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John H. Blume

Stephen P. Garvey
spg3@cornell.edu

HARMLESS ERROR IN FEDERAL HABEAS CORPUS AFTER *BRECHT v. ABRAHAMSON*

JOHN H. BLUME*
STEPHEN P GARVEY**

The law of habeas corpus has changed again.[1] This time it was the law of harmless error. Before *Brecht v. Abrahamson*,[2] the courts applied the same harmless error rule on direct appeal and in federal habeas corpus. Under that rule, embraced for constitutional errors in *Chapman v. California*,[3] a conviction tainted by a constitutional error susceptible to harmless error analysis could be upheld only if the state demonstrated that the error was harmless beyond a reasonable doubt. After *Brecht*, the venerable *Chapman* rule still applies to constitutional errors identified and reviewed on direct appeal, but an ostensibly "less onerous" standard applies to constitutional errors identified and reviewed on federal habeas corpus.[4] Under this standard, derived from *Kotteakos v. United States*,[5] and once used only for nonconstitutional errors, a conviction tainted by constitutional error "requires reversal only if it

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* Executive Director, South Carolina Death Penalty Resource Center. B.A., University of North Carolina, Chapel Hill; M.A.R., J.D., Yale University.

** Associate, Covington & Burling. B.A., Colgate University; M.Phil., Oxford University; J.D., Yale University.

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1. Changes in the law of habeas corpus have been wrought by a string of recent cases. *See, e.g.*, Sawyer v. Whitley, 112 S. Ct. 2514 (1992) (narrowly defining "miscarriage of justice" exception as applied to penalty phase of capital trial); Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992) (requiring habeas petitioner to show "cause and prejudice" for failing to develop material facts in state court before being entitled to federal evidentiary hearing); Coleman v. Thompson, 111 S. Ct. 2546 (1991) (explicitly overruling "deliberate bypass" standard for excusing state procedural default); McCleskey v. Zant, 111 S. Ct. 1454 (1991) (requiring habeas petitioner to show "cause and prejudice" to excuse abusive claims in successive petitions); Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion) (establishing new doctrine of nonretroactivity). For cases applying *Teague*, see Sawyer v. Smith, 497 U.S. 227 (1990); Saffle v. Parks, 494 U.S. 484 (1990); Butler v. McKellar, 494 U.S. 407 (1990).

2. 113 S. Ct. 1710 (1993).

3. 386 U.S. 18 (1967).

4. *Brecht*, 113 S. Ct. at 1721-22.

5. 328 U.S. 750 (1946).

'had substantial and injurious effect or influence in determining the jury's verdict.' "[6]

The Court was sharply divided in *Brecht*. The opinion of the Court was delivered by Chief Justice Rehnquist and joined by Justices Stevens, Scalia, Kennedy and Thomas. Justice Stevens, who provided the critical fifth vote, wrote a separate concurring opinion "to emphasize that the [*Brecht*] standard is appropriately demanding."[7] Justice Stevens' separate concurring opinion deserves careful attention because it diverges from that of the Chief Justice in several ways, making Justice Stevens' version of the *Brecht-Kotteakos* test much more favorable to habeas petitioners than that advanced by the Chief Justice.

The following Article provides a concise overview and analysis of *Brecht*, focusing especially on the opinions of the Chief Justice and Justice Stevens. It explores the structure of the *Brecht-Kotteakos* rule, both as articulated in the *Brecht* opinion and as interpreted thus far by the lower federal courts. Its principal conclusion is that on careful analysis the *Brecht-Kotteakos* rule and the *Chapman* rule, though doubtlessly different, turn out not to be that different. Finally, this Article examines various exceptions to the *Brecht-Kotteakos* rule, as well as the limited authority of the federal habeas courts to apply harmless error analysis to errors infecting the penalty phase of a capital trial.

I. The Structure of the *Brecht-Kotteakos* Rule

Brecht came to the Supreme Court from the Seventh Circuit, in which Judge Easterbrook held that when a federal habeas court reviews a state conviction tainted by a *Doyle* error,[8] the proper harmless error standard was not that of *Chapman*, but rather the

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6. *Brecht*, 113 S. Ct. at 1718 (quoting *Kotteakos*, 328 U.S. at 776). Because the Supreme Court announced and applied the *Brecht-Kotteakos* rule in *Brecht* itself, at least one court has held that *Brecht* applies retroactively. *See* Henry v. Estelle, 993 F.2d 1423, 1427 (9th Cir. 1993). The better explanation is probably that *Brecht* applies retroactively under the rationale of Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993), indicating in dicta that changes in constitutional rules beneficial to a state's interest in finality apply retroactively.

7. *Brecht*, 113 S. Ct. at 1723 (Stevens, J., concurring). The remaining Justices each wrote dissents, in which Justices White and O'Connor offered extended analyses.

8. A violation of the Due Process Clause arises when the state uses a criminal defendant's post-*Miranda* silence to impeach him at trial. *See* Doyle v. Ohio, 426 U.S. 610 (1976).

more forgiving standard of *Kotteakos*.[9] Judge Easterbrook confined his analysis to the peculiar nature of the *Doyle* rule as "a prophylactic rule designed to protect another prophylactic rule [i.e., the *Miranda* rule] from erosion or misuse."[10] As he stated elsewhere, "there is much less need to enforce [these] rules on collateral attack than there is to enforce 'core' constitutional rules."[11] The Supreme Court rejected this relatively narrow holding in favor of a broader one under which the *Kotteakos* rule was extended to encompass *all* "trial errors," prophylactic or otherwise.[12]

The *Chapman* rule and the *Brecht-Kotteakos* rule both have canonical formulations, which the lower courts undoubtedly will tend to recite without further analysis. Under *Chapman*, a constitutional error requires reversal unless the state—the "beneficiary of the error"—can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[13] Under *Brecht-Kotteakos*, a constitutional error requires reversal only if it " 'had substantial and injurious effect or influence in determining the jury's verdict.' "[14]

These canonical formulations are hard to compare. To determine how the two rules differ, they need to be mapped onto a common matrix. To that end, any harmless error rule can be separated into four different elements. These elements specify (1) who bears the burden of proof to show that the error is or is not harmless; (2) what that burden is; (3) what the requisite standard of "prejudice" is (i.e., how likely is it that the error did or did not affect the verdict); and (4) what "approach" the reviewing court must take to

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9. *See* Brecht v. Abrahamson, 944 F.2d 1363, 1375 (7th Cir. 1991). Judge Cudahy concurred in the judgment but dissented to the applicable standard of review. *Id.* at 1376.

10. *Id.* at 1370.

11. Hunter v. Clark, 934 F.2d 856, 866 (7th Cir. 1991) (Easterbrook, J., concurring), *cert. denied*, 112 S. Ct. 388 (1992).

12. *See Brecht*, 113 S. Ct. at 1717. The distinction between "trial error" and "structural error" is discussed *infra* part II.B.

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

14. *Brecht*, 113 S. Ct. at 1722 (quoting *Kotteakos*, 328 U.S. at 776). Other language used to describe the *Brecht-Kotteakos* rule includes whether the error "substantially influence[d]" the jury's verdict, *id.* at 1722 n.9, and whether the reviewing court can state with "fair assurance" that the error did not contribute to the verdict. *See Kotteakos*, 328 U.S. at 765.

evaluate whether prejudice has been demonstrated.[15] Significantly, the views expressed in *Brecht* by the Chief Justice and Justice Stevens differ on the first and fourth elements. Both Justices were silent, as were the dissenting Justices, on the second and third elements.

A. Allocation of the Burden of Proof

The first element, on which the Chief Justice and Justice Stevens plainly disagreed, specifies who bears the burden of proof. The Chief Justice intimated that *Brecht* and *Kotteakos* impose that burden on the defendant. According to the Chief Justice, habeas petitioners are "not entitled to habeas relief unless *they can establish* that [the trial error] resulted in 'actual prejudice.' "[16] Because this statement is dicta and does not address explicitly and self-consciously to whom the burden of proof should be allocated, the lower federal courts should not, and certainly need not, consider themselves bound by it, though some have followed it nonetheless.[17]

In contrast, Justice Stevens pointedly observed that "*Kotteakos* plainly stated that unless an error is merely 'technical,' the burden of sustaining a verdict by demonstrating that the error was harm-

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15. In *Chapman*, the Court indicated that the second and third elements may be equivalent, stating that

> little, if any, difference [exists] between [its] statement in *Fahy v. Connecticut*, 375 U.S. 85 (1963), about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

Chapman, 386 U.S. at 24. Similarly, the Court in United States v. Bagley, 473 U.S. 667 (1985), stated "that the standard of review applicable to the knowing use of perjured testimony [by the prosecution, i.e., 'any reasonable likelihood that the false testimony could have affected the jury's verdict,'] is equivalent to the *Chapman* harmless-error standard." *Id.* at 679-80 n.9. Despite this proposed equivalence between the second and third elements, they are kept separate in the analysis offered here. *Cf.* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 26.6, at 998, 1006 (1985) (indicating that the two elements are distinct).

16. *Brecht*, 113 S. Ct. at 1722 (emphasis added); *see also id.* at 1727 (White, J., dissenting).

17. *See* Castillo v. Stainer, 997 F.2d 669, 669 (9th Cir. 1993), *modifying* 983 F.2d 145 (9th Cir. 1992); Henry v. Estelle, 993 F.2d 1423, 1427 (9th Cir. 1993); Cumbie v. Singletary, 991 F.2d 715, 724 (11th Cir. 1993).

less *rests on the prosecution.*"[18] In support of his position, Justice Stevens quoted the following passage from *Kotteakos*:

> It is also important to note that the purpose of the bill [enacting the federal harmless error statute upon which the *Kotteakos* rule is based] was stated authoritatively to be "to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be disregarded." H.R. Rep. No. 913, 65th Cong., 3d Sess., 1. But that this burden does not extend to all errors appears from the statement which follows immediately. "The proposed legislation affects only technical errors. If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation rest upon the one who claims under it."[19]

The Court in *Kotteakos* reiterated this same point later, stating that "whether the burden of establishing that the error affected substantial rights or, conversely, the burden of sustaining the verdict shall be imposed, turns on whether the error is 'technical' or is such that 'its natural effect is to prejudice a litigant's substantial rights.' "[20] Because "[a] constitutional violation, of course, would never fall in the 'technical' category," Justice Stevens explained that under *Kotteakos*, as under *Chapman*, the state bears the burden of demonstrating harmlessness.[21]

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18. *Brecht*, 113 S. Ct. at 1723 (Stevens, J., concurring) (emphasis added). Justice Stevens also stated that *Kotteakos* "*places the burden on prosecutors* to explain why [trial errors that affect substantial rights] were harmless." *Id.* (emphasis added).

19. *Id.* at 1723 n.1 (citations omitted) (quoting *Kotteakos*, 328 U.S. at 760).

20. *Kotteakos*, 328 U.S. at 765.

21. *See Brecht*, 113 S. Ct. at 1723-24 (Stevens, J., concurring); *accord* Stoner v. Sowders, 997 F.2d 209, 213 (6th Cir. 1993); Smith v. Dixon, 996 F.2d 667, 676-77 n.13 (4th Cir. 1993). *But see Castillo*, 997 F.2d at 669; *Henry*, 993 F.2d at 1427; *Cumbie*, 991 F.2d at 724.

When applying the *Kotteakos* standard to nonconstitutional errors, the lower federal courts have split over who bears the burden of proof. Some impose the burden on the government. *See, e.g.*, United States v. Rivera, 900 F.2d 1462, 1469 n.4 (10th Cir. 1990) (en banc) (holding that "[e]xcept possibly for minor, technical errors" government bears burden of proving harmlessness); United States v. Grier, 866 F.2d 908, 920 (7th Cir. 1989); *accord* United States v. Jefferson, 925 F.2d 1242, 1255 n.15 (10th Cir.), *cert. denied*, 112 S. Ct. 238 (1991); United States v. Herrera, 893 F.2d 1512, 1530 (7th Cir.), *cert. denied*, 496 U.S. 927 (1990); United States v. Studley, 892 F.2d 518, 530 (7th Cir. 1989).

Others impose the burden on the defendant. *See, e.g.*, United States v. Hill, 976 F.2d 132, 143 (3d Cir. 1992) (holding that "defendant [is] required to show a reasonable probability

In addition to the plain mandate of *Kotteakos*, the law governing the federal harmless error rule, Federal Rule of Criminal Procedure 52(a), provides another reason to impose the burden of proof on the state under the *Brecht-Kotteakos* rule. The *Kotteakos* standard embraced in *Brecht* is an interpretation of, and is based on, the language of the statutory predecessor of the current federal harmless error statute, 28 U.S.C. § 2111. According to that statute, "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."[22]

Like *Kotteakos*, Rule 52(a) is derived from section 2111 and its statutory predecessor. Under Rule 52(a), "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."[23] Only five days after handing down its opinion in *Brecht*, the Court stated that the government shoulders the burden of proving harmlessness under Rule 52(a).[24] Because the *Brecht-Kotteakos* rule is based on the same federal harmless error statute as is Rule 52(a), it should follow Rule 52(a) in imposing the burden of proving harmlessness on the state. Sharing a common statutory source, the harmless error rules of *Brecht-Kotteakos* and Rule 52(a) should also share in common the allocation of the burden of proof on the prosecution. On the question of who bears the

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that the assumed error contributed to his conviction by having a substantial influence on the minds of the jury") (citing Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1987)); United States v. Killough, 848 F.2d 1523, 1527 (11th Cir. 1988) ("The party asserting error has the burden of proving that the error prejudiced a substantial right of that party.") (citing Howard v. Gonzales, 658 F.2d 352, 357 (5th Cir. Unit A Oct. 1981); Coughlin v. Capitol Cement Co., 571 F.2d 290, 307 (5th Cir. 1978)).

22. 28 U.S.C. § 2111 (1988); *see also Brecht*, 113 S. Ct. at 1722. The predecessor of § 2111 provided that

> [o]n the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions that do not affect the substantial rights of the parties.

28 U.S.C. § 391 (1925-26 ed.). For present purposes, the differences between § 391 and § 2111, which result from little more than "tinker[ing]," *Brecht*, 113 S. Ct. at 1718 n.7, are immaterial. *See id.* "[T]he enactment of § 2111 did not alter the basis for the harmless-error standard announced in *Kotteakos*." *Id.*

23. FED. R. CRIM. P 52(a).

24. *See* United States v. Olano, 113 S. Ct. 1770, 1778 (1993).

burden of proof under *Brecht*, uniformity is on the side of Justice Stevens.[25]

B. Burden of Proof

The second element, the "burden of proof" for the purposes of this Article, is the probability by which the party who bears that burden must show something. In a criminal prosecution, the state bears the burden of showing the existence of each element of the offense beyond a reasonable doubt. In harmless error doctrine, the something that must be shown is the harmlessness or harmfulness of the error, or the probability that the error either did or did not affect the verdict. This latter probability may be described as a standard of "prejudice." In formal terms, therefore, the burden of proof within the law of harmless error represents a probability of prejudice, or a probability of another probability

Both principal opinions in *Brecht* are silent as to the burden of proof. *Chapman* imposes on the state the burden of showing harmlessness beyond a reasonable doubt.[26] As is more fully discussed below, one may read *Brecht* to impose on the state the same burden—harmlessness beyond a reasonable doubt—but still to be "less onerous" than *Chapman* by weakening the applicable standard of prejudice. In other words, *Brecht* may retain *Chapman*'s "beyond a reasonable doubt" burden, but make it somewhat easier than does *Chapman* to show prejudice. Militating against this construction, the Court in *Kotteakos* stated that it was "highly probable that the error [in that case] had substantial and injurious effect or influence in determining the jury's verdict."[27] The Court's reference to "highly probable" may be taken to suggest a burden less than "beyond a reasonable doubt," i.e., either preponderant or clear and convincing evidence. Assuming it makes sense to distinguish between the burden of proof and the standard of prejudice, the *Brecht-Kotteakos* rule should be construed to require the state to demonstrate by clear and convincing evidence that the error did

25. *See also* Darden v. Wainwright, 477 U.S. 168, 197 (1986) (Blackmun, J., dissenting) (stating that "[e]very harmless-error standard" employed by the Court has "shift[ed] to the beneficiary of the error [the burden] to show that the conviction was not tainted").

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

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

not have "a substantial and injurious effect or influence in determining the jury's verdict." Anything less would needlessly jeopardize the rule's ability to protect constitutional rights and would belie Justice Stevens' assurance that the *Brecht-Kotteakos* rule is "appropriately demanding."

C. *Standard of Prejudice*

The third element is the applicable standard of "prejudice" and specifies the degree of probability that the error either did or did not affect the verdict. This element is at the heart of any harmless error rule and depends substantially on who bears the burden of proof. Neither the Chief Justice nor Justice Stevens specifically identified or defended a particular standard in *Brecht*, perhaps leaving that task to another day and giving the lower courts an opportunity to address the issue first.

Despite his silence in *Brecht*, the Chief Justice likely hopes or intends the *Brecht-Kotteakos* standard of prejudice to be greater than that of *Chapman*. "[G]ranting habeas relief merely because there is a 'reasonable possibility' that trial error contributed to the verdict," wrote the Chief Justice in *Brecht*, "is at odds with the historic meaning of habeas corpus—to afford relief to those whom society has 'grievously wronged.' "[28] Under *Chapman*, the state must show lack of prejudice by demonstrating that there was no "reasonable possibility" that the error "contributed to the verdict." For the Chief Justice, *Brecht* requires "something less" of the state.

1. *Burden on the State*

Assuming that the burden of proof remains on the state, the "something less" required by *Brecht* probably would translate into a weaker standard of prejudice. One such weaker standard is that

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28. *Brecht*, 113 S. Ct. at 1721 (quoting *Chapman*, 386 U.S. at 24 (quoting Fahy v. Connecticut, 375 U.S. 85, 86 (1963))). This way of formulating the *Chapman* inquiry subtly suggests that the burden is on the defendant to show that "there [was] a 'reasonable possibility' that the trial error contributed to the verdict." Although this may be a fair rendering of *Fahy*, it misreads *Chapman*. *See also* Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 428 & n.77 (1980) (noting similar legerdemain in then-Justice Rehnquist's majority opinion in Schneble v. Florida, 405 U.S. 427 (1972)).

of a "reasonable probability." Taking this view, while *Chapman* requires the state to show that there was no reasonable *possibility* that the error affected the verdict,[29] *Brecht-Kotteakos* would require the state to show that there was no reasonable *probability* that the error affected the verdict. The distinction between possibility and probability marks a central and critical divide, the importance of which should not be overlooked. The only open question is what degree of probability *Brecht-Kotteakos* should be held to require.[30]

The Chief Justice confidently predicted in *Brecht* that the federal courts would not encounter any confusion in applying the *Kotteakos* standard because the long history of that standard had established an "existing body of case law" that would provide a clear guide to its application.[31] A body of case law has indeed developed around *Kotteakos*, but the guidance it offers is less than clear.[32] While there appears to be general agreement that the state must show some probability that the error was harmless, there is disagreement regarding how strong that probability must be.

Many lower courts follow and rely on language in *Kotteakos* that requires a reviewing court to find with "fair assurance" that the

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29. *See Chapman*, 386 U.S. at 23-24 ("An error in admitting plainly relevant evidence which *possibly* influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless.") (emphasis added).

30. Literature, case law and linguistic intuition suggest the following equivalences. Each formulation assumes the burden of proof is on the state.

Probability = 50-60%
"slightly probable that the error was harmless"
"more probable than not that the error was harmless"
"error was harmless by preponderance of the evidence"
Probability = 60-75%
"highly probable that the error was harmless"
"fair assurance that the error was harmless"
"error was harmless by clear and convincing evidence"
Probability = 75-90%
"near certainty that the error was harmless"
"error was harmless beyond a reasonable doubt"
"error could not possibly have been harmful"

31. *Brecht*, 113 S. Ct. at 1722.

32. *See, e.g.*, Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1009 (1973) ("Although the judiciary may profess to act in reliance upon *Kotteakos*, the test laid down in that case [has been] unevenly applied.").

error was harmless.[33] Others sometimes follow the instruction in *Kotteakos* that the reviewing court must grant relief if it is in "grave doubt" as to whether or not the error was harmless.[34] Some courts go on to state that "fair assurance" means that it is "highly probable" the error was harmless.[35] Others embrace a lesser degree of probability, saying that an "error is harmless if it is more probable than not that the prejudice resulting from the error did not materially affect the verdict."[36] Another court has specified no particular degree of probability, saying simply that the "test for harmlessness for nonconstitutional error is whether it is probable that the error could have affected the verdict reached by the particular jury in the particular circumstances of the trial."[37]

In short, the Chief Justice's prediction to the contrary notwithstanding, the case law in the lower courts does not provide unequivocal guidance. Although there is general agreement that harmlessness must be shown to some probability, the courts disagree as to the degree of probability Because *Brecht* departs from the gen-

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33. *See, e.g.*, United States v. Hitt, 981 F.2d 422, 425 (9th Cir. 1992); United States v. Wood, 924 F.2d 399, 402 (1st Cir. 1991); United States v. Colombo, 909 F.2d 711, 713 (2d Cir. 1990); United States v. Bernal, 814 F.2d 175, 184-85 (5th Cir. 1987); United States v. Nyman, 649 F.2d 208, 211-12 (4th Cir. 1980); Government of the Virgin Islands v. Toto, 529 F.2d 278, 283-84 (3d Cir. 1976).

34. *See, e.g.*, United States v. Tyler, 943 F.2d 420, 423 (4th Cir.) (quoting Kotteakos v. United States, 328 U.S. 750, 756 (1946)), *cert. denied*, 112 S. Ct. 646 (1991).

35. *See, e.g.*, *Wood*, 924 F.2d at 402; *Colombo*, 909 F.2d at 713; *Nyman*, 649 F.2d at 211-12 (citing ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 34-35 (1970)); *Toto*, 529 F.2d at 283-84 (citing TRAYNOR, *supra*, at 35); *see also Hitt*, 981 F.2d at 425 n.2 (observing that the "fair assurance" standard "seems to have the Supreme Court's blessing"); *cf.* United States v. Sands, 899 F.2d 912, 916 (10th Cir. 1990) (stating that a court must be able to say "with reasonable certainty that the [error] had but a very slight effect on the verdict of the jury") (internal quotations omitted); United States v. Hays, 872 F.2d 582, 588 (5th Cir. 1989) (stating that the court must be able to "conclude that the error had no effect, or only a slight effect on the jury's decision"); United States v. Shackleford, 738 F.2d 776, 783 (7th Cir. 1984) (stating that a court must be "convinced that the error did not influence the jury, or had but very slight effect") (internal quotations omitted).

36. United States v. Lui, 941 F.2d 844, 848 (9th Cir. 1991); *accord* United States v. Echavarria-Olarte, 904 F.2d 1391, 1398 (9th Cir. 1990); United States v. Norris, 873 F.2d 1519, 1525 (D.C. Cir.), *cert. denied*, 493 U.S. 835 (1989); United States v. Weger, 709 F.2d 1151, 1158 (7th Cir. 1983).

Judge Kozinski has detected a split within the Ninth Circuit between the "fair assurance" or "highly probable" standard and the "more probable than not" standard. *See Hitt*, 981 F.2d at 425.

37. United States v. Davis, 657 F.2d 637, 640 (4th Cir. 1981).

eral and longstanding rule that constitutional error is to be evaluated under the stringent *Chapman* test, courts should interpret the *Brecht-Kotteakos* rule in the most demanding way possible, resolving any ambiguity in favor of protecting the rights of the petitioner. The degree of probability therefore should be that of "highly probable."

2. *Burden on the Defendant*

The assumption prior to this point has been that the burden rests with the state. The picture naturally changes if *Brecht* places the burden of proof on the *defendant*. As explained above, this allocation is difficult, if not impossible, to justify. It would represent a dramatic departure from the general law of harmless error and would also render the *Brecht* rule inconsistent with the plain language of *Kotteakos* and the law of Rule 52(a), both of which spring from the same statutory source as does *Brecht*. Nonetheless, the Chief Justice stated in *Brecht*, albeit in dicta, that "[u]nder [the *Kotteakos*] standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief unless they can establish that it resulted in 'actual prejudice.' "[38]

Judging from this passage alone, the Chief Justice would seem not only to impose the burden of proof on the petitioner, but also to require him to show "actual prejudice." Yet this reference to "actual prejudice" must be handled with some care, since it has the potential to transform the *Brecht* rule into something it is not. This potential derives from the fact that "actual prejudice" has become a term of art in the areas of procedural default under *Wainwright v. Sykes*[39] and ineffective assistance of counsel under

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38. Brecht v. Abrahamson, 113 S. Ct. 1710, 1722 (1993) (citing United States v. Lane, 474 U.S. 438 (1986) (interpreting the federal harmless error statute and rule)).

An alternative reading of the phrase "affect substantial rights" does not link it to the idea of prejudice. Instead, this interpretation classifies certain rights as "substantial" and subjects them to a rule of automatic reversal, leaving "non-substantial" rights subject to a harmless error rule. Justice Brennan both described and rejected this approach to § 2111 and Rule 52(a) in *Lane*. *See Lane*, 474 U.S. at 455 (Brennan, J., concurring in part and dissenting in part). Justice Stevens did not try to resurrect this approach in his concurrence in *Brecht*.

39. 433 U.S. 72, 87 (1977).

Strickland v. Washington.[40] It would, however, be a mistake to construe prejudice under *Brecht-Kotteakos* to be coextensive with "actual prejudice" under *Sykes* and *Strickland*. Though they may share the same linguistic formulation, *Brecht* prejudice is not the same as *Sykes-Strickland* prejudice. To see why this is so, one must look beneath the linguistic surface.

As noted above the *Kotteakos* rule—"substantial and injurious effect or influence in determining the jury's verdict"—is derived directly from, and is an interpretation of, the old federal harmless error statute.[41] The current version of that rule, 28 U.S.C. § 2111, is substantially the same and provides that "[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."[42] Section 2111 is in turn embodied in the federal harmless error rule,[43] which provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."[44] Indeed, according to the Advisory Committee notes accompanying it, Rule 52(a) was a restatement of existing law, which included the statutory predecessor of section 2111.[45]

The key language in both Rule 52(a) and section 2111—"affect substantial rights"—is also found in the federal "plain error" rule,[46] which states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."[47] The Court has recently stated that "in most cases" this language "means that the error must have been prejudicial: It must have affected the outcome of the District Court proceedings."[48] Unlike Rule 52(a), however, Rule 52(b) im-

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40. 466 U.S. 668, 694 (1984); *cf.* Smith v. Dixon, 996 F.2d 667, 692-93 (4th Cir. 1993) (Wilkins, J., dissenting) (stating that the *Brecht* inquiry is "precisely the analysis" required by *Strickland* and "essentially the same" analysis required by *Sykes*).

41. 28 U.S.C. § 391 (1925-26 ed.); *Brecht*, 113 S. Ct. at 1722; *see also supra* note 22.

42. 28 U.S.C. § 2111 (1988).

43. FED. R. CRIM. P 52(a).

44. *Id.*

45. *Id.* (advisory committee's notes).

46. FED. R. CRIM. P 52(b).

47. *Id.*

48. United States v. Olano, 113 S. Ct. 1770, 1778 (1993) (citing Kotteakos v. United States, 328 U.S. 750, 758-65 (1966)); *see also id.* ("Normally, although perhaps not in every

poses the burden of showing prejudice on the defendant,[49] just as *Brecht-Kotteakos* would under the Chief Justice's (erroneous) interpretation.

As under Rule 52(b), habeas petitioners bear the burden of showing prejudice under *Sykes* in order to overcome a procedural default[50] and under *Strickland* to state a claim that counsel has been unconstitutionally ineffective.[51] Yet insofar as the courts interpret *Brecht* to require habeas petitioners to show "prejudice" in order to receive relief on the basis of a valid constitutional claim, the meaning of "prejudice" under *Brecht* is *not* coextensive with the meaning of "prejudice" under *Sykes* and *Strickland*. Whatever the exact standards of prejudice under *Sykes-Strickland* and *Brecht-Kotteakos*, one thing is clear: prejudice under the former is greater than prejudice under the latter. They are not one and the same.

Frady v. United States[52] demonstrates this point. In *Frady*, the Court held that the proper standard of review for a section 2255 motion was not the "plain error" standard of Rule 52(b), but rather the "cause and actual prejudice" standard of *Sykes*. The Court observed that "[t]he burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even *greater* than the showing required to establish plain error on direct appeal."[53] In short, the showing a defendant must make under *Sykes* is more difficult than the showing he must make under Rule 52(b). Because prejudice under Rule 52(b) is the same

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case, the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)."); *United States v. Young*, 470 U.S. 1, 17 n.14 (1985).

Notably, Justice Stevens argued in his dissent in *Olano* that

> [a]t least some defects bearing on the jury's deliberative function are subject to reversal regardless of whether prejudice can be shown, not only because it is so difficult to measure their effects on a jury's decision, but also because such defects "undermin[e] the structural integrity of the criminal tribunal itself."

Olano, 113 S. Ct. at 1782-83 (Stevens, J., dissenting) (quoting Vasquez v. Hillery, 474 U.S. 254, 263-64 (1986)). This passage resonates with language in footnote nine of the Chief Justice's opinion in *Brecht*. *See infra* notes 102-04 and accompanying text.

49. *See Olano*, 113 S. Ct. at 1778.

50. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

51. *See* Strickland v. Washington, 466 U.S. 668, 694 (1984).

52. 456 U.S. 152 (1982).

53. *Id.* at 166 (emphasis added) (quoting Henderson v. Kibbe, 431 U.S. 145, 154 (1977)).

as that under *Kotteakos*—Rule 52(b), Rule 52(a) and *Kotteakos* are all based on "affecting substantial rights" and so incorporate the same standard of prejudice[54]—it would follow from *Frady* that *Sykes-Strickland* prejudice is greater than *Brecht-Kotteakos* prejudice, just as it is greater than Rule 52(b) prejudice.

The Court noted in *Frady* that it had "refrained from giving 'precise content' to the term 'prejudice' " used in *Sykes*.[55] Although that term continues to lack precise content, at least one pair of commentators have argued that *Sykes* requires a petitioner to show that there was a "reasonable probability" that alleged error affected the verdict.[56] This is the same standard articulated in *Strickland*.[57] One standard of prejudice compared to which *Sykes-Strickland* prejudice would be greater is that of a "reasonable possibility" *Brecht* might thus require a petitioner to show (on the assumption that the petitioner bears the burden of proof) only that the error *possibly* could have affected the verdict, not that it *probably* would have, as *Sykes* and *Strickland* require.[58] Showing a mere possibility of prejudice is very much easier than showing a probability

D. Approach of the Reviewing Court

The final element, and the second on which the Chief Justice and Justice Stevens appeared to disagree, involves the "approach" of the reviewing court. There are two basic and analytically distinct approaches a reviewing court may take to determine if an error is harmless. The first focuses on the error and whether it might have contributed to the guilty verdict. The second, in contrast, fo-

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54. *See Olano*, 113 S. Ct. at 1777-78.

55. *Frady*, 456 U.S. at 168 (quoting Wainwright v. Sykes, 433 U.S. 72, 91 (1977)).

56. *See* John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus Cases*, 57 U. CHI. L. REV. 679, 684 & n.25 (1990).

57. *See* Strickland v. Washington, 466 U.S. 668, 694 (1983).

58. *Cf.* 8B JAMES W MOORE, MOORE'S FEDERAL PRACTICE ¶ 52.03, at 52-5 (2d ed. 1993) (pre-*Olano* commentary stating that under Fed. R. Crim. P 52(a) "error will not be found to have affected 'substantial rights' " unless "defendant can show a reasonable possibility that the error was prejudicial") (citations omitted). *But cf.* United States v. Hill, 976 F.2d 132, 143 (3d Cir. 1992) (pre-*Olano* case holding that under Fed. R. Crim. P 52(a) "defendant [is] required to show a reasonable *probability* that the assumed error contributed to his conviction by having a substantial influence on the minds of the jury") (emphasis added) (citing Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1987)).

cuses on the outcome of the trial. It begins by eliminating the evidentiary effect of the error and then focuses on whether the evidence that remains in support of the verdict is overwhelming (not just whether it is sufficient).[59] In other words,

> [t]he first approach requires examining the erroneously admitted evidence, without regard to the weight of other evidence, to determine whether the error might have swayed the factfinder and contributed to the verdict. The second position does not look to the tainted evidence, but to the untainted evidence, and asks whether it alone compels a verdict of guilty.[60]

Despite language in *Chapman* indicating that a reviewing court should use the error-focused approach,[61] the courts have nonetheless used both, so that a finding of harmlessness under *Chapman* can be premised on either.[62]

Although the Chief Justice does not state in so many words the approach he endorses, his application of the rule suggests that he would combine both. On the facts of *Brecht*, he reasoned that because the state's impermissible references to the defendant's post-

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59. *See, e.g.*, Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15, 16 (1976).

60. *Id.* at 16-17; *see also* Harrington v. California, 395 U.S. 250, 255 (1969) (Brennan, J., dissenting) (distinguishing the two approaches).

A coerced confession is one type of error on which the two approaches will likely yield different results. As the *Kotteakos* court itself explicitly recognized, a coerced confession will almost never be harmless under the error-focused approach, *see Kotteakos*, 328 U.S. at 764-65 & n.19, but such error can be harmless under the outcome-focused approach as long as there is overwhelming evidence of guilt apart from the confession.

61. *See* Chapman v. California, 386 U.S. 18, 23 (1967); *see also* Field, *supra* note 59, at 27.

62. For example, in Rose v. Clark, 478 U.S. 570 (1986), the Court seemed to embrace the outcome-focused approach: "Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed." *Id.* at 579. Yet in Satterwhite v. Texas, 486 U.S. 249 (1988), the Court appeared to return to the canonical form of *Chapman*, which embraces the error-focused approach: "The question is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *Id.* at 258-59 (quoting *Chapman*, 386 U.S. at 24); *see also* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE § 29.06, at 704 (1986) (suggesting a trend toward an outcome-focused overwhelming evidence test); Field, *supra* note 59, at 21 ("On the whole the cases support the propriety of an overwhelming evidence test."); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 126-31 (1988). *But see* Lowery v. Collins, 988 F.2d 1364, 1373 (5th Cir. 1993) (holding that *Chapman* requires the error-focused approach).

Miranda silence were "infrequent" while its permissible references to his pre-*Miranda* silence were "extensive," the impermissible references were merely "cumulative."[63] More importantly, the Chief Justice also stated that "the State's evidence of guilt was, if not overwhelming, certainly weighty."[64] Based on these statements, it is likely that the Chief Justice would instruct a reviewing court to find an error harmless under the *Brecht-Kotteakos* rule if that error did not contribute to the verdict *or* if the untainted evidence was overwhelming—or perhaps merely "weighty."[65]

Justice Stevens appeared to defend a different position. He first took the Chief Justice to task by noting that "we would misread *Kotteakos* itself if we endorsed only a single-minded focus on how the error may (or may not) have affected the jury's verdict. The habeas court cannot ask *only* whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place."[66] To this passage he appended the following footnote, quoting language from *Kotteakos*: " 'The inquiry cannot be *merely* whether there was enough to support the result, apart from the phase affected by the error.' "[67]

Immediately thereafter Justice Stevens quoted further from *Kotteakos*. He noted, for example, that *Kotteakos* "requires a reviewing court to decide that 'the error did not influence the jury' and that 'the judgment was not substantially swayed by the error.' "[68] Borrowing an extensive passage from *Kotteakos* and admonishing "all courts that review trial transcripts" to keep it "in

63. *Brecht*, 113 S. Ct. at 1722.

64. *Id.*

65. Similarly, the Chief Justice wrote in Arizona v. Fulminante, 111 S. Ct. 1246 (1991): "When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt." *Id.* at 1265. In Schneble v. Florida, 405 U.S. 427 (1972), then-Justice Rehnquist wrote: "In some cases the properly admitted evidence of guilt is so overwhelming and the prejudicial effect of the [error] is so insignificant by comparison, that it is clear beyond a reasonable doubt that the [error] was harmless error." *Id.* at 430. This way of formulating the test indicates that the two approaches operate in tandem, with the effect of the error balanced against the extent of the untainted evidence. *See also* Field, *supra* note 59, at 60.

66. *Brecht*, 113 S. Ct. at 1724 (Stevens, J., concurring) (emphasis added).

67. *Id.* at 1724 n.2 (emphasis added) (quoting *Kotteakos*, 328 U.S. at 765).

68. *Id.* at 1724 (quoting *Kotteakos*, 328 U.S. at 764, 765).

mind,"[69] Justice Stevens insisted that the question under *Kotteakos* is *not*

> *were they [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision.* The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.
>
> This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. *This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.*[70]

Interpreting the meaning of "prejudice" under the federal plain error rule,[71] Justice Stevens elsewhere relied on *Kotteakos* for the proposition that while

> it is [not] improper for the Court to evaluate the probable impact of the error on the outcome of the case[,] [i]t is important to remember that the question is not whether the judge is persuaded that the defendant is guilty, but "rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting."[72]

These statements suggest that Justice Stevens believes a reviewing court should focus on whether the error contributed to the verdict, not on whether untainted evidence establishes guilt overwhelmingly

Based on the foregoing, Justice Stevens' view of the *Brecht-Kotteakos* rule would appear to require reviewing courts to look first,

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69. *Id.*

70. *Id.* (emphasis added) (quoting *Kotteakos*, 328 U.S. at 764).

71. FED. R. CRIM. P 52(b).

72. United States v. Young, 470 U.S. 1, 36 n.4 (1985) (Stevens, J., dissenting) (quoting *Kotteakos*, 328 U.S. at 764); *see also* LAFAVE & ISRAEL, *supra* note 15, § 26.6, at 997 (stating that *Kotteakos* rejected the "correct result" or "outcome-oriented" approach).

and perhaps only, to the contribution of the error to the verdict.[73] In contrast to that of the Chief Justice, Justice Stevens' view is probably one of the following: (a) an error is harmless only if it did not contribute to the verdict (whatever the other evidence); or (b) an error is harmless only if it did not contribute to the verdict *and* the untainted evidence is overwhelming.[74] Though Justice Stevens would thus make the error-focused approach an integral part of the *Brecht* rule, experience with the *Chapman* and *Kotteakos* rules suggests that vigilance nonetheless will be required to keep the lower courts from lapsing into exclusive reliance on the outcome-focused approach.[75]

Although Justice Stevens' position on the proper approach under *Brecht* seems at odds with that of the Chief Justice, he ended his concurrence in *Brecht* by stating that "[i]n [his] own judg-

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73. Justice Brennan has interpreted *Kotteakos* in the same way:

> The crucial thing [under *Kotteakos*] is the effect the error had in the proceedings which actually took place, not whether the same thing could have been done in hypothetical proceedings. Harmless-error analysis is not an excuse for overlooking error because the reviewing court is itself convinced of the defendant's guilt.

United States v. Lane, 474 U.S. 438, 465 (1986). Justice Scalia wrote in one of the Court's latest pronouncements on harmless error: "The [*Chapman*] inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." Sullivan v. Louisiana, 113 S. Ct. 2078, 2081 (1993).

74. Although this latter formulation is possible, one astute observer has pointed out that it is "unlikely that a court would reverse when the error itself is so unimportant that it could not have influenced the result." Field, *supra* note 59, at 19. It is therefore unlikely that a reviewing court would require overwhelming evidence of guilt *in addition to* requiring that the error did not contribute to the verdict.

75. So far, the lower courts have not analyzed *Brecht* carefully or applied it consistently. Many appear to have applied an outcome-focused approach. *See, e.g.*, Quinn v. Neal, 998 F.2d 526, 534 (7th Cir. 1993) (finding error harmless because of "overwhelming evidence" establishing guilt); Nethery v. Collins, 993 F.2d 1154, 1159 (5th Cir. 1993); Cumbie v. Singletary, 991 F.2d 715, 725 (11th Cir. 1993); Stewart v. Lane, Nos. 89-C-20188, 89-C-20189, 1993 U.S. Dist. LEXIS 7962, at *43 (N.D. Ill. June 8, 1993); *cf.* Wright v. Dallman, No. 92-3771, 1993 U.S. App. LEXIS 18005, at *15 (6th Cir. July 20, 1993) (finding other evidence "sufficient to sustain the jury's guilty verdict").

Others appear to have used an error-focused approach. *See, e.g.*, Stoner v. Sowder, 997 F.2d 209, 213 (6th Cir. 1993); Vanderbilt v. Collins, 994 F.2d 189, 199 (5th Cir. 1993); Standen v. Whitley, 994 F.2d 1417, 1423 (9th Cir. 1993); McKinney v. Rees, 993 F.2d 1378, 1385-86 (9th Cir. 1993).

Still other courts appear to have used both. *See, e.g.*, Pemberton v. Collins, 991 F.2d 1218, 1226-27 (5th Cir. 1993).

ment, *for the reasons explained by the Chief Justice*, the *Doyle* error that took place in respondent's [sic] trial did not have a substantial and injurious effect or influence in determining the jury's verdict."[76] In light of the Chief Justice's reliance on the outcome-focused approach, this passing and putative endorsement is puzzling. Yet it should not be invested with more significance than it deserves, especially since Justice Stevens went to considerable length to reject an approach that asked only whether the jurors were "right in their judgment."[77]

In conclusion, the *Chapman* rule and the *Brecht-Kotteakos* rule, fairly interpreted, differ only as follows:

> *Chapman* rule: The state must show beyond a reasonable doubt that under the error-focused or outcome-focused approach the trial error could not possibly have affected the verdict.[78]

> *Brecht-Kotteakos* rule: The state must show by clear and convincing evidence that under the error-focused approach it is highly probable that the trial error did not affect the verdict.[79]

So construed, *Brecht-Kotteakos* is: (1) slightly less favorable than *Chapman* with respect to the burden of proof and the standard of prejudice; (2) the same as *Chapman* with respect to the allocation of the burden of proof; and (3) generally more favorable than

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76. *Brecht*, 113 S. Ct. at 1725 (Stevens, J., concurring) (emphasis added).

77. Two other aspects of Justice Stevens' concurrence should be emphasized. First, Justice Stevens underscored the statutory obligation of the "reviewing court to evaluate the error in the context of the entire trial record." *Id.* at 1724.

Second, he stressed that because the question of harmless error is a "mixed question[] of law and fact," the standard of review is de novo. *Id.*, *accord* Orndorff v. Lockhart, No. 91-3510, 1993 U.S. App. LEXIS 17482, at *16 (8th Cir. July 15, 1993) (citing Gunn v. Newsome, 881 F.2d 949, 964 (11th Cir. 1989) (en banc); Graham v. Wilson, 828 F.2d 656, 659-60 (10th Cir. 1987)); Suniga v. Bunnell, 998 F.2d 664, 667 (9th Cir. 1993); Lowery v. Collins, 988 F.2d 1364, 1372 (5th Cir. 1993); Dickey v. Lewis, 859 F.2d 1365, 1370 (9th Cir. 1988); *cf.* Rushen v. Spain, 464 U.S. 114, 120 (1983) (per curiam); Chapman v. California, 386 U.S. 18, 20-21 (1967). Accordingly, on direct review the state courts still must apply the *Chapman* test, but the federal courts cannot accord any deference to the conclusion of a state court that an error was harmless.

78. *Cf.* Field, *supra* note 59, at 32.

79. If, instead, the courts interpret *Brecht* to place the burden of proof on the defendant, then the *Brecht-Kotteakos* rule would require the defendant to show prejudice, but that would only require the defendant to show that the error possibly could have affected the verdict.

Chapman with respect to the approach used by the reviewing court.[80]

II. EXCEPTIONS TO THE *BRECHT-KOTTEAKOS* RULE

The *Brecht-Kotteakos* rule applies in federal habeas corpus proceedings, but the scope of its application is limited in several important ways.[81] For example, *Brecht* does not apply to "structural" errors. Nor, the Court intimated, does it apply to cases in which the error arose from state misconduct. Nor does it apply under certain circumstances to errors which infect the penalty phase of a capital trial. Finally, at least one circuit court of appeals recently has held that *Brecht* does not apply unless the state courts have first applied *Chapman*.

A. *The* Orndorff *Exception*

In *Orndorff v. Lockhart*,[82] the Court of Appeals for the Eighth Circuit held that a federal court should not apply the *Brecht* rule

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80. The Court itself once ventured the hypothesis "that § 2111 [and thus *Kotteakos*] by its terms may be *coextensive* with *Chapman*." United States v. Hastings, 461 U.S. 499, 509 (1983) (emphasis added) (citing ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 41-43 (1970)); *cf.* Saltzburg, *supra* note 32, at 1009 ("*Kotteakos* adopted a standard of review quite similar to the 'reasonable possibility' test "); Donald A. Winslow, Note, *Harmful Use of Harmless Error in Criminal Cases*, 64 CORNELL L. REV. 538, 550 (1979) (suggesting that *Kotteakos* and *Chapman* standards are "ultimate[ly] similar[]").

The particular factors to which the courts tend to look to determine if an error contributed to the verdict include, among other things: (1) whether the case was "close," *see, e.g.*, United States v. Urbanik, 801 F.2d 692, 699 (4th Cir. 1986); Gaither v. United States, 413 F.2d 1061, 1079 (D.C. Cir. 1969); (2) whether the issue affected by the error was "central" to the case, *see, e.g.*, United States v. Livingston, 661 F.2d 239, 243 (D.C. Cir. 1981); *Gaither*, 413 F.2d at 1079; (3) what steps, if any, the trial court took to mitigate the impact of the error, *see, e.g.*, *Gaither*, 413 F.2d at 1079; (4) whether the evidence precluded by the error was merely cumulative, *see, e.g.*, United States v. Parry, 649 F.2d 292, 296 (5th Cir. Unit B 1981); (5) whether the prosecution emphasized the evidence admitted under the auspices of the error, *see, e.g.*, United States v. Ariza-Ibarra, 605 F.2d 1216, 1223-24 (1st Cir. 1979); and (6) whether the case was tried by a judge or jury, *see, e.g.*, Pemberton v. Collins, 991 F.2d 1218, 1226-27 (5th Cir. 1993) (suggesting that trial judges are better able than juries to disregard effects of error).

81. There may be a wholesale exception for capital cases based on the principle that "death is different, which generally" requires rules more favorable to capital petitioners than non-capital petitioners. On the other hand, this type of wholesale exception seems unlikely, given that capital cases have not been exempted under this principle from any of the other areas of habeas law recently reconstructed by the Court.

82. No. 91-3510, 1993 U.S. App. LEXIS 17482 (8th Cir. July 15, 1993).

to an error identified on habeas corpus unless the state courts already had determined that the error was harmless under *Chapman*. If a state court fails to apply *Chapman*, fails to address an alleged error or finds no error, then the federal habeas court under *Orndorff* must apply *Chapman* instead of *Brecht* if it concludes that an error does indeed exist.[83] Unfortunately, the court in *Orndorff* did not explain the purpose of such an exception to *Brecht*'s general application on habeas corpus, and the Supreme Court had no occasion to entertain such an exception in *Brecht* itself because the state court in that case in fact had applied *Chapman*.[84] Still, the *Orndorff* exception can be readily derived from the justification advanced in *Brecht* for adopting the *Kotteakos* rule and rejecting *Chapman* as the appropriate rule to be used in habeas corpus.

At its most basic, harmless error analysis represents an accommodation between a criminal defendant's interest in receiving a remedy for the violation of a constitutional right and the state's interest in preserving convictions where the error did not affect the outcome of the trial. The *Chapman* rule is the historical result the Court reached when it sought to accommodate those interests in the context of direct appeal. Yet, as the Court in *Brecht* stated, the configuration of interests changes when a federal court identifies an error in habeas corpus. Into the mix of interests must be added the principles of comity and finality, both of which support a weaker rule favoring the state. Finality is fostered by rules that preserve state convictions. Comity is a principle of deference to state courts and is fostered by rules designed to preserve state court judgments. In federal habeas corpus, these judgments necessarily are those that preserve state convictions.

The state's interest in finality and the preservation of its convictions exists on direct appeal and on habeas corpus, though that interest grows stronger after the defendant leaves direct appeal and enters post-conviction proceedings in federal court. The prin-

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83. If the state court did not find error because the petitioner defaulted on the claim, then the *Orndorff* exception will not benefit the petitioner. The petitioner must show a greater degree of prejudice to overcome the default than the showing he must make under the interpretation of the *Brecht* rule advanced above. If the petitioner overcomes the default, the error necessarily will not be harmless under *Brecht*.

84. Brecht v. Abrahamson, 113 S. Ct. 1710, 1715 (1993).

ciple of comity, in contrast, gains a foothold only in federal habeas corpus when a federal habeas court threatens to upset the considered judgment of the state courts. Against this backdrop of competing interests, the *Orndorff* exception represents the view that the state's finality interest in preserving its convictions in the face of error is by itself insufficient to trigger the application of *Brecht*. Rather, *Brecht* responds directly to the principle of comity, which comes into play only if there is in fact a state court judgment to which a federal court can defer. The *Orndorff* exception is thus based on the theory that the primary function of the *Brecht* rule is to accord and enforce deference to state court applications of *Chapman*. The rule advances the state's interest in finality only as a by-product.[85]

B. Trial Error and Structural Error

The characterization of certain errors as "trial errors" and others as "structural errors" was introduced into harmless error jurisprudence in *Arizona v. Fulminante*,[86] though this distinction had perhaps been implicit before. The two categories identify those errors that are susceptible to harmless error analysis and those that are not. The first step in harmless error analysis is therefore to characterize the error at issue as a "trial" or "structural" one. "Trial errors" are subject to harmless error analysis. "Structural errors" are not; for them, a rule of automatic reversal applies.

"Trial errors" are "error[s] which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."[87] "Structural errors," on the other hand, lie "[a]t the other end of the spectrum of constitutional errors."[88] Errors of this

85. Importantly, *Brecht* requires and enforces deference to state court judgments regarding harmlessness by weakening the standard of harmless error applied in federal habeas corpus, not by changing the applicable standard of review. That is, if the state courts have applied *Chapman* to uphold a conviction or sentence despite the existence of constitutional error, a federal habeas court applies *Brecht* de novo rather than reviewing the state court's application of *Chapman* under a clearly erroneous standard.

86. 111 S. Ct. 1246 (1991).

87. *Id.* at 1264.

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

sort "require[] automatic reversal of the conviction because they infect the entire trial process."[89] The Court has yet to elaborate further on this dichotomy, but the idea that these two types of errors lie on, or perhaps define the endpoints of, a spectrum suggests room for dispute, at least at the margin.

As explained in *Fulminante*, the distinction between trial error and structural error is based on the truth-seeking function of the trial process and the reliability of the result reached through that process. Trial errors have a definite, discrete and identifiable effect on the quantum of evidence presented to the trier of fact. Harmless error analysis is therefore possible in principle because a reviewing court can more or less confidently evaluate the effect of the error. The impact of a structural error, in contrast, cannot be so readily isolated or confidently assessed. The nature of a structural error is to undermine a reviewing court's ability to evaluate with any precision the impact of the error on the verdict. Structural errors are resistant to harmless error analysis because a reviewing court cannot readily assess their effect.

Fulminante offered as examples of "structural error" depriving a defendant of counsel;[90] trying a defendant before a biased judge;[91] excluding members of the defendant's race from a grand jury;[92] denying a defendant's right to self-representation at trial;[93] and denying a defendant's right to a public trial.[94] The Court recently added constitutionally deficient "reasonable doubt" instructions to this list.[95] Violations of *Witherspoon v. Illinois*,[96] which helps secure a capital defendant's right to an impartial jury, are also immune to harmless error analysis.[97]

Some commentators have suggested that the Court's explanation of the distinction between trial error and structural error does not account adequately for all the errors the Court has characterized as

89. *Id.* (citing *Fulminante*, 111 S. Ct. at 1254).

90. *See Fulminante*, 111 S. Ct. at 1264-65 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)).

91. *See id.* (citing Tumey v. Ohio, 273 U.S. 510 (1927)).

92. *See id.* (citing Vasquez v. Hillery, 474 U.S. 254 (1986)).

93. *See id.* (citing McKaskle v. Wiggins, 465 U.S. 168 (1984)).

94. *See id.* (citing Waller v. Georgia, 467 U.S. 39 (1984)).

95. *See* Sullivan v. Louisiana, 113 S. Ct. 2078, 2082-83 (1993).

96. 391 U.S. 510 (1968).

97. *See* Gray v. Mississippi, 481 U.S. 648, 668 (1987) (plurality opinion).

"structural."[98] A reviewing court may, for example, be justifiably confident that the exclusion of members of the defendant's race from the grand jury that indicted him would have made no difference in the outcome of the trial because the evidence of guilt presented at trial was overwhelming. Indeed, a court will possess such confidence toward any proceeding marred by structural error, as long as the applicable harmless error rule incorporates an outcome-focused approach and there is overwhelming evidence of guilt.

This observation has led to the view that at least some of the errors the Court has described as structural might alternatively, or perhaps better, be explained by the fact that these errors arise from the breach of rules that do not directly regulate the admission of evidence and that serve some purpose other than promoting reliability.[99] Inasmuch as they advance some purpose other than reliability, a violation of these rules will commonly have no discrete and identifiable evidentiary effect. Lacking such an effect, they afford no reason to believe the jury would have acted differently had the error not occurred. A violation of these rules would thus always be deemed harmless. Consequently, to subject these rules to harmless error analysis would in essence convert the rights supported by these rules into rights without remedies.[100] These

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98. *See, e.g.*, Henry P Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 SUP. CT. REV. 195, 204; Charles J. Ogletree, Jr., Arizona v. Fulminante: *The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 163 (1991).

99. In line with this view, Justice Stevens has said that harmless error analysis should not be employed "when an independent value besides reliability of the outcome suggests that such an analysis is inappropriate." United States v. Lane, 474 U.S. 438, 474 (1986) (Stevens, J., dissenting in part and concurring in part); *accord* Dawson v. Delaware, 112 S. Ct. 1093, 1100 (1992) (Blackmun, J., dissenting); Rose v. Clark, 478 U.S. 570, 587 (1986) (Stevens, J., concurring in the judgment).

In United States v. Olano, 113 S. Ct. 1770 (1993), Justice Stevens wrote in dissent:

> At least some defects bearing on the jury's deliberative function are subject to reversal regardless of whether prejudice can be shown, not only because it is so difficult to measure their effects on a jury's decision, *but also because* such defects "undermin[e] the structural integrity of the criminal tribunal itself."

Id. at 1782-83 (Stevens, J., dissenting) (emphasis added) (quoting Vasquez v. Hillery, 474 U.S. 254, 263-64 (1986)). *But cf. Brecht*, 113 S. Ct. at 1730-31 (O'Connor, J., dissenting) (suggesting that *less* protection be afforded rights that do not "impair confidence in the trial's outcome").

100. *See, e.g.*, Field, *supra* note 59, at 20 ("[I]f violation of a rule is generically harmless and cannot lead to reversal, then unless some other means of enforcing the rule is provided,

rights can only be protected and enforced by shielding them with a rule of automatic reversal.[101]

C. *Prosecutorial Misconduct and Cumulative Error*

The ninth footnote in the opinion of the Chief Justice in *Brecht* will, as Justice O'Connor correctly predicted, be a rich source of future litigation. The footnote reads in relevant part as follows:

> 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 proceedings as to war-

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it will be reduced to an empty exhortation.") (footnote omitted); Monaghan, *supra* note 98, at 204 ("[A]pplication of harmless error analysis might effectively render the relevant constitutional commands judicially unenforceable.").

101. In principle, there are three distinct types of rules whose breach should be subject to a rule of automatic reversal. First are rules whose purpose is not based on reliability or truth-seeking. Such rules can be breached with impunity unless they are subject to a rule of automatic reversal. Second are reliability-based rules whose breach gives rise to error the effect of which is such that a reviewing court cannot tell one way or the other whether or not the error was prejudicial. This appears to be what the Court intends by its distinction between structural and trial error. Third are reliability-based rules whose breach gives rise to error the effect of which can be evaluated by a reviewing court, but that it would not be cost-effective to subject to a totality-of-the-circumstance harmless error rule because the error is rarely harmless. *See, e.g.*, Ogletree, *supra* note 98, at 164 (suggesting that the trial error-structural error distinction is better understood in terms of a "generic distinction between general standards and bright line rules").

It would seem to make sense to talk about particular types of rules, and errors arising from their breach, as being subject to automatic reversal or harmless error analysis only if the approach used is error-focused. Under an outcome-focused approach, the likelihood that an error is harmless or not depends on the other evidence presented at trial. Consequently, there is no systematic relationship under the outcome-focused approach between the type of error and the likelihood that the error was harmless or not. It all depends on what other evidence was presented.

This explains the difference between Chief Justice Rehnquist and Professor Ogletree over whether coerced confessions should be subject to harmless error analysis or automatic reversal. Based on an error-focused approach, Professor Ogletree persuasively argues that coerced confessions usually will be harmful and accordingly should be subject to automatic reversal. Based on an outcome-focused approach, the Chief Justice plausibly implies that one cannot tell whether coerced confessions usually will or will not be harmless, since it all depends on what other evidence of guilt there is. Yet what the Chief Justice overlooks is that the outcome-focused approach is inconsistent with *any* effort to classify certain errors as necessarily harmful, which is what the classification of certain errors as "structural" is intended to do.

> rant the grant of habeas relief, even if it did not substantially influence the jury's verdict.[102]

Footnote nine relies on Justice Stevens' concurring opinion in *Greer v. Miller*,[103] and was no doubt included at Justice Stevens' behest. In his concurrence in *Greer*, Justice Stevens urged that the *Kotteakos* rule be applied to *Doyle* errors on habeas corpus, but he was quick to add that "there may be extraordinary cases in which the error is so egregious, or is combined with other errors or incidents of prosecutorial misconduct, that the integrity of the proceeding is called into question."[104]

Combining these two passages, three different types of error may fall outside the reach of the *Brecht-Kotteakos* rule and instead be subject to the *Chapman* rule: (1) an "egregious" trial error arising from a single instance of deliberate prosecutorial misconduct; (2) a non-egregious trial error "combined with a pattern of prosecutorial misconduct;" and (3) an error combined with other errors (i.e., cumulative error), such that "the integrity of the proceeding is called into question."

The theory behind the first two exceptions appears to be based on the realization that the *Kotteakos* rule may encourage the prosecution to deliberately disregard established constitutional rules. By weakening the otherwise applicable harmless error rule, *Brecht* will allow more errors to go unremedied than would *Chapman*. Under *Brecht* an error detected in federal habeas corpus proceedings will now be more likely deemed harmless than it would have been before *Brecht*. Consequently, *Brecht* increases the incentive for prosecutors to ignore or willfully neglect constitutional limits and to commit constitutional error. The first two exceptions respond to this problem by holding out the possibility that errors arising from deliberate or willful disregard of constitutional rules or "combined with a pattern of prosecutorial misconduct" will continue to be governed by *Chapman*.[105]

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102. *Brecht*, 113 S. Ct. at 1722 n.9 (citation omitted).

103. 483 U.S. 756 (1987).

104. *Id.* at 769 (Stevens, J., concurring in the judgment).

105. *Cf.* Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298, 1323-24 (1988) ("Uniform application of the *Doyle* approach is necessary to deter prosecutors

Related to the exceptions for prosecutorial misconduct is an analogous exception for misconduct on the part of state courts. The petitioner in *Brecht* had argued before the Supreme Court that *Chapman*'s stringent rule was required on federal habeas corpus in order "to deter state courts from relaxing their own guard in reviewing constitutional error."[106] The Court rejected this argument, saying that "[a]bsent affirmative evidence that state-court judges are ignoring their oath, we discount petitioner's argument that courts will respond to our ruling by violating their Article VI duty to uphold the Constitution."[107] This reply assumes the vigilance of state courts, but it implicitly recognizes that if a habeas petitioner *can* adduce "affirmative evidence" that state court judges have violated their oath, *Brecht* may not apply Evidence that a state trial court deliberately allowed error to go unchecked or that a state appellate court applied *Chapman* in a perfunctory or otherwise inadequate fashion might thus call this exception into play

The third exception—taken from Justice Stevens' concurrence in *Greer*—is perhaps best understood as a variation of the structural-error theory If structural errors are immune to harmless error analysis because their impact cannot be evaluated with any precision, the same principle may be thought to apply to trials infected with multiple errors. When a trial is tainted by a number of discrete trial errors it may be practically impossible to evaluate their combined impact with any degree of confidence, even if the impact of any single error could be calculated. At some point the number of errors may be so great and their effects so interrelated that any attempt to sort it all out would be sheer guesswork. At the very least, this exception opens the door to relief predicated on cumulative error.[108]

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from violating rules of conduct designed both to ensure the fairness and protect the integrity of the truth-seeking process.").

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

107. *Id.* (citing Robb v. Connolly, 111 U.S. 624, 637 (1884)).

108. Several courts of appeals have adopted cumulative error analysis on habeas corpus. *See, e.g.*, Derden v. McNeel, 978 F.2d 1453, 1456-59 (5th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 2928 (1993); Lundy v. Campbell, 888 F.2d 467, 481 (6th Cir. 1989), *cert. denied*, 495 U.S. 950 (1990); Bell v. Duckworth, 861 F.2d 169, 170 (7th Cir. 1988), *cert. denied*, 489 U.S. 1088 (1989). *But see* Scott v. Jones, 915 F.2d 1188, 1191 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1626 (1991).

D The Richmond *Principle*

Another exception involves errors that taint the penalty phase of a capital trial. Though its precise parameters have yet to be set, this exception limits the power of the federal courts to salvage state-imposed death sentences by applying harmless error analysis. Unlike the others, this exception is based on the axiom that the authority to impose a capital sentence is within the exclusive province of the states and that when a federal court attempts to salvage a death sentence in the face of constitutional error it will sometimes engage in what is in essence resentencing, thus violating that axiom. At work in several of the Supreme Court's recent pronouncements,[109] this exception was perhaps most clearly stated in *Richmond v. Lewis*.[110]

The sentencing judge in *Richmond* had based the defendant's death sentence on three aggravating circumstances, including a finding that the offense was "especially heinous, cruel or depraved."[111] Pursuant to the Arizona sentencing scheme, the judge weighed these aggravating circumstances against the mitigating circumstances, finding that there were no mitigating circumstances "sufficiently substantial to call for leniency."[112] Speaking for the Court, Justice O'Connor found that the "especially heinous" factor relied upon by the trial judge was unconstitutionally vague on its face, had not been properly limited and thus had impermissibly skewed the sentencing calculus in favor of death.[113] As a result, the defendant's death sentence violated the Eighth Amendment.

Despite this Eighth Amendment sentencing error, the defendant's death sentence could have been salvaged by the state supreme court on direct review The Arizona Supreme Court could have done so by applying harmless error analysis or by weighing aggravating and mitigating circumstances against one another after

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109. *See, e.g.*, Sochor v. Florida, 112 S. Ct. 2114, 2123 (1992); Stringer v. Black, 112 S. Ct. 1130, 1136, 1140 (1992) ("[U]se of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing *in the state judicial system.*") (emphasis added); Parker v. Dugger, 498 U.S. 308, 322-23 (1991); Clemons v. Mississippi, 494 U.S. 738, 754 (1990).

110. 113 S. Ct. 528 (1992).

111. *Id.* at 532.

112. *Id.* at 533.

113. *Id.* at 534-37.

either eliminating the vague aggravating circumstance from the sentencing calculus altogether or confining it through a constitutionally valid limiting construction.[114] According to Justice O'Connor, the Arizona Supreme Court availed itself of none of those options, and the defendant's death sentence therefore could not stand.[115]

In remanding the case to the district court to issue an order granting a writ of habeas corpus, Justice O'Connor said in no uncertain terms that "[w]here [a] death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, *the state appellate court or some other state sentencer* must actually perform a new sentencing calculus, if the sentence is to stand."[116] The Court itself did not undertake to salvage the defendant's death sentence, reserving that task for the "state appellate court or some other state sentencer."[117] The lower federal courts accordingly have understood *Richmond* to limit their authority to salvage death sentences infected by vague aggravating circumstances.[118]

In its narrowest form, the *Richmond* principle forbids a federal habeas court from itself salvaging a death sentence in a so-called "weighing" state, like Arizona, where that sentence is based on an invalid aggravating circumstance and can be salvaged under state law only by reweighing aggravating and mitigating circumstances. Although the basis for this principle has yet to be made explicit, it would appear based on the realization that to ask a federal habeas court to salvage a death sentence under these circumstances amounts to a request for the court to resentence the defendant. But this power the federal courts do not possess. State defendants can only be condemned by state authority

Outside the context of capital sentencing, harmless error analysis ordinarily involves a counterfactual inquiry into whether or not the error affected the verdict. To the extent that any appellate

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114. *Id.* at 535.

115. *Id.*

116. *Id.* (emphasis added).

117. *Id.*

118. *See* Smith v. Dixon, 996 F.2d 667, 676-77 (4th Cir. 1993); Wiley v. Puckett, 969 F.2d 86, 94 n.8 (5th Cir. 1992); *see also* Jeffers v. Lewis, 974 F.2d 1075, 1084 & n.11 (9th Cir. 1992).

court is equipped to conduct such an inquiry on the basis of a cold record, the federal courts stand in virtually the same position as do the state appellate courts. The same cannot be said in the context of capital sentencing. In that context, harmless error analysis is intimately bound up with the moral inquiry that constitutes the substance of the death-selection decision.[119] The federal courts may be just as able as the state courts to make this decision *sub specie aeternitatis*, but the death-selection decision is supposed to reflect the "conscience of the community"[120] in whose name the sentence is imposed. Moreover, the link between that decision and the community is provided and established not by requiring the sentencer to apply community standards, but rather by the fact that the sentencer is a member of the community.[121] A federal court as such cannot legitimately claim to speak in this capacity; only a state court can.[122]

As already noted, the exact scope of the *Richmond* principle is uncertain. While there will be circumstances, as in *Richmond*, in which the federal courts do not have the authority to salvage a death sentence because doing so would usurp state authority by engaging in resentencing, there may be other circumstances in which a federal court can salvage a death sentence without overstepping its bounds. At least three factors appear to make the process of "salvaging" more or less like resentencing: (1) the type of sentencing scheme; (2) the type of error; and (3) the method of salvaging established by state law

Each of these factors is related in some way to the distinction between so-called "weighing states" and so-called "threshold states." In a "threshold" state, the sentencer has complete discretion in assessing a sentence once it has found that the defendant

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119. California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (stating that the capital sentencing decision must represent a "reasoned *moral* response" to the offender and offense).

120. Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).

121. *See* Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 IND. L.J. 617, 617-18 (1989).

122. This rationale may weaken the ability to characterize harmless error analysis credibly as a mixed question of law and fact reviewable do novo in federal court. A state court finding that an error is harmless starts to look more like the kind of finding to which the federal courts must defer. Such deference, however, may be enforced fully by the *Brecht* standard itself. *See supra* note 85 and accompanying text.

passes the "death-eligible" threshold, i.e., once it finds the existence of a single aggravating circumstance.[123] In such a system, aggravating circumstances perform one function: to set the death-eligible threshold.[124] In contrast, aggravating circumstances in "weighing" states perform two functions. Not only do they set the death-eligible threshold, they also guide the jury's decision beyond that point insofar as they are weighed or balanced by the jury against mitigating circumstances in order to arrive at a sentence.[125]

In order to salvage a death sentence that is invalid because it is premised on an invalid aggravating circumstance, a reviewing court in a weighing state may need to place itself more or less in the same position as the initial sentencer. When reweighing is the method of salvaging a death sentence prescribed by state law, a federal habeas court will for all practical purposes be required to resentence the defendant if the death sentence is to be upheld.[126] The court must assign a weight to each aggravating and mitigating circumstance, consider all the nonstatutory aggravating and mitigating evidence and then balance all the circumstances and evidence against each other to arrive at a conclusion. It is legal fiction to maintain that in so doing the reviewing court is not resentencing the defendant.[127] A federal habeas court thus acts most like a sentencer (and farthest outside the scope of its legitimate authority) when it tries by reweighing to salvage a death sentence imposed in a weighing state and based on an invalid aggravating circumstance.

It is difficult to say whether the *Richmond* principle does or should apply where the three factors are aligned so that the federal

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123. *See, e.g.*, Zant v. Stephens, 462 U.S. 862, 870-74 (1983) (describing the "threshold" capital sentencing scheme of Georgia).

124. *Id.*

125. *See, e.g.*, Stringer v. Black, 112 S. Ct. 1130, 1136 (1992) (describing the operation of Mississippi's capital sentencing scheme).

126. Embedded in this claim is an unsettled choice-of-law question: Assuming that a federal habeas court can salvage a death sentence involving an invalid aggravating circumstance and that the state courts have not salvaged the sentence themselves, is the method of salvaging to be used by the federal court dictated by state law or by federal law? If state law, the method will be either harmless error analysis under *Chapman* or reweighing. If federal law, the method will be harmless error analysis under *Brecht*. For present purposes, it is assumed that the federal court must use the method prescribed by state law.

127. *See* Clemons v. Mississippi, 494 U.S. 738, 762 (1993) (Blackmun, J., concurring in part and dissenting in part) (stating that a reviewing state appellate court under *Clemons* must "assume[] for itself the role of sentencer").

habeas court acts considerably less like a sentencer. Consider, for example, a death sentence imposed in a threshold state that is invalid because evidence used to support the finding of an aggravating circumstance was obtained in violation of the defendant's Sixth Amendment right to counsel.[128] A federal habeas court asked to salvage this sentence would not be required to reweigh, but rather to decide whether or not the error "had a substantial and injurious effect or influence in determining the jury's verdict." In doing so, the court is initially distanced from the death-selection decision by a presumption (albeit somewhat weaker than that of *Chapman*) that the error was not harmless. That distance is increased because in a threshold state such an error "does not infect the formal process of deciding whether death is an appropriate penalty"[129] Indeed, as long as the sentencer has found at least one valid aggravating circumstance, that "formal process" would remain untouched even if the error arose from the fact that another aggravator was invalid.[130]

However far the *Richmond* principle should and ultimately does reach, its core is well-settled: A federal habeas court lacks the authority to reweigh aggravating and mitigating circumstances in order to salvage a death sentence imposed in a weighing state when that sentence is infected by an invalid aggravating circumstance. To authorize a federal court to uphold such a sentence would put it in the role of sentencer. That role, however, can be legitimately occupied only by a state actor.

III. Conclusion

More exists in *Brecht* than meets the eye. It is a complex rule, the devil of which is in the details. *Brecht* itself does little more than tell us once again how habeas corpus imposes too great a burden on the twin principles of comity and finality and then extracts the standard used in *Kotteakos* to alleviate that burden. *Kotteakos*, we are told, is "less onerous" than *Chapman*, but from *Brecht* itself it is hard to determine exactly how much less onerous

128. *Cf.* Satterwhite v. Texas, 486 U.S. 249 (1988).
129. *Stringer*, 112 S. Ct. at 1137.
130. *Id.*

it is. A fair construction of *Kotteakos* and the surrounding law of habeas corpus would suggest the differences are marginal.

Still, whatever its detail, any harmless error rule vests considerable discretion in the sound judgment of the reviewing court. Justice Stevens went so far as to state in *Brecht* that "the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied."[131] This bit of legal realism contains a good deal of truth, but it cannot be gainsaid that under *Brecht* a reviewing court's good judgment will be informed and guided by a rule heralded as "less onerous" than *Chapman*. Consequently, it becomes all the more important for reviewing courts to keep in mind that if *Brecht* is less onerous than *Chapman*, it is only modestly so. It does not, in any event, relieve them of the burden and responsibility of judgment.

131. *Brecht*, 113 S. Ct. at 1725 (Stevens, J., concurring).