HABEAS CORPUS—HARMLESS-ERROR RULE—PROPER HARMLESS-ERROR STANDARD ON HABEAS REVIEW OF FIFTH AMENDMENT VIOLATIONS IS WHETHER THE ERROR HAD "SUBSTANTIAL OR INJURIOUS EFFECT" ON THE JURY'S DETERMINATION OF PETITIONER'S GUILT—*Brecht v. Abrahamson*, 114 S. Ct. 1710 (1993).

A person in state custody who alleges that his or her conviction was obtained in violation of the law, and whose right to direct appeal has either lapsed or been exhausted, may seek relief from the federal courts in the form of habeas corpus.[1] Conceptually, habeas review of a conviction is a civil remedy, unconnected to the criminal appellate process.[2] The present federal statute governing habeas relief, set forth in 28 U.S.C. §§ 2241-2255 (federal habeas statute),[3] was derived from the Habeas Corpus Act of

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[1] LARRY W. YACKLE, POSTCONVICTION REMEDIES § 16, at 74-75 (1981). "Habeas corpus" is Latin for "[y]ou have the body." BLACK'S LAW DICTIONARY 709 (6th ed. 1990). *Black's* refers to habeas corpus as the name bestowed upon a variety of judicial orders or "writs." *Id.* Habeas corpus is also referred to as "the Great Writ." Fay v. Noia, 372 U.S. 391, 399 (1963), *overruled by* Coleman v. Thompson, 111 S. Ct. 2546 (1991). Justice Brennan, writing for the United States Supreme Court in *Fay v. Noia*, noted that the English common law regarded habeas corpus as "the most celebrated writ in the English law." *Id.* at 399-400 (quotation omitted).

[2] JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED: POST-TRIAL RIGHTS § 86, at 205, 207 (1976). The sole purpose of habeas review is freeing those persons who have been imprisoned unlawfully. YACKLE, *supra* note 1, § 16, at 75. The central principle behind habeas corpus is that "in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Fay*, 372 U.S. at 402. Habeas relief is considered an "extraordinary remedy [directed at] the extraordinary restraints of custodial situations." YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 1518 (7th ed. 1990) (alteration in original) (citation omitted). Approximately 9000 to 10,000 habeas petitions are filed each year by state prisoners. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 28.2, at 1187 (2d ed. 1992). Less than four percent of filed petitions are successful, however, and fewer still actually result in the petitioner's freedom. *Id.* State prisoners have sought habeas relief alleging their convictions to be invalid due to a wide variety of constitutional violations. *See, e.g.*, Nix v. Whiteside, 475 U.S. 157, 162 (1986) (alleging ineffective assistance of counsel); Rose v. Mitchell, 443 U.S. 545, 547 (1979) (claiming discrimination during grand jury selection); Wainwright v. Sykes, 433 U.S. 72, 75 (1977) (asserting that the defendant did not understand the nature of his rights as set forth in the *Miranda* warning); Stone v. Powell, 428 U.S. 465, 470, 472-73 (1976) (disputing the presentation of evidence seized in violation of the Constitution); *Fay*, 372 U.S. at 394 (challenging the presentation of a coerced confession, obtained in violation of the Due Process Clause, into evidence at trial); Moore v. Dempsey, 261 U.S. 86, 87 (1923) (alleging that a mob-influenced trial deprived defendants of due process of law).

[3] 28 U.S.C. §§ 2241-2255 (1988). Section 2241(a) provides that the federal courts may grant habeas corpus relief. 28 U.S.C. § 2241(a). Providing for collateral review of state prisoners' convictions, § 2254(a) states:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court

1867.[4] Since the enactment of this Act, interpretations of the federal habeas statute have favored a gradually expanding scope of habeas review, a philosophy that reached its pinnacle in 1963.[5] By the mid-1970s, however, the Supreme Court shifted away from decisions favoring prisoners' rights and began to slowly erode the expansive scope of habeas review.[6]

> 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.

Id. § 2254(a). Section 2254(b) adds to the requirement of custody that a petitioner must have "exhausted the remedies available in the courts of the State," or established the "absence of [an] available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." *Id.* § 2254(b). Additionally, § 2255 provides collateral review for federal prisoners. *Id.* § 2255. Otherwise, the federal habeas statute is vague as to its scope and application. LAFAVE & ISRAEL, *supra* note 2, § 28.2(d), at 1183; *see also* Brecht v. Abrahamson, 113 S. Ct. 1710, 1718 (1993) ("The [federal] statute says nothing about the standard for harmless-error review in habeas cases."). For example, § 2243 states only that the reviewing court shall "hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. § 2243.

[4] *See* LAFAVE & ISRAEL, *supra* note 2, § 28.2(b), at 1181. The right to habeas review is provided by negative grant in Article I of the Constitution, which states that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion if the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. Habeas corpus has existed as a means of relief for prisoners since the 14th century. *See* LAFAVE & ISRAEL, *supra* note 2, § 28.1(b), at 1178. The Habeas Corpus Act of 1867 provided for the federal courts to grant habeas relief "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . ." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385-86 (1867) (current version at 28 U.S.C. §§ 2241-2255 (1989)). Justice Brennan, writing for the majority in *Fay*, explained that the 1867 Act was Congress's response to the upheavals of the Reconstruction. *Fay*, 372 U.S. at 415. Justice Brennan asserted that Congress was confronted with the problem of protecting the constitutional rights of freed slaves in the defeated South. *Id.* at 415-17. Thus, the 1867 Act not only broadened the scope of common law habeas protection, but, in Justice Brennan's view, shifted primary responsibility for protecting state prisoner's constitutional rights from the state courts to the federal courts. *Id.* at 416. *See infra* notes 55-61 and accompanying text (discussing *Fay* in more detail).

Most states allow for some form of post-conviction relief. *See* YACKLE, *supra* note 1, § 13, at 66-69. For example, in Wisconsin, the principal post-conviction remedy, codified at Wisconsin Statute Annotated § 974.06, is modeled after § 2255 of the federal habeas statute. DONALD E. WILKES, JR., FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF 339 (2d ed. 1987). New Jersey provides for post-conviction relief in Rule 3:22 of the New Jersey Rules Governing Criminal Practice. N.J. Ct. R. 3.22-1 to -12 (1993); *see also* State v. Preciose, 129 N.J. 451, 459, 609 A.2d 1280, 1284 (1992) (explaining the grounds for post-conviction relief in New Jersey state courts).

[5] *See Fay*, 372 U.S. at 434-35 (ruling that a waiver of state appeals did not preclude habeas review). *See infra* notes 52-54 and accompanying text (discussing early interpretations of the federal habeas corpus statute).

[6] *See, e.g.*, *Stone*, 428 U.S. at 494 (concluding that habeas relief is not warranted where petitioner had been allowed to fully present his or her claim in state proceed-

Under the harmless-error doctrine, civil and criminal courts reviewing the result of a trial may determine that an error in the trial process was so harmless and insignificant to the parties' rights that vacating the original result is unwarranted.[7] The doctrine arose in England during the 19th century as a response to a proliferation of retrials resulting from insignificant errors in the trial process.[8] The United States adopted its own harmless-error rule in 1919.[9] The current federal harmless-error statute, adopted in 1949, substantially follows the 1919 Act and requires that appellate courts review the record "without regard to errors or defects which do not affect the substantial rights of the parties."[10]

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ings); *Sykes*, 433 U.S. at 72 (requiring a habeas petitioner to show that failure to satisfy a state procedural requirement was motivated by cause that resulted in prejudice); *see also* Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 993-94 & n.13 (1985) (noting that several Justices have expressed views favoring a more restricted scope for habeas review with Justice Rehnquist leading the Court's charge).

[7] *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 27.6, at 1160-75 (2d ed. 1990) (explaining the harmless-error doctrine, its history, and its application to both constitutional and non-constitutional violations). The harmless-error doctrine "serve[s] a very useful purpose insofar as [it] block[s] setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of a trial." Chapman v. California, 386 U.S. 18, 22 (1967). Harmless error provides for the conservation of "judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error." ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 81 (1970). Harmless error, and more specifically, harmless constitutional error, has not attracted a great deal of scholarly attention. *See* Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 81 & n.11 (1988) (pointing out that the leading works on harmless constitutional error date back to the early 1970s) (citing TRAYNOR, *supra*; Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15 (1976); Philip J. Mause, *Harmless Constitutional Error: The Implications of* Chapman v. California, 53 MINN. L. REV. 519 (1969); Stephen A. Saltzburg, *The Harm Of Harmless Error*, 59 VA. L. REV. 988 (1973)).

[8] LAFAVE & ISRAEL, *supra* note 2, § 27.6(a), at 1160. In 1873, the English Parliament included a version of the harmless-error rule in the Judicature Act of 1873. *Id.* According to the English rule, retrials were not to be granted "on the basis of 'the improper admission or rejection of evidence' or a 'misdirection' of the jury 'unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has thereby been occasioned.'" *Id.*

[9] Act of Feb. 26, 1919, ch. 48, § 269, 40 Stat. 1181 (current version at 28 U.S.C. § 2111 (1988)). The 1919 statute deemed as harmless any "technical errors, defects, or exceptions which do not affect the substantial rights of the parties." *Id.* The purpose of the 1919 statute was to allow appellate review to correct significant errors in the trial process, but not to afford persons "fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record." Kotteakos v. United States, 328 U.S. 750, 759-60 (1946). Simply put, the 1919 harmless-error rule warned: "Do not be technical . . . ." *Id.* at 760 (citation omitted).

[10] 28 U.S.C. § 2111 (1988); *see also* Act of Feb. 26, 1919, ch. 48, § 269, 40 Stat. 1181 (current version at 28 U.S.C. § 2111 (1988)) ("[T]he court shall give judgment after an examination of the entire record before the court, without regard to technical

A court reviewing an error in the trial process that did not implicate the Constitution would ask whether the error "had substantial and injurious effect or influence in determining the jury's verdict."[11] In 1969, the United States Supreme Court concluded that violations of the Constitution were also subject to harmless-error analysis.[12] The standard applied to constitutional errors required the prosecution to prove that the error was "harmless beyond a reasonable doubt" to the interests of the defendant to prevent reversal of the conviction.[13] Prior to 1993, the "harmless beyond a reasonable doubt" standard was applied to constitutional errors regardless of whether the error was raised on direct appeal or habeas corpus review.[14]

In a recent case, *Brecht v. Abrahamson*,[15] the United States

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errors, defects, or exceptions which do not affect the substantial rights of the parties."). Section 2111 provides in full: "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." 28 U.S.C. § 2111. The harmless-error rule is contained in Rule 52(a) of the Federal Rules of Criminal Procedure: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." FED. R. CRIM. P. 52(a). Rule 61 of the Federal Rules of Civil Procedure also provides for harmless error. FED. R. CIV. P. 61.

11 *Kotteakos*, 328 U.S. at 764-65; *see also* United States v. Lane, 474 U.S. 438, 449 (1986) (invoking the *Kotteakos* test). *See infra* notes 94-95 and accompanying text (discussing *Kotteakos* and *Lane* and the Court's application of the "substantial and injurious effect" standard). Lafave and Israel classified non-constitutional errors as generally falling into one of two categories. LAFAVE & ISRAEL, *supra* note 2, § 27.6(a), at 1161-62. Errors in the "structure of the proceeding" include "such matters as jury selection, pleadings and venue." *Id.* § 27.6(a), at 1162. Analysis of such errors, Lafave and Israel explained, generally requires determining the substantive purpose of the right in question and whether the defendant was deprived of the benefit of that right. *Id.* The second category of non-constitutional errors relates to the presentation of evidence and is more amenable to analysis under the substantial prejudice standard than structural errors. *Id.* Evidentiary non-constitutional errors include issues of admissibility of evidence, examination of witnesses, pre-trial discovery, jury instruction, and the conduct of the judge and prosecutor at trial. *Id.*

12 Chapman v. California, 386 U.S. 18, 24 (1967). *See infra* note 91 (providing an analysis of the Court's reasoning in *Chapman*). Lafave and Israel stated: "Prior to the 1960s, it was generally assumed that constitutional violations could never be regarded as harmless error." LAFAVE & ISRAEL, *supra* note 2, § 27.6(c), at 1166. The authors observed that in only one case prior to *Chapman* had the Court not concluded that a constitutional error did not warrant reversal of a conviction. *Id.*

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

14 *See* LAFAVE & ISRAEL, *supra* note 2, § 28.2(d), at 1183 (stating that the federal statute leaves open the proper scope of habeas review). In *Brecht v. Abrahamson*, the Court noted that the applicability of the "harmless beyond a reasonable doubt" standard to constitutional errors raised on habeas review was, at most, assumed. *See* Brecht v. Abrahamson, 113 S. Ct. 1710, 1718 (1993). The federal habeas corpus statute, the Court asserted, is silent as to the issue of harmless error. *Id.*

15 113 S. Ct. 1710 (1993).

Supreme Court held that the correct harmless-error standard applicable to habeas corpus petitions evaluated whether the constitutional error in question "had substantial and injurious effect or influence in determining the jury's verdict."[16] The Court rejected the petitioner's argument that the correct standard applicable to the collateral review of constitutional errors considered whether the error was harmless beyond a reasonable doubt.[17] Direct review and collateral review, the Court explained, are separate and distinct avenues of post-conviction review.[18]

On October 17, 1985, a district attorney for Buffalo County, Wisconsin, Roger Hartman, was shot at his home by his brother-in-law, Todd Brecht.[19] Brecht fled the scene in his sister's automo-

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16 *Id.* at 1722 (quoting *Kotteakos*, 328 U.S. at 776). The *Brecht* Court resolved a dispute between the United States Courts of Appeals for the Seventh and Eighth Circuits over the applicable harmless-error standard. *Id.* at 1716 & n.3. The Seventh Circuit had previously held that the harmless-error standard applicable to the impermissible use of a defendant's post-arrest silence was the "substantial and injurious effect" test of *Kotteakos*. Brecht v. Abrahamson, 944 F.2d 1363, 1375 (7th Cir. 1991), *aff'd*, 113 S. Ct. 1710 (1993). In contrast, the Eighth Circuit applied the "harmless beyond a reasonable doubt" standard of *Chapman* to a similar situation. Bass v. Nix, 909 F.2d 297, 304-05 (8th Cir. 1990) (citations omitted). *See infra* note 44 (discussing *Bass v. Nix*).

17 *Brecht*, 113 S. Ct. at 1721 (citing *Chapman*, 386 U.S. at 24). This standard, the Court pronounced, is better suited to the nature and intent of collateral review, and application of this less onerous standard promotes the notions underlying habeas jurisprudence. *Id.* at 1714.

18 *Id.* at 1719. Direct review of a conviction or judgment consists of the state appellate process and, upon a petition for certiorari, discretionary review by the United States Supreme Court. L. Anita Richardson & Leonard B. Mandell, *Fairness Over Fortuity: Retroactivity Revisited and Revised*, 1989 UTAH L. REV. 11, 12 n.3 (citing Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965)). A "direct attack" of a conviction or judgment is defined as "an attempt, for sufficient cause, to have [a judgment or conviction] annulled, reversed, vacated, corrected, declared void, or enjoined, in a proceeding instituted for that specific purpose, such as an appeal . . . or injunction to restrain its execution." BLACK'S LAW DICTIONARY 459 (6th ed. 1990). Direct attacks contrast with collateral attacks, which are attempts "to impeach the validity or binding force of [a judgment or conviction] as a side issue or in a proceeding instituted for some other purpose." *Id.* (citation omitted). In the context of habeas corpus, collateral review defendants are "defendants who have litigated their claimed constitutional errors to finality." Richardson & Mandell, *supra*, at 13-14 n.8.

19 State v. Brecht, 421 N.W.2d 96, 98 (Wis. 1988). Roger Hartman died almost one month later from his injuries. *Id.* at 99. Brecht had been living with his sister and brother-in-law in Wisconsin since October 12, 1985. *Id.* at 98. Prior to that period, Brecht had been imprisoned in Georgia for a felony theft conviction. *Id.* The Hartmans paid $3750 restitution for Brecht's theft and were able to transfer his probation status from Georgia to Wisconsin. *Id.* Brecht's probation status barred him from leaving Wisconsin without permission and required that he refrain from violating the law. *Id.* Brecht's probation also required him to avoid intoxication and other abusive habits. *Id.* Additionally, the Hartmans had voiced their opposition to Brecht's drinking and homosexuality. *Id.*

bile, which he soon disabled by driving it into a ditch.[20] Brecht refused assistance offered by a police officer and eventually obtained a ride to a town in Minnesota.[21] Brecht did not discuss the shooting at any time.[22] Thereafter, municipal police officers apprehended Brecht for the shooting of Hartman.[23] Brecht told one of the arresting officers that a mistake had been made and that he wished to speak with someone who would understand him.[24] Although it was unclear exactly when Brecht received *Miranda*[25] warnings after being arrested, Brecht was informed of his *Miranda* rights when he first appeared in court.[26]

During presentation of the State's case against Brecht, the prosecutor questioned witnesses regarding Brecht's silence about the shooting before he had received his *Miranda* warnings.[27] After the State presented its case-in-chief, Brecht took the stand, claim-

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20 *Id.* at 98-99. At trial, Brecht claimed that the shooting was an accident. *Id.* at 98. Brecht testified that, on the day of the shooting, he was alone at the Hartman house, drinking and shooting Hartman's gun in the backyard. *Id.* When Roger Hartman pulled into the driveway, Brecht ran into the house, intending to replace the gun without Hartman knowing that he had been using it. *Id.* Brecht testified that he tripped and the gun went off, striking Hartman in the back. *Id.* Subsequently, Brecht lost sight of the wounded Hartman. *Id.* Brecht testified that when he saw Hartman at a neighbor's house, he fled the scene in his sister's automobile. *Id.* Hartman sought the help of his neighbors, telling them that Brecht had shot him. *Id.*

21 *Id.* at 99.

22 *Id.*

23 *Id.* Brecht lied to the Minnesota police concerning his identity shortly after he was apprehended. *Id.*

24 *Id.*

25 Miranda v. Arizona, 384 U.S. 436 (1966). *Miranda* has been called "the centerpiece of the Warren Court's 'revolution in American criminal procedure . . . .'" KAMISAR, *supra* note 2, at 473. *Miranda* requires that any statement made by a suspect in police custody may not be used at his or her trial unless the state has informed the suspect of his or her Fifth Amendment rights to counsel and to remain silent. *Miranda*, 384 U.S. at 444-45. *Miranda* warnings serve to protect an individual's Fifth Amendment right against self-incrimination in the compellingly coercive atmosphere of police custody and interrogation. *Id.* at 467.

26 State v. Brecht, 405 N.W.2d 718, 722 (Wis. Ct. App. 1987), *rev'd*, 421 N.W.2d 96 (Wis. 1988); *Brecht*, 421 N.W.2d at 99.

27 *Brecht*, 421 N.W.2d at 99. The Wisconsin Supreme Court asserted that Brecht's constitutional right to silence was not implicated by his encounters with Officer Zeller, who offered Brecht assistance after he had wrecked Mrs. Hartman's car, or with Mr. Schlesselman, who drove Brecht to Minnesota. *Id.* at 99, 102. The court concluded that Brecht was not in police custody in either encounter. *Id.* at 102. Accordingly, the court observed, it was permissible to question both witnesses as to whether Brecht made any mention of the incident. *Id.* (citations omitted). The Wisconsin Supreme Court also concluded that Brecht's rights were not violated by the State's questioning of Officer Papke, the arresting officer, regarding Brecht's failure to explain his statement that a mistake had been made. *Id.* Because the issue had been raised by Brecht's counsel, the court ruled that the State was free to question Officer Papke regarding Brecht's post-arrest silence. *Id.* (citations omitted).

ing for the first time that the shooting was an accident.[28] The State asked Brecht whether he had told anyone his version of the incident prior to the trial.[29] The State commented again on Brecht's post-*Miranda* silence during its closing argument.[30] Brecht was later found guilty of first degree murder.[31]

The Wisconsin Court of Appeals overturned Brecht's conviction, concluding, *inter alia*, that the State's comments regarding Brecht's failure to explain his actions, after he had been arrested and read his *Miranda* rights, violated Brecht's right to due process of law under the Fifth and Fourteenth Amendments.[32] The appellate court concluded that the State's comments were not harmless

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[28] Brecht v. Abrahamson, 113 S. Ct. 1710, 1714-15 (1993).

[29] *Brecht*, 421 N.W.2d at 103. The State first inquired of Brecht:

> "Q. In fact the first time you have ever told this story is when you testified here today was it not? . . . .
>
> A. You mean the story of actually what happened?
>
> Q. Yes.
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> A. I knew what happened, I'm just telling it the way it happened, yes, I didn't have a chance to talk to anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir."

Id. On re-cross examination, the State asked Brecht:

> "Q. Did you tell anyone about what had happened in Alma?
>
> A. No I did not."

Id.

[30] *Id.* Specifically, the prosecutor stated:

> "[A]nd remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence. . . .
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> . . . .
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> He sits back here and sees all of our evidence go in and then comes out with this crazy story. . . .
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> . . . .
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> I know what I'd say, I'd say, I'd say 'hold on, this was a mistake, this was an accident, let me tell you what happened,' but he didn't say that did he. No, he waited until he hears our story."

Id.

[31] *Id.* at 99.

[32] State v. Brecht, 405 N.W.2d 718, 722-23 (Wis. Ct. App. 1987), *rev'd*, 421 N.W.2d 96 (Wis. 1988) (citing Wainwright v. Greenfield, 474 U.S. 284, 290-93 (1986)). Although the appellate court focused on the State's impeachment use of Brecht's post-arrest, pre-*Miranda* failure to explain his actions, the court noted, for the purpose of aiding a retrial, that the trial court's admission of evidence concerning Brecht's homosexuality, as well as his prior convictions for passing bad checks, also constituted error. *Id.* at 721-22, 724. The Wisconsin Supreme Court concluded, however, that the references to Brecht's post-arrest, pre-*Miranda* silence violated neither the United States Constitution nor the Wisconsin Constitution. *Brecht*, 421 N.W.2d at 103 (citation omitted). Additionally, on habeas review, the district court concluded that Brecht's Fifth and Fourteenth Amendment rights had not been violated. Brecht v. Abrahamson, 759 F. Supp. 500, 507 (W.D. Wis.), *rev'd*, 944 F.2d 1363, 1375 (7th Cir. 1991), *aff'd*, 113 S. Ct. 1710 (1993).

beyond a reasonable doubt under the harmless-error analysis advanced in *Chapman v. California*.[33]

The Wisconsin Supreme Court reversed, agreeing with the lower court that the State's references to Brecht's post-arrest, post-*Miranda* silence were constitutional errors, but concluded that the errors were harmless.[34] In finding the error harmless, the court weighed the infrequency of the State's impermissible references against the overwhelming evidence of Brecht's guilt.[35]

Pursuant to 28 U.S.C. § 2254, Brecht filed for habeas corpus relief.[36] Brecht alleged several federal constitutional violations, including that the State's comments on his pre-trial silence impinged his Fifth and Fourteenth Amendment rights.[37] The district court agreed with both state courts that the post-arrest, post-*Miranda* references were constitutional violations of Brecht's right to due process of law.[38] The district court, however, disagreed with the

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[33] *Brecht*, 405 N.W.2d at 722 (citing Chapman v. California, 386 U.S. 18, 22 (1967)); *see* State v. Fencl, 325 N.W.2d 703, 711 (Wis. 1982) (articulating Wisconsin's harmless-error standard). Under *Fencl*, a constitutional error was deemed harmless beyond a reasonable doubt "if there is no reasonable possibility that the error might have contributed to the conviction." *Fencl*, 325 N.W.2d at 711 (citing *Chapman*, 386 U.S. at 23-24. The Wisconsin standard inquired into: "(1) the frequency of the error; (2) the nature of the State's evidence against the defendant; and (3) the nature of the defense." *Id.* (citing Rudolph v. State, 254 N.W.2d 471, 475 (Wis. 1977) (per curiam)).

[34] *Brecht*, 421 N.W.2d at 104, 106. In *Doyle v. Ohio*, the United States Supreme Court held that the use of a defendant's silence for impeachment purposes after he had been informed of his right to remain silent, pursuant to *Miranda*, constituted a violation of due process and was fundamentally unfair. Doyle v. Ohio, 426 U.S. 610, 618 (1976). The *Doyle* Court found an implicit assurance in the *Miranda* warnings that silence could not be used against a person invoking that right. *Id.*

[35] *Brecht*, 421 N.W.2d at 104. The Wisconsin Supreme Court recognized the strength of the evidence the State presented against Brecht. *Id.* Particularly, the court observed that Brecht fled without obtaining assistance for the wounded Hartman, that the officers who examined the Hartmans' house failed to find anything that would have caused Brecht to trip, and that the coroner concluded that Brecht's version of the incident was not consistent with the trajectory of the bullet in Hartman's back. *Id.* The supreme court also noted that the State had established the existence of a motive—Hartman's disapproval of Brecht's homosexuality. *Id.* at 104, 105-06.

[36] *Brecht*, 759 F. Supp. at 501. *See supra* note 3 (providing the pertinent parts of § 2254).

[37] *Brecht*, 759 F. Supp. at 501. In his habeas petition, Brecht also alleged that his rights to due process were violated by the prosecutor's comments regarding Brecht's homosexuality and a previous criminal conviction, and by the State's use of an *ex parte* trial brief. *Id.*

[38] *Id.* at 507. The district court also agreed with the Wisconsin Supreme Court that the State's references to Brecht's failure to mention the shooting either to Officer Zeller or Mr. Schlesselman or to explain his statements to Officer Papke were not constitutional errors. *Id.* (citations omitted). Because of the prosecution's comments on Brecht's homosexuality and previous criminal convictions, the district court

Wisconsin Supreme Court on the issue of whether the State's error harmed Brecht and found that the State had not proven the error harmless beyond a reasonable doubt.[39]

Reversing the district court, the Seventh Circuit Court of Appeals held that the *Kotteakos v. United States* harmless-error standard applied to habeas review and required the reviewing court to determine whether the error "had substantial and injurious effect or influence in determining the jury's verdict."[40] The court of appeals asserted that the federal habeas process is a separate, distinct, and costly action that should not merely review state court results in the manner of direct review.[41] The court further reasoned that *Doyle v. Ohio*[42] established a prophylactic rule of the rights outlined by the Supreme Court in *Miranda*, which were not rights expressly granted by the Constitution.[43] Accordingly, the court of appeals concluded that a less burdensome harmless-error standard was applicable to collateral review of prophylactic rules and that Brecht had not, in fact, demonstrated that he had been harmed by the

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concluded that Brecht was entitled to habeas relief. *Id.* at 509. The district court, however, rejected Brecht's claim regarding the use of the *ex parte* brief. *Id.* at 509-10.

[39] *Id.* at 508. Recognizing that Brecht's intent was the only real issue during the trial, the district court posited that the State's impermissible remarks may have swayed the jury. *Id.* (citations omitted). The district court also disagreed with the Wisconsin Supreme Court's determination that the State presented overwhelming evidence of Brecht's guilt. *Id.*

[40] Brecht v. Abrahamson, 944 F.2d 1363, 1375 (7th Cir. 1991) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946); United States v. Lane, 474 U.S. 438, 449 (1986)), *aff'd*, 113 S. Ct. 1710 (1993).

[41] *Id.* at 1370-75. The court relied primarily on *Stone v. Powell* for the notion that the federal habeas statute, 28 U.S.C. § 2254, does not require that the same standards that state reviewing courts apply on direct review must also be applied on collateral review. *Id.* at 1371 (citing Stone v. Powell, 428 U.S. 465, 481-82 (1976)). See *infra* notes 62-72 and accompanying text for a complete analysis of the *Stone* decision.

[42] 426 U.S. 610 (1976). *See supra* note 34 (discussing the *Doyle* holding).

[43] *Brecht*, 944 F.2d at 1370. A prophylactic rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." United States v. Calandra, 414 U.S. 338, 348 (1974). A prophylactic rule "functions as a preventive safeguard to insure that constitutional violations will not occur." Joseph D. Grano, *Prophylactic Rules In Criminal Procedure: A Question Of Article III Legitimacy*, 80 NW. U. L. REV. 100, 105 (1985). Professor Grano stated that "particularly in criminal procedure cases, the Supreme Court has developed 'a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions.'" *Id.* at 101 (quoting Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975)). Explaining the theoretical underpinnings of prophylactic rules, Professor Stuntz declared that "[b]y definition, a prophylactic rule forbids more behavior than would be forbidden if detecting and preventing truly objectionable behavior were costless." William J. Stuntz, *Waiving Rights In Criminal Procedure*, 75 VA. L. REV. 761, 767 n.19 (1989).

State's references to his silence.[44]

The United States Supreme Court granted certiorari[45] to resolve the dispute between the Seventh and Eighth Circuits regarding the proper harmless-error standard applicable to habeas review of state convictions where the petitioner alleges a violation of *Doyle*.[46] Affirming the Seventh Circuit's decision, the Court rejected the lower court's reasoning that the *Doyle* rule existed solely as protection for the rights enunciated in *Miranda*.[47] *Doyle*, the Court observed, stood for the proposition that a defendant is to be accorded due process and treated fairly.[48] The Court then concluded that the "substantial and injurious effect or influence" harmless-error standard applied to *Doyle* violations.[49] Applying this standard, the Court determined that the State's impermissible use of Brecht's pre-trial silence did not have a meaningful effect on the jury's determination of his guilt.[50]

The Habeas Corpus Act of 1867 was followed by nearly a century of Supreme Court decisions narrowly interpreting the scope of habeas relief.[51] Early applications of the 1867 Act were limited to situations in which the petitioner alleged a flaw in the jurisdiction of the convicting court.[52] In 1942, the Supreme Court abandoned

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44 *Brecht*, 944 F.2d at 1375, 1376. The court of appeals acknowledged that its decision conflicted with a recent Eighth Circuit decision, *Bass v. Nix*. *Id.* at 1375 (citing Bass v. Nix, 909 F.2d 297, 304-05 & n.14 (8th Cir. 1990)). In *Bass*, the Eighth Circuit also dealt with a prosecutor's efforts to impeach a defendant by cross-examining the defendant on why he did not offer his version of the alleged incident until trial. *Bass*, 909 F.2d at 300. After concluding that Bass's Fourteenth Amendment right to due process had been violated under *Doyle*, the Eighth Circuit then turned to the issue of the *Doyle* violation's effect on Bass. *Id.* at 301-04, 304. The Eighth Circuit noted the Supreme Court's failure to address the issue of the proper "standard of review for evaluating the prejudicial effect of a *Doyle* violation." *Id.* at 304 (citing Greer v. Miller, 483 U.S. 756, 761 n.3 (1987)). The *Bass* court determined that the "harmless beyond a reasonable doubt" standard was appropriate for *Doyle* violations. *Id.* at 304-05 (citing Clark v. Wood, 823 F.2d 1241, 1247 (8th Cir.), *cert. denied*, 484 U.S. 945 (1987); United States v. Disbrow, 768 F.2d 976, 980 (8th Cir. 1985)). Consequently, the Eighth Circuit rejected an "actual prejudice" harmless-error standard. *Id.* at 305 n.14 (citing Miller v. Greer, 789 F.2d 438, 448 (7th Cir. 1986) (Easterbrook, J., dissenting) (citation omitted), *cert. denied*, 483 U.S. 756 (1987)).

45 Brecht v. Abrahamson, 112 S. Ct. 2937 (1992).

46 Brecht v. Abrahamson, 113 S. Ct. 1710, 1716 (1993). *See supra* note 44 (discussing the conflicting decisions in the circuit courts).

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

48 *Id.*

49 *Id.* at 1722.

50 *Id.* at 1722-23.

51 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 27.2(b), at 1016, § 27.3, at 1023 (Student ed. 1985).

52 *Id.* § 27.3, at 1023. In *Ex parte Lange* the trial court's attempt to correct a sentencing error by resentencing the petitioner was alleged to constitute punishing the

the jurisdictional defect requirement and extended the availability of habeas relief to state prisoners who simply alleged that their convictions had been obtained in violation of the Constitution.[53] Approximately ten years later, the Court dramatically expanded the scope of habeas corpus by holding that the federal courts could entertain habeas petitions asserting claims that had already been addressed by state courts.[54]

Ninety-six years of court efforts to expand the availability of habeas relief culminated in the landmark case of *Fay v. Noia*.[55] In

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petitioner twice for the same offense. *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 164, 168 (1873). Lange's original sentence for theft crimes included a prison term and a monetary fine. *Id.* at 164. The statute under which Lange was sentenced, however, authorized punishment of either imprisonment or monetary fines. *Id.* Five days after Lange entered prison and four days after he paid the fine, the trial judge vacated the sentence and resentenced Lange to a year in prison. *Id.* The United States Supreme Court granted Lange's habeas petition, emphasizing the inherent unlawfulness in punishing a man twice for the same offense. *Id.* at 168. Once Lange had fully satisfied one of the prescribed alternative punishments by paying the fine, the Court explained, the trial court no longer had authority to resentence him. *Id.* at 176. The Supreme Court asserted that the trial court had no jurisdiction to impose a new or additional sentence on Lange and the attempt to do so was void. *Id.* at 176-77. Additionally, in *Johnson v. Zerbst*, the Court responded to a habeas petition alleging a violation of the right to counsel by stating: "If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void . . . ." Johnson v. Zerbst, 304 U.S. 458, 468 (1938); *see also* Moore v. Dempsey, 261 U.S. 86, 90-91 (1923) (concluding that a court in a mob-dominated trial departed from due process of law and was without jurisdiction to convict) (citation omitted).

[53] Waley v. Johnston, 316 U.S. 101, 104-05 (1942). Waley, convicted of kidnapping, alleged in his habeas petition that his guilty plea had been coerced by federal law enforcement agents. *Id.* at 102. Concluding that Waley's claim was cognizable on habeas review, the Court noted that Waley's allegations were based on facts outside the record and thus not appealable on direct review. *Id.* at 104. Specifically, the *Waley* Court stated:

> In such circumstances . . . [habeas review] is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. [Habeas review] extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.

Id. at 104-05 (citations omitted).

[54] Brown v. Allen, 344 U.S. 443, 463-65 (1953). The *Brown* Court recognized that the federal district courts, located in the state where a challenged conviction was reached, were in an opportune position to review state proceedings. *Id.* at 458. Construing the federal habeas statue, the Court noted that Congress did not reference the relevance of state court results when granting federal courts the right to hear habeas petitions. *Id.* at 462 (citing 28 U.S.C. § 2254 (1988)).

[55] 372 U.S. 391 (1963), *overruled by* Coleman v. Thompson, 111 S. Ct. 2546 (1991). Judge Gibbons, former Chief Judge for the United States Court of Appeals for the Third Circuit, perceived *Fay* as the launching pad for much of the Warren Court's criminal procedure jurisprudence. John J. Gibbons, *Waiver: The Quest For Functional*

Fay, the Court addressed whether the petitioner was to be granted habeas relief despite a failure to appeal his conviction.[56] The Supreme Court held that the federal courts could entertain applications for habeas relief where the petitioner had defaulted on state court remedies, provided that the failure to pursue those remedies was not deliberate or motivated by bad faith.[57]

After extensively reviewing the historical applications of habeas corpus,[58] the *Fay* Court concluded that there was no indication that federal courts were barred from granting habeas relief by

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Limitations On Habeas Corpus Jurisdiction, 2 SETON HALL L. REV. 291, 294 (1971) (footnote omitted). Judge Gibbons also opined that *Fay* foreshadowed the result reached in *Chapman v. California*. *Id.* at 294-95 (citing Chapman v. California, 386 U.S. 18 (1967)). As for the practical effect of *Fay*, Judge Gibbons noted a nearly five-fold increase in the number of habeas petitions filed from 1963, the year *Fay* was decided, to 1970. *Id.* at 294.

56 *Fay*, 372 U.S. at 394. The petitioner, Noia, along with two other men, had been convicted of felony murder. *Id.* Noia's cohorts unsuccessfully appealed their convictions in the New York state courts alleging that their confessions, the sole evidence against the three defendants, had been coerced. *Id.* at 395 & n.1 (citations omitted). One of Noia's co-defendants obtained federal habeas corpus relief and the other's conviction was subsequently overturned in state court proceedings. *Id.* at 395 n.1 (citations omitted). Noia then sought post-conviction relief in the New York state courts, but was unsuccessful because he had failed to appeal his conviction. *Id.* at 396 n.3 (citations omitted). Noia contended that his failure to appeal was motivated by his desire not to burden his family with the costs of an appeal and also because he feared receiving the death penalty if he was granted a retrial. *Id.* at 397 n.3. The district court denied Noia's habeas petition, despite the State's stipulation that Noia's confession had been, in fact, coerced. *Id.* at 395-96 & n.2. The district court concluded that Noia did not satisfy the requirement of the federal habeas statute, 28 U.S.C. § 2254, that he first exhaust all potential state remedies. United States v. Fay, 183 F. Supp. 222, 227 (S.D.N.Y. 1960), *rev'd*, 300 F.2d 345, 365 (2d Cir. 1962), *aff'd*, 372 U.S. 391 (1963), *overruled by* Coleman v. Thompson, 111 S. Ct. 2546 (1991).

57 *Fay*, 372 U.S. at 438.

58 *Id.* at 399-426. Justice Brennan asserted that early applications of habeas corpus were not limited solely to questions involving jurisdiction. *Id.* at 404. The Justice also argued that the Constitution granted broad authority to courts on habeas review, stating that "the Constitution invites, if it does not compel, . . . a generous construction of the power of the federal courts to dispense the writ" in conformity with the common law, which Justice Brennan construed as affording habeas review "to remedy any kind of governmental restraint contrary to fundamental law." *Id.* at 405-06 (citation omitted). Circumstances surrounding the Habeas Corpus Act of 1867, Justice Brennan contended, indicated that it was Congress's intent to expand the scope of habeas review substantially. *Id.* at 415-17, 417. Justice Brennan asserted that the 1867 Act was Congress's response to anticipated southern defiance during Reconstruction, and the Act was intended as "a remedy almost in the nature of *removal* from the state to the federal courts of state prisoners' constitutional contentions." *Id.* at 416 (emphasis in original) (citations omitted). Justice Brennan cited a 17th century case as a common law example of habeas corpus relief being granted where a person had been illegally imprisoned in violation of the due process principles accorded by the Magna Carta. *Id.* at 404-05 (citation omitted).

state procedural requirements.[59] Justice Brennan, writing for the majority, acknowledged that state procedural requirements could have the effect of barring direct review of federal constitutional claims, but the Justice reasoned that habeas corpus was a distinct process, derived from the principle of personal liberty, and thus subject to a different standard.[60] The *Fay* Court limited its holding by noting that the power of a reviewing judge to grant relief is discretionary and that in instances where a petitioner has deliberately rejected state remedies, the reviewing court may deny relief.[61]

The expansion of habeas availability came to an abrupt halt with the Supreme Court's decision in *Stone v. Powell*.[62] In *Stone*, two petitions for habeas relief were filed, both alleging that evidence subject to the exclusionary rule[63] had been presented at trial.[64] Writing for the Court, Justice Powell held that violations of the exclusionary rule were not reviewable on habeas corpus, provided that the state had allowed the petitioner to fully present his or her claim.[65] The majority based its decision on the proposition that

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59 *Id.* at 426. Justice Brennan stated: "Our survey discloses nothing to suggest that the Federal District Court lacked the *power* to order Noia discharged because of a procedural forfeiture he may have incurred under state law." *Id.* Noting that habeas review was entirely distinct from direct review, the Justice reasoned that while respect for state legal systems was an important consideration, that respect should not impinge on Congress's intent that habeas review be widely available. *Id.* at 424, 426-27.

60 *Id.* at 430-31. The Court stated:

> [T]he broad power of the federal courts under 28 U.S.C. § 2243 summarily to hear the application and to "determine the facts, and dispose of the matter as law and justice require," is hardly characteristic of an appellate jurisdiction. Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner.

Id. (citation omitted).

61 *Id.* at 438. The Court found that although Noia chose not to pursue any appeals, this default could not be considered "a deliberate circumvention of state procedures," because Noia chose not to appeal fearing that a retrial could result in the death penalty. *Id.* at 439-40.

62 428 U.S. 465 (1976).

63 *See* Mapp v. Ohio, 367 U.S. 643, 654-55 (1961). In *Mapp*, the Supreme Court held that evidence obtained by law enforcement officers in violation of the Fourth Amendment's protection against unreasonable searches and seizures was inadmissible in state courts. *Id.* at 655. Barring the use of illegally seized evidence, the Court stated, created a deterrent effect by removing an incentive for law enforcement officers to disregard the Constitution. *Id.* at 656-57 (citations omitted).

64 *Stone*, 428 U.S. at 470-74. Lloyd Powell's arrest for vagrancy and a search incident to that arrest yielded a handgun, which was later determined to have been used to murder a shopkeeper. *Id.* at 469-70. David Rice, convicted of murder, filed for habeas relief contending that the warrant used by police to search his home was invalid. *Id.* at 471, 472-73.

65 *Id.* at 494. The precursor to the Court's opinion in *Stone* was Justice Powell's

the exclusionary rule is a prophylactic rule granted not by the Constitution, but by the courts as a means of protecting Fourth Amendment rights.[66] The *Stone* Court then determined that the substantial costs attendant to application of the exclusionary rule outweighed the limited benefit it provided in the situation at hand.[67]

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concurrence in *Schneckloth v. Bustamonte.* Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process,* 77 MINN. L. REV. 1015, 1022 (1993); *see* Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring). The defendant in *Schneckloth* petitioned for habeas relief contending that the car search producing the State's evidence was unconstitutional, despite the fact that both the driver and the borrower of the car, in which the petitioner was travelling, consented to the search. *Id.* at 219-20. The *Schneckloth* majority held that consent to a non-custodial search must be voluntary, without coercion or duress. *Id.* at 248. Justice Powell, however, argued that the real issue was whether the exclusionary rule applied to habeas petitions. *Id.* at 250 (Powell, J., concurring). Justice Powell propounded that collateral review should be limited to issues relating to the petitioner's guilt or innocence. *Id.* at 265-66 (Powell, J., concurring). Citing recent Supreme Court cases that expanded the scope of habeas review, Justice Powell stated:

> [These cases were possibly a] justifiable evolution of the use of habeas corpus where the one in state custody raises a constitutional claim bearing on his innocence. But the justification for disregarding the historic scope and function of the writ is measurably less apparent in the typical Fourth Amendment claim asserted on collateral attack. In this latter case, a convicted defendant is most often asking society to redetermine a matter with no bearing at all on the basic justice of his incarceration.

Id. at 256 (Powell, J., concurring) (citing Kaufman v. United States, 394 U.S. 217, 231 (1969) (ruling that claims alleging illegally seized evidence used at trial are cognizable on habeas review of federal convictions pursuant to 28 U.S.C. § 2255); Fay v. Noia, 372 U.S. 391, 424-27 (1963) (declaring that state procedural bars to appeal did not preclude federal habeas review)).

In practice, courts asking whether a petitioner has received a "full and fair opportunity" to litigate a claim have applied a two-prong analysis asking: "(1) whether the state procedural mechanism is satisfactory in the abstract, and (2) whether there was a failure of the mechanism in the individual case." LAFAVE & ISRAEL, *supra* note 51, § 27.3(d), at 1034. Because the state systems are modeled after the federal system, satisfaction of the first prong is almost presumed and the test becomes subjective relating to the second prong. *Id.*

66 *Stone,* 428 U.S. at 486. The Court quoted that a prophylactic rule was "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." *Id.* (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)). *See supra* note 43 (defining prophylactic rules).

67 *Stone,* 428 U.S. at 493-94. Justice Powell asserted that the most significant costs of the exclusionary rule were its propensity to cloud the determination of guilt or innocence and allow a guilty offender to go free. *Id.* at 490. The primary benefit of the exclusionary rule, the Justice declared, was the deterrent effect the rule had on police officers inclined to violate the Constitution. *Id.* at 486. Justice Powell reasoned, however, that the benefit provided by the rule did not outweigh its costs. *See id.* at 493-95. Justice Powell reiterated:

> [H]abeas corpus . . . results in serious intrusions on values important to our system of government. They include "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal

Justice Brennan dissented, condemning the Court's holding as based not upon logic, but rather on the majority's hostility toward the principles of habeas corpus and the exclusionary rule.[68] First, Justice Brennan argued that the majority's distinction between direct and collateral review was unjustifiable in light of the federal habeas statute's clear meaning.[69] The Justice then declared that the majority's holding was motivated by a desire to "eviscerate" the federal habeas statute.[70] Reserving particular scorn for the assertion that collateral review distracts the justice system from the central issue of a defendant's guilt, Justice Brennan dismissed the majority's arguments regarding the costs of habeas review.[71] The dissent argued that the sanctity of constitutional rights and the need to safeguard those rights clearly outweighed the need for

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> trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded."

Id. at 491 n.31 (quoting *Schneckloth*, 412 U.S. at 259 (Powell, J., concurring)).

[68] *Id.* at 502 (Brennan, J., dissenting). Justice Brennan was joined by Justice Marshall. *Id.*

[69] *Id.* at 509-11 (Brennan, J., dissenting). Under *Mapp*, Justice Brennan argued, the admission of evidence seized in violation of the Fourth Amendment was itself an infringement of a defendant's constitutional right to be free from unreasonable searches and seizures. *Id.* at 510-11 (Brennan, J., dissenting). Accordingly, "the defendant has been placed 'in custody in violation of the Constitution.'" *Id.* at 509 (Brennan, J., dissenting) (quoting 28 U.S.C. § 2254(a) (1988)). Justice Brennan then professed confusion as to the reasoning behind the majority's conclusion that a petitioner is unconstitutionally confined "during the process of direct review, no matter how long that process takes, but that the unconstitutionality then suddenly dissipates at the moment the claim is asserted in a collateral attack on the conviction." *Id.* at 509-10 (Brennan, J., dissenting) (footnote omitted).

[70] *Id.* at 516 (Brennan, J., dissenting). Justice Brennan stated that the Court's rationale could be found only in footnotes to the majority opinion. *See id.* at 516-17 (Brennan, J., dissenting) (citing *Stone*, 428 U.S. at 478 n.11, 491-92 nn.30-31). Specifically, the dissent ridiculed the majority's "vague notions of comity and federalism." *Id.* at 516 (Brennan, J., dissenting) (citing *Stone*, 428 U.S. at 478 n.11). Justice Brennan also discredited the majority's distinction of guilt related and non-guilt related constitutional violations. *Id.* at 516-17 (Brennan, J., dissenting) (citing *Stone*, 428 U.S. at 491-92 n.31). Furthermore, the Justice foresaw the Court's holding as the beginning of "a drastic withdrawal of federal habeas jurisdiction." *Id.* at 517 (Brennan, J., dissenting). Claims cognizable on habeas review that the dissent believed would eventually be narrowed by the Court included "double jeopardy, entrapment, self-incrimination, *Miranda* violations, and use of invalid identification procedures." *Id.* at 517-18 (Brennan, J., dissenting) (footnote omitted).

[71] *Id.* at 522-23 (Brennan, J., dissenting). The dissent dismissed the majority's concern for the costs of habeas corpus as "carry[ing] no more force with respect to non-'guilt-related' constitutional claims than they do with respect to claims that affect the accuracy of the factfinding process." *Id.* at 523 (Brennan, J., dissenting). Justice Brennan noted that Congress made no provision for the costs cited by the majority. *Id.* *See supra* note 67 (discussing the costs of habeas review).

streamlining the judicial process.[72]

The evisceration of the habeas statute envisaged by Justice Brennan, however, did not immediately follow the *Stone* decision.[73] Instead, in *Wainwright v. Sykes*,[74] the Court began to gradually restrict the availability of habeas review by rejecting, without overruling, *Fay*.[75] Writing for the *Sykes* majority, Justice Rehnquist concluded that to overcome a state procedural bar to appeals—the

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[72] *See Stone*, 428 U.S. at 522-24 (Brennan, J., dissenting). The dissenting Justice noted that the Court's efforts to distinguish between guilt related and non-guilt related claims served no purpose other than to foster disrespect for the rights of the Constitution. *Id.* at 524 (Brennan, J., dissenting). Justice Brennan reasoned that the Court corrupted the values of the Constitution by subjugating its guarantees to the truth finding function of trials. *Id.*

[73] *See* LAFAVE & ISRAEL, *supra* note 51, § 27.3(b), at 1029-30. The Court's post-*Stone* rulings addressed a variety of issues on habeas review without denying the cognizability of those issues. *Id.* § 27.3(b), at 1029. In two of the most significant post-*Stone* cases, *Rose v. Mitchell* and *Kimmelman v. Morrison*, the Court refused to extend the holding of *Stone* to claims that were unrelated to the guilt-determination process. *See* Kimmelman v. Morrison, 477 U.S. 365, 383 (1986); Rose v. Mitchell, 443 U.S. 545, 564 (1979); LAFAVE & ISRAEL, *supra* note 51, § 27.3(c), at 1030-33. In *Mitchell*, the respondents claimed that the foreman of the grand jury had been selected in a discriminatory manner, thus violating the Equal Protection Clause of the Fourteenth Amendment. *Mitchell*, 443 U.S. at 547. The State contended that, in light of *Stone*, the respondents' claims were not cognizable on habeas review because grand jury proceedings had no relationship with the ultimate determination of the petitioner's guilt or innocence. *Id.* at 560. Justice Blackmun, writing for the majority, held that *Stone* was not applicable to an allegation of discrimination in a grand jury and that habeas relief could be granted if the respondents established a violation of the Equal Protection Clause. *Id.* at 564, 565. The *Mitchell* Court then concluded that the respondents failed to establish such a violation. *Id.* at 574. Justice Blackmun, who had joined the majority in *Stone*, stressed that *Stone* was not concerned with the scope of habeas review, but with the exclusionary rule and its applicability on collateral review. *Id.* at 560 (citing *Stone*, 428 U.S. at 495-60 n.37). Noting the prophylactic nature of the exclusionary rule, the Justice explained that claims under the Equal Protection Clause were essentially different from those arising from the exclusionary rule. *Id.* at 561-62 (citation omitted).

The issue in *Kimmelman* was whether *Stone* applied to a respondent's claim for habeas relief on grounds of ineffective assistance of counsel relating to a mishandling of the exclusionary rule. *Kimmelman*, 477 U.S. at 368. Justice Brennan, writing for the Court, held that such claims were clearly within the scope of the habeas statute. *See id.* at 383. The right to counsel, the Justice observed, was fundamental to the justice system. *Id.* at 374 (citation omitted). In addition, Justice Brennan reasoned that the complexities of the legal system often prevent criminal defendants from recognizing the incompetence of their attorneys. *Id.* at 378 (citation omitted). Justice Brennan asserted that restricting habeas review by applying *Stone* would thus hamper the proper functioning of the Sixth Amendment. *Id.*

[74] 433 U.S. 72 (1977).

[75] *See* Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362, 372 n.66 (1991) ("*Sykes* related only to trial-type defaults, where [*Fay*] involved an appellate default (failure to appeal), so that technically [*Fay*] was not thereby overruled."). *Sykes* marked the effective overruling of *Fay*, as it limited its holding to that specific set of facts. Coleman v. Thompson, 111 S. Ct. 2546, 2563 (1991); Rosenberg,

contemporaneous objection rule[76]—a habeas petitioner would be required to show cause for his or her waiver and prejudice resulting from that waiver.[77] The broad "deliberate bypass" standard,[78] the Court declared, failed to account for the benefits of the contemporaneous objection rule.[79] Justice Rehnquist also claimed that a less onerous standard for overcoming the rule encouraged lawyers to store claims for appeal instead of airing them during the trial.[80]

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supra, at 372. For a detailed discussion of *Fay*, see *supra* notes 55-61 and accompanying text.

76 FLA. R. CRIM. P. 3.190(i) (1993). The federal contemporaneous objection rule is embodied in Rule 51 of the Federal Rules of Criminal Procedure and provides:

> Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time of the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor . . . .

FED. R. CRIM. P. 51 (1989). The contemporaneous objection rule provides that "an error not raised and preserved at trial will not be considered on appeal." LAFAVE & ISRAEL, *supra* note 2, § 27.5(c), at 1158.

77 *Sykes*, 433 U.S. at 86-87 (citation omitted). Sykes petitioned for habeas relief on the grounds that he did not understand his *Miranda* warning. *Id.* at 75 (footnote omitted). The issue was not raised by Sykes's counsel at trial. *Id.* (footnote omitted). The Supreme Court denied Sykes's petition for relief holding that the "cause-and-prejudice" standard of *Francis v. Henderson* applied to Sykes's procedural waiver. *Id.* at 87 (citing Francis v. Henderson, 425 U.S. 536, 542 (1976)). The Court, however, left open the definition of "cause-and-prejudice," as well as the precise scope of which procedural rules would be affected. *Id.* at 87-88, 88 n.12. In addition, the Court denied that its decision conflicted with *Brown v. Allen*, which held that habeas petitioners were entitled to *de novo* review of their claims in federal court. *Id.* at 87 (citing Brown v. Allen, 344 U.S. 443, 460-65 (1953)). Justice Rehnquist asserted that *Brown* was concerned with claims that had already been litigated in the state court. *Id.* In contrast, the Justice reasoned, Sykes's claim had not been resolved in the state courts. *Id.*

78 A "deliberate bypass" or waiver of a state procedural requirement is "'an intentional relinquishment or abandonment of a known right or privilege.'" *Id.* at 83 (quoting Fay v. Noia, 372 U.S. 391, 439 (1963); Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

79 *Id.* at 88-89.

80 *Id.* at 89. Specifically, Justice Rehnquist referred to "sandbagging" by defense lawyers. *Id.*

The "cause-and-prejudice" standard was extended to all habeas petitions filed subsequent to a state procedural default by *Engle v. Isaac*. 456 U.S. 107, 134-35 (1982). In *Isaac*, the Court rejected the contention that the "cause-and-prejudice" standard of *Sykes* should only apply to constitutional errors not relating to the "truthfinding function of the trial," for example, the prophylactic rule of *Miranda*. *Id.* at 129 (citing Miranda v. Arizona, 384 U.S. 436 (1966)). Specifically, the *Isaac* Court stated: "The costs [of habeas review] do not depend upon the type of claim raised by the prisoner. While the nature of a constitutional claim may affect the calculation of cause and actual prejudice, it does not alter the need to make that threshold showing." *Id.*

In 1991, the Rehnquist Court explicitly overruled what was left of *Fay* in deciding

The Court further eroded the scope of habeas review in *Teague v. Lane*,[81] holding that retroactive effect of new constitutional rules announced by the Court would generally not be available to habeas petitioners.[82] Petitioner argued that he was entitled

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whether the deliberate bypass standard was still applicable where a prisoner had failed to appeal. Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991); *see* LAFAVE & ISRAEL, *supra* note 2, § 28.4(e), at 1213-14. Specifically, the *Coleman* Court held that habeas review was not available to any state prisoner who had defaulted on federal claims pursuant to a state procedural rule, absent a showing of cause for the default and prejudice resulting therefrom. *Coleman*, 111 S. Ct. at 2565. The petitioner in *Coleman*, facing the death penalty, defaulted on his opportunity for state post-conviction review because his attorney inadvertently filed for review three days late. *Id.* at 2552-53, 2564 (citation omitted). Under the deliberate bypass standard, the Court noted, federal habeas review was still available to Coleman. *Id.* at 2564. Overruling *Fay*, the Court subjected Coleman to the more rigorous cause-and-prejudice standard, which Coleman was unable to satisfy. *Id.* at 2565, 2568. The Court asserted that *Fay* deemphasized the importance of comity and state procedural rules. *Id.* at 2565.

Judge Lay, former Chief Judge of the United States Court of Appeals for the Eighth Circuit, criticized the cause-and-prejudice standard as unjust, particularly in the context of a capital punishment case. Lay, *supra* note 65, at 1033-34. Judge Lay observed that the world is imperfect and that attorneys will inevitably make mistakes affecting their clients. *Id.* Judge Lay questioned the need for strict enforcement of the cause-and-prejudice standard on habeas review where, as in Coleman's case, the attorney's mistake occurred during state direct review, and the error would have been subject to the Sixth Amendment. *Id.* at 1036. The cause-and-prejudice standard, Judge Lay asserted, does not advance or improve judicial efficiency but rather complicates the habeas process by requiring more detailed review. *Id.* at 1036-37.

[81] 489 U.S. 288 (1989) (plurality).

[82] *Id.* at 306, 310. Chief Justice Rehnquist and Justices Scalia and Kennedy joined in the plurality opinion. *Id.* at 292. Justice White concurred in Parts I, II, and III of the plurality opinion and found the plurality's holding to be an acceptable result. *Id.* at 316, 317 (White, J., concurring in part and concurring in the judgment). Justice Stevens, joined by Justice Blackmun, concurred only in Part I of the plurality's decision and agreed with the plurality's holding with regards to retroactivity and collateral review. *Id.* at 318 (Stevens, J., concurring in part and concurring in the judgment).

Justice Brennan, joined by Justice Marshall, argued that the plurality's decision was a drastic and insupportable new interpretation of the scope of habeas review. *Id.* at 326-27 (Brennan, J., dissenting). Justice Brennan attacked the plurality for ignoring the nature of federal habeas corpus, as enacted by the Habeas Corpus Act of 1867. *Id.* at 327-28 (Brennan, J., dissenting). The dissent also stated that the plurality ignored precedent, which dictated a broad interpretation of the scope of habeas review. *Id.* at 328-30 (Brennan, J., dissenting) (citations omitted). *Stone*, Justice Brennan argued, was the only case in which the Court limited the scope of habeas review absent a procedural default. *Id.* at 329 n.2 (Brennan, J., dissenting) (citing Stone v. Powell, 428 U.S. 465, 479 (1976)).

Furthermore, Justice Brennan asserted: "[T]he plurality's decision to ignore history and to link the availability of relief to guilt or innocence when the outcome of a case is not '*dictated*' by precedent would apparently prevent a great many Fifth, Sixth, and Fourteenth Amendment cases from being brought on federal habeas." *Id.* at 334 (Brennan, J., dissenting). Justice Brennan gave examples of previous cases that would not have reached the Court under the plurality's new standard. *Id.* at 334-37 (Brennan, J., dissenting) (citations omitted); *see, e.g.*, Nix v. Whiteside, 475 U.S. 157, 159 (1986) (implicating a criminal defendant's right to assistance of counsel); Estelle v.

to retroactive application of a Supreme Court decision handed down after he filed for habeas corpus relief.[83] The Court, in a plurality decision by Justice O'Connor,[84] concluded that the need for a clear standard and the costs to society of habeas corpus relief warranted a substantial restriction in applying decisions retroactively to habeas petitions.[85] The plurality allowed two exceptions to

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Smith, 451 U.S. 454, 461 (1981) (alleging a violation of the Fifth Amendment privilege against self-incrimination); Crist v. Bretz, 437 U.S. 28, 29 (1978) (claiming violation of the Double Jeopardy Clause). Finally, the dissent dismissed the plurality's emphasis on the disparate treatment of similarly situated habeas petitioners caused by the lack of a clear retroactivity standard. *Teague*, 489 U.S. at 337-40 (Brennan, J., dissenting). Justice Brennan stated he believed that the "uniform treatment of habeas petitioners is not worth the price the plurality is willing to pay." *Id.* at 339 (Brennan, J., dissenting). The Justice continued: "[I]t is at least arguably better that the wrong done to one person be righted than that none of the injuries inflicted on those whose convictions have become final be redressed, despite the resulting inequality in treatment." *Id.*

83 *Teague*, 489 U.S. at 294. Teague's initial habeas petition alleged that the prosecutor used his peremptory challenges to exclude blacks from the jury. *Id.* at 293. During Teague's appeal of the district court's denial of habeas relief the Supreme Court decided *Batson v. Kentucky*, which substantially relaxed the requirements for establishing racial discrimination under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 294, 295 (quoting Batson v. Kentucky, 476 U.S. 79, 96-97 (1986)). To establish a *prima facie* case of racial discrimination in jury selection, the *Batson* Court held that a petitioner would have to demonstrate that the prosecutor in the specific case violated the Equal Protection Clause. *Batson*, 476 U.S. at 96, 97. The *Batson* Court rejected a standard requiring a showing of repeated instances of deliberate exclusion of jurors based on their race. *Id.* at 95-96 (citations omitted).

84 *Teague*, 489 U.S. at 292. The plurality opinion relied extensively on the opinions of Justice Harlan. *Id.* at 303-15; *see* Desist v. United States, 394 U.S. 244, 260-69 (1969) (Harlan, J., dissenting) (expressing Justice Harlan's views regarding the retroactive application of rules of constitutional law on habeas corpus review). Justice O'Connor noted Justice Harlan's recognition of distinct differences between direct and collateral review, stating that "[h]abeas corpus has always been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review." *Teague*, 489 U.S. at 306 (quoting Mackey v. United States, 401 U.S 667, 682-83 (1971) (Harlan, J., concurring in part and dissenting in part)). Justice O'Connor emphasized that "it is 'sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation.'" *Id.* (alteration in original) (quoting *Mackey*, 401 U.S. at 689 (Harlan, J., concurring in part and dissenting in part)). The plurality expressed its agreement with Justice Harlan's view and added that considerations of finality in the criminal justice system, as well as courtesy between the state and federal systems, also warranted restricting the scope of habeas review. *Id.* at 308.

85 *Teague*, 489 U.S. at 305, 309-10 (citations omitted). The plurality rejected the retroactivity analysis of *Linkletter v. Walker*, asserting that it produced inconsistent results. *Id.* at 302 (citing Linkletter v. Walker, 381 U.S. 618 (1965)). In *Linkletter*, the Court addressed the issue of whether its decision in *Mapp* applied retroactively to a habeas petition where the petitioner's conviction had become final prior to the Court's decision. *Linkletter*, 381 U.S. at 619-20. While retroactive application of changes in law clearly applied to cases on direct review, retroactive application to

the general rule of non-retroactivity.[86] Justice O'Connor first excepted situations where a new constitutional rule proscribed certain types of primary, private-individual behavior outside the scope of the criminal law-making power.[87] Second, the plurality provided for retroactive application of a new rule where the fundamental fairness of a trial is implicated and the rule is related to the guilt determination process.[88]

In *Chapman v. California*,[89] the Supreme Court significantly broadened the scope of the harmless-error rule.[90] The *Chapman* Court held that certain constitutional violations did not warrant automatic reversal of a conviction and could be subjected to harmless-error analysis.[91] As the Court increasingly favored the con-

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cases on collateral review required a deeper analysis. *Id.* at 627 (citations omitted). The Court then analyzed the purpose of the new rule set forth in *Mapp*, the reliance placed on the old rule, and the effect retroactive application would have on the justice system. *Id.* at 636. After this extensive analysis, the *Linkletter* Court concluded that *Mapp* was not retroactively applicable. *Id.* at 639-40.

86 *Teague*, 489 U.S. at 307, 311 (quoting *Mackey*, 401 U.S. at 692-93 (Harlan, J., concurring in part and dissenting in part)).

87 *Id.* at 311 (quoting *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in part and dissenting in part) (stating that a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe")). The plurality found that Teague's claim clearly did not fit into this first exception. *Id.*

88 *Id.* at 307, 311-13 (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part) (quoting Palko v. Connecticut, 302 U.S 319, 324-25 (1937))). The plurality relied on the reasoning of *Stone* to narrow the scope of Justice Harlan's second exception. *Id.* at 312, 313 (citing Stone v. Powell, 428 U.S. 465, 491-92 n.31)). Justice Harlan's second exception permitted retroactive application where procedures "'implicit in the concept of ordered liberty'" were affected. *Id.* at 311 (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part) (quoting *Palko*, 302 U.S. at 324-25)). Applying the second exception, the plurality concluded that Teague was not entitled to relief because the effect of not being tried by a fair cross section of his peers neither impaired the fundamental fairness of Teague's trial nor related unfavorably to the truth determination process. *Id.* at 315.

89 386 U.S. 18 (1967).

90 *See* Stacy & Dayton, *supra* note 7, at 82-83; LAFAVE & ISRAEL, *supra* note 2, § 27.6(c), at 1166. *Chapman* rests on the proposition that, given human fallibility, "there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial." United States v. Hasting, 461 U.S. 499, 508-09 (1983) (citations omitted).

91 *Chapman*, 386 U.S. at 22. The petitioners in *Chapman*, Ruth Chapman and Thomas Teale, received life imprisonment and the death penalty for their respective roles in the robbery, kidnapping, and murder of a bartender. *Id.* at 18-19. Chapman and Teale chose not to testify at their trial, and the prosecutor referred extensively to that fact in his summation, as he was entitled to under the California Constitution. *Id.* at 19. The defendants were found guilty, but before they began the appeal process, the United States Supreme Court ruled in another case that the California practice of commenting on the silence of defendants, as well as the provision of the California Constitution upon which the practice was based, violated the Fifth Amendment's

cerns of prosecutors, the reach of the harmless-error rule gradually expanded to include almost all constitutional errors.[92] Between 1967 and 1993, courts reviewing constitutional violations applied the harmless-error standard announced in *Chapman*, which evaluated whether the effect of the error was "harmless beyond a reasonable doubt" to the defendant's interests.[93] The standard applied to non-constitutional errors was first enunciated by the Court in *Kotteakos v. United States*.[94] The *Kotteakos* test required reversal where the error "had substantial and injurious effect or influence in determining the jury's verdict."[95]

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guarantee against self-incrimination. *Id.* at 18, 19-20 (citing Griffin v. California, 380 U.S. 609, 615 (1965)).

On appeal, the California Supreme Court acknowledged that Chapman's and Teale's rights had been violated under *Griffin*. *Id.* at 20 (citation omitted). However, the court applied the harmless-error provision of the state constitution and concluded that the defendants were unharmed by the error because a "miscarriage of justice" had not occurred. *Id.* (footnote omitted). The United States Supreme Court rejected the argument that constitutional errors could never be harmless, citing federal and state harmless-error rules as evidence of the acceptance and worth of the rule. *Id.* at 21-22. The Court stated: "[T]here 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." *Id.* at 22. The *Chapman* Court recognized that some constitutional violations could never be harmless. *Id.* at 23. *See infra* note 100 (listing constitutional errors affecting a party's substantial rights that are not subject to harmless-error analysis). The Court determined that the appropriate standard for harmlessness required the reviewing court to "be able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. The Court concluded that it could not be shown beyond a reasonable doubt that the defendants were unharmed by the prosecutor's statements. *Id.* at 26.

92 Stacy & Dayton, *supra* note 7, at 79-80, 80 n.7 (quoting Rose v. Clark, 478 U.S. 570, 578-79 (1986) (citing *Hasting*, 461 U.S. at 509)). The *Rose* Court stated that constitutional errors not subject to harmless-error analysis were the exception rather than the rule. *Rose*, 478 U.S. at 578-79 (citation omitted). The Court noted that if the accused had been represented by counsel before an impartial judge, then "there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Id.* at 579.

93 *See Rose*, 478 U.S. at 576-79; *Chapman*, 386 U.S. at 24.

94 328 U.S. 750, 764-65 (1946). In *Kotteakos*, the petitioners had been tried pursuant to an indictment charging a single conspiracy when, in fact, several separate conspiracies had operated. *Id.* at 752, 755 (citations omitted). At issue was whether the error affected the substantial rights of the parties. *Id.* at 752. The *Kotteakos* Court concluded that the proper analysis considered the error's effect on the outcome of the trial, and not the nature of the error. *Id.* at 764. Refining this conclusion, Justice Rutledge, writing for the Court, stated: "The inquiry cannot be merely whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." *Id.* at 765.

95 *Id.* at 764-65, 776. Applying the *Kotteakos* standard in 1986, the Supreme Court held that improper joinder, a non-constitutional trial error, affected substantial rights and was subject to harmless-error analysis. United States v. Lane, 474 U.S. 438, 449

Twenty-two years after *Chapman*, the Supreme Court markedly expanded the scope of the harmless-error rule in *Arizona v. Fulminante*.[96] The *Fulminante* Court held that the use of a coerced confession at trial in violation of the Due Process Clause was subject to the harmless-error standard of *Chapman*.[97] Writing for the Court, Chief Justice Rehnquist[98] first expounded the vast body of decisions applying harmless-error analysis to various issues.[99] Acknowledging *Chapman*'s warning that some types of constitutional violations, including the use of a coerced confession, could never be harmless, the Chief Justice asserted that *Chapman* did not affirmatively bar applying harmless-error analysis to the use of a coerced confession.[100]

(1986). The *Lane* Court then concluded that a limiting jury charge prevented the error from substantially influencing the jury's verdict. *Id.* at 450.

96 111 S. Ct. 1246 (1991).

97 *Id.* at 1264, 1266. Fulminante was a suspect in the Arizona murder of his stepdaughter. *Id.* at 1250. Fulminante was not charged with the murder, and he left Arizona for New Jersey, where he was later convicted of a federal firearms offense. *Id.* In prison, another inmate, a former police officer and a paid Federal Bureau of Investigation informant, was instructed to inquire into the fate of Fulminante's stepdaughter. *Id.* The Arizona Supreme Court and the United States Supreme Court both concluded that Fulminante's confession to the inmate that he murdered his stepdaughter was coerced. *Id.* at 1252-53 (footnote omitted). The Court discerned that the confession was motivated by Fulminante's fear of other prisoners and the inmate's offer of protection in exchange for a confession. *Id.* at 1253.

98 Chief Justice Rehnquist authored Part II for the Court and filed a dissent as to Parts I and III. *Id.* at 1249, 1261-66. Justice White delivered Parts I, II, and IV of the Court's opinion. *Id.* at 1248, 1250-53, 1257-61. The Justice, however, dissented as to Part III. *Id.* at 1253-57 (White, J., dissenting). Justice Kennedy concurred in the judgment. *Id.* at 1266-67 (Kennedy, J., concurring).

99 *Id.* at 1263 (citations omitted); *see, e.g.*, Rose v. Clark, 478 U.S. 570, 579-80 (1986) (determining that a jury instruction that wrongly created a presumption regarding the defendant's mental state was not so fundamental to a fair trial that harmless-error analysis was precluded).

100 *Fulminante*, 111 S. Ct. at 1264 (quoting Chapman v. California, 386 U.S. 18, 23 (1967)). *But see id.* at 1253, 1253-57 (White, J., dissenting) (asserting that the harmless-error rule cannot be applied to coerced confessions that have been erroneously admitted). The *Chapman* Court stated: "[O]ur prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error . . . ." *Chapman*, 386 U.S. at 23 (citing Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (declaring that indigent defendants have a constitutional right to counsel); Payne v. Arkansas, 356 U.S. 560, 568 (1958) (concluding that a coerced confession deprived the defendant of due process of law); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (holding that constitutional due process of law requires an impartial judge)). Chief Justice Rehnquist asserted that the *Chapman* Court referred to the impermissible applications for "historical" purposes. *Fulminante*, 111 S. Ct. at 1264. The Chief Justice then declared that *Payne* rejected a sufficiency of the evidence standard and did not act to bar findings of harmlessness. *Id.* (citing *Payne*, 356 U.S. at 567-68); *see Payne*, 356 U.S. at 568 (stating that where a coerced confession was part of the evidence presented to a jury, the effect of such evidence on the jury was not measurable, and accordingly, "even though there may have been sufficient evi-

The *Fulminante* majority then declared that constitutional errors were classifiable as either "structural errors" or "trial errors."[101] A trial error, the Court posited, occurred during the presentation of a case to the jury and was capable of being "quantitatively assessed" to measure its effect on a trial and thus amenable to harmless-error analysis.[102] In contrast, the Court explained, structural errors affected the integrity of the entire trial process and therefore could not be subjected to harmless-error analysis.[103]

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dence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment") (footnote omitted). In *Fulminante*, Chief Justice Rehnquist contended that the *Payne* Court rejected not a strict *Chapman* style analysis of the error, "but a much more lenient rule which would allow affirmance of a conviction if the evidence other than the involuntary confession was sufficient to sustain the verdict." *Fulminante*, 111 S. Ct. at 1264.

In dissent, Justice White, joined by Justices Marshall, Blackmun, and Stevens, chastened the majority for abandoning the proposition that the use of a coerced confession could never be harmless. *Id.* at 1253 (White, J., dissenting). Justice White stated that the majority had abandoned the principle that "'a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession.'" *Id.* (citation omitted). Justice White asserted that precedent dictated that the majority's result was an "'impermissible doctrine.'" *Id.* (quoting Lynumn v. Illinois, 372 U.S. 528, 537 (1963)). Citing the body of law dictating that the use of a coerced confession violates due process, Justice White assailed the majority for making such a monumental change without adequately explaining its reasons. *Id.* at 1253-54 (White, J., dissenting) (citations omitted).

The dissent also reasoned that the use of coerced confessions could undermine the guilt-determination function of trials. *Id.* at 1255-56 (White, J., dissenting). The dissent asserted that coerced confessions are not inherently trustworthy and thus their "admission . . . may distort the truth-seeking function of the trial upon which the majority focus[ed]." *Id.* at 1256 (White, J., dissenting) (citations omitted). Finally, the dissent asserted that the majority's decision was inconsistent with society's vision of justice. *Id.* at 1256-57 (White, J., dissenting). Justice White observed that the Court's previous decisions relating to coerced confessions reflected society's "'strongly felt attitude . . . that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.'" *Id.* at 1256 (White, J., dissenting) (quoting Blackburn v. Alabama, 361 U.S. 199, 206-07 (1960)).

101 *Fulminante*, 111 S. Ct. at 1264-65. The dissent characterized the majority's distinction of structural error and trial error as meaningless. *Id.* at 1254 (White, J., dissenting). The dissent argued that the majority's definition of a trial error unjustifiably assumed that all constitutional errors could be easily classified into one of two seemingly exclusive categories. *Id.* at 1254-55 (White, J., dissenting). *Compare* Kentucky v. Whorton, 441 U.S. 786, 789-90 (1979) (holding that failure to instruct the jury on the presumption of innocence was subject to harmless-error analysis) *with* Jackson v. Virginia, 443 U.S. 307, 320 n.14 (1979) (concluding that failure to instruct the jury on the reasonable doubt standard was not reviewable under the harmless-error doctrine).

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

103 *Id.* at 1264-65 (citing Gideon v. Wainwright, 372 U.S. 335, 339 (1963); Tumey v. Ohio, 273 U.S. 510, 523 (1927)). The Chief Justice stated that structural errors "af-

Against this background, the United States Supreme Court addressed the doctrines of both habeas corpus and harmless-error in *Brecht v. Abrahamson.*[104] The issue, a source of conflict among the circuit courts, was the correct harmless-error standard applicable to the collateral review of violations of a suspect's right not to incriminate himself.[105] The Court adopted the substantial prejudice standard of *Kotteakos* rather than the "harmless beyond a reasonable doubt" standard of *Chapman.*[106]

Writing for the majority, Chief Justice Rehnquist[107] commenced the Court's analysis by examining the Court's holding in *Doyle,* which had provided the basis for Brecht's appeals on both the state and federal level.[108] The Court summarily dismissed the Seventh Circuit's characterization of *Doyle* as a prophylactic rule.[109] Chief Justice Rehnquist acknowledged that *Doyle* stood for the proposition that it is inherently unfair to impeach the testimony of a defendant with post-arrest silence after assuring him of his right to remain silent and that any silence would not be used against him.[110] In the case at bar, the Court noted that while the prosecutor's references to Brecht's failure to offer any explanation prior to his receiving *Miranda* rights were obviously permissible, the refer-

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fect[ed] the framework within which the trial proceeds, rather than simply . . . the trial process itself." *Id.* at 1265; *see also* Vasquez v. Hillery, 474 U.S. 254, 255-56 (1986) (alleging discrimination during grand jury proceedings); McKaskle v. Wiggins, 465 U.S. 168, 170 (1984) (seeking a right to self-representation); Waller v. Georgia, 467 U.S. 39, 40-41 (1984) (asserting the right to a public trial).

104 113 S. Ct. 1710 (1993).

105 *Id.* at 1713-14, 1716 (citations omitted). *Compare* Brecht v. Abrahamson, 944 F.2d 1363, 1375 (7th Cir. 1991) (holding that the substantial and injurious effect or influence standard was appropriate when reviewing *Doyle* violations), *aff'd,* 113 S. Ct. 1710 (1993) *with* Bass v. Nix, 909 F.2d 297, 304-05 (8th Cir. 1990) (applying the "harmless beyond a reasonable doubt" standard to *Doyle* violations).

106 *Brecht,* 113 S. Ct. at 1716, 1724.

107 Justices Stevens, Scalia, Kennedy, and Thomas joined in the majority opinion. *Id.* at 1713.

108 *Id.* at 1716-17. *See supra* note 34 (discussing *Doyle*).

109 *Brecht,* 113 S. Ct. at 1717. In *Stone,* Justice Powell characterized the exclusionary rule of *Mapp* as a prophylactic rule. Stone v. Powell, 428 U.S. 465, 485-87 (1976). A prophylactic rule, Justice Powell explained, was not found in the Constitution, afforded no personal rights, and was not intended to redress any wrong. *Id.* at 486 (citing Linkletter v. Walker, 381 U.S. 618, 637 (1965)). Having established what a prophylactic rule was not, Justice Powell asserted that a prophylactic rule was instead a "'judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.'" *Id.* (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)). The *Stone* Court submitted that the prophylactic effect of the exclusionary rule—deterring state violations—was extremely diminished where a habeas review could occur possibly years after a petitioner's original trial. *Id.* at 493.

110 *Brecht,* 113 S. Ct. at 1716 (quoting Wainwright v. Greenfield, 474 U.S. 284, 292 (1986)).

ences to Brecht's post-*Miranda* silence clearly violated *Doyle*.[111]

Having rejected the court of appeals's characterization of *Doyle* as a prophylactic rule,[112] Chief Justice Rehnquist posited that the proper framework for viewing *Doyle* violations was to categorize the violation as either a "structural error" or a "trial error."[113] Structural errors, the Court noted, are errors that have such a negative impact on the whole essence of a fair trial that their occurrence can never be viewed as harmless.[114] The Court explained that trial errors are viewed as quantifiable, a quality that allows courts to make an objective determination of an error's impact on the jury, and are therefore subject to harmless-error analysis.[115] The majority determined that the prosecutor's comments concerning Brecht's pre-trial silence were trial-type constitutional violations.[116]

Turning to the issue of the appropriate harmless-error standard, Chief Justice Rehnquist noted that the question presented was one of first impression because previous cases applying the harmless-error rule did not address the application of the *Chapman* standard to habeas petitions.[117] The Court acknowledged that the

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111 *Id.* at 1716-17. The Chief Justice posited that if the shooting really was an accident, Brecht should have explained so immediately. *Id.* at 1717. Accordingly, the Court determined that the State properly impeached Brecht's account by questioning why there was no immediate explanation. *Id.* at 1716-17. In contrast, Chief Justice Rehnquist reasoned, once Brecht was informed of his *Miranda* rights, he was entitled to rely on the substance of those rights. *Id.* at 1717.

112 *Id.* The Court quoted the lower court's reasoning that "*Doyle* is . . . a prophylactic rule designed to protect another prophylactic rule from erosion or misuse." *Id.* (quoting Brecht v. Abrahamson, 944 F.2d 1363, 1370 (7th Cir. 1991)). Chief Justice Rehnquist refuted this construction, stating that *Doyle* was not simply a further extension of the *Miranda* prophylactic rule, but rather "it is rooted in fundamental fairness and due process concerns." *Id.*

113 *Id.* (quoting Arizona v. Fulminante, 111 S. Ct. 1246, 1264-65 (1991)). *See supra* notes 101-03 and accompanying text (evaluating the differences between trial errors and structural errors).

114 *Brecht*, 113 S. Ct. at 1717 (quoting *Fulminante*, 111 S. Ct. at 1254). *Chapman* acknowledged that some constitutional errors were so egregious that a harmless-error analysis simply could not be applied. Chapman v. California, 386 U.S. 18, 23 (1967). *See supra* note 100 (listing constitutional errors not amenable to harmless-error analysis).

115 *Brecht*, 113 S. Ct. at 1717 (quoting *Fulminante*, 111 S. Ct. at 1264) ("Trial error 'occur[s] during the presentation of the case to the jury, and . . . 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.'")).

116 *Id.* The Chief Justice stated the majority thought that a "*Doyle* error fits squarely into the category of constitutional violation which [the Supreme Court] categorized as "'trial error.'" *Id.* (citing *Fulminante*, 111 S. Ct. at 1264-65).

117 *Id.* at 1718 (citing Yates v. Evatt, 111 S. Ct. 1884 (1991); Rose v. Clark, 478 U.S. 570 (1986); Milton v. Wainwright, 407 U.S. 371 (1972); Anderson v. Nelson, 390 U.S. 523 (1968)). Chief Justice Rehnquist explained that in previous cases, the Court simply had not questioned *Chapman* as the only harmless-error standard applicable on

habeas corpus statute provided only the means for state prisoners to reach federal courts and offered scant guidance on the methods of collateral review.[118] Given the broad nature of the habeas statute, the Chief Justice declared that it was the role of the Court to specify in areas where the statute was silent.[119]

The majority then began a general discussion of habeas review by stating that direct review and collateral review are separate and distinct processes.[120] Direct review fills the primary role of the post-conviction process, the Court explained, while federal habeas review holds a supporting role as a remedy for those persons who have been subjected to egregious failures of state legal systems.[121] Given this role of habeas corpus, the Court concluded that errors were reviewable on collateral appeal according to less strict standards than those applicable on direct appeal.[122] The majority justi-

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collateral review. *Id.* For example, in *Rose v. Clark*, the issue was whether the harmless-error standard applied to jury instructions. *Rose*, 478 U.S. at 572 (citations omitted). In addition, the *Brecht* Court dismissed Brecht's argument that *stare decisis* precluded a finding that the "substantial and injurious effect" standard of *Kotteakos* applied. *Brecht*, 113 S. Ct. at 1718. But the Court noted that the issue of which standard was applicable had not been previously addressed. *Id.* (citation omitted). The Court also spurned Brecht's reasoning that Congress's rejection of past efforts to apply a less burdensome standard of harmless-error review to habeas petitions amounted to tacit approval of the *Chapman* standard's continued application. *Id.* at 1718-19.

118 *Brecht*, 113 S. Ct. at 1718. *See supra* note 3 (providing the text of specific provisions of the federal habeas statute, 28 U.S.C. §§ 2241-2255). The federal statute has basically remained unchanged since 1867 and Congress has not significantly reacted to the Court's varying interpretations of the statute. *See* LAFAVE & ISRAEL, *supra* note 51, § 27.2(c), at 1017.

119 *Brecht*, 113 S. Ct. at 1719 (citations omitted). For example, in *Sanders v. United States*, the Court stated that "the judicial and statutory evolution of the principles governing successive applications for federal habeas corpus and motions under [28 U.S.C.] § 2255 has reached the point at which the formulation of basic rules to guide the lower federal courts is both feasible and desirable." Sanders v. United States, 373 U.S. 1, 15 (1963) (citation omitted).

120 *Brecht*, 113 S. Ct. at 1719 (citing Wright v. West, 112 S. Ct. 2482, 2490 (1992); Teague v. Lane, 489 U.S. 288, 306 (1989); Pennsylvania v. Finley, 481 U.S. 551, 556-57 (1987); Mackey v. United States, 401 U.S. 667, 682-83 (1971) (Harlan, J., concurring in part and dissenting in part)). *Contra* Stone v. Powell, 428 U.S. 465, 509-11 (1976) (Brennan, J., dissenting) (arguing that the *Stone* Court's distinction between direct and collateral review was unjustifiable in light of the federal habeas statute's clear meaning).

121 *See Brecht*, 113 S. Ct. at 1719. The Chief Justice emphasized: "Direct review is the principal avenue for challenging a conviction. 'The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited.'" *Id.* (quoting Barefoot v. Estelle, 463 U.S. 880, 887 (1983)).

122 *Id.* at 1720-22. With regard to other issues, the Chief Justice noted, habeas petitions were subject to different standards from cases on direct review. *Id.* at 1720; *see, e.g., Teague*, 489 U.S. at 305-10 (positing that habeas petitioners cannot obtain retroactive application of favorable decisions handed down after having received final judg-

fied disparate treatment of cases on collateral review by emphasizing the importance of finality in the criminal justice system, a goal thwarted by extensive habeas review,[123] as well as the need for federal deference to state judicial systems.[124]

Next, Chief Justice Rehnquist analyzed the relative costs and benefits of applying the *Chapman* harmless-error rule, noting that Brecht had now aired his claims before six courts.[125] The majority asserted that there was no reason to doubt the state courts' competence and integrity in their adjudication of the issue.[126] The Court reiterated the values of finality and respect for state legal systems.[127] The Chief Justice emphasized that, given the role of habeas corpus as an extraordinary remedy, the *Chapman* standard

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ment); Stone v. Powell, 428 U.S. 465, 481-82 (1976) (holding that violations of the exclusionary rule were not cognizable on collateral review).

123 *Brecht*, 113 S. Ct. at 1720 (citing *Wright*, 112 S. Ct. at 2486-92; McCleskey v. Zant, 111 S. Ct. 1454, 1468-69 (1991); Wainwright v. Sykes, 433 U.S. 72, 90 (1977)); *cf. Sanders*, 373 U.S. at 24-25 (Harlan, J., dissenting) (stating that criminal defendants, as well as society, "have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community"). *See generally* Paul M. Bator, *Finality In Criminal Law And Federal Habeas Corpus For State Prisoners*, 76 HARV. L. REV. 441, 525-28 (1963) (arguing that federal habeas corpus should not be used as a means of merely rehashing issues which have already been adjudicated in state courts).

124 *Brecht*, 113 S. Ct. at 1720 (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982)); *see also* Bator, *supra* note 123, at 523 (arguing that the Court's message, in *Brown v. Allen*, to the state courts was that "no matter how conscientiously and fairly [state courts applied] themselves to the consideration of the merits of federal claims, whether presented at trial or on postconviction process, they will nevertheless automatically be second-guessed by federal district courts as to their conclusions of law and, possibly, factfindings, too").

125 *Brecht*, 113 S. Ct. at 1721-22. The issue was reviewed by the trial court, the Wisconsin Court of Appeals, the Wisconsin Supreme Court, the Federal District Court for the Western District of Wisconsin, the Court of Appeals for the Seventh Circuit, and finally, the United States Supreme Court. *Id.* at 1714-16, 1721.

126 *Id.* at 1721. In addition, the Chief Justice noted that the "state courts often occupy a superior vantage point from which to evaluate the effect of trial error." *Id.* (citing Rushen v. Spain, 464 U.S. 114, 120 (1983) (per curiam)); *cf. Stone*, 428 U.S. at 494 (barring habeas relief where "the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim") (footnote omitted). Chief Justice Rehnquist rejected Brecht's argument that the *Chapman* standard had any deterrent effect. *Brecht*, 113 S. Ct. at 1721. Absent specific allegations that lower courts were abusing their positions, the Chief Justice opined, the Court would not assume any need for deterrence. *Id.* (citation omitted). The *Brecht* Court explained: "Federalism, comity, and the constitutional obligation of state and federal courts all counsel against any presumption that a decision of this Court will 'deter' lower federal or state courts from fully performing their sworn duty." *Id.* (citing *Engle*, 456 U.S. at 128; Schneckloth v. Bustamonte, 412 U.S. 218, 263-65 (1973) (Powell, J., concurring)).

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

was too unforgiving in its effect on prosecutors' errors.[128] Finally, the Court stressed the cost to society of allowing cases to drag out for years.[129]

In light of these considerations, the Court ruled that the "less onerous" *Kotteakos* harmless-error standard applied to habeas corpus petitions alleging trial-type constitutional errors and asked whether the error "had substantial and injurious effect or influence in determining the jury's verdict."[130] The majority reasoned that the decision was consistent with its vision of habeas jurisprudence.[131] The Court also declared that ample case law existed concerning the federal harmless-error statute as guidance for future applications of the Court's holding.[132] Applying the *Kotteakos* standard to the facts, the Court concluded that the prosecution's impermissible use of Brecht's post-*Miranda* silence did not substantially sway the jury's determination.[133] The Court found Brecht's early failures to explain his actions and the pre-*Miranda* silence utilized by the State at trial as highly probative of Brecht's guilt.[134] Additionally, the majority emphasized that the State presented substantial evidence of Brecht's guilt.[135]

Justice Stevens, concurring, supported the Court's holding by

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128 *Id.*

129 *Id.* The majority stated that such costs included "the expenditure of additional time and resources for all the parties involved, the 'erosion of memory' and 'dispersion of witnesses' which accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of 'society's interest in the prompt administration of justice.'" *Id.* (quoting United States v. Mechanik, 475 U.S. 66, 72 (1986) (quotations omitted)). The majority also lamented the lack of any statute of limitation applying to habeas reviews. *Id.*

130 *Id.* at 1721-22 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). The Court emphasized that habeas petitioners would not be eligible for relief without showing that the error actually caused harm. *Id.* at 1722 (citing United States v. Lane, 474 U.S. 438, 449 (1986)). The Court left open the possibility that a trial-type constitutional error could potentially be so outrageous as to have the effect of a structural-type error, "so infect[ing] the integrity of the proceeding as to warrant the grant of habeas relief." *Id.* at 1722 n.9. Such an error, the Chief Justice observed, would warrant granting relief even absent a showing that the jury was influenced by the error. *Id.* (citing Greer v. Miller, 483 U.S. 756, 769 (1987) (Stevens, J., concurring) (stating that the possibility existed for "extraordinary cases in which the *Doyle* error is so egregious, or is combined with other errors or incidents of prosecutorial misconduct, that the integrity of the process is called into question")).

131 *Id.* at 1722.

132 *Id.* (citing 28 U.S.C. § 2111 (1988)). *See supra* note 10 (discussing the federal harmless-error rule).

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

134 *Id.*

135 *Id.* The Chief Justice cited several inconsistencies between Brecht's version of the event and the determinations of investigators. *See id.* The Court also observed that the prosecution had established a motive for the killing. *Id.*

emphasizing that the substantial prejudice standard provided more than merely nominal protection of state prisoners' interests.[136] The Justice noted that the Court's decision in *Kotteakos* placed the burden of proving an error's harmlessness upon the prosecution.[137] Justice Stevens further emphasized that the new standard required a fresh review of the record to determine an error's effect on the jury.[138] While the *Kotteakos* standard was more forgiving to prosecutors than *Chapman*, given effective and fair application, the concurrence concluded that the new standard sufficiently protected the interests of habeas petitioners.[139]

In dissent,[140] Justice White argued that the reasoning behind the Court's holding was flawed in light of judicial precedent and the nature of the federal habeas statute.[141] Only in *Stone*, the dissent observed, had the Court ever held that a constitutional violation warranted relief on direct review, but not on collateral

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136 *Id.* at 1723-25 (Stevens, J., concurring). In *Greer v. Miller*, Justice Stevens had previously addressed the issue of what harmless-error standard applied to violations of *Doyle* on habeas review. Greer v. Miller, 483 U.S. 756, 768 (1987) (Stevens, J., concurring). Justice Stevens observed that, on direct review, the harmless-error standard applicable to *Doyle* violations was whether the error was harmless beyond a reasonable doubt. *Id.* Generally, Justice Stevens opined that *Chapman* required too burdensome a standard for states to meet on collateral review and should apply only to the most outrageous instances of misconduct. *See id.* at 768-69 (Stevens, J., concurring).

137 *Brecht*, 113 S. Ct. at 1723 (Stevens, J., concurring) (footnote omitted); *see also* Kotteakos v. United States, 328 U.S. 750, 760 (1946) (quotation omitted) (looking to the legislative history of the federal harmless-error statute, § 269 of the Judicial Code, as amended, 28 U.S.C. § 391, for the proposition that if an "'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'").

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

139 *Id.* at 1724-25 (Stevens, J., concurring). Justice Stevens contended that "[i]n the end, the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied." *Id.* at 1725 (Stevens, J., concurring).

140 *Id.* (White, J., dissenting). Justice White was joined by Justice Blackmun. *Id.* Justice Souter joined except as to the footnote and Part III of the dissent. *Id.* at 1725, 1732 (Souter, J., dissenting).

141 *Id.* at 1725 (White, J., dissenting). Justice White began by asserting that the practical effect of the majority's holding, the application of a less stringent harmless-error standard on collateral review, would act to foreclose habeas petitioners from relief and was problematic because it assumed that the direct appeal process functions without flaw. *Id.* The Justice stated: "As a result of [the Court's] decision . . . the fate of one in state custody turns on whether the state courts properly applied the federal Constitution as then interpreted by decisions of this Court, and on whether we choose to review his claim on certiorari." *Id.* Justice White then reasoned that although there was no explicit authorization for using the *Chapman* standard on habeas review, construction of both *Chapman* and the habeas statute supported such an application. *Id.* at 1726 (White, J., dissenting) (citing 28 U.S.C. § 2254 (1988); Rose v. Clark, 478 U.S. 570, 584 (1986) (citation omitted)).

review.[142] The reasoning in *Stone*, Justice White continued, was wholly inapplicable regarding the use of Brecht's post-*Miranda* silence because the nature of that violation was rooted in concerns of due process and fundamental fairness and not the prophylactic effects at issue in *Stone*.[143] Accordingly, the dissent characterized the majority's result as inexplicable, especially in light of the Court's continued acceptance of the *Chapman* standard on direct review.[144]

Justice White next explained that the Court's holding, in tandem with the recent decision in *Fulminante*, foreclosed from habeas review state court determinations that a constitutional error was harmless beyond a reasonable doubt.[145] The Justice declared that such a result was inconsistent with the purpose of habeas corpus as a deterrent against violations of the Constitution by the state criminal justice systems.[146]

Justice O'Connor authored a separate dissent.[147] First, the Justice acknowledged that the majority correctly noted the inherently different natures of direct review and collateral review.[148] The Jus-

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142 *Id.* For an analysis of the majority opinion in *Stone*, see *supra* notes 65-67 and accompanying text. Justice White also noted his dissent from the Court's result in *Stone*. *Brecht*, 113 S. Ct. at 1726 (White, J., dissenting) (citing Stone v. Powell, 428 U.S. 465, 536-37 (1976) (White, J., dissenting)). *See supra* notes 68-72 and accompanying text (discussing Justice Brennan's dissent in *Stone*, with which Justice White substantially agreed).

143 *Brecht*, 113 S. Ct. at 1726-27 (White, J., dissenting) (citations omitted). Justice White agreed with the majority's conclusion that the *Doyle* rule was not a prophylactic rule. *Id.* (citation omitted).

144 *Id.* at 1727 (White, J., dissenting) (citation omitted). Specifically, Justice White stated: "Because the Court likewise leaves undisturbed the notion that *Chapman*'s harmless-error standard is required to protect constitutional rights, . . . its conclusion that a *Doyle* violation that fails to meet that standard will not trigger federal habeas relief is inexplicable." *Id.* (citation omitted).

145 *Id.* (citing Arizona v. Fulminante, 111 S. Ct. 1246, 1264 (1991) (footnote omitted)). *See supra* notes 96-103 and accompanying text (discussing *Fulminante*). In other words, the Justice stated: "[A] state court determination that a constitutional error—even one as fundamental as the admission of a coerced confession . . . —is harmless beyond a reasonable doubt has in effect become unreviewable by lower federal courts by way of habeas corpus." *Brecht*, 113 S. Ct. at 1727 (White, J., dissenting) (citation omitted).

146 *Brecht*, 113 S. Ct. at 1727 (White, J., dissenting) (quoting Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting) ("[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.")). Modifications of the scope of the statute, the dissent asserted, were the proper function of Congress, not the Supreme Court. *Id.* at 1727-28 (White, J., dissenting) (citations omitted).

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

148 *Id.* (citation omitted). Justice O'Connor's dissent in *Withrow v. Williams*, handed down by the Court on the same day as *Brecht*, in which the Justice was joined by Chief

tice also agreed with the majority's characterization of the violation of *Doyle* as a constitutional trial error.[149] Justice O'Connor asserted, however, that the standard foundations for the Court's reductions in the scope of habeas review, notions of "federalism, finality and fairness," did not justify the majority's conclusion.[150]

Justice O'Connor focused on the majority's failure to adequately address the nature of the *Chapman* standard and to explain its reason for rejecting that standard in favor of the less strict standard of *Kotteakos*.[151] The Justice argued that proper and diligent application of the harmless-error rule was crucial to the guilt determination aspect of trials.[152] The use of a lesser standard, Justice O'Connor reasoned, would only undermine the reliability of convictions, as well as the confidence placed by the justice system and the nation in that reliability.[153] While not dismissing the majority's caveat that outrageous errors might trigger the stricter *Chapman* standard, the Justice asserted that the exception nonetheless offered limited potential.[154] In addition, Justice O'Connor cautioned that even providing an exception was only likely to complicate further habeas jurisprudence.[155]

Justice Rehnquist, offered a rebuttal of the Court's decision not to extend the reasoning of *Stone* to violations of the Fifth Amendment right to silence under *Miranda*. Withrow v. Williams, 113 S. Ct. 1745, 1756-65 (1993) (O'Connor, J., concurring in part and dissenting in part).

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

150 *Id.* (citation omitted). Justice O'Connor bemoaned the Court's failure to offer any explanation of or investigation into the source of the *Chapman* standard. *Id.* The Justice also observed that the purpose of habeas review, as a prisoner's right of action, warranted the equitable construction of issues related to the guilt determination process. *Id.* (citation omitted).

151 *See id.* at 1729-31 (O'Connor, J., dissenting). The Justice stated: "Proof of harmlessness beyond a reasonable doubt . . . sufficiently restores confidence in [a] verdict's reliability that the conviction may stand despite the potentially accuracy impairing error." *Id.* at 1730 (O'Connor, J., dissenting).

152 *Id.* at 1729 (O'Connor, J., dissenting) (citations omitted). Justice O'Connor posited that the new standard would allow errors to pass through the appellate process uncorrected. *Id.* at 1730 (O'Connor, J., dissenting). The Justice further asserted that the majority's assertion, that habeas relief was available only to remedy the most egregious errors, ignored the practical fact that persons entitled to habeas relief "because of constitutional trial error *have* suffered a grievous wrong and ought not be required to bear the greater risk of uncertainty the Court now imposes upon them." *Id.*

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

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

155 *Id.* Justice O'Connor observed that the majority's footnoted "exception would be both exceedingly narrow and unrelated to reliability concerns." *Id.* (citing *Brecht*, 113 S. Ct. at 1722 n.9). Justice O'Connor pondered the possibility of allowing a broad exception to the majority's holding for allegations of errors related to the guilt determination process. *Id.* at 1730-31 (O'Connor, J., dissenting). Justice O'Connor antici-

Justice O'Connor asserted that the Court's decision to utilize a less strict standard did not advance the cause of judicial efficiency.[156] Noting Justice Stevens's concurrence, Justice O'Connor observed that reviewing courts were still required to review the record extensively to ascertain the effect of an alleged violation.[157] The only factor affected by the new standard, the Justice stated, would be the number of successful petitions.[158] Justice O'Connor concluded by criticizing the majority for relying on the justifiable concerns of finality, federalism, and fairness, *per se*, without explaining the relationship between those concerns and the application and effect of the harmless-error rule.[159]

The Supreme Court's decision in *Brecht v. Abrahamson* can be fairly viewed as a substantial restriction on the availability of habeas corpus relief. Coupled with the recent *Fulminante* decision, the Rehnquist Court has taken another step in the "evisceration" of the habeas statute that Justice Brennan had foreseen as a result of *Stone*.[160]

The result reached by the *Brecht* Court, however, cannot be criticized by asserting that it runs counter to precedent and plain construction of the federal habeas statute. As the majority demonstrated, there does exist ample precedent to support the argument that different standards apply to collateral review than are applicable to similar claims heard on direct review.[161] Additionally, Congress, regardless of its reasons, has left the habeas statute vague and has not responded to the Court's varying interpretations over the

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pated that pursuant to this exception, accuracy-related violations would be analyzed under the stricter *Chapman* standard, while all other constitutional trial errors would be analyzed under the *Kotteakos* standard. *Id.* The Justice rejected this approach because of its potential for opening new frontiers to litigation. *Id.* at 1731 (O'Connor, J., dissenting).

156 *Id.*

157 *Id.* (citing *Brecht*, 113 S. Ct. at 1724 (Stevens, J., concurring)). *See supra* notes 136-39 and accompanying text (discussing Justice Stevens's concurrence).

158 *Brecht*, 113 S. Ct. at 1731 (O'Connor, J., dissenting). Justice O'Connor stated that the new standard would "simply reduce[ ] the number of cases in which relief will be granted. It does not decrease the burden of identifying those cases that warrant relief." *Id.*

159 *Id.* at 1731-32 (O'Connor, J., dissenting). In conclusion, Justice O'Connor declared: "[T]he Court's decision cuts too broadly and deeply to comport with the equitable and remedial nature of the habeas writ; it is neither justified nor justifiable from the standpoint of fairness or judicial efficiency." *Id.* at 1732 (O'Connor, J., dissenting).

160 Stone v. Powell, 428 U.S. 465, 516 (1976) (Brennan, J., dissenting).

161 *Brecht*, 113 S. Ct. at 1719. *See supra* notes 122-24 and accompanying text (commenting on the disparate treatment given to cases on direct and collateral review).

years.[162] Nonetheless, Justice White's arguments that the Court ignores precedent and the nature of the habeas statute are not without merit.[163] In *Brecht*, Chief Justice Rehnquist cited the many cases which have acknowledged the difference between direct and collateral review.[164] But as Justice White noted, only in *Stone* did the Court find that a right cognizable on direct review was not reviewable on collateral review.[165] Additionally, the Supreme Court in *Stone* emphasized that its focus was not on habeas corpus, but on the significant costs of the exclusionary rule.[166] Given the wide reach of the harmless-error rule, state courts now have the *effective* power to exclude constitutional rights from the scope of habeas corpus.[167]

The habeas statute itself, 18 U.S.C. § 2254(a), provides that petitions for relief shall be entertained where the petitioner has alleged that his or her imprisonment was "in violation of the Constitution."[168] Section 2243 directs reviewing courts to "dispose of the matter as law and justice require."[169] The statute is thus based on the principle of fairness to those unjustly convicted. The operation of the statute is obviously subject to principles of criminal procedure, but it simply cannot be implied from the statute that persons imprisoned in violation of the Constitution are to be denied relief if the violation is shown not to have had a substantial effect on the jury's result.

Justice O'Connor, dissenting in *Brecht*, implied that the Court was not seeking to "eviscerate" the habeas corpus doctrine.[170] The world is far from perfect, yet the majority apparently believes that the direct review process will always come up with the correct result. The majority also ignores the fact that the Supreme Court, as the last stop on direct review, cannot begin to effectively entertain

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162 *See* LAFAVE & ISRAEL, *supra* note 2, § 28.2(d), at 1183; *Brecht*, 113 S. Ct. at 1718.

163 *Brecht*, 113 S. Ct. at 1725 (White, J., dissenting). *See supra* notes 141-46 and accompanying text (discussing Justice White's dissenting opinion).

164 *Brecht*, 113 S. Ct. at 1719 (citations omitted).

165 *Id.* at 1726 (White, J., dissenting) (citing Stone v. Powell, 428 U.S. 465, 536-37 (1976)). *See supra* notes 142-43 and accompanying text (discussing Justice White's comparison of the issues in *Brecht* and *Stone*).

166 *Stone*, 428 U.S. at 481-82 n.17.

167 *Brecht*, 113 S. Ct. at 1727 (White, J., dissenting). *See supra* notes 141-46 and accompanying text (analyzing Justice White's dissent).

168 28 U.S.C. § 2254(a) (1988).

169 *Id.* § 2243 (1988).

170 *See Brecht*, 113 S. Ct. at 1732 (O'Connor, J., dissenting) ("Unless we are to accept the proposition that denying relief whenever possible is an unalloyed good, the costs [of habeas cited by the Court] cannot by themselves justify the lowering of standards announced [by the Court].").

even a small portion of the constitutional claims raised by defendants on direct review. Defendants with valid federal claims are forced to seek collateral relief precisely because the state courts have failed them.

The Court's emphasis on the hostility generated in the state courts because of habeas review is unwarranted.[171] As noted, of the 9000 to 10,000 habeas petitions filed each year, fewer than four percent result in any relief being granted.[172] Lightning strikes, but not very often.[173] Based on the numbers, it would seem as if the system is working correctly, granting relief only to outrageous failures in the crowded, overburdened state justice systems.

Justice O'Connor's dissent lends credence to the argument that the Court's motivation lies in hostility to defendants' rights in general.[174] As the Justice noted, the Court's decision does little to streamline the post-conviction relief process.[175] The Court simply exchanged a less strict standard for a stricter one. Courts will still be required to review the records of an imposing number of habeas petitioners.[176] The decision in *Brecht* only allows for fewer of those petitions to be granted.[177]

Finally, the Court has consistently praised the virtues of finality as a significant reason for curtailing the scope of habeas corpus.[178] The Court's praise of finality, however, denigrates the value of the Constitution's guarantees.[179] The Court has determined that there is great worth in establishing a clear line that marks the end of

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171 *See Brecht*, 113 S. Ct. at 1720.

172 LAFAVE & ISRAEL, *supra* note 2, § 28.2, at 1187.

173 *See* Withrow v. Williams, 113 S. Ct. 1745, 1765 (1993) (O'Connor, J., dissenting). In *Withrow*, Justice O'Connor explained that habeas relief, "'strik[ing] like lightning' years after conviction," afforded little deterrent effect to potential violators of the Constitution. *Id.* (quotation omitted).

174 *See* Erwin Chemerinsky, *Is the Rehnquist Court Really That Conservative?: An Analysis of the 1991-92 Term*, 26 CREIGHTON L. REV. 987, 994 (1993) ("Perhaps the most consistent theme of the Rehnquist Court has been the narrowing of the rights of criminal defendants.").

175 *Brecht*, 113 S. Ct. at 1731 (O'Connor, J., dissenting). *See supra* notes 156-59 and accompanying text (discussing Justice O'Connor's opinion that the Court's holding will not advance judicial efficiency).

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

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

178 *Id.* at 1720. *See supra* note 123 and accompanying text (discussing the Court's value of finality).

179 In response to *Coleman v. Thompson*, and Roger Coleman's subsequent execution, Judge Lay stated: "It is difficult . . . to believe that in today's society an individual may be executed by reason of a technical error by his or her lawyer in order to exalt the goal of state finality above the requirements of fundamental fairness." Lay, *supra* note 65, at 1063.

legal proceedings. The favoring of procedure over those guarantees devalues the Constitution as well as the entire justice system.

The Supreme Court, in its efforts to ease the strain on the judiciary caused by habeas corpus petitions, dismissed the needs of imprisoned persons who have been convicted in violation of the Constitution. Habeas corpus remains an extraordinary remedy for those who have been egregiously wronged by the legal system.[180] The Court's decision in *Brecht* does little to ease the burden on the judiciary and senselessly harms persons who have been wrongly convicted. The Court's decision in *Withrow*, declining to extend the reasoning of *Stone* to violations of *Miranda*,[181] demonstrates that the Court is not blind to the virtues of habeas corpus. Nonetheless, the Court's decision to distinguish direct and collateral review by establishing an easily satisfied harmless-error standard is a significant step in the evisceration of habeas corpus that Justice Brennan so feared.

James A. Carey, Jr.

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[180] One commentator suggested that the appropriate response to the controversy of habeas corpus is to change the nature of habeas corpus review from a collateral proceeding to part of the direct appellate review process. Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 324, 331 (1988). Professor Friedman contended that the Supreme Court cannot provide meaningful direct review of the vast amount of claims challenging state courts' handling of federal claims. *Id.* at 331. Accordingly, the professor asserted, habeas review should be available to all claims of federal constitutional error as an automatic appeal in the federal courts. *Id.*

[181] Withrow v. Williams, 113 S. Ct. 1745, 1750-55 (1993).