The "Burden" of Proof in Federal Habeas Litigation

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I. INTRODUCTION

The Supreme Court's 1993 decision in *Brecht v. Abrahamson*,\(^1\) clarified by the 1995 decision in *O'Neal v. McAninch*,\(^2\) represents an important extension of the Court's recent work in restructuring the federal habeas corpus remedy against the backdrop of recurring congressional debate over the limitation of federal review for state inmates.\(^3\) In *Brecht*, the Court imposed for the first time a prejudice requirement for state inmates litigating federal constitutional claims in federal habeas cases. The Court departed from the traditional harmless-error standard for reviewing constitutional error,\(^4\) which required reversal in state proceedings unless a federal constitutional error was considered harmless beyond a reasonable doubt.\(^5\) Rather, the *Brecht* majority concluded that claims in-
volving "trial error" require relief only if the error "had substantial and injurious effect or influence in determining the jury's verdict."6

In a series of significant decisions over the past decade, the Court has limited access to federal remedies based on procedural failures in the litigation process. Most notably, in Coleman v. Thompson,7 the Court recognized state procedural default of federal constitutional claims as barring subsequent habeas review on their merits, with only very narrowly interpreted exceptions to the general rule.8 The Court's approach has essentially restricted state prisoners to litigation of constitutional claims in a single federal habeas action,9 recognizing only quite limited exceptions to this general policy.10

[which] put the burden on the beneficiary of the error [here, as Justice Breyer notes, the State] . . . to prove that there was no injury." O'Neal, 115 S. Ct. at 995 (quoting Chapman, 386 U.S. at 24); see also 1 J. Wigmore, Evidence § 21 (3d ed. 1940).

6. Brecht, 113 S. Ct. at 1714 (quoting 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 . . . ." Id.


8. Id. at 729-31. The exceptions to application of state procedural default as a bar to relitigation of federal constitutional claims in federal habeas corpus include application of the "cause and prejudice" test of Wainwright v. Sykes, 433 U.S. 72, 87 (1977). Cause and prejudice may be demonstrated by a claim of constitutionally ineffective assistance of counsel, Coleman, 501 U.S. at 750, but the Coleman Court expressly concluded that ineffectiveness in the context of state post-conviction representation did not implicate the Sixth Amendment's guarantee of effective assistance. Consequently, Coleman's state post-conviction counsel's defective performance in missing the date for filing a necessary appeal in his state writ barred consideration of his federal claims in federal habeas corpus. Coleman, 501 U.S. at 752. The other exception to the application of the procedural bar rule arises when the conviction of an innocent person is demonstrated, raising a question of manifest injustice in the state prosecution. Murray v. Carrier, 477 U.S. 478, 495-96 (1986).

9. E.g., McCleskey v. Zant, 499 U.S. 467 (1991) (dismissing successor petition absent showing of cause and prejudice in failing to raise claim in initial application); Delo v. Stokes, 495 U.S. 320 (1990) (granting successive habeas petition only upon showing of substantial grounds upon which relief can be granted, typically not when claims could have been raised in prior petition); Woodard v. Hutchins, 464 U.S. 377 (1984) (vacating stay granted where petition asserted claims which could have been asserted in prior petition); Wainwright v. Sikes, 433 U.S. 72 (1977) (requiring petitioner seeking to assert claim in successor habeas petition to demonstrate cause and prejudice resulting from factor external to his representation, such as interference by state officials, precluding litigation of claim in prior proceeding).

10. State inmates may bring successive federal habeas petitions only upon a show-
In contrast to its concern for procedural regularity in federal habeas litigation, in *Brecht* and *O'Neal* the Court addressed the substantive problem of prejudice resulting from constitutional violations, rather than focusing on procedural limitations imposed upon inmates seeking federal relief from their state court convictions. *Brecht* and *O'Neal* dealt with the circumstances in which an inmate may demonstrate a substantive claim to federal relief from his state court conviction.

These decisions signal a shift in the federal habeas petitioner's burden of demonstrating a right to relief in a significant class of federal claims raised by state inmates in federal habeas proceedings—those relating to error committed during the course of trial. The test for relief has been fundamentally altered as a result of the Court's work in *Brecht* and *O'Neal*. The Court now recognizes a "standard" or "burden" of proof of some degree of prejudice for federal habeas claimants asserting trial error in their state trials.

1. For instance, the Court's 1993 decision in *Herrera v. Collins*, focused on cognizance of a claim of actual innocence advanced by a state inmate not supporting a claim of constitutional rights violation. Herrera v. Collins, 113 S. Ct. 853 (1993), aff'd 954 F.2d 1029 (5th Cir. 1992) (rejecting Texas death row inmate's claim that exculpatory evidence established his actual innocence of capital crime, asserted in successive federal habeas petition without substantial claim that government had effectively suppressed exculpatory evidence).

11. See, e.g., Waley v. Johnston, 316 U.S. 101, 104-05 (1942) (finding that federal habeas relief was available to state inmates to address claims based on "disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights").

12. *See, e.g.*, Waley v. Johnston, 316 U.S. 101, 104-05 (1942) (finding that federal habeas relief was available to state inmates to address claims based on "disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights").


14. Trial error has been defined by the Supreme Court as error occurring during the course of the actual trial, including the presentation of evidence, argument, and jury deliberations. Arizona v. Fulminante, 499 U.S. 279, 306-07 (1990).
II. THE SETTING FOR THE COURT'S NEW RULE OF PREJUDICE

_Brecht_ arose in the context of a factually bizarre murder prosecution. Brecht had been released from a Georgia prison into the custody of his sister and her husband, who happened to be a local district attorney in Wisconsin. When his brother-in-law returned home to find that Brecht had violated the terms of his in-house probation by drinking and firing a rifle in the backyard of the home, Brecht shot and killed him.\(^\text{15}\) After a temporary escape and flight to Minnesota, which included at least two encounters with police during which Brecht neither admitted the killing nor explained its circumstances, he was caught and returned to Wisconsin for trial. Brecht was given his _Miranda_\(^\text{16}\) warnings at arraignment.\(^\text{17}\)

At trial, Brecht claimed that the shooting had been accidental and that he had panicked and fled when he realized his brother-in-law had been shot.\(^\text{18}\) The prosecution argued that Brecht had given inconsistent and false stories to police who investigated the accident and that he had failed to tell the officer investigating the accident or the officers who arrested him that the shooting had been an accident.\(^\text{19}\) Over defense objection, the prosecution also asked the petitioner on cross-examination if he had ever told anyone prior to trial that the shooting had been an accident. After Brecht responded that he had not wished to waive his rights at that time,\(^\text{20}\) the prosecutor argued his pre-arrest silence during closing argument.\(^\text{21}\)

The Wisconsin appellate courts differed on the use of Brecht's pre-arrest silence. The Wisconsin Court of Appeals held\(^\text{22}\) that this comment on silence violated due process under

\(^\text{15}\) 113 S. Ct. 1710, 1714 (1993).
\(^\text{16}\) Miranda v. Arizona, 384 U.S. 436 (1966). Miranda warnings inform a person that he has the right to remain silent and assure him, at least implicitly, that his subsequent decision to remain silent cannot be used against him. _Id._ at 467-68.
\(^\text{17}\) Brecht, 113 S. Ct. at 1714.
\(^\text{18}\) _Id._
\(^\text{19}\) _Id._ at 1714-15.
\(^\text{20}\) _Id._ at 1715 n.2.
\(^\text{21}\) _Id._
\(^\text{22}\) State v. Brecht, 405 N.W.2d 718, 723 (Wis. Ct. App. 1987), _rev'd_, 421
Doyle v. Ohio.²³ The Wisconsin Supreme Court agreed that a Doyle violation had occurred, but held that the error was harmless beyond a reasonable doubt²⁴ in compliance with the standard for review enunciated by the United States Supreme Court in Chapman.²⁵

Brecht then sought federal habeas relief based on the claimed Doyle violation.²⁶ The district court set aside the conviction, finding that the use of Brecht's post-arrest silence violated Doyle. The district court disagreed with the Wisconsin Supreme Court's conclusion that the error could be deemed harmless on the record.²⁷

The case was again reversed, this time by the Seventh Circuit, which concluded that a Doyle error had occurred, but fashioned a different rule for determining whether the error occurred.²⁸ The Seventh Circuit concluded that the Doyle violation involved a violation of a "prophylactic rule" designed to implement constitutional protections, rather than a fundamental right.²⁹ In distinguishing the nature of the violation, the court of appeals concluded that the Chapman harmless-error standard would not apply to review of this type of violation.³⁰ Instead, the court of appeals applied a prejudice standard previously


23. 426 U.S. 610 (1976) (holding reference to accused's silence upon being given Miranda warnings at time of arrest violates due process in punishing accused for relying on right to remain silent). The Wisconsin Court of Appeals referred to Reichhoff v. State, 251 N.W.2d 470, 473 (Wis. 1977), which cited Doyle as authority for its holding regarding the improper use of custodial silence in federal criminal prosecution. Brecht, 405 N.W.2d at 722.


27. Id. at 508.


29. Id. at 1370.

30. Id. at 1374-75.
formulated for review of claims of error in federal proceedings. This standard was articulated in *Kotteakos v. United States*. The *Kotteakos* Court required a showing that error prejudiced the accused’s right to a fair trial before relief should be afforded on a federal habeas petitioner’s claim challenging a state court conviction. The court of appeals reversed the grant of relief, finding that the error did not result in the prejudice required for reversal of Brecht’s state conviction for murder.

The Supreme Court affirmed the judgment of the Seventh Circuit and approved its application of the *Kotteakos* rule for disposition of claims of constitutional trial error on federal habeas review of state convictions. However, the *Brecht* majority did not adopt the reasoning of the Seventh Circuit with respect to its characterization of the error as involving a violation of a prophylactic rule. The majority rejected the Seventh Circuit’s characterization of *Doyle* error as “a prophylactic rule designed to protect another prophylactic rule [*Miranda*] from erosion or misuse.” According to the majority, *Doyle* stands

31. 328 U.S. 750 (1946); see also United States v. Lane, 474 U.S. 438, 449 (1986).

32. *Kotteakos*, 328 U.S. at 776. The standard requires consideration of whether the constitutional violation “had substantial and injurious effect or influence in determining the jury’s verdict.” *Id.*

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

34. *Brecht*, 113 S. Ct. at 1722-23. The Court concluded that the “*Doyle* error which occurred at petitioner’s trial did not ‘substantially influence’ the jury’s verdict.” *Id.*

35. The Court’s treatment of the interplay of *Miranda* and the Fifth Amendment privilege against self-incrimination may appear inconsistent. For instance, in *Michigan v. Tucker*, 417 U.S. 433, 446 (1974), Justice Rehnquist observed that the conduct of the police complained of “did not abridge respondent’s constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege.” The issue in *Tucker* involved a pre-*Miranda* failure of police to advise a suspect of his right to assistance of counsel prior to interrogating him. *Id.* at 933. Justice Powell later observed that *Tucker* had apparently involved no infringement on constitutional rights because the police interrogation was not tainted by compulsion, but only by departure from the subsequently imposed *Miranda* standards. *Oregon v. Elstad*, 470 U.S. 298, 308 (1985) (Powell, J., concurring). If violations of *Miranda* truly implicate only “departures” from its prophylactic requirements, the Seventh Circuit’s limited application of *Kotteakos* to violations involving prophylactic safeguards appears sound.

36. *Brecht*, 113 S. Ct. at 1717 (quoting *Brecht v. Abrahamson*, 944 F.2d 1363,
for the proposition that a prosecution’s use of post-Miranda silence violates due process,\textsuperscript{37} and Doyle error consequently involves “trial error,” rather than violation of a mere prophylactic rule.\textsuperscript{38}

The Court’s rejection of the “prophylactic rule” analysis advanced by the Seventh Circuit was consistent with its treatment of Miranda claims in another important context during the same term. In \textit{Withrow v. Williams},\textsuperscript{39} the majority rejected the distinction previously urged by Justice O’Connor in \textit{Duckworth v. Eagan}.\textsuperscript{40} In \textit{Duckworth}, Justice O’Connor reasoned in her concurrence that Miranda-based claims should be treated similarly to Fourth Amendment issues for purposes of federal habeas corpus and should not be heard by federal courts if the petitioner had previously been afforded a full and fair hearing on the suppression claims in state courts.\textsuperscript{41} Instead, the \textit{Withrow} majority retained federal habeas jurisdiction over claims of Miranda violations allegedly committed by state authorities.\textsuperscript{42}

Consequently, the Brecht majority’s adoption of the Kotteakos rule reaches far beyond the limited effect which would have been given to the Seventh Circuit’s application of the rule. Rather than being limited to violations of prophylactic

\begin{itemize}
\item 1370 (7th Cir. 1991)).
\item 37. \textit{Id.}
\item 38. \textit{Id.} The majority relied on the characterization of trial error as that which occurs during the “presentation of the case to the jury.” \textit{Id.} (quoting Arizona v. Fulminante, 499 U.S. 279, 307 (1991)).
\item 39. 113 S. Ct. 1745 (1993).
\item 40. 492 U.S. 195, 205 (1989) (O’Connor, J., concurring). Justice Scalia joined in the O’Connor concurrence.
\item 41. \textit{Id.} The Court held in Stone v. Powell, 428 U.S. 465, 493-94 (1976), that claimed violations of a state criminal defendant’s Fourth Amendment rights to be free from unlawful searches and seizures would no longer be cognizable in federal habeas corpus if the petitioner had been afforded a full and fair hearing on these claims in the state court proceedings.
\end{itemize}
rules, the majority’s approach permits the rule to supplant the traditional harmless-error analysis of Chapman in resolution of all constitutional claims arising during the course of trial itself.\textsuperscript{43}

\textbf{A. The Nature of the Constitutional Violation Considered in Brecht}

The Seventh Circuit concluded that Brecht’s conviction should not be set aside because the error resulting from the Doyle error involved only a violation of the prophylactic rule\textsuperscript{44} of Miranda v. Arizona.\textsuperscript{45} While agreeing that a Doyle error had been committed, the Seventh Circuit nevertheless concluded that relief should be granted only if the error “‘had substantial and injurious effect or influence in determining the jury’s verdict.’”\textsuperscript{46} Chief Justice Rehnquist, writing for the Brecht majority, rejected the distinction between violation of fundamental rights and the prophylactic rule of Miranda drawn by the Seventh Circuit and instead held that Doyle error constitutes a violation of due process.\textsuperscript{47} In so holding, the majority expressly concluded that “due process is violated whenever the prosecution uses for impeachment purposes a defendant’s post-Miranda silence. Doyle thus does not bear the hallmarks of a

\textsuperscript{43} According to the Brecht Court, trial error is that which “occur[s] during the presentation of the case to the jury.” Brecht, 113 S. Ct. at 1717. The Court relied on its prior decision in Arizona v. Fulminante, 499 U.S. 279, 307 (1991), for this formulation of “trial error.” Brecht, 113 S. Ct. at 1717.

\textsuperscript{44} Brecht, 944 F.2d at 1370.

\textsuperscript{45} 384 U.S. 436 (1966).

\textsuperscript{46} Brecht, 944 F.2d at 1375 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

\textsuperscript{47} Brecht, 113 S. Ct. at 1717. Justice O’Connor’s dissent expressly notes the significance of prophylactic rules in the truth-finding calculation which she believes should govern availability of federal habeas review. Id at 1728-29 (O’Connor, J., dissenting). In Withrow v. Williams, 113 S. Ct. 1745, 1756-65 (1993), Justice O’Connor dissented from a majority holding refusing to extend the principle of limitation on federal habeas review first recognized to apply to Fourth Amendment claims in Stone v. Powell, 428 U.S. 465 (1976), to Miranda violations, arguing that these claims represented violations of a prophylactic rule which effectively impedes the truthseeking function of criminal trials.
prophylactic rule."\textsuperscript{48}

The majority's approach permitted the Court to effectively reinforce the significance of the guarantee of silence as an alternative for a criminal suspect and facilitated the imposition of the rule, which had been applied in limited fashion by the Seventh Circuit, for the resolution of all claims of constitutional trial error. Yet, the majority did not conclude that the right to avoid negative inferences from silence is absolute: it held that Brecht's pre-
Miranda silence was properly admitted to impeach his trial testimony that the killing had been accidental.\textsuperscript{49}

\section*{B. Rejection of Characterization of Miranda as "Prophylactic"}

The Court's characterization of the error in Doyle as fundamental, rather than a violation of a prophylactic rule, does present one problem. If the error represents a violation of the accused's fundamental right to remain silent, why does that violation occur only when the accused has been advised of his or her Miranda rights? In Jenkins v. Anderson\textsuperscript{50} and Fletcher v. Weir\textsuperscript{51} the Court held that pre-arrest silence and post-arrest, pre-Miranda silence remained admissible to impeach trial testimony. The reasoning in both cases rested on the assumption that absent formal custodial intervention and the giving of the required warnings, an accused's silence could not be inferred to flow from a reliance on his constitutional right to remain silent.\textsuperscript{52} Thus, the probative value of silence, which forms the

\begin{itemize}
  \item \textsuperscript{48} Brecht, 113 S. Ct. at 1717.
  \item \textsuperscript{49} Id. at 1716-19 ("It was entirely proper—and probative—for the State to impeach his testimony by pointing out that petitioner had failed to tell anyone before the time he received his Miranda warnings at his arraignment about the shooting being an accident.").
  \item \textsuperscript{50} 447 U.S. 231, 239 (1980) (holding that the use of pre-arrest silence to impeach a defendant's credibility does not deny him the fundamental fairness guaranteed by the Fourteenth Amendment).
  \item \textsuperscript{51} 455 U.S. 603, 606-07 (1982) (holding that in the absence of the affirmative assurances embodied in the Miranda warnings, states do not violate due process by allowing cross-examination about post-arrest silence).
  \item \textsuperscript{52} See Jenkins, 447 U.S. at 238-40; Fletcher, 455 U.S. at 603-06.
\end{itemize}
basis for its use in impeachment, would remain undisturbed even by a presumption that the suspect was aware of his constitutional rights at the time he elected not to offer an explanation.

There can be no doubt that silence may be highly probative when a subsequent explanation offered at trial would suggest that the same explanation could have been appropriately offered to investigating officers or other witnesses prior to trial. Even assuming reliance on the Fifth Amendment privilege, silence in lieu of a reasonable explanation might still prove probative for a fact-finder assessing the credibility of an explanation advanced for the first time at trial.

Yet, Doyle and its federal companion, United States v. Hale, do not permit the use of silence for impeachment where the suspect might well have elected not to advance the explanation in his exercise of the Fifth Amendment privilege. Brecht clearly respects the Doyle principle in this regard, yet does not answer either of two questions posed by the disparate application of the principle to pre-Miranda and post-Miranda silence. First, why not presume that an accused knows and understands his right to remain silent in the absence of Miranda warnings? If this presumption was made, one could not assume that his pre-Miranda silence reflects a fabrication of the trial testimony rather than a generalized reliance on the right not to have to offer an explanation. Second, if the protection is effectively triggered by the giving of the Miranda warning, why was the Seventh Circuit in error in concluding that Doyle merely reflected a prophylactic rule enforcing the prophylactic intent of Miranda? Neither question is adequately addressed by the opinion in Brecht.

In fact, according to the holding, “due process” is offended only when the accused has been read his Miranda rights, and his post-warning silence is used by the prosecution. The Brecht majority’s framing of the issue seems inherently to implicate the prophylactic nature of Miranda warnings as part and

54. Brecht, 113 S. Ct. at 1717.
parcel of the Fifth Amendment protection. Otherwise, pre-
Miranda silence would be equally unavailable to the prosecu-
tion as violative of the privilege because the suspect would be
presumed to understand his right to remain silent. In holding
that only post-Miranda silence is protected, the substantive
right is clearly made contingent on the prophylactic rule; i.e.,
"You have a right to remain silent once we tell you that you
do."

The Brecht majority could have extended Kotteakos to all
claims of constitutional trial error raised by state inmates in
federal habeas actions without rejecting the Seventh Circuit’s
distinction between violations of fundamental rights and viola-
tions of prophylactic rules designed to protect fundamental
rights. Instead, the Court, without explaining why the protection
afforded by the Fifth Amendment remains contingent on the
giving of Miranda warnings, supplied an alternative explanation
which superficially enhances the value of the privilege rather
than extending the privilege to all post-transaction silence on
the part of a suspect.55

III. THE SIGNIFICANCE OF THE ALLOCATION OF THE
"BURDEN" OF PROOF

In requiring the habeas petitioner to establish that trial error
has "had substantial and injurious effect or influence in deter-
mining the jury's verdict," the Brecht Court clearly broke with
tradition, holding that violations of federally protected rights do
not have to be shown to be harmless beyond a reasonable
doubt in order to avoid reversal.56 As the majority noted, ap-
plication of the Chapman harmless-error rule on direct appeal
places the burden on the State to demonstrate that the error

55. Factually, of course, Brecht was further distinguishable because the accused
did not remain totally silent in his pre-arrest dealings with police; instead he offered a
fabricated explanation for the accident involving his sister's car which occurred while
he was in flight from the homicide. While silence is certainly protected by the Fifth
Amendment, a prior explanation inconsistent with trial testimony would not be subject
to the privilege and should always be available for impeachment of the trial testimony.

56. Brecht, 113 S. Ct. at 1721-22 (quoting Kotteakos v. United States, 328 U.S.
750, 776 (1946)).
committed at trial was harmless beyond a reasonable doubt.\footnote{Id. at 1717 ("The State bears the burden of proving that an error passes muster under this standard.").}

The significance of the change in the burden of proof is highlighted by the concurring opinion in \textit{Brecht} authored by Justice Stevens.\footnote{Id. at 1723-25 (Stevens, J., concurring).} He argued that the different standards of review represented by \textit{Chapman} and \textit{Kotteakos} actually represented a less dramatic variance than might be at first thought.\footnote{Id. at 1725 (Stevens, J., concurring).} For Justice Stevens, “the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied.”\footnote{Id. (Stevens, J., concurring).}

The Stevens’ posture is particularly critical because his was the fifth vote in the narrow \textit{Brecht} majority. Moreover, his assessment is subject to a very practical critique. Appellate decisionmaking, including that in which a district or magistrate judge engages in considering the state trial record alleged to support a claimed violation, varies according to the quality of the judge involved in the determination and her skill and commitment to the process. The least “judicious” of reviewing judges are most likely to reach results oriented to their perceptions of the merits of the claim based upon their reaction to the accused, the offense, or the work or reputation of counsel. For these judges, the question of standard of review or burden of proof is less than critical because decisionmaking will most often be compromised by political or social disposition.

The phrasing of the burden of proof or standard of review is most critical to the most “judicious” of reviewing judges. For these judges, fidelity to principles of law and thorough review of the trial court’s actions is paramount. For them, a change in the standard of review or burden of proof is more likely to change a result because the quality of the judgment, to which Justice Stevens refers in his concurring opinion, will reflect a correct appreciation for both the burden of proof and standard of review.
A. The Perspective of the Reviewing Court

There is a subtle, yet significant difference in the perspective suggested by the use of the differing standards of Chapman and Kotteakos. The former, which focuses on the possibility that error has contributed to judgment or sentence imposed, presents the type of legal assessment regularly utilized by appellate courts in reviewing evidentiary questions. That is, the reviewing court is positioned to make an essentially objective view of the evidence. In reviewing a sufficiency claim, the appellate court merely reviews the record to ascertain the existence of evidence which, if believed by the trier of fact, would serve to prove an element of the offense charged. The absence of any evidence whatsoever as to an element requires reversal of the conviction for evidentiary insufficiency—one finding which triggers double jeopardy protections against further prosecution.

1. Traditional "Harmlessness" Analysis

While engaging in Chapman analysis, the reviewing court again looks at the totality of the evidence in assessing whether it was not only sufficient to support judgment but also of such a qualitative and quantitative nature as to negate the inference that trial error contributed to the verdict. The issue is not the absence of evidence, but the likelihood that error committed by the trial court could be characterized as sufficient to have contributed to the judgment. If, in the reviewing court's opinion, the effect of the trial error is merely cumulative or insignificant in light of overwhelming evidence, then reversal is not required.

A Chapman inquiry, much like the sufficiency assessment, can realistically be undertaken with accuracy from the perspec-

61. Jackson v. Virginia, 443 U.S. 307 (1979) (holding that an applicant is entitled to habeas corpus relief if it is found that upon the evidence at trial no reasonable trier of fact could have found the applicant guilty beyond a reasonable doubt).

tive of the trained advocate. The reviewing judges may simply assess the effect of the trial error from the standpoint of the advocate by weighing the impact of the evidence against the evidence developed at trial.

An excellent framework for the analysis of harm was developed by the Texas Court of Criminal Appeals and set forth in *Harris v. State*:

A procedure for reaching this determination should: first, isolate the error and all its effects, using the considerations set out above and any other considerations suggested by the facts of an individual case; and second, ask whether a rational trier of fact might have reached a different result if the error and its effects had not resulted.

The *Harris* formulation (i.e., the Texas rule) for determination of harmlessness is designed to calculate the "probable impact of the error on the jury in light of the existence of the other evidence."

2. "Harm" Analysis Under *Kotteakos/Brecht*

The Texas rule was announced in terms of application of the *Chapman* test for harmlessness, rather than in the context of the *Kotteakos* test for harm. This distinction is significant because *Chapman* harmlessness is essentially a quantitative measure of evidence: the error's contribution to the conviction must be overwhelmed by the existence of other, properly admitted evidence. With respect to *Kotteakos* harm, however,

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64. Id. at 588.
65. Bradford v. State, 873 S.W.2d 15, 21 (Tex. Crim. App. 1993), *cert. denied sub nom. Texas v. Bradford, 115 S. Ct. 311 (1994) (citing Harris v. State, 790 S.W.2d 568, 587 (Tex. Crim. App. 1989)). The Texas court further explained its *Harris* approach to harmlessness determination by noting a number of factors to be considered in conducting the assessment, including the "source and nature of the error, whether or to what extent it was emphasized by the State, its probable collateral implications, and consideration of how much weight a juror would probably place upon the error and whether a determination of declaring it harmless would encourage the State to repeat it with impunity." *Id.*
66. E.g., United States v. Wilson, 11 F.3d 346, 351 (2nd Cir. 1993), *cert. denied*
the question more properly should be focused on the likely misuse of constitutionally impermissible evidence or argument. Qualitative analysis, rather than quantitative analysis, is necessary to determine actual, rather than hypothetical, harm. Yet, the Brecht Court specifically referred to the error being "quantitatively assessed in the context of other evidence presented."\textsuperscript{67}

A demonstration of prejudice under Brecht almost necessarily negates a harmlessness showing under Chapman. While instructive in explaining how a reviewing court should conduct harmlessness analysis, the burden of proof utilizing the reasonable doubt standard requires the reviewing court to determine whether a rational trier of fact might have reached a different result but for the error.

The perspective demanded by application of the Kotteakos standard is different. In making this type of prejudice determination, the reviewing court is obliged to consider whether the evidence or trial error probably contributed to the judgment.\textsuperscript{68} In this sense, the weighing of error and evidence must be undertaken from the perspective of a lay person or by using a common juror approach.\textsuperscript{69} Matters which counsel accept as insignificant in terms of their legal force may have an altogether different value when viewed from the standpoint of the rational, or common, juror.\textsuperscript{70}


\textsuperscript{68} Kotteakos v. United States, 328 U.S. 750, 764 (1946).

\textsuperscript{69} Id.

\textsuperscript{70} See, e.g., Samuels v. Mann, 13 F.3d 522 (2d Cir. 1993), cert. denied, 115 S. Ct. 145 (1994).

In this case, the evidence against Samuels likewise [as in Brecht] as "weighty," in view of the partially corroborated confession and the eyewitness testimony implicating Samuels in the robbery. We are mindful, however, not to give conclusive effect to our view of the evidence and that our ultimate task is to determine the impact the improperly admitted evi-
An example of this situation is presented by the non-testifying defendant. An accused who elects not to testify presents no ground for adverse inference based on the decision not to offer an explanation consistent with innocence or inconsistent with guilt. This proposition is clearly accepted as a consequence of the Fifth Amendment protection afforded an accused. No appellate judge would predicate an affirmance on the fact that the accused had declined to testify in his own behalf at trial. Such a conclusion would be subject to the most basic of constitutional attacks.

From the perspective of the common juror, however, the same assumption cannot be drawn. The common juror, having no specific education concerning the Fifth Amendment privilege and the preclusion of consideration of the accused's exercise of his Fifth Amendment rights, cannot be assumed to draw no adverse inference from the accused's decision not to testify. This basic difference in perspective explains the Court's decisions in *Carter v. Kentucky*, *James v. Kentucky*, and, particularly, in *Lakeside v. Oregon*. In *Lakeside*, the Court went so far as to remove from the defendant's discretion the trial
dence had or reasonably may have had upon the minds of the jury.
Id. at 528 (emphasis added).
72. For example, in O'Connor v. Ohio, 385 U.S. 92 (1966), the Court excused a procedural default in state trial court when counsel for the accused failed to timely interpose an objection to an improper comment on the defendant's silence in applying *Griffin* retroactively to the non-final claim raised by the defense. The *O'Connor* Court's willingness to excuse procedural default is likely now overruled by Coleman v. Thompson, 501 U.S. 722 (1991), but its position on retroactivity correctly anticipated the Court's later holding in *Teague v. Lane*, 489 U.S. 288, 310 (1989). Nevertheless, the holding in *O'Connor* demonstrates the significance with which improper comments on the accused's silence were viewed at the time of the Court's initial decisions on this issue.
73. 450 U.S. 288 (1981). A defense request for a cautionary instruction advising the jury not to consider the accused's silence as evidence of guilt must be granted by the trial court to avoid a violation of his Fifth Amendment right. Id.
74. 466 U.S. 341 (1984). The Court extended its decision in *Carter v. Kentucky* to include a defense request for an admonition to the jury not to consider the accused's silence, even though under Kentucky law an "admonition" differs from an "instruction." Id.
court's decision to instruct the jury not to draw an adverse inference from the accused's decision not to testify, regardless of the perceived tactical value which might be claimed by not having the jury's attention drawn to the accused's silence in any fashion.  

From the standpoint of the trained advocate, a comment on the accused's silence, standing alone, is inherently prejudicial. For the appellate court applying the Chapman rule, that prejudice requires reversal unless the evidence of guilt is so overwhelming that the prejudice could not reasonably be said to have influenced the jury to convict. However, when the same comment is considered from the standpoint of a juror untrained in the law, the assessment of the impact of the comment requires divorcing one's legal training from that consideration. While counsel and reviewing judges understand that the prejudicial nature of the comment on silence is not a proper subject for evaluation of guilt, jurors do not necessarily bring this same understanding to the trial process.

The Brecht majority engaged in a rather simplistic analysis to support its conclusion that the disclosure of the petitioner's post-Miranda silence did not likely prejudice his trial. The Chief Justice merely noted that the comments concerning this aspect of his post-arrest comments comprised less than two pages of the nine-hundred-page trial transcript in the case.

The Court implied that error can properly be evaluated in terms of its prevalence within the overall trial transcript. However, the significance of the error does not lie in repetition or even emphasis alone. This is particularly likely to be true when the error is viewed from the standpoint of the lay juror, rather than the trained lawyer/judge. A lay juror is more susceptible to improper inferences which may rationally, but not legally, be

76. Id. at 340-41.
77. See United States v. Hasting, 461 U.S. 499 (1983) (involving the Court's exercise of its supervisory power over federal criminal prosecutions, rather than explication of constitutional protection afforded by the Fifth Amendment). The Court essentially applied the Chapman harmless-error test to a comment on the accused's decision not to testify. Id.
78. Brecht, 113 S. Ct. at 1722.
drawn from the evidence. The underlying theory of admission of post-arrest silence in any event is its significance in determining the accused's expression of culpability through tacit acceptance of guilty knowledge. Thus, a mere improper reference to such post-arrest silence, occurring in the context of a Miranda violation, may influence a lay juror to consider this silence as evidence of guilt, regardless of the fact that the comment or reference itself occurs at a single point during a lengthy trial.

The need to instruct jurors to disregard an objectionable comment on an accused's silence is directly related to their general lack of familiarity with the extreme significance attached to the exercise of the Fifth Amendment privilege. Once the reviewing court considers the comment in the context of a trial in which there is no overwhelming evidence permitting the inference that the comment did not improperly cause a conviction, the reviewing court is obligated to adopt the posture of the jury in reaching a conclusion on probable prejudice. Rather than weighing the error against the evidence in terms of legal sufficiency, the appellate court must consider how an otherwise insignificant error, in terms of the quantum of evidence presented, would affect non-trained jurors. Once the evidence reviewed in a given case proves not to be overwhelming, the reviewing court must shift its own perspective from an objective evaluation of the significance of the error in light of the totality of the trial to a subjective consideration of the probable effect of the error on the jury's decisionmaking.

The proposition that the quality of decisionmaking by the reviewing judges is more critical to a correct outcome than to the precise standard utilized for review may be correct, as Justice Stevens claims, but the issue implies far more than mere deference to semantics. In fact, the Court itself has consistently expressed reservations about attempting to assess the actual process of deliberation by which a jury reaches its verdict. For example, in Romano v. Oklahoma, the majority declined to find constitutional error in disclosure of a previously imposed

death sentence against an accused in a second capital sentencing hearing. The majority concluded that the disclosure did not result in a due process violation because the court's charge did not provide any basis for consideration of the prior death sentence by the jury that deliberated the accused's fate in the second prosecution. \footnote{80} However, the majority did recognize, as the majority did in \textit{Keeble v. United States}, \footnote{81} that the jury might not have complied with the trial court's instructions:

Even assuming that the jury disregarded the trial court's instructions and allowed the evidence of petitioner's prior death sentence to influence its decision, it is \textit{impossible to know how this evidence might have affected the jury}. It seems equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so. Either conclusion necessarily rests upon one's intuition. To hold on the basis of this record that the admission of evidence relating to petitioner's sentence in the Thompson case rendered petitioner's sentencing proceeding for the Sarfaty murder fundamentally unfair would thus be an exercise in speculation, rather than reasoned judgment. \footnote{82}

This candid admission by the Chief Justice, writing for the \textit{Romano} majority, is offered to support a rejection of the claim that improper admission of evidence, which constitutes "trial error" under the categorization authorized in \textit{Brecht}, could be susceptible to a valid prejudice determination. \footnote{83} The problem

\footnote{80} \textit{Id.} at 2012.

\footnote{81} 412 U.S. 205 (1973). Justice Brennan observed that the problem posed by the jury instructions in \textit{Keeble} that did not include a lesser-included offense instruction is that a jury will not necessarily comply with its duty to acquit on a greater offense if the evidence would have required a different result had the charge included an instruction on a lesser-included offense. The jury in such a case is required to either acquit and permit an offense to go unpunished or convict on the greater offense which might not be proved by evidence which would otherwise be sufficient to convince jurors. \textit{Id.}

\footnote{82} \textit{Romano}, 114 S. Ct. at 2012-13 (emphasis added).

\footnote{83} \textit{Id.} "Even assuming that the jury disregarded the trial court's instructions and allowed the evidence of petitioner's prior death sentence to influence its decision, it is \textit{impossible to know how this evidence might have affected the jury}.” \textit{Id.} at 2012 (emphasis added).
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presented by Brecht, of course, is that it relies on precisely this type of speculation as to the actual use or misuse of evidence by a jury in its deliberations.

Similarly, in another recent death penalty decision, Schiro v. Farley, the Court's conservative majority again refused to engage in judicial second-guessing about a jury's underlying motivation for returning a punishment verdict arguably inconsistent with the guilty verdict. Schiro does not represent a novel or new position in this regard, as the Court's historical position on inconsistent jury verdicts demonstrates. At least since its decision in Dunn v. United States, the Court has rejected arguments attacking the rationality of jury verdicts of conviction as to some, but not all, counts on multi-count indictments as internally inconsistent. Recognizing that jury inconsistency may be attributed to preference for leniency or juror confusion concerning the applicable law or its role in deciding issues of fact, the Court has deferred to the jury's ultimate role as arbiter of facts, regardless of the arguable inconsistency.

The same hesitance to engage in retrospective assumption concerning jury activity in reaching a verdict has attended the Court's jury instruction cases prior to application of the Kotteakos rule in Brecht. For example, in Sandstrom v. Montana, the Court ruled that use of a constitutionally impermissible mandatory or conclusive presumption required reversal precisely because the jury's actual reliance on the erroneous instruction could not be ascertained with accuracy. Consequently, rather than requiring the accused to prove that the in-

84. 114 S. Ct. 783 (1994).
85. Id. at 791. "[S]ince it was not clear to the jury that it needed to consider each count independently, we will not draw any particular conclusion from its failure to return a verdict on Count I." Id.
86. Dunn v. United States, 284 U.S. 390 (1932).
87. See United States v. Powell, 469 U.S. 57 (1984) (extending the rule that a defendant may not challenge inconsistent verdicts to preclude challenge where jury acquitted on predicate felony, but convicted on compound felony relying on the predicate felony in multi-count indictment).
88. Id. at 66.
90. Id. at 526.
struction was prejudicial, the Sandstrom Court remanded the cause, giving the accused the benefit of the doubt on the question of prejudice.\textsuperscript{91}

Subsequent decisions, extending the Chapman harmless-error analysis to other instructions that impermissibly shift or lower the prosecution’s burden of proof, continued the policy of favoring an accused whose trial is potentially tainted by the use of an improper instruction unless that constitutional error could be shown to have been harmless beyond a reasonable doubt.\textsuperscript{92} Application of the Kotteakos/Brecht formulation, which requires a showing of likely prejudice from use of an infirm instruction, clearly mandates the type of speculation into jury deliberations which the Court previously sought to avoid when evaluating constitutional claims.

In contrast to the abstract question posed by the Chapman analysis—whether the error could have contributed unfairly to the verdict, the test approved in Brecht requires the reviewing court to essentially reweigh the evidence offered in order to determine the likelihood of prejudice. This is a function which appellate courts have traditionally declined to pursue—the reweighing of evidence after verdict has been returned by a jury sitting as fact-finder in a criminal case.\textsuperscript{93}

For instance, in Lockhart v. Nelson,\textsuperscript{94} the petitioner sought the Court’s consideration of the likely implication trial error would have in determining the overall sufficiency of evidence. The Court declined to approve reweighing of the properly admissible evidence in order to arrive at a sufficiency determi-
nation.\textsuperscript{95} The approach the petitioner advocated in \textit{Lockhart} would have effectively supplanted the jury’s determination with a re-assessment of evidence by the appellate court.\textsuperscript{96}

Yet a court, charged with considering prejudice in terms of review of the trial record rather than observing the trial as it took place, performs much the same type of speculation as that rejected by the Supreme Court in \textit{Lockhart}.\textsuperscript{97} Now, the \textit{Brecht/Kotteakos} formula virtually demands that a federal habeas court review evidence in a case in which the claimed error cannot be dismissed as harmless by requiring that the court reweigh the evidence which the state court jury heard and presumably considered at trial.

\textbf{B. The Assignment of the “Burden” of Proof}

The ultimate disposition of the question as to how the burden of proof must be shouldered in a federal habeas action awaited the Court’s decision in \textit{O’Neal v. McAninch}.\textsuperscript{98} The question presented by the petitioner asked whether the State must bear the burden of proving that constitutional trial error is harmless under \textit{Brecht}.\textsuperscript{99} Clearly, \textit{Brecht} changed the standard or formula for determining when error requires relief from a

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\textsuperscript{95} \textit{Id.}

\textsuperscript{96} \textit{Id.} The issue had been reserved by the Court in its decision in Greene v. Massey, 437 U.S. 19, 26 n.9 (1978). The \textit{Lockhart} Court phrased the issue: “Whether the Double Jeopardy Clause allows retrial when a reviewing court determines that a defendant’s conviction must be reversed because evidence was erroneously admitted against him, and also concludes that without the inadmissible evidence there was insufficient evidence to support a conviction . . . .” \textit{Lockhart}, 488 U.S. at 40 (emphasis added).

\textsuperscript{97} The \textit{Lockhart} majority declined to hold that the appellate court must refuse to consider erroneously admitted evidence as part of its sufficiency analysis, opting instead for retrial which “merely recreates the situation that would have been obtained if the trial court had excluded the evidence” and thus, affords the prosecution the opportunity to offer other evidence, if available, to meet its constitutional burden. \textit{Lockhart}, 488 U.S. at 42.

\textsuperscript{98} 115 S. Ct. 992 (1995).

\textsuperscript{99} The Sixth Circuit had held that the federal habeas petitioner bore the “burden of establishing” prejudice in the state court’s commission of federal constitutional error. \textit{O’Neal v. Morris}, 3 F.3d 143, 145 (6th Cir. 1993), \textit{vacated sub nom. O’Neal v. McAninch}, 115 S. Ct. 992 (1995).
standard of harmlessness beyond a reasonable doubt\textsuperscript{100} to one in which relief is granted only upon a showing of some prejudice to the accused’s right to fair trial under the \textit{Kotteakos} rule.

Moreover, the majority opinion in \textit{Brecht} seemed to contemplate a shift in the burden of proving that error has resulted in prejudice to the federal petitioner—a burden allocated to the prosecution under the \textit{Chapman} harmless-error approach. While Justice Stevens adhered to the \textit{Kotteakos} principle, which included allocation of the burden of proving that error did not result in prejudice to the prosecution,\textsuperscript{101} his additional willingness to join the majority opinion undermined either his fidelity to \textit{Kotteakos} in terms of discharge of the burden or the strength of the five-vote majority opinion in \textit{Brecht}.

The Court’s more recent holding in \textit{O’Neal v. McAninch}\textsuperscript{102} demonstrated that the five-vote \textit{Brecht} majority was not as solid as its opinion would have suggested. Justice Thomas, joined by the Chief Justice and Justice Scalia, dissented in \textit{O’Neal}, after both justices had joined in the \textit{Brecht} majority opinion authored by Chief Justice Rehnquist.\textsuperscript{103}

The \textit{O’Neal} majority opinion, authored by Justice Breyer,\textsuperscript{104} rejected the notion that the habeas petitioner bears a “burden” of proving prejudice in order to obtain relief.\textsuperscript{105}

\textsuperscript{100} The \textit{Chapman} test requires inquiry into whether there was a “reasonable possibility that the evidence complained of might have contributed to the conviction.” \textit{Chapman}, 386 U.S. at 23 (quoting \textit{Fahy v. Connecticut}, 375 U.S. 85, 86-87 (1963)); see also supra notes 4-5 and accompanying text.

\textsuperscript{101} \textit{Brecht v. Abrahamson}, 113 S. Ct. 1710, 1710-11 (1993) (Stevens, J., concurring). Justice Stevens stated: “\textit{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 prosecution. A constitutional violation, of course, would never fall in the ‘technical’ category.” \textit{Id.} at 1723-24.

\textsuperscript{102} 115 S. Ct. 992 (1995).

\textsuperscript{103} \textit{Id.} at 999.

\textsuperscript{104} Ironically, Justice Breyer replaced Justice White on the Court, and in writing the majority opinion in \textit{O’Neal} seemingly vindicated his predecessor’s sharp dissent criticizing application of the \textit{Kotteakos} prejudice standard to federal habeas review of state convictions in \textit{Brecht. Brecht}, 113 S. Ct. at 1725 (White, Blackmun & Souter, JJ., dissenting).

\textsuperscript{105} 115 S. Ct. at 994.
Instead, he explained that once the constitutional violation has been established, the habeas petitioner is entitled to relief when the federal habeas judge is in "grave doubt" about whether the error had "substantial and injurious effect of influence in determining the jury's verdict"—the standard imposed by the Court in *Brecht* for review of state court trial error.106 "Grave doubt" is defined by the Court as arising when "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error."107

The majority in *O'Neal* took care not to phrase the standard of review applicable to federal habeas consideration of state court trial error that implicates federal constitutional guarantee in terms of a "burden of proof." Justice Breyer explained:

> [W]e deliberately phrase the issue in this case in terms of a judge's grave doubt, instead of in terms of "burden of proof." The case before us does not involve a judge who shifts a "burden" to help control the presentation of evidence at a trial, but rather involves judges who apply a legal standard (harmlessness) to a record that the presentation of evidence is no longer likely to affect. In such a case, we think it conceptually clearer for the judge to ask directly, "Do I, the judge, think that the error substantially influenced the jury's decision?" than for the judge to try to put the same question in terms of proof burdens (e.g., "Do I believe the party has borne its burden of showing . . . ?").108

Perhaps the most significant aspect of the majority opinion is its declaration that the petitioner obtains the benefit of a "grave doubt" in the federal habeas court's consideration of the likelihood that the error did improperly affect the outcome of the trial.109

Also interesting is Justice Breyer's attempt to distinguish

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106. *Id.*
107. *Id.*
108. *Id.* at 994-95.
109. *Id.* at 995.
between the "burden of proof" normally associated with the trial process and the "standard of review" which typically reflects the degree of deference an appellate court recognizes with respect to the proceedings in the trial court. The Brecht formulation actually implies a "standard of proof." The O'Neal majority addressed the assignment of the "burden of proof" by referring to the "grave doubt" standard.

Yet, in the context of habeas litigation, which involves a lawsuit collaterally attacking a state judgment presumed correct, it would hardly be inappropriate to speak in terms of a petitioner's burden or, indeed, the prosecution's burden. In this situation, a distinction drawn by Professor Martha S. Davis with respect to the elements of the burden of proof may be instructive. The burden of production—the burden of going forward with evidence—which requires a demonstration of the existence of constitutional error in the state trial, clearly falls on the habeas petitioner. The second burden described by Professor Davis, the burden of persuasion, requires a party to ful-

110. See Martha S. Davis, A Basic Guide to Standards of Judicial Review, 33 S.D. L. Rev. 468, 469-70 n.4 (1988). Professor Davis explains that standards of review actually refer to the deference given by reviewing courts to decision or actions under review. "Standards of proof are concerned with the quantum and quality of proof that must be presented in order to prevail on an issue." Id. at 469. The "burden" of proof assigns the duty to present the proof to one side or the other in a dispute. Id. at 470. For a thorough treatment of the application of these terms in the context of criminal prosecutions, see 2 CHILDRESS & DAVIS, STANDARDS OF REVIEW (1986).

Perhaps the clearest expression of the standard of review in federal habeas corpus involves the habeas court's deference to state court fact-finding. The habeas court is required by statute, 28 U.S.C. § 2254(d) (Supp. IV 1992), to presume facts found by state courts to be correct. Keeney v. Tamayo-Reyes, 504 U.S. 1, 9-10 (1992); Wainwright v. Witt, 469 U.S. 412, 426-29 (1985); Sumner v. Mata, 449 U.S. 539, 546 (1981). The presumption relates to "historical facts," not findings which actually reflect mixed questions of law and facts, such as the voluntariness of a confession. Miller v. Fenton, 474 U.S. 104, 112 (1985). State fact-finding must be presumed correct unless it is clearly erroneous and the "clear error" standard is the correct standard of review which governs the habeas court's review of the proceedings in state court. Similarly, an appellate court is obliged to treat the fact-finding by the trial court—or habeas court, when appropriate—with similar deference. Pemberthy v. Beyer, 19 F.3d 857, 864 (3d Cir. 1994), cert. denied, 115 S. Ct. 439 (1994).

111. See supra notes 101-08 and accompanying text.

112. Davis, supra note 110, at 470.
fill the standard of proof. In this sense, Justice Breyer's opinion suggests that the burden of persuasion continues to fall on the government,113 just as it does under traditional Chapman analysis.

Whether denoted a "burden" or "standard" of proof, or a "standard of review," the Court's approach in Brecht and O'Neal suggests certain important consequences for habeas petitioners. A change in application of any standard relating to proof or review necessarily suggests that the relative positions of the parties before the court have changed. Thus, a relaxation of the Chapman harmless-error rule must mean that some petitioners whose claims would have succeeded under the Chapman rule of reversible error will now lose. Consequently, petitioners face a burden in order to establish a right to relief under Brecht/O'Neal higher than the burden under Chapman. Regardless of the terminology given to the Court's action in these cases, the net effect remains: an increased difficulty for state inmates seeking relief in federal habeas litigation.

The Court's approach in O'Neal reversed, by implication, the understanding of some lower federal courts that Brecht had, in fact, imposed a burden on habeas petitioners to establish prejudice resulting from the alleged federal constitutional rights violations committed in the course of state trials. Specifically, the Sixth Circuit in its opinion in O'Neal concluded that after Brecht, "[t]he habeas petitioner bears the burden of establishing such prejudice."114 Other lower courts correctly anticipated that the prosecution would ultimately shoulder the burden of failing to prove that state court trial error did not prejudice the

113. For example, the First Circuit essentially held that the government bore this burden in applying Brecht. See Ortiz v. Dubois, 19 F.3d 708, 715 (1st Cir. 1994), cert. denied, 115 S. Ct. 739 (1995) ("[W]e believe that the government has met its burden of demonstrating that the error did not 'have a substantial and injurious effect or influence in determining the jury's verdict.'"(quoting Kotteakos v. United States, 328 U.S. 750,776 (1993))).

114. O'Neal v. Morris, 3 F.3d 143, 145 (6th Cir. 1993), vacated, 115 S. Ct. 992 (1995); see also Castillo v. Stainer, 997 F.2d 669 (9th Cir. 1993), cert. denied, 114 S. Ct. 609 (1993); Kyles v. Whitley, 5 F.3d 806, 818 (5th Cir. 1993), rev'd, 115 S. Ct. 1555 (1995); Samuels v. Mann, 13 F.3d 522, 526 (2nd Cir. 1993); Tague v. Richards, 3 F.3d 1133, 1140 (7th Cir. 1993).
habeas petitioner.\textsuperscript{115}

Chapman imposes a standard which virtually presumes harm in the commission of constitutional error for resolution of claims arising on direct appeal. Consequently, the State, to avoid the grant of relief, bears the negative burden of disproving the proposition that constitutional trial error inherently prejudiced an accused. In contrast, the Kotteakos rule, now applicable to the review of state court proceedings under Brecht, bars relief unless some actual harm\textsuperscript{116} can be demonstrated by using the formula that inquires whether the error "had substantial and injurious effect or influence in determining the jury's verdict."\textsuperscript{117} Logically, this change in the formula for review of state court trial error in federal habeas would suggest that the petitioner must actually assume a burden of proving prejudice. In fact, the majority opinion in O'Neal expressly disavows this approach.\textsuperscript{118}

In terms of the conduct of habeas litigation, the likely consequences of a "shift" in the "burden of proof" may be less significant than the new requirement for proof of prejudice. Regardless of the allocation of the burden or the O'Neal Court's rejection of the applicability of this concept, counsel representing petitioners are now obligated to formulate a theory of prejudice. Under Chapman, the prosecution already had the burden of developing a theory of constitutional harmlessness. Undoubtedly, the same reasoning will now simply be applied to

\textsuperscript{115} Relatively few circuits had adopted this view before the Supreme Court's ruling in O'Neal. See, e.g., Libby v. Duval, 19 F.3d 733, 739-40 n.5 (1st Cir. 1994) (supporting the proposition that prosecution bears burden of disproving prejudice with the four dissenting votes and Justice Stevens' concurrence in Brecht), cert. denied, 115 S. Ct. 314 (1994); Stoner v. Sowders, 997 F.2d 209, 213 (6th Cir. 1993).

Stoner relied on Justice Stevens' concurring opinion in Brecht for its holding: "As with the Chapman standard, the prosecutors bear the burden of proof . . . . The prosecution's brief has offered little more than a conclusory statement that any error which may have occurred was harmless." Id. at 213. It is important to note that the Stoner decision predates O'Neal in the 6th Circuit, and O'Neal puts the burden on the petitioner without mentioning Stoner.

\textsuperscript{116} Brecht, 113 S. Ct. at 1722 (noting relief available upon showing of "actual prejudice").

\textsuperscript{117} Id. (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

\textsuperscript{118} O'Neal, 115 S. Ct. at 995.
demonstrate lack of prejudice from the constitutional error, if any.\footnote{119. The prosecution's failure to establish lack of prejudice through a thorough discussion of the error in the context of the totality of evidence will apparently result in relief for the petitioner, regardless of whether the Chapman or Brecht standard is applied. See, e.g., Stoner, 997 F.2d at 213 ("The prosecution's brief has offered little more than a conclusory statement that any error which may have occurred was harmless.")}

From the petitioner's standpoint, however, it is essential to develop and demonstrate a theory of prejudice. Failure to do so will doom some claims of constitutional trial error, even though the Court did not assign the "burden of proof" of prejudice to the petitioner. Prior to Brecht, a habeas petitioner, needing to demonstrate commission of constitutional error in order to trigger application of the Chapman test for harmlessness, might simply have assumed that proof of the error would be sufficient to warrant relief. The Court's shift in focus toward a different standard of prejudice may jeopardize some claims that would have survived failure to assert prejudice under Chapman.

The reason for this change in strategic significance of the theory of prejudice lies in the following problems associated with the Kotteakos/Brecht rule. A prosecutor, unable to establish harmlessness under Chapman, may also fail to convince the habeas court even under the "likely prejudice" test of Brecht. However, in closer cases, the State's creative assertion of lack of prejudice may be sufficiently strong in terms of argument to persuade conscientious jurists, who might otherwise be inclined to believe that all constitutional error should merit relief absent a showing of harmlessness, to conclude that prejudice cannot be presumed, even if the burden remains assigned to the State. Thus, the respondent's argument of lack of demonstrable prejudice may be sufficient for rejection of the claim for relief in the absence of an equally strong argument of prejudice advanced by the petitioner. That is, assignment of the burden to the State may simply force prosecutors to more thoroughly develop arguments in cases that could not have been won under the more stringent harmlessness test of Chapman. To avoid rejection of the claim, petitioner's counsel
must vigorously argue prejudice, even though no burden of proof beyond establishing the claim of constitutional trial error was imposed by the Court in *O'Neal*.

Thus, petitioners may face a tactical need for demonstrating prejudice, or an arguable theory of prejudice, even though they are not forced to discharge a burden of proof on this aspect of the federal habeas claim. The Court’s change in the standard of proof effectively compels prosecutors to argue closer cases more vigorously because the higher standard for relief promises greater success for respondents, in theory, than that suggested by the *Chapman* harmlessness standard. Consequently, rather than risking default, petitioners must be prepared to advance prejudice arguments to avoid a loss based on the heightened burden of proof, which will work to their disadvantage, even if the Court ultimately continues to require the prosecution to shoulder a negative burden of proof on constitutional trial error claims.

Unless *Brecht* represents a mere aberration in the Court’s progress toward a simplified and far more restrictive federal habeas remedy, the holding should be viewed as one in which the Court continues to stress the “extraordinary” aspect of the remedy by limiting relief to those cases in which a constitutional trial error has actually prejudiced a state court defendant in the exercise of his right to fair trial. Interestingly, the Court rejected a rather thoughtful proposition advanced by the State in *O'Neal*. The prosecution argued that because federal habeas relief is available under the statute only when the deprivation of liberty is occasioned by constitutional error in the state criminal process, a petitioner is entitled to habeas relief only if he can demonstrate that the error resulted in or contributed to his status of being “in custody.”120

The *O'Neal* majority rejected this argument, which would have logically imposed a burden of proof upon the habeas petitioner. The Court responded that, because the error’s natural effect is to prejudice substantial rights, the error should be treated as prejudicial if there remains grave doubt as to wheth-

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er the error actually did prejudice the petitioner. The O’Neal majority’s reasoning is consistent with its reading of Kotteakos, upon which the decision in Brecht relied for its application of a prejudice standard in the review of state court trial error, but the prosecution’s argument appears more faithful to the intent of 28 U.S.C. § 2254.

IV. DETERMINATION OF PREJUDICE BY THE FEDERAL HABEAS COURT

In applying the Kotteakos standard to constitutional claims brought by state inmates, federal courts are now required to consider the significance of the claimed error in the decisionmaking process, rather than simply determining whether the error is harmless under the Chapman standard. The qualitative nature of this judgment is particularly important because it requires the reviewing court to view the evidence from a perspective different from that typically taken by a trial level court. Although trial judges routinely make decisions about the character and probative value of evidence in making evidentiary decisions, particularly when balancing the potential for unfair prejudice inherent in a particular item of evidence against its probative value, they seldom do this on a completed trial record.

The habeas court, in contrast, must review a state trial record to arrive at a judgment regarding prejudice to the accused’s fair trial right inherent in an established constitutional trial error. The Kotteakos standard clearly requires that the court afford the accused relief only if the trial error actually affected the jury’s deliberations—a standard much closer to the evaluation of effectiveness of counsel, articulated by the Court in Strickland v. Washington, than the standard employed in

121. O’Neal, 115 S. Ct. at 998.
123. 466 U.S. 668, 687 (1984). In Strickland, the Court held that deficient performance of counsel was not sufficient, taken alone, to demonstrate a violation of the Sixth Amendment guarantee of effective assistance. The accused must not only demonstrate a defect in counsel’s performance, but also establish that the defect probably
harmless-error decisions. The difficulty in making either a Kotteakos or Strickland evaluation lies in the fact that the reviewing court must consider not only the totality of the evidence available from which reasonable inferences might be drawn to support the verdict, but also the probable effect of trial court rulings on the jury’s use of the available evidence in its deliberations on the questions of guilt or sentence.

Two threshold problems are posed by the federal habeas court in applying the rule of Brecht to the evaluation of constitutional claims brought by state inmates. First, even assuming that the petitioner demonstrates trial error that implicates a federally protected right, that claim will have been previously litigated in state appellate courts as part of the normal exhaustion process. A state appellate court, complying with the Chapman harmless-error analysis, must conclude that the error was harmless beyond a reasonable doubt in order to reach its decision to affirm. Because state court factual findings are entitled to a presumption of correctness under subsection (d) of § 2254, one might assume that a finding of harmlessness would, therefore, be binding on a federal habeas court precisely because it involves a weighing of evidence and a consideration of facts. However, prior state determinations of harmlessness have not been viewed as pure factual determinations at all; rather, they involve mixed determinations of law and fact.125 Had these determinations been subject to the presumption of regularity and deference accorded pure questions of fact, Brecht would have made no sense because the federal habeas court would have been required to defer to the state appellate court’s determination that the error was harmless under Chapman.

Second, even though the Kotteakos rule represents a rather long-held position within the jurisprudence of federal habeas actions brought by federal inmates, it is unlikely that this

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The "Burden" of Proof

rule is regularly employed by district courts and magistrate judges in evaluating habeas claims because most trial error claims in the federal system must have initially been presented on direct appeal.\textsuperscript{127} Once litigated on direct appeal in the circuit court, trial error claims in the federal system are not subject to relitigation by post-conviction writ, absent a showing of a change in fact or law that would support a reconsideration of the disposition.\textsuperscript{128} Thus, despite the traditional dual role of federal district courts in considering habeas petitions brought by federal and state inmates, it appears unlikely that these courts extensively applied \textit{Kotteakos} analysis in their consideration of federal habeas applications in the past. \textit{Brecht} now requires familiarity with both the role and the framework for its application in order to review state inmate petitions presenting claims previously unlitigated in the federal system.

Moreover, the role of the district court and magistrate judge in reaching factual conclusions concerning the prejudice resulting from state court constitutional trial error may prove particularly critical within the federal system. The determination that prejudice has resulted from the trial error, or, indeed, that it has not, will be subject to deference on appeal from the district court's disposition of the writ.\textsuperscript{129} However, the legal issue of whether the writ should be issued remains subject to de novo review in the court of appeals, because it concerns a mixed question of law and fact.\textsuperscript{130}

\begin{itemize}
\item \textsuperscript{127} See Feldman v. Henmen, 815 F.2d 1318, 1321 (9th Cir. 1987).
\item \textsuperscript{128} See Taylor v. United States, 798 F.2d 271, 273 (7th Cir. 1986), cert. denied, 479 U.S. 1056 (1987).
\item \textsuperscript{129} See, e.g., Hill v. Lockhart, 894 F.2d 1009 (8th Cir.) (holding that district court's acceptance of petitioner's testimony regarding advice rendered by counsel entitled to deference on appeal unless clearly erroneous), \textit{cert. denied sub nom.} Lockhart v. Hill, 497 U.S. 1011 (1990); Chitwood v. Dowd, 889 F.2d 781, 785 (8th Cir. 1989) (holding that district court's decision that special circumstances exist such that habeas corpus relief may be granted even though state remedy not exhausted is finding of fact subject to deference on appeal), \textit{cert. denied sub nom.} Dowd v. Chitwood, 495 U.S. 953 (1990); Thompson v. Armontrout, 808 F.2d 28 (8th Cir. 1986) (holding that district court's finding on allegation of vindictiveness entitled to deference unless clearly erroneous), \textit{cert. denied sub nom.} Armontrout v. Thompson, 481 U.S. 1059 (1987).
\item \textsuperscript{130} Bliss v. Lockhart, 891 F.2d 1335 (8th Cir. 1989).
\end{itemize}
Due to the importance likely to be attached to the fact-finding initially conducted by the district court and magistrate judge, a framework for the application of the Kotteakos/Brecht rule is particularly desirable in order to reach a relatively uniform application of the standard to the disparate issues and evidentiary contexts in which the rule will be employed. Because almost all trial error is now subject to harmless-error analysis, even including admission of a coerced confession, it is unlikely that any framework developed for assessing the impact of constitutional error is beyond critique. If, for example, error is "harmless" under Chapman, it certainly does not warrant relief under Brecht. However, that obvious conclusion does not preclude a consideration of common circumstances which may direct a reviewing court in its assessment of likely prejudice resulting from constitutional error.

A number of scenarios suggest the appropriateness of relief in the event constitutional trial error is demonstrated by the habeas petitioner. By their very nature, these assume that the evidence is otherwise legally sufficient to support conviction under the Jackson standard, even though a challenge to sufficiency itself is subject to independent consideration in the federal habeas action. Consequently, the reviewing court must consider whether the error could have influenced the jury's verdict irrespective of the existence of the otherwise sufficient evidence supporting conviction. Otherwise, the habeas court's review can virtually always be considered superficial in failing to consider the extent to which that same evidence would not have resulted in conviction but for the trial court's ruling. The following scenarios demonstrate that relief is almost always appropriate for the federal petitioner, assuming that the trial error is properly preserved and ruled on by the state

132. See supra notes 61, 93 and accompanying text.
133. Closs v. Leapley, 18 F.3d 574 (8th Cir. 1994) (denying pro se petition attacking evidentiary sufficiency based on state court's conclusion improper without consideration of factual and legal basis for state court's opinion on the record).
A. Error Resulting in Admission of Evidence Essential to Support Conviction

Clearly, error in the admission of evidence which would permit the prosecution to establish an essential element of its case would appear to always establish a constitutional violation that would require federal habeas relief under *Brecht*. In order to secure a constitutionally sufficient conviction under *Jackson v. Virginia*, the government is required to prove each element of the offense charged beyond a reasonable doubt. Although the evidence must be reviewed in a light most favorable to the trial court's verdict under *Jackson*, absence of proof as to any element of the prosecution's case will require reversal on appeal and also bar further prosecution.

Where the trial court improperly admits evidence that would require reversal of conviction, the reviewing court may afford federal habeas relief. However, all errors in admission of evidence do not implicate constitutional guarantees. Unless the trial error has a constitutional cast, relief is not appropriate in federal habeas corpus simply because a state court improperly admitted evidence critical to the prosecution's satisfaction of its burden of proof. In fact, in this context the "trial error"

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134. 28 U.S.C. § 2254 (b) and (c) require that claims of federal rights violations be initially asserted in state court proceedings. *Rose v. Lundy*, 455 U.S. 509, 520 (1982). However, despite the duty imposed on the State to plead failure of exhaustion in state courts as a bar to consideration of unexhausted claims, failure to plead this defense affords federal courts authority to consider unexhausted claims on the merits. *Granberry v. Greer*, 481 U.S. 129, 134-35 (1987).


137. The most obvious overlap between evidentiary principles and constitutional concerns involves the problem posed by admission of testimony which would be excludable as hearsay but for the existence of an exception to the hearsay rule. Admission of out-of-court declarations made by an unavailable declarant always pose the threat of a Confrontation Clause violation of the protection afforded by the Sixth Amendment. In such a case, properly preserved error would typically include an objection to this testimony or evidence based on both the Sixth Amendment guarantee and the hearsay rule, or violation of the technical requirements for admission of the evidence pursuant to an exception. While the evidence might prove admissible pursuant to
concept has previously been employed by appellate courts in holding that errors in admission of evidence do not require retrial even though improperly admitted evidence might form a critical component of the prosecution's case.\textsuperscript{138}

If, however, a constitutional claim of improper admission of evidence has been preserved and rejected by state courts, a finding that constitutional error did occur would require reversal if the conviction required jury consideration of the improperly admitted evidence in order to establish an element of the offense. In this circumstance, the constitutional error necessarily had a "substantial and injurious effect or influence in determining the jury's verdict."\textsuperscript{139} Otherwise, the evidence would not have been sufficient to support conviction, and the jury presumably would have acquitt.ed or convicted on a lesser-included offense.

\textbf{B. Error Resulting from Jury Instructions Improperly Authorizing Conviction}

A second category of state trial error which would justify federal relief involves an incorrect instruction that authorizes the defendant's conviction. While matters of constitutionally defective jury instructions are generally subject to harmless-error analysis,\textsuperscript{140} the general principle is inapplicable to consideration of an instruction actually authorizing conviction on state evidentiary rule, this determination would not necessarily bind the habeas court in its consideration of the constitutional claim. \textit{Compare} Idaho v. Wright, 110 S. Ct. 3139 (1990) \textit{and} White v. Illinois, 502 U.S. 346 (1992). The objection might also include a state constitutional or statutory basis as well, although the federal habeas court is not empowered to enforce this protection. Lewis v. Jeffers, 497 U.S. 764, 780-81 (1990).


an incorrect theory of state law or a theory wholly inapplicable to the offense charged.

For example, if the instruction permitted conviction on a theory of the offense not charged in the indictment or information, the resulting conviction would prove constitutionally infirm either because the accused had no notice of the prosecution's intended theory of the offense or because the evidence adduced at trial would vary from the theory alleged in the charging instrument. In *Allen v. State*, the Arkansas Supreme Court reversed a defendant's conviction for first-degree murder which may have resulted from the inclusion of an incorrect first-degree felony murder jury instruction. The defendant was charged with premeditated and deliberate capital murder, rather than felony capital murder. The court ruled that first-degree felony murder for which the defendant ultimately may have been convicted was not a lesser-included offense under Arkansas law. Because deliberate and felony murder theories of capital murder describe different offenses under state law, rather than a variation in proof of intentional killing, which supported the Supreme Court's narrow decision in *Schad v. Arizona*, the Arkansas scheme for defining the capital offense required reversal. The constitutional challenge in this instance, had it been necessary to preserve and litigate the issue in a federal habeas court, could have rested upon either a Sixth Amendment notice theory or general due process allegations that the instruction permitted the jury to reach a non-unanimous verdict inconsistent with the Court's holding in *Schad*.

The decision in *Allen* illustrates an important consideration regarding the application of "harmlessness" analysis in this type

141. 838 S.W.2d 346 (Ark. 1992).

142. *Id.*


144. For instance, in *Lankford v. Idaho*, 500 U.S. 110 (1991), the Court reversed the defendant's capital sentence where the charging instrument did not afford plain notice that the death penalty would be sought in the case. The Court's holding was predicated on due process grounds, although the Sixth Amendment's guarantee of notice would appear to afford an alternative theory for relief.
of situation.\textsuperscript{145} The verdict form returned by the jury did not reflect which theory of first-degree murder the jury based its decision to convict.\textsuperscript{146} Consequently, the state supreme court was unable to conclude that the error in this instance—an improper instruction on first-degree felony murder—was, in fact, harmless; the jury had reached its decision based on an alternative theory of first-degree murder, a purposeful killing, which was an appropriate lesser-included offense of premeditated and deliberate capital murder.\textsuperscript{147} Had a special verdict been returned reflecting that the conviction was based on a correct theory of the lesser charge, the court might well have concluded that the potential confusion, created by including the inapplicable lesser instruction, was harmless.

\textbf{C. Error in Exclusion of Admissible Evidence Requiring Instruction on Defensive Theory or Lesser-Included Offense}

Trial error in improperly excluding defensive evidence which would require instruction on a defensive theory or lesser-included offense, not otherwise included in the court’s charge, would almost always appear to be prejudicial and injurious to the defendant’s right to a fair trial. Harmlessness would only occur if the defendant was convicted of a lesser-included offense to which the defensive theory would not have applied or of an offense no more onerous than that supported by the improperly excluded evidence. Given the general rule that defensive instructions, including lesser-included offense instructions, are available if supported by any evidence,\textsuperscript{148} exclusion of evidence which would have required the giving of a defensive instruction typically results in reversible error.

Exclusion of evidence supporting a defensive theory at trial

\begin{footnotesize}
\begin{enumerate}
\item[145.] \textit{Allen}, 838 S.W.2d at 347.
\item[146.] \textit{Id.} at 346.
\item[147.] \textit{Id.}
\item[148.] \textit{E.g.,} Keeble v. United States, 412 U.S. 205 (1973) (allowing an instruction on a lesser-included offense was allowed because the evidence warranted such instruction, even though the lesser-included offense was not specified in the Act, where a Native-American was prosecuted under the Major Crimes Act).
\end{enumerate}
\end{footnotesize}
may be cast in constitutional terms, particularly when the defendant argues that a violation of the Compulsory Process Clause has occurred. This provision affords a criminal defendant a general right to present his defense to the trier of fact through access to a legal process designed to compel the attendance of witnesses having favorable testimony at trial. Historically, the clause has been used to override state evidentiary rules barring the use of certain classes of testimony based upon witness incompetence determinations. Thus, in the leading Compulsory Process Clause case, Washington v. Texas, the Sixth Amendment right was relied upon to override a Texas rule which declared co-defendants incompetent as witnesses for the defense. Similarly, in Rock v. Arkansas, the Court held that a per se state evidence rule could not be relied upon to bar the use of hypnotically refreshed testimony, which was the basis for the exclusion of the defendant's own testimony at trial.

This type of error is inherently substantial and injurious in depriving the jury of any opportunity to consider defensive theories which might have otherwise been available to the accused at trial. Even though evidence may overwhelmingly support guilt, the actual determination cannot be deemed reliable if the trier of fact was denied access to alternative verdicts upon which justification, excuse, or mitigation could have been predicated. Exclusion of non-cumulative evidence sufficient to support defensive instructions would constitute the type of constitutional trial error virtually demanding relief.

D. Error in Refusing Defensive Instruction or Lesser-Included Offense Instruction

A trial court's refusal to instruct on lesser-included offenses or defensive theories supported by evidence admitted at trial is generally subject to reversal in state courts. There are, of

149. U.S. CONST. amend. VI.
150. 388 U.S. 14 (1967).
152. See Hill v. State, 634 S.W.2d 120, 121 (Ark. 1982) ("We have consistently
course, peculiar exceptions to the general rule depending on the jurisdiction, such as in those jurisdictions in which the accused’s denial of commission of any offense renders failure to instruct on a lesser offense harmless, if erroneous at all, and those where conviction on a greater offense results, despite instruction on a degree of a lesser-included offense higher than the degree of the lesser-included offense upon which instruction has been refused. Nevertheless, absent a particular local rule which would serve to excuse apparent trial court error, a refusal to instruct on a defensive instruction or lesser-included offense would always constitute a prejudicial error.

Moreover, a trial court’s refusal to instruct on a lesser-included offense properly raised by the excluded evidence might itself constitute a due process violation, as suggested by the Court’s opinion in *Beck v. Alabama.* Assertion of a due process claim in a federal petition attacking a state conviction in which the accused was deprived of a lesser-included offense instruction to which he was entitled based on evidence admitted at trial should meet the standard of prejudice required for relief under *Brecht.*

Virtually all other trial error claims raising constitutional questions must be considered in light of traditional harm analysis precisely because the error must be evaluated in light

held that a trial court commits reversible error when it refuses to give a correct instruction defining a lesser-included offense and its punishment when there is testimony on which the defendant might be found guilty of the lesser rather than the greater offense.”); Sansone v. United States, 380 U.S. 343 (1965) (holding that federal standard for determination of lesser-included offense evidence requires instruction).

153. *E.g.*, Flurry v. State, 720 S.W.2d 699 (Ark. 1986) (holding that failure to instruct on lesser-included offense of rape was not error where accused denied commission of any offense).


155. 447 U.S. 625 (1980) (voiding death penalty imposed pursuant to state scheme which precluded trial judge from instructing jury on lesser-included homicide offense in capital case).

156. See supra note 56 and accompanying text; *e.g.*, Cordova v. Lynaugh, 838 F.2d 764, 770 n.8 (5th Cir.), *cert. denied sub nom.* Lynaugh v. Cordova, 486 U.S. 1061 (1988).
of the totality of the evidence adduced at trial. Assignment of the burden of proving prejudice to the petitioner in the federal habeas action may involve far more than proving that the constitutional trial error might have caused the jury to reach a result different from that which would have resulted had the error not occurred. Instead, the Brecht rule requires the petitioner to demonstrate "actual prejudice."

The test under Kotteakos is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 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." Thus, proof of prejudice under a strict Kotteakos/Brecht formulation does not amount to an unequivocal finding of harmlessness, which would require reversal under the Chapman formula. However, under O'Neal, an unequivocal finding on the issue of harmlessness results in the "grave doubt" which the Court directs should inure to the benefit of the habeas petitioner. Rather than reaching a conclusion as to whether the error might have impacted the jury's consideration of the evidence in convicting, Brecht apparently requires a positive finding that the error did taint the proceedings, or at the least an inability to conclude that it did not. This conclusion is reached to the extent that it can be done without attempting to interview jurors in order to assess the actual impact of the error.

157. The Brecht Court relied on Arizona v. Fulminante, 499 U.S. 279, 280 (1990), for the proposition that "trial error" is particularly "amenable to harmless-error analysis because it 'may . . . be quantitatively assessed in the context of other evidence presented in order'" to assess likely prejudice to the accused. Brecht, 113 S. Ct. at 1717 (quoting Arizona v. Fulminante, 499 U.S. 279, 280 (1991)).

158. Brecht, 113 S. Ct. at 1722 (citation omitted) (emphasis added) (quoting United States v. Lane, 474 U.S. 438, 449 (1986)).

159. See supra notes 4-5 and accompanying text.

V. THE ROLE OF FEDERAL HABEAS CORPUS IN ENFORCING CONSTITUTIONAL GUARANTEE

What is clear from the Court's decision in *Brecht* is that federal habeas does not represent merely another step in the appellate process available to defendants convicted in state court proceedings. The habeas court does not sit to review the disposition of federal constitutional claims by state courts; in fact, the majority opinion in *Brecht* disavows any contention that state courts have failed in their enforcement of federal constitutional rights. Instead, federal habeas exists merely to vindicate federal rights violations when such violations have resulted in some actual or presumed prejudice to a state court defendant resulting in a constitutionally impermissible conviction or confinement. This approach is certainly consistent with the legislative intent expressed in 28 U.S.C. § 2254, but it raises questions concerning the relationship between state and federal courts in the enforcement of federal constitutional rights.

Initially, it is clear that the Court rejects the argument that state courts will prove less vigorous in enforcement of federal constitutional rights with the adoption of the *Kotteakos* rule.

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Petitioner argues that application of the *Chapman* harmless-error standard on collateral review is necessary to deter state courts from relaxing their own guard in reviewing constitutional error and to discourage prosecutors from committing error in the first place. Absent affirmative evidence that state-court judges are ignoring their oath, we discount petitioner's argument that courts will respond to our ruling by violating their Article VI duty to uphold the Constitution.

162. *Id.* "Moreover, granting habeas relief merely because there is a 'reasonable probability' that trial error contributed to the verdict is at odds with the historic meaning of habeas corpus—to afford relief to those whom society has 'grievously wronged.'" *Id.* (quoting *Chapman* v. California, 386 U.S. 18, 24 (1967)).

163. A federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (1977) (emphasis added), cited in *Brecht*, 113 S. Ct. at 1718.

164. *Brecht*, 113 S. Ct. at 1721. "Absent affirmative evidence that state-court judges
Yet, the existence of the federal habeas remedy necessarily recognizes that state courts represent merely a first line of defense in the protection of those guarantees. Otherwise, there would have been no rationale to support the congressional adoption of § 2254.

Moreover, the Brecht majority’s expressed reliance on the accuracy and integrity of state appellate court decisionmaking runs contrary to the Court’s decision in Michigan v. Long. In Long, the Court applied a presumptive rule of jurisdiction to afford it the power to consider state appellate judgments even arguably resting upon the application of federal constitutional authority. Under this rationale, a state appellate decision interpreting a right arising under both federal and state constitutions is subject to review by the Court unless it rests on “bona fide separate, adequate, and independent state grounds.”

The deference by the Brecht Court shown to state appellate decisionmaking in their enforcement of federally protected rights did not persuade the majority in Long that state court construction of constitutional guarantees could proceed without intervention on certiorari. Clearly, a distinction can be drawn between interpretation of constitutional language and application of well-defined principles to particular factual scenarios. But, as Justice White observed in his Brecht dissent, if state courts were accurately enforcing federal constitutional protections, then continued reliance on the Chapman harmless-error standard in federal habeas review would entail no cost. Whereas, if they are failing to address federal constitutional protections, this is precisely the situation federal habeas is designed to address.

are ignoring their oath, we discount petitioner’s argument that courts will respond to our ruling by violating their Article VI duty to uphold the Constitution.” Id.; see also supra note 149 and accompanying text.

166. Id. at 1042.
167. Id. at 1041.
169. Id. at 1041.
170. Brecht, 113 S. Ct. at 1728 (White, J., dissenting). Similarly, in Wright v. West, 505 U.S. 277 (1992), a fragmented Court retained the tradition of de novo review in
While the Brecht majority dismissed the argument that application of a less rigorous standard for enforcement in federal habeas would encourage state appellate courts to relax their enforcement, the imposition of the prejudice rule does permit that relaxation to occur. State appellate courts, particularly those staffed by popular election, may well find it easier to avoid rigorous application of the Chapman standard knowing that they will not suffer reversal as easily by federal habeas courts now obliged to apply the Brecht formulation. The Eighth Circuit has addressed this problem prophylactically by holding that the Brecht test is not applicable unless the state appellate court has identified the error and first applied Chapman in its analysis. 171

The structural problem created by the use of differing standards of review or burdens of proof in the direct appeal and post-conviction stages of litigation is that those courts demonstrating less fidelity to the enforcement of federal constitutional values are now able to relax enforcement. Those courts most rigorous in their application of the Chapman harmlessness analysis are perhaps likely to continue with their pattern of vigorous enforcement. Nonetheless, state appellate judges might question why their review should be more likely to result in reversal of state convictions based on violations of the federal constitution than review conducted by federal courts.

For the Brecht majority, that answer lies in the fundamental distinction between direct appeal and habeas corpus or other avenues for collateral attack.172 The error-correcting function of direct appeal simply does not apply to the intended, extraordinary nature of habeas relief—"to afford relief to those whom

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172. 113 S. Ct. at 1721.
society has 'grievously wronged.'”

Although the majority clearly draws this distinction to explain the intertwining of the goals of judicial economy, federalism, and comity, the impact of Brecht will necessarily restrict habeas relief even further in the future. Especially if some state appellate courts tend to relax in their enforcement of constitutional values, some cases that formerly would have resulted in relief being granted will ultimately result in denial of relief. The potential deterrent effect to trial court and prosecution error that flows logically from rigorous enforcement of constitutional rights will necessarily be diluted by any procedure which insulates less-than-rigorous enforcement on state direct appeal from the high degree of review which Chapman formerly required of federal habeas courts.

The Brecht majority responded to the suggestion that the adoption of the Kotteakos rule would jeopardize enforcement of federal constitutional rights: “‘The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials.’” This approach certainly advances the majority’s concern for comity, yet does so by admitting that federal habeas will not continue to serve its former role in the enforcement of constitutional rights.

Eventually, one must question whether the reliance on a state appellate court’s enforcement of federal constitutional rights can be predicated on continued reliance on Chapman’s harmless-error doctrine. State appellate judges might logically inquire as to why constitutional error should be treated any differently than non-constitutional error in disposition of criminal appeals. Absent a showing of unfairness resulting from the error, reversal is a costly solution to the problem of trial error which may or may not carry with it the intended deterrent effect.

Certainly, the Court has already demonstrated that state

173. Id. (citation omitted).
procedural devices for preservation of error may be applied equally to constitutional and non-constitutional claims in order to preclude federal habeas review of unpreserved constitutional trial error. The next step for the Brecht majority may be reconsideration of the Chapman rule itself, as the Court elevates concerns for federalism, comity, and judicial economy above costly enforcement of federal rights when a violation has occasioned no significant unfairness in the adjudication process.

VI. CONCLUSION

Although the pace of habeas corpus reform in the decisions of the Supreme Court appears to have slowed somewhat in light of major holdings of prior terms, a slowed pace does not preclude further refinement of the remedy or a congressiona

nal restructuring of § 2254. First, it is clear that the decision in Brecht itself will generate additional litigation concerning the proper disposition of constitutional claims brought by state inmates. Most interestingly, petitioners might challenge applicability of Brecht to cases already pending in federal habeas courts as a “new rule” not entitled to retroactive application under Teague v. Lane,¹⁷⁵ although it appears that the prosecution is permitted to benefit from new rules of procedure even when a defendant cannot.

Moreover, the Court will likely confront questions which arise as a consequence of procedural irregularity in the application of Chapman on direct review. For example, should a petitioner be able to argue that his claim of error was itself improperly adjudicated by a state appellate court erring in its Chapman analysis? If so, virtually all federal claims would include an allegation that the state system failed in its application of the correct standard of review of the federal constitutional error on direct appeal. Yet, the principle of de novo

¹⁷⁵. 489 U.S. 288 (1989) (holding that a habeas corpus petitioner cannot benefit from a “new rule” of criminal procedure after the conviction has become final). The Teague Court defined “new rule” as “not dictated by precedent existing at the time defendant’s conviction became final.” Id. at 301.
review, affirmed by a fragmented Court in Wright v. West, would suggest that a federal habeas court addresses the merits of the federal constitutional claim without reference to the state court’s rejection of the claim and the reasons for its affirmance. Otherwise, the argument for deference to a state court law finding, which was advanced by Justice Thomas in his separate opinion in Wright v. West, would find support in the suggestion that the federal habeas court should sit to perform appellate review of state court decisionmaking. This is, at best, a controversial proposition, given the continuing concern for comity that is evident in the Court’s habeas corpus decisions. The reaffirmation of de novo habeas review of state court legal determinations, including review of mixed questions of law and fact which is conducted de novo despite statutorily required deference to state court fact finding,

177. Id. at 285-95. The Thomas position advocating deference to state court law finding, perhaps paralleling the deference required to state fact finding required by §2254(d), was joined by the Chief Justice and Justice Scalia.
178. See Brecht, 113 S. Ct. at 1710 (“Federalism, comity, and the constitutional obligation of state and federal courts all counsel against any presumption that a decision of this Court will ‘deter’ lower federal or state courts from fully performing their sworn duty.”); Barefoot v. Estelle, 463 U.S. 880, 887 (1983) (“Federal courts are not forums in which to relitigate state trials.”).
179. The decision in Wright v. West, 505 U.S. 277 (1992), affirmed Brown v. Allen, 344 U.S. 443 (1953), in regard to the federal habeas court’s tradition of de novo review of state court determinations of law. That Wright expressly addresses this issue as a matter of primary importance within the Court is evidenced by the terms of the order granting certiorari which directed the parties to brief the issue of deferential review of state court legal determinations. See Wright v. West, 502 U.S. 1021, 1021 (1991). The Wright Court requested the parties to argue and brief the following question:

In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court’s application of law to the specific facts of the petitioner’s case or should it review the state court’s determination de novo?

Id.
181. A state court determination of a factual issue “evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be
leads more logically to the conclusion that state appellate court error in its application of the *Chapman* harmless-error analysis is not, in itself, a ground for relief in federal habeas.

Furthermore, the narrow majorities and pluralities which have characterized a number of the Court's recent criminal procedural decisions, often rendered in the context of capital prosecutions, suggest that existing precedent is subject to challenge. In light of the forceful argument by Justice Scalia in his concurrence in *Payne v. Tennessee*, that narrow precedent of short term duration should be subject to reconsideration, changes in Court composition might well produce the result advocated by the Scalia approach. Even if the overruling of recent precedent does not result from changes in the Court's membership, the prospects for continuing challenge to rulings that restrict access to federal habeas corpus remain high both because of the closeness of the Court's decisions and because of the pressures for extended litigation experienced by counsel in death penalty cases.

Clearly, the worst fears about the implication of *Brecht* have been tempered by the majority opinion in *O'Neal*, which revitalized Justice Stevens' limited concurrence in *Brecht*. The 5-4 split in the subsequent decision effectively modified the impact of *Brecht* by expressly disavowing any intent to impose a "burden of proof" upon the federal habeas petitioner. However, even *O'Neal's* moderating impact suggests a duty upon petitioner's counsel to advance an arguable theory of prejudice when advancing claims of constitutional trial error by the state court. This does represent some shift in a policy which had provided even stronger protection for state inmates asserting constitutional claims relying on the *Chapman* standard of review.

Regardless of the future course of habeas litigation, *Brecht* serves an important function in restricting federal relief to those constitutional claims involving rights deprivations truly injurious to an accused's right to a fair trial. The holding may also sug-

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suggest that the Court will ultimately abandon the Chapman harmless-error rule—a principle binding on state court review of federal constitutional claims—in favor of a rule of prejudice that resembles the rule now applicable to claims of trial error.\textsuperscript{183}

The significance of the Court’s use of language in explaining harmlessness analysis is not to be underestimated. The Chapman formulation was subsequently explained further by the Court in Sullivan v. Louisiana:\textsuperscript{184} “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."\textsuperscript{185} Chapman, however, addressed harmlessness in terms of the “possibility that the evidence complained of might have contributed to the conviction,” drawing this language from the Court’s prior decision in Fahy v. Connecticut.\textsuperscript{186} Certainly, the Chapman Court did not view the problem of harm in a theoretical void. Instead, it looked to the impact of the constitutional error on the trial, rather than merely considering the question of reversal in the abstract.\textsuperscript{187}

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\textsuperscript{183} The Brecht majority noted that the Kotteakos rule itself derived from 28 U.S.C. § 2111: “On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.” 28 U.S.C. § 2111 (1988). The majority observed that this principle had been applied only to non-constitutional claims of error in federal proceedings in the past and cited United States v. Lane, 474 U.S. 438 (1986). This reference may suggest that the majority believes Lane will ultimately be ripe for overruling in favor of the adoption of a single standard for review of all claims of error in federal cases, suggesting that state courts would then be afforded a relaxation of the requirement that Chapman harmless-error analysis be applied in reviewing claims of federal constitutional error in state proceedings. This approach would certainly be consistent with the Court’s recent concern for comity in the operation of the federal habeas remedy. Brecht, 113 S. Ct. at 1721.

\textsuperscript{184} 113 S. Ct. 2078 (1993).

\textsuperscript{185} Id. at 2081 (emphasis added).

\textsuperscript{186} 375 U.S. 85 (1963) (holding that the exclusionary rule governing illegally seized evidence applied to cases on direct appeal).

\textsuperscript{187} Chapman v. California, 386 U.S. 18, 23 (1967).

Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, this statement in Fahy itself belies any belief that all trial
Justice Scalia's assessment of Chapman, however, looks surprisingly like the Brecht/Kotteakos test in application. His subtle restatement of the rule in terms of whether the guilty verdict was "surely attributable" to the error does not reflect the "possibility" standard to which the Court referred in Fahy and Chapman. Instead of questioning the likelihood that error resulted in conviction in light of the other evidence or that it could have prejudiced the accused in any event in a case of overwhelming evidence, the Sullivan "restatement" of Chapman, what must be considered dicta in light of the ultimate disposition, focuses on whether the error "surely" contributed to the verdict. 188

Although ultimately holding that Chapman is inapplicable to this "structural error" essentially deprives the reviewing court of any accurate means of determining harm, 189 this characterization of Chapman may actually foreshadow an eventual change in the way a majority of the Court perceives harmlessness even in the context of the direct appeal. The Court concluded that the defective jury instruction at issue, which improperly expressed the prosecution's burden of proof, could not be subject to constitutional harmless-error analysis because the error essentially vitiates all findings made by the jury. 190

Eventually, abandonment of Chapman may be seen by yet another majority of the Court to impose a burden for enforcement of federal constitutional protections on state courts no greater than that seen by the Brecht Court as reasonable for

errors which violate the Constitution automatically call for reversal. At the same time, however, like the federal harmless-error statute, it emphasizes an intention not to treat as harmless those constitutional errors that 'affect substantial rights' of a party.

Id. at 23 (citing Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (impartial judge)).

188. See Jason S. Marks, Postscript: Harmless Error, Habeas Corpus, and a Constitutional Eclipse, 8 CRIM. JUST. No. 3, 30, 31 (1993) (arguing that Sullivan and Brecht represent a decisive shift from Chapman's strong statement in support of enforcement of federal constitutional rights in state criminal trials)


190. Id. at 2082.
resolution of those trial error claims once they reach the federal habeas process. However, the most recent shift in the composition of the Court, evidenced by Justice Breyer’s opinion for the majority in *O’Neal*, may indicate that *Chapman*’s viability as an important safeguard of federal constitutional protections for criminal defendants will not be sacrificed to the Court’s recent preferences for comity, finality, and federalism in the context of its habeas corpus jurisprudence.