

No. 06-5247

IN THE  
SUPREME COURT OF THE UNITED STATES

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JOHN F. FRY,  
Petitioner,

v.

CHERYL K. PLILER, Warden  
Respondent.

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

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Brief of Missouri, Alabama, Arizona, Arkansas, Colorado,  
Delaware, Hawaii, Illinois, Indiana, Iowa, Kentucky, Michigan,  
Mississippi, Montana, North Dakota, Oklahoma, South Carolina,  
South Dakota, Texas, Utah and West Virginia as *Amicus Curiae*  
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## INTEREST OF AMICUS CURIAE

This case concerns the circumstances under which federal courts should apply the harmless-error standard enunciated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), versus the harmless-error standard enunciated in *Chapman v. California*, 386 U.S. 18 (1967), to habeas corpus petitions filed by state prisoners under 28 U.S.C. §2254.

Amici States, whose wardens defend against numerous habeas petitions filed under §2254, have a substantial interest in the proper application of harmless error standards to such claims.

## STATEMENT OF THE CASE

Petitioner John Fry was charged in 1993 with the first degree murders of James and Cynthia Bell, who were found dead in their car on the dirt shoulder of Interstate 505 near the freeway intersection with Vaca Valley Parkway in Vacaville, California. J.A. 26, 67. Cynthia died of a close-range gunshot wound to the head, which caused “massive damage” to the upper part of her face and skull. *Id.*, at 27. James had a total of eight bullet wounds on his head, chest, back, and wrist and died from head and lung wounds. *Id.*

The jurors deadlocked in Fry’s first two trials. *Id.*, at 67. In the third trial, the prosecution introduced newly discovered evidence identifying the murder weapon as Fry’s .357 Ruger. Resp. Br. 2-3; J.A. 44, 71. In addition, the prosecution showed that Cynthia owed Fry money for drug transactions. J.A. 71. Three witnesses testified that Fry threatened to kill Cynthia within a few days of the murders. *Id.* Several witnesses, including Fry’s brother, testified that Fry returned home the night of the murders spotted with blood and that Fry said that he “did” Cynthia and James Bell and described how a .357-magnum bullet impacted a human head. *Id.* The prosecution also showed that Fry had confessed the murders to a fellow

inmate and that Fry had planned to coerce his brother to change his testimony by trying to arrange to have his brother and his brother's family injured. *Id.*

The defense in turn presented evidence that Fry was not present at the murder scene and that at least three other people could have murdered the Bells – Daryl Borelli, Ryan Bernal, and Anthony Hurtz. J.A. 46. Seven witnesses said that Hurtz had confessed to the Bells' murders or was involved in the planning. Resp. Br. 5. The defense presented an eighth witness – Hurtz's cousin Pamela Maples – to testify that she had overheard Hurtz saying that he shot a girl in the head and that he reached over and shot a guy in a car in a “parking place” and that he was “full of blood” after the shootings and had run through a field and thrown mud on himself before calling someone to pick him up. J.A. 12, 15, 94-95. But the trial court excluded Maples' testimony for lack of foundation after the prosecution elicited that Maples heard only “bits and pieces” of the conversation and could not provide any further details about the referenced murders, including whether they had taken place within the last ten years or in what State. *Id.*, at 10, 13-14.

The jury found Fry guilty of both murders, and the trial court sentenced him to life imprisonment without the possibility of parole, plus a term of 35 years. J.A. 67-68.

The California Court of Appeal, First Appellate District, affirmed Fry's conviction, rejecting his argument that barring Maples' testimony violated his Sixth and Fourteenth Amendment rights to present a defense. J.A. 25, 94. “Given the absence of any actual linkage to the charged offenses, or any other evidence supporting an inference that the killings allegedly described by Hurtz were those of Cynthia and James Bell,” the court reasoned, “Maples' testimony simply did not tend to show [Fry's] innocence.” J.A. 97. In a footnote, the state appellate court also concluded that Fry suffered “no possible prejudice ... as a result of the exclusion” because the trial court had permitted the defense to introduce “the very similar testimony” of two other witnesses “regarding Hurtz's

alleged confessions of shooting two unidentified people at close range while the victims were sitting in a parked car near Vacaville.” *Id.*, at 97 n.17.

The California Supreme Court denied discretionary review. J.A. 113.

Fry sought federal habeas corpus relief under 28 U.S.C. §2254. A federal magistrate judge for the United States District Court for the Eastern District of California issued a report recommending that Fry’s application be denied. J.A. 114-207. In the magistrate’s view, the state appellate court unreasonably applied clearly established federal law within the meaning of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, §104(3), 110 Stat. 1214, 1219, 28 U.S.C. §2254(d)(1), when it determined that Fry’s Sixth and Fourteenth Amendment rights were not infringed by the exclusion of Maples’ testimony. J.A. 177-180. But the magistrate concluded that federal habeas relief was unwarranted because the exclusion did not have “a substantial and injurious effect on the jury’s verdict” under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), in light of the facts that the “defense witnesses implicating Hurtz, who were heard by the jury, were more exact and precise in their testimony and alleged far more damning detail, notwithstanding any bias and/or impeachment the prosecution was able to show” and that cross-examination of Maples “would have pointed up the infirmities of her putative testimony.” J.A. 180-182.

The district court adopted the magistrate’s findings and recommendations in full in an unpublished memorandum order. J.A. 208-209.

The United States Court of Appeals for the Ninth Circuit affirmed in a divided, unpublished decision. Judges D.W. Nelson and Bea agreed with the magistrate and district court’s analysis that the state court’s exclusion of Maples’ testimony involved an unreasonable application of clearly established federal law, and with their analysis that relief was nonetheless unwarranted because any error was harmless under

the standard set forth in *Brecht*, 507 U.S., at 637, because it did not have a substantial and injurious effect or influence in determining the jury's verdict. J.A. 212.

Judge Rawlinson dissented because he believed that the exclusion of Maples' testimony was not harmless under *Brecht*. J.A. 213-214.

The court of appeals denied rehearing and rehearing en banc. *Id.*, at 215.

This Court granted certiorari limited to Question 3 presented by the petition.

### SUMMARY OF ARGUMENT

The broad holding in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), that the harmless-error standard of *Kotteakos v. United States*, 328 U.S. 750 (1946), applies to federal habeas actions filed by state prisoners, did not include an exception, express or tacit, for cases in which the state courts did not do harmless-error analysis under *Chapman v. California*, 386 U.S. 24 (1967). Rather, *Brecht* states a single standard to be applied by federal habeas courts as they consider habeas petitions challenging state confinements. This Court should hold unequivocally that the *Brecht* standard applies regardless of whether the state court expressly referred to or clearly applied the *Chapman* standard.

The passage of §2254(d)(1) in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) did not change the *Brecht* rule. It did, however, impose a preliminary step – a gatekeeping function. The federal court can insert itself into harmless error review, regardless of whether the state court expressly applied *Chapman*, only when the state court's choice or application of a harmless error standard is either contrary to or an unreasonable application of this Court's precedents. This Court should confirm that when a state court has done harmless-error analysis, federal habeas petitioners seeking relief must show that the state court's decision was contrary to or

involved an unreasonable application of *Chapman* and then also satisfy the *Brecht* standard.

Finally, the Court should not be swayed by the claim made by Fry and by his amicus that requiring federal habeas courts to do harmless-error analysis under *Chapman* instead of *Brecht* will reduce the number of wrongful convictions. Though the wrongful conviction of the innocent is certainly an injustice that we must take extraordinary steps to avoid, Fry and his amicus have not shown that the requirement they propose would significantly ameliorate wrongful convictions.

## ARGUMENT

### **I. The *Brecht* harmless-error standard applies to all federal habeas proceedings, whether or not a state court has done harmless-error analysis under *Chapman*.**

In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), this Court “squarely” held, *id.*, at 623, 631, that the harmless-error standard of *Kotteakos v. United States*, 328 U.S. 750 (1946) – namely, whether an error had a “substantial and injurious effect on the verdict” – applies to federal habeas actions, not the “beyond a reasonable doubt” standard of *Chapman v. California*, 386 U.S. 24 (1967). This Court noted that while 28 U.S.C. §2254(a) authorized federal habeas relief “only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States,” the federal habeas statutes did not specify a particular harmless-error standard. 507 U.S., at 631 (internal quotation marks omitted). To plug the statutory gap, the Court adopted the *Kotteakos* standard because it was “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.

The broad holding in *Brecht* defeats Fry’s argument that a federal habeas court must do *Chapman* analysis when a state court has not. Notably, the majority raised only two possible exceptions to its broad holding – namely, “where there was a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct.” *Id.*, at 638 n.9. The implication is that there are no others.

To reach a contrary conclusion, Fry extracts three words – “scarcely seems logical” – from the majority in *Brecht*. See Pet. Br. 15, 25. But that language appears in the majority’s response to two of the dissenting opinions – a response that in fact confirms our understanding of the majority rule.

One *Brecht* dissenter, Justice O’Connor, characterized the majority rule as a “repudiation of the application of *Chapman* to all trial errors asserted on habeas.” *Id.*, at 652. She would have applied the *Chapman* harmless-error standard because “it substantially promotes the central goal of the criminal justice system – accurate determinations of guilt and innocence.” *Id.* The other dissenters (Justices White, Blackmun, and Souter) observed, as a criticism of the majority rule, that if a state conviction involved constitutional error that did not have a substantial and injurious effect on the verdict but was not harmless beyond a reasonable doubt, the state court “erroneously concluded that no violation occurred,” and “certiorari was not sought or granted, the majority would foreclose relief on federal habeas review.” *Id.*, at 644 (White, J., dissenting).<sup>1</sup>

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<sup>1</sup> If the *Brecht* standard applied only when the state court did harmless-error analysis under *Chapman*, the hypothetical would have no teeth. Notably, not a single justice from the majority either (a) disagreed with the dissenters’ understanding of the scope of the majority rule or (b) declared that Justice White was addressing an issue not before the Court. Doing either would have defanged Justice White’s quasi-equal

The majority responded with a critique of the dissenters' proposal that the federal habeas courts should apply harmless-error analysis under *Chapman* in all cases where constitutional error amenable to harmless-error analysis is found. The majority declared that it “*scarcely seems logical* to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review.” 507 U.S., at 636 (emphasis added).

The majority thus agreed with the dissenters' understanding of the scope of the majority rule, but thought that applying *Chapman* in federal habeas actions would result in the unacceptable consequence of duplicating a state court's harmless-error analysis. Where Fry treats the majority's “scarcely seems logical” comment as a “premise” of the *Brecht* rule, Pet. Br. 15, 25, it is actually a critique of the dissenters' rule. “Had [this Court] intended to suggest” that the *Brecht* rule applied only when the state courts did such analysis, it “could have stated [its rule] much more clearly and economically.” *Sisson v. Ruby*, 497 U.S. 358, 366-367 (1990). But the majority never implied that it was limiting its holding to cases in which the state courts did harmless-error analysis under *Chapman*.

Moreover, that the state courts did harmless-error analysis in *Brecht* was a “fluke”: “ordinarily . . . the state court will not have found any error and therefore will have had no occasion to apply any standard of harmless error.” *Tyson v. Trigg*, 50 F.3d 436, 446 (7<sup>th</sup> Cir. 1995) (Posner, J.). *Accord Smith v. Dixon*, 14 F.3d 956, 975-80 (4<sup>th</sup> Cir. 1994) (en banc). So the limitation urged by Fry “would rob the decision of any general significance.” *Tyson*, 50 F.3d, at 446.

Since *Brecht*, this Court has twice assumed that the *Brecht* harmless-error standard applies in federal habeas

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protection critique and alleviated the reliability concerns voiced by Justice O'Connor. See 507 U.S., at 652-54.

proceedings even though the state courts did not do harmless-error analysis under *Chapman*. *Early v. Packer*, 537 U.S. 3, 10-11 (2002) (per curiam); *Penry v. Johnson*, 532 U.S. 782, 795 (2001). See also *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (“[W]e held in *Brecht* that the standard of harmless-ness generally to be applied in habeas cases is the *Kotteakos* formulation[.]”).

Only the Eighth Circuit has held that a federal habeas court must do *Chapman* analysis when the state court did not. *Orndorff v. Lockhart*, 998 F.2d 1426, 1430 (8<sup>th</sup> Cir. 1993); *Richardson v. Bowersox*, 188 F.3d 973, 979 (8<sup>th</sup> Cir. 1999). In contrast, the Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have all held that *Brecht* applies when a state court did not do *Chapman* analysis. *Hassine v. Zimmerman*, 160 F.3d 941, 950-953 (3<sup>rd</sup> Cir. 1998); *Sherman v. Smith*, 89 F.3d 1134, 1140-41 (4<sup>th</sup> Cir. 1996); *Garcia v. Quarterman*, 454 F.3d 441, 446-47, 447 n.9 (5<sup>th</sup> Cir. 2006); *Eddleman v. McKee*, 471 F.3d 576, 585 (6<sup>th</sup> Cir. 2006); *Aleman v. Sternes*, 320 F.3d 687, 690 (7<sup>th</sup> Cir. 2003); *Castro v. Oklahoma*, 71 F.3d 1502, 1515-1516 & n.14 (10<sup>th</sup> Cir. 1995); *Horsley v. Alabama*, 45 F.3d 1486, 1492 & n.11 (11<sup>th</sup> Cir. 1995). In fact, the Sixth and Seventh Circuits have respectively held that *Brecht* “clearly applies in that situation” and that it is “obvious” that it does. *Eddleman*, 471 F.3d, at 585; *Aleman*, 320 F.3d, at 690. The Ninth Circuit has simply followed the majority rule.

Importantly, the majority rule supports all three of the policy rationales discussed in *Brecht*: (1) the “State’s interest in finality of convictions that have survived direct review within the state court system”; (2) “comity and federalism”; and (3) that “liberal allowance of the writ . . . degrades the prominence of the trial itself.” *Id.*, at 635 (internal quotations omitted). 507 U.S., at 635. The State’s interest in the finality of convictions that have survived direct review is not extinguished, or even mitigated, by the fact that the state courts did not do harmless-error analysis.

Nor is the State’s interest in comity and federalism

weakened when the state courts find no constitutional error (and do not reach harmless-error analysis). Rather, it is strengthened. As Judge Boggs has explained:

“The principles of comity and finality . . . dictate that we should defer to a state court’s ultimate disposition of a case. For two reasons, this second type of deference is weaker when a state court found an error to be harmless than when it found no error at all. First, the state interest in finality is weaker. A state court acknowledges that its resolution of the case was not perfect when it recognizes that a federal constitutional error occurred at trial. While an imperfect judgment still is entitled to a presumption of correctness, this presumption is not as strong as it would be absent any finding of error. Second, the relevant state interest in comity is weaker. When a state proceeding has violated federal constitutional rights, the state’s interest in the autonomous administration of its criminal laws give way, at least in part, to the federal government’s interest in protecting those rights.” *Eddleman*, 471 F.3d, at 585.<sup>2</sup>

The third rationale cited in *Brecht* – that liberal allowance of the writ would degrade the prominence of the trial itself, 507 U.S., at 635 – remains unaffected by whether the state court did harmless-error analysis under *Chapman*. There

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<sup>2</sup> To be sure, if a State had an obligation to do harmless-error analysis despite finding no constitutional error, its comity interest would be attenuated. But this Court has never implied, let alone held, that state courts must do gratuitous harmless-error analysis based on a hypothesized error.

are serious “social costs” from making it easier for habeas petitioners to secure relief. 507 U.S., at 637. As the Court noted in *Brecht*, these include “the expenditure of additional time and resources for all the parties involved, the erosion of memory and dispersion of witnesses that accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of society’s interest in the prompt administration of justice.” *Id.* That Congress enacted a statute of limitations applicable to federal habeas actions and a general prohibition on filing successive habeas petitions, 28 U.S.C. §§ 2244(b)(1), (d)(1), helps mitigate some of these social costs; it does not eliminate them.

**II. Should this Court find that the state court did harmless-error review consistent with *Chapman*, Fry cannot obtain relief unless the state court unreasonably applied *Chapman* and any constitutional error was not harmless under *Brecht*.**

Fry’s argument that the Ninth Circuit should have done *de novo Chapman* analysis is premised on the assumption that the state appellate court did not do *Chapman* analysis. And Respondent has conceded that the state appellate court did not do *Chapman* analysis, despite the court’s finding that there was “no possible prejudice” from the exclusion of Maples’ testimony. Resp. Br. 6 n.3. But should this Court disagree that no *Chapman* analysis was conducted, *see Sibron v. New York*, 392 U.S. 40, 58-59 (1968); *Young v. United States*, 315 U.S. 257, 258-59 (1942) (“[O]ur judicial obligations compel us to examine independently the errors confessed.”), the following question arises: To prevail, must Fry just prove that the state appellate court unreasonably applied *Chapman* or must he also satisfy *Brecht*? Compare *Herrera v. Lemaster*, 301 F.3d 1192, 1200 (10<sup>th</sup> Cir. 2002) (en banc) and *Sanna v. Dipaolo*, 205 F.3d 1, 14 (1<sup>st</sup> Cir. 2001) (requiring petitioner to satisfy only *Brecht*) with *Inthavong v. Lamarque*, 420 F.3d 1055, 1059 (9<sup>th</sup> Cir.

2005), *Jones v. Polk*, 401 F.3d 257, 264-266 (4<sup>th</sup> Cir. 2005), and *Aleman*, 320 F.3d, at 690-91 (requiring petitioner to satisfy *Brecht* and to show an unreasonable application of *Chapman*), and with *Eddleman*, 471 F.3d, at 583 (holding that AEDPA “replaced the *Brecht* standard with the standard of *Chapman* plus AEDPA deference when ... a state court made a harmless-error determination”). The answer is that Fry must do both.

A state prisoner seeking federal habeas relief under 28 U.S.C. §2254 must prove that he (or she) is “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. §2254(a). “Whether a given prisoner’s custody violates the Constitution, laws, or treaties of the United States depends, first, on whether all substantive rules of have been respected (the merit of the claim) and, second, whether any error *caused* the custody. That is where *Brecht*’s harmless error doctrine enters: a harmless error did not play a causal role.” *Aleman*, 320 F.3d, at 690. *Accord Brecht*, 507 U.S., at 631; *O’Neal v. McAninch*, 513 U.S. 432, 438 (1995) (Thomas, J., dissenting) (“Even the majority implicitly agrees that causation is necessary, for otherwise it would have no need to discuss harmful errors as opposed to mere errors.”).

In passing AEDPA, Congress did not eliminate or modify the causation requirement. Hertz & Liebman, *FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE* 1505 n.12 (5<sup>th</sup> ed. 2005). It did, however, add a provision prohibiting habeas relief that would otherwise be available, namely, 28 U.S.C. §2254(d). *Cf. Williams v. Taylor*, 529 U.S. 362, 437 (2000), (describing structurally similar provision, 28 U.S.C. §2254(e), as a prohibition). Section 2254(d)(1) declares:

“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 adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . 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.” 28 U.S.C. §2254(d)(1) (emphasis added).

The view that §2254(d) supplants *Brecht* when a state court has done *Chapman* analysis is based on the belief that §2254(d) is a “standard of review.” *Eddleman*, 471 F.3d, at 584. But whatever the label attached to §2254(d), *see Lindh v. Murphy*, 521 U.S. 320, 343 (1997) (Rehnquist, C.J., dissenting) (“There is a good argument that §2254(d) is itself jurisdictional.”), it is a general prohibition on granting habeas relief that otherwise would be available under §2254(a), except where a state court’s decision is contrary to, or involves an unreasonable application of, this Court’s precedents. 28 U.S.C. §2254(d)(1). Section 2254(d)(1) “does not require federal habeas courts to grant relief reflexively. 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.” *Robertson v. Cain*, 324 F.3d 297, 306 (5<sup>th</sup> Cir. 2003). *Accord Aleman*, 320 F.3d, at 690.

There is no positive repugnancy between §2254(d)(1) and *Brecht*, and so the Court should give effect to both. *See Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992). A federal habeas court can conclude that a state court unreasonably applied *Chapman* and yet still hold, on plenary review, that the error did not have a substantial and injurious effect on the verdict. *See, e.g., Jones*, 401 F.3d, at 265-66 (holding that state court unreasonably applied *Chapman* but that error did not have substantial and injurious effect).

To be sure, *Brecht* analysis and reasonableness review of a state court’s *Chapman* analysis can overlap. For instance, when a federal habeas court finds that a constitutional error had

a substantial and injurious effect, it follows that (to the federal court) the state court unreasonably applied *Chapman* (if the state court did harmless error analysis). But this overlap does not make *Brecht* or §2254(d)(1) “wholly superfluous.” *Germain*, 503 U.S., at 253. State courts do not always do harmless-error analysis. In the mine run of cases, the state courts, having found no constitutional error, do not decide the harmless-error issue. In such cases, §2254(d)(1) applies to the substantive constitutional claim, and whether the constitutional error was harmless is determined by *Brecht*. Even when the state courts do *Chapman* analysis and the federal habeas court finds that the constitutional error had a substantial and injurious effect, §2254(d)(1) has independent force, because it applies to the state court’s holding that there was no constitutional error.

This would not be the first time that this Court has held that a habeas doctrine that predated AEDPA and has overlapping, but distinct, purposes from AEDPA survived the passage of AEDPA. In *Horn v. Banks*, 536 U.S. 266 (2002) (per curiam), the Court held that “none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard, or that AEDPA relieves courts from the responsibility of addressing properly raised *Teague* arguments.” *Id.*, at 272. This Court held that “in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state.” *Id.*

Interpreting §2254(d)(1) as supplanting *Brecht* would also frustrate Congress’s intent in passing AEDPA. *Cf. Rumsfeld v. Padilla*, 542 U.S. 426, 446 (2004) (rejecting argument because it would “undermine, if not negate, the purpose of Congress in amending the habeas statute in 1867”). Suppose a state court found constitutional error but treated the error as harmless under a preponderance-of-the-evidence or a reasonable-probability standard, instead of *Chapman*’s beyond-a-reasonable-doubt standard. This merits decision

would be contrary to clearly established Supreme Court precedent (*i.e.*, *Chapman*). *Williams*, 529 U.S. at 412-413; 28 U.S.C. §2254(d)(1). And if §2254(d)(1) abrogated *Brecht*, the petitioner would be entitled to relief – even if the constitutional error played absolutely no role in the conviction. It has been a long time since any state or federal court has followed the Exchequer Rule<sup>3</sup> under which no constitutional error could be harmless. In passing AEDPA, Congress was not trying to revive the Exchequer Rule (in federal habeas cases, no less – an inversion of the tradition of habeas review being *less* exacting than direct review). It was trying to make it harder for state prisoners to obtain habeas relief, not easier. *See Lindh*, 521 U.S., at 334 n.7 (describing §2254(d)(1) as a “highly deferential standard for evaluating state-court rulings”).

*Mitchell v. Esparza*, 540 U.S. 12 (2003) (per curiam), does not undermine the foregoing analysis. The issue in *Mitchell* was whether the Sixth Circuit erred in holding that a state court should not have applied *any* type of harmless-error review to the Eighth Amendment error raised by the petitioner – not which type of harmless-error review the Sixth Circuit should have done. 540 U.S., at 13, 15-17. This Court summarily reversed the Sixth Circuit for not doing deferential *Chapman* analysis under §2254(d)(1). *Id.*, at 15-17. This Court did not hold – or even imply – that the habeas petitioner could have prevailed without satisfying the *Brecht* standard.

Whether the petitioner could satisfy *Brecht* was also immaterial. Given this Court’s holding that the state court reasonably concluded that any error was harmless beyond a reasonable doubt, 540 U.S., at 17-18, the error could not have had a substantial and injurious effect on the jury’s verdict. At a minimum, *Mitchell* did not directly address whether federal habeas courts must do both *Brecht* analysis and deferential *Chapman* analysis. *See also Connecticut v. Doehr*, 501 U.S. 1,

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<sup>3</sup> *Crease v. Barrett*, 149 Eng. Rep. 1353 (Ex. 1835).

12 n.4 (1991) (noting that “a summary disposition does not enjoy the full precedential value of a case argued on the merits”), citing *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

**III. The interest in freeing the innocent does not justify imposing the *Chapman* standard on federal habeas courts.**

The imprisonment of an innocent person is an abomination, which the state and federal legal systems strive to prevent. It is important to keep in mind, however, that such wrongful convictions are extremely rare. Because of the requirement that guilt be proven beyond a reasonable doubt, “the overwhelming majority of the innocent will never reach the habeas stage[.]” *O’Neal*, 513 U.S., at 447 (Thomas, J., dissenting) (citation omitted). Studies of wrongful convictions bear out this conclusion. For instance, a report on the study of nationwide exonerations from 1989 through 2003 found a total of 340 exonerations. S.R. Gross, et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524, 529 (2005). Suppose the report understated the number of innocents by a factor of ten. That would mean that in 99.973 percent of all felony convictions during the period under study, a guilty person was convicted. *Kansas v. Marsh*, 126 S.Ct. 2516, 2538 (2006) (Scalia, J., concurring) (citing Joshua Marquis, *The Innocent & The Shamed*, N.Y. Times, Jan. 26, 2006, p. A23).

Even if the rate of wrongful convictions were higher, it would be a mistake to suppose, as Fry and his amicus the Innocence Network do, that requiring federal habeas courts to do *de novo Chapman* analysis would do much to reduce the number of wrongful convictions. There are two reasons why:

(1) Two of the key constitutional errors linked to wrongful convictions are not subject to *any* harmless-error analysis, making the choice between the *Brecht* and *Chapman* standards immaterial. Consider ineffective assistance of

counsel. According to Judge Betty B. Fletcher, “A root cause of the failures of our system to protect the innocent is inadequacy of representation at trial.” *The Death Penalty in America: Can Justice Be Done?*, 70 N.Y.U. L. REV. 811, 823 (1995). Accord Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231, 248 (2006) (“Ineffective assistance of counsel is a recurring theme in wrongful convictions.”). But if a court finds ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), it follows that the error was not harmless under either *Chapman* or *Brecht*. *Hill v. Lockhart*, 28 F.3d 832, 839 (8<sup>th</sup> Cir. 1994), cited approvingly by *Kyles*, 514 U.S., at 436 n.9; *United States v. Dominguez Benitez*, 542 U.S. 74, 86 (2004) (Scalia, J., concurring).

The Innocence Project, which is a member of the Innocence Network, cites “government misconduct” – specifically, the suppression of exculpatory evidence and the knowing use of false testimony – as a significant factor in wrongful convictions. Innocent Project, *The Causes of Wrongful Conviction, Government Misconduct*, <http://www.innocenceproject.com/understand/Government-Misconduct.php> (last visited February 21, 2007). Accord Gross, et al., 95 J. CRIM. L. & CRIMINOLOGY at 529. We can logically conclude that these categories include (and perhaps are coextensive with) misconduct under *Brady v. Maryland*, 373 U.S. 83 (1963). But, as with ineffective- assistance claims, a successful *Brady* claim presupposes that the petitioner can satisfy the “reasonable probability” standard – and thus the *Chapman* standard, as well. *Kyles*, 514 U.S. at 435; *Dominguez Benitez*, 542 U.S., at 86 (Scalia, J., concurring).

Granted, the district court here found a violation of Fry’s right to present a complete defense. But Fry’s case is apparently atypical of the constitutional errors that contribute to wrongful convictions. On its website, the Innocence Project

lists the “most common causes of wrongful convictions.” Innocence Project, *The Causes of Wrongful Convictions*, <http://www.innocenceproject.com/understand/> (last visited February 21, 2007). They are: eyewitness misidentification, unreliable or limited science, false confessions, forensic science fraud or misconduct, informants or snitches, and bad lawyering. *Id.* Not listed are denial of the right to present a complete defense or judicial exclusion of exculpatory evidence. Nor does the Gross study, which lists some of the major causes of wrongful convictions, mention wrongful exclusion of exculpatory evidence, though it acknowledges, “Like many accidents, [false convictions] are caused by a mix of carelessness, misconduct, and bad luck.” Gross, et al., 95 J. CRIM. L. & CRIMINOLOGY at 542-553. The Bedau study does attribute seven wrongful convictions to judicial denial of the admissibility of exculpatory evidence – but out of a total of 350 “exonerations.” Bedau, et al., *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 56, 59 (1987).

In its brief, the Innocence Network lists a string of cases in which “key evidence of third-party guilt” led to the exoneration and release from prison of innocent persons. Br. 10-14. But in each of these cases, the key evidence was DNA evidence, not a third-party confession of dubious exculpatory value, such as the one here. The Innocence Network also contends that many individuals have been exonerated despite state court determinations that there was overwhelming evidence of guilt. *Id.*, at 14-16. But requiring federal habeas courts to do *Chapman* analysis will do little to ameliorate that problem: The existence of overwhelming evidence of guilt is a reason commonly given for finding a constitutional error to have been harmless under *Chapman*. See *Neder v. United States*, 527 U.S. 1, 17 (1999); *Harrington v. California*, 395 U.S. 250, 254 (1969).

(2) Even if an innocent person were to raise a constitutional error amenable to harmless-error analysis, it is unlikely that applying the *Chapman* standard instead of the

*Brecht* standard would make much of a difference to his chances of prevailing. Normally, the petitioner would have to prove that the state courts unreasonably applied this Court's precedent in denying a constitutional claim – an onerous task that requires more than proof of clear error. *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003); 28 U.S.C. §2254(d)(1). “Less than 1% of state prisoners who file federal habeas petitions ultimately prevail.” John H. Blume, *AEDPA: The “Hype” & The “Bite.”* 91 CORNELL L. REV. 259, 284 (2006). Doubtless most lose because they cannot leap the §2254(d)(1) hurdle that applies to their substantive constitutional claims – and, as discussed above, to a state court's *Chapman* analysis.

### CONCLUSION

For the foregoing reasons, the Court should affirm the court of appeals.

Respectfully submitted,

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