SUPREME COURT OF THE UNITED STATES

No. 91–7358

TODD A. BRECHT, PETITIONER *v.* GORDON A. ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[April 21, 1993]

JUSTICE O'CONNOR, dissenting.

I have no dispute with the Court's observation that "collateral review is different from direct review." *Ante*, at 12. Just as the federal courts may decline to adjudicate certain issues of federal law on habeas because of prudential concerns, see *Withrow* v. *Williams*, 5–– U. S. ___, ___ (1993) (slip op., at 4); *id.*, at ___ (O'CONNOR, J., concurring in part and dissenting in part) (slip op., at 3–4), so too may they resolve specific claims on habeas using different and more lenient standards than those applicable on direct review, see, *e.g.*, *Teague* v. *Lane*, 489 U. S. 288, 299–310 (1989) (habeas claims adjudicated under the law prevailing at time conviction became final and not on the basis of intervening changes of law). But decisions concerning the Great Writ "warrant restraint," *Withrow*, 5–– U. S., at ___, (O'CONNOR, J., concurring in part and dissenting in part) (slip op., at 4), for we ought not take lightly alteration of that "`fundamental safeguard against unlawful custody,'" *id.*, at ___ (slip op., at 2), (quoting *Fay* v. *Noia*, 372 U. S. 391, 449 (1963) (Harlan, J., dissenting)).

In my view, restraint should control our decision today. The issue before us is not whether we should remove from the cognizance of the federal courts on habeas a discrete prophylactic rule unrelated to the truthfinding function of trial, as was the case in *Stone* v. *Powell*, 428 U. S. 465, (1976), and more recently in *Withrow* v. *Williams, supra*. Rather, we are asked to alter a standard that not only finds application in

virtually every case of error but that also may be critical to our faith in the reliability of the criminal process. Because I am not convinced that the principles governing the exercise of our habeas powers—federalism, finality, and fairness—counsel against applying *Chapman*'s harmless-error standard on collateral review, I would adhere to our former practice of applying it to cases on habeas and direct review alike. See *ante*, at 9. I therefore respectfully dissent.

The Court begins its analysis with the nature of the constitutional violation asserted, *ante*, at 6–9, and appropriately so. We long have recognized that the exercise of the federal courts' habeas powers is governed by equitable principles. *Fay* v. *Noia, supra*, at 438; *Withrow*, *supra*, at ___ (O'CONNOR, J., concurring in part and dissenting in part) (slip op., at 3–4). And the nature of the right at issue is an important equitable consideration. When a prisoner asserts the violation of a core constitutional privilege critical to the reliability of the criminal process, he has a strong claim that fairness favors review; but if the infringement concerns only a prophylactic rule, divorced from the criminal trial's truthfinding function, the prisoner's claim to the equities rests on far shakier ground. Thus, in *Withrow* v. *Williams*, this Court declined to bar relitigation of *Miranda* claims on habeas because *Miranda* is connected to the Fifth Amendment and the Fifth Amendment, in turn, serves the interests of reliability. *Withrow*, *supra*, at ___ (slip op., at 10–11). I dissented because I believe that *Miranda* is a prophylactic rule that actually impedes the truthseeking function of criminal trials. 5–– U. S., at 4, 6–12. See also *Stone* v. *Powell*, 428 U. S. 465, 486, 490 (1976) (precluding review of exclusionary rule violations in part because the rule is judicially fashioned and interferes with the truthfinding function of trial).

Petitioner in this case alleged a violation of *Doyle* v. *Ohio*, 426 U. S. 610 (1976), an error the Court accurately characterizes as constitutional trial error. *Ante*, at 8–9. But the Court's holding today, it turns out, has nothing to do with *Doyle* error at all. Instead, the Court announces that the harmless-error standard of *Chapman* v. *California*, 386 U. S. 18, 24 (1967), which requires the prosecution to prove constitutional error harmless beyond a reasonable doubt, no longer applies to *any* trial error asserted on habeas, whether it is a *Doyle* error or not. In *Chapman*'s place, the

Court substitutes the less rigorous standard of *Kotteakos* v. *United States*, 328 U. S. 750, 776 (1946). *Ante*, at 17.

A repudiation of the application of *Chapman* to *all* trial errors asserted on habeas should be justified, if at all, based on the nature of the *Chapman* rule itself. Yet, as JUSTICE WHITE observes, *ante*, at 2 (dissenting opinion), one searches the majority opinion in vain for a discussion of the basis for *Chapman*'s harmless-error standard. We are left to speculate whether *Chapman* is the product of constitutional command, or a judicial construct that may overprotect constitutional rights. More important, the majority entirely fails to discuss the *effect* of the *Chapman* rule. If there is a unifying theme to this Court's habeas jurisprudence, it is that the ultimate equity on the prisoner's side—the possibility that an error may have caused the conviction of an actually innocent person—is sufficient by itself to permit plenary review of the prisoner's federal claim. *Withrow, supra,* at ___ (slip op., at 4) (O'CONNOR, J., concurring in part and dissenting in part) (citing cases). Whatever the source of the *Chapman* standard, the equities may favor its application on habeas if it substantially promotes the central goal of the criminal justice system—accurate determinations of guilt and innocence. See *Withrow*, *supra*, at ___–___ (slip op., at 9–11) (reasoning that, although *Miranda* may be a prophylactic rule, the fact that it is not "divorced" from the truthfinding function of trial weighs in favor of its application on habeas); *Teague*, 489 U. S., at 313 (if absence of procedure seriously diminishes likelihood of accurate conviction, new rule requiring such procedure may be retroactively applied on habeas).

In my view, the harmless-error standard often will be inextricably intertwined with the interest of reliability. By now it goes without saying that harmless-error review is of almost universal

application; there are few errors that may not be forgiven as harmless. *Arizona* v. *Fulminante*, 499 U. S. ___, ___ (1991) (slip op., at 5–6). For example, we have recognized that a defendant's right to confront the witnesses against him is central to the truthfinding function of the criminal trial. See, *e.g.*, *Maryland* v. *Craig*, 497 U. S. 836, 845–847 (1990); *Ohio* v. *Roberts*, 448 U. S. 56, 65 (1980); *Mattox* v. *United States*, 156 U. S. 237, 242–243 (1895); see also 3 W. Blackstone, Commentaries 373–374 (1768). But Confrontation Clause violations are subject to harmless-error review nonetheless. See *Coy* v. *Iowa*, 487 U. S. 1012, 1021–1022 (1988). When such an error is detected, the harmless-error standard is crucial to our faith in the accuracy of the outcome: The absence of full adversary testing, for example, cannot help but erode our confidence in a verdict; a jury easily may be misled by such an omission. Proof of harmlessness beyond a reasonable doubt, however, sufficiently restores confidence in the verdict's reliability that the conviction may stand despite the potentially accuracy impairing error. Such proof demonstrates that, even though the error had the *potential* to induce the jury to err, in fact there is no reasonable possibility that it did. Rather, we are confident beyond a reasonable doubt that the error had no influence on the jury's judgment at all. Cf. *In re Winship*, 397 U. S. 358, 363–364 (1970) (proof of guilt beyond a reasonable doubt indispensable to community's respect and confidence in criminal process).

At least where errors bearing on accuracy are at issue, I am not persuaded that the *Kotteakos* standard offers an adequate assurance of reliability. Under the Court's holding today, federal courts on habeas are barred from offering relief unless the error "`had substantial and injurious effect or influence in determining the jury's verdict.'" *Ante*, at 16 (quoting *Kotteakos*, *supra*, at 776). By tolerating a greater

probability that an error with the potential to undermine verdict accuracy was harmful, the Court increases the likelihood that a conviction will be preserved despite an error that actually affected the reliability of the trial. Of course, the Constitution does not require that every conceivable precaution in favor of reliability be taken; and certainly 28 U. S. C. §2254 does not impose such an obligation on its own. Indeed, I agree with the Court that habeas relief under §2254 is reserved for those prisoners "whom society has grievously wronged." *Ante*, at 16. But prisoners who may have been convicted mistakenly because of constitutional trial error *have* suffered a grievous wrong and ought not be required to bear the greater risk of uncertainty the Court now imposes upon them. Instead, where constitutional error may have affected the accuracy of the verdict, on habeas we should insist on such proof as will restore our faith in the verdict's accuracy to a reasonable certainty. Adherence to the standard enunciated in *Chapman* requires no more; and the equities require no less.

To be sure, the harmless-error inquiry will not always bear on reliability. If the trial error being reviewed for harmlessness is not itself related to the interest of accuracy, neither is the harmless-error standard. Accordingly, in theory it would be neither illogical nor grudging to reserve *Chapman* for errors related to the accuracy of the verdict, applying *Kotteakos*' more lenient rule whenever the error is of a type that does not impair confidence in the trial's result. But the Court draws no such distinction. On the contrary, it holds *Kotteakos* applicable to *all* trial errors, whether related to reliability or not. The Court does offer a glimmer of hope by reserving in a footnote the possibility of an exception: *Chapman* may remain applicable, it suggests, in some "unusual" cases. But the Court's description of those cases suggests that its potential exception would be both exceedingly narrow and unrelated to reliability

concerns. See *ante*, at 17, n. 9 (reserving the "possibility that in an unusual case, a deliberate and especially egregious error of the trial type" or error "combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even it did not substantially influence the jury's verdict").

But even if the Court's holding were limited to errors divorced from reliability concerns, the decision nevertheless would be unwise from the standpoint of judicial administration. Like JUSTICE WHITE, I do not believe we should turn our habeas jurisprudence into a "patchwork" of rules and exceptions without strong justification. *Ante*, at 6 (dissenting opinion). The interest of efficiency, always relevant to the scope of habeas relief, see, *e.g.*, *Stone*, 428 U. S., at 491, n. 31; *Withrow*, 5–– U. S., at ___–___ (slip op., at 11–13); *id.*, at ___–___ (O'CONNOR, J., dissenting) (slip op., at 12–17), favors simplification of legal inquiries, not their multiplication. A rule requiring the courts to distinguish between errors that affect accuracy and those that do not, however, would open up a whole new frontier for litigation and decision. In each case, the litigants would brief and federal judges would be required to decide whether the particular error asserted relates to accuracy. Given the number of constitutional rules we have recognized and the virtually limitless ways in which they might be transgressed, I cannot imagine that the benefits brought by such litigation could outweigh the costs it would impose.

In fact, even on its own terms the Court's decision buys the federal courts a lot of trouble. From here on out, prisoners undoubtedly will litigate—and judges will be forced to decide—whether each error somehow might be wedged into the narrow potential exception the Court mentions in a footnote today. Moreover, since the Court only mentions the

possibility of an exception, all concerned must also address whether the exception exists at all. I see little justification for imposing these novel and potentially difficult questions on our already overburdened justice system.

Nor does the majority demonstrate that the *Kotteakos* standard will ease the burden of conducting harmless-error review in those cases to which it does apply. Indeed, as JUSTICE STEVENS demonstrates in his concurrence, *Kotteakos* is unlikely to lighten the load of the federal judiciary at all. The courts still must review the entire record in search of conceivable ways the error may have influenced the jury; they still must conduct their review *de novo*; and they still must decide whether they have sufficient confidence that the verdict would have remained unchanged even if the error had not occurred. See *ante*, at 3–4. The only thing the Court alters today is the degree of confidence that suffices. But *Kotteakos*' threshold is no more precise than *Chapman*'s; each requires an exercise of judicial judgment that cannot be captured by the naked words of verbal formulae. *Kotteakos*, it is true, is somewhat more lenient; it will permit more errors to pass uncorrected. But that simply reduces the number of cases in which relief will be granted. It does not decrease the burden of identifying those cases that warrant relief.

Finally, the majority considers the costs of habeas review generally. *Ante*, at 16. Once again, I agree that those costs—the effect on finality, the infringement on state sovereignty, and the social cost of requiring retrial, sometimes years after trial and at a time when a new trial has become difficult or impossible—are appropriate considerations. See *Withrow*, 5–– U. S., at ___–___ (O'CONNOR, J., concurring in part and dissenting in part) (slip op., at 8–9); see also *id.*, at ___, ___ (slip op., at 5, 13); *Stone*, *supra*, at 489–491. But the Court does not explain how those

costs set the harmless-error inquiry apart from any other question presented on habeas; such costs are inevitable *whenever* relief is awarded. Unless we are to accept the proposition that denying relief whenever possible is an unalloyed good, the costs the Court identifies cannot by themselves justify the lowering of standards announced today. The majority, of course, does not contend otherwise; instead, it adheres to our traditional approach of distinguishing between those claims that are worthy of habeas relief and those that, for prudential and equitable reasons, are not. Nonetheless, it seems to me that the Court's decision cuts too broadly and deeply to comport with the equitable and remedial nature of the habeas writ; it is neither justified nor justifiable from the standpoint of fairness or judicial efficiency. Because I would remand to the Court of Appeals for application of *Chapman*'s more demanding harmless-error standard, I respectfully dissent.