No. 06-5247

IN THE

Supreme Court of the United States

JOHN FRANCIS FRY,

Petitioner,

vs.

CHERYL K. PLILER, Warden,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

When the state court rejected the defendant's claim on the merits and did not review the claimed error for harmlessness under *Chapman* v. *California*, does the *Brecht* v. *Abrahamson* standard apply to harmless error review on federal habeas corpus?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Petitioner in this case seeks to overturn in part the clear holding of *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), on the standard of review applicable in habeas corpus proceedings. That standard has served our judicial system well in helping to

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

insure that the "secondary and limited" remedy of collateral attack on final judgments is reserved for error of real substance, not minor issues with only a speculative connection with the reliability of the verdict. Any cutting back on *Brecht* would be a step backward and would be contrary to the interests CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

The facts are taken from the unpublished decision of the California Court of Appeal. Defendant John Fry was convicted of the murder of James and Cynthia Bell. J. A. 25-26. In his defense, Fry offered a variety of evidence, including attempts to link three other people to the murders, one of whom was Anthony Hurtz. The testimony of several witnesses was admitted to implicate Hurtz. See J. A. 61-64. Defendant also proffered the testimony of Hurtz's cousin, Pamela Maples, that she heard Hurtz "say he had killed a man and woman in a car in Vacaville . . . ." J. A. 94. After questioning outside the presence of the jury, the trial court excluded the testimony on the basis that no sufficient connection had been shown between the crime Maples heard Hurtz admit to and the crime in the present case.

The Court of Appeal found that this ruling was within the trial court's discretion. J. A. 97. In a footnote, the Court of Appeal found in the alternative that there was "no possible prejudice," because the evidence was "merely cumulative" to the other witnesses. The California Supreme Court denied discretionary review. J. A. 113.

On federal habeas, the magistrate judge found that the exclusion was error under *Chambers* v. *Mississippi*, 410 U. S. 284 (1973), and that the criteria for relief of 28 U. S. C. § 2254(d) had been met. J. A. 180. However, the magistrate judge held that the error was harmless under the standard of *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), citing many of the same problems with Maples' testimony that the state court

had discussed in finding that the exclusion was not error. See J. A. 180-182.

The District Court summarily adopted the magistrate judge's report and recommendation. On appeal, the Ninth Circuit held in an unpublished, divided opinion that, "even assuming constitutional error," the error was harmless under *Brecht*. The court rejected Fry's claim that *Brecht* was inapplicable. J. A. 212-213. Judge Rawlinson dissented. She agreed that *Brecht* was the standard, but disagreed that the standard had been met in this case. J. A. 213-214.

The panel denied rehearing by the same divided vote. No judge of the full court called for a vote on rehearing en banc. J. A. 215. The Court granted certiorari limited to one question. J. A. 216.

SUMMARY OF ARGUMENT

Harmless error analysis is appropriate and necessary for all errors found in a trial except for two groups of errors. The first kind, structural error, is not involved in this case. The second kind involves rules such as *Brady* v. *Maryland* where harmfulness is an element of the claim. For such rules, any event that is harmless is not error at all. *Chambers* v. *Mississippi* is arguably such a rule, in which case deciding the harmless error question would necessarily require redeciding the merits.

If a separate harmless error step is needed, *Brecht* is the correct standard for all claims on federal habeas corpus. *Brecht* is based primarily on the need to limit collateral attacks on final judgments to cases where genuine harm is a substantial possibility. *Brecht* is not a rule of deference, unlike 28 U. S. C. § 2254(d). The statement in the opinion about redeciding an issue already decided by the state court is a makeweight argument. It is not the primary rationale, and it does not limit the scope of the rule.

ARGUMENT

Kotteakos is the standard for all collateral attacks on criminal judgments where harmless error of the trial type is at issue.

A. Cases Appropriate for Harmless Error Analysis.

The first question to ask when a harmless error issue arises is whether the error in question is one for which harmless error analysis is appropriate and necessary. There are two main groups of errors for which it is not. They might be called the "error is never harmless" group and the "harmless is never error" group. *Brecht* v. *Abrahamson*, 507 U. S. 619, 638 (1993), acknowledged that its rule does not apply to the first group by limiting its statement of the rule to "error of the trial type." Structural errors, such as denial of counsel, are excluded from harmless error analysis. See *id*., at 629-630.

In the second group, harmless error analysis is superfluous because "harmfulness" is built into the definition of the rule. The rule of *Brady* v. *Maryland*, 373 U. S. 83 (1963), exemplifies this group. Under *United States* v. *Bagley*, 473 U. S. 667 (1985), the prosecution's *Brady* duty to disclose exculpatory information is limited to information with a reasonable probability of changing the outcome. See *Kyles* v. *Whitley*, 514 U. S. 419, 434 (1995). Given that the habeas petitioner must clear a hurdle higher than *Brecht* as an element of his claim of error, there is simply no such thing as a harmless *Brady/Bagley* error. See *id.*, at 436. Conversely, any nondisclosure that would be harmless under *Brecht* is *per se* not constitutional error under *Bagley*.[2]

A good argument can be made that the rule of *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973), falls into the same

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2. We say "constitutional error" because a failure to disclose information that does not reach the *Bagley* threshold of materiality may be error under a state discovery rule. However, federal habeas does not lie for errors of state law. See *Estelle* v. *McGuire*, 502 U. S. 62, 67 (1991).

category as *Brady/Bagley*. "*Chambers* . . . does not stand for the proposition that the defendant is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence." *United States* v. *Scheffer*, 523 U. S. 303, 316 (1998). "The exclusions of evidence that we declared unconstitutional in [the *Chambers* line of] cases significantly undermined the fundamental elements of the defendant's defense." *Id.*, at 315. Where that is not the case, there is no constitutional error. See *id.*, at 317.

Petitioner argues that the Ninth Circuit's finding of *Chambers* error[3] is inconsistent with its finding that the error is harmless under *Brecht*. See Brief for Petitioner 33. There is force in this argument, but the inconsistency of two holdings only tells us that one must be wrong, not which one. Petitioner's argument in Part II of his brief that the error was not harmless under *Brecht* necessarily asks the Court to redecide whether there was error at all under *Chambers* and *Scheffer*. Even though the state did not cross-petition, the existence of error in this case is fairly included in the question petitioner has posed. See Supreme Court Rule 14.1(a). If there is no error, then the question of the harmless error standard is moot.

B. Harmless Error and Collateral Attacks.

If this case is deemed to be an appropriate vehicle for deciding the harmless error standard, then the question is simply whether *Brecht* meant what it said.

> "For the foregoing reasons, then, we hold that the *Kotteakos* harmless-error standard applies in determining

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3. Despite the fact that this is an Antiterrorism and Effective Death Penalty Act of 1996 case, the Ninth Circuit cited its own decision in *Chia* v. *Cambra*, 360 F. 3d 997 (CA9 2004), rather than *Chambers*, the clearly established Supreme Court precedent that actually matters for the purpose of 28 U. S. C. § 2254(d)(1). See J. A. 212. However, *Chia* is a *Chambers* case, 360 F. 3d, at 999, and the citation to *Chia* can reasonably be construed to indicate a finding of *Chambers* error in this case.

whether habeas relief must be granted because of constitutional error of the trial type.[9]

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[9]Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict. [Citation.] We, of course, are not presented with such a situation here." *Brecht*, 507 U. S., at 638.

Brecht's own statement of its rule is so straightforward that it is surprising that there is any doubt about it. The standard of *Kotteakos* v. *United States*, 328 U. S. 750 (1946), applies whenever a harmless error question arises on habeas corpus. The only possible exception noted is for deliberate and especially egregious errors, an issue not presented in this case, as it was not in *Brecht*. This is not a rule of deference. Nothing in the statement of the rule depends on what happened in state court. Like the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), it is a limitation on the extraordinary remedy of collateral attack on a final conviction, see *Brecht*, 507 U. S., at 633-634, which is fundamentally different from a rule of deference. Cf. *Wright* v. *West*, 505 U. S. 277, 308 (1992) (Kennedy, J., concurring in the judgment). After *Wright*, Congress did enact a rule of deference, see *Williams* v. *Taylor*, 529 U. S. 362, 410-411 (2000) (discussing 28 U. S. C. § 2254(d) in light of *Wright*), but this new limitation is in addition to, not in substitution of, the pre-existing case law limitations. See *Horn* v. *Banks*, 536 U. S. 266, 272 (2002) (*per curiam*) (*Teague* not supplanted by AEPDA).

The argument that *Brecht* does not mean what it says is based on *one* of the many reasons given by the opinion for the adoption of its rule. The Eighth Circuit reached this conclusion three months after *Brecht* was decided in a stunningly

conclusory, superficial opinion, devoting only two paragraphs to the question. See *Orndorff* v. *Lockhart*, 998 F. 2d 1426, 1430 (CA8 1993). This logic has been overwhelmingly rejected by other federal courts. See *Bains* v. *Cambra*, 204 F. 3d 964, 976-977, and n. 8 (CA9 2000) (collecting cases); *Herrera* v. *Lemaster*, 301 F. 3d 1192, 1199-1200 (CA10 2002) (en banc).

It is true, of course, that the *Brecht* Court referred to the number of courts that had evaluated the harmfulness of the error in that case, and it expressed confidence in the ability of the state courts to do the *Chapman* analysis correctly. See 507 U. S., at 636. However, this is not by any means the sole or even primary reason for the adoption of the *Kotteakos* standard. The primary reason is the importance of finality and the drastic nature of a collateral attack on a final conviction. The Court noted the secondary and limited role of habeas proceedings, see *id*., at 633, and the fact that it " 'is designed to guard against extreme malfunctions,' " *id.*, at 634 (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in judgment)), with the result that many errors that would justify reversal on appeal do not justify collateral attack on a final conviction. For nonconstitutional errors, only a "fundamental defect" warrants collateral relief, but no such limitation applies to appeal. See *id.*, at 634, n. 8. The Court made analogy to the rule of *Teague*, which does not depend on application of the proper rule by the state court. See *id*., at 634. It also referred to the rule of *Stone* v. *Powell*, 428 U. S. 465 (1976), which requires only an opportunity for full and fair litigation in the state court, not necessarily a correct or even reasonable decision or application of any particular standard. See *Brecht*, *supra*, at 635. Finally, the Court noted the intrusion on state authority, citing procedural default cases, see *ibid*., an intrusion which is just as great whether the state court held the error harmless or held there was no error.

The fact that the state court had previously analyzed the error for harmlessness under *Chapman* in the *Brecht* case was

a minor, makeweight argument. It was not the primary reason for the decision in that case, and the Court did not include it as a limitation in its statement of the rule. The question of whether an exception can be carved out of a clearly stated rule in this way is effectively asking whether courts and litigants can depend on the words of this Court meaning what they say, whether "regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles." *Brown* v. *Allen*, 344 U. S. 443, 535 (1953) (Jackson, J., concurring in judgment).

The plain meaning of *Brecht* is reflected in the actual practice in this Court. In numerous habeas cases, both opinions of the Court and opinions of individual Justices have applied the *Brecht* standard without regard to whether a *Chapman* analysis was performed in state court. While assumptions routinely made are not binding, they are relevant. See *Lopez* v. *Monterey County*, 525 U. S. 266, 281 (1999).

O'Neal v. *McAninch*, 513 U. S. 432 (1995), is the first major discussion of *Brecht*. That case involved a claim of instructional error. See *id*., at 435. The Court proceeded to explain the proper application of *Brecht* without ever asking if there had been a *Chapman* analysis in the state court. See *id*., at 438-444. In fact, there had not. See *State* v. *O'Neal*, No. 44551, 1985 Ohio App. LEXIS 6819, *13-*14 (July 25, 1985) (instructions were not erroneous). In *Tuggle* v. *Netherland*, 516 U. S. 10, 14 (1995), neither the state nor the federal court had conducted any harmless error analysis, and this Court remanded for that purpose. Justice Scalia's concurring opinion noted that *Brecht* was the correct standard. See *id*., at 15.

In *Kyles* v. *Whitley*, *supra*, the state court had not applied *Chapman*. See Joint Appendix in *Kyles* v. *Whitley*, No. 93-7927, pp. 31a *et seq.* *Brecht* was nonetheless the applicable standard, although unnecessary in the particular case. See 514 U. S., at 435.

In *Calderon* v. *Coleman*, 525 U. S. 141, 143 (1998) (*per curiam*), the state court had found error under the State Constitution but not the Federal Constitution and had therefore applied the state harmless error rule. "The State . . . contend-[ed] . . . that the [federal] Court of Appeals erred by failing to apply the harmless-error analysis of *Brecht*," and this Court agreed. *Id.*, at 145. The Court reiterated that the basis of *Brecht* was the balancing of the need for finality against the need to correct actual wrongs. See *id.*, at 145-146.

> "The State is not to be put to this arduous task [of retrial or resentencing] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error. *Brecht*, *supra*, at 637. As a consequence, once the Court of Appeals determined that the giving of the Briggs instruction was constitutional error, it was bound to apply the harmless-error analysis mandated by *Brecht*." *Id.*, at 146.

Conspicuously absent from the *Calderon* Court's reasoning is any reference to the state court's harmless error analysis, which had not been done under the *Chapman* standard. Yet, the status of *Brecht* as the correct standard was so obvious that neither the dissent nor the habeas petitioner challenged it. See *id.*, at 148 (Stevens, J., dissenting).

In *Penry* v. *Johnson*, 532 U. S. 782, 795 (2001), the Court held that the state court's rejection of Penry's Fifth Amendment claim on the merits was reasonable within the meaning of 28 U. S. C. § 2254(d) and therefore the claim could not be a basis for habeas relief. The Court went on to hold in the alternative that if there was error it was harmless under *Brecht*. See *Penry*, *supra*, at 795. Similarly, in *Brown* v. *Payton*, 544 U. S. 133, 139, 147 (2005), this Court held that the state court's rejection of the claim on the merits was reasonable. The dissent disagreed but cited *Brecht* as the standard for harmless error. See *id*., at 166 (Souter, J., dissenting).

Brecht is ultimately about the " 'secondary and limited' " role of federal habeas corpus in reviewing state criminal convictions. It is part of the renewed confidence in state appellate courts that this Court has expressed since *Stone* v. *Powell*, 428 U. S., at 493, n. 35, and that Congress endorsed in enacting Antiterrorism and Effective Death Penalty Act of 1996. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 953, and n. 60 (1998). Clear constitutional errors lying at the heart of constitutional protections will be recognized on direct appeal and analyzed for harmlessness under *Chapman*. In all of the cases noted above where the state court held there was no error, the defendant presented to the state court a claim on the ragged edge of constitutional criminal procedure. It was debatable whether any violation of the Constitution had occurred at all. Such claims do not make a compelling case for review under the extra-stringent standard of *Chapman*. Properly applied, the standard of *Brecht/Kotteakos* is stringent enough. See *Brecht*, 507 U. S., at 640-641 (Stevens, J., concurring); *O'Neal*, 513 U. S., at 437-438.[4]

CONCLUSION

To the extent it held that *Brecht* v. *Abrahamson* was the correct standard to apply, the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

February, 2007

Respectfully submitted,

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4. *Amicus* CJLF takes no position on the application of *Brecht* to the particular facts of this case.