 1472, 1477 (9th Cir. 1995) (absence at reading of some trial testimony); Tapia v. Roe, No. C95-0607 MMC (OEW), 1996 U.S. Dist. LEXIS 18316, at *12 (N.D. Cal. Dec. 4, 1996) (imprecise jury instruction and prosecutorial misconduct); Moore v. Ponte, 924 F. Supp. 1281, 1295 (D. Mass. 1996) (defendant confined to "prisoner's dock" during entire trial); *Simmons*, 910 F. Supp. at 1527 (jury's exposure to facts not in evidence); Cardinal v. Gorczyk, 880 F. Supp. 261, 271 (D. Vt. 1995) (absence at voir dire), *rev'd*, 81 F.3d 18 (2d Cir. 1996).

instruction to be structural and another a mere trial error although their prejudicial impact is arguably indistinguishable.[138] Petitioners usually are unsuccessful at recharacterizing errors as structural.[139]

Recognizing the difficulty in recharacterizing an error as structural, a habeas petitioner might recharacterize a constitutional error as falling into a third category, known as a "Footnote Nine" error because of its location in the *Brecht* opinion. Although such an error was not present in that case, the *Brecht* majority wrote that "a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief."[140] Several federal courts have recognized Footnote Nine errors as a distinct third category.[141] The Ninth Circuit has twice identified Footnote Nine errors as a distinct category of errors requiring automatic reversal, although the court has yet to reverse a conviction on this ground.[142] Not all courts agree. The Second Circuit, for example, recently sent a mixed message regarding whether a Footnote Nine error exists outside the realm of a classic trial error or structural defect.[143]

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138. *See* California v. Roy, 117 S. Ct. 337, 339 (1996) (per curiam) (holding that omission of element of crime from jury instructions is trial error subject to *Brecht* analysis); Sullivan v. Louisiana, 508 U.S. 275, 281–82 (1993) (holding that deficient jury instruction on reasonable doubt was structural error requiring automatic reversal).

139. *See, e.g.*, *Samuel*, 1996 U.S. App. LEXIS 6589, at *4–*5 (holding that trial court's denial of competency hearing was trial error); *Plascencia*, 1996 U.S. App. LEXIS 15634, at *5 (finding that admission of coerced confession was trial error); *Calderon*, 52 F.3d at 1476 (holding that instructional error was trial error unless it involved deficient reasonable-doubt instruction); *Hegler*, 50 F.3d at 1477 (holding that defendant's absence at reading of certain trial testimony was trial error); *Tapia*, 1996 U.S. Dist. LEXIS 18316, at *23–*24 (holding that imprecise jury instruction was trial error); *Moore*, 924 F. Supp. at 1295 (holding that confining defendant to "prisoner's dock" during entire proceedings was trial error); *Simmons*, 910 F. Supp. at 1527 (finding that jury's exposure to facts not in evidence was trial error).

140. *Brecht*, 507 U.S. at 638 n.9.

141. *See e.g.*, Cupit v. Whitley, 28 F.3d 532, 538 (5th Cir. 1994) (recognizing Footnote Nine errors as "'hybrid' or 'unusual' cases that do not fit so neatly" into one of two primary categories of error); Hardnett v. Marshall, 25 F.3d 875, 879–81 (9th Cir. 1994) (recognizing that Footnote Nine analysis required inquiry of whether integrity of proceeding was so infected that entire trial was unfair); *Simmons*, 910 F. Supp. at 1527 (recognizing same).

142. *See* Lee v. Marshall, 42 F.3d 1296, 1298 (9th Cir. 1994) (commenting that officer's unauthorized interference with jury deliberations not egregious enough to meet Footnote Nine standard); *Hardnett*, 25 F.3d at 879–81 (9th Cir. 1994) (holding that although prosecutor's introduction of impermissible hearsay evidence violated defendant's Confrontation Clause rights, error was not so egregious or deliberate as to meet Footnote Nine requirement).

143. *See* Peck v. United States, 73 F.3d 1220, 1229 (1995), *vacated*, No. 94-2444, 1997 WL 33947 (2d Cir. Jan. 30, 1997). On first hearing, the Second Circuit Court of Appeals applied Footnote Nine analysis to an erroneous jury instruction, holding that although omitting an element of a crime was a classic trial error, it infected the defendant's entire trial with "an error of

The attempt to recharacterize errors as structural or Footnote Nine errors departs from the principle that reviewing courts should undertake a thorough analysis of the prior proceedings.[144] Recharacterization provides an opportunity for district and appellate courts more sympathetic to a prisoner to overturn a conviction without undertaking a rigorous analysis. Reviewing courts focus on categorizing the error rather than evaluating its impact on a verdict. Recharacterization also thwarts stare decisis principles regarding a particular error's amenability to harmless error analysis.[145] As an analysis of its most recent habeas case demonstrates, the Ninth Circuit remains deeply divided over this issue.[146]

B. Rice v. Wood *Illustrates the* Brecht *Test's Defects*

1. Facts and Procedural History

David Lewis Rice was tried in King County Superior Court for the Christmas Eve, 1985 murder of the Goldmark family.[147] The defendant was present for the verdict, at which time the jury found him guilty of four counts of aggravated first-degree murder.[148] On the eve of his sentencing hearing, Rice drank a homemade tobacco liquid that rendered him unconscious.[149] He was hospitalized and was absent when the jury returned his death sentence.[150] When neither prosecutors nor defense counsel objected, the superior court judge proceeded with sentencing in Rice's absence, and the jury sentenced Rice to death.[151]

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constitutional dimensions" requiring reversal. *Peck*, 73 F.3d at 1229. Vacating upon rehearing, the court of appeals not only held that the error was classic trial error subject to harmless error analysis, but also omitted from its analysis any reference to Footnote Nine. *Peck*, 106 F.3d at 454.

144. *See* Traynor, *supra* note 1, at 30.

145. Four justices in *Arizona v. Fulminante*, dissenting from the idea that a coerced confession can ever be subject to harmless error analysis, suggested that the majority created its trial-structural dichotomy as a convenient way of overruling a "vast body of precedent" without a word. Arizona v. Fulminante, 499 U.S. 279, 289 (1991).

146. *See* Rice v. Wood, 77 F.3d 1138 (9th Cir.) (en banc), *cert. denied*, 117 S. Ct. 191 (1996). In a six-five decision, the court of appeals vacated its three-judge panel's decision characterizing as "structural" the constitutional error of receiving a death verdict in the defendant's involuntary absence. *Id.* at 1145.

147. *See* State v. Rice, 110 Wash. 2d 577, 580, 757 P.2d 889, 891–92 (1988).

148. *Id.*

149. *Id.* at 614, 757 P.2d at 909.

150. *Id.* at 614–15, 757 P.2d at 909.

151. *Id.*

On direct appeal, the Supreme Court of Washington affirmed his conviction on the ground that Rice's actions constituted a suicide attempt that effectively waived his right of presence at sentencing.[152] The court reasoned that because this error was a rule violation rather than a constitutional infringement,[153] the trial judge was justified in proceeding in absentia because administrative concerns such as a sequestered jury overrode the slight possibility that Rice's absence affected the jury.[154] Following an unsuccessful personal restraint petition on other grounds,[155] Rice sought a writ of habeas corpus in the Federal District Court for the Western District of Washington.[156]

Confronting the district court was the issue whether the trial court violated Rice's right to be present during rendition of the death verdict. In *Diaz v. United States*,[157] the U.S. Supreme Court held that when persons are tried for crimes, even the most heinous of crimes, the Sixth Amendment guarantees them the right to be present in the courtroom at every stage of their trials.[158] Although this rule applies to all accused persons, defendants can waive the right of presence either expressly or manifestly through their conduct.[159] Because neither the trial judge nor the Washington Supreme Court conducted a hearing to determine whether Rice voluntarily waived his right of presence,[160] the district court held that receiving the death verdict in Rice's absence violated his Sixth Amendment right.[161] The State of Washington appealed the district court's grant of habeas corpus.[162] After a three-judge panel of the Ninth Circuit upheld the writ,[163] the Ninth Circuit reheard the case en banc and

152. *Id.* at 619–20, 757 P.2d at 912.

153. *Id.* at 616, 757 P.2d at 910; *see also* Wash. R. Crim. P. 3.4.

154. *Id.* at 615–16, 757 P.2d at 910.

155. *See In re* Rice, 118 Wash. 2d 876, 897, 828 P.2d 1086, 1098 (1992).

156. *See* Rice v. Wood, 77 F.3d 1138, 1139 (9th Cir.) (en banc), *cert. denied*, 117 S. Ct. 191 (1996).

157. 223 U.S. 442 (1912).

158. *Id.* at 445. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI.

159. *See* Illinois v. Allen, 397 U.S. 337, 346–47 (1970) ("[I]f our courts are to remain what the Founders intended, the citadels of justice, their proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the Illinois trial judge in this case.").

160. *See* Rice v. Wood, 44 F.3d 1396, 1400 (1995), *vacated in part*, 77 F.3d 1138 (9th Cir.) (en banc), *cert. denied*, 117 S. Ct. 191 (1996).

161. *Rice*, 77 F.3d at 1140.

162. *Rice*, 44 F.3d at 1399.

163. *Id.* at 1402.

reinstated Rice's death sentence, holding that it was harmless error to proceed with the death verdict in the defendant's absence.[164] On October 7, 1996, the U.S. Supreme Court denied certiorari.[165]

2. *The Ninth Circuit's Struggle To Apply the* Brecht *Test*

Rice v. Wood demonstrates the difficulties appellate courts have in applying harmless error analysis under *Brecht-O'Neal*. More precisely, this case shows how a habeas petitioner, and even an appellate court, recharacterizes an error as structural to avoid applying the *Brecht-O'Neal* standard. The Ninth Circuit's three-judge panel made two findings in agreeing with Rice's characterization of the error as structural under *Fulminante*. First, Rice's absence occurred during the critical stage of sentencing rather than during presentation of the State's case.[166] Second, the error could not be quantitatively assessed in the context of other evidence.[167] Specifically, the three-judge panel found it impossible to calculate how Rice's absence may have affected the sentencing.[168]

Rehearing the case en banc, the Ninth Circuit applied the *Brecht* standard without any reference to *O'Neal*'s "grave doubt" degree of certainty, or any degree of certainty for that matter.[169] Had the en banc panel applied *Chapman*, it would have required them to declare their belief beyond a reasonable doubt that the error of receiving the death verdict in Rice's absence did not contribute to his conviction. The en banc majority opinion, however, contains references only to the unlikelihood that Rice's presence would have affected the jurors, the strength of the aggravating circumstances, and the weakness of the mitigating circumstances.[170]

The absence of a degree of certainty led to an overwhelming evidence of guilt approach by the *Rice* majority. The majority spoke of "senseless butchery of the worst sort," and noted that Rice's presence in the courtroom for the return of the guilt verdict did not dissuade any jurors from convicting him.[171] It also claimed that during voir dire the

164. *See Rice*, 77 F.3d at 1145.

165. *See Rice*, 117 S. Ct. 191.

166. *See Rice*, 44 F.3d at 1401–02.

167. *Id.* at 1402 n.9.

168. *Id.* at 1404.

169. *See Rice*, 77 F.3d at 1145.

170. *Id.* at 1144–45.

171. *Id.* at 1144.

prosecution had filtered out any prospective jurors who would have been uncomfortable looking Rice in the eye and sentencing him to die.[172] Even if the en banc panel applied the *O'Neal* "grave doubt" standard without actually mentioning it, *Rice* provides a strong argument that the *Brecht-O'Neal* standard unfairly handicaps habeas petitioners in their quests for new trials. For it is difficult, if not impossible, to imagine the judges arriving at a state of "equipoise" regarding the error's effect, in view of the court's overwhelming-evidence approach.[173]

The court of appeals found overwhelming evidence of juror antipathy toward Rice; therefore, he carried the insurmountable burden of proving that the constitutional error had a substantial and injurious effect or influence on his death sentence. The majority noted that the petitioner "proffered no evidence" that jurors were uncomfortable rendering the death verdict in his absence.[174] An equally plausible inference from this lack of discomfort is that the jury found it easier to deliver the death sentence without facing Rice, which in itself constitutes an impact on the jury's decision to impose death. The Ninth Circuit did not indicate what amount of evidence of potential juror change would have sufficed to overcome the overwhelming evidence of juror antipathy toward Rice.

III. PROPOSAL

Recognizing the need for flexibility in assessing diverse types of errors, it would be inappropriate to mandate a blanket rule for automatic affirmance or reversal.[175] Federal courts, states, and prisoners all would benefit, however, from a harmless error test that requires from the reviewing court a consistent and clearly defined degree of certainty. In addition, the tendency to recharacterize trial errors as structural supports abandoning that dichotomy in favor of an individualized threshold evaluation aided only by stare decisis. If this threshold is met, federal courts should consider a harmless error inquiry that blends the constrained spirit of *Chapman* with the finality interests espoused by *Brecht*.

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172. *Id.* The five dissenting justices pointed out that prosecutorial attention to the jury's views on capital punishment only furthers the notion that a defendant's presence has a significant impact on death sentencing. *Id.* at 1149 (Nelson, C.J., dissenting).

173. Although evidence of Rice's guilt was not at issue because the error occurred at sentencing, the appellate court based its finding of harmlessness upon overwhelming evidence of aggravating factors supporting the death sentence. *See id.* at 1144. *But see* Jeffries v. Blodgett, 5 F.3d 1180, 1190 (9th Cir. 1993) (rejecting overwhelming-evidence-of-guilt test for harmless error).

174. *See Rice*, 77 F.3d at 1145.

175. *See* Traynor, *supra* note 1, at 50.

A. New Harmless Error Test for Collateral Review

To affirm a conviction, a State should establish by clear and convincing proof that the error did not have a substantial and injurious effect on the verdict. This new test moderates the extreme, and sometimes ignored,[176] degree of certainty currently in force in federal courts. The harmlessness standard would remain the *Brecht* substantial-and-injurious test. The degree of certainty, however, would differ from *Brecht* and its progeny. Before affirming a conviction notwithstanding a constitutional error, a federal judge must declare that it is highly probable that the error did not have a substantial and injurious effect or influence on the verdict. Thus, the highly probable test prescribes a degree of certainty more restrictive than *O'Neal* but less restrictive than *Chapman.*

The advantages of this test are palpable. It provides a clear, realistic degree of certainty regarding harmless error. It places the burden of establishing harmlessness on the state. The new test promotes finality concerns better than *Chapman*, which seems to be important to the federal courts in handling habeas corpus proceedings as contrasted with direct appeals. Finally, it restores individual constitutional rights as a priority in harmless error review, although not so far as to threaten the federalism principles inherent within states' concerns over finality of convictions.

A highly probable test provides a specific and fair degree of certainty in determining harmlessness. Whereas the "equipoise" test allows affirmance only when a judge's doubts as to harmlessness rise to the level of a vague ambivalence, the highly probable test uses a standard of proof with which most courts are familiar. This familiarity might prevent courts from misapplying or refusing to apply a degree of certainty. Had the *Rice* court applied the highly probable test, the prisoner would have received a review based on consistent, clear standards, rather than a review that was arguably a path of least resistance for the Ninth Circuit. The proposed test avoids the evils of inadequate analysis by conditioning affirmance on high probability that error did not affect the judgment.[177]

This test removes the burden from petitioner and restores it to the state, in keeping with the U.S. Supreme Court's emphasis that a constitutional error imposes on someone other than the defendant a

176. *See, e.g., Rice*, 77 F.3d at 1145 (holding error harmless to unknown degree of certainty).

177. *See* Traynor, *supra* note 1, at 50.

burden to show the error's impact.[178] As Justice O'Connor opined in *Brecht*, "[P]risoners who may have been convicted mistakenly because of constitutional trial error have suffered a grievous wrong and ought not to be required to bear the greater risk of uncertainty . . . ."[179] At first glance, shifting the burden in *Rice v. Wood* might seem trivial. However, given the unclear degree of certainty, the Ninth Circuit's six-to-five vote suggests it would have been more difficult for the State to establish by clear and convincing proof that the error did not affect the verdict. The proposed test returns to the vision for collateral review stated in *Kotteakos*, where the U.S. Supreme Court insisted a state must carry the burden of sustaining a verdict where an alleged error affects substantial rights.[180]

Although not as friendly to finality interests as the *Brecht-O'Neal* test, the highly probable test provides adequate deference to state courts without sacrificing an individual's constitutional rights. By requiring a lesser degree of certainty than *Chapman*'s reasonable doubt test, the proposed framework ensures that federal courts will not displace state courts in keeping prisoners behind bars where appropriate. Presumably state courts will continue to apply the *Chapman* harmless error test for direct appeals whenever a prisoner alleges federal constitutional error. Along with its concern for finality, the new test reflects the remedial and deterrence purposes of reversal, which, notwithstanding evidence of guilt, uphold constitutional rights not only for their truth-furthering value but also their protection of civil liberties and contribution to the judicial system's integrity.[181]

B. *Abandon the* Fulminante *Test in Favor of a Threshold Test Based on Stare Decisis*

Because petitioners may be tempted to continue recharacterization of errors as "structural" to invoke an automatic reversal, the *Fulminante* test should be abandoned as a means of bringing a consistently rational approach to evaluating constitutional error. Justice Traynor once pointed out that "[t]he real problem of justice is not whether an error is of constitutional or nonconstitutional dimension or whether it mars a

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

179. Brecht v. Abrahamson, 507 U.S. 619, 654 (1993) (O'Connor, J., dissenting).

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

181. *See* Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 Colum. L. Rev. 79, 90 (1988).

criminal or a civil trial, but whether it affected the judgment."[182] Harmless error determination, whether on direct or collateral review, should not hinge upon the characterization of an error as trial or structural. Recharacterization provides appellate judges with the opportunity for all too ready reversal.

Courts should rely on stare decisis in deciding whether to apply harmless error analysis. Although far from perfect, stare decisis is preferable to the *Fulminante* test for two reasons. First, the U.S. Supreme Court's list of errors requiring automatic reversal is too short to warrant a detached threshold test.[183] Second, the Court has failed to justify its replacement of ordinary stare decisis principles with the *Fulminante* test.[184] If stare decisis does not require reversal of an error, the highly probable standard for harmless error analysis ensures that courts will undertake a thorough determination of an error's impact. Prisoners deserve this rigorous inquiry when reversal and affirmance are matters of life and death.

IV. CONCLUSION

Consider the proposed test in the context of the hypothetical introduced at the beginning of this Comment. Under the *Brecht-O'Neal* test, prisoner *B* must establish to the level of "equipoise" that the error had a substantial and injurious effect or influence on the murder conviction. Under the proposed test, the State must establish that it was highly probable the coerced confession did not have such an impact. This higher and clearer degree of certainty, although below the degree required for direct appeals, might result in a new trial and perhaps life instead of death for prisoner *B*. Even if it upholds the conviction, the reviewing court that applies the highly probable test vindicates prisoner *B*'s rights without threatening the state's interest in finalizing a correctly obtained conviction. The soul of fairness may yet conceive the soul of reason.

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182. Traynor, *supra* note 1, at 48–49.

183. To date, the following errors require reversal: depriving a defendant of counsel; trying a defendant before a biased judge; unlawfully excluding members of a defendant's race from a grand jury; denying the right to self-representation; and denying the right to a public trial. *See* Vasquez v. Hillery, 474 U.S. 254, 260 (1986) (grand jury); Waller v. Georgia, 467 U.S. 39, 46 (1984) (public trial); Faretta v. California, 422 U.S. 806, 819 (1975) (self-representation); Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (denial of counsel); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (biased judge).

184. *See supra* note 145.