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CASENOTE

BRECHT V. ABRAHAMSON: ANOTHER STEP TOWARD EVISCERATION OF HABEAS CORPUS*

As the amount of crime in this country increases, society is becoming more conscious of our criminal justice system. People are increasingly concerned with the outcome of criminal trials, specifically in assuring that crimes do not go unpunished. Determining guilt, ensuring that verdicts are not overruled on a “technicality,” and issuing punishment have taken precedence over the protection of constitutional rights.¹ However, the Constitution is not only concerned with the outcome of criminal trials. It is just as surely concerned with individual rights and process.²

Outcome-orientation appears to be the current trend among members of the Supreme Court as well. Although veiled in the language of “federalism” and “finality,” the Court has slowly been eviscerating the writ of habeas corpus, particularly by weakening the harmless error standard to be applied on a habeas corpus petition.³ The Court maintains that it must lighten the load of the federal judiciary, and although that sounds appealing, that is not what is actually happening.⁴ Instead, constitutional

* The author gratefully acknowledges the insight provided by Michael A. Moynihan who argued and briefed the *Brecht* case before the Seventh Circuit Court of Appeals and also prepared the petition for certiorari to the United States Supreme Court.

1. Irene M. Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the MaHaRal of Prague*, 90 MICH. L. REV. 604, 605 (1991) (“[T]he issue of factual guilt now pervades American criminal constitutional law, often in ways that do not rest comfortably along-side the Bill of Rights’ guarantees limiting government power in the criminal justice process.”).

2. Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 90 (1988).

3. *Stone v. Powell*, 428 U.S. 465, 503 (1976) (Brennan, J., dissenting) (“Today’s holding portends substantial evisceration of federal habeas corpus jurisdiction”); Jeffrey J. Pokorak, “*Death Stands Condemned: Justice Brennan and the Death Penalty*,” 27 CAL. W. L. REV. 239, 256 (1990/1991) (“The gradual elimination of federal habeas corpus has had obvious impact on all individuals convicted of a crime in a state court.”); Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362, 362-63 (1991) (“[t]he Rehnquist Court has quietly eviscerated, if not interred, federal habeas corpus”).

4. Commentators have argued that the impact habeas corpus petitions have upon the federal judiciary is overstated. See, e.g., David D. Kammer, *Restricting New-Claim Successive*

rights are being violated and the window of opportunity for individuals to question those violations or to have their convictions overturned is closing rapidly.⁵

The opportunity for a prisoner to have the violation of his constitutional rights reviewed and reversed has recently been diminished by the Supreme Court in *Brecht v. Abrahamson*.⁶ The Court upheld the Seventh Circuit Court of Appeals which had, by using the standard created in *Kotteakos v. United States*,⁷ created a new standard of harmlessness for collateral review of constitutional errors.⁸ This new standard considers whether the error had "substantial and injurious effect or influence in determining the jury's verdict,"⁹ as opposed to the "harmless beyond a reasonable doubt" standard that had been in effect.¹⁰ This new standard further erodes harmless error review, making it more difficult for a petition of habeas corpus to be granted based upon a constitutional error.

In Part I this article provides background history and current Supreme Court trends in harmless error and habeas corpus jurisprudence. Part II presents a factual analysis of the *Brecht* case. Part III includes a history of collateral review and the recent trends in the Court's analyses. An in-depth discussion of the Seventh Circuit's decision in *Brecht v. Abrahamson* is presented in Part IV, while Part V presents the Supreme Court's ruling and justification. The conclusion in Part VI suggests that the Court is determined to "fix" the problem of habeas corpus, however affirming the Seventh Circuit's decision is not the solution.

I. HISTORY OF HARMLESS CONSTITUTIONAL ERROR

Harmless constitutional error originated in mid-nineteenth century England.¹¹ English courts adopted a procedure for evaluating error in criminal cases which required reversal if a reasonable possibility existed that the error contributed to the finding of guilt.¹² This presumption of

Applications for Federal Writs of Habeas Corpus: McCleskey v. Zant, 111 S. Ct. 1454 (1991), 60 U. CIN. L. REV. 1405, 1423 (1992).

5. See Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1, 94 (1991) ("Under these [recent Supreme Court] decisions, numerous people have been executed despite having been convicted or sentenced in prejudicial violation of the Constitution.").

6. 113 S. Ct. 1710 (1993).

7. 328 U.S. 750 (1946).

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

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

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

11. ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 4, 7-8 (1970).

12. *Id.* at 1-11. See generally Charles J. Ogletree, Jr., *Comment: Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 156 (1991).

prejudice, also called the Exchequer Rule,¹³ caused a backlog in the courts since many cases were retried on extremely technical errors.¹⁴ In response to the overcrowded English courts, Parliament enacted legislation that prohibited reversal in cases unless "some substantial wrong or miscarriage ha[d] been thereby occasioned on the trial."¹⁵

American courts adopted the Exchequer Rule and soon had the same difficulties as the English courts.¹⁶ American courts took longer to remedy the problem, but in 1919 Congress established a harmless error rule which is now embodied in Rule 52(a) of the Federal Rules of Criminal Procedure.¹⁷ Most federal and state courts only applied the harmless error rules to ordinary trial errors, and not to errors that violated the Constitution.¹⁸ Those federal courts that did review constitutional errors generally presumed them to be harmful per se, requiring automatic reversal.¹⁹ It was not until the 1960's that the United States Supreme Court guided state courts on how to apply harmless error analysis to federal constitutional errors.²⁰ In *Fahy v. Connecticut*,²¹ the Court considered whether a state court's application of the harmless error rule to illegally seized evidence was proper.²² The Court applied harmless error analysis to the particular facts in *Fahy*; however, it did not address the question of whether

13. Most commentators trace the Exchequer Rule to the case of *Crease v. Barrett*, 149 Eng. Rep. 1353 (Ex. 1835). See TRAYNOR, *supra* note 11, at 1-11; Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 422 (1980). See generally J.L. Renfro, *Arizona v. Fulminante: Extending Harmless-Error Analysis to the Erroneous Admission of Coerced Confessions*, 66 TUL. L. REV. 581, 582 (1991).

14. TRAYNOR, *supra* note 11, at 1-11.

15. TRAYNOR, *supra* note 11, at 9 (emphasis omitted) (quoting Judicature Act, 1873, 36 & 37 Vict., ch. 66, sched. 48 (Eng.)).

16. 1 JOHN H. WIGMORE, EVIDENCE § 21 (Tillers rev. 1983).

17. Act of February 26, 1919, ch. 48, 40 Stat. 1181. The current version is codified in 28 U.S.C. § 2111 (1993) 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." *Id.* § 2111.

18. Philip J. Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 520 (1969). Constitutional errors were considered to be of such great importance that a finding of harmless error was improper. *Id.* Most courts reversed convictions based on constitutional error without even a discussion of harmless error. *Id.* See, e.g., *Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967) (holding defendant's denial of a speedy trial was error); *Stromberg v. California*, 283 U.S. 359, 369-70 (1931) (holding a conviction based on an unconstitutional statute required automatic reversal). *But see Motes v. United States*, 178 U.S. 458 (1900) (holding defendant who confessed in court was not entitled to automatic reversal of his conviction despite the erroneous admission of evidence which violated the Sixth Amendment).

19. See, e.g., *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946); *Jackson v. United States*, 264 F.2d 377 (D.C. Cir.), cert. denied, 359 U.S. 936 (1959). *But see Motes*, 178 U.S. at 475-76.

20. Mause, *supra* note 18, at 520.

21. 375 U.S. 85 (1963).

22. *Id.* at 86.

harmless error statutes covered every constitutional error.²³ It merely found that the error in *Fahy* was harmful.²⁴

In the 1967 decision *Chapman v. California*²⁵ the Supreme Court finally spoke definitively about harmless constitutional error and squarely rejected the idea that all constitutional errors require overturning the conviction. In *Chapman*, although noting that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error,"²⁶ the Court held that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."²⁷ Placing the burden of persuasion on the prosecution, the Court stated that "before a federal constitutional error can be held harmless, the [reviewing] court must be able to declare a belief that it was harmless beyond a reasonable doubt."²⁸ The Court proceeded to apply this harmless error rule to the constitutional error before it, which involved the prosecutor's repeated comments concerning the defendant's failure to testify.²⁹ The Court concluded that the prosecutor's improper comments were harmful.³⁰

The Court in *Chapman* adopted a precise standard for applying harmless error. The government is required to establish that the error is harmless "beyond a reasonable doubt" before a constitutional violation will be subject to harmless error.³¹ The application of this strict rule which was developed in *Fahy* and affirmed in *Chapman*, essentially required automatic reversal in all circumstances.³²

The Supreme Court then moved toward a less stringent application of harmless constitutional error analysis in *Harrington v. California*.³³ Har-

23. Charles F. Campbell, Jr., *An Economic View of Developments in the Harmless Error and Exclusionary Rules*, 42 BAYLOR L. REV. 499, 506-07 (1990).

24. *Id.* The *Fahy* Court ruled that when a reviewing court finds a constitutional error to be harmless, there must be no reasonable possibility that the error contributed to the petitioner's conviction. *Id.*

25. 386 U.S. 18 (1967).

26. *Id.* at 23. The Court cited three examples of constitutional rights that required automatic reversal: the right to counsel, freedom from coerced confessions, and the right to an impartial judge. *Id.* & n.8 (citations omitted).

27. *Id.* at 22.

28. *Id.* at 24.

29. *Id.* at 24-26.

30. *Id.* at 26.

31. *Id.* at 24.

32. TRAYNOR, *supra* note 11, at 43. The Court appeared reluctant to affirm a decision where the trial court committed a constitutional error. *Id.*

33. 395 U.S. 250, 253-54 (1969). See generally Stephen L. Earnest, Recent Decision, *Admission of Coerced Confession Constitutional Error Subject to Harmless Error Analysis*, 61 Miss. L.J. 445, 446 (1991); Campbell, *supra* note 23 at 506-07. Violations of the Sixth

rington and three others were jointly tried and convicted of attempted robbery and first-degree murder. Harrington's three co-defendants confessed to the crime and the prosecution introduced their confessions at trial.³⁴ Two of the three who confessed did not testify at trial. Therefore, Harrington was not able to cross-examine them, and was denied his Sixth Amendment right to confrontation.³⁵ The Court agreed that Harrington's constitutional rights were violated but applied harmless error analysis, concluding that the error was harmless because statements made by Harrington, combined with other evidence, overwhelmingly supported the conviction.³⁶ Specifically, the evidence was "so overwhelming" that the admission of the co-defendant's confession was harmless beyond a reasonable doubt.³⁷ This application of harmless error analysis suggested the Supreme Court's willingness to apply harmless error in most constitutional error cases.³⁸ However, no identifiable test for assessing the harmlessness of constitutional error had yet been established.³⁹

The Supreme Court further modified the overwhelming evidence test of *Harrington* in *Milton v. Wainwright*.⁴⁰ In *Milton* a police officer posed as the defendant's cellmate and the defendant eventually confessed the crime to him.⁴¹ The police officer then testified against the defendant at trial.⁴² The defendant argued that the use of this confession violated his Fifth Amendment right against self incrimination and his Sixth Amendment right to have counsel present during post-arrest questioning.⁴³ The Supreme Court declined to decide whether the police officer's testimony violated Milton's Fifth and Sixth Amendment rights. Instead, the Court held that "[a]ssuming, *arguendo*, that the challenged testimony should

Amendment right to confrontation clause had been addressed by the Supreme Court one year earlier in *Bruton v. United States*. 391 U.S. 123 (1968) (one codefendant's confession used to implicate another codefendant). However, the Court reversed Bruton's conviction based on constitutional error without applying harmless error analysis. *Id.* at 137. The Court stated that such an error required automatic reversal every time, even though *Chapman v. California*, 386 U.S. 18 (1967), had been decided one year previously.

34. *Harrington*, 395 U.S. at 252. The Court stated that the other two confessions would merely provide cumulative evidence. *Id.* at 254.

35. *Id.* at 254-55.

36. *Id.* at 254.

37. *Id.*

38. *Id.* at 252; see also *Moore v. Illinois*, 434 U.S. 220, 227, 232 (1977) (violating defendant's Sixth Amendment rights was subject to harmless error analysis); *Brown v. United States*, 411 U.S. 223, 231-32 (1973) (improperly admitting testimony of another was harmless); *Coleman v. Alabama*, 399 U.S. 1, 11 (1970) (denying counsel, which violated the Sixth Amendment, was subject to harmless error analysis).

39. See generally *Campbell*, *supra* note 23, at 506; *Goldberg*, *supra* note 13; *Stacy & Dayton*, *supra* note 2.

40. 407 U.S. 371 (1972).

41. *Id.* at 372.

42. *Id.*

43. *Id.*

have been excluded, the record clearly reveals that any error in its admission was harmless beyond a reasonable doubt."⁴⁴ The Court agreed that the confession should not have been admitted; however, it concluded that other evidence, excluding the confession, justified the conviction.⁴⁵ The Court seemed to adopt the view that the erroneous admission of even incriminating evidence may be harmless if the Court is satisfied that there is overwhelming evidence of guilt to support a conviction.⁴⁶ Thus, it appears that regardless of how prejudicial a constitutional error might be, if a case against a defendant was so strong that a conviction was inevitable, the conviction should not be reversed.⁴⁷

Over the ten-year aftermath of its decisions in *Chapman*, *Harrington*, and *Milton*, the Supreme Court expanded the power of the courts to find harmless constitutional error.⁴⁸ In 1983, the Court clarified its approach regarding the specific rights to which *Chapman* applies.⁴⁹ Three years later, the Court reiterated its position by stating "while there are some errors to which *Chapman* does not apply, they are the exception and not the rule."⁵⁰ In *Rose v. Clark*, the Court declared that the *Chapman* rule is presumptively appropriate for virtually every kind of constitutional error.⁵¹ As a result, constitutional error generally does not necessitate automatic reversal of a criminal conviction. A conviction will be upheld if an appellate court concludes beyond a reasonable doubt that the error had no impact on the ultimate finding of guilt.⁵²

44. *Id.*

45. *Id.* at 373-77. The petitioner had confessed to the crime three other times before the police charged him. Thus, the Court ruled that the three confessions were overwhelmingly supportive of the conviction and the confession to the police officer in his cell was harmless. *Id.* at 377-78.

46. Campbell, *supra* note 23, at 506-07; see also Earnest, *supra* note 33, at 447.

47. Campbell, *supra* note 23, at 507.

48. Commentators have sharply criticized the Court's gradual expansion of the harmless error doctrine. Stacy & Dayton, *supra* note 2; see Goldberg, *supra* note 13 at 427; Mause, *supra* note 18, at 557.

49. *United States v. Hastings*, 461 U.S. 499 (1983). The Court stated that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *Id.* at 509 (citations omitted).

50. *Rose v. Clark*, 478 U.S. 570, 578-79 (1986) (citation omitted) (applying harmless error analysis to an erroneous malice instruction).

51. *Id.* at 576. In *Rose*, the Court held that if a defendant was represented by counsel and was tried before an impartial adjudicator, any errors are strongly presumed to be subject to harmless error analysis. *Id.* at 577-79. The Court appealed to the truth-determining function of a criminal trial, declaring that "the central purpose of a criminal trial is to decide the factual question of defendant's guilt or innocence." *Id.* at 577 (quoting *United States v. Nobles*, 422 U.S. 225, 230 (1975)). Unless the errors affect the reliability of the fact-finding process, harmless error analysis should apply. See Stacy & Dayton, *supra* note 2, at 85-87.

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

The Supreme Court made a second significant decision in 1986 in *Delaware v. Van Arsdall*.⁵³ The trial court had prohibited any questions relating to the possibility that the state's witness was biased. The Supreme Court, applying *Chapman's* harmless error rule, held that the central theme of the trial was to determine factual questions of the defendant's guilt or innocence, with the focus upon the overall fairness of the trial and not on the presence of immaterial error.⁵⁴ The Court also affirmed that the denial of counsel and the presence of a non-impartial judge always required automatic reversal regardless of the facts of the case. Unlike *Chapman*, however, coerced confessions were not deemed to mandate strict automatic reversal.⁵⁵ The *Van Arsdall* Court indicated that coerced confessions could be harmless depending on the specific facts of the case.⁵⁶

In 1991, the Supreme Court directly addressed whether confessions obtained in violation of the Fourteenth Amendment were subject to harmless error analysis.⁵⁷ In *Arizona v. Fulminante*, the prosecution obtained a conviction based upon the coerced confession of the defendant.⁵⁸ The Supreme Court held that an appellate court must apply harmless error analysis and uphold the conviction if the court deems the confession to be harmless beyond a reasonable doubt.⁵⁹ In determining that harmless error analysis should be applied, the Court divided errors into two types: trial errors and structural defects. Trial errors were defined as errors in the trial process occurring in the presentation of the case which could be quantitatively assessed.⁶⁰ The Court listed examples of trial errors such as excluding members of the defendant's race from a grand jury or violating the defendant's right to self-representation.⁶¹ Structural defects are errors

53. 475 U.S. 673 (1986) (applying harmless error analysis to a violation of the Confrontation Clause).

54. *Id.* at 681. The Court stated that certain constitutional errors could be harmless in "terms of their effect on the fact finding process at trial." *Id.*

55. *Id.* at 682.

56. *Id.* at 684.

57. *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991). The dissent argued that the majority's decision deviated from clear precedent. *Id.* at 1253 (White, J., dissenting). In support of the dissent's proposition, Justice White listed the unbroken line of precedent before and after *Chapman* that expressly exempted coerced confessions from harmless error analysis. *Id.*

58. While *Fulminante* was incarcerated on weapons charges a rumor had been spread that *Fulminante* had killed his eleven-year old stepdaughter in Arizona. Therefore, *Fulminante* was befriended by an FBI informant who promised *Fulminante* protection while he was in prison if he would tell the informant whether the rumor was true. Consequently, *Fulminante* confessed that he had sexually assaulted and killed his stepdaughter. He had previously been a suspect in the case because of inconsistencies in his statements; however, the police did not have enough evidence to charge him with the crime. *Fulminante* was subsequently indicted on murder charges in Arizona. *Fulminante*, 111 S. Ct. at 1250.

59. *Id.*

60. *Id.* at 1264.

61. *Id.* at 1265.

that affect the framework or the conduct of the trial, such as denying the defendant counsel or trying a case before a biased judge.⁶² Harmless error analysis only applies to trial errors, while structural defects remain subject to automatic reversal.⁶³ This test in *Fulminante* expands the potential application of harmless error analysis, possibly marking the beginning of a new era in constitutional criminal procedure in which the rights of criminal defendants are further constricted.⁶⁴ Even though the Arizona police lacked sufficient evidence to charge *Fulminante* at the time of the murder, four Justices would have held that the admission of *Fulminante's* confession to the informant was harmless error.⁶⁵ Thus, the amount of untainted evidence necessary to support finding harmless error may in fact be minimal.

II. *Brecht v. Abrahamson*: THE SEVENTH CIRCUIT DECISION

Todd Brecht had been serving time in Georgia for felony theft when his sister and brother-in-law, Molly and Roger Hartman, paid restitution and took temporary custody of him while he waited for an opening in a half-way house.⁶⁶ The Hartmans placed two restrictions on Brecht. He was not permitted to drink alcohol or engage in homosexual activities while he was living in their home.⁶⁷ On October 17, 1985, Brecht was at home alone and decided to consume alcohol and shoot some cans in the back yard. When Roger Hartman returned home, Brecht shot him and fled the scene. Hartman was able to crawl to a neighbor's house and inform them that Brecht had shot him.⁶⁸ In the meantime, Brecht drove away and later ran his car into a ditch. When a police officer stopped to help, Brecht told the officer that his sister was calling a tow truck.⁶⁹ Brecht then hitched a ride to Minnesota and was later picked up and arrested at a shopping center. He first lied about his identity and then asked to talk with "somebody that would understand" him.⁷⁰ Brecht made no further statements about the shooting until the day of his trial. At trial, Brecht admitted shooting Hartman but said that the rifle discharged by acci-

62. *Id.*

63. *Id.* at 1264-65.

64. R.W. Rachal, Recent Development, *State v. Cage: Harmless Error Analysis in Louisiana After Fulminante*, 66 TUL. L. REV. 1086, 1095 (1992).

65. Justices O'Connor, Scalia, Kennedy, and Souter found that it was harmless error to admit *Fulminante's* testimony.

66. Brecht's brother-in-law was the District Attorney for Buffalo County, Wisconsin at the time. *Brecht v. Abrahamson*, 944 F.2d 1363, 1364 (7th Cir. 1991) *aff'd*, 113 S. Ct. 1710 (1993).

67. Brecht was a self-admitted alcoholic and the Hartmans were recovering alcoholics. Brecht had also admitted to his sister that he had homosexual tendencies. *Id.* at 1364.

68. Roger Hartman eventually died from his wounds on November 11, 1985. *Id.*

69. *Id.*

70. *Id.*

dent.⁷¹ The prosecution pointed to four instances of Brecht's silence and attempted to use that to impeach him.⁷² On March 14, 1986, the jury found Brecht guilty of first-degree murder by use of a dangerous weapon. A succession of appeals followed, and the Seventh Circuit Court of Appeals eventually heard the case.⁷³ This court was the fourth court in sequence to disagree with its immediate predecessor.⁷⁴ It is important to consider in some detail the rationale behind the Seventh Circuit's decision in order to better understand the United States Supreme Court's final ruling.

The Seventh Circuit first disagreed with the district court's overall analysis.⁷⁵ The court essentially dismissed the evidentiary question and

71. According to Brecht, Roger's return caught him by surprise. Brecht did not want Roger to see him with the gun so he ran to replace it upstairs. While running, he tripped and the rifle accidentally discharged. Brecht stated that he tried to find Roger to help him, but he disappeared. When he saw Roger at the neighbor's door, Brecht panicked and drove away. *Id.*

72. The trial court pointed to two instances where the prosecutor asked Brecht whether he told anyone at any time before trial that the shooting was accidental. He also remarked twice in closing argument that Brecht told no one of the incident. The court thought these four references invited the jury to draw an adverse inference from post-arraignment silence. References to post-arraignment silence were found to violate the rule set forth in *Doyle v. Ohio*, 426 U.S. 610 (1976) (holding post-arrest silence may not be used to impeach a defendant). *Id.* at 1465.

73. The Wisconsin Court of Appeals reversed Brecht's conviction, holding that prosecutorial references to Brecht's pre-trial silence violated his right to a fair trial. The court also held this prejudicial error to be magnified by erroneous evidentiary rulings made at the trial level. *State v. Brecht*, 405 N.W.2d 718 (1987). The Wisconsin Supreme Court reversed the decision of the Court of Appeals and reinstated Brecht's conviction. While finding error in the state's reference to Brecht's post-arrest silence, the supreme court held such error to be harmless. Similarly, the court concluded that any erroneous evidentiary rulings made by the trial court were harmless. *State v. Brecht*, 421 N.W.2d 96 (1988).

On August 24, 1990, Brecht filed a Petition for a Writ of Habeas Corpus with the United States District Court for the Western District of Wisconsin. In its Opinion and Order of March 14, 1991, the district court granted the petition for habeas relief. 759 F. Supp. 500 (W.D. Wis. 1991). The court held that the state's references at trial to Brecht's post-arrest silence impermissibly infringed on his Fifth and Fourteenth Amendment rights under the Constitution. *Id.* The trial court's error in allowing such references to be made was not harmless. The district court further held that the admission of evidence as to Brecht's homosexuality as well as a trial court ruling that Brecht could not offer testimonial evidence as to his non-violent character without exposing himself to cross-examination regarding a past conviction were both constitutional errors and not harmless in nature. *Id.*

74. In referring to the district court's issuance of the writ of habeas corpus, Judge Easterbrook of the Seventh Circuit Court of Appeals stated the court "continued this game of Ping-Pong." *Brecht*, 944 F.2d at 1366.

75. *Id.* at 1367. The court stated that the district judge substituted her assessment for that of the Supreme Court of Wisconsin and that it is "not an appropriate stance for a federal judge engaged in collateral review of a state conviction." *Id.*

the homosexuality issue, instead focusing on Brecht's silence.⁷⁶ The court's first step was to determine that the prosecution's references to Brecht's silence before arraignment were proper. However, the questions and remarks made during the prosecutor's closing argument concerning whether Brecht told his story "at any time" before trial were condemned by *Doyle v. Ohio*.⁷⁷ In *Doyle*, the Supreme Court held that a prosecutor may not undermine the implications of the Miranda warnings. A suspect told that he has a right to remain silent may not be "bushwacked by an argument that silence implies guilt."⁷⁸ Once concluding that the references to Brecht's post-arrest silence constituted error, the court then considered whether the error was harmless.

The Seventh Circuit stated that the issue of whether the error was harmless depended on whether the entitlement *Doyle* established implements a part of the Bill of Rights or is a constitutional prophylaxis.⁷⁹ The court explained that the rule of *Doyle* reduces the chance that Miranda warnings will injure the persons they are supposed to protect. Having implied when giving warnings that silence is safe, the government may not change its tune at trial.⁸⁰ However, the warnings themselves are not a part of the Constitution. They are designed to inform suspects of their entitlements and so reduce the likelihood of subtle coercion while in custody.⁸¹ The court determined that *Doyle* is a "prophylactic rule designed to protect another prophylactic rule from erosion or misuse. It has nothing to do with the defendant's guilt and everything to do with insisting that the government play straight with those it prosecutes."⁸²

Next, instead of considering whether the violation of *Doyle* was "harmless beyond a reasonable doubt,"⁸³ the court moved on to what it termed the "antecedent" question.⁸⁴ This question is whether a federal court should apply the "reasonable doubt" standard derived from *Chapman* on collateral review of *Doyle* violations.⁸⁵ The Seventh Circuit had previously considered the question to be "open" in *Hunter v. Clark*.⁸⁶ Al-

76. See *id.* at 1367-68 for a complete discussion on the evidentiary issues. Since the United States Supreme Court did not grant certiorari on these issues, they are beyond the scope of this paper.

77. 426 U.S. 610 (1976).

78. *Brecht*, 944 F.2d at 1368.

79. *Id.*

80. *Id.* at 1370.

81. *Id.* (citations omitted).

82. *Id.*

83. This is the standard promulgated in *Chapman v. California*, 386 U.S. 18 (1967).

84. The court stated that the question is one about which reasonable persons could and had disagreed, referring to the judges and justices who reached different conclusions as the *Brecht* case moved from court to court. *Id.* at 1370.

85. *Id.*

86. 934 F.2d 856 (7th Cir. 1991) (en banc). See also *Hanrahan v. Greer*, 896 F.2d 241, 244-45 (7th Cir. 1990) (calling the question open but avoiding resolution because the argument

though two judges concluded that the reasonable doubt standard should not be employed in the collateral enforcement of prophylactic rules,⁸⁷ four other judges called the concurring opinion "persuasive." They remarked that the opinion "may well be correct," however found it unnecessary to issue a final decision.⁸⁸ Thus, the issue has never been fully addressed.

The Supreme Court has never addressed the collateral review issue.⁸⁹ There are, however, several cases which have considered collateral review generally. In *Stone v. Powell*,⁹⁰ the Court explained that federal courts are not required on collateral review to employ the same standards which state courts must use for reviewing every constitutional claim.⁹¹ *Stone*, in its most direct ruling, held that when a defendant invokes the exclusionary rule devised to implement the Fourth Amendment, the only inquiry made by a federal court should be whether the state gave the defendant a full and fair opportunity to litigate the claim.⁹² Errors in application would no longer be cognizable in federal habeas corpus proceedings.⁹³ Further, *Stone* disregarded the argument that state courts could not be trusted.⁹⁴ In essence, the Court provided that on collateral review federal courts need not replicate the efforts of the judges of the state tribunals; it is enough to ensure that states adjudicate these claims.⁹⁵

The *Brecht* court, considering the *Stone* collateral review standard too strict, proffered a more deferential alternative.⁹⁶ This alternative would serve as a middle ground between federal review that duplicates the direct appeal and federal review that is, after the fashion of *Stone*, next to no review at all.⁹⁷ The *Brecht* court looked to the history of collateral

had not been preserved in district court); *Fencel v. Abrahamson*, 841 F.2d 760, 766-67 n.6 (7th Cir. 1988) (recognizing the question but avoiding resolution).

87. *Hunter*, 934 F.2d at 865-66 (concurring opinion).

88. *Id.* at 859 n.1 (plurality opinion). The other five members of the court did not address the question.

89. The Supreme Court did grant certiorari to identify the proper standard on collateral attack in *United States ex rel. Miller v. Greer*, 789 F.2d 438 (7th Cir. 1986) (en banc) (using the reasonable doubt test), however it did not reach the issue because it held there had been no error in the first place. *Greer v. Miller*, 483 U.S. 756 (1987). See also *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1020 (7th Cir. 1987) (reiterating the approach in *Miller*).

90. 428 U.S. 465 (1976).

91. 28 U.S.C. § 2254 (1992) regulates federal petitions for writ of habeas corpus which seek relief from a state court criminal judgment.

92. *Stone*, 428 U.S. at 493-94.

93. *Id.* at 494.

94. *Id.*

95. *Id.* at 494 n.35.

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

97. *Id.* This alternative, stated the court, would provide the federal court with substantially greater power to ensure that the state court is taking seriously its obligation to enforce the substantive rules. *Id.*

review in order to find some instruction in how to address the proper standard for collateral review.⁹⁸

III. HISTORY OF COLLATERAL REVIEW

For the majority of this nation's history, "next to none" accurately described collateral review of state judgments.⁹⁹ The Judiciary Act of 1789 gave federal courts jurisdiction to issue writs of habeas corpus to prisoners in federal custody.¹⁰⁰ The specific availability of federal habeas corpus for state petitioners was not addressed until 1867. The Federal Habeas Corpus Act of 1867 empowered the federal courts to issue writs of habeas corpus only to release persons held without authority, or in other words, without jurisdiction.¹⁰¹ If a tribunal had jurisdiction over the subject matter and the person, one could obtain no collateral relief, regardless of how egregious the trial error.¹⁰²

From 1867 until the 1930's, federal habeas relief for state petitioners was generally limited to cases in which the state statute defining the offense or the punishment was unconstitutional or the conviction or sentence was void for lack of jurisdiction.¹⁰³ Although it was established that federal habeas corpus relief could be granted when a state petitioner had been denied a federally protected constitutional right, from the 1930's until the early 1950's, various procedural obstacles to relief made the consideration of habeas petitions on the merits rare.¹⁰⁴ However, in *Brown v. Allen*,¹⁰⁵ just prior to the Warren years, the Supreme Court sanctioned

98. *Id.* at 1372-73.

99. *Id.* at 1372.

100. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 81-82 (codified at 28 U.S.C. §§ 1-1631 (1982)). Section 14 of the Judiciary Act provides in part: "[E]ither 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." *Id.* at 82.

101. Federal Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385, 385 (current version codified at 28 U.S.C. §§ 2241-55 (1982)). 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) (1982). See generally WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS, 189-94 (1980).

102. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 463-69 (1963).

103. See generally DONALD E. WILKES, JR., FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF 23-24 (1983) (discussing Supreme Court decisions regarding the scope of the writ).

104. See *id.* The Court's method of expanding review beyond strictly jurisdictional claims was to consider the omission of procedures designed to protect the innocent as equivalent to the lack of jurisdiction. *Brecht v. Abrahamson*, 944 F.2d 1363, 1372 (7th Cir. 1991), *aff'd*, 113 S. Ct. 1710 (1993).

105. 334 U.S. 443 (1953).

the broad application of habeas corpus to state adjudications of federal law.¹⁰⁶ *Brown* held that the Supremacy Clause required a federal law question raised in a state proceeding to receive federal review.¹⁰⁷ *Brown* later became a critical tool in the Warren Court's revolution in constitutional criminal procedure.¹⁰⁸

The Warren Court enlarged the number of federal rights available for state defendants, removed various procedural obstacles to habeas relief, and expanded the scope of review of the federal courts.¹⁰⁹ This expansion of the writ lasted until the early 1970's when the Burger Court began to restrict the availability of federal habeas corpus relief. The Burger Court narrowed the scope of federally protected rights and generally expanded the number and reach of various obstacles to relief.¹¹⁰ Specifically, in *Wainwright v. Sykes*,¹¹¹ the Court held that a state procedural default would prevent federal review unless the defendant could show both external cause and prejudice resulting from the state procedural default, or in the alternative, demonstrate the necessity of review to prevent a fundamental miscarriage of justice.¹¹² The defendant cannot merely show that the error had an adverse effect. Rather, he or she must show that the error could threaten the conviction of the innocent.¹¹³ The Rehnquist Court has continued this trend of establishing procedural barriers to the federal habeas corpus remedy. This Court seems to be more concerned with respecting state interests than protecting constitutional rights.¹¹⁴

Recently, in *Coleman v. Thompson*,¹¹⁵ the Court overruled *Fay v. Noia*, a case that had been a milestone in collateral review expansion.¹¹⁶ The

106. *Id.* at 459-60.

107. *Id.* at 459.

108. See Mark M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 U.C.L.A. L. REV. 503, 530 (1992).

109. WILKES, *supra* note 103, at 23-24; cf. *Fay v. Noia*, 372 U.S. 391 (1963) (holding that a procedural default in state court does not bar federal habeas corpus review unless the prisoner deliberately bypassed state procedures, intentionally foregoing an opportunity for state review).

110. See generally WILKES, *supra* note 103, at 23-24.

111. 433 U.S. 72 (1977).

112. *Id.* at 90-91. *Wainwright* specifically held that a state prisoner who failed to make a timely objection under state rule to the admission of inculpatory statements could not litigate that claim in a federal habeas corpus proceeding without showing cause for and actual prejudice from the noncompliance. *Id.* at 78.

113. *Brecht v. Abrahamson*, 944 F.2d 1363, 1372 (7th Cir. 1991), *aff'd*, 113 S. Ct. 1710 (1993); see also Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

114. See, e.g., *Teague v. Lane*, 489 U.S. 288, 309-10 (1989) (plurality opinion) (holding that the states' interest in finality prevents federal courts from applying new constitutional rules retroactively in a habeas proceeding); *Wainwright*, *supra* notes 111-12 and accompanying text.

115. 111 S. Ct. 2546, 2565 (1991).

116. 372 U.S. 391 (1963); see *supra* note 109.

Coleman Court held that all cases involving a state prisoner who has forfeited his federal claims pursuant to an independent and adequate state procedural rule will be denied federal habeas review.¹¹⁷ However, the bar does not apply to any claimant who demonstrates cause for the default and proves that actual prejudice resulted from the abuse of federal law, or demonstrates that a fundamental miscarriage of justice will result if the federal court does not hear the claims.¹¹⁸ *Coleman* also held that attorney error in state collateral proceedings is unlikely to cause a procedural default.¹¹⁹ In reaching its holdings, the Court gave deference to state procedures and a state's interest in finality. This is a new type of federalism which essentially requires further contraction of the reach of habeas review.¹²⁰

The Supreme Court further restricted access to the writ of habeas corpus in *McCleskey v. Zant*.¹²¹ In *McCleskey*, the Court relaxed the standard for determining that a habeas petitioner has "abused the writ" with the filing of a second or subsequent habeas petition.¹²² Specifically, the Court held that in situations involving successive habeas corpus petitions, the habeas court should apply the same standard used to determine whether to excuse a petitioner's state procedural defaults in order to determine whether to hear the successive petition.¹²³ The Court stated that this "cause and prejudice standard should curtail abusive petitions that in recent years have threatened to undermine the integrity of the habeas corpus process."¹²⁴ In *McCleskey*, the Court enforced a hard rule designed to protect state interests and continued to restrict the congressional jurisdiction intended to preserve individual constitutional rights.¹²⁵

117. *Coleman*, 111 S. Ct. at 2565.

118. *Id.*

119. *See id.* at 2566-68.

120. *See generally* Comment, *Adequate and Independent State Grounds Doctrine: Coleman v. Thompson*, 105 HARV. L. REV. 329 (1991).

121. 111 S. Ct. 1454 (1991).

122. *Id.* The "abuse of the writ" standard can be found at 28 U.S.C. § 2244(b) (1988) which states:

[A] subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

Id.

123. *McCleskey*, 111 S. Ct. at 1467-71. The Court adopted the standard of "cause and prejudice" which required the petitioner to show that he or she was prevented from presenting the claim by some outside cause and that actual prejudice arose from the error. *Id.*

124. *McCleskey*, 111 S. Ct. at 1471.

125. *See generally* *The Supreme Court, 1990 Term — Leading Cases* 105 HARV. L. REV. 319 (1991). Commentators have suggested that the *McCleskey* decision will cause more prisoners to be held or executed without a meritorious claim being heard, depriving them of

IV. SEVENTH CIRCUIT ANALYSIS IN *Brecht*

The *Brecht* court referred to themes of federalism and finality as being at the forefront of any discussion on the scope of collateral review.¹²⁶ It then concentrated on three additional practical considerations in determining whether a federal court should examine a state's decision. The first consideration is that substantial delay will occur when collateral review is followed by a new trial.¹²⁷ Second, because of the high costs of retrial, federal courts may dilute the standard of harmlessness, excusing errors that would not have been tolerated on direct appeal.¹²⁸ Finally, the *Brecht* court maintained that while re-doing decisions made by state courts, time would be taken from federal matters. The federal courts would have even less time to devote to cases that have not even received initial consideration.¹²⁹

The court in *Brecht* then stated that to select a standard for assessing harmless error, an assessment of the marginal benefits and costs of enforcement is required.¹³⁰ The standards from *Kotteakos v. United States*¹³¹ and *United States v. Lane*¹³² were compared with the *Chapman* standard of review on collateral attack.¹³³ The court stated that the difference between the two would not be likely to impair the enforcement of *Doyle*.¹³⁴ It added that "[w]hen the rule is as far removed from protecting

their liberty or life. See *id.* at 329 ("[T]he Court's ruling strikes a deadly blow."); David D. Kammer, *Restricting New-Claim Successive Applications for Federal Writs of Habeas Corpus: McCleskey v. Zant*, 111 S. Ct. 1454 (1991), 60 U. CIN. L. REV. 1405 (1992).

126. *Brecht v. Abrahamson*, 944 F.2d 1363, 1372 (7th Cir. 1991), *aff'd*, 113 S. Ct. 1710 (1993). For a full discussion on federalism and finality, see generally *Coleman v. Thompson*, 111 S. Ct. 2546, 2565 (1991); *McCleskey*, 111 S. Ct. at 1456.

127. *Brecht*, 944 F.2d at 1373. "Passage of time diminishes the courts' ability to resolve factual disagreements accurately. Trials long after the event, when memories have faded, are less likely to convict the guilty and acquit the innocent." *Id.* Furthermore, new trials mean there is an opportunity for new errors. *Id.*

128. *Id.* The court further argued that state courts would then relax their own vigilance, which could be avoided if the standards of harmlessness on direct and collateral review were distinguished. *Id.*

129. *Id.* Less time per case means a greater chance an error will occur. It also means that a longer docket will form, during which disputes fester and memories fade, impairing the federal courts' ability to accurately resolve their pending cases. *Id.*

130. *Id.* at 1374.

131. 328 U.S. 750 (1946).

132. 474 U.S. 438 (1986).

133. See *supra* notes 20-26 and accompanying text. *Kotteakos* and *Lane* held that only an error that exerts substantial influence on the course of the trial and produces actual prejudice to the accused vitiates the judgment. *Lane*, 474 U.S. at 449; *Kotteakos*, 328 U.S. at 776.

134. *Brecht v. Abrahamson*, 944 F.2d 1363, 1374 (7th Cir. 1991), *aff'd*, 113 S. Ct. 1710 (1993).

the innocent as is *Doyle*, there is no need for the strict enforcement that the *Chapman* standard creates."¹³⁵

In its conclusion, the *Brecht* court proffered a new standard of harmlessness on collateral enforcement of prophylactic rules such as *Doyle*. It held that the correct standard should be whether the error "had substantial and injurious effect or influence in determining the jury's verdict."¹³⁶ In its application, the court held that the four references to *Brecht's* post-arraignment silence did not have "substantial and injurious effect," given the many proper references to his silence preceding arraignment.¹³⁷ Therefore, the Seventh Circuit concluded that the *Doyle* violation did not support a writ of habeas corpus and reversed the district court.¹³⁸

In reversing the district court, the *Brecht* court recognized that in 1990, the Eighth Circuit elected not to apply the *Kotteakos-Lane* approach to collateral review of *Doyle* errors.¹³⁹ However, the Seventh Circuit respectfully declined to follow the Eighth Circuit.¹⁴⁰ One commentator stated that the Seventh Circuit returned to the vexing issue of determining the appropriate standard of harmless error analysis on collateral review of state court judgments.¹⁴¹ He further criticized the Seventh Circuit for "[b]ucking its own precedents, the law in many other circuits, and arguably the Supreme Court as well . . ."¹⁴² The practical effect is that more errors will be deemed harmless and that habeas relief will be less available to remedy admitted errors below.¹⁴³

Brecht also recognized that the Supreme Court used the *Chapman* standard on collateral attack twice previously.¹⁴⁴ In the first case, *Rose v. Clark*,¹⁴⁵ the central question was whether an unconstitutional burden-

135. *Id.*

136. *Id.* at 1375. See *Lane*, 474 U.S. at 449; *Kotteakos*, 328 U.S. at 776.

137. *Brecht*, 944 F.2d at 1376.

138. *Id.*

139. *Id.* at 1375 (citing *Bass v. Nix*, 909 F.2d 297, 304-05 & n.14 (8th Cir. 1990)).

140. *Id.* at 1375-76. The court stated that the *Bass* court misunderstood the justification of the *Doyle* rule and the Supreme Court's present view on post-arraignment silence. *Id.* at 1376.

141. Adam H. Kurland, *Foreward: The Seventh Circuit as a Criminal Court: The Role of a Federal Appellate Court in the Nineties*, 67 CHI-KENT L. REV. 1, 26, n.110 (1991).

142. *Id.*

143. *Id.* "*Brecht* seems grounded in a naked reevaluation of existing precedent. This shunting aside of controlling precedent by an intermediate appellate court was not accepted quietly." *Id.* Note that five Seventh Circuit judges voted in favor of a rehearing en banc, but fell one vote short. *Brecht*, 944 F.2d at 1376 n.*. Judge Cudahy, the third panel member, concurred in the judgment but also voted to rehear the case en banc. *Id.* at 1376 & n.*. He indicated in his concurrence that he believed the majority improperly overruled the existing Supreme Court "harmless beyond a reasonable doubt" standard required by *Chapman v. California*. *Id.* at 1376.

144. *Brecht*, 944 F.2d at 1375.

145. 478 U.S. 570 (1986).

shifting instruction could ever be harmless error.¹⁴⁶ The Court held that such instruction may be deemed harmless under *Chapman*.¹⁴⁷ In the second case,¹⁴⁸ the Court held that the Supreme Court of South Carolina erred in withholding collateral relief when it employed a standard of harmless error which varied from that established by *Chapman*.¹⁴⁹ *Brecht* maintained that *Yates* was different because it dealt with constitutional rules designed to protect the innocent, whereas *Doyle* represented a penumbra rule.¹⁵⁰ Also, *Yates* was directed at a "state court apparently unwilling to accept the federal norm; Wisconsin, by contrast, had applied *Doyle* conscientiously."¹⁵¹

The *Brecht* court circumvented the Supreme Court's application of *Chapman* in *Rose* and *Yates* by recognizing that "only twice" had the Supreme Court applied *Chapman*. In addition, the *Brecht* court stated that neither Congress nor the Supreme Court has directed the application of the *Chapman* standard on collateral review.¹⁵² The court illustrated the proposition that the standard of harmless error may vary between direct and collateral appeal by describing the enforceability of Federal Rule of Criminal Procedure 11.¹⁵³ On direct appeal it is enforceable by virtually automatic reversal, but on collateral attack it is only enforceable to the extent that disregarding its provisions would make the proceedings fundamentally unfair.¹⁵⁴ The court then concluded that "one round of review is sufficient unless something has gone very wrong indeed. Collateral review is not supposed to be a replay of the direct appeal."¹⁵⁵

146. *Brecht*, 944 F.2d at 1375.

147. *Rose*, 478 U.S. at 582.

148. *Yates v. Evatt*, 111 S. Ct. 1884 (1991). In *Yates*, a South Carolina trial court issued jury instructions in a murder case stating that malice could be presumed from the use of a deadly weapon and that malice could be presumed when death occurs in the course of an unlawful act. *Brecht*, 944 F.2d at 1375. Both presumptions allowed the state to evade its burden of proving guilt beyond a reasonable doubt and thus, were declared unconstitutional. *Id.* See *Yates v. Aiken*, 484 U.S. 211 (1988); *Sandstrom v. Montana*, 442 U.S. 510 (1979). The state court originally denied relief to *Yates* without even citing to federal cases, despite a remand by the Supreme Court with instructions to apply *Francis v. Franklin*, 471 U.S. 307 (1985). On remand from *Yates v. Aiken*, the state court misstated the facts, showing complete disdain for the opinion reversing it. The Supreme Court again granted review and reversed, explaining the meaning of *Chapman* in burden-shifting cases. *Brecht*, 944 F.2d at 1375.

149. *Brecht*, 944 F.2d at 1375 (citing *Yates v. Evatt*, 111 S. Ct. 1884, 1892 & n.8 (1991)).

150. *Id.*

151. *Id.*

152. *Id.* at 1374.

153. *Id.* Federal Rule of Criminal Procedure 11 establishes procedures for taking guilty pleas.

154. *Id.* (citing *United States v. Timmreck*, 441 U.S. 780 (1979)); *McCarthy v. United States*, 394 U.S. 459 (1969).

155. *Id.* (citations omitted).

Once the *Brecht* court determined that the *Kotteakos-Lane* standard was to be applied, it found that the application to the present case was straightforward.¹⁵⁶ *Brecht* could not "with a straight face," contend that the four references to his post-arrest silence had "substantial and injurious effect" because there were many other proper references to his pre-arrest silence.¹⁵⁷ Finally, since the court rejected the "overwhelming evidence" test from *Harrington v. California*,¹⁵⁸ it found that the violation of *Doyle* did not support a writ of habeas corpus.¹⁵⁹

V. THE SUPREME COURT'S DECISION

In a five-four decision, the Supreme Court upheld the Seventh Circuit's new harmless error standard for collateral review of constitutional errors.¹⁶⁰ Writing for the majority,¹⁶¹ Chief Justice Rehnquist began by recognizing that *Brecht* had suffered a *Doyle* error. He classified the *Doyle* error as a trial error, not as a prophylactic rule, and then proceeded to discuss collateral review and why the *Chapman* standard did not apply on collateral review.

In characterizing the error that *Brecht* suffered, the Court referred to its decision in *Doyle v. Ohio*.¹⁶² In line with the five lower courts that heard the *Brecht* case, the Supreme Court found it obvious that the prosecution's reference to *Brecht*'s post-arrest silence violated *Doyle* and thus, Due Process.¹⁶³ The Court disagreed with the Seventh Circuit, however, in the characterization of a *Doyle* violation. The Seventh Circuit referred to *Doyle* as a "prophylactic rule designed to protect another prophylactic rule [Miranda] from erosion or misuse."¹⁶⁴ The Supreme Court disagreed stating that *Doyle* is "rooted in fundamental fairness and due

156. *Id.* at 1376.

157. *Id.*

158. See *supra* notes 33-38 and accompanying text.

159. *Brecht* 944 F.2d at 1376. Judge Cudahy concurred in the judgment, but only because he believed that the error was not "harmless beyond a reasonable doubt." *Id.* Standing on precedent, he stated, "I do not believe — whatever its merits — that this is an open question." *Id.* at 1377.

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

161. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices Stevens, Scalia, Kennedy, and Thomas joined. Justice Stevens filed a concurring opinion. Justice White filed a dissenting opinion in which Justice Blackmun joined and in which Justice Souter joined except for the footnote and Part III. Justices Blackmun, O'Connor, and Souter filed dissenting opinions.

162. 426 U.S. 610 (1976). See *supra* notes 77-80 and accompanying text.

163. *Brecht*, 113 S. Ct. at 1717. In *Doyle*, the Court held that "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving Miranda warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." *Doyle*, 426 U.S. at 619.

164. *Brecht v. Abrahamson*, 944 F.2d 1363, 1370 (7th Cir. 1991), *aff'd*, 113 S. Ct. 1710 (1993).

process concerns” and “does not bear the hallmarks of a prophylactic rule.”¹⁶⁵ Instead, the Supreme Court classified a *Doyle* error as a “trial error,” a term first explained in *Arizona v. Fulminante*.¹⁶⁶ Trial errors are those which occur during the presentation of a case to the jury, and since *Chapman*, have been subjected to the harmless-beyond-a-reasonable-doubt standard.¹⁶⁷

The Court then explained the *Chapman* standard,¹⁶⁸ specifically recognizing that it was established on direct review.¹⁶⁹ Although acknowledging that the *Chapman* standard has been applied in several federal habeas cases, the Court added that it has not yet squarely addressed *Chapman's* applicability on collateral review.¹⁷⁰ Therefore, the Court stated that it was not bound by *stare decisis* and was free to address the issue on its merits.¹⁷¹

The Court first looked to the federal habeas corpus statute for guidance, but found that it is silent as to collateral review.¹⁷² The habeas corpus statute merely permits federal courts to entertain a habeas petition and directs the courts to “dispose of the matter as law and justice require.”¹⁷³ Since the statute says nothing about the standard for harmless error review in habeas cases, the Court felt free to consider respondent's suggestion to adopt the *Kotteakos* standard.¹⁷⁴ The Court briefly discussed petitioner's argument, contending that since Congress was unable to enact legislation after *Chapman* to limit the availability of habeas relief, it must have intended that a less strict standard of harmless error analysis on collateral review was inappropriate.¹⁷⁵ However, stating that the Court is reluctant to draw inferences from the inaction of Congress, it quickly dismissed the proposition.¹⁷⁶

With the Court's determination that it had the duty to establish the correct standard of harmless error on collateral review absent direct statutory guidance, it first considered its habeas jurisprudence.¹⁷⁷ The Court distinguished direct review from collateral review by pointing to examples

165. *Brecht*, 113 S. Ct. at 1717.

166. 111 S. Ct. 1246 (1991). See *supra* notes 57-65 and accompanying text.

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

168. See *supra* notes 25-30 and accompanying text.

169. *Brecht*, 113 S. Ct. at 1718.

170. *Id.*

171. *Id.*

172. 28 U.S.C. § 2254(a) (1992).

173. 28 U.S.C. § 2243 (1992).

174. *Brecht*, 113 S. Ct. at 1718-19. See *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), which determined that an error requires reversal only if it had “substantial or injurious effect or influence in determining the jury's verdict.” *Id.*

175. *Brecht*, 113 S. Ct. at 1718-19.

176. *Id.*

177. *Id.* at 1719.

of its cases; some describe collateral review¹⁷⁸ and others illustrate the application of different standards on collateral review.¹⁷⁹ The two most frequently cited reasons for distinguishing between direct and collateral review are federalism and the state's interest in finalizing convictions.¹⁸⁰ "Federal intrusions into state criminal trials frustrate both the State's sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."¹⁸¹

In its decision to apply a different standard of harmlessness in a habeas proceeding, the Court considered the arguments *supra* and finally stated that "state courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman* and State courts often occupy a superior vantage point from which to evaluate the effect of trial error."¹⁸² The Court dismissed Brecht's argument that the *Chapman* standard is necessary to deter state courts from giving relaxed harmless error review and to discourage prosecutors from committing the error.¹⁸³ No reason was found to believe that lower federal or state courts would violate their Article VI duty to uphold the Constitution. In addition to interests of federalism and finality, the Court mentioned the significant "social costs" that would be imposed by retrying

178. See, e.g., *Kuhlman v. Wilson*, 477 U.S. 436, 447 (1986) ("The Court uniformly has been guided by the proposition that the writ should be available to afford relief to those 'persons whom society has grievously wronged' in light of modern concepts of justice.") (quoting *Fay v. Noia*, 372 U.S. 391, 440-41 (1963)); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) ("The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited."); *United States v. Frady*, 456 U.S. 152, 165 (1982) ("[A]n error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.") (quoting *United States v. Addonizio*, 442 U.S. 178, 184 (1979)).

179. See, e.g., *Griffith v. Kentucky*, 479 U.S. 314, 320-28 (1987) (holding that new rules seldom have retroactive application to criminal cases on federal habeas review); *Frady*, 456 U.S. at 162-69 (holding that the "plain error" rule applies to claims on direct appeal, but the "cause and prejudice" standard applies in determining whether that same claim may be raised on habeas); *Stone v. Powell*, 428 U.S. 465, 489-96 (1976) (holding that claims under *Mapp v. Ohio*, 367 U.S. 643 (1961) are not cognizable on habeas review as long as the state courts have provided a full and fair opportunity to litigate them at trial or on direct review).

180. *Brecht*, 113 S. Ct. at 1720. For a discussion of these issues see *McCleskey v. Zant*, 111 S. Ct. 1454, 1468-70 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 110-15 (1977).

181. *Brecht*, 113 S. Ct. at 1720 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)).

182. *Id.* at 1721 (citing *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (per curiam)).

183. *Id.* For a discussion of the negative message sent to prosecutors, see Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 421 (1992) ("tacitly inform[ing] prosecutors that they can weigh the commission of evidentiary or procedural violations not against a legal or ethical standard of appropriate conduct, but rather, against an increasingly accurate prediction that the appellate courts will ignore the misconduct when sufficient evidence exists to prove the defendant's guilt."); *Goldberg*, *supra* note 13, at 439 ("Every time an error is declared harmless in a particular situation, it diminishes the risk to the prosecutor in the use of the evidence or the technique.").

defendants whose convictions were set aside.¹⁸⁴ Additional time and resources would be expended, memories would fade, and witnesses could be difficult to locate, thus frustrating society's interest in the prompt administration of justice.¹⁸⁵ The Court contends that applying the *Kotteakos* standard on habeas review of constitutional error would be less onerous and more likely to promote the considerations that underlie its recent habeas cases.¹⁸⁶ Under the *Kotteakos* standard, "habeas 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.'" ¹⁸⁷ However, the Court added a footnote to its holding that the *Kotteakos* standard applied. The footnote states:

Our holding does not foreclose the possibility that in an unusual case, 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, even if it did not substantially influence the jury's verdict.¹⁸⁸

The Court then applied the new habeas standard to Brecht's case and found that the State's references to his post-arrest silence were infrequent.¹⁸⁹ Further, the State had made extensive, permissible references to Brecht's pre-arrest silence. Finally, the State had substantial evidence of Brecht's guilt.¹⁹⁰ Therefore, the Court denied Brecht's petition for habeas corpus.

In his concurrence, Justice Stevens agreed with the majority that the *Kotteakos* standard should be applied on collateral review, but emphasized that it is a demanding standard.¹⁹¹ Specifically, it requires a de novo examination of the trial record where the reviewing court must decide that "the error did not influence the jury" and that "the judgment was not substantially swayed by the error."¹⁹² *Kotteakos*, asserted Stevens, re-

184. *Brecht*, 113 S. Ct. at 1721.

185. *Id.* (citing *United States v. Mechanik*, 475 U.S. 66, 72 (1986)).

186. *Id.*

187. *Id.* (citing *United States v. Lane*, 474 U.S. 438, 449 (1986)).

188. *Id.* at 1722 n.9.

189. *Id.* The state court had determined that less than two pages of the 900-page trial transcript contained improper references to Brecht's post-arrest silence. *State v. Brecht*, 421 N.W.2d 96, 104 (Wis. 1988).

190. The path of the bullet in Hartman's body was inconsistent with the testimony that the gun discharged as Brecht was falling; nothing was found that could have caused Brecht to trip; the gun was found outside with a jammed cartridge, appearing as if a second round was attempted to be fired; and, Brecht had motive to kill Hartman. *Brecht*, 113 S. Ct. at 1722.

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

192. *Id.* at 1724 (citing *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946)).

quires more than simply focusing on how the error may or may not have affected the jury's verdict.¹⁹³

VI. A CRITICAL ANALYSIS OF THE *Brecht* DECISION

Justice White and Justice O'Connor wrote separate dissents¹⁹⁴ supporting each other on some points and providing additional viewpoints on other issues. Both dissenting opinions criticized the majority for expanding the harmless error standard of *Chapman* beyond a *Doyle* error to all trial errors. O'Connor asserted that when constitutional error is found, proof of harmlessness beyond a reasonable doubt provides confidence that the verdict is reliable.¹⁹⁵ "Such proof demonstrates that, even though the error had the potential to induce the jury to err, in fact there is no reasonable possibility that it did."¹⁹⁶ White posited further that after *Fulminante*, all "trial errors" are subject to harmless error analysis and most errors are trial errors according to *Fulminante*.¹⁹⁷ Therefore, "the Court effectively has ousted *Chapman* from habeas review of state convictions."¹⁹⁸

O'Connor and White also agree that, without strong justification, habeas jurisprudence should not be turned into a "confused patchwork in which different constitutional rights are treated according to their status, and in which the same constitutional right is treated differently depending on whether its vindication is sought on direct or collateral review."¹⁹⁹ Judicial efficiency favors simplification.²⁰⁰ The dissenters also argue that *Kotteakos* will not ease the burden on courts. They must still review the entire record de novo and show sufficient confidence that the verdict would remain unchanged even if the error had not occurred. "The only thing the Court alters today is the degree of confidence that suffices."²⁰¹ *Kotteakos* is more lenient, but still requires judicial judgment. Leniency does not decrease the burden of identifying those cases that warrant relief; it merely reduces the number of cases in which relief will be granted.²⁰²

193. *Id.*

194. Justices Blackmun and Souter joined Justice White in his dissent, although Justice Souter did not join in the footnote or Part III.

195. *Brecht*, 113 S. Ct. at 1730 (O'Connor, J. dissenting).

196. *Id.*

197. *Fulminante*, 111 S. Ct. 1246 (1991). See *supra* notes 57-65 and accompanying text.

198. *Brecht*, 113 S. Ct. at 1727 (White, J., dissenting).

199. *Id.* at 1728 (White, J., dissenting).

200. *Id.* at 1731 (O'Connor, J. dissenting).

201. *Id.*

202. *Id.*

Justice White further argued that the majority's decision created illogical disparate treatment of constitutional error cases.²⁰³ White opined that if a state court erroneously held that there was no constitutional violation, or that such error was harmless beyond a reasonable doubt, and subsequent writ of certiorari was not sought or granted, relief would be foreclosed on federal habeas review because of the new more lenient standard the Court approved.²⁰⁴

Finally, Justice White argued that the majority's result in *Brecht* is at odds with one of the functions of habeas review — to deter prosecutors and courts from disregarding their constitutional responsibilities.²⁰⁵ White disagreed with the majority's assumption that prosecutors and courts will perform their duties correctly. However, this proposition has had considerable support with many commentators over the past decade.²⁰⁶

Justice O'Connor also provided a thorough dissent. She stated that restraint should be the controlling factor when the Court makes decisions regarding the writ of habeas corpus.²⁰⁷ Further, Justice O'Connor is not convinced that federalism, finality, and fairness counsel against applying *Chapman*, therefore she would continue to apply its holding on direct and collateral review.²⁰⁸ Finally, O'Connor argues that footnote nine of the majority's opinion will cause prisoners to plead their case in accordance with the narrow exception.²⁰⁹ Moreover, since the Court only says there is a possible exception, litigators must first address whether the exception exists at all.

In addition to the arguments advanced by the dissenters in *Brecht*, there are several others to be asserted. There is no logical reason for adopting a new rule that is different from the *Chapman* standard. The Supreme Court made it clear that the protection of rights such as those articulated in *Doyle*, was contemplated in its *Chapman* decision. In discussing the scope of the new rule, the Court stated:

An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless. Certainly error, constitutional error, in illegally admitting highly

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

204. *Id.*

205. *Id.* at 1727.

206. *See generally* Gershman, *supra* note 183, at 420-21 (arguing that prosecutors have been informed by the Court that their violations of a defendant's constitutional rights may be ignored if sufficient evidence exists to prove the defendant's guilt); Goldberg, *supra* note 13, at 439 ("Every time an error is declared harmless in a particular situation, it diminishes the risk to the prosecutor in the use of the evidence or the technique.").

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

208. *Id.* at 1729.

209. *See supra* text accompanying note 187.

prejudicial evidence or comments, casts on someone other than the person prejudiced by it the burden to show that it was harmless.²¹⁰

More importantly, the applicability of the *Chapman* standard was never made contingent on the method of federal review. While *Chapman* itself was heard before the Supreme Court on direct appeal, the decision did not circumscribe its applicability to collateral enforcement of federal rights. To date, the Court has never drawn such a distinction although it has had the opportunity in the context of a *Doyle* violation. When the issue was most recently raised in *Greer v. Miller*,²¹¹ the Court, in fact, deferred decision on the question stating that "we have no occasion to consider whether *Doyle* errors may be viewed differently on collateral attack on direct review."²¹²

The Supreme Court recently applied the *Chapman* standard in collateral habeas corpus proceedings. In both *Rose v. Clark*,²¹³ and *Yates v. Evatt*,²¹⁴ the Court held that challenged jury instructions would be reviewed under the "harmless beyond a reasonable doubt" standard. In both cases, the alleged constitutional violations related to the use of jury instructions which allowed the prosecutor to evade the requirement of proving the defendant guilty beyond a reasonable doubt. The decisions in *Rose* and *Yates* suggest that the Court remains committed to the application of the *Chapman* standard in the collateral enforcement of federal rights. Therefore, the *Chapman* standard should have been used to address the constitutional error in *Brecht's* case. Notwithstanding the current applicability of the *Chapman* standard, the Supreme Court held that it was not bound by *stare decisis* because it had not ruled directly on the issue.²¹⁵ By detracting from its previous decisions which applied *Chapman*, the Court's motivation becomes clear. The Court had the opportunity to embrace *Chapman* on collateral review, but the Court ignored it, holding to its agenda to "fix" habeas corpus.

The Court has not considered the natural consequences of upholding the Seventh Circuit in *Brecht*. Watering-down the harmless error standard on collateral review will still contribute to judicial waste. Although the number of habeas cases will decrease, countless appeals occurring prior to a petition for a writ of habeas corpus will remain. This will not promote judicial efficiency, it will only create more waste. All lower courts will continue to hear cases that will only be disposed of ultimately upon collateral review which uses a new standard. Conversely, the courts will still be backlogged on collateral review because although the standard of

210. *Chapman v. California*, 386 U.S. 18, 23-24 (1967).

211. 483 U.S. 756 (1987).

212. *Id.* at 756.

213. 478 U.S. 570 (1986).

214. 111 S. Ct. 1884 (1991).

215. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1718 (1993).

review is weaker, the courts are still required to review the entire record de novo. If it is the Court's intention to alleviate the problems of habeas corpus and control the amount of litigation, upholding *Brecht v. Abrahamson* will not accomplish that end.

VI. CONCLUSION

The Supreme Court's decision in *Brecht v. Abrahamson* came as no surprise to most commentators and practitioners in American criminal constitutional law. The current trend, since at least the advent of the Rehnquist Court, has been to dilute the harmless error standard as a means to eviscerate habeas corpus. Massive opposition to this course by attorneys as well as academicians has done little to curtail the string of opinions emanating from the Court which have all but succeeded in removing the writ of habeas corpus as a substantive protection of federal constitutional rights. What *Brecht* has done, however, is to highlight the underlying fallacy of the Court's approach to what it considers the "problem" of habeas corpus.

No one can seriously dispute that prisoners' rights litigation, especially habeas corpus, is an enormous strain on the federal judicial system. The great majority of habeas petitions filed are unfounded, last-ditch efforts by properly convicted criminals seeking to escape the retributive effects of their conduct. It is in the federal district courts of this country, which are laboring under the influx of these filings to the disadvantage of the rest of their dockets, where habeas corpus remains a problem to be solved.

By eliminating the *Chapman* standard for harmless error in collateral federal proceedings, the Court in *Brecht* does nothing to resolve the difficulties and challenges posed by the doctrine of habeas corpus. After *Brecht*, no fewer petitions for relief will be filed in the district courts, no less effort will be required of federal judges in reaching the merits of those petitions and, no more efficient procedure for disposing of collateral attacks will be established. In short, the "problem" of habeas continues unabated.

Rather than addressing these concerns, *Brecht* has an effect far more ill-advised and damaging to our criminal justice system. By adulterating the harmless error standard in order to lessen the effect of habeas corpus, the Court in *Brecht* succeeds only in eviscerating the underlying federal rights that are the subject of habeas claims. While most habeas petitions do not involve challenges of significant constitutional dimensions, there are important exceptions. In every haystack there is a needle. These exceptions are the cases that federal habeas law was designed to remedy.

By raising the threshold standard for demonstrating harmful error, the Court has only determined that some constitutional rights are not impor-

tant enough to uphold. This decision is superficially based on the Court's expressed intent to respect state courts' own determinations of federal constitutional challenges. Such a concern is illusory and dangerous. No person or entity benefits from a purposeful reduction in the force behind individual constitutional rights. In fact, a continued assault on constitutional rights masquerading as an attack on habeas corpus will result only in a generalized lack of respect for a legal system which has only continued to function thus far through persistent and vigilant protection of these rights. *Brecht* threatens us today with this very loss of respect. Almost as bad, *Brecht* does not even do what it portends to do; address the "problem" of habeas corpus.

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