

## NOTE

### MOSTLY HARMLESS: AN ANALYSIS OF POST-AEDPA FEDERAL HABEAS CORPUS REVIEW OF STATE HARMLESS ERROR DETERMINATIONS

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#### INTRODUCTION

Sixty years ago, in *Kotteakos v. United States*, the Supreme Court ruled that a small class of so-called harmless errors committed by courts did not require correction.<sup>1</sup> The Court acknowledged that some judicial errors, though recognizable as errors, did not threaten the validity of criminal convictions and therefore did not require reversal.<sup>2</sup> Specifically, the Court held that errors that violated federal statutes should be deemed harmless unless they had a “substantial and injurious effect or influence in determining the

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1. *Kotteakos v. United States*, 328 U.S. 750 (1946).

2. *Id.* at 776.

jury's verdict."<sup>3</sup> While *Kotteakos* represented the Supreme Court's first treatment of the concept of harmless error,<sup>4</sup> other courts had a history of preserving convictions using harmless error review.<sup>5</sup> For some time before *Kotteakos*, state statutes had directed appellate courts throughout the country to use harmless error review,<sup>6</sup> a doctrine that prevents appellate courts from disposing of convictions on technicalities,<sup>7</sup> "conserve[s] judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error,"<sup>8</sup> and allows courts to focus on "decid[ing] the factual question of the defendant's guilt or innocence."<sup>9</sup>

The Supreme Court expanded the category of harmless errors when it first allowed appellate courts to disregard certain criminal trial errors that violated the United States Constitution.<sup>10</sup> In 1967, *Chapman v. California* concluded that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."<sup>11</sup> *Chapman* thus provided a more burdensome standard for more troublesome errors.<sup>12</sup> For over a quarter of a century, constitutional errors deemed "harmless beyond a reasonable doubt" under *Chapman*,<sup>13</sup> and federal law errors that had a "substantial and injurious effect or influence in determining the jury's verdict" under *Kotteakos*,<sup>14</sup> did not warrant relief on federal habeas corpus review.

The Court retooled harmless error review again in 1993, this time addressing criminal claims on federal habeas corpus review and making it easier for federal habeas courts to call constitutional errors harmless.<sup>15</sup> *Brecht v. Abrahamson* announced that one harmless error standard should apply to all cases on federal collateral review.<sup>16</sup> The Court directed the lower courts to review

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3. *Id.*

4. Jason S. Marks, *Harmless Constitutional Error: Fundamental Fairness and Constitutional Integrity*, CRIM. JUST., Spring 1993, at 2, 3.

5. See 5 WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE § 27.6(a) (2d ed. 1999); see also *Chapman v. California*, 386 U.S. 18, 22 (1967) (noting that all fifty states had harmless error statutes or rules by 1967).

6. See 1 LAFAVE, ISRAEL, & KING, *supra* note 5, § 1.5(d) (asserting that state legislatures enacted general harmless error statutes in the early 1900s).

7. *United States v. Green*, 847 F.2d 622, 625 (10th Cir. 1998).

8. *United States v. Hasting*, 461 U.S. 499, 509 (1983) (quoting ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 81 (1970)).

9. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (citation omitted).

10. *Chapman*, 386 U.S. at 22.

11. *Id.* at 24.

12. See *United States v. Lane*, 474 U.S. 438, 446 (1986) ("[T]he standard for harmless-error analysis adopted in *Chapman* concerning constitutional errors is considerably more onerous than the standard for nonconstitutional errors adopted in *Kotteakos v. United States*." (citation omitted)).

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

14. *Kotteakos v. United States*, 328 U.S. 750, 776 (1946).

15. *Brecht v. Abrahamson*, 507 U.S. 619, 622–23 (1993).

16. See *id.*

both constitutional errors and errors of federal law, which had previously been subject to two different standards of harmless error review, under the less petitioner-friendly standard of *Kotteakos v. United States*.<sup>17</sup>

Only three years later, Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), which amended the federal habeas corpus statute. AEDPA added a provision that precluded federal habeas relief when a state court decision was neither “contrary to, [nor] . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”<sup>18</sup> The Supreme Court interpreted this statute as allowing federal habeas relief only when a federal habeas court could establish that a state court determination was not simply error, but an objectively unreasonable application of federal law.<sup>19</sup>

In May of 2005, seeking to end the “extraordinary delays” often created by “a single Federal judge” on federal habeas review,<sup>20</sup> Congress proposed the Streamlined Procedures Act of 2005 (SPA).<sup>21</sup> If enacted, this statute would have stripped the jurisdiction of federal courts in a small but significant way: the SPA would have eliminated federal review of any sentencing error found by a state court to be harmless or nonprejudicial.<sup>22</sup> According to the bill’s proponents, the problem is that federal “judges are acting . . . lawlessly” in reversing state court denials of collateral relief, and therefore “[i]t is not unreasonable for Congress to . . . seek to circumscribe federal judicial discretion.”<sup>23</sup>

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17. See *id.* (quoting *Kotteakos*, 328 U.S. at 776). The Court stated that the “*Kotteakos* harmless-error standard is better tailored to the nature and purpose of collateral review than the *Chapman* standard, and application of a less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence.” *Id.* at 623.

18. 28 U.S.C. § 2254(d)(1) (2000). Previously, federal courts reviewed mixed questions of law and fact from state court convictions de novo. Jennifer Park, Yarborough v. Alvarado: *At the Crossroads of the “Unreasonable Application” Provision of the Antiterrorism and Effective Death Penalty Act of 1996 and the Consideration of Juvenile Status in Custodial Determinations*, 95 J. CRIM. L. & CRIMINOLOGY 871, 874 (2005). AEDPA changed this analysis by requiring federal courts to determine merely whether the state court determination was objectively unreasonable. *Id.*

19. *Williams v. Taylor*, 529 U.S. 362, 365 (2000).

20. *Terrorist Death Penalty Enhancement Act of 2005, and the Streamlined Procedures Act of 2005: Hearing on H.R. 3060 and H.R. 3035 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 2 (2005) [hereinafter *Hearing*] (statement of Rep. Coble, Member, House Comm. on the Judiciary).

21. Streamlined Procedures Act of 2005, S. 1088, 109th Cong. (2005). The Streamlined Procedures Act is currently stalled in the Senate Judiciary Committee. GovTrack.US, <http://www.govtrack.us/congress/bill.xpd?bill=s109-1088> (last visited Nov. 5, 2006) (noting that action was last taken on November 16, 2005 and that the bill has been referred to the Senate Judiciary Committee). Even if this particular bill never becomes law, this proposal signals that Congress may again attempt to curtail habeas jurisdiction through jurisdiction stripping in the near future.

22. Streamlined Procedures Act § 6 (“A court, justice, or judge shall not have jurisdiction to consider an application with respect to an error relating to the applicant’s sentence or sentencing that has been found to be harmless or not prejudicial in State court proceedings, unless a determination that the error is not structural is contrary to clearly established Federal law, as determined by the Supreme Court of the United States.”).

23. Ted Frank, *How Important is Habeas?: Ted Frank and David Bruck Debate*, LEGAL AFFAIRS, Aug. 1, 2005, [http://www.legalaffairs.org/webexclusive/dc\\_printerfriendly.msp?id=54](http://www.legalaffairs.org/webexclusive/dc_printerfriendly.msp?id=54); see

This Note will show that the bill's proponents have misidentified the problem. The real problem is that federal habeas courts have differing interpretations of the law of harmless error and thus diverge in their application of harmless error review. The problem is not that federal judges are using their jurisdiction to grant unmeritorious habeas petitions by capriciously reversing state court harmless error determinations because, as shown below, most federal habeas courts rarely reverse state court harmless error determinations. Instead, the current articulation of harmless error law gives federal habeas courts inadequate guidance. While stripping the courts of jurisdiction might solve the problem of legal uncertainty by removing the question altogether, such a radical procedure would be "the functional equivalent of amputating four limbs to improve the blood flow of a healthy and functioning human being."<sup>24</sup>

This Note argues that the Supreme Court should clarify the standard by which federal habeas courts conduct harmless error review where there is a state court determination of harmlessness. This Note organizes three and a half years' worth of federal habeas court harmless error analyses into four categories and concludes that the best analysis is that in which the *Brecht* standard is integrated into AEDPA's analysis. Part I of this Note surveys habeas corpus cases over the course of three and a half years, from January 2003 through June 2006, and concludes that Congress's proposed action, jurisdiction stripping, is an inappropriate measure because most circuit courts already regularly agree with the harmless error determinations of state courts. Part II argues that the Supreme Court should clarify how to apply *Brecht* and AEDPA in federal review of state court harmless error determinations because the law is unclear. Part III discusses several approaches to federal review of state court harmless error determinations and ultimately argues that the proper solution is to adopt a uniform analysis for harmless error that integrates the *Brecht* standard into AEDPA's analysis.

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*Hearing, supra* note 20, at 90 (statement of Ron Eisenberg, Deputy District Attorney, Philadelphia District Attorney's Office).

24. *Hearing, supra* note 20, at 99 (statement of Bernard E. Harcourt, Professor of Law, University of Chicago).

## I. THE RESULTS OF FEDERAL HABEAS HARMLESS ERROR ANALYSES

Scholars, courts, and practitioners claim, among other things,<sup>25</sup> that “many Federal courts seem flatly unwilling to affirm capital sentences.”<sup>26</sup> In response, federal lawmakers have proposed the SPA, which would strip federal courts of habeas corpus jurisdiction when a state court has deemed a sentencing error harmless.<sup>27</sup> But the SPA’s proponents have got it wrong; this reform will not significantly affect the number of state court decisions, capital or otherwise, that are affirmed. As this Part concludes, the SPA provides an ineffective solution because most circuit courts already regularly agree with the harmless error determinations of state courts.

Far from being “flatly unwilling to affirm”<sup>28</sup> state court convictions or sentences, a survey of every available circuit court habeas opinion decided over the span of three and a half years<sup>29</sup> reveals that in cases in which the

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25. Critics of federal habeas corpus jurisdiction complain that federal “habeas jurisdiction clogs federal calendars with frivolous claims and thus wastes valuable judicial resources.” Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1010 (1985). Federal habeas review allegedly creates a backlog that “prejudice[s] the occasional meritorious application to be buried in a flood of worthless ones.” *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring). Complaints are often lodged at federal habeas review because federal courts “second-guess judgments that may have been affirmed by the states’ highest courts” and “undercut the ‘finality’ of court judgments.” Yackle, *supra*, at 1010 (citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963)). Finally, some commentators complain that because federal courts are so removed from the crime and the trial, they do not give credit to the judgments of the state courts or think about the interests of crime victims. *Hearing, supra* note 20, at 93 (statement of Ron Eisenberg, Deputy District Attorney, Philadelphia District Attorney’s Office) (“Federal habeas courts have great power, simply because they are last in line. But they have little responsibility, because they are so far removed in time and space from the circumstances of the crime and the subtleties of the state proceedings. Accordingly, they have small motive to act expeditiously or efficiently, to give credit to the judgments of their brethren in state courts, or to consider the needs of crime victims.”).

26. *Hearing, supra* note 20, at 89 (statement of Ron Eisenberg, Deputy District Attorney, Philadelphia District Attorney’s Office).

27. Streamlined Procedures Act of 2005, S. 1088, 109th Cong. § 6 (2005).

28. *Hearing, supra* note 20, at 89 (statement of Ron Eisenberg, Deputy District Attorney, Philadelphia District Attorney’s Office).

29. To determine the necessity of a measure like section 6 of the proposed Streamlined Procedures Act of 2005, which strips federal courts of habeas jurisdiction whenever a state court has properly determined a sentencing error harmless, I scoured electronic databases for circuit court habeas cases that discussed harmless error.

Because I wanted to know how federal habeas courts had dealt with two different standards of review—AEDPA’s “contrary to” and “unreasonable application” provision, 28 U.S.C. § 2254(d)(1) (2000), and *Brecht*’s separate requirement of a “substantial and injurious effect,” *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)—I discarded cases concerning petitions filed before the enactment of AEDPA, and therefore not subject to AEDPA. I limited the survey to opinions decided after January 1, 2003, mostly because I noticed that older opinions tended to adjudicate claims filed before AEDPA was enacted. I also discarded opinions addressing petitions from prisoners in federal custody because AEDPA’s deference applies only where there is a decision by the state. I then read through every remaining case’s discussion of harmless error review to determine whether a state court had previously conducted harmless error review.

Sometimes, this was not apparent. When circuit court opinions did not mention whether the state had conducted harmless error review, I read the available state opinions and the appellate briefs to determine whether the state had called the errors harmless. I discarded cases in which there was no discernable state court determination of harmlessness. Sixty-eight circuit court opinions containing discussions of harmless error when a state court had also conducted harmless error review

state court explicitly found an error harmless or non-prejudicial, most circuit courts, with the notable exceptions of the Sixth and Ninth Circuits, seemed “flatly unwilling” to *reverse* a denial of a petition for a writ of habeas corpus.<sup>30</sup> From the beginning of 2003 to the end of June 2006, the circuit courts heard 68 habeas appeals in which a state court had explicitly determined that all apparent federal and constitutional errors were harmless.<sup>31</sup> The circuit courts agreed with the state courts that the errors were harmless in 52 of these cases (76.5%) and disagreed with the state court’s determination of harmlessness, finding the errors non-harmless, in 16 cases (23.5%).<sup>32</sup> At first blush, these aggregate rates may seem high; the circuit courts appear to disagree with the state courts in approximately one out of every four state court harmless error determinations.<sup>33</sup>

When viewed by circuit, however, the numbers show that two circuit courts, the Sixth and Ninth Circuits, account for almost every case illustrating a disagreement with a state court’s harmless error determination.<sup>34</sup> The Sixth Circuit disagreed with 8 out of 18 (44.4%) state court determinations of harmless error,<sup>35</sup> and the Ninth Circuit disagreed with 5 out of 30 (16.7%) state court determinations of harmless error.<sup>36</sup> Of the remaining 20 circuit court opinions, only 3 other petitions were granted.<sup>37</sup> Over a span of three and a half years, the Second, Fourth, and Seventh Circuits each disagreed with only one state court determination of harmless error.<sup>38</sup>

No circuit court was “flatly unwilling to affirm”<sup>39</sup> capital convictions when the state had determined errors harmless.<sup>40</sup> In fact, the circuit courts disagreed with the state courts’ findings of harmlessness in capital cases less

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remained. Admittedly, I might have missed some cases in which neither the state court opinions that were available nor the circuit court opinions indicated whether the state court had determined the alleged errors in the petition were harmless. The sixty-eight cases in the Appendix to this Note represent the cases that I was able to find using an electronic search database.

30. This survey consisted only of circuit court opinions, primarily because circuit court cases are more likely to be published and available on electronic databases. Also, I thought that circuit courts would be more likely to articulate their reasoning and the standard applied when reviewing state court harmless error determinations. There are also fewer circuit court opinions, which made the survey more manageable. Finally, this Note discusses a circuit split, and to discuss how circuits have split one must examine circuit court opinions. There were many district court opinions decided in the same three and one-half year span, but this Note does not discuss them.

31. *See infra* app. tbl.1.

32. *See id.* Percentages were rounded to the nearest tenth.

33. *See id.*

34. *See id.* Incidentally, the Sixth and Ninth Circuits also reviewed more state court harmless error determinations than their sister courts. *See id.*

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.*

39. *Hearing, supra* note 20, at 89 (statement of Ron Eisenberg, Deputy District Attorney, Philadelphia District Attorney’s Office).

40. *See infra* app. tbl.1.

often than in noncapital cases.<sup>41</sup> Specifically, of 19 cases involving petitions from capital prisoners in which the state court had determined the errors harmless, the circuit courts disagreed with the states' assessments only 4 times (21.1%).<sup>42</sup> The First, Second, and Third Circuits did not discuss state court findings of harmless error when reviewing state capital convictions, but the other circuit courts were willing to agree with state court harmless error determinations and affirm capital convictions.

Circuit	Capital Cases Affirming State Court Determination of Harmlessness	Capital Cases Rejecting State Court Determination of Harmlessness
4th	2	1
5th	3	0
6th	1	2
7th	0	1
8th	1	0
9th	4	0
10th	4	0

This survey shows that the jurisdiction-stripping provision of section 6 of the proposed Streamlined Procedures Act<sup>43</sup> is an ineffective measure. Because nearly all federal habeas courts already defer to state courts' harmless error determinations,<sup>44</sup> the provision would have a minor effect on the number of state court convictions affirmed on collateral review. In three and a half years, the circuit courts disagreed with only sixteen out of sixty-eight state court harmless error determinations—including guilt-stage errors and sentencing errors.<sup>45</sup> While the rate of reversals for sentencing errors in capital cases may have been too high in the past,<sup>46</sup> section 6 of the SPA, in stripping federal habeas jurisdiction only in sentencing decisions,<sup>47</sup> would presently have only a minor effect on this perceived problem.

The SPA's jurisdiction-stripping provision is also inappropriate because it is a disproportionate response to the practices of only two circuit courts. Because the Sixth and Ninth Circuits are the only two circuit courts that disagree with state court determinations with any regularity,<sup>48</sup> stripping all

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41. Noncapital cases: 24.5%; capital cases: 21.1%. *See id.*

42. *See id.*

43. Streamlined Procedures Act of 2005, S. 1088, 109th Cong. § 6 (2005).

44. *See infra* app. tbl.1.

45. *See id.*

46. *See, e.g.,* Barry Latzer & James N.G. Cauthen, *Capital Appeals Revisited*, 84 JUDICATURE 64, 64–71 (2000) (finding that from 1990 to 1999, courts reversed in 837 death penalty cases, 328 (39%) of which were conviction reversals and 509 (61%) of which were sentence reversals only).

47. Streamlined Procedures Act § 6.

48. *See infra* app. tbl.1.

federal courts of their jurisdiction amounts to an overcorrection—what some might call shooting a fly with a cannon. Moreover, while the Sixth and Ninth Circuit Courts disagreed with state courts' harmless error analyses more than the other circuit courts, they did agree with state courts' harmless error determinations more often than not.<sup>49</sup> The actual extent of the problem then is merely that two circuit courts disagree with state court harmless error determinations less than fifty percent of the time, and the SPA's proposed solution—stripping every federal court of jurisdiction any time a state court calls a sentencing error harmless—seems extremely drastic. Moreover, as Part II explains, the real issue is not that a couple of circuit courts have high reversal rates, but rather that all federal courts lack a clear and well-defined standard for conducting habeas review of state court harmless error determinations.

## II. HOW FEDERAL HABEAS COURTS CONDUCT HARMLESS ERROR REVIEW

The law of harmless error has courts confused because there are two different applicable standards for reviewing a state court's harmless error determination. First, the Supreme Court announced in *Brecht* that when conducting harmless error review, federal habeas courts should apply the *Kotteakos* standard,<sup>50</sup> which requires that federal habeas courts determine whether the error “had substantial and injurious effect or influence in determining the jury’s verdict.”<sup>51</sup> Second, three years after the Supreme Court handed down *Brecht*, Congress enacted AEDPA, which amended the federal habeas corpus statute in part by adding the following:

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49. See discussion *supra* notes 34–36 and accompanying text. The Sixth Circuit disagreed with the state courts' determinations of harmlessness in 44.4% of the cases it heard. The Ninth Circuit disagreed with the state courts' determinations of harmlessness in 16.7% of the cases it heard.

There are several plausible explanations for the higher reversal rates of the Ninth and Sixth Circuits. Ninth and Sixth Circuit Court judges may have a lower threshold in determining whether errors had a substantial and injurious effect. Also, they might be less trusting of the state court judgments finding errors harmless because many state judges are elected officials who must appear tough on crime to secure reelection.

Or perhaps the state courts in the Ninth and Sixth Circuits are the reason for the higher reversal rates. The Ninth and Sixth Circuits engaged in harmless error analysis when there was a state court determination of harmless error more often than any other circuit court. See *infra* app. tbl. 1. The state courts in those circuits might be reluctant to grant petitions on state collateral review. Whereas state courts in other circuits might either grant the petition on state collateral review or simply find that no error occurred, state courts in the Ninth and Sixth Circuits might be more willing to find an error has been made, but insulate their convictions from reversal by calling the identified errors harmless. Consequently, the Ninth and Sixth Circuits might be presented with more cases in which the state courts' harmless error determinations were objectively unreasonable.

Another plausible explanation for the higher reversal rates of the Ninth and Sixth Circuits is that the judges on those courts are simply disregarding the law or applying the law improperly. Perhaps these judges have interpreted the law of harmless error in a manner that allows them to find errors “not harmless” more often than judges on the other circuit courts.

50. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

51. *Id.*

d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court *shall not be granted* with respect to any claim that was adjudicated on the merits in State court proceedings *unless the adjudication of the claim—*

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .<sup>52</sup>

Interpreting this provision, the Supreme Court held in *Williams v. Taylor* that federal courts could no longer merely determine whether the state court decision had been erroneous; rather, AEDPA required federal courts to grant habeas relief only when the state court determination had been objectively unreasonable.<sup>53</sup> The Court explained that a state court decision is “contrary to” clearly established Supreme Court law in two instances: when “the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law”; and when “the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts.”<sup>54</sup> An “unreasonable application” of clearly established Supreme Court case law would occur when a state court “identifie[ed] the correct governing legal principle from [the Supreme Court’s] decisions but unreasonably applie[ed] that principle to the facts of [a] prisoner’s case.”<sup>55</sup> Justice O’Connor, writing for the majority, cautioned that “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”<sup>56</sup>

The *Williams* Court stated that “AEDPA plainly sought to ensure a level of ‘deference to the determinations of state courts,’”<sup>57</sup> yet federal habeas courts remained confused about whether and how AEDPA’s deference applied to state court findings of harmless error.<sup>58</sup> In the years following AEDPA’s enactment, federal habeas courts developed distinct approaches to harmless error review where a state court had made a determination of

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52. 28 U.S.C. § 2254(d)(1) (2000) (emphasis added).

53. *Williams v. Taylor*, 529 U.S. 362, 409 (2000).

54. *Id.* at 412–13.

55. *Id.* at 413.

56. *Id.* at 411.

57. *Id.* at 386 (quoting H.R. REP. NO. 104–518, at 111 (1996) (Conf. Rep.)).

58. Compare *Gutierrez v. McGinnis*, 389 F.3d 300, 306 (2d Cir. 2004) (declining to apply *Brecht* when a state court adjudicated a federal claim on harmless error grounds because habeas courts are required to evaluate the reasonableness of the state court’s application of federal law), with *Webber v. Scott*, 390 F.3d 1169, 1177 (10th Cir. 2004) (applying *Brecht* when the state court did not apply the *Chapman* harmless error standard), and *Inthavong v. Lamarque*, 420 F.3d 1055, 1059 (9th Cir. 2005) (holding that a federal habeas court must perform both an AEDPA-based review of the state court’s *Chapman* harmless error analysis and a *Brecht* harmless error review of the original error as a precondition to granting habeas relief).

harmlessness.<sup>59</sup> Whereas some courts continued to apply *Brecht* without applying AEDPA,<sup>60</sup> other courts reviewed state court harmless error determinations under AEDPA's "unreasonable application" standard without considering whether the error had a "substantial and injurious effect" under *Brecht*.<sup>61</sup> Still other courts used a combination of the two standards.<sup>62</sup>

This Part argues that the Supreme Court should clarify how to apply *Brecht* and AEDPA to federal review of state court harmless error determinations because the law is unclear. Section II.A describes each circuit's stated method for reviewing state court harmless error determinations and argues that the Supreme Court has failed to establish a clear and uniform rule. Section II.B explores how the circuit courts have actually conducted review of state court harmless error determinations and contends that circuit courts have applied their rules inconsistently. Section II.C argues that the Supreme Court must clarify the law to limit judicial discretion.

#### A. How Courts Say Harmless Error Review Should Be Conducted

The circuits have divided on the question of how to review state court harmless error determinations, and the Supreme Court has not resolved the resulting uncertainty. This Section reviews the circuit courts' stated methods for reviewing state court determinations of harmlessness by discussing the Ninth Circuit, the Sixth Circuit, and the remaining circuits in turn. This Section then argues that the Supreme Court's two decisions on the matter have given inadequate guidance to the lower federal courts.

The Ninth Circuit has not established a unified standard for reviewing state court harmless error determinations. First, proceeding as if AEDPA had no effect on federal review of state court harmless error determinations, the Ninth Circuit adopted a *Brecht*-only approach in *Bains v. Cambra*.<sup>63</sup> *Bains* held that "regardless of what, if any, type of harmless error review was conducted by the state courts,"<sup>64</sup> the *Brecht* standard "should apply uniformly in all federal habeas corpus cases."<sup>65</sup> Later, in 2004's *Medina v. Hornung*, the Ninth Circuit revised its approach and adopted a two-step analysis.<sup>66</sup> The court declared that where there is a state determination of harmlessness, Ninth Circuit courts should first apply AEDPA to "determine whether the state court's harmless error analysis was objectively unreasonable."<sup>67</sup> Then, "if there is a predicate finding that the state court's harmless

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59. See generally *infra* Section II.A.

60. See *infra* app. tbls. 2-4, group 1.

61. *Id.*, tbls.2-4, group 4.

62. *Id.*, tbls.2-4, groups 2 & 3.

63. 204 F.3d 964, 977 (9th Cir. 2000).

64. *Bains*, 204 F.3d at 977.

65. *Id.*

66. 372 F.3d 1120, 1126 (9th Cir. 2004).

67. *Medina*, 372 F.3d at 1126.

error analysis was objectively unreasonable, and thus an unreasonable application of clearly established federal law,” the court should “engage in a *Brecht* analysis.”<sup>68</sup> Subsequently, *Medina* was superseded by an amended opinion that did not address the issue of harmless error.<sup>69</sup> Consequently, Ninth Circuit courts have no settled standard regarding the treatment of state court determinations of harmless error post-AEDPA.<sup>70</sup>

The Sixth Circuit also had difficulty establishing a post-AEDPA harmless error review standard. In 2001, the Sixth Circuit collapsed AEDPA and *Brecht* analyses.<sup>71</sup> In *Bulls v. Jones*, the court stated that “the *Brecht* test continues to apply after the enactment of [AEDPA], and that if a habeas petitioner satisfies the *Brecht* standard, ‘he will surely have demonstrated that the state court’s finding that the error was harmless beyond a reasonable doubt . . . resulted from an unreasonable application of *Chapman*.’”<sup>72</sup> Under this approach, the result of the *Brecht* test determined whether the state court determination of harmlessness was objectively reasonable under AEDPA. Only two years later, in *Passino v. Tessmer*, the Sixth Circuit stated that “the writ [of habeas corpus] will not issue unless the petitioner can establish that the [state] Court of Appeals’s [harmless error] determination was objectively unreasonable,”<sup>73</sup> which is the AEDPA standard. The court applied AEDPA only—not *Brecht*—in reaching this determination.<sup>74</sup> The Sixth Circuit has mostly followed the rule of *Bulls*,<sup>75</sup> but its articulation of the circuit rule has been inconsistent.

Although the other circuit courts have not settled on a single approach, they have succeeded in establishing a clear rule within their respective jurisdictions. In *Zappulla v. New York*, the Second Circuit conducted only AEDPA analysis,<sup>76</sup> and in a later case it specifically articulated that federal habeas courts should only evaluate whether the state unreasonably applied federal law—an AEDPA-only approach.<sup>77</sup> The Eighth Circuit expressed

68. *Id.*

69. *Medina v. Hornung*, 386 F.3d 872 (9th Cir. 2004) (amending and superseding *Medina*, 372 F.3d 1120 (9th Cir. 2004)). Superseded opinions are void. See BLACK’S LAW DICTIONARY 1479 (8th ed. 2004) (“supersede, *vb.* 1. To annul, make void, or repeal by taking the place of <the 1996 statute supersedes the 1989 act>.”).

70. *Gutierrez v. McGinnis*, 389 F. 3d 300, 304–05 n.3 (2d Cir. 20004) (“The Ninth Circuit initially adopted this approach in *Medina v. Hornung*, 372 F.3d 1120, 1125–27 (9th Cir.2004), but later superseded the relevant analysis by an amended opinion that did not address the issue.”).

71. *Bulls v. Jones*, 274 F.3d 329, 335 (6th Cir. 2001).

72. *Id.* (quoting *Nevers v. Killinger*, 169 F.3d 352, 371–72 (6th Cir. 1999)).

73. *Passino v. Tessmer*, 61 F. App’x 124, 127 (6th Cir. 2003).

74. *See id.*

75. *See infra* app. tbl.3, groups 1 & 2.

76. 391 F.3d 462, 467 (2d Cir. 2004).

77. *Gutierrez v. McGinnis*, 389 F.3d 300, 306 (2d Cir. 2004) (“*Mitchell [v. Esparza]*, 540 U.S. 12 (2003)] signals, and we therefore hold, that when a state court explicitly conducts harmless error review of a constitutional error, a habeas court must evaluate whether the state unreasonably applied *Chapman*.”).

doubt as to whether *Brecht* survived AEDPA<sup>78</sup> and has subsequently employed an AEDPA-only approach.<sup>79</sup> The Fourth Circuit established a two-step test, first evaluating whether the state court had unreasonably applied *Chapman*, and then further assessing the underlying error under *Brecht*.<sup>80</sup> The Seventh Circuit established the same two-step test in 2003; however, the court did not require that the steps be applied in a particular order.<sup>81</sup> Finally, the First, Fifth, and Tenth Circuits have each held that *Brecht* is the sole standard required.<sup>82</sup>

Even though the circuit split made the issue ripe for clarification, the Supreme Court has not yet provided clear guidance. Indeed, the Court's two post-AEDPA decisions may have added to the confusion by employing one standard in *Early v. Packer*<sup>83</sup> and a seemingly different standard in *Mitchell v. Esparza*.<sup>84</sup> In *Early*, the Supreme Court reviewed a state court harmless error determination by first analyzing the state court's determination under AEDPA and then conducting a *Brecht* analysis.<sup>85</sup> The Court explicitly rejected the *Brecht*-only analysis<sup>86</sup> and clarified that a *Brecht* analysis was proper only where the federal court "first found (pursuant to the correct standard) that the [state] court's decision was 'contrary to' clearly established Supreme Court law."<sup>87</sup>

The Court appears to have applied a different standard only a year later. In *Mitchell v. Esparza*, the Court held that an Ohio Court of Appeals decision, affirming a death sentence, was neither "contrary to" nor an "unreasonable application" of clearly established federal law, and there began and ended its harmless error analysis.<sup>88</sup> The Court, per the two-part test set out in *Early*, could have ended its analysis before discussing the *Brecht*

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78. *Whitmore v. Kemna*, 213 F.3d 431, 433 (8th Cir. 2000) ("We are not convinced that the AEDPA did not abrogate the requirement that federal habeas courts conduct a harmless error analysis under *Brecht* in situations such as the one before us, where the state court already has conducted a *Chapman* harmless error analysis, that is, where the claim has been 'adjudicated on the merits' in state court. It seems to us that § 2254(d) as amended by the AEDPA is unambiguous as to the scope of federal court review, limiting such review (at least as compared with past practice) in order to effect the intent of Congress to expedite habeas proceedings with appropriate deference to state court determinations.").

79. *Brown v. Luebbbers*, 371 F.3d 458, 469 (8th Cir. 2004) (en banc).

80. *Allen v. Lee*, 366 F.3d 319, 336–37, 342–44 (4th Cir. 2004) (en banc) (plurality opinion) (two concurrences applying two-step approach).

81. *Aleman v. Sternes*, 320 F.3d 687, 690–91 (7th Cir. 2003) (endorsing two stage inquiry, but not requiring judges to follow particular sequence in applying standards on habeas review).

82. *Robertson v. Cain*, 324 F.3d 297, 306–07 (5th Cir. 2003); *Herrera v. Lemaster*, 301 F.3d 1192, 1200 (10th Cir. 2002) (en banc); *Sanna v. Dipaolo*, 265 F.3d 1, 14 (1st Cir. 2001).

83. 537 U.S. 3, 10 (2002).

84. 540 U.S. 12, 18 (2003).

85. *Early*, 537 U.S. at 10.

86. *Id.* at 11.

87. *Id.* at 10–11.

88. *Mitchell*, 540 U.S. at 18.

prong, but *Mitchell* made no mention of *Brecht*.<sup>89</sup> Because *Mitchell* did not explicitly overrule *Brecht*, lower courts disagree on whether *Mitchell* implicitly rejected the *Brecht* analysis.<sup>90</sup> Where there is a state court determination of harmlessness, *Mitchell* may have implicitly adopted an AEDPA-only approach to examining the harmlessness of errors on collateral review.<sup>91</sup>

The Court's two opinions discussing this issue provide inadequate guidance to the lower federal courts. First, *Early*'s discussion of harmless error review is arguably dicta.<sup>92</sup> In *Early*, the Court noted that the circuit court should not have conducted harmless error review in that case because there had been, in its view, no error.<sup>93</sup> If there had been no error, then the harmlessness of an error was not at issue, and the opinion's commentary on harmless error was unnecessary and therefore dicta. Second, *Mitchell* did not explicitly hold anything with respect to the relationship between AEDPA and *Brecht*; rather, the court merely conducted AEDPA analysis without applying the *Brecht* standard.<sup>94</sup> The Court did not specifically address whether all courts should thereafter conduct only AEDPA analysis in similar situations.<sup>95</sup>

Despite the lapse of over ten years since AEDPA's enactment,<sup>96</sup> AEDPA's relationship with *Brecht* remains unclear in part because the Supreme Court has failed to establish a clear test and has instead confused the lower courts.

89. *Id.*

90. *Compare* Zappulla v. New York, 391 F.3d 462, 467–75 (2d Cir. 2004) (“We follow, as we must, the Supreme Court’s reasoning in *Mitchell* to hold that, in reviewing a state court’s harmless error determination, we only may reverse determinations that are objectively unreasonable.”), Gutierrez v. McGinnis, 389 F.3d 300, 306 (2d Cir. 2004) (“In its recent decision of *Mitchell v. Esparza* . . . [,] however, the Supreme Court implicitly rejected *Brecht* as the proper lens for examining the harmlessness of constitutional errors on collateral review, at least where the state explicitly adjudicated a federal claim on harmless error grounds.”) (citations omitted), and Nguyen v. McGrath, 323 F. Supp. 2d 1007, 1016 (N.D. Cal. 2004) (“More recently, in *Esparza*, the Supreme Court seemed to hold that, instead of independently applying *Brecht*, federal courts should apply the objective unreasonableness test to a state appellate court’s application of *Chapman*.”) with Inthavong v. Lamarque, 420 F.3d 1055, 1059 (9th Cir. 2005) (“Admittedly the Second Circuit has done away with the *Brecht* standard in light of AEDPA and *Esparza*, and the Eighth Circuit has at least questioned *Brecht*’s continued vitality. We, however, have squarely held that the *Brecht* standard survived AEDPA.” (citation omitted)), and Picazo v. Alameida, 366 F.3d 971, 971 (9th Cir. 2004) (“Given that *Esparza* did not even mention *Brecht*, or its progeny [,] . . . we do not believe that the [Supreme] Court intended to overrule those earlier decisions.” (citations omitted)).

91. *See Mitchell*, 540 U.S. at 18; *see also* 6 LAFAYETTE, ISRAEL, & KING, *supra* note 5, § 28.3(f) (2d ed. 2004 & Supp. 2006) (“An alternative position is that when reviewing a case in which the state court explicitly conducted harmless error review of a constitutional error, federal courts must review whether or not the state court’s decision was ‘contrary to, or involved an unreasonable application of’ *Chapman*, an approach that appears to be supported by the Court’s analysis in *Mitchell v. Esparza*.” (citations omitted)).

92. *See Early*, 537 U.S. at 10–11.

93. *See id.* at 11.

94. *See Mitchell*, 540 U.S. at 18.

95. *See id.*

96. *See* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104–132, 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2254 (2000)).

### B. How Circuit Courts Actually Conduct Harmless Error Review

Since AEDPA was enacted, federal habeas courts' review of state court harmless error determinations has been somewhat erratic.<sup>97</sup> This Section shows that some circuit courts have inconsistently applied the law of harmless error review of their respective circuits. The discussion organizes the opinions of the circuit courts into four distinct groups based on the reasons stated for finding an error harmless or not and the description of the test applied.<sup>98</sup>

Group 1 comprises cases in which courts simply applied *Brecht*, as though AEDPA's "contrary to" and "unreasonable application of clearly established Federal law" clause did not apply to harmless error review.<sup>99</sup> For example, in *Blakeley v. Terhune*,<sup>100</sup> the Ninth Circuit concluded that the "failure to give the 'imperfect self-defense' pinpoint instruction to the charge of involuntary manslaughter" did not clearly result "in prejudice to the petitioner by 'ha[ving] a substantial and injurious effect or influence in determining the jury's verdict.'" <sup>101</sup> Finding that *Brecht* was not satisfied, the court ended its analysis without mentioning whether AEDPA also applied, or even citing AEDPA.<sup>102</sup> The First, Fifth, and Tenth Circuits have endorsed—but not necessarily followed<sup>103</sup>—the *Brecht*-only approach used in the opinions in Group 1.<sup>104</sup>

97. See *infra* app., tbls.2–4.

98. The following discussion of the application of harmless error review separates the opinions of the circuit courts into four groups. Although the discussion may employ the word "approach" to describe how a court conducted harmless error review in a particular opinion, the reader should not assume that an opinion classified under Group 1 necessarily contains an application of harmless error review that is wholly distinct from the review employed by an opinion classified under Group 2.

In some cases, the court employed a two-part test, and, finding the petitioner failed to satisfy the first part of the test, the court declined to conduct the second part of the test. The court that reaches only the first part of a two-part test is not conducting a different test than a court that reaches both parts of the two-part test. Most opinions, however, do not indicate which test they are using, whether one-part, two-part, or twelve-part. The opinions usually do not indicate whether the court skipped the second part of a test. Instead, courts often simply declared that the error was harmless or not harmless for one reason or another, without indicating the framework applied to come to that determination. It is often impossible to tell which test the court applied.

Therefore, the following discussion will categorize opinions in different groups according to how an error was determined to be harmless or non-harmless. No attempt was made to guess at what a given court would have done—whether the court would have applied the second part of a test had it not made the determination it did under the first part of the test. The reasoning that the court actually explained and the tests that the court actually conducted in the opinion determine an opinion's classification.

99. See *infra* app. tbls.2–4, group 1.

100. 126 F. App'x 396 (9th Cir. 2005).

101. *Id.* at 398–99 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).

102. See *id.* at 399.

103. For examples of when these circuit courts did not follow the Group 1 approach, see the Appendix to this Note, Table 4, Groups 2–4.

104. *Robertson v. Cain*, 324 F.3d 297, 306–07 (5th Cir. 2003); *Herrera v. Lemaster*, 301 F.3d 1192, 1200 (10th Cir. 2002) (en banc); *Sanna v. DiPaolo*, 265 F.3d 1, 14 (1st Cir. 2001).

In Group 2 cases, the result of the application of *Brecht* determined whether the state court determination was objectively reasonable under AEDPA.<sup>105</sup> If the circuit court found an error harmless under *Brecht*, it automatically declared that the state court's determination of harmlessness was not objectively unreasonable under AEDPA.<sup>106</sup> If it found the error non-harmless under *Brecht*, the circuit court concluded that the state court's determination of harmlessness was therefore objectively unreasonable under AEDPA.<sup>107</sup> In *Bell v. Hurley*, where "[t]he same judge who presided over [the petitioner's] trial . . . denied [his] post-conviction motion to vacate his conviction," the Court of Appeals for the Sixth Circuit concluded that the state court's determination was neither contrary to clearly established Supreme Court precedent nor an unreasonable application of that precedent because the error did not have a substantial and injurious effect under *Brecht*.<sup>108</sup> Essentially, the approach applied to cases in Group 2 is identical to the approach applied to cases in Group 1. The Group 2 approach somewhat diminishes AEDPA's independent relevance because a state court's harmless error analysis is an unreasonable application of clearly established law if, and only if, the federal habeas court determines that the error in question had a "substantial and injurious effect or influence in determining the jury's verdict."<sup>109</sup>

The opinions in which a circuit court applied only AEDPA without mentioning *Brecht* fall under Group 3.<sup>110</sup> Perhaps because these courts interpret AEDPA as having eliminated the need for *Brecht*, these opinions did not cite *Brecht* or discuss whether the error had a substantial and injurious effect.<sup>111</sup> The courts merely determined whether the state courts' determinations of harmlessness were objectively unreasonable and thereupon ended their analyses.<sup>112</sup> For example, in *Brown v. Luebbers*, the Eighth Circuit noted that the state court had determined that the exclusion of a witness's testimony was "harmless beyond a reasonable doubt" under *Chapman*.<sup>113</sup> After reviewing the facts of the case, the court held that the state court's determination of harmlessness "was sufficient adjudication on the merits to entitle this [. . .] holding to AEDPA deferential review."<sup>114</sup> The Eighth Circuit did not cite

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105. See *infra* app. tbls.2–4, group 2.

106. E.g., *Isasi v. Herbert*, 176 F. App'x 143, 145 (2d Cir. 2006); *Diaz v. Hickman*, 101 F. App'x 726, 727 (9th Cir. 2004); *McNeil v. Castro*, 81 F. App'x 901, 902 (9th Cir. 2003).

107. E.g., *Ben-Yisrayl v. Davis*, 431 F.3d 1043, 1051–53 (7th Cir. 2005); *Ruimveld v. Birkett*, 404 F.3d 1006, 1012–18 (6th Cir. 2005).

108. 97 F. App'x 11, 15, 17 (6th Cir. 2004).

109. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

110. See *infra* app. tbls.2–4, group 3.

111. See, e.g., *Zappulla v. New York*, 391 F.3d 462, 467–75 (2d Cir. 2004).

112. E.g., *Hamilton v. Mullin*, 436 F.3d 1181, 1187–97 (10th Cir. 2006).

113. 371 F.3d 458, 462–63 (8th Cir. 2004).

114. *Luebbers*, 371 F.3d at 463.

*Brecht* or conduct any further review to determine whether the error had a “substantial and injurious effect.”<sup>115</sup>

Group 4 comprises cases in which circuit courts first applied AEDPA to determine whether a state court’s application of *Chapman* was objectively unreasonable.<sup>116</sup> When the circuit courts found a state court’s determination unreasonable under AEDPA, they applied *Brecht* in de novo review.<sup>117</sup> For example, in *Jones v. Polk*, the Fourth Circuit first determined that the state court had unreasonably applied *Chapman*, then reviewed the claim de novo and determined that under *Brecht* the error was harmless.<sup>118</sup>

NUMBER OF OPINIONS IN EACH GROUP BY CIRCUIT

	Group 1	Group 2	Group 3	Group 4
1st Circuit	0	0	0	1
2d Circuit	0	1	2	0
3d Circuit	2	0	0	0
4th Circuit	1	0	0	2
5th Circuit	2	1	0	0
6th Circuit	7	8	2	1
7th Circuit	1	1	0	0
8th Circuit	0	0	1	0
9th Circuit	13	4	5	8
10th Circuit	2	0	3	0

Organized into these groups, the patterns of each circuit court become apparent. Table 2 shows that the Ninth Circuit has not followed its own rules on harmless error review.<sup>119</sup> The court deviated at least five times following the establishment of the *Bains v. Cambra* approach (Group 1),<sup>120</sup> which the Ninth Circuit announced in 2000, clarifying that harmless error review should consist only of *Brecht* analysis, regardless of whether the state court

115. *Id.*

116. *See infra* app. tbls.2–4, group 4. Some opinions in Group 3 might not have differed greatly from the opinions in Group 4. Arguably, an opinion that ostensibly employed an AEDPA-only approach might actually have applied the first part of a Group 4 two-step approach, where, finding the case failing under the first step (AEDPA), the court declined to review the error under the second step (*Brecht*). The opinions in Group 3, however, did not indicate a two-step application, whereas the opinions in Group 4 contain language that explicitly described the approach as having two steps.

117. *See infra* app. tbls.2–4, group 4.

118. *Jones v. Polk*, 401 F.3d 257, 264–65 (4th Cir. 2005).

119. *See infra* app. tbl. 2.

120. *See Johnson v. Garcia*, 80 F. App’x 599, 600 (9th Cir. 2003); *Paulinkonis v. Ryder*, 82 F. App’x 514, 518–19 (9th Cir. 2003); *McNeil v. Castro*, 81 F. App’x 901, 902 (9th Cir. 2003); *Martinez v. Castro*, 77 F. App’x 403, 403–04 (9th Cir. 2003); *Dao v. Terhune*, 57 F. App’x 779, 779–80 (9th Cir. 2003). The Ninth Circuit decided these cases after it announced the *Bains* rule, yet these cases do not follow the *Bains* rule.

found harmless error.<sup>121</sup> The court's two-step *Medina v. Hornung* analysis (Group 4), announced in 2004, combined the AEDPA and *Brecht* analyses,<sup>122</sup> but it was used a mere three times after its pronouncement.<sup>123</sup> Most often the Ninth Circuit simply applied *Brecht* (Group 1).<sup>124</sup> The Ninth Circuit utilized the approach of Group 1 in nearly all of the cases that reversed the state court determination of harmlessness, although that tendency does not warrant a causal inference.<sup>125</sup> Whenever AEDPA's deference was independently applied, however, the Court agreed with the state court determination of harmless error.<sup>126</sup>

Despite its declaration of a unified approach in *Bulls*,<sup>127</sup> the Sixth Circuit's opinions fall into all four groups.<sup>128</sup> Most often, however, the court did follow the *Bulls* rule, and, consequently, 8 of the 18 cases from the Sixth Circuit fall under Group 2.<sup>129</sup> Furthermore, 7 of the other Sixth Circuit opinions compose Group 1, the *Brecht*-only approach, which is practically identical to the *Bulls* rule.<sup>130</sup> Unlike the Ninth Circuit, the Sixth Circuit did disagree with state court harmless error determinations using the approaches of Groups 1 through 3.<sup>131</sup> In the Sixth Circuit, none of the approaches produced a substantially higher rate of disagreement with state courts.<sup>132</sup>

Some other circuit courts also failed to follow their rules. Although the Tenth Circuit stated that it would apply a *Brecht*-only standard,<sup>133</sup> it applied

121. *Bains v. Cambra*, 204 F.3d 964, 977 (9th Cir. 2000). Specifically, the *Bains* court said that harmless error review of state court convictions, whether there was a determination of harmlessness by the state court or not, should uniformly consist of the application of *Brecht*. *Id.* The court made it clear that harmless error review would be the same if there was a state court determination of harmlessness (where AEDPA could apply) or not (where AEDPA could not apply). Thus, the court mandated a *Brecht*-only approach where there was a state court determination of harmlessness.

122. *Medina v. Hornung*, 372 F.3d 1120, 1126 (9th Cir. 2004).

123. *See infra* app. tbl. 2; *Earle v. Runnels*, 176 F. App'x 883, 886 (9th Cir. 2006); *Villescas v. Hernandez*, 163 F. App'x 612, 613–14 (9th Cir. 2006); *Earp v. Stokes*, 149 F. App'x 607, 609–612 (9th Cir. 2005).

124. *See infra* app. tbl.2. The Ninth Circuit applied the *Brecht*-only standard in 13 out of 30 cases, or 43.3%.

125. *See infra* app. tbl.2. *Castillo v. McFadden*, 399 F.3d 993, 1007–09 (9th Cir. 2005), which utilized the approach of Group 2, provides an exception to this trend.

126. *See infra* app. tbl.2.

127. *Bulls v. Jones*, 274 F.3d 329, 335 (6th Cir. 2001).

128. *See infra* app. tbl.3.

129. *Id.*

130. As discussed, *supra* note 98, the distinction between the approach used in the cases categorized in Group 1 and the approach used by the cases categorized in Group 2 is tenuous. Because the *Bulls* rule combines AEDPA analysis with the *Brecht* standard, a court that applies only *Brecht* is conducting a review that is essentially identical to that of a court that applies *Brecht* and uses the result to determine the outcome of an AEDPA analysis.

131. *See infra* app. tbl.3.

132. *See id.*

133. *Herrera v. Lemaster*, 301 F.3d 1192, 1200 (10th Cir. 2002) (en banc).

the AEDPA-only standard three times.<sup>134</sup> The First Circuit has applied the two-step approach used by courts in Group 4,<sup>135</sup> even though it declared in 2001 that it would apply a *Brecht*-only approach.<sup>136</sup> The Fourth Circuit established the Group 4 two-step test in 2004,<sup>137</sup> but applied a *Brecht*-only test in 2005.<sup>138</sup> The Second Circuit declared that it would adhere to the AEDPA-only standard,<sup>139</sup> but applied the two-step approach of Group 2 in one case.<sup>140</sup>

### C. The Current State of Harmless Error Analysis Is Not Harmless

The application of harmless error in federal habeas cases has been inconsistent. This Section argues for a clarification of the law.

The reason for the circuit courts' high rate of disagreement with the state courts is largely that the law has not settled since AEDPA's enactment—not necessarily that federal courts are unwilling to let state court convictions stand. The law is unclear, and the differences among the various standards are not apparent to many courts.<sup>141</sup> In fact, judges deciding which approach to use sometimes remark that, because the outcome would be the same under any of the standards, which particular standard is applied is not important.<sup>142</sup> For example, in *Tidwell v. Calderon*, the Ninth Circuit discussed the Supreme Court's use of AEDPA in *Mitchell v. Esparza*<sup>143</sup> and the approaches used in other Ninth Circuit cases<sup>144</sup> that only analyzed state court decisions under *Brecht*.<sup>145</sup> The court then stated, "As the result in this case would be the same under either analysis, we do not pursue this enigma fur-

134. *Hamilton v. Mullin*, 436 F.3d 1181, 1187–97 (10th Cir. 2006); *Malicoat v. Mullin*, 426 F.3d 1241, 1247, 1262–63 (10th Cir. 2005); *Spears v. Mullin*, 343 F.3d 1215, 1232–33 (10th Cir. 2003).

135. *Petrillo v. O'Neill*, 428 F.3d 41, 44–45 (1st Cir. 2005).

136. *Sanna v. DiPaolo*, 265 F.3d 1, 14 (1st Cir. 2001).

137. *Allen v. Lee*, 366 F.3d 319 (4th Cir. 2004) (en banc).

138. *Simpson v. Polk*, 129 F. App'x 782 (4th Cir. 2005).

139. *Zappulla v. New York*, 391 F.3d 462, 467–75 (2d Cir. 2004) (applying AEDPA without applying *Brecht*).

140. *Isasi v. Herbert*, 176 F. App'x 143, 145 (2d Cir. 2006) (applying a two-step analysis).

141. *See, e.g., Belmontes v. Brown*, 414 F.3d 1094, 1139 (9th Cir. 2005) ("Regardless of the applicable rule, we are convinced that the instructional error in this case, which prevented the jury from considering and giving effect to Belmontes' most important mitigation evidence, had a substantial and injurious effect on the jury's verdict."); *Tidwell v. Calderon*, 134 F. App'x 141, 143 n.3 (9th Cir. 2005) ("As the result in this case would be the same under either analysis, we do not pursue this enigma further."); *Benn v. Greiner*, 402 F.3d 100, 105 (2d Cir. 2005) ("Because these standards all produce the same result in this case, we do not resolve that open question here."); *Rosa v. McCray*, 396 F.3d 210, 226 (2d Cir. 2005) ("I do not resolve which of the possible harmless error tests apply, because I think under any of tests the constitutional error was not harmless.");

142. *See supra* note 141.

143. *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003).

144. *Medina v. Hornung*, 386 F.3d 872, 878–79 (9th Cir. 2004); *Picazo v. Alameida*, 366 F.3d 971, 971 (9th Cir. 2004).

145. *Tidwell*, 134 F. App'x at 143 n.3.

ther.”<sup>146</sup> In *Murden v. Artuz*, the Second Circuit questioned whether state harmless error determinations should be reviewed under *Brecht* or AEDPA and concluded with minimal discussion that it did not need to “decide this issue here because any possible error in this case was harmless under either of the standards.”<sup>147</sup> With the law of harmless error in such a state of discombobulation, judges essentially have free rein to apply any of the four standards or no standard at all.

Because the unsettled state of the law allows judges the freedom to disregard state court harmless error determinations, the Supreme Court must issue a clear directive. Without a clear dictate from the Supreme Court, judges might listen only to the commands of their consciences when calling errors harmless. The potential for arbitrary decision-making might be great enough to warrant the fears that federal judges will second-guess and “undercut the ‘finality’ of state [court] judgments”<sup>148</sup> only because they are last in the habeas corpus lineup. It is not necessary, however, to infer bad faith, or even disrespect for the law. The law is unclear. A clarification from the Supreme Court would constrain judges by imposing a unified rational approach.

The question remains, which approach should the Court adopt? Part III discusses each option and argues that the proper solution is the approach used by the courts in Group 2: applying *Brecht* and using the result of the *Brecht* analysis to determine whether the state court harmless error determination is an unreasonable application under AEDPA.

### III. GROUP 2 HAS IT RIGHT

The possible choices for reviewing an error’s harmless ness can be viewed as points on a spectrum. At one end sits the *Chapman* standard, “harmless beyond a reasonable doubt,”<sup>149</sup> which, in theory, should result in the fewest errors dismissed as harmless and the most petitions granted on federal habeas review. *Chapman*’s standard is considered to be the most petitioner-friendly standard<sup>150</sup> because it requires the state to carry our legal system’s most onerous burden.<sup>151</sup> At the other end of the spectrum is section 6 of the proposed Streamlined Procedures Act of 2005, or a like rule, which

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146. *Id.*

147. 60 F. App’x 344, 347 n.2 (2d Cir. 2003).

148. Yackle, *supra* note 25, at 1010 (quoting Bator, *supra* note 25).

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

150. *See Gutierrez v. McGinnis*, 389 F.3d 300, 305 (2d Cir. 2004) (“On direct review, *Chapman* is considerably more generous to prejudiced defendants than is *Brecht*.”); Brent E. Newton, *A Primer on Post-Conviction Habeas Corpus Review*, CHAMPION, June 2005, at 16, 18 (“[O]n federal habeas corpus review, this *Chapman* standard generally is inapplicable and, instead, a habeas petitioner faces a considerably less favorable harmless-error standard . . . [T]he *Brecht* standard places a lower burden on the prosecution to show that the error did not have a ‘substantial and injurious effect’ on the verdict or sentence.” (citation omitted)).

151. *See United States v. Hernandez*, 176 F.3d 719, 738 (3d Cir. 1999) (“[B]eyond a reasonable doubt is the highest burden we have in our system of justice.”).

would strip federal habeas courts of jurisdiction for sentencing errors that the state courts have determined to be harmless.<sup>152</sup> If their jurisdiction were stripped, federal habeas courts would grant no petitions in cases in which the state called sentencing errors harmless. The various combinations and sequences of *Brecht* and AEDPA described in Part II fall between the two extremes.

This Part will consider the merits of each approach. Section III.A discusses the *Chapman* standard, which the Supreme Court appropriately rejected. Section III.B addresses Congress's proposed solution to the problem: jurisdiction stripping. Section III.C discusses the approaches currently used by federal habeas courts and argues that the approach used in the opinions in Group 2, where *Brecht* is incorporated into AEDPA's analysis, is the best approach.

#### A. Chapman's "Harmless Beyond a Reasonable Doubt"

The standard from *Chapman v. California*, which requires courts to determine whether the error was "harmless beyond a reasonable doubt,"<sup>153</sup> was rejected by the Supreme Court<sup>154</sup> and is inappropriate for federal habeas review. In *Brecht*, the Court rejected the *Chapman* standard because "collateral review is different from direct review,"<sup>155</sup> and "'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'"<sup>156</sup> *Brecht's* majority opined that "state courts often occupy a superior vantage point from which to evaluate the effect of trial error,"<sup>157</sup> and that the costs of the additional time and resources necessary to relitigate criminal trials would outweigh any deterrent effect on state courts to be derived from the use of *Chapman*.<sup>158</sup>

The Supreme Court's reasons for rejecting *Chapman* are still relevant today. Although Justice O'Connor, in dissent, worried that the application of any standard other than *Chapman* might undermine "our faith in the reliability of the criminal process,"<sup>159</sup> society's confidence in the trustworthiness of convictions can be preserved with a less petitioner-friendly standard than *Chapman*. Moreover, the soundness of applying the same standard on federal habeas as on direct review must be questioned. By the time a federal habeas court reviews a petition from a state prisoner, the case has been tried

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152. Streamlined Procedures Act of 2005, S. 1088, 109th Cong. § 6 (2005).

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

154. *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993).

155. *Id.* at 633.

156. *Id.* at 634 (quoting *United States v. Frady*, 456 U.S. 152, 165 (1982)).

157. *Id.* at 636.

158. *Id.*

159. *Id.* at 650 (O'Connor, J., dissenting).

and its harmlessness reviewed under *Chapman* by up to five courts.<sup>160</sup> The interests of comity aside,<sup>161</sup> one begins to wonder how many courts must review the degree of an error's harm. Federal habeas review should not be a forum to relitigate the same issues under the same standards for the sixth time. Because the trial and direct appeal from the trial should be the focus of the criminal process,<sup>162</sup> *Brecht* correctly recognized that federal habeas relief should be an extraordinary remedy.<sup>163</sup> Because the application of *Chapman* on federal habeas review would make habeas relief less extraordinary, *Chapman* should not apply on federal habeas review.

### B. Jurisdiction Stripping

The other extreme, stripping federal habeas courts of jurisdiction when a state has determined that any error was harmless, is an even less appropriate solution. While this would undoubtedly eliminate the confusion surrounding the law of harmless error, it would also significantly reduce the opportunity for federal courts to weigh in on state court application and interpretation of federal law. “[T]here is a national interest in the correct and uniform interpretation of federal law,”<sup>164</sup> but federal courts might never hear many criminal federal-law claims if Congress limits or eliminates federal habeas jurisdiction. The interpretation of federal law would be left to state courts and the Supreme Court of the United States—in the few cases in which the Supreme Court actually grants the writ of certiorari on direct review.<sup>165</sup>

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160. A state prisoner is convicted in trial court, and direct appeal is heard by up to two courts, the intermediate appellate court and the state high court. If the appeal is denied at all levels, then the prisoner must go through state collateral review. See 28 U.S.C. § 2254(b)(1)(A) (2000). Often, up to three more state courts will hear the prisoner's case. 39 AM. JUR. 2D *Habeas Corpus* § 24 (1999).

161. Many Supreme Court decisions dealing with habeas corpus focus on the states' comity interests. See, e.g., *Brecht*, 507 U.S. at 635 (“The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system. We have also spoken of comity and federalism.” (citations omitted)); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (“Finality has special importance in the context of a federal attack on a state conviction . . . . Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.” (citations omitted)); *Teague v. Lane*, 489 U.S. 288, 308 (1989) (plurality opinion) (“[T]he Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error. Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review.” (alteration in original) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion))).

162. See *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (noting the importance of the “perception of the trial of a criminal case in state court as a decisive and portentous event”).

163. *Brecht*, 507 U.S. at 633–34 (“[T]he writ of habeas corpus has historically been regarded as an extraordinary remedy . . .”).

164. Yackle, *supra* note 25, at 1022; see also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347–48 (1816) (propounding the importance of correct and uniform federal law and “the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution” (emphasis omitted)).

165. See John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 598 (2006) (“The Supreme Court currently hears between seventy and eighty-five cases per year, while about 60,000 cases a year are filed in the courts of appeal and about 325,000 cases are filed a year in the district courts.”)

Further, petitioners in state custody would not have their federal law and constitutional claims heard by a federal court and would therefore have no opportunity to obtain “a sympathetic forum in which their federal claims [could] be addressed by independent judges familiar with relevant principles.”<sup>166</sup> If Congress stripped federal habeas jurisdiction, the same state courts that convicted the petitioner and affirmed his conviction might also conduct his collateral review.<sup>167</sup>

Critics argue that Congress should further cabin federal habeas jurisdiction because the victims of crime have an interest in the finality of convictions,<sup>168</sup> but victims’ interests should not compel lawmakers to compromise the accuracy of our system of justice. Although courts often consider the state’s and victims’ interest in the finality of convictions,<sup>169</sup> they need not weigh finality so heavily. Some crime victims do suffer through the rehashing of the crime at each stage of collateral review,<sup>170</sup> but the victims’ need for finality must be weighed against the accused’s need for fairness and society’s need to bring the right person to justice.<sup>171</sup> Accuracy and fundamental fairness are the foundations of our criminal justice system.<sup>172</sup>

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(citing OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2003, at 6, <http://www.uscourts.gov/caseload2003/front/Mar03Txt.pdf>); *see also* Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting) (arguing that the Supreme Court’s appellate jurisdiction “cannot even come close to ‘doing the whole job’” of “correct[ing] erroneous state-court decisions and . . . insur[ing] that federal law is interpreted and applied uniformly”). Admittedly, if federal habeas jurisdiction were reduced, the Supreme Court of the United States might take more cases on direct review from high courts of the states.

166. Yackle, *supra* note 25, at 1022.

167. *See, e.g.*, Bell v. Hurley, 97 F. App’x 11, 15 (6th Cir. 2004) (“The same judge who presided over Bell’s trial, however, denied Bell’s post-conviction motion to vacate his conviction.”).

168. *Hearing*, *supra* note 20, at 91 (statement of Ron Eisenberg, Deputy District Attorney, Philadelphia District Attorney’s Office) (“The truth is that, whether or not they actually reverse a conviction, federal habeas courts drag out litigation for years of utterly unjustifiable delay, creating exorbitant costs for the state and endless pain for the victims.”).

169. *See, e.g.*, Calderon v. Thompson, 523 U.S. 538, 539 (1998) (“A State’s finality interests are compelling when a federal court of appeals issues a mandate denying federal habeas relief. Only with an assurance of real finality can the State execute its moral judgment and can victims of crime move forward knowing the moral judgment will be carried out.”); Schlup v. Delo, 513 U.S. 298, 324 (1995) (“As we have stated, the fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case.”).

170. *See, e.g.*, Adam Liptak, *Prosecutors See Limits to Doubt in Capital Cases*, N.Y. TIMES, Feb. 24, 2003, at A1 (“Conversations with victims’ families about these [DNA] motions are not easy for prosecutors . . . . ‘Every Prosecutor dreads making a phone call to a victim after the victim thinks the case is over . . . . You’re reopening the wound.’”) (quoting Joshua Marquis, National District Attorneys Association).

171. *Cf.* Sawyer v. Smith, 497 U.S. 227, 259 (1990) (Marshall, J., dissenting) (“Although a State undoubtedly possesses a legitimate interest in the finality of its convictions, when the State itself undermines the accuracy of a capital proceeding, that general interest must give way to the demands of justice.”).

172. Arizona v. Youngblood, 488 U.S. 51, 73 (1988) (Blackmun, J., dissenting) (“It still remains ‘a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.’”) (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J.,

Meaningful federal habeas review is important for ensuring that the system punishes only the guilty, and without it the criminal system, which can take away liberty and life, is less measured and more unjust.

### C. The Muddled Middle

The remaining rules must be considered on theoretical grounds because they differ little in their practical application. It is difficult to imagine which standard will be the most or least petitioner-friendly in practice. In fact, none of the standards has proved universally more petitioner-friendly than the others. For example, as explained above, since the beginning of 2003 the Court of Appeals for the Ninth Circuit has granted petitions most often when it has applied the *Brecht*-only standard of Group 1.<sup>173</sup> One might conjecture that the application of the *Brecht*-only standard would result in more grants of habeas relief than the application of other standards, but the Sixth Circuit has granted habeas relief using almost every combination of *Brecht* and AEDPA.<sup>174</sup> Moreover, the rest of the circuits only granted petitions when they applied a standard other than the *Brecht*-only standard.<sup>175</sup> Intuition might lead jurists and commentators to think that a *Brecht*-only standard—“substantial and injurious effect or influence in determining the jury’s verdict”—would be easier for petitioners to meet than AEDPA’s requirement that the state court’s determination was objectively unreasonable. The practical application of the rules, however, has produced a counterintuitive result.<sup>176</sup>

Two of the approaches discussed in Part II can be dismissed immediately. The approach used in the opinions in Group 1, *Brecht*-only, and the approach used by the opinions in Group 3, AEDPA-only, utilize only one of the two extant binding standards, and therefore neither seems appropriate. A *Brecht*-only standard of review ignores Congress’s command under AEDPA that federal courts defer to the state court’s rulings. Moreover, because the Supreme Court did not apply *Brecht* in *Mitchell*,<sup>177</sup> a *Brecht*-only standard must be incorrect. On the other hand, even though the *Mitchell* court only applied AEDPA,<sup>178</sup> an AEDPA-only approach would overrule *Brecht*, and the Supreme Court has yet to do so.<sup>179</sup> Congress might have tried to overrule *Brecht* by passing AEDPA, but the Supreme Court has implied that *Brecht*

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concurring)); *United States v. Lipowski*, 423 F. Supp. 864, 866 (D.N.J. 1976) (“[F]undamental fairness . . . is the foundation of our judicial system.”).

173. *See infra* app. tbl.2.

174. *See id.* tbl.3.

175. *See id.* tbl.4.

176. *See id.* tpls.2–4.

177. *Mitchell v. Esparza*, 540 U.S. 12, 17–18 (2003).

178. *Id.* As discussed above, the *Mitchell* court might not have applied *Brecht* because it did not reach the second stage of the AEDPA-then-*Brecht* test of Group 4.

179. *See supra* notes 83–96 and accompanying text. As mentioned above, some circuit courts have acted as if *Mitchell v. Esparza* overruled *Brecht*, but the Court did not explicitly state that *Brecht* was overruled. *Mitchell*, 540 U.S. at 17–18.

survived after Congress enacted AEDPA.<sup>180</sup> Choosing either AEDPA or *Brecht* necessarily means that one rule is disregarded. Because both standards appear to be binding, the approaches used by Groups 1 and 3 must be incorrect.

The Supreme Court should not adopt the approach utilized in the opinions in Group 4, applying AEDPA and then applying *Brecht*, because this approach excessively inhibits federal courts' power to grant habeas relief. Group 4 courts, which require an error to be harmless under first AEDPA then *Brecht*, will have two chances and two separate standards under which they can call errors harmless. Federal courts may deem harmless not only errors that did not have a substantial and injurious effect on the jury's determination of the verdict, but also errors that state courts deemed harmless in a manner that was not contrary to or an unreasonable application of current federal law. Applying two standards would theoretically tend to result in more errors being called harmless than if only one standard were applied, and consequently federal courts could reverse convictions in a meager number of cases. Federal habeas relief should only be granted in extraordinary circumstances, but it should not be next to impossible to obtain.<sup>181</sup>

Moreover, Group 4's approach would diminish the important individual protections provided by the federal forum. While the AEDPA-then-*Brecht* standard would allow the state court's judgment to stand more often and settle cases at an earlier stage, it would also foreclose the opportunity for a state prisoner to have her case reviewed by an independent and unbiased federal judge.<sup>182</sup> This approach would significantly diminish the opportunity for innocent individuals to have their convictions overturned, because in many cases the approach would effectively remove the federal courts as a meaningful safeguard against the conviction of innocent individuals.<sup>183</sup> Without a meaningful federal check on state court convictions, the public could lose confidence in the accuracy of criminal convictions.<sup>184</sup>

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180. In *Early*, the Supreme Court applied *Brecht* post-AEDPA. *Early v. Packer*, 537 U.S. 3, 10 (2002). However, no Supreme Court case has directly answered the question of whether AEDPA overruled *Brecht*, and the Supreme Court could still hold that AEDPA did in fact overrule *Brecht*.

181. See *infra* app. tbls.2-4 (showing that in this survey only one federal court disagreed with the state court determination when the approach of Group 4 was applied).

182. See *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (noting that state prisoners with constitutional claims are entitled to have a federal habeas court make an independent determination, without regard to the state courts' determinations).

183. See Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005) (reporting that from 1989 to 2003, at least 340 individuals have been exonerated, and that many exonerations happened on retrial).

184. Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 227 (2006) (asserting that the conviction of innocent persons diminishes the integrity of the justice system and the public's confidence in the courts); see also *In re Winship*, 397 U.S. 358, 364 (1970) ("It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.").

Further, Group 4's approach would handicap federal courts' ability to police how state courts apply constitutional and federal law rules of criminal procedure. Federal habeas jurisdiction allows federal courts to ensure that individual state courts have applied the law in a uniform and constitutional manner.<sup>185</sup> When a state court has incorrectly applied federal law, a federal court can grant habeas relief and force the state to hold a new trial—a measure that has a significant deterrent effect on state courts' improper practices.<sup>186</sup> Under Group 4's approach, however, federal courts would have no means of disciplining state courts that incorrectly but reasonably applied federal or constitutional law, because they would not have the power to grant relief. Because this approach too significantly diminishes the power of federal habeas courts to grant meritorious petitions from improperly convicted defendants who allege serious errors, the Supreme Court should not adopt it.

The best approach is that used in the opinions of Group 2: applying *Brecht* to determine whether the state court's harmless error analysis was objectively unreasonable under AEDPA. Ostensibly, this approach applies both *Brecht* and AEDPA, but federal habeas courts still have enough flexibility to find errors non-harmless when they have a "substantial and injurious effect or influence in determining the jury's verdict."<sup>187</sup> Unlike Group 4's approach, which provides a more superficial federal review, Group 2's approach would allow federal courts a meaningful opportunity to revisit the harmfulness of errors. With a more searching review, federal courts could vigorously police the uniformity of state court application of federal and constitutional law.<sup>188</sup> Federal judges, who are experts on federal and constitutional law,<sup>189</sup> have the final word on the application of that law. Under Group 2's approach, federal judges can overturn convictions when a state court application is incorrect and harmful, rather than only when the state courts' application is incorrect, harmful, and objectively unreasonable.

Group 2's approach would also provide for the appearance of fairness to a greater extent because it would allow federal judges, who may be less

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185. See R. Stephen Painter, Jr., Note, *O'Sullivan v. Boerckel and the Default of State Prisoners' Federal Claims: Comity or Tragedy?*, 78 N.C. L. REV. 1604, 1642–43 (2000) ("The give and take of two courts of concurrent jurisdiction result in a dialectical federalism that respects state autonomy while at the same time encouraging the uniform adjudication of federal law.").

186. See *Teague v. Lane*, 489 U.S. 288, 306 (1989) (plurality opinion) ("[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." (quoting *Desist v. United States*, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting))).

187. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

188. See *supra* notes 183–186.

189. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 US 473, 484 (1981); see also Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 593 (1991) ("In the 1953 case of *Brown v. Allen*, the Supreme Court concluded that federal habeas corpus petitioners may relitigate constitutional issues tried in state court because, in Justice Frankfurter's words, 'even the highest state courts' had failed to give adequate protection to federal constitutional rights." (quoting 344 U.S. 443, 511 (1953) (Frankfurter, J., concurring))).

biased and more independent than state judges, to review state prisoners' claims in a more circumspect manner. State judges, who are often elected, might be more willing to call non-harmless errors harmless so as to secure convictions and appear tough on crime for their constituents.<sup>190</sup> In Group 4's approach, when federal courts separately apply AEDPA and *Brecht* to state court harmless error determinations, state court judges have a nearly unchecked ability to immunize their convictions from reversal on federal habeas review. State court judges can call harmful errors harmless and thereby effectively insulate the conviction from reversal on federal habeas review. On the other hand, federal judges hold life appointments, and their analyses are less likely to be swayed by a desire to assuage members of the public. Group 2's approach recognizes that independent federal judges with life appointments can provide a meaningful check on the soundness of state criminal processes and the accuracy of state convictions.

Group 2's incorporation of the *Brecht* standard into AEDPA's analysis is also acceptable under current law. Courts presume that Congress knows the federal judiciary's interpretation of statutes it plans to amend.<sup>191</sup> In drafting AEDPA, Congress made no specific mention of *Brecht* or harmless error review.<sup>192</sup> Instead, AEDPA says merely that habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim" is either "contrary to" or an "unreasonable application of" clearly established federal law, as defined by the Supreme Court, or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."<sup>193</sup> This language does not prescribe a new and separate test. Indeed, AEDPA does not preclude federal habeas courts from using Supreme Court standards, such as the *Brecht* standard, to determine whether a state court decision is objectively unreasonable.<sup>194</sup> AEDPA requires federal habeas courts to defer to state court determinations;<sup>195</sup> however, the deferential principles "embodied in AEDPA are fully consistent with *Brecht's* standard for

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190. For a general discussion of elected judges' use of tough-on-crime campaigns, see Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101 (2006); see also Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 727 (1995).

191. See *Firststar Bank v. Faul*, 253 F.3d 982, 988 (7th Cir. 2001) ("[C]ourts presume that Congress will use clear language if it intends to alter an established understanding about what a law means; if Congress fails to do so, courts presume that the new statute has the same effect as the previous version.").

192. *Robertson v. Cain*, 324 F.3d 297, 306 (5th Cir. 2003) ("[N]othing in the text or the legislative history of AEDPA specifically or generally alludes to an alteration in the application of federal harmless error doctrine to a state court decision.").

193. 28 U.S.C. §§ 2254(d)(1)–(2) (2000).

194. *Robertson*, 324 F.3d at 306 ("The words of the statute simply cannot be read to bar federal courts from further examination and review of state habeas claims based on additional standards established by Supreme Court precedent, especially when those standards are not inconsistent with the language and purpose of AEDPA.").

195. See *Williams v. Taylor*, 529 U.S. 362, 409 (2000).

harmless error and with *Brecht's* observations concerning the limited role of the federal courts in habeas cases.<sup>196</sup> In fact, because *Brecht's* standard is already deferential to the states, it seems redundant to apply AEDPA and *Brecht* separately, as in Group 4's approach. Group 2's approach is consistent with AEDPA.

The Supreme Court should adopt the standard of Group 2, in which *Brecht* analysis is incorporated into AEDPA analysis. Unlike Congress's proposed solution, which unnecessarily strips the federal courts of jurisdiction, the standard of Group 2 ensures that independent federal judges hear state convicts' federal law and constitutional claims even when a state court has determined any errors to be harmless. Group 2's approach avoids the level of relitigation entailed in *Chapman's* standard, which the Supreme Court explicitly rejected in *Brecht*.<sup>197</sup> Yet, unlike Group 4's AEDPA-then-*Brecht* approach, federal courts retain the authority to revisit state court determinations of harmlessness. Under Group 2's approach, federal judges may provide more than a cursory check of state court decisions for reasonableness; they may effectively nullify state court convictions where those convictions are incorrect and unjust. By providing a more searching federal review, Group 2's approach enhances the appearance of fairness, provides a meaningful check on the accuracy of state court convictions, and contributes to the uniform application of federal and constitutional law.

#### CONCLUSION

This Note argues that claims that federal habeas courts reverse state court decisions too often are unfounded because most circuit courts affirm state court convictions when the state has determined any errors to be harmless. Federal habeas courts should not be stripped of habeas jurisdiction; instead, the Supreme Court should clarify harmless error law because federal courts are not applying it in a uniform or coherent manner. This Note categorizes the four types of harmless error review currently employed by the circuit courts and concludes that the proper solution is to adopt a test for harmless error in which the standard of *Brecht v. Abrahamson* is integrated into AEDPA analysis.

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196. *Robertson*, 324 F.3d at 306.

197. *Brecht v. Abrahamson*, 507 U.S. 619, 622–23 (1993).

## APPENDIX

TABLE I:  
CIRCUIT COURT AGREEMENT/DISAGREEMENT WITH  
STATE COURT DETERMINATION OF HARMLESSNESS

Circuit	Year	Case	Circuit Court Agreed/Disagreed with State Finding of Harmless Error	Capital Case?
1st	2005	Pertrillo v. O'Neill, 428 F.3d 41, 44–45	Agreed	
2d	2006	Isasi v. Herbert, 176 F. App'x 143, 145	Agreed	
	2004	Gutierrez v. McGinnis, 389 F.3d 300, 303–08	Agreed	
	2004	Zappulla v. NY, 391 F.3d 462, 466–75	Disagreed	
3d	2004	Affinito v. Hendricks, 366 F.3d 252, 262–63	Agreed	
	2003	Lewis v. Pinchak, 348 F.3d 355, 359–60	Agreed	
4th	2005	Simpson v. Polk, 129 F. App'x 782, 788–94	Agreed	*
	2005	Jones v. Polk, 401 F.3d 257, 264–66	Agreed	*
	2004	Allen v. Lee, 366 F.3d 319, 322, 343–50	Disagreed	*
5th	2005	Nixon v. Epps, 405 F.3d 318, 328–33	Agreed	*
	2004	Cole v. Dretke, 99 F. App'x 523, 531–33	Agreed	*
	2003	Hopkins v. Cockrell, 325 F.3d 579, 582–86	Agreed	*
6th	2006	Fulcher v. Motley, 444 F.3d 791, 794, 808–11	Disagreed	
	2006	Broom v. Mitchell, 441 F.3d 392, 407, 412–14	Agreed	*
	2005	Bates v. Bell, 402 F.3d 635, 641–49	Disagreed	*
	2005	Ruimveld v. Birkett, 404 F.3d 1006, 1012–18	Disagreed	
	2005	Madrigal v. Bagley, 413 F.3d 548, 550–53	Disagreed	*
	2005	Dorchy v. Jones, 398 F.3d 783, 787, 791	Disagreed	
	2005	Jordan v. Hurley, 397 F.3d 360, 363–65	Agreed	
	2004	Wesener v. Straub, 110 F. App'x 614, 623–25	Agreed	
	2004	Bell v. Hurley, 97 F. App'x 11, 15–17	Agreed	
	2004	Scott v. Gundy, 100 F. App'x 476, 476–82	Disagreed	
	2004	Henry v. Martin, 105 F. App'x 786, 790–94	Agreed	
	2004	Coburn v. Howes, 100 F. App'x 328, 328–330	Agreed	
	2003	Passino v. Tessmer, 61 F. App'x 124, 124–25, 127	Agreed	
	2003	Dotson v. Morgan, 2003 WL 22682426 at *1–4	Disagreed	
	2003	Singleton v. Carter, 74 F. App'x 536, 539–41, 544–45	Agreed	
	2003	Hill v. Hofbauer, 337 F.3d 706, 718	Disagreed	
	2003	Tucker v. Warden Ohio State Penitentiary, 64 F. App'x 467, 472–73	Agreed	
2003	Williams v. Straub, 56 F. App'x 259, 260	Agreed		
7th	2006	Whitman v. Bartow, 434 F.3d 968, 971–72	Agreed	
	2005	Ben-Yisrayl v. Davis, 431 F.3d 1043, 1047, 1051–53	Disagreed	*
8th	2004	Brown v. Luebbbers, 371 F.3d 458, 462–70	Agreed	*
9th	2006	Earle v. Runnels, 176 F. App'x 883, 886	Agreed	

Circuit	Year	Case	Circuit Court Agreed/ Disagreed with State Finding of Harmless Error	Capital Case?
	2006	Villescas v. Hernandez, 163 F. App'x 612, 613-614	Agreed	
	2006	Hernandez v. Piler, 2006 WL 377136 at *2	Agreed	
	2006	Hasan v. Galaza, 165 F. App'x 557, 559-60	Agreed	
	2005	Inthavong v. Lamarque, 420 F.3d 1055, 1057-62	Agreed	
	2005	Earp v. Stokes, 149 F. App'x 607, 609-612	Agreed	*
	2005	Tidwell v. Calderon, 134 F. App'x 141, 143	Disagreed	
	2005	Blakely v. Terhune, 126 F. App'x 396, 397-99	Agreed	
	2005	Sims v. Brown, 425 F.3d 560, 567, 570-73	Agreed	*
	2005	McNeil v. Middleton, 402 F.3d 920, 922-23	Agreed (after reversed by Supreme Ct.)	
	2005	Beltran v. Knowles, 121 F. App'x 182, 184-85	Disagreed	
	2005	Castillo v. McFadden, 399 F.3d 993, 1007-09	Disagreed	
	2005	Allen v. Woodford, 395 F.3d 979, 1011-15	Agreed	*
	2004	Nettles v. Newland, 105 F. App'x 144, 147	Agreed	
	2004	Palumbo v. Ortiz, 89 F. App'x 3, 4-6	Agreed	
	2004	Diaz v. Hickman, 101 F. App'x 726, 726-27	Agreed	
	2004	Medina v. Hornung, 386 F.3d 872, 876-78	Agreed	
	2004	Duran v. Castro, 102 F. App'x 631, 632	Agreed	
	2004	Parle v. Runnels, 387 F.3d 1030, 1034-35, 1044-45	Agreed	
	2004	Beltran v. Roe, 111 F. App'x 970, 970-71	Agreed	
	2004	Beardslee v. Brown, 393 F.3d 1032, 1035-36, 1041	Agreed	*
	2003	Martinez v. Castro, 77 F. App'x 403, 403-04	Agreed	
	2003	Evanchyk v. Stewart, 340 F.3d 933, 940-43	Disagreed	
	2003	Dao v. Terhune, 57 F. App'x 779, 779-80	Agreed	
	2003	Statler v. Garcia, 78 F. App'x 22, 23-24	Disagreed	
	2003	Mai v. Prunty, 75 F. App'x 586, 587-89	Agreed	
	2003	McNeil v. Castro, 81 F. App'x 901, 902	Agreed	
	2003	Paulinkonis v. Ryder, 82 F. App'x 514, 518-19	Agreed	
	2003	Johnson v. Garcia, 80 F. App'x 599, 600	Agreed	
	2003	Hunter v. Parin, 68 F. App'x 59, 59	Agreed	
10th	2006	Hamilton v. Mullin, 436 F.3d 1181, 1187-1197	Agreed	*
	2006	Bowman v. Neal, 172 F. App'x 819, 828-29	Agreed	
	2005	Malicoat v. Mullin, 426 F.3d 1241, 1244, 1247, 1262-63	Agreed	*
	2005	Patton v. Mullin, 425 F.3d 788, 800-01, 810	Agreed	*
	2003	Spears v. Mullin, 343 F.3d 1215, 1232-33	Agreed	*

TABLE 2:  
NINTH CIRCUIT APPROACHES TO HARMLESS ERROR ANALYSIS WHEN  
THERE IS A STATE COURT DETERMINATION OF HARMLESSNESS

Year	Case	Circuit Court Disagreed or Agreed with State Court Determination of Harmless Error
<i>Group 1: Court applied Brecht only.</i>		
2006	Hernandez v. Piller, 2006 WL 377136 at *2	Agreed
2005	Tidwell v. Calderon, 134 F. App'x 141, 143	Disagreed
2005	Blakeley v. Terhune, 126 F. App'x 396, 397–99	Agreed
2005	Sims v. Brown, 425 F.3d 560, 570–73	Agreed
2005	Beltran v. Knowles, 121 F. App'x 182, 184–85	Disagreed
2004	Allen v. Woodford, 395 F.3d 979, 1011–15	Agreed
2005	Palumbo v. Ortiz, 89 F. App'x 3, 4–6	Agreed
2004	Parle v. Runnels, 387 F.3d 1030, 1034–35, 1044–45	Agreed
2004	Beardslee v. Brown, 393 F.3d 1032, 1035–36, 1041	Agreed
2003	Evanchyk v. Stewart, 340 F.3d 933, 940–41	Disagreed
2003	Statler v. Garcia, 78 F. App'x 22, 23–24	Disagreed
2003	Mai v. Prunty, 75 F. App'x 586, 587–89	Agreed
2003	Hunter v. Parin, 68 F. App'x 59, 59	Agreed
<i>Group 2: Court applied Brecht, and finding the error harmful/harmless under Brecht, concluded that the state court harmless error determination is/isn't an "unreasonable application" under AEDPA.</i>		
2005	Castillo v. McFadden, 399 F.3d 993, 1007–09	Disagreed
2004	Diaz v. Hickman, 101 F. App'x 726, 726–27	Agreed
2003	McNeil v. Castro, 81 F. App'x 901, 902	Agreed
2003	Dao v. Terhune, 57 F. App'x 779, 779–80	Agreed
<i>Group 3: Court only applied AEDPA without considering Brecht.</i>		
2006	Hasan v. Galaza, 165 F. App'x 557, 559–60	Agreed
2005	McNeil v. Middleton, 402 F.3d 920, 921–23	Agreed
2004	Nettles v. Newland, 105 F. App'x 144, 147	Agreed
2004	Beltran v. Roe, 111 F. App'x 970, 970–71	Agreed
2003	Paulinkonis v. Ryder, 82 F. App'x 514, 518–19	Agreed
<i>Group 4: Court applied AEDPA, then mentioned or applied Brecht.</i>		
2006	Earle v. Runnels, 176 F. App'x 883, 886	Agreed
2006	Villescas v. Hernandez, 163 F. App'x 612, 613–614	Agreed
2005	Earp v. Stokes, 149 F. App'x 607, 609–612	Agreed
2005	Inthavong v. Lamarque, 420 F.3d 1055, 1057–62	Agreed
2004	Duran v. Castro, 102 F. App'x 631, 632	Agreed
2004	Medina v. Hornung, 386 F.3d 872, 876–78	Agreed
2003	Martinez v. Castro, 77 F. App'x 403, 403–04	Agreed
2003	Johnson v. Garcia, 80 F. App'x 599, 600	Agreed

TABLE 3:  
SIXTH CIRCUIT APPROACHES TO HARMLESS ERROR ANALYSIS WHEN  
THERE IS A STATE COURT DETERMINATION OF HARMLESSNESS

Year	Case	Circuit Court Disagreed or Agreed with State Court Determination of Harmless Error
<i>Group 1: Court applied Brecht only.</i>		
2006	Fulcher v. Motley, 444 F.3d 791, 794, 808–11	Disagreed
2005	Bates v. Bell, 402 F.3d 635, 641–49	Disagreed
2005	Dorchy v. Jones, 398 F.3d 783, 787, 791	Disagreed
2005	Jordan v. Hurley, 397 F.3d 360, 363–65	Agreed
2004	Wesener v. Straub, 110 F. App'x 614, 623–25	Agreed
2003	Williams v. Straub, 56 F. App'x 259, 260	Agreed
2003	Dotson v. Morgan, 2003 WL 22682426 at *1–4	Disagreed
<i>Group 2: Court applied Brecht, and finding the error harmful/harmless under Brecht, concluded that the state court harmless error determination is/isn't an "unreasonable application" under AEDPA.</i>		
2006	Broom v. Mitchell, 441 F.3d 392, 412–14	Agreed
2005	Ruimveld v. Birkett, 404 F.3d 1006, 1012–18	Disagreed
2004	Bell v. Hurley, 97 F. App'x 11, 15–17	Agreed
2004	Scott v. Gundy, 100 F. App'x 476, 476–82	Disagreed
2004	Henry v. Martin, 105 F. App'x 786, 790–94	Agreed
2003	Singleton v. Carter, 74 F. App'x 536, 539–41, 544–45	Agreed
2003	Tucker v. Warden Ohio State Penitentiary, 64 F. App'x 467, 472–73	Agreed
2003	Hill v. Hofbauer, 337 F.3d 706, 718	Disagreed
<i>Group 3: Court only applied AEDPA without considering Brecht.</i>		
2005	Madrigal v. Bagley, 413 F.3d 548, 550–53	Disagreed
2003	Passino v. Tessmer, 61 F. App'x 124, 124–25, 127	Agreed
<i>Group 4: Court applied AEDPA, then mentioned or applied Brecht.</i>		
2004	Coburn v. Howes, 100 F. App'x 328, 328–330	Agreed

TABLE 4:  
 FIRST, SECOND, THIRD, FOURTH, FIFTH, SEVENTH, EIGHTH, & TENTH  
 CIRCUIT APPROACHES TO HARMLESS ERROR ANALYSIS WHEN THERE IS A  
 STATE COURT DETERMINATION OF HARMLESSNESS

Circuit/Year	Case	Circuit Court Disagreed or Agreed with State Court Determination of Harmless Error
<i>Group 1: Court applied Brecht only.</i>		
3d Cir./2004	Affinito v. Hendricks, 366 F.3d 252, 262–63	Agreed
3d Cir./2003	Lewis v. Pinchak, 348 F.3d 355, 359–60	Agreed
4th Cir./2005	Simpson v. Polk, 129 F. App'x 782, 788–94	Agreed
5th Cir./2005	Nixon v. Epps, 405 F.3d 318, 329–330	Agreed
5th Cir./2003	Hopkins v. Cockrell, 325 F.3d 579, 582–86	Agreed
7th Cir./2006	Whitman v. Bartow, 434 F.3d 968, 971–72	Agreed
10th Cir./2006	Bowman v. Neal, 172 F. App'x 819, 828–29	Agreed
10th Cir./2005	Patton v. Mullin, 425 F.3d 788, 800–01, 810	Agreed
<i>Group 2: Court applied Brecht, and finding the error harmful/harmless under Brecht, concluded that the state court harmless error determination is/isn't an "unreasonable application" under AEDPA.</i>		
2d Cir./2006	Isasi v. Herbert, 176 F. App'x 143, 145	Agreed
5th Cir./2004	Cole v. Dretke, 99 F. App'x 523, 531–33	Agreed
7th Cir./2005	Ben-Yisrayl v. Davis, 431 F.3d 1043, 1047, 1051–53	Disagreed
<i>Group 3: Court only applied AEDPA without considering Brecht.</i>		
2d Cir./2004	Zappulla v. New York, 391 F.3d 462, 467–75	Disagreed
2d Cir./2004	Gutierrez v. McGinnis, 389 F.3d 300, 303–08	Agreed
8th Cir./2004	Brown v. Luebbbers, 371 F.3d 458, 462–70	Agreed
10th Cir./2006	Hamilton v. Mullin, 436 F.3d 1181, 1187–1197	Agreed
10th Cir./2005	Malicoat v. Mullin, 426 F.3d 1241, 1247, 1262–63	Agreed
10th Cir./2003	Spears v. Mullin, 343 F.3d 1215, 1232–33	Agreed
<i>Group 4: Court applied AEDPA, then mentioned or applied Brecht.</i>		
1st Cir./2005	Pertrillo v. O'Neill, 428 F.3d 41, 44–45	Agreed
4th Cir./2005	Jones v. Polk, 401 F.3d 257, 264–66	Agreed
4th Cir./2004	Allen v. Lee, 366 F.3d 319, 322, 343–50	Disagreed