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CRIMINAL LAW

BRECHT v. ABRAHAMSON: HARMFUL ERROR IN HABEAS CORPUS LAW*

James S. Liebman** and Randy Hertz***

I. Introduction: The Court's New Harmless Error Standard for Habeas Corpus Cases

For the past two and one-half decades, the Supreme Court and the lower federal courts have applied the same rule for assessing the harmlessness of constitutional error in habeas corpus proceedings as they have applied on direct appeal of both state and federal convictions. Under that rule, which applied to all constitutional errors except those deemed per se prejudicial or per se reversible, the state could avoid reversal upon a finding of error only by proving that the error was harmless beyond a reasonable doubt. The Supreme

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2 See infra notes 72-111 and accompanying text.

Court adopted this stringent standard in *Chapman v. California*\(^4\) to fulfill the federal courts' responsibility to "protect people from infractions by the States of federally guaranteed rights."\(^5\) Although *Chapman* itself arose on direct appeal, the Court understood the decision's harmless error rule to be of constitutional magnitude\(^6\) and, consistent with the principle of parity between direct and habeas corpus consideration of constitutional issues in the federal courts,\(^7\) the Court repeatedly and routinely applied the same standard in habeas corpus proceedings.\(^8\) So did the lower federal courts.\(^9\)

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\(^4\) 386 U.S. 18 (1967).

\(^5\) *Id.* at 21. The *Chapman* Court believed that its standard was necessary to protect rights that are "rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the 'independent' federal courts would be the 'guardians of those rights.'" *Id.*

\(^6\) See, e.g., *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1725-26 (1993) (White, J., dissenting) (discussing *Chapman*, 386 U.S. at 21). The *Brecht* majority never addressed Justice White's point in dissent that the *Chapman* rule is constitutionally mandated. Had the Court acknowledged the rule's constitutional status, it could not have concluded that "[t]he federal habeas corpus statute is silent on . . . the standard for harmless-error review . . . ." *Brecht*, 113 S. Ct. at 1718. Thus, assuming, as *Chapman* does and as *Brecht* does not dispute, that the Constitution dictates relief from constitutional errors not shown to be harmless beyond a reasonable doubt, the habeas corpus statute's provision for relief upon a showing that the petitioner is "in custody in violation of the Constitution . . . . of the United States" provides for relief from all constitutional violations save those satisfying *Chapman's* strict harmlessness standard. 28 U.S.C. § 2254(a).


\(^8\) See, e.g., *Yates v. Evatt*, 111 S. Ct. 1884, 1892 (1991); *Rose v. Clark*, 478 U.S. 570, 582 (1986); Hopper v. Evans, 456 U.S. 605, 613-14 (1982); Milton v. Wainwright, 407 U.S. 371, 372-73 (1972); *Anderson v. Nelson*, 390 U.S. 523, 525 (1968) (*per curiam*). In a decision later in the same term as *Brecht*, its author, Chief Justice Rehnquist, joined a separate opinion acknowledging (i) that "there [was] . . . reason to consider ourselves bound by precedent . . . in *Brecht*" to apply the *Chapman* standard in habeas corpus proceedings and (ii) that "our consistent practice of applying . . . *Chapman* . . . to cases on collateral review [arguably] precluded us from limiting the rule's application to cases on direct review." *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2529 (1993) (O'Connor, J., dissenting). The Court's statement in *Brecht* that none of its prior habeas corpus decisions applying the *Chapman* rule "squarely addressed the issue" of what standard of harmlessness applied in habeas corpus proceedings, and that those decisions "at most assumed the applicability of the *Chapman* standards," may be misleading. *Brecht*, 113 S. Ct. at 1718. A number of the Court's prior decisions focused exclusively on the question whether, having found constitutional violations, federal habeas corpus courts nonetheless could withhold relief because the violations were harmless. See, e.g., *Milton*, 407 U.S. 371; *Anderson*, 390 U.S. 523. And at least one of those decisions addressed the precise question of the standard of prejudice or harmlessness, if any, that should apply in determining whether a particular constitutional violation required habeas corpus relief. *Rose*, 478 U.S. 570.

\(^9\) See, e.g., *Lesko v. Lehman*, 925 F.2d 1527, 1546 (3d Cir. 1991); *Dickson v. Sullivan*, 849 F.2d 403, 405 (9th Cir. 1988); *Wilson v. Murray*, 806 F.2d 1232, 1238 (4th Cir. 1986); *Phelps v. Duckworth*, 772 F.2d 1410, 1413-15 (7th Cir. 1985) (en banc); *Crutchfield v. Wainwright*, 772 F.2d 839, 843 (11th Cir. 1985); *Hawkins v. LeFevre*, 758 F.2d 866, 877-78 (2d Cir. 1985); *Blackwell v. Brewer*, 562 F.2d 596, 600 (8th Cir. 1977).
In its 1993 decision in *Brecht v. Abrahamson*, however, a bare majority of the Court ruled that a new and different measure of harmless error should apply in federal habeas corpus proceedings. The applicable standard is the one the Court fashioned in 1946 in *Kotteakos v. United States* for assessing the harmlessness of nonconstitutional errors: an error may be deemed harmless if the reviewing court finds that “the error did not influence the jury, or had but very slight effect” and that “the judgment was not substantially swayed by the error.” Or, to use the phrase the *Brecht* Court most frequently extracted from *Kotteakos*, “the standard for determining whether habeas relief must be granted is whether the . . . error ‘had substantial and injurious effect or influence in determining the jury's verdict.’”

To justify the newly drawn distinction between the harmless error rule that applies on direct appeal and the different one that applies in habeas corpus, the *Brecht* majority pointed to “the State’s interest in the finality of convictions that have survived direct review within the state court system” and concerns of “comity and federalism.” It is difficult to see how these rationales justify *Brecht’s* al-

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10 113 S. Ct. at 1710.

11 328 U.S. 750 (1946).

12 *Brecht*, 113 S. Ct. at 1722 (“We hold that the *Kotteakos* harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type.”). Cf. infra notes 72-111 and accompanying text (“per se prejudice” standard applicable to “structural” errors); infra notes 177-90 and accompanying text (possible exception for “trial errors” of a certain sort).

13 *Kotteakos*, 328 U.S. at 764.

14 Id. at 765.

15 *Brecht*, 113 S. Ct. at 1714 (quoting *Kotteakos*, 328 U.S. at 776); accord *Brecht*, 113 S. Ct. at 1718, 1718 n.7, 1722; id. at 1724 (Stevens, J., concurring). Although there are good reasons for doing otherwise, see Liebman & Hertz, supra note *, § 22A.8 (1993 Cum. Supp.), the federal courts probably will apply the *Brecht* rule retroactively—as did the Court itself in *Brecht*—to all cases reaching them on habeas corpus, no matter how far along in their proceedings those cases were when the Court announced *Brecht*. See *Henry v. Estelle*, 993 F.2d 1423, 1427 n.2 (9th Cir. 1993) (*Brecht* applies retroactively). See also decisions cited infra note 145 (applying *Brecht* retroactively, albeit without acknowledging any argument for doing otherwise). Cf. *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2518 (1993) (civil case in which Court approvingly notes courts' traditional practice of applying all new rulings retroactively in all cases, and in which Court holds that, when Court applies new rule to litigant in civil case in which new rule was announced, rule also applies to all other civil litigants); *Lockhart v. Fretwell*, 113 S. Ct. 838, 844 (1993) (dicta) (new rules of criminal procedure beneficial to the states apply retroactively on habeas corpus, even though new rules of criminal procedure beneficial to petitioners generally do not apply retroactively on habeas corpus).

16 *Brecht*, 113 S. Ct. at 1720. Because the *Brecht* majority apparently premised these justifications on an assumption that a finding of harmlessness by the state courts under the more stringent *Chapman* rule always will precede habeas corpus review of the harmlessness question under the less stringent *Brecht* rule, the Eighth Circuit has limited *Brecht* to situations in which the state courts in fact have previously applied the *Chapman*
most singular departure from over 200 years of direct appeal/habeas corpus parity in the scope and standard of review of constitutional issues. As Justice O'Connor observed in her dissent in *Brecht*, the interests identified by the majority have little bearing on the choice of harmless error standard. Rather, as Justice White

rule. See Orndorff v. Lockhart, 998 F.2d 1426, 1430 (8th Cir. 1993). In the Eighth Circuit, therefore, if the state courts did not apply *Chapman*, the federal courts on habeas corpus must themselves do so. See id. But cf. infra note 172 and accompanying text (federal courts should apply harmless error rule *de novo*, giving no deference to state court determinations).

17 See *Brecht*, 113 S. Ct. at 1728 (White, J., dissenting). As Justice White explained: [The Court's] habeas jurisprudence is taking on the appearance of a confused patchwork in which different constitutional rights are treated according to their status, and in which the same constitutional right is treated differently depending on whether its vindication is sought on direct or collateral review. I believe this picture bears scant resemblance either to Congress' design or to our own precedents.

Id. See id. at 1731 (O'Connor, J., dissenting) ("Like Justice White, I do not believe we should turn our habeas jurisprudence into a 'patchwork' of rules and exceptions without strong justification. . . . The interest of efficiency, always relevant to the scope of habeas relief . . . favors simplification of legal inquiries, not their multiplication.") (citation omitted). On Congress and the Court's 200-year-old practice of treating the scope and standard of review of constitutional questions identically on direct and habeas corpus review, see Liebman, *supra* note 7, at 2055-94.

There is one way in which *Brecht* may be understood to preserve, rather than to defeat, the principle of parity between the scope of constitutional review available on direct appeal and the scope of review available in habeas corpus proceedings. The more forgiving harmless error rule that now applies on habeas corpus may provide a rough method of avoiding a windfall that successful habeas corpus petitioners otherwise might receive in comparison to defendants who prevail on direct appeal. Because the time lapse between trial and retrial is likely to be several years longer in the case of a successful habeas corpus petitioner than in the case of a successful direct appellant, the likelihood is greater in the habeas corpus context that a more favorable outcome on retrial will be reached because of the staleness of the evidence of guilt, rather than the removal of the violation that prompted the retrial. As the Court noted in *Brecht*:

Retrying defendants whose convictions are set aside also imposes significant "social costs," including . . . the "erosion of memory" and "dispersion of witnesses" which accompany the passage of time and make obtaining convictions on retrial more difficult . . . . And since there is no statute of limitations governing federal habeas . . . , retrials following grants of habeas relief ordinarily take place much later than do retrials following reversal on direct review.

*Brecht*, 113 S. Ct. at 1721 (citations omitted). See also Herrera v. Collins, 113 S. Ct. 853, 862 (1993) ("the passage of time [between the crime and a new trial ordered on habeas corpus] only diminishes the reliability of criminal adjudications"); McCleskey v. Zant, 499 U.S. 467, 491 (1991) ("[W]hen a habeas petitioner succeeds in obtaining a new trial, the 'erosion of memory and dispersion of witnesses that occur with the passage of time' prejudice the government and diminish the chances of a reliable criminal adjudication" (quoting Kuhlmann v. Wilson, 477 U.S. 436, 453 (1986) (plurality opinion))). See also Parke v. Raley, 113 S. Ct. 517, 525 (1992) ("To the extent the government fails to carry its burden due to the staleness or unavailability of evidence . . . , its legitimate interest in . . . punishing . . . offenders is compromised.") The *Brecht* rule arguably neutralizes this disparity in favor of habeas corpus petitioners by increasing the degree of certainty that the error actually affected the original trial and, thus, that any improved outcome on retrial flows from the removal of the error and not the staleness of the evidence.

18 *Brecht*, 113 S. Ct. at 1729 (O'Connor, J., dissenting). Justice O'Connor added:
and Justice O'Connor emphasized in dissent in *Brecht*, and as one member of the five-person majority seemed to acknowledge, the most significant, statutorily recognized interest bearing on the issue—the federal courts’ obligation to vindicate federal constitutional rights and to protect criminal defendants from unconstitutional convictions and sentences—calls for restraint in finding constitutional errors to be harmless, whether the federal forum is direct review in the Supreme Court or habeas corpus review in the federal courts as a whole.  

On analysis, indeed, the *Brecht* limitation on the applicability of the *Chapman* rule may be as much an opening sally against the *Chapman* rule itself as it is an assault on the principle of direct appeal/habeas corpus parity. The Court thus may be setting the groundwork for a switch to the *Kotteakos* harmless error standard whenever a federal court finds constitutional trial error in any forum, whether on direct appeal or in postconviction proceedings.

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I am not convinced that the principles governing the exercise of our federal habeas powers—federalism, finality, and fairness—counsel against applying *Chapman*'s harmless-error standard on collateral review . . . .

The Court does not explain how the costs of federal habeas corpus review set the harmless-error inquiry apart from any other question presented on habeas; such costs are inevitable whenever relief is awarded. Unless we are to accept the proposition that denying relief whenever possible is an unalloyed good, the costs the Court identifies cannot by themselves justify the lowering of standards announced today.

Id. at 1732 (emphasis in original).

19 See id. at 1727 (White, J., dissenting) (majority's rejection of *Chapman* standard is “at odds with the role Congress has ascribed to habeas review which is, at least in part, to deter both prosecutors and courts from disregarding their constitutional responsibilities”). Justice White's opinion was joined on this point by Justices Blackmun and Souter. See also id. at 1729-30 (O'Connor, J., dissenting):

If there is a unifying theme to this Court's habeas jurisprudence, it is that the ultimate equity on the prisoner's side—the possibility that an error may have caused the conviction of an actually innocent person—is sufficient by itself to permit plenary review of the prisoner's federal claim. . . . In my view, the harmless-error standard often will be inextricably intertwined with the interest of reliability.

Justice Stevens, who supplied the fifth vote for the majority opinion in *Brecht*, did so only because he viewed the *Kotteakos* standard as “appropriately demanding.” Id. at 1723 (Stevens, J., concurring). Justice Stevens' concurrence emphasizes the many protections embedded in the *Kotteakos* rule and observes that “the difference [between the *Kotteakos* and *Chapman* standards] is less significant than it might seem.” Id. at 1725 (Stevens, J., concurring).

20 In places, the majority opinion in *Brecht* suggests that its application of the *Kotteakos* standard stems not from the peculiarities of habeas corpus adjudication but instead from the dictates of the federal harmless error statute that succeeded the statute interpreted in *Kotteakos*. See id. at 1718 (“the *Kotteakos* standard . . . is grounded in the federal harmless error statute. 28 U.S.C. § 2111 . . . .”) (citation omitted); id. at 1718 n.7; id. at 1722 (“because the *Kotteakos* standard is grounded in the federal harmless-error rule (28 U.S.C. § 2111), federal courts may turn to an existing body of case law in applying it”); id. at 1723 (Stevens, J., concurring). The statute to which the *Brecht* majority refers reads as follows: “On the hearing of any appeal or writ of certiorari in any case,
Prior to Brecht, the application of the harmless error rule in habeas corpus cases did not merit special comment. The rule applied in the same, well-established manner in those cases as on direct appeal in virtually all American courts with jurisdiction over criminal and constitutional matters. Any discussion of the intricacies of the harmless error rule consequently applied equally to direct appeal and habeas corpus. Suddenly, however, Brecht has thrown up for grabs the application of this previously well-understood set of doctrines, at least in habeas corpus cases. Courts now must answer anew a whole series of potentially difficult questions. For example, which party bears the burden of proving harmlessness vel non in habeas corpus proceedings? To what constitutional issues does harmless error analysis apply in habeas corpus cases? What standards, criteria, and factors should govern the application of the Brecht/Kotteakos rule? Are there exceptional circumstances in which the Chapman standard should continue to apply in habeas corpus cases?

Drawing on the Court’s analysis in Brecht and the cases and other sources that the Court there treats as authoritative, this Article provides some preliminary answers to these and other questions posed by the Court’s adoption of the Brecht/Kotteakos rule in habeas corpus cases. Part II discusses the question of which party bears the burdens of pleading and proving an error’s harmlessness. Part III

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 (emphasis added). As the Brecht Court at one point remarks (albeit acknowledging the remark’s status as dicta), this statute “[o]n its face” makes no distinction between review on direct appeal and in habeas corpus proceedings; between review in one type of federal court and another; between federal review of state and federal court judgments; between constitutional and nonconstitutional claims; or even between criminal and civil cases. Brecht, 113 S. Ct. at 1718. Although this same statute was in effect at the time the Court decided Chapman, the Court there found that the statute, and the Kotteakos standard developed under it, did not govern constitutional error. See Chapman v. California, 386 U.S. 18, 22-24 (1967). Now that the Court seems to have made Section 2111 authoritative, and now that the Court has rejected Chapman’s reading of the statute to exempt constitutional error, see Brecht, 113 S. Ct. at 1718 n.7 (discussing section 2111’s “amenability to harmless error review of constitutional error”), the statute would appear to dictate application of the Kotteakos standard in all federal proceedings in which relief from constitutional error is considered.

The Court’s reliance on Section 2111 has one other important implication. Although, as a rule of constitutional law, the Chapman standard applies equally in state and federal court, see supra notes 4-6 and accompanying text, the Brecht/Kotteakos rule is a creature of a federal statute that explicitly limits its mandate to federal court proceedings. As such, state courts are not bound by Brecht to apply the Kotteakos standard in their own postconviction proceedings, nor would they be bound to do so in direct proceedings if the Kotteakos standard were to be extended to all federal court proceedings.

21 See, e.g., authorities cited supra note 1.
addresses the concept of “prejudice per se” and the categories of errors that the Court exempts from harmless-error analysis. Part IV provides a detailed examination of the new test of harmless error, the degree of certainty required before a court can find that test satisfied, the focus of the court’s attention and the criteria it appropriately may consider in determining harmlessness, and the manner in which a court should go about informing its judgment on the harmless error question. Finally, Part V discusses an exception to the Brecht/Kotteakos rule that Brecht appears to recognize for trial errors involving egregious or cumulative misconduct.

II. Allocation of the Burdens of Pleading and Proof

A. Allocation of the Burden of Pleading

Like other defenses to habeas corpus relief, the “harmless error” obstacle does not arise unless the state asserts it; the state’s failure to do so in a timely and unequivocal fashion waives the defense.\(^2\) Indeed, the “harmless error” rule is particularly susceptible to the types of abuse that have led the Supreme Court to call for strict application of waiver rules to the state in habeas corpus proceedings. Absent allocation to the state of the burden of pleading, the state initially could limit its arguments to the question of whether error occurred, thus “seek[ing] a favorable ruling on the merits . . . while holding the [harmless error] defense in reserve for use”\(^3\) only after the district court has ruled against the state on the merits or, worse, after the merits ruling has gone up on appeal.\(^4\)

B. Allocation of the Burden of Proof

Before the Court’s decision in Brecht, the applicable rule of

\(^2\) See, e.g., Holland v. McGinnis, 963 F.2d 1044, 1057-58 (7th Cir. 1992) (state waived harmless error argument by withholding it until oral argument before court of appeals); Wilson v. O’Leary, 895 F.2d 378, 384 (7th Cir. 1990) (Easterbrook, J.) (state waived harmless error argument by withholding it until reply brief; “[p]rocedural rules apply to the government as well as to defendants”). See also Amadeo v. Zant, 486 U.S. 214, 228 n.6 (1988) (finding forfeiture by state of analogous question of “prejudice” for purposes of the “cause and prejudice” exception to the procedural default defense). Cf. Lufkins v. Leapley, 965 F.2d 1477, 1481 (8th Cir. 1992) (“While the government may waive harmless error [by failing to raise it in timely fashion], an appellate court has discretion to overlook the waiver under certain circumstances.”). See generally Liebman & Hertz, supra note *, §§ 22A.3, 23.3a, 25A.2, 24.2a, 25.3a, 26.3a (1993 Cum. Supp.) (waivability of other habeas corpus defenses).


\(^4\) See, e.g., Wilson, 895 F.2d at 384 (“Astoundingly, the state did not mention harmless error in its opening brief. It tried instead to persuade us that there was nothing wrong with any of the statements. It got ‘round to harmless error at page 19 of its reply brief.”).
Chapman v. California\textsuperscript{25} squarely placed the burden of proving harmlessness beyond a reasonable doubt on the state.\textsuperscript{26} This allocation of the burden applied in habeas corpus proceedings as well as on direct appeal.\textsuperscript{27}

Although Brecht changes the substantive standard for assessing the harmlessness of constitutional error in habeas corpus proceedings, it apparently leaves intact the preexisting allocation to the state of the burden of proving harmlessness. Regrettably, however, especially for litigants and judges faced with the Court's substitution of the confusion-ridden Kotteakos standard\textsuperscript{28} for the thoroughly understood Chapman rule, the majority did not explicitly reach this conclusion but instead left it to be inferred from other aspects of its opinion and the sources on which it relied.\textsuperscript{29} The Court's dereliction, by remaining silent on the allocation of the burden of proof, is all the more vexing given the debate that rages on the issue in separate opinions in the case. Thus, although Justice Stevens, who provided the necessary fifth vote for the majority, wrote a concurring opinion designed explicitly to make clear, among other things, that the Brecht/Kotteakos standard "places the burden on prosecutors to explain why... errors are harmless,"\textsuperscript{30} Justice White's dissent

\textsuperscript{25} 386 U.S. 18 (1967).
\textsuperscript{26} See id. at 24 ("beneficiary of a constitutional error" must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"). See also Brecht v. Abrahamson, 113 S. Ct. 1710, 1717 (1993) (under Chapman, "[t]he State bears the burden of proving that an error passes muster"); id. at 1727 (White, J., dissenting) ("Under Chapman, the state must prove beyond a reasonable doubt that the constitutional error 'did not contribute to the verdict obtained.'" (quoting Chapman, 386 U.S. at 24)).
\textsuperscript{27} See, e.g., Dickson v. Sullivan, 849 F.2d 403, 405 (9th Cir. 1988); Wilson v. Murray, 806 F.2d 1232, 1238 (4th Cir. 1986); Crutchfield v. Wainwright, 772 F.2d 839, 843 (11th Cir. 1985); Hawkins v. LeFevre, 758 F.2d 866, 877 n.15 (2d Cir. 1985); Phelps v. Duckworth, 757 F.2d 811, 820 (7th Cir.), rev'd on other grounds, 772 F.2d 1410 (7th Cir. 1985) (en banc); Blackwell v. Brewer, 562 F.2d 596, 600 (8th Cir. 1977).
\textsuperscript{28} More accurately, the confusion stems from the current status of the Kotteakos rule following amendment of the statute the decision interpreted. Kotteakos itself is rather clear on most of the issues on which the lower courts have split since the 1949 amendment of the statute under which the Court decided Kotteakos in 1946. See infra notes 57-68 and accompanying text.
\textsuperscript{29} The majority's silence on the allocation of the burden of proof also is vexing because of the importance of the question. As the Court frequently has noted, assessing harmlessness is inherently difficult, thus often making the outcome of the proceeding dependent on the question of which party bears the burden of proof. See, e.g., Sullivan v. Louisiana, 113 S. Ct. 2078, 2081-83 (1993); Doggett v. United States, 112 S. Ct. 2686, 2692-93 (1992). The Court has granted certiorari in O'Neal v. McAninch, 114 S. Ct. 1396 (1994), to resolve the question of which party bears the burden of proof under Brecht.
\textsuperscript{30} Brecht, 113 S. Ct. at 1723 (Stevens, J., concurring). See also id. at 1723-24 (Stevens, J., concurring) ("Kotteakos plainly stated that unless an error is merely 'technical,' the burden of sustaining a verdict by demonstrating that the error was harmless rests on the
characterizes the majority opinion as “impos[ing] on the defendant the burden of establishing that the error ‘resulted in “actual prejudice.”’” 31

The best place to begin the analysis that the majority necessitated by its silence on this important question is by noting what the Court did not hold. Justice White’s dissent notwithstanding, there are at least five good reasons why the majority opinion cannot be read to assign the burden of proof to the petitioner.

First, the majority opinion contains not a single passage or word devoted expressly to the allocation of the burden of proof. Second, other parts of the majority opinion stand for the proposition that issues not “squarely addressed” by the Court should not be taken as decided. 32 Third, the majority opinion clearly acknowledged the difference between the “Chapman . . . standard for determining whether a conviction must be set aside because of federal constitutional error[, i.e.,] . . . whether the error ‘was harmless beyond a reasonable doubt’” 33 and Chapman’s allocation of the “burden of proving that an error passes muster under this standard,” which, as the Court noted, “[t]he State bears.” 34 Yet, when the Court came to state how its holding changed Chapman, it repeatedly referred only to the Chapman “standard.” 35 Fourth, Justice Stevens

31 Id. at 1727 (White, J., dissenting). The passage from the majority opinion to which Justice White refers when he interprets the majority decision as assigning the burden to the defendant is discussed infra note 43 and accompanying text.
32 Brecht, 113 S. Ct. at 1718 (discussed supra note 8); see Harper v. Virginia Dep’t of Taxation, 113 S. Ct. 2510, 2529 (1993) (O'Connor, J. dissenting) (treating Brecht as leading decision for proposition that even consistent practice of Court cannot be assumed to decide question absent Court’s direct and explicit consideration of the issue).
33 Brecht, 113 S. Ct. at 1713 (emphasis added).
34 Id. at 1717 (emphasis added); see id. at 1721.
35 Initially, the Court described the change it was adopting as follows: [T]he standard for determining whether habeas relief must be granted is whether the . . . error “had substantial and injurious effect or influence in determining the jury’s verdict.” Kotteakos v. United States, 328 U.S. 750, 776 (1946). The Kotteakos harmless error standard is better tailored to the nature and purpose of collateral review than the Chapman standard, and application of a less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence.

Id. at 1714 (emphasis added). The Court’s subsequent statements were to like effect. For example, the Court stated:
Respondent urges us to fill this gap [in the statute in regard to harmless error] with the Kotteakos standard, under which an error requires reversal only if it “had substantial and injurious effect or influence in determining the jury’s verdict.” Kotteakos, 328 U.S., at 776. This standard is grounded in the federal harmless error statute. 28 U.S.C. § 2111 . . . .

Id. at 1718 (emphasis added). Later the Court stated:
The imbalance of the costs and benefits of applying the Chapman harmless-error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error. The Kotteakos standard, we believe, fills the
wrote explicitly to say that he would not have joined the majority opinion, thus providing the fifth and decisive vote, but for his understanding that the opinion placed the burden of proof on the state. In sum, there is simply no basis for discerning in *Brecht* a holding allocating the burden to the habeas corpus petitioner. If there is a "majority" view on the question, it is that the state should bear the burden.

Nor is there anything fanciful about Justice Stevens' discernment of an implicit allocation of the burden to the state in a majority opinion that, to be sure, says nothing explicitly on the question. The clear and quite explicit rule of *Brecht*, repeated over and over again in both the majority opinion and Justice Stevens' concurrence, is that, to whatever extent the decision changes preexisting law on harmless error, it does so by adopting the rule of *Kotteakos*. More-
over, as Justice Stevens wrote separately to point out, the clear and explicit ruling of Kotteakos is that the government bears the burden of proving the harmlessness of nontechnical (including all constitutional) error. Before the Kotteakos decision, the lower courts evidenced considerable confusion as to whether the then-existing harmless error statute governing nonconstitutional error, 28 U.S.C. § 391, called for allocation of the burden to the appellant or the appellee. Kotteakos resolved the issue by definitively declaring that the appellant bears the burden of showing prejudice only with respect to "technical errors," while the appellee bears the burden of proving the harmlessness of violations of "substantial rights":

"The purpose of the bill in its final form was stated authoritatively to be "to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be disregarded." But that this burden does not extend to all errors appears from the statement which follows immediately. "The proposed legislation affects only technical errors. If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation rest upon the one who claims under it.""

39 Section 391 has since been superseded by 28 U.S.C. § 2111 (1988), discussed supra note 20. See also infra notes 57-68 and accompanying text.

40 Compare, e.g., Valli v. United States, 94 F.2d 687, 690 (1st Cir. 1938) and Shuman v. United States, 16 F.2d 457, 458 (5th Cir. 1927) and Armstrong v. United States, 16 F.2d 62, 65 (9th Cir. 1926) and Rich v. United States, 271 F. 566, 570 (8th Cir. 1921) (all holding that statute assigns to appellant the burden of showing both error and prejudice) with Little v. United States, 73 F.2d 861, 865-67 (10th Cir. 1934) and Nicola v. United States, 72 F.2d 780, 783 (3d Cir. 1934) and Gold v. United States, 26 F.2d 185, 186 (2d Cir. 1928) (all holding that the statute assigns the burden of proving harmlessness of violations of substantial rights to the party seeking to benefit from the error). For a detailed analysis of the statute and the conflicting interpretations, see Little, 73 F.2d at 865-67.

41 Kotteakos v. United States, 328 U.S. 750, 760-61 (1946) (quoting 28 U.S.C. § 391 and its legislative history (quoted in Brecht, 113 S. Ct. at 1723-24 n.1 (Stevens, J., concurring))). Accord id. at 765 ("[W]hether the burden of establishing that the error affected substantial rights, or, conversely, the burden of sustaining the verdict shall be imposed, turns on whether the error is 'technical' or [conversely] is such that 'its natural effect is to prejudice a litigant's substantial rights.' "). See also id. at 765 ("The inquiry... is... whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. " (emphasis added)). To like effect is an important passage in Kotteakos describing the standard in terms of what the state would have to prove in order to establish harmlessness:

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand ... . But if one cannot say with fair assurance . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.

Id. at 764-65 (emphasis added). As Kotteakos itself makes clear, and as Justice Stevens emphasizes in his concurring opinion in Brecht, any division of errors into "technical" and "substantial" categories must necessarily include constitutional violations in the lat-
By incorporating the rule of *Kotteakos*, *Brecht* rather clearly seems to endorse an allocation of the burden of proof of harmlessness to the state. Although that conclusion arguably should end the matter, it is reinforced by examining the other sources on which *Brecht* relies to define its new harmless error rule. As the following discussion shows, each of those sources likewise identifies the state as the appropriate bearer of the burden of proving harmlessness.

Besides *Kotteakos*, there are only three potential sources of an allocation of the burden of proof that *Brecht* could be viewed as endorsing. The first is the Court's decision in *United States v. Lane*; the second is the harmless error provision in Rule 52(a) of the Federal Rules of Criminal Procedure; the third is the federal harmless error statute, 28 U.S.C. § 2111. On analysis, all three of these authorities either cycle analysis directly back to *Kotteakos* or independently allocate the burden to the state.

First, consider *United States v. Lane*. That decision's claim to govern harmless error analysis in habeas corpus cases stems from a single passage in *Brecht*—the passage, notably, to which Justice White referred in expressing his opinion in dissent that the Court had effectively allocated the burden of proof to the petitioner. That passage reads as follows:

> The imbalance of costs and benefits of applying the *Chapman* harmless-error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error. The *Kotteakos* standard, we believe, fills the bill. The test under *Kotteakos* is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 328 U.S. at 776 .... Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice." *See United States v. Lane*, 474 U.S. 438, 449 .... (1986). The *Kotteakos* standard is thus better tailored to the nature and purpose of collateral review, and more likely to promote the considerations underlying our recent habeas cases.

This passage, of course, is not prominently about *Lane* but rather about *Kotteakos*. Nor is it about allocation of the burden of proof, but rather about "[t]he Kotteakos standard" of proof; to the extent the passage makes *Lane* relevant, it is explicit in explaining "this [Kotteakos] standard." This understanding of the relevance of *Lane* be-

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43 *Brecht*, 113 S. Ct. at 1721-22.
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comes even clearer from the particular portion of *Lane* that the Court quoted and cited in *Brecht*. That portion is as follows:

Under Rule 52(a) [of the Federal Rules of Criminal Procedure], the harmless-error rule focuses on whether the error “affect[ed] substantial rights.” In *Kotteakos* the Court construed a harmless error-statute with similar language, and observed: “The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.” 328 U.S., at 765.

Invoking the *Kotteakos* test, we hold that an error involving misjoinder “affects substantial rights” and requires reversal only if the misjoinder results in actual prejudice because it “had substantial and injurious effect or influence in determining the jury’s verdict.” *Id.*, at 776.44

Like the passage in *Brecht* that cites it, this passage from *Lane* mainly reprises *Kotteakos’* standard of review. *Lane* does not here (or elsewhere) directly take up the question of which party bears the burden of proof.

Nor, *pace* Justice White in *Brecht*, can any allocation of the burden of proof be derived from *Brecht’s* quotation of *Lane* in support of a requirement that “habeas petitioners . . . establish that [trial error] resulted in ‘actual prejudice.’” 45 For in the quoted passage, *Lane* quite explicitly equates the concept of “actual prejudice,” not with any allocation of the burden of proof, but rather with the same “‘substantial and injurious effect or influence’” formulation of the standard of proof that *Brecht* itself extracts from *Kotteakos*.46 Together, therefore, the *Brecht* passage and the language from *Lane* that the *Brecht* passage incorporates stand for the simple proposition that, henceforth, harmless error will not be measured by *Chapman’s* “harmless beyond a reasonable doubt” standard, but rather by *Kotteakos’* “substantial and injurious effect or influence” standard (which *Brecht* equates with *Lane’s* notion of “actual prejudice,” a concept which *Lane*, in turn, equates with *Kotteakos’* “substantial and injurious effect or influence” standard). More simply, under *Brecht*, as under *Lane* and *Kotteakos*, the harmless error standard is whether the error “‘had substantial and injurious effect or influence in determining the jury’s verdict.’” 47

44 Lane, 474 U.S. at 449 (footnote omitted).
45 Brecht, 113 S. Ct. at 1722 (quoting Lane, 474 U.S. at 449).
46 Id. at 1713-14 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946). See also supra note 15 and accompanying text.
47 Brecht, 113 S. Ct. at 1722 (quoting Kotteakos, 328 U.S. at 776); Lane, 474 U.S. at 449 (quoting Kotteakos, 328 U.S. at 776). Indeed, by making the legal error at issue in *Lane* (“misjoinder”) the subject of the critical sentence, and “results in actual prejudice” the
On examination, however, the passage from *Lane* that *Brecht* incorporates may have an important, if implicit, bearing on the allocation of the burden of proof. For one thing, the passage makes relevant (though not decisive) a type of showing that only the state would have an incentive to make—that “‘there was enough [evidence] to support the result.’”

For another thing, quoting *Kotteakos*, the passage states that “‘the conviction cannot stand’” in either of two situations: if the record convinces the decisionmaker that the “‘error . . . had substantial influence’”; or if the record is so evenly divided that the decisionmaker “‘is left in grave doubt’” on the question. Under any fair burden of proof (i.e., a preponderance of the evidence test), the party that loses in the event of a tie is the party with the burden of proof. Consequently, *Lane* and *Kotteakos*—and hence *Brecht*’s—identification of the state as the loser, in the event the decisionmaker is in doubt about an error’s “substantial influence,” clearly assumes that the burden of proof is on the state. That *Lane* picked up this assumption about the allocation of the burden of proof from *Kotteakos* is hardly surprising. Although *Lane* was not a burden of proof case, *Kotteakos* was, and it clearly allocated the burden to the state.

The passage from *Lane* on which *Brecht* relies provides an even more powerful clue as to where the burden of proof should lie. *Lane* passive verb and object, the passage from *Lane* on which *Brecht* relies clearly leaves open the question that *Brecht*’s usage of “habeas petitioners” as the subject and “establish actual prejudice” as the verb and object might otherwise be thought to answer—namely, which party must show that the error did or did not “result in” prejudice.

There is a danger, in any event, in according too much significance to the phrase “actual prejudice.” As the Court explained in a harmless-error decision announced soon after *Brecht*, the phrase “actual prejudice” is a term of art with little application to the question at hand. Thus, “actual prejudice” does not describe an allocation of the burden, or even a standard, for demonstrating harm or harmlessness. Rather, the Court uses that term simply to distinguish one general mode of harmless error review (in which the issue of harm or harmlessness actually must be the subject of inquiry, based on the facts and circumstances of the particular case) from another mode of such review—“prejudice per se”—in which prejudice need not be the subject of inquiry because it is categorically presumed. See *United States v. Olano*, 113 S. Ct. 1770, 1778 (1993) (contrasting “actual prejudice” analysis, which applies to errors that are reversible only following a “specific analysis” of their effect on the actual proceeding, and “per se prejudicial” analysis, which applies to “errors that should be presumed prejudicial [even] if the defendant cannot make a specific showing of prejudice”); see also *id.* at 1781 (“On this record, we are not persuaded that the instant violation . . . was actually prejudicial. Nor will we presume prejudice for purposes of the . . . analysis here.”); *id.* at 1782 (Stevens, J., dissenting) (violations subject to “actual prejudice” review result in relief only if there is “a prejudicial impact on a particular defendant”; errors subject to a presumption of prejudice require reversal regardless of such impact).

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48 *Lane*, 474 U.S. at 449 (quoting *Kotteakos*, 328 U.S. at 765).
49 *Id.*
50 See supra notes 39-41 and accompanying text.
interpreted the harmless error rule in Criminal Procedure Rule 52(a), which Lane (in the passage that Brecht cites) equates with Kotteakos' harmless error rule. By endorsing Lane's equation of Kotteakos' "substantial and injurious effect or influence" test—which Brecht adopts—with Rule 52(a)'s "affect[ed] substantial rights" test, Brecht adds Rule 52(a) to the list of authoritative determinants of an appropriate allocation of the burden of proof. In so doing, moreover, Brecht points emphatically to the state as the bearer of that burden because the federal courts have traditionally given the burden of proving Rule 52(a) harmlessness to the government. The leading discussion of that point is a Supreme Court decision, United States v. Olano, announced nearly simultaneously with Brecht.

In Olano, the Court discussed similarities and differences between the harmless error and plain error provisions found in Rules 52(a) and 52(b) of the Criminal Procedure Rules, respectively. Among other things, that discussion addressed the allocation of the burden of proof under the two provisions—and in the process clearly confirmed the practice of requiring the government to prove harmlessness:

The third and final limitation on appellate authority under Rule 52(b) is that the plain error "affec[t] substantial rights." This is the same language employed in [the harmless error provision in] Rule 52(a), and in most cases it means that the error must have been prejudicial . . . . When the defendant has made a timely objection to an error and [the harmless error provision in] Rule 52(a) applies, the Court of Appeals normally engages in a specific analysis of the District Court record—a so-called "harmless error" inquiry—to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: [Under the plain error provision in Rule 52(b), i]t is the defendant rather than the Government

51 The majority opinion in Lane is one of many authorities for the proposition that both the harmless error statute interpreted in Kotteakos and Rule 52(a) incorporate the same harmless error rule. A particularly comprehensive treatment of the same conclusion appears in Justice Brennan's separate opinion in the same case. See Lane, 474 U.S. at 454-55 (Brennan, J., concurring in part and dissenting in part). See also id. at 470 (Stevens, J., dissenting); Kotteakos v. United States, 328 U.S. 750, 757 n.9 (1946) (Rule 52(a) is "a restatement of" the statute interpreted in Kotteakos, 28 U.S.C. § 391 (quoting Advisory Committee Notes to the Rules of Criminal Procedure for the District Courts of the United States 43 (1945))); Bihn v. United States, 328 U.S. 633, 638 (1946); other authority cited infra note 68.

52 See generally 3A CHARLES A. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 854, at 304 n.17 (2d ed. 1982).


54 Fed. R. CRIM. P. 52 provides as follows:

(a) HARMLESS ERROR. Any error, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.
who bears the burden of persuasion with respect to prejudice. In most cases, the Court of Appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial . . . . This burden-shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: while Rule 52(a) precludes error-correction only if the error “does not affect substantial rights,” Rule 52(b) authorizes no remedy unless the error does “affect substantial rights.”55

Olano is important not only because of its clear allocation to the government of the burden of proving harmlessness but also because of its “subtle,” text-based rationale for that allocation: The Court derived Rule 52(a)’s allocation of the burden of proof from the rule’s description of the standard of proof in terms of a negative showing that the party responsible for the error (the government), and not the party affected by the error (the appellant), would be expected to make—namely, that the error “‘does not affect substantial rights.’”56 Applied to the final potential source of an allocation of the burden of proof that can be derived from Brecht, 28 U.S.C. § 2111, this same interpretive technique makes those sources’ endorsement of an allocation of the burden to the state unanimous.

According to Brecht, “the Kotteakos standard” it adopts to govern harmless error analysis in habeas corpus cases “is grounded in the federal harmless error statute,” 28 U.S.C. § 2111, which states that “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.”57

As Brecht’s quotation of section 2111 makes clear, the statute, like Rule 52(a), states the standard of review in terms of a negative showing that the state, not the petitioner, would be expected to make: “‘[T]he court shall give judgment . . . without regard to er-

55 Olano, 113 S. Ct. at 1777-78 (citations omitted). Accord id. at 1781:
In sum, respondents have not met their burden of showing prejudice under [the plain error provision in] Rule 52(b). Whether the Government could have met its burden of showing the absence of prejudice, under [the harmless error provision in] Rule 52(a), if respondents had not forfeited their claim of error, is not at issue here. This is a plain error case, and it is respondents who must persuade the appellate court that the [error] . . . was prejudicial.
(emphasis added). See also id. at 1782 (Kennedy, J., concurring).
56 Id. at 1778 (quoting Fed. R. Crim. P. 52(a)) (emphasis added by the Court).
57 Brecht v. Abrahamson, 113 S. Ct. 1710, 1718 (1993) (quoting 28 U.S.C. § 2111) (footnote omitted). See also id. at 1722 (“[B]ecause the Kotteakos standard is grounded in the federal harmless-error rule (28 U.S.C. § 2111), federal courts may turn to an existing body of case law in applying it.”); id. at 1718 n.7; id. at 1723 (Stevens, J., concurring) (the Kotteakos standard “accords with the statutory rule for reviewing other trial errors that affect substantial rights”).
rors ... which do not affect the substantial rights of the parties.’”

Under the interpretive “dictate[s]” of Olano, therefore, this statement of the standard in terms of a showing the government, and not the petitioner, would be expected to make gives “the Government ... [the] burden of showing the absence of prejudice.”

Consideration of section 2111’s origins produces the same conclusion, by once again cycling interpretation back to the Court’s clear and ubiquitously influential allocation of the burden to the government in Kotteakos. Kotteakos construed the then-existing harmless error statute, 28 U.S.C. § 391, which provided:

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

Congress repealed section 391 in 1948 and replaced it in 1949 with section 2111, which was nearly identical to the statute construed in Kotteakos but for the deletion of the term “technical:”

“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.”

Unless deletion of the word “technical” has any significance,

58 Id. (quoting 28 U.S.C. § 2111 (emphasis added)).
59 Olano, 113 S. Ct. at 1778, 1781.
60 See Kotteakos v. United States, 328 U.S. 750, 757 (1946); see also Brecht, 113 S. Ct. at 1718 n.7.
61 See Brecht, 113 S. Ct. at 1718 n.7 (“Congress tinkered with the language of § 391 when it enacted § 2111 in its place in 1949, ... [leaving] untouched the phrase ‘affect the substantial rights of the parties’ ... [but] delet[ing] ... the word ‘technical.’”); United States v. Hasting, 461 U.S. 499, 509-10 n.7 (1983).
62 The argument that deletion of the word “technical” is important might run as follows: Although Kotteakos assigned appellants the burden of proof only as to “technical” errors, those in fact were the only errors covered by section 391. See 28 U.S.C. § 391 (1925-26 ed.) (forbidding relief based on “technical errors, defects, or exceptions which do not affect the substantial rights of the parties”) (emphasis added). Arguably, therefore, Congress’ broadening of the set of errors to which the statute applied to include all “errors or defects which do not affect the substantial rights of the parties” also broadened the scope of the errors as to which the appellant bore the burden of proving harm.

The central flaw in this argument is that it inaccurately assumes that section 391 applied only to “technical” errors, leaving all other errors reversible per se, even when they did not affect the “substantial rights of the parties.” In fact, neither Kotteakos nor other contemporaneous harmless error cases arising under section 391 read the statute to apply only to “technical” errors. Rather, those cases interpreted the statute and its legislative history to give federal courts the power to refuse to grant relief on any (at least nonconstitutional) error that “d[id] not affect the substantial rights of the parties,” including concededly nontechnical error of just the sort that Kotteakos itself reviewed. See,
section 2111 is simply the successor to section 391. And, if so, the Court's authoritative construction of the earlier statute in Kotteakos, including as to the allocation of the burden of proof to the government, also would govern its construction of the later, existing statute.

Moreover, the Court repeatedly has declined to attach significance to Congress' "tinkering" with the federal harmless error statute between 1948, when section 391 was repealed, and 1949, when section 2111 was adopted. Rather, the Court has attributed section 391's repeal to Congress' mistaken belief that the harmless error provisions in the Federal Rules of Criminal and Civil Procedure made the statute superfluous. It also has attributed section 2111's "reenactment" of section 391 (renumbered because of the intervening revision of the Judicial Code) to Congress' realization a year later that the preexisting statute had to be revived because error under review in the federal courts could arise in contexts other than those governed by the Civil or Criminal Rules.

Likewise, in Lane, the majority clearly assumed that sections 391 and 2111—as well as Criminal Rule 52(a)—were equivalent and governed by the Court's analysis in Kotteakos. Discussing the rele-

e.g., Kotteakos, 328 U.S. at 760-61, 764-65; Berger v. United States, 295 U.S. 78, 82-84 (1935) (finding concededly nontechnical violation harmless and denying relief under section 391). The only import the Court assigned the word "technical" thus was to shift the burden of proof, which usually was borne by the government, to the appellant in cases involving error fitting that description. See Kotteakos, 328 U.S. at 760-61; supra notes 39-41 and accompanying text. By deleting the word "technical," therefore, Congress simply conformed the new statute to the already evolved practice under the old statute of subjecting all (at least nonconstitutional) error to harmless error analysis. See United States v. Seidel, 620 F.2d 1006, 1013 (4th Cir. 1980); Brulay v. United States, 383 F.2d 345, 351 (9th Cir.), cert. denied, 389 U.S. 986 (1967). The only other significance that might be assigned to Congress' removal of the word "technical" is an intention to remove any occasion—of the sort provided by the word's inclusion in the prior statute—for giving appellants the burden of proof. Whether or not the latter intention was present, however, there is simply nothing in the change from section 391 as explained in Kotteakos to section 2111 that indicates the intention to modify Kotteakos' allocation to the government of the burden of proving harmlessness for all errors save those designated as "technical." See also infra notes 64-68 and accompanying text (discussing legislative history of section 2111 and caselaw interpreting it, and concluding that section 2111 effected no substantive change in section 391).

63 Brecht, 113 S. Ct. at 1718 n.7 (describing section 391 as "§ 2111's statutory predecessor").
64 Id.
65 Hastings, 461 U.S. at 509-10 n.7.
66 See United States v. Lane, 474 U.S. 438, 444 (1986) (Rule 52(a) and section 2111 "similarly instruct[ ]" courts on the treatment of harmless error); id. at 446, 448 (discussing Shaffer v. United States, 362 U.S. 511, 517 (1960), and concluding that Kotteakos governs analysis under section 2111, notwithstanding that section's replacement of section 391 and Congress' deletion of the word "technical"); id. at 449 (Kotteakos governs
vant legislative history, which confirms section 2111's intention simply to reenact section 391, Justice Brennan's influential concurrence in *Lane* explained the basis for treating those statutes and Rule 52(a) as equivalent, and thus as governed by *Kotteakos*:

> [Section 391] . . . provided in part . . . [that] "... the court shall give judgment . . . without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties." 28 U.S.C. § 391 (1925-1926 ed.) . . . In 1949, this provision was reenacted in its current form as 28 U.S.C. § 2111, and now instructs appellate courts to "give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." [Section 391] was also incorporated in the Federal Rules of Criminal Procedure, and Rule 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." ... Although § 2111 and Rule 52(a) refer to "errors or defects" without the qualifying word "technical," this change did not alter the substantive legal test. See H. R. Rep. No. 352, 81st Cong., 1st Sess., 18 (1949) (§ 2111 "incorporates" former harmless-error statute); Advisory Committee's Notes on Fed. Rule Crim. Proc. 52(a), 18 U.S.C. App., p. 657 (Rule is a "restatement of existing law").

Not surprisingly, therefore, *Brecht* itself concluded that "the enactment of § 2111 did not alter the basis for the harmless-error standard in *Kotteakos*." On its face and as repeatedly interpreted in the analysis under Rule 52(a), though *Kotteakos* arose under section 391, not Rule 52(a); Bihm v. United States, 328 U.S. 633, 638 n.3 (1946) (Rule 52(a) "effects no change in the [statutory] harmless-error rule" previously governed by section 391).

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68 *Brecht*, 113 S. Ct. at 1718 n.7. *See* United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990) (legislative history of section 2111 indicates no intention to change section 391 substantively).

The lower court caselaw under section 2111 is not as clear as it might be in allocating the burden of proof, but on the whole it bears out the analysis above. A rare comprehensive treatment of the issue in *Rivera*, supra, concludes—based on a discussion of the text and history of section 2111 and its antecedents, Rule 52(a), *Kotteakos,* and prior circuit precedent—that "except possibly for minor, technical errors for which there is no reasonable possibility that the verdict could have been affected, the government ordinarily has the burden of proving that a non-constitutional error was harmless." *Id.* at 1469 n.4. More typically, the decisions simply make brief and unconsidered allusions to the allocation of the burden, evidencing a considerable amount of confusion. *Compare* United States v. Flores, 968 F.2d 1366, 1372 (1st Cir. 1992) (government's attempt to prove harmless found unconvincing) *and* United States v. Patrick, 959 F.2d 991, 1002-03 (D.C. Cir. 1992) (relief granted because court was not persuaded by government's showing of harmlessness) *and* United States v. Tyler, 943 F.2d 420, 423 (4th Cir. 1991) (reversal required if there is a "grave doubt" that the error did not have a substantial influence) *and* United States v. Jefferson, 925 F.2d 1242, 1255 & n.15 (10th Cir.), *cert denied,* 112 S. Ct. 238 (1991) (government satisfied its burden of proving harmless-
Supreme Court, therefore, section 2111 can only fairly be read to recodify Kotteakos' allocation to the government of the burden of proving harmlessness.

What Justice Blackmun wrote in a different harmless error context some years ago aptly encapsulates the law governing the allocation of the burden of proving harmlessness under Kotteakos and the

ness of nonconstitutional error) and United States v. Studley, 892 F.2d 518, 530 (7th Cir. 1989) (government bears burden of showing that error had no substantial influence or effect on the verdict) and United States v. Hays, 872 F.2d 582, 588 (5th Cir. 1989) (stating standard in terms of showing state would be expected to make; error requires reversal unless court can "conclude that the error had no effect, or only a slight effect on the jury's decision") and Government of Virgin Islands v. Bedford, 671 F.2d 758, 762 (3d Cir. 1982) (requiring reversal unless the government proves that there is no "reasonable possibility" that the error had no substantial effect) with United States v. Hill, 976 F.2d 132, 143 (3d Cir. 1992) (discussed below) and United States v. Killough, 848 F.2d 1523, 1527 (11th Cir. 1988) (discussed below) and United States v. Kopelciw, 815 F.2d 1235, 1238 (8th Cir. 1987) (discussed below) and United States v. Lawal, 736 F.2d 5, 9-10 (2d Cir. 1984) (relief denied because appellant failed to show that error was harmful) and Howard v. Gonzales, 658 F.2d 352, 357 (5th Cir. 1981) (party asserting error has burden of proving harm).

After excluding discussions of the issue that are clearly faulty, however—for example, discussions that, contrary to Olano, understand Rule 52(a) to assign the burden to the defendant, see, e.g., Hill, 976 F.2d at 142, or that, contrary to Kotteakos and Olano, simply assume that the appellant, as the moving party in the assertion of error, should bear the burden of proving harm even after proving error, see, e.g., Killough, 848 F.2d at 1527 and Kopelciw, 815 F.2d at 1238—the preponderant lower court view seems to be that the government bears the burden of proof.

At least seven post-Brecht habeas corpus decisions expressly allocate the burden of proof. Three of these decisions assign the burden to the state. See Stoner v. Sowders, 997 F.2d 209, 213 (6th Cir. 1993); Lowery v. Collins, 996 F.2d 770, 773 (5th Cir. 1993); Smith v. Dixon, 996 F.2d 667, 676 n.13 (4th Cir. 1993). The other four decisions assign the burden to the petitioner, although all of them do so based on a misreading of the passage from Brecht that is discussed supra notes 43-47 and accompanying text. See Jeffries v. Blodgett, 5 F.3d 1180, 1190 (9th Cir. 1993) (quoting Brecht, 113 S. Ct. at 1722) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)); Tague v. Richards, 3 F.3d 1133, 1140 (7th Cir. 1993) (quoting Brecht, 113 S. Ct. at 1722); O'Neal v. Morris, 3 F.3d 143, 145 (6th Cir. 1993), cert. granted, 114 S. Ct. 1396 (1994) (citing Brecht, 113 S. Ct. at 1722); Castillo v. Stainer, 997 F.2d 669, 669 (9th Cir. 1993) (quoting Brecht, 113 S. Ct. at 1714, and Kotteakos v. United States, 328 U.S. 750, 776 (1946). Moreover, one of these decisions, O'Neal v. Morris, assigns the burden to the petitioner in dicta despite a previous holding in the same Circuit that interpreted Brecht as assigning the burden to the state. Compare O'Neal, 3 F.3d at 145, with Stoner, 997 F.2d at 213. Two additional decisions use formulations of the standard that might be understood also to allocate the burden of proof, although any such allocation that can be discerned in these decisions is based once again on a misreading of the passage from Brecht that is discussed supra notes 43-47 and accompanying text. See Henry v. Estelle, 993 F.2d 1423, 1426 (9th Cir. 1993) ("a federal court will not reverse the conviction unless the petitioner shows that the error 'had a substantial and injurious effect or influence in determining the jury's verdict'") (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946) and citing Brecht, 113 S. Ct. at 1721-22); Cumbie v. Singletary, 991 F.2d 715, 724 (11th Cir. 1993) ("the relevant inquiry is whether [the petitioner] can demonstrate that he was 'actually prejudiced' by [the error]") (quoting Lane, 474 U.S. at 449).
other authoritative sources to which Brecht refers—United States v. Lane, Rule 52(a), section 2111, and the cases interpreting them: "Every harmless-error standard that this Court has employed . . . shares two salient features . . . [the first being that,] once serious error has been identified, the burden shifts to the beneficiary of the error to show that the conviction was not tainted."69 Chapman v. California reached the same conclusion in its discussion of the allocation of the burden of proof, which, unlike its discussion of the standard of proof, had recourse to Kotteakos and the entire American common law tradition in regard to harmless error:

Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.70

Finally, none of the jurisprudential interests that led the Brecht Court to differentiate habeas corpus proceedings from direct appeal justify a change in the longstanding and uniform federal practice of allocating to the party shown to be seriously at fault the burden of proving that its error did not affect the proceedings. Indeed, in applying the other habeas corpus defenses that the Supreme Court and Congress have devised in service of those same jurisprudential interests—for example, exhaustion of state remedies, nonretroactivity, and procedural default—the Supreme Court and the lower federal courts have repeatedly recognized that interests of finality, comity, and federalism do not justify absolving the responding party of its traditional burdens of pleading and proving the defenses on which it relies.71

III. *Per Se* Prejudicial Errors

In conducting harmless error analysis of constitutional violations in direct appeal and habeas corpus cases, the Court repeatedly has reaffirmed that "[s]ome constitutional violations . . . by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless."72

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70 Chapman v. California, 386 U.S. 18, 24 (1967) (citing 1 Wigmore, Evidence § 21 (3d ed. 1940)).
71 See Liebman & Hertz, supra note *, §§ 22A.3, 23.3a, 23A.2, 24.2a, 25.3a, 26.3a (1993 Cum. Supp.).
72 Satterwhite v. Texas, 486 U.S. 249, 256 (1988). Accord Sullivan v. Louisiana, 113 S. Ct. 2078, 2081 (1993) ("Although most constitutional errors have been held amenable to harmless-error analysis . . . some will always invalidate the conviction"); id. at 2083-84
In Arizona v. Fulminante a five-Judge majority of the Court elucidated this rule of per se prejudice (sometimes called the "rule of automatic reversal") by distinguishing between the concepts of "structural" and "trial" error: "structural defects in the constitution of the trial mechanism" are per se prejudicial; trial errors occurring "during the presentation of the case to the jury" are subject to harmless error analysis.

Although in Brecht the Court changed the standard that applies in habeas corpus cases for assessing the harmlessness of constitutional "trial errors," it did not change—and in fact reaffirmed—its longstanding doctrine treating "structural" error as not subject to harmless error analysis and accordingly as prejudicial (hence reversible)

Trial error "occur[s] during the presentation of the case to the jury," and is amenable to harmless-error analysis because it "may . . . be quantitatively assessed in the context of other evidence presented in

(Rehnquist, C.J., concurring); United States v. Olano, 113 S. Ct. 1770, 1778 (1993); Rose v. Clark, 478 U.S. 570, 577 (1986) ("some constitutional errors require reversal without regard to the evidence in the particular case . . . [because they] render a trial fundamentally unfair"); Vasquez v. Hillery, 474 U.S. 254, 263-64 (1986); Chapman, 386 U.S. at 23 ("there are some constitutional rights so basic to a fair trial that their infractions can never be treated as harmless error").

Fulminante, 111 S. Ct. 1265. See also Satterwhite, 486 U.S. at 257 ("automatic rule of reversal").

Fulminante, 111 S. Ct. at 1265. See also id. ("structural defect[s] affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself").

Id. at 1264-65. Examples of "trial error" include, generally, (i) unconstitutional "outside intrusions on the jury," see, e.g., United States v. Olano, 113 S. Ct. 1770, 1780 (1993); Patton v. Yount, 467 U.S. 1025, 1031-35 (1984); (ii) violations of the rule of Doyle v. Ohio, 426 U.S. 610 (1976), which forbids the state to tell suspects upon arrest that they have the right to remain silent, then to use the suspects' post-arrest silence against them as proof of their guilt, see Brecht v. Abrahamson, 113 S. Ct. 1710, 1717 (1993); (iii) violations of the rule of Sandstrom v. Montana, 442 U.S. 510 (1979), forbidding instructions requiring jurors to presume the presence of elements of an offense, see Rose v. Clark, 478 U.S. 570, 577-79 (1986); (iv) violations of the rule forbidding prosecutorial comment on the defendant's failure to testify, see Chapman v. California, 386 U.S. 18, 24 (1967); and, more controversially, (v) introduction at trial of involuntary confessions, see Fulminante, 111 S. Ct. at 1265-66. Cf. id. at 1254-55 (opinion of White, J.) ("The majority . . . draw[s] . . . a meaningless dichotomy between 'trial errors' and 'structural defects' in the trial process . . . . This effort [to distinguish the two types of errors] fails, for our jurisprudence on harmless error has not classified so neatly the errors at issue.").

See supra notes 1-15 and accompanying text.
order to determine [the effect it had on the trial].’” At the other end of
the spectrum of constitutional errors lie “structural defects in the con-
stitution of the trial mechanism, which defy analysis by ‘harmless-er-
ror’ standards . . . .” The existence of such defects—deprivation of the
right to counsel, for example—requires automatic reversal of the con-
viction because they infect the entire trial process.

For the foregoing reasons, then, we hold that the Kotteakos harm-
less-error standard applies in determining whether habeas relief must
be granted because of constitutional error of the trial type.79

Thus, even in habeas corpus proceedings adjudicated under Brecht,
“structural” errors, as opposed to “errors of the trial type,” are al-
ways considered “prejudicial” and accordingly are reversible per se.

Even more recently, in United States v. Olano,80 the Court seems
to have divided the universe of constitutional errors into three,
rather than two, categories for purposes of harmlessness analysis—
or, perhaps, the Court has divided the category of automatically re-
versible errors into two subcategories. According to this taxonomy,
“structural errors” must “be corrected regardless of their effect” on
the trial because they violate “‘basic protections [without which] . . .
no criminal punishment may be regarded as fundamentally fair.’”81
As to such errors—for example, the denial of an attorney or a jury,
or other failures to “complete the proceeding”82—the presence or
absence of prejudice is irrelevant.83 A second category of automati-
cally reversible errors is subject to reversal only upon a finding of
prejudice, but “should be presumed prejudicial if the defendant
cannot make a specific showing of prejudice.”84 Automatic reversal
upon a finding of these errors—a single attorney’s joint representa-
tion of criminal defendants with conflicting interests, for exam-
ple85—occurs not so much because of the fundamentality of the
right that was violated, but instead because prejudice is simultane-
ously so likely to occur and so difficult to prove.86

79 Brecht, 113 S. Ct. at 1717, 1722 (quoting Fulminante, 499 U.S. at 308-09, and
discussing Kotteakos v. United States, 328 U.S. 750 (1946)) (emphasis added); accord id. at
1723 (Stevens, J. concurring).
80 113 S. Ct. at 1770.
81 Id. at 1778 (quoting Fulminante, 499 U.S. at 310).
83 As to such rights, the violation “‘affect[s] substantial rights’ independent of its
prejudicial impact.” Olano, 113 S. Ct. at 1779.
84 Id. at 1778.
1779; Riggins v. Nevada, 112 S. Ct. 1810, 1816-17 (1992) (refusing to engage in preju-
dice analysis and effectively applying prejudice per se standard to reverse conviction of
defendant who was unconstitutionally forced to take antipsychotic medication during
trial).
86 See, e.g., Olano, 113 S. Ct. at 1783 (Stevens, J., dissenting) (“some defects . . . are
Opinions of the Court designate the rights listed below as “structural” constitutional rights that are “so basic to a fair trial that their infraction can never be treated as harmless error,” or at least as so prone to prejudice that, when violated, prejudice should be presumed: 87

(1) The right to counsel at critical stages of the proceedings before and at trial and on appeal, 88 including:
   (a) the right to effective assistance of counsel; 89 and
   (b) the right to representation by an attorney who does not simultaneously represent another criminal client with a conflicting interest. 90

(2) The right to self-representation. 91

(3) The right to an impartial judge. 92

(4) The right to trial by jury, 93 which encompasses:

subject to reversal regardless of whether prejudice can be shown . . . because it is so difficult to measure their effects on a jury’s decision’); Brecht v. Abrahamson, 113 S. Ct. 1710, 1717 (1993) (discussing “defects . . . which defy analysis by ‘harmless-error’ standards” (quoting Arizona v. Fulminante, 499 U.S. 279, 290 (1991)); Sullivan v. Louisiana, 113 S. Ct. 2078, 2081-82 (1993); Riggins, 112 S. Ct. at 1816-17. Olano delineates the three categories of errors—(1) errors that so thoroughly impugn the structure of the criminal process that their commission is reversible apart from prejudice; (2) errors as to which prejudice is required to justify reversal but is presumed; and (3) trial errors subject to case-specific harmless error analysis—in the following passage: “[t]he presence of alternate jurors during jury deliberations is not the kind of error that ‘affect[s] substantial rights’ independent of its prejudicial impact [category (1)]. Nor have respondents made a specific showing of prejudice [category (3)]. Finally, we see no reason to presume prejudice here [category (2)].” Olano, 113 S. Ct. at 1779; see also id. at 1783 (Stevens, J., dissenting).


88 See, e.g., Sullivan, 113 S. Ct. at 2081 (“total deprivation of the right to counsel”); Brecht, 113 S. Ct. at 1717; Fulminante, 499 U.S. at 294 (opinion of White, J.) (denial of counsel at trial or preliminary hearing “can never be harmless error”); Penson v. Ohio, 488 U.S. 75, 86-89 (1988) (actions of counsel effectively leaving defendant without appellate representation can never be harmless error); Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986); Gideon v. Wainwright, 372 U.S. 335 (1963); see also United States v. Allen, 895 F.2d 1577, 1580 (10th Cir. 1990) (failure to inform defendants of dangers of self-representation at trial can never be harmless).


93 See, e.g., Rose, 478 U.S. at 577-78.
(a) the right to a jury,\textsuperscript{94} including a capital sentencing jury,\textsuperscript{95} that is impartial and is not organized to convict or to condemn; and
(b) the right to a grand and petit jury selected in a representative manner free of racial discrimination.\textsuperscript{96}

(5) The right to a public trial.\textsuperscript{97}

(6) The right to a "jury verdict within the meaning of the Sixth Amendment," which, in light of the Fifth Amendment requirement of proof beyond a reasonable doubt, is the right to "a jury verdict of guilt beyond a reasonable doubt."\textsuperscript{98} This right includes:
(a) the full protection of the reasonable doubt standard at trial,\textsuperscript{99} including the right to a jury instruction on the state's burden to prove all charges beyond a reasonable doubt\textsuperscript{100} that does not water down the protection afforded by the "reasonable doubt" standard;\textsuperscript{101}
(b) a ban on "direct[ed] . . . verdict[s] for the State";\textsuperscript{102}
(c) the right to an instruction on each element of the offense of which the prisoner has been convicted;\textsuperscript{103} and
(d) the right to a unanimous jury verdict.\textsuperscript{104}

(7) The right, in capital cases, to a sentencing process that adequately "narrows" the categories of offenses and offenders eligible for

\textsuperscript{94} See, e.g., id.; Thompson v. White, 680 F.2d 1173, 1174 (8th Cir. 1982) (per curiam), cert. denied, 459 U.S. 1177 (1983); Hines v. Enomoto, 658 F.2d 667, 674 (9th Cir. 1981); Huffman v. Wainwright, 651 F.2d 347, 350 (5th Cir. 1981).
\textsuperscript{95} See, e.g., Gray v. Mississippi, 481 U.S. 648, 668 (1987) (plurality opinion) (harmless error analysis not applicable to violations of rule of Witherspoon v. Illinois, 391 U.S. 510 (1968), forbidding automatic exclusion from capital sentencing juries of individuals who have conscientious scruples against death penalty but nonetheless can follow the law).
\textsuperscript{99} Fulminante, 499 U.S. at 291 (citing Cool v. United States, 409 U.S. 100, 104 (1972), and In re Winship, 397 U.S. 358, 364 (1970)).
\textsuperscript{100} Id.; Jackson v. Virginia, 445 U.S. 307, 320 n.14 (1979); Lanigan v. Maloney, 853 F.2d 40, 49-50 (1st Cir. 1988), cert. denied, 488 U.S. 1007 (1989) (failure to instruct jury as to reasonable doubt standard is reversible without regard to showing of prejudice).
\textsuperscript{101} See Sullivan, 113 S. Ct. at 2081.
\textsuperscript{102} Id. at 2080.
\textsuperscript{103} See id. at 2084 (Rehnquist, C.J., concurring) (suggesting that "remov[ing] an element of the offense from the jury's consideration" can never be harmless (citing Rose v. Clark, 478 U.S. 570, 579 n.7, 580 n.8 (1986)). See also Teel v. Tennessee, 498 U.S. 1007 (1990) (White, J., dissenting from denial of certiorari) (certiorari should be granted to decide "whether harmless error analysis applies when a jury is not instructed on an essential element of the offense"); "[s]everal courts of appeal have held that error resulting from a failure to give proper instructions on the essential elements of an offense cannot be harmless").
\textsuperscript{104} See, e.g., Sincox v. United States, 571 F.2d 876, 879 (5th Cir. 1978).
capital punishment and that requires sentencer consideration of all relevant mitigating circumstances.

(8) In States in which death sentences are based on the sentencer’s weighing of aggravating and mitigating evidence, the right to have a state court or the sentencer reweigh the proper aggravating and mitigating factors in the event that the sentencer premised the original sentence on an aggravating factor later determined to be invalid as a matter of federal law or state law.

(9) The right to an appeal.

This list is not exhaustive, and the lower courts have expanded it.

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107 If a sentencer in a “weighing” state bases a death sentence on an invalid aggravating factor, the condemned individual has a constitutional right to have either the state courts or the original sentencer reweigh the valid aggravating and mitigating factors. In this event, the federal courts may not themselves engage in either a reweighing or in harmless error analysis. See, e.g., Richmond v. Lewis, 113 S. Ct. 528, 535 (1992) (“Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court . . . or other state sentencer must actually perform a new sentencing calculus . . . .”) (emphasis added); Sochor v. Florida, 112 S. Ct. 2114, 2123 (1992); Parker v. Dugger, 498 U.S. 308, 322-23 (1991); Clemons v. Mississippi, 494 U.S. 738, 754 (1993); Wiley v. Puckett, 969 F.2d 86, 94 n.8 (5th Cir. 1992) (pre-Brecht decision). But see Smith v. Dixon, 14 F.3d 956 (4th Cir. 1994) (en banc) (overturning panel decision adhering to automatic-relief rule and engaging in harmless error analysis following conclusion that jury premised original sentence in part on aggravating circumstance).

108 See, e.g., Sochor, 112 S. Ct. at 2123.

109 See, e.g., Lozada v. Deeds, 498 U.S. 430, 432 (1991) (per curiam) (petitioner was entitled to certificate of probable cause on claim of ineffectiveness of counsel on appeal even without showing of prejudice because “at least two Courts of Appeals have presumed prejudice” when petitioner is deprived of right to appeal); Lozada v. Deeds, 964 F.2d 956, 958 (9th Cir. 1992) (following reversal and remand by Supreme Court, circuit court “hold[s] that prejudice is presumed under Strickland [v. Washington] if it is established that counsel’s failure to file a notice of appeal was without the petitioner’s consent”); Gray v. United States, 834 F.2d 967 (11th Cir. 1987) (per curiam) (unconstitutional denial of appeal is reversible per se); Ashby v. Wyrick, 693 F.2d 789, 794 (8th Cir. 1982) (similar).

to include a number of other constitutional rights.\textsuperscript{111}

IV. STANDARDS, CRITERIA, AND PROCEDURES FOR ASSESSING HARMLESSNESS

A. INTRODUCTION

Although in \textit{Brecht} the Supreme Court specified the harmless error standard that henceforth will apply in habeas corpus proceedings by adopting the rule of \textit{Kotteakos v. United States},\textsuperscript{112} the Court left much unsaid about the meaning and application of that standard. Already noted is the majority's silence on the question of which party bears the burden of proving harmlessness or its opposite.\textsuperscript{113} Also unstated is the degree of certainty by which the court must be convinced that the error had no, or had some, substantial effect—be that burden “beyond a reasonable doubt,” “by clear and convincing evidence,” by a “preponderance of the evidence” or some alternative formulation such as a “high,” “reasonable,” or simple “probability.” \textit{Brecht} also incompletely addressed the focus of its “no substantial effect” test: is the question whether the error had no (or some) substantial impact on the process by which the actual jury reached a verdict, or is it whether removing the error creates a substantial likelihood of a different outcome upon a hypothetical new trial? Finally, because \textit{Brecht} applied its new standard to only the single violation before it, the Court had only a little to say about the factors the new standard makes relevant.

\textsuperscript{111} \textit{See, e.g.}, \textit{Hays v. Arave}, 977 F.2d 475, 479 (9th Cir. 1992) (“unconstitutional sentencing of an individual \textit{in absentia} . . . is a ‘structural’ error and . . . cannot be affirmed on the basis of harmless error”); \textit{Woods v. Dugger}, 923 F.2d 1454, 1460 (11th Cir. 1991), \textit{cert. denied}, 112 S. Ct. 407 (1991) (presence of large numbers of uniformed corrections officers as spectators at petitioner's trial for killing of prison guard violated right to a fair trial and "a denial of a fair trial can never be harmless because the right is so fundamental to our notion of due process"); \textit{Sheppard v. Rees}, 909 F.2d 1234, 1236-38 (9th Cir. 1989) ("fundamental right to be clearly informed [in a timely fashion] of the nature and cause of the charges in order to permit adequate preparation of a defense"); \textit{Meagher v. Dugger}, 861 F.2d 1242, 1244-47 (11th Cir. 1988) (foregoing jury trial in reliance on plea bargain that judge did not follow in sentencing); \textit{Jones v. Lockhart}, 851 F.2d 1115, 1117 (8th Cir. 1988) (erroneous stipulation to prior felony convictions when enhancement statute was involved). \textit{See also} \textit{Anderson v. Butler}, 858 F.2d 16, 19 (1st Cir. 1988) (counsel’s failure to call psychiatric experts after promising to do so in opening statement is prejudicial as matter of law).

\textsuperscript{112} 328 U.S. 750 (1946). \textit{See supra} notes 10-15 and accompanying text.

\textsuperscript{113} \textit{See supra} notes 29-37 and accompanying text.
These open questions are important. Even assuming a standard focused on the "substantiality" vel non of a violation, wide variations in the meaning of the Brecht/Kotteakos rule remain possible, pending the resolution of these questions. On the one hand, taking Brecht at its word that it changed nothing but the "standard" of review under Chapman v. California, the rule would require the state to prove beyond a reasonable doubt that the error had no substantial effect on the jury's view of the case when it deliberated to a verdict against the petitioner (or, put differently, to dispel any reasonable possibility that the error had such an effect). On the other hand, were Brecht meant to transform the harmless error doctrine from a defense applicable only in cases of relatively minor violations into a new and difficult-to-satisfy element of the violation itself, the decision might require petitioners to show, for example, a substantial probability of acquittal at a hypothetical new trial at which the violation did not occur.

114 See, e.g., Brecht, 113 S. Ct. at 1713-14 (discussing Chapman v. California, 386 U.S. 18 (1967)); see also supra notes 31-35 and accompanying text (discussing Court's replacement of Chapman with Brecht harmless error standard in habeas corpus proceedings).


116 Although not entirely clear on the point, Brecht seems to intend only a modest change in the harmless error doctrine in habeas corpus. See Brecht, 113 S. Ct. at 1713-14 (Kotteakos standard adopted because it is "less onerous" than the Chapman standard); id. at 1724-25 (Stevens, J. concurring) ("The Kotteakos standard . . . is less stringent than the Chapman . . . standard . . . . Given the critical importance of the faculty of judgment in administering either standard, however, that difference is less significant than it might seem . . . ."); id. at 1723 (Stevens, J. concurring) (although not as demanding on the state as the Chapman standard, the Kotteakos standard is "appropriately demanding"); id. at 1731 (O'Connor, J., dissenting) ("Kotteakos . . . is somewhat more lenient" than Chapman). See also United States v. Hastin, 461 U.S. 499, 509 n.7 (1983) (harmless error standard in 28 U.S.C. §2111 [and thus Kotteakos, see supra notes 57-68 and accompanying text] by its terms may be coextensive with Chapman) (emphasis added). Cf. Brecht, 113 S. Ct. at 1727 (White, J., dissenting) ("The majority's decision to adopt this novel approach is far from inconsequential.").

117 This standard essentially would supplement the doctrine defining every constitutional violation with a requirement of "materiality" of the sort that is an element of a "prosecutorial suppression of exculpatory evidence" violation under United States v. Bagley, 473 U.S. 667, 682-83 (1985), or a requirement of "prejudice" of the sort that is an element of an "ineffective assistance of counsel" claim under Strickland v. Washington, 466 U.S. 668, 694 (1984). Cf. Smith v. Dixon, 996 F.2d 667, 692-93 (4th Cir. 1993) (Wilkins, J., dissenting), rev'd, 14 F.3d 956 (4th Cir. 1994) (en banc) (Brecht calls for "precisely the analysis" required by Strickland and is "essentially the same" inquiry as that required by the prejudice prong of the "cause and prejudice" test in Wainwright v. Sykes, 433 U.S. 72 (1977)). See generally Liebman & Hertz, supra, note 1, § 24.3c (1993 Cum. Supp.) (discussing "prejudice" prong of "cause and prejudice" exception to procedural default rule). This reading of Brecht is not tenable. First, the Brecht Court acknowledged that the petitioner there had established a constitutional violation. See Brecht, 113 S. Ct. at 1717. The violation finding left only the question whether the "effect or influence" of that violation was insufficient to warrant relief. Id. at 1718 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). The Kotteakos decision, which
Questions of this sort about other "harmless error" and "prejudice" tests have generated legions of books and articles. The fol-

the Brecht Court made authoritative in future habeas corpus cases, see, e.g., Brecht, 113 S. Ct. at 1722, supra notes 10-15 and accompanying text, likewise treated the harmless error question as one that arises only after a violation has been proved. See Kotteakos v. United States, 328 U.S. 750, 764-65 (1946).

In addition, Brecht and Kotteakos are replete with acknowledgments that what was at stake in both cases was the proper scope of "harmless error" analysis. See, e.g., Brecht, 113 S. Ct. at 1713-14, 1716, 1722; Kotteakos, 328 U.S. at 757. As the Court made clear in a decision announced not long before Brecht, the phrase "harmless error" is a term of art that applies only after a violation has been found. That distinguishes other prejudice-focused doctrines, which, by contrast, determine whether or not a violation has occurred in the first place.

Today's decision does not involve or require a harmless error inquiry. Harmless error analysis is triggered only after the reviewing court discovers that an error has been committed. And under Strickland v. Washington, an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice. Our opinion does nothing more than apply the case-by-case prejudice inquiry that has always been built into the Strickland test. Since we find no constitutional error, we need not, and do not, consider harmlessness.

Lockhart v. Fretwell, 113 S. Ct. 838, 842-43 n.2 (1993) (emphasis in original) (citation omitted). In short, Brecht is a harmless error, not a constitutional merits, decision. It simply cannot be read to add a new "prejudice" element to the definition of every variety of constitutional trial error that petitioners might allege in support of habeas corpus relief.

A different approach to the issue leads to the same conclusion. Even if the burden of proof of "substantial effect" rested on the petitioner, the burden thereby imposed would, at most, be one that is coextensive with a federal criminal appellant's burden of showing "plain error" under Fed. R. Crim. P. 52(b). United States v. Olano, 113 S. Ct. 1770, 1777-78 (1993) explains that the "substantial effect" test in the "harmless error" provision of Fed. R. Crim. P. 52(a)—which, as developed above, is identical to Kotteakos' "substantial effect" test adopted in Brecht, see supra notes 51-55 and accompanying text—is the same as the "substantial effect" test in the "plain error" provision of Criminal Rule 52(b), with the only difference between the two subparts of Rule 52 being Rule 52(a)'s allocation to the government of the burden of proving harmlessness, and Rule 52(b)'s allocation to the appellant of the burden of proving plain error. Moreover, the Court has carefully noted that the appellant's burden of showing "plain error" under Rule 52(b) is a lesser burden than is the burden borne by a prisoner attempting to show "cause and prejudice" under Wainwright v. Sykes, 473 U.S. 72 (1977), and a fortiori, than the burden borne by a defendant attempting to establish the "materiality" element of a "suppression of evidence" violation under Bagley, 473 U.S. at 682-83, or the "prejudice" element of an "ineffective assistance" violation under Strickland, 466 U.S. at 694. See Frady v. United States, 456 U.S. 152, 166 n.15 (1982) (burden of demonstrating Sykes "prejudice" is greater than burden of demonstrating Rule 52(b) "plain error"); Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (same); Liebman & Hertz, supra note *, § 24.3c (1993 Cum. Supp.) (standard of Sykes prejudice is certainly no more, and probably is less, demanding than burden of showing Bagley "materiality" or Strickland "prejudice"). Likewise, an analysis of Brecht and Kotteakos makes clear that the Brecht/Kotteakos rule is not focused on the outcome of a hypothetical trial at which the violation did not occur, but rather on the violation's effect or lack of it on the actual trial at which the petitioner was convicted. See infra notes 132-50 and accompanying text. (We are particularly indebted to John Blume for the analysis set out in this paragraph.)

118 See, e.g., LaFave & Israel, supra note 1, § 26.6; Weinstein & Berger, supra note 1, § 2.03(05); Traynor, supra note 1; Field, supra note 1; Goldberg, supra note 1;
lowing discussion does not offer a comprehensive treatment of these issues. Instead, it examines the bearing on them of Brecht and the small number of other sources (primarily Kotteakos) that Brecht treats as authoritative. Subsection B fleshes out the Kotteakos standard of harmlessness that the Brecht Court adopted. Subsection C addresses the degree of certainty by which the decisionmaker must be convinced. Subsection D analyzes whether the proper focus of the Brecht/Kotteakos test is on the actual effect of the violation on the petitioner's original trial or on the putative effect of removing the violation on the outcome of a hypothetical new trial. Subsection E lists some of the factors that frequently bear on the harmless error analysis. Finally, subsection F discusses ways in which judges may go about informing their judgment on the harmless error question.

B. THE STANDARD OF REVIEW

As noted, the Brecht Court adopted as the standard of harmlessness of constitutional error in habeas corpus proceedings the harmlessness standard that the Court has applied to nonconstitutional error since its 1946 decision in Kotteakos. In describing the Kotteakos standard, the Brecht Court repeatedly quotes a passage from Kotteakos that asks “whether the . . . error ‘had substantial and injurious effect or influence in determining the jury’s verdict.’” Justice Rutledge’s explication of the standard in Kotteakos, however, is far richer than a single quotation reveals.

Of particular note, Justice Rutledge concluded his most self-conscious statement of the standard in Kotteakos in the following manner:

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.

In addition to speaking directly to Kotteakos' allocation of the burden of proving harmlessness and the decision's careful calibration of

Monaghan, supra, note 1; Saltzburg, supra note 1; Stacy & Dayton, supra note 1; Harmless Error, Prosecutorial Misconduct, supra note 1; Harmful Use of Harmless Error in Criminal Cases, supra note 1; Deadly Mistakes: Harmless Error in Capital Sentencing, supra note 1.  
119 See Brecht, 113 S. Ct. at 1722; supra notes 11-15 and accompanying text.  
120 Brecht, 113 S. Ct. at 1714 (quoting Kotteakos, 328 U.S. at 776); see also id. at 1718 & n.7, 1722.  
121 Kotteakos, 328 U.S. at 764-65.  
122 See supra notes 38-41 and accompanying text.
the degree of certainty that the decisionmaker must have before finding an error harmless,\textsuperscript{123} this crucial passage makes clear that harmless error determinations should hinge on the difference between an error with only "slight effect" on the jury, for which relief need not be granted, and an error that "substantially swayed" the jury, which requires relief.

C. THE REQUISITE DEGREE OF CERTAINTY

Perhaps no question presented by harmless error theory is more vexing than that of the degree of conviction or certainty that a decisionmaker must have in regard to the error's effect on the proceedings before deeming the error reversible or not. That is, must the judge be sure (or alternatively, "pretty sure," "reasonably sure," "more sure than not") that the error did not have a substantial effect on the jury's deliberations in the case?\textsuperscript{124} The lower courts' myriad formulations of the degree of conviction they require before finding nonconstitutional error harmless illustrate the difficulties the question has posed.\textsuperscript{125}

Nonetheless, given Brecht's clear adoption of the harmless error rule of Kotteakos,\textsuperscript{126} and given Kotteakos' clear pronouncements on the "degree of certainty" issue, that issue may be less difficult in this context than in others. According to Kotteakos, reversal is required

\textsuperscript{123} See infra note 127 and accompanying text.

\textsuperscript{124} Under the Chapman standard that Brecht supplanted in habeas corpus cases, the requisite degree of certainty was clear: the state had to demonstrate that the error "was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967) (emphasis added). See also supra notes 3-9 and accompanying text.

\textsuperscript{125} For example, the D.C. Circuit has sometimes required reversal unless the government convinced it beyond a reasonable doubt that the error had no substantial effect. See United States v. Fowler, 608 F.2d 2, 12 (D.C. Cir. 1979); see also Dallago v. United States, 427 F.2d 546, 560 (D.C. Cir. 1969) (reversal required if there is the "slightest possibility" that the error affected the verdict). At other times, however, without acknowledging any inconsistency, the same circuit has allowed the government to avoid reversal by showing that it is "more probable than not" that the error had no substantial effect on the verdict. See United States v. Norris, 873 F.2d 1519, 1525 (D.C. Cir.), cert. denied, 493 U.S. 835 (1989). Likewise, the Third Circuit has applied tests ranging from a requirement of reversal if there is any "reasonable possibility" that the error had a substantial effect on the verdict (in essence, a "beyond a reasonable doubt" standard), Government of Virgin Islands v. Bedford, 671 F.2d 758, 763 n.7 (3d Cir. 1982), to a requirement of reversal unless the government demonstrates a "high[ ] probabil[ity]" that the error had no substantial effect (something like a "clear and convincing" standard), Government of Virgin Islands v. Toto, 529 F.2d 278, 283-84 (3d Cir. 1976), to a standard forbidding reversal unless the petitioner proves a "reasonable probability" of substantial harm, United States v. Hill, 976 F.2d 132, 143 (3d Cir. 1992). See also United States v. Hitt, 981 F.2d 422, 425 (9th Cir. 1992) (noting conflict in Ninth Circuit precedent on degree of conviction required to find error harmless).

\textsuperscript{126} See supra notes 11-15 and accompanying text.
upon a finding of error unless "the conviction is sure that the error did not influence the jury" or "if one cannot say, with fair assurance . . . that the judgment was not substantially swayed by the error." To like effect is another statement in Kotteakos, which the Court thereafter repeated in United States v. Lane in a passage to which Brecht specifically refers in describing its new harmless error standard for habeas corpus cases: "The inquiry . . . is . . . whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." Defined in terms of either the degree of certainty that the judge must possess before finding an error harmless or the degree of doubt on the judge's part that prevents such a finding, the Kotteakos test seems to fall in essentially the "highly probable" or "clear and convincing" range: An error is harmless if the court has a fair assurance or sure conviction that the error did not substantially affect the verdict; the error is not harmless if there is a grave doubt (i.e., something more than merely a reasonable possibility or reasonable doubt) as to the substantiality of the error's impact.

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129 Id. at 449 (quoting Kotteakos, 328 U.S. at 765, and quoted in Brecht v. Abrahamson, 113 S. Ct. 1710, 1722 (1993)) (emphasis added).
130 Cf. Brecht v. Abrahamson, 113 S. Ct. 1710, 1721 (1993) (quoting and distinguishing Chapman v. California, 386 U.S. 18, 24 (1967) (quoting Fahy v. Connecticut, 375 U.S. 85, 86 (1966) ("granting relief merely because there is a 'reasonable possibility' that the trial error contributed to the verdict is at odds with the historic meaning of habeas corpus")).
131 This statement of the test conjoins Kotteakos' description of the burden of proof (referred to above as the requisite degree of certainty) with Kotteakos' allocation of the burden to the state. See supra notes 22-71 and accompanying text.

Cases which have used a reasonable facsimile of the "fair assurance"/"grave doubt" test include: United States v. Hitt, 981 F.2d 422, 425 (9th Cir. 1992) (requiring "fair assurance" that violation was harmless, because "fair assurance" standard "seems to have the Supreme Court's blessing" in Kotteakos); United States v. Tyler, 943 F.2d 420, 423 (4th Cir.) ("grave doubt" as to error's substantiality requires reversal), cert. denied, 112 S. Ct. 646 (1991); United States v. Wood, 924 F.2d 399, 402 (1st Cir. 1991) ("fair assurance" defined as "highly probable"); United States v. Colombo, 909 F.2d 711, 713 (2d Cir. 1990) ("conviction is sure"); United States v. Sands, 899 F.2d 912, 916 (10th Cir. 1990) ("fair assurance" defined as "reasonable certainty"); United States v. Moree, 897 F.2d 1329, 1332-33 (5th Cir. 1990) ("significant possibility" of substantial effect requires reversal); Schrand v. Federal Pacific Elec. Co., 851 F.2d 152, 157 (6th Cir. 1988) ("fair assurance"); United States v. Bernal, 814 F.2d 175, 185 (5th Cir. 1987) ("fair assurance"); United States v. Muza, 788 F.2d 1309, 1312 (8th Cir. 1986) ("fair assurance"); United States v. Nyman, 649 F.2d 208, 212 (4th Cir. 1980) ("fair assurance" defined as "highly probable"); Government of Virgin Islands v. Toto, 529 F.2d 278, 283-84 (3d Cir. 1976) ("fair assurance" defined as "highly probable"). See also Tipton v. Canadian Imperial Bank of Commerce, 872 F.2d 1491, 1498 (11th Cir. 1989) ("likely"); United States v. Hays, 872 F.2d 582, 588 (5th Cir. 1989) (error requires reversal unless court can "conclude that the error had no effect, or only a slight effect on
D. THE FOCUS OF INQUIRY—ACTUAL IMPACT VERSUS HYPOTHETICAL OUTCOME

Characterizing an error as harmless might have either of two meanings. On the one hand, an error might be deemed harmless if it played such an inconsequential role in the actual trial in which it occurred that it assuredly had no impact on the trial’s verdict. On the other hand, an error might be deemed harmless—even if it played an important role in the actual trial—if a hypothetical new trial absent the error would likely produce the same outcome as did the actual trial.\(^\text{132}\)

In some cases, this difference in approach to harmless error will have little impact. For example, in a case in which the error produced the only evidence of guilt (say, a coerced confession), the error assuredly will have affected the evidence, argument, instructions, deliberations, and, accordingly, the guilty verdict at the actual trial. By like measure, curing the error assuredly would result in a not-guilty verdict at a hypothetical new trial. In both cases, the analysis is essentially the same, and the conclusion is identical: the error quite obviously was not harmless. Similarly, if an error occurred so far on the periphery of the original proceedings (say, a brief, casual remark by a police witness about a defendant’s post-arrest silence\(^\text{133}\)) that the lawyers, judge, and, assumedly, the jurors paid it no heed, then a hypothetical new proceeding absent the error would assumedly resemble the actual proceeding at which the error was essentially invisible, and the harmless error analyses and conclusions in both events will be similar.\(^\text{134}\)

\(^{132}\) There arguably is a third approach to harmless error, which in fact is a variation of the first approach. This approach would analyze a single aspect of an error’s impact on the actual proceedings—namely, the extent to which the error “render[ed] the result of the trial unreliable or [rendered] the proceeding fundamentally unfair.” Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993) (finding counsel’s error, which had major impact on both the proceedings and outcome of the original trial (and the removal of which, at a later trial, might well have changed the outcome), to be nonprejudicial for purposes of assessing the prejudice prong of the test for ineffective assistance of counsel, because the error had no impact on the fairness of either the proceeding or its result).

\(^{133}\) See Doyle v. Ohio, 426 U.S. 610 (1976).

\(^{134}\) For the reasons discussed in the text, the strength or weakness of the evidence of guilt that was properly admitted at the actual trial is relevant under both approaches to harmless error. Nonetheless, the two approaches diverge in their use of this factor. In
In the usual case, however, the two approaches require different analyses that are quite capable of reaching different results. Consider a trial at which the prosecution offers a coerced confession that monopolizes the lawyers' questions during the voir dire of prospective jurors as well as their opening and closing arguments, is the focus of the state's case-in-chief and the defendant's rebuttal, and is addressed by the judge in her instructions to the jury. In such a case, the harmless error analysis and conclusion are clear under a rule focused on the impact of the error on the actual trial: the error substantially affected the proceedings and was not harmless. This conclusion holds even if the prosecution's presentation also included reference to strong circumstantial evidence—say, motive, fingerprints, and a matching license plate number. However else the prosecution might have chosen to present its case under different, hypothetical circumstances, the prosecution in fact chose to concentrate its attention—thus, in fact forcing defense counsel, the judge, and assumingly the jurors to focus their attention—on the illegal confession. In the context of the actual trial, the confession was not harmless.

Under a different harmless error rule, however, one focused on the outcome of a hypothetical trial conducted without the error, the analysis would be quite different, as, very possibly, would be the outcome of the analysis. Here, analysis would focus on a differently configured, hypothetical trial, at which, in the assumed absence of the confession, the state's case necessarily would emphasize the circumstantial evidence—motive, fingerprints, and matching license plate numbers. If that evidence is thought to be likely to lead to a guilty verdict at the hypothetical trial, then the conclusion of a hypothetical-outcome analysis would be different from the one reached under an actual-effect analysis—namely, that the error was harmless.\textsuperscript{135}

hypothetical-outcome analysis, the emphasis is on the intrinsic or potential strength of the proper evidence, regardless of the importance, emphasis, or impact of that evidence at the original trial. In actual-effect analysis, see, e.g., Yates v. Evatt, 111 S. Ct. 1884, 1893-94 (1991); Schneble v. Florida, 405 U.S. 427, 430 (1972), the emphasis instead is on the strength or weakness of the evidence in the context of the actual trial, and depends less on intrinsic weight and more on the way in which—or the frequency with which—the evidence actually was introduced, discussed in argument, and instructed on by the judge. See infra note 158 and accompanying text.

\textsuperscript{135} Professor Field has described the difference between the two modes of harmless error analysis as follows:

The first approach requires examining the erroneously admitted evidence, without regard to the weight of other evidence, to determine whether the error might have swayed the factfinder and contributed to the verdict. The second position does not look to the tainted evidence, but to the untainted evidence, and asks whether it alone compels a verdict.
As the Court recently held in an opinion by Justice Scalia, the Constitution seems to dictate the proper choice among these two modes of harmless error analysis. Because the Sixth Amendment’s guarantee of a jury trial allocates to actual jurors the exclusive responsibility to render criminal verdicts, those same actual jurors must be the focus of harmless error analysis. If those jurors deliberated to a verdict without being influenced by an error, then their verdict satisfies the Constitution’s jury-verdict requirement and may stand. On the other hand, if those jurors deliberated to a verdict under the influence of a constitutional error, then their verdict is tainted, and a new verdict, produced by a new set of actual jurors who are not influenced by the error, must supplant the first verdict.

A different approach, which proceeds by imagining the behavior of hypothetical jurors at a hypothetical new trial, risks depriving the petitioner of a jury trial altogether or, at best, of putting the petitioner of a jury trial altogether or, at best, of putting

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Field, supra note 1, at 16-17. See also Harrington v. California, 395 U.S. 250, 255 (1969) (Brennan, J., dissenting). Compare Yates, 111 S. Ct. at 1893-94 (harmless error doctrine focuses on error’s impact on actual trial) and Satterwhite v. Texas, 486 U.S. 249, 258-59 (1988) (“The question . . . is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather whether the State proved ‘. . . that the error complained of did not contribute to the verdict obtained.’”) and Chapman v. California, 386 U.S. 18, 23 (1967) (actual-impact approach) and Lowery v. Collins, 988 F.2d 1364, 1373 (5th Cir. 1993) (actual-impact approach) with Arizona v. Fulminante, 111 S. Ct. 1246, 1256 (1991) (hypothetical-outcome approach: “When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless . . . .”) and Rose v. Clark, 478 U.S. 570, 579 (1986) (hypothetical-outcome approach: “Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed” even if the prosecution relied, or the trial judge instructed, on an unconstitutional burden-shifting presumption).


137 See id. at 2080 (proper approach to harmless error analysis is dictated by the Sixth Amendment “right to have the jury, rather than the judge, reach the requisite finding of ‘guilty’”).

138 As Justice Scalia noted in Sullivan, in considering the harmlessness vel non of an improper instruction on reasonable doubt, the constitutional right to a jury verdict comprehends the constitutional right to a jury verdict free of the influence of violations of other constitutional rights. See id. at 2081. Thus, in view of the Fifth Amendment due process clause’s requirement of proof beyond a reasonable doubt, “the jury verdict required by the Sixth Amendment is a jury verdict of guilt beyond a reasonable doubt.” Id. Accordingly, a jury verdict reached at a level of certainty less than beyond a reasonable doubt is not a valid verdict under the Sixth, as well as the Fifth, Amendments and must be replaced by a verdict that is valid under both amendments. See id.

139 See id. at 2082 (citing Yates, 111 S. Ct. at 1898 (Scalia, J., concurring in part and concurring in the judgment) for the proposition that it is “‘not enough’” to “‘conclude that a jury would surely have found petitioner guilty beyond a reasonable doubt’”; instead, court must conclude that “the jury’s actual finding of guilty beyond a reasonable doubt would surely not have been different, absent the constitutional error”).
ting the reviewing judges in the role of jurors, in violation of the Sixth Amendment requirement of a jury of one's peers drawn from one's community. As the Court concluded:

Consistent with the jury-trial guarantee, the question . . . the reviewing court [is] to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Here again, however, the answer to the question of which focus of analysis is correct in the current habeas corpus context is simpler than a comprehensive review of the general harmless error caselaw and secondary writing would suggest. Brecht controls that context,

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140 See id. (it is improper for "reviewing court" to "engage in pure speculation—its view of what a reasonable jury would have done"); "when it does that, 'the wrong entity judge[s] the defendant guilty' ")(quoting Rose v. Clark, 478 U.S. 570, 578 (1986)); United States v. Lane, 474 U.S. 438, 465 (1986) (Brennan, J., concurring in part and dissenting in part) ("[h]armless-error analysis is not an excuse for overlooking error because the reviewing court is itself convinced of the defendant's guilt"); because the guilt determination "is for the jury to make, . . . the reviewing court is concerned solely with whether the error may have had a 'substantial effect' upon that body") (emphasis added); Kotteakos v. United States, 328 U.S. 750, 763 (1946) ("[I]t is not the appellate court's function to determine guilt or innocence. . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out.").

141 Sullivan, 113 S. Ct. at 2081-82 (citations omitted) (quoting Yates v. Evatt, 111 S. Ct. 1884, 1893 (1991) (emphasis added by the Court) and citing Rose v. Clark, 478 U.S. 570, 578 (1986)); Pope v. Illinois, 481 U.S. 497, 509-10 (1987) (Stevens, J., dissenting); Chapman v. California, 386 U.S. 18, 24 (1967). See also Yates v. Evatt, 111 S. Ct. 1884, 1893 (1991) (reviewing court must focus on the evidence "the jury actually considered in reaching its verdict"); Satterwhite v. Texas, 486 U.S. 249, 258-59 (1988) (the question "is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proven 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained'").

Although Sullivan involved an application of the Chapman standard of "harmlessness beyond a reasonable doubt," the Court directed its analysis to all "harmless error" analysis. Sullivan, 113 S. Ct. at 2081-82. In any event, in another case announced nearly contemporaneously with both Brecht and Sullivan, the Court endorsed the same approach in applying the "substantial impact" standard that Brecht adopted. See United States v. Olano, 113 S. Ct. 1770, 1780 (1993) (describing "the normal interpretation of the phrase 'affecting substantial rights,' " and the "ultimate inquiry" in assessing "prejudicial impact" for purposes of harmless error analysis under a "substantial effect" regime, as the following question: "Did the intrusion affect the jury's deliberations and thereby its verdict?").
and the standard to which the Brecht Court repeatedly referred, drawn from Kotteakos v. United States,\(^{142}\) answers the question: "the standard for determining whether habeas relief must be granted is whether . . . the error 'had a substantial and injurious effect or influence in determining the jury's verdict.'"\(^{143}\)

The determinative consideration under the Brecht/Kotteakos standard thus is not the strength of the evidence or the probability of conviction at a hypothetical retrial absent the error.\(^{144}\) Rather, the relevant question is whether the error substantially affected the actual thinking of the jurors or the deliberative processes by which they reached their verdict. Once again the words of Justice Rutledge in Kotteakos are instructive:

[The question is . . . not [whether the jurors] were . . . right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.\(^{145}\)

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\(^{142}\) 328 U.S. at 750.

\(^{143}\) Brecht v. Abrahamson, 113 S. Ct. 1710, 1713-14 (1993) (quoting Kotteakos, 328 U.S. at 776 (emphasis added)); accord id. at 1718, 1718 n.7, 1722; id. at 1724 (Stevens, J., concurring). See also id. at 1717 ("Trial error . . . is amenable to harmless-error analysis because it 'may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial].' ") (quoting Arizona v. Fulminante, 111 S. Ct. 1246, 1264 (1991) (brackets in original) (emphasis added)); id. at 1725 (Stevens, J., concurring) (the Court's new harmless error standard "requires a habeas court to review the entire record de novo in determining whether the error influenced the jury's deliberations") (emphasis added); id. at 1724 ("The purpose of [the requirement that the court] review the entire record is, of course, to consider all the ways that error can infect the course of a trial.") (emphasis added); id. (quoting Kotteakos, 328 U.S. at 764-65, for the proposition that "[t]he habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place" and must decide that 'the error did not influence the jury,' and that 'the judgment was not substantially swayed by the error.' ") (emphasis added) (footnote omitted).

\(^{144}\) Id. at 1724 (Stevens, J., concurring) ("The habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place. Kotteakos is full of warnings to avoid that result.").

\(^{145}\) Kotteakos, 328 U.S. at 764 (citations omitted). See Brecht, 113 S. Ct. at 1724 (Stevens, J., concurring) (passage quoted in text is one "that should be kept in mind by all courts that review trial transcripts"); United States v. Lane, 474 U.S. 438, 449 (1986) (quoting Kotteakos, 328 U.S. at 765: "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 . . . whether the error itself had substantial influence."). Kotteakos could not be
The best way to illustrate this approach to harmless error review is to consider the application of the approach in the case in which it was established, Kotteakos, and the case in which the Court applied it to habeas corpus proceedings, Brecht. In Kotteakos, the Court reversed a lower court conclusion that an instructional error was harmless "'since guilt was so manifest.'"146 Although agreeing with the lower court that guilt was manifest, the Court nonetheless found the instructional error prejudicial because the error "per- vaded the entire charge" and accordingly made it "highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict."147 In reaching this result, the Kot- teakos Court took great pains to make clear to lower court judges that the touchstone of harmless error is not whether "there was enough [evidence] to support the result, apart from the phase affected by the error"; or whether "the evidence offered specifically and properly to convict each defendant would be sufficient to sustain his conviction, if submitted in a separate trial"; or whether the clearer on this point, given its repeated descriptions of the actual-effect focus of harm- less error analysis. See Kotteakos, 328 U.S. at 762 (analysis focuses on "the relation of the error asserted to casting the balance for decision on the case as a whole"); id. at 764 (the "effect the error had or reasonably may be taken to have had upon the jury's decision"); id. ("the impact of the thing done wrong on the minds of [the jurors]"); id. (whether the error "influence[d] the jury"); id. at 765 (whether "the judgment was ... substantially swayed by the error"); id. ("whether the error itself had substantial influence"); id. at 776 (whether "the error had substantial and injurious effect or influence in determining the jury's verdict").

Although the small number of lower court decisions published since Brecht have not been particularly explicit or careful in revealing the focus of their analyses, most seem to concentrate on the error's impact on the actual trial, not the strength of the evidence as it bears exclusively on the likelihood of conviction on retrial. See, e.g., Jeffries v. Bloodgett, 5 F.3d 1180, 1190-91 (9th Cir. 1993); Tague v. Richards, 3 F.3d 1133, 1140 (7th Cir. 1993); Lowery v. Collins, 996 F.2d 770, 772-73 (5th Cir. 1993); Duest v. Singletary, 997 F.2d 1336 (11th Cir. 1993); Stoner v. Sowders, 997 F.2d 209 (6th Cir. 1993); Vanderbilt v. Collins, 994 F.2d 189 (5th Cir. 1993); Standen v. Whiteley, 994 F.2d 1417 (9th Cir. 1993); McKinney v. Rees, 993 F.2d 1378 (9th Cir.) cert. denied, 114 S. Ct. 622 (1993); Pemberton v. Collins, 991 F.2d 1218, 1226-27 (5th Cir.) cert. denied, 114 S. Ct. 637 (1993); Cumbie v. Singletary, 991 F.2d 715, 755 (11th Cir.) cert. denied, 114 S. Ct. 650 (1993). Other decisions emphasize the existence of "overwhelming evidence" without making clear whether that evidence is relevant because of its tendency, in the context of the actual trial, to overwhelm the error's effect on the jury or because of the likely outcome that evidence would produce at a new trial. See Quinn v. Neal, 998 F.2d 526 (7th Cir. 1993); Nethey v. Collins, 993 F.2d 1154 (5th Cir. 1993). Cf. supra note 134; infra notes 158-59 and accompanying text (strength of the evidence relevant, albeit in different ways, under both actual-impact and hypothetical-outcome approaches). At least one decision uses a standard expressly rejected by Kotteakos. Compare Wright v. Dallman, 999 F.2d 174 (6th Cir. 1993) (error harmless because proper evidence is "sufficient to sustain the jury's guilty verdict") with Kotteakos, 328 U.S. at 763-65, 767, 775-76 (rejecting "sufficiency of the evidence test").

146 Kotteakos, 328 U.S. at 755.  
147 Id. at 768, 776.
jurors “were . . . right in their judgment”; or whether “conviction would, or might probably, have resulted in a properly conducted trial”; or even whether “the evidence concerning each petitioner was so clear that conviction would have been dictated and reversal forbidden, if it had been presented in [proper] trials.” Under Kotteakos, “the question is . . . rather what effect the error had or reasonably may be taken to have had upon the jury’s decision. The crucial thing is the impact of the thing done wrong on the minds of [the jurors] . . . .”

In Brecht, the Court similarly refrained from inquiring whether the evidence untainted by the constitutional violation was sufficient to sustain the verdict or whether the defendant would probably be convicted in a retrial free of error. Focusing on the central question of whether the constitutional violation “‘substantially influence[d]’” the jurors, the Court concluded that the error was harmless because the prosecutor’s unconstitutional references to petitioner’s post-Miranda silence were not only minimal but “in effect, cumulative” of entirely constitutional evidence, given the state’s “extensive and permissible references to petitioner’s pre-Miranda silence.”

E. RELEVANT FACTORS

Assessments of harmless error are necessarily context-specific, leading the Court in Kotteakos to recognize that such judgments may be “tempered,” but may not be “governed,” by stare decisis or “what has been done in similar situations.” Context-sensitive factors that are relevant to harmless error determinations include:

148 Id. at 763-65, 767, 775-76. Notably, the passage that contains Kotteakos’ most sustained admonition to judges to avoid hypothetical-outcome analysis in favor of actual-effect analysis, id. at 775-76, is the same passage from which the Brecht Court extracted the standard that henceforth is to apply to harmless error analysis in habeas corpus proceedings, namely, “whether . . . the error ‘had substantial and injurious effect or influence in determining the jury’s verdict.’” Brecht, 113 S. Ct. at 1713-14 (quoting Kotteakos, 328 U.S. at 776).
149 Kotteakos, 328 U.S. at 764.
150 Brecht, 113 S. Ct. at 1722.
151 Kotteakos, 328 U.S. at 762 (“In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations.”). Emphasizing the context-specificity of harmless error analysis, Kotteakos itself found harmful a type of error that the Court had found harmless in a prior case, Berger v. United States, 295 U.S. 78 (1935). See Kotteakos, 328 U.S. at 772:
These are the abstract similarities [between the two cases]. They are only abstract. To strip them from the separate and distinct total contexts of the two cases, and disregard the vast difference in those contexts, is to violate the whole spirit, and we think the letter also, of [the statute governing harmless error analysis].
The nature of the right at issue and the extent to which violations of that right are likely to affect the jury's deliberations or otherwise undermine the reliability or fairness of the proceedings.152

The "character of the proceedings," with particular reference to "what is at stake upon its outcome."153

The importance of "the phase [of trial] affected by the error."154

The egregiousness of the violation.155

The frequency of the error or the extent to which it "permeated[d]" the proceeding.156

The "central[ity]" to the case, as actually tried, of the issue affected by the error.157

The relative weakness of the properly admitted evidence, to the extent that this factor bears on the question whether the constitutional error did or did not affect the thinking or deliberative processes of the actual jurors,158 or the "closeness of the case"

152 See Kotteakos, 328 U.S. at 761, 766 (likelihood of harm affected by the "nature of the error," whether, for example, the right violated "embod[ies] a great tradition of justice or... a necessity for drawing lines somewhere between great areas of law"); id. at 760-61, 764-65 (recognizing a continuum of predictable harm running from violations of "technical" errors to violations of "substantial rights" to "departure[s] from a constitutional command or a specific command of Congress"); Fretwell v. Lockhart, 113 S. Ct. 838, 844 (1993) (relevance to harmless error analysis of likelihood that error "render[ed] the result of the trial unreliable or the proceeding fundamentally unfair").

153 Kotteakos, 328 U.S. at 762 ("Necessarily, the character of the proceeding [and]... what is at stake upon its outcome... are material factors in judgment."). In Kotteakos, the Court indicated that criminal cases may demand a more stringent standard of harmless error than civil cases because "a person is on trial for his life or his liberty." Id. at 763. This factor may have particular significance in capital cases. See LIEBMAN & HERTZ, supra note *, § 2.2d; infra notes 191-95 and accompanying text. See also Pemberton v. Collins, 991 F.2d 1218, 1226-27 (5th Cir.) (suggesting that error is less likely harmless when case is tried to jury than when case is tried to judge), cert. denied, 114 S. Ct. 637 (1993).

154 Kotteakos, 328 U.S. at 765. See United States v. Lane, 474 U.S. 438, 450 & n.13 (1986) (suggesting that errors occurring during trial court's instructions are more important than ones during lengthy presentation of evidence); Kotteakos, 328 U.S. at 768 (error not harmless, despite strong evidence of guilt, because error "pervaded the entire [jury] charge"). See also Dobbs v. Zant, 113 S. Ct. 835, 836 n.1 (1993) (per curiam) ("an inadequate or harmful closing argument, when combined, as here, with a failure to present mitigating evidence, may be highly [prejudicial]").

155 See, e.g., Kotteakos, 328 U.S. at 772-74 (egregiousness of violation before Court distinguishes case from prior cases that found similar errors to be harmless). See also infra notes 177-90 and accompanying text.

156 Kotteakos, 328 U.S. at 769 (error could not be deemed harmless because it "permeated the entire [jury] charge, indeed the entire trial"). Cf. Brecht v. Abrahamson, 113 S. Ct. 1710, 1722 (1993) (error harmless in part because "[t]he State's references to petitioner's post-Miranda silence were infrequent, comprising less than two pages of the 900-page trial transcript in this case").


158 See, e.g., Brecht, 113 S. Ct. at 1722 (considering strength of evidence of guilt as one among several factors relevant in assessing whether error "substantially influence[d]" jury); Lane, 474 U.S. at 450 (misjoinder-of-claims error unlikely to affect jury because properly admitted evidence was so strong as to overwhelm the impact of small amount of evidence admitted exclusively on the misjoined count); Kotteakos, 328 U.S. at 763
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on the evidence adduced at the original trial.\(^{159}\)

(8) In cases in which evidence was improperly admitted, the extent to which:

(a) the prosecutor emphasized the improper evidence in closing argument or the trial judge did so in the jury charge.\(^{160}\)

(b) the improperly admitted evidence was likely to influence the jury's deliberations, either because it was particularly salient or appeared to be particularly probative of the ultimate issue\(^{161}\) or for some other reason.\(^{162}\)

(question "whether the evidence in other respects is evenly balanced or one-sided" is relevant in determining whether "an error in receiving or excluding evidence" affected jury). As discussed supra notes 139-41 and 144, the court's assessment of the strength of the properly admitted evidence must not be based on some notion of the idealized or intrinsic strength of the evidence or its potential strength if offered at a new trial—at which its importance will automatically be enhanced by the omission of the improper evidence introduced at the original trial. Rather, the assessment must focus entirely on the probability that the properly admitted evidence—as actually presented, argued over, and instructed on, at the original trial—overwhelmed the effect of improperly admitted evidence, as that evidence actually was presented, argued over, and instructed on. A good example of how the strength of the properly admitted evidence should be factored into an actual-impact approach to harmless error is then-Justice Rehnquist's opinion for the Court in Schneble v. Florida, 405 U.S. 427 (1972): "In some cases the properly admitted evidence of guilt is so overwhelming and the prejudicial effect of the [error] is so insignificant by comparison, that it is clear . . . that the [violation] was harmless error." Id. at 430. See also Yates v. Evatt, 111 S. Ct. 1884, 1893-94 (1991); United States v. Young, 470 U.S. 1, 36 n.4 (1985) (Stevens, J., dissenting) (quoting Kotzeakos, 328 U.S. at 764).

\(^{159}\) See, e.g., Duest v. Singletary, 997 F.2d 1336, 1338-39 (11th Cir. 1993); United States v. Urbanik, 801 F.2d 692, 699 (4th Cir. 1986); Gaither, 413 F.2d at 1079.

\(^{160}\) See, e.g., United States v. Ariza-Ibarra, 605 F.2d 1216, 1223 (1st Cir. 1979).

\(^{161}\) See, e.g., Arizona v. Fulminante, 111 S. Ct. 1246, 1257 (1991) (erroneous admission of coerced confession rarely, if ever, can be deemed "harmless" because "[a] confession is like no other evidence" and is "'probably the most probative and damaging evidence that can be admitted against'" the defendant, and has such a "'profound impact on the jury . . . that we may justifiably doubt its ability to put [the confession] out of mind even if told to do so'"") (quoting Bruton v. United States, 391 U.S. 123, 139-40 (1968) (White, J., dissenting)). See also id. at 1266-67 (Kennedy, J., concurring) ("[T]he court conducting a harmless-error inquiry must appreciate the indelible impact a full confession may have on the trier of fact . . . . Apart, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence.'"); Carella v. California, 491 U.S. 263, 267, 270 (1989) (Scalia, J., concurring) (when assessing harmlessness of erroneous instruction that required jurors conclusively to presume presence of element of the crime, reviewing court should find error to be harmless only in "'rare situations'"); Lowery v. Collins, 996 F.2d 770, 773 (5th Cir. 1993) (erroneous admission of videotape of interview of child complainant was not harmless because "the State failed to introduce any non-hearsay, direct evidence of Lowery's guilt other than the videotaped interview").

\(^{162}\) See, e.g., Jeffries v. Blodgett, 5 F.3d 1180, 1190-91 (9th Cir. 1993) (jurors' acquisition of extra-record information about defendant's "prior conviction [of crime] similar to the charge at issue" could not be deemed harmless, given the "'highly inflammatory' effect that knowledge of substantially similar bad acts has upon the jury"); Duest, 997 F.2d at 1339 (erroneous admission of subsequently vacated prior conviction deemed not harmless under Brecht because admitted evidence "was materially inaccurate" and "helped portray Duest to the jury not only as an individual with a propensity for criminal
(c) the improperly admitted evidence did not duplicate other evidence that was lawfully presented to the jury.

(9) Whether the error resulted in the exclusion or omission of evidence that could have influenced the jury's deliberations or whether the absence of that evidence could have misled the jury concerning the facts.

(10) In cases in which there was more than one error, the "cumulative effect" of the errors.

(11) Whether the court failed to give "curative instructions" or to take other remedial measures sufficient to prevent the error from substantially affecting the jurors' deliberative processes.

F. THE EXERCISE OF JUDGMENT; DE NOVO REVIEW; HEARINGS

"In the end, the way we phrase the governing standard is far less important than the quality of the judgment with which it is app-
plied."  

Through statements such as this, both Justice Stevens in concurrence in *Brecht* and Justice Rutledge for the Court in *Kotteakos* emphasized the importance—especially in a “substantial effect” harmless error regime focused on the context-dependent impact of constitutional error on *other* individuals (the jurors)—of “the discrimination . . . of judgment transcending confinement by formula or precise rule.”

To inform their judgment, district court judges generally are obliged to consider the entire record. Only in this way can they understand the way in which the error presented itself to the jurors and the extent to which the error either was highlighted or overwhelmed by the rest of the trial, including the *voir dire* of prospective jurors, presentation of evidence, argument of counsel, instructions, sentencing proceedings, and other important aspects of the tribunal.

One factor that may *not* control the judge’s determination, and that can only influence it to the extent the judge independently finds it persuasive, is a state court determination that the error was harmless. For, “[t]o apply the *Kotteakos* standard properly, a court must . . . make a *de novo* examination of the record.”

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167 *Brecht*, 113 S. Ct. at 1725 (Stevens, J. concurring).
168 See supra notes 132-50 and accompanying text.
169 *Brecht*, 113 S. Ct. at 1725 (Stevens, J., concurring) (quoting *Kotteakos* v. United States, 328 U.S. 750, 761 (1946)). See also id. at 1723 (Stevens, J., concurring) (rule Court adopts “leaves considerable latitude for the exercise of judgment by federal courts”).
170 See *Lane*, 474 U.S. at 448; *Kotteakos* v. United States, 328 U.S. 750, 762, 764 (1946) (reviewing court must exercise judgment “influenced by conviction resulting from examination of the proceedings in their entirety” and must “weigh the error’s effect against the entire setting of the record”); *Lowery* v. *Collins*, 996 F.2d 770, 779 (5th Cir. 1993) (“As applied by the Court in *Brecht*, *Kotteakos* commands that, in determining whether a constitutional error is harmless, a *de novo* review of the entire trial record must be performed by the reviewing court.”). See also *Yates* v. *Evatt*, 111 S. Ct. 1884, 1894, 1896 (1991).
171 See *Kotteakos*, 328 U.S. at 765 (reviewing court should “ponder[ ] all that happened without stripping the erroneous action from the whole”). As the Court concluded in *Yates*, 111 S. Ct. at 1893-94, when making a harmless error determination, the judge must focus on the evidence the jury actually considered in reaching its verdict and must decide “whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the [constitutional violation].” In other words, “[t]o say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.” Id. at 1893.
172 *Brecht*, 113 S. Ct. at 1724 (Stevens, J., concurring) (“The Court faithfully engages in such *de novo* review today, . . . just as the plurality did in the dispositive portion of its analysis in *Wright* v. *West*, 112 S. Ct. 2482, 2492-93 (1992) (opinion of Thomas, J.).”). See also id. at 1731 (O’Connor, J., dissenting) (under *Kotteakos*, the “courts . . . still must
Sometimes, besides independently reviewing the existing record in the case, district court judges may have to make an additional record of their own. The duty to hold an evidentiary hearing\textsuperscript{173} or to pursue other fact-development procedures\textsuperscript{174} in connection with harmless error analysis may arise in situations in which the impact of an error on the proceedings—say, for example, excessive law enforcement presence in the courtroom, outside influences on the jurors, or the racial or other segregation of the courtroom—may not be fully revealed by the existing record\textsuperscript{175} and may properly be inquired into without violating evidentiary rules limiting the testimony of judges and jurors about their actual thought processes in the course of reaching a decision or verdict.\textsuperscript{176}

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\textsuperscript{173} See J. Liebman & R. Hertz, \textit{supra} note *, ch. 20.

\textsuperscript{174} See id. §§ 19.3-19.5.

\textsuperscript{175} See id. § 20.3.

\textsuperscript{176} See, e.g., Remmer v. United States, 347 U.S. 227, 229-30 (1954) (discussed in United States v. Olano, 113 S. Ct. 1770, 1781 (1993)) (because sending "an F.B.I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror," Court remands for evidentiary hearing to "determine the circumstances [of the FBI investigation], the impact thereof upon the juror, and whether or not it was prejudicial"); J. Liebman & R. Hertz, \textit{supra} note *, § 21.2 nn.13-14 and accompanying text (limitations on calling judges and jurors as witnesses in habeas corpus and other federal proceedings). \textit{Cf.} Sullivan v. Louisiana, 113 S. Ct. 2078, 2084 (1993) (Rehnquist, C.J., concurring) ("reviewing court is usually left only with the record developed at trial to
V. The Brecht Exception: Egregious or Repeated Misconduct

In Brecht, apparently at the behest of Justice Stevens, whose vote made a majority for the Court’s new “substantial effect” harmless error rule for habeas corpus cases, the Court tentatively announced an exception to that rule:

Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not “substantially influence” the jury’s verdict.177

As Justice Stevens explained in his concurrence in Greer v. Miller, “there may be extraordinary cases in which the . . . error is so egregious, or is combined with other errors or incidents of prosecutorial misconduct, that the integrity of the proceeding is called into question.”178 To this prosecution-focused exception may be added the Brecht Court’s suggestion that “affirmative evidence that state-court judges are ignoring their oath” to uphold federal law might warrant a less forgiving harmless error rule in order “to deter state courts from relaxing their own guard in reviewing constitutional error.”179

As Justice O’Connor pointed out in her dissent in Brecht, the Court’s language in describing this exception is only suggestive, forcing litigants, lawyers, and courts in the first instance to “address whether the exception exists at all.”180 In addition, the Court’s language leaves open the question of what harmless error standard, if any, should apply in the event of a qualifying violation that “did not substantially influence the jury’s verdict.”181 If this exception is simply designed to establish a new category of prejudicial per se or automatically reversible “structural error” of the sort discussed in Part III above, then the violation should require reversal apart from any harmless error inquiry.182 On the other hand, because the Brecht Court refers in the passage recognizing the exception to “error of the trial type,” about which the Court previously stated that

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179 Brecht, 113 S. Ct. at 1721.
180 Id. at 1731 (O’Connor, J., dissenting).
181 Id. at 1722 n.9 (majority opinion).
182 See supra notes 80-86 and accompanying text.
some kind of harmless error analysis always applies,\textsuperscript{183} the possibility arises that the Court meant to subject these "unusual" or "extraordinary" violations to harmless error analysis under the stricter \textit{Chapman v. California} standard, which \textit{Brecht} otherwise supplants.\textsuperscript{184}

Whether, as Justice O'Connor wondered, the suggested exception ought to exist at all may depend on two competing sets of concerns. On the one hand, there is a certain logic to the exception the Court describes. Because the exception focuses on self-conscious misconduct by prosecutors (and possibly state judges as well), the exception may restore some of the deterrent capacity lost in the shift from \textit{Chapman} to \textit{Brecht}. That deterrent effect would be brought to bear in the very cases in which deterrence is most needed and most likely to prove efficacious. In addition, the putative exception's focus on errors that are obviously flagrant—from either a qualitative or quantitative perspective—avoids the extra expenditure of resources occasioned by a \textit{Brecht} inquiry in situations in which an error is most likely to have been prejudicial.

On the other hand, recognizing the exception would only add further complexity to an area of the law that \textit{Brecht} already has made vastly more complicated by adopting, but only partially explaining, a special harmless error rule for habeas corpus cases.\textsuperscript{185} Moreover, when combined with the existing categories of violations and proceedings for purposes of harmless error review—(1) \textit{per se} reversible violations,\textsuperscript{186} (2) \textit{per se} prejudicial violations,\textsuperscript{187} (3) "trial errors" to which, in certain proceedings, the old \textit{Chapman} rule applies,\textsuperscript{188} and (4) "trial errors" to which in other proceedings the \textit{Brecht/Kotteakos} rule applies\textsuperscript{189}—the recognition of a new set of "trial errors" exempted from category (4) and placed in one of the other categories (or in a category of its own) would only exacerbate the already dangerous tendency of the Court to view some constitutional rights as

\begin{footnotes}
\textsuperscript{183} See \textit{supra} notes 77-79 and accompanying text.
\textsuperscript{184} See \textit{supra} notes 1-9 and accompanying text.
\textsuperscript{185} See \textit{Brecht}, 113 S. Ct. at 1731 (O'Connor, J., dissenting): The interest of efficiency, always relevant to the scope of habeas relief, . . . favors simplification of legal inquiries, not their multiplication.
\textsuperscript{186} See \textit{supra} notes 72-111 and accompanying text.
\textsuperscript{187} See \textit{supra} notes 72-111 and accompanying text.
\textsuperscript{188} See \textit{supra} notes 1-9 and accompanying text. \textit{But cf. supra} note 20 and accompanying text (discussing the possibility that the Court may be preparing to abandon \textit{Chapman} in all cases).
\textsuperscript{189} See \textit{supra} notes 10-20 and accompanying text.
\end{footnotes}
VI. HARMLESS ERROR IN CAPITAL HABEAS CORPUS CASES

Brecht v. Abrahamson was a noncapital case. It did not present, and the Court consequently did not address, the applicability of its new rule to capital cases.\(^\text{191}\) The current Court generally has resisted special rules for habeas corpus review in capital cases.\(^\text{192}\) In the harmless error context, however, the Court might take a different tack. The choice of harmless error standard is "critical to our faith in the reliability of the criminal process,"\(^\text{193}\) and as the Court long has recognized, capital cases demand heightened standards of reliability because of the unique "severity and . . . finality" of the death penalty.\(^\text{194}\)

Significantly, Justice Stevens, who provided the crucial fifth vote in Brecht v. Abrahamson, is one of the strongest proponents of specialized, reliability-enhancing procedures in postconviction capital cases.\(^\text{195}\) If Justice Stevens' capital jurisprudence leads him to favor application of the more stringent Chapman standard of harmless er-

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\(^{190}\) See Brecht v. Abrahamson, 113 S. Ct. 1710, 1728 (White, J., dissenting):

Our habeas jurisprudence is taking on the appearance of a confused patchwork in which different constitutional rights are treated according to their status, and in which the same constitutional right is treated differently depending on whether its vindication is sought on direct or collateral review. I believe this picture bears scant resemblance either to Congress' design or to our own precedents.

\(^{191}\) See, e.g., Penry v. Lynaugh, 492 U.S. 302, 313 (1989) (deciding applicability of Court's new Teague rule to capital cases, an issue that the Court did not resolve in Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion), because "Teague was not a capital case").

\(^{192}\) See, e.g., Herrera v. Collins, 113 S. Ct. 853, 863 (1993) ("[W]e have 'refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus.'" (quoting Murray v. Giarratano, 492 U.S. 1, 9 (1989) (plurality opinion))); J. Liebman & R. Hertz, supra note *, § 2.2d.

\(^{193}\) Brecht, 113 S. Ct. at 1728-29 (O'Connor, J., dissenting).

\(^{194}\) Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (quoting Gardner v. Florida, 430 U.S. 349, 357-58 (1977)). See also Herrera, 113 S. Ct. at 863 ("We have, of course, held that the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed."); authority cited in J. Liebman & R. Hertz, supra note *, § 2.2d.

\(^{195}\) See Penry, 492 U.S. at 349 (Stevens, J., concurring in part and dissenting in part) ("I do not support the Court's assertion . . . that Teague's retroactivity principles pertain to capital cases."); Murray v. Giarratano, 492 U.S. 1, 22 (1989) (Stevens, J., dissenting) (arguing that the "unique nature of the death penalty not only necessitates additional protections during pretrial, guilt, and sentencing phases, but also enhances the importance of the appellate process," thus creating right to counsel in capital but not necessarily in noncapital postconviction proceedings); Teague v. Lane, 489 U.S. 288, 321 & n.3 (1989) (Stevens, J., concurring in part and concurring in the judgment) (arguing that the finality concerns underlying Teague rule are "wholly inapplicable to the capital sentencing context").
ror in capital habeas corpus proceedings, this view may command a majority of the Court.

VII. Conclusion

The aim of this Article has not been to criticize *Brecht v. Abrahamson* but to flesh out and clarify its new harmless error standard for habeas corpus cases. Nonetheless, this attempt to answer the various questions newly raised by *Brecht* serves to highlight the decision's central shortcoming. *Brecht* took a relatively clear and well-settled body of law and transformed it into a swamp of ambiguities and exceptions. The intra- and intercircuit conflicts the decision already has spawned bear out Justice O'Connor's prediction in dissent in the case that *Brecht* only spells "trouble" for federal courts engaged in habeas corpus adjudication in the future. \(^{196}\)

*Brecht* thus fits a pattern apparent in much of the Court's effort, over the last 15 years, to curb habeas corpus judicially and piecemeal in the face of Congress' refusal to reform the writ more systematically. Although avowedly erected to improve efficiency and finality, the Court's ever-expanding obstacles to habeas corpus relief in fact have had the opposite effect. Rather than streamlining the process of litigating and deciding habeas corpus cases, the Court's innovations—now joined by the harmless error standard of *Brecht*—have complicated and prolonged the review process. \(^{197}\) Confronted with such counterproduction, it is difficult to avoid Justice O'Connor's suspicion that the Court's goal is not improvement in the administration of justice but, instead, "denying [habeas corpus] relief whenever possible." \(^{198}\)

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\(^{196}\) *Brecht*, 113 S. Ct. at 1731 (O'Connor, J., dissenting) (quoted *supra* note 185). For examples of intra- and intercircuit conflicts in the application of *Brecht*, see *supra* notes 68, 125, 131, 145.


\(^{198}\) *Brecht*, 113 S. Ct. at 1732 (O'Connor, J., dissenting).