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# NOT-SO-HARMLESS ERROR: A HIGHER STANDARD FOR MITIGATION ERRORS ON CAPITAL HABEAS REVIEW

Ryan C. Thomas

*Abstract:* This Comment looks at how federal courts handle mitigation errors during the penalty phase of capital punishment cases on habeas corpus review; it argues that the United States Supreme Court should expressly adopt the *Chapman* “harmless beyond a reasonable doubt” standard rather than the *Brecht* “substantial and injurious effect” standard. The heightened stakes of capital sentencing dictate that a higher standard of review should apply. The Court has yet to rule on this matter, and the United States Courts of Appeals cannot agree upon which standard to apply.

Currently, a lopsided circuit split exists regarding whether harmless error review applies to mitigation errors, and if so, what standard should apply. While the Court has yet to decide this issue, it has dealt with harmless error review in non-capital cases. The *Chapman* harmless error standard, promulgated by the Court in 1967, requires that a state must prove that any constitutional errors were harmless beyond a reasonable doubt. In 1993, the *Brecht* Court found the *Chapman* standard too onerous for collateral attacks and determined that a lower standard was necessary: during collateral attacks, the defendant must show that the error had a substantial and injurious effect upon determining the jury’s verdict. *Chapman* placed the burden upon the State; *Brecht* placed the burden upon the defendant.

This Comment argues that the higher *Chapman* standard should apply to collateral attacks in capital habeas cases because of the possibility of a total deprivation of one’s life and liberty. The Court has before determined that “death is different,” and in keeping with that sentiment, the Court should adopt an error standard that similarly acknowledges the difference between life and death.

## INTRODUCTION

This Comment addresses which harmless error standard should be used when analyzing mitigation errors on habeas corpus review. Habeas corpus review occurs when a defendant exhausts his or her state appeals and subsequently seeks the ancient writ of habeas corpus<sup>1</sup> as codified in 28 U.S.C. § 2254.<sup>2</sup>

This Comment examines cases where the defendant claims that the state trial court violated his or her constitutional rights during sentencing

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1. BLACK’S LAW DICTIONARY 778 (9th ed. 2009) (“[Habeas corpus is a] writ employed to bring a person before a court, most frequently to ensure that the person’s imprisonment or detention is not illegal.”). For an excellent overview of this complicated terrain, see generally *Habeas Relief for State Prisoners*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 872 (2008).

2. 28 U.S.C. § 2254 (2012).

by committing mitigation error. During the sentencing phase of a capital punishment trial the defendant may present mitigation evidence—any relevant information regarding the defendant’s person and history—that may cause a juror to deliver a sentence less than death.<sup>3</sup> Mitigation errors often take one of two forms: *Lockett* error or *Penry* error. *Lockett* error occurs when the court denies the defendant the chance to present any relevant evidence that may cause a jury to deliver a sentence less than death.<sup>4</sup> Mitigation may include evidence of a difficult family history, mental disturbance, healthy adjustment to life in prison, emotional disturbance, or false imprisonment.<sup>5</sup> In fact, the United States Supreme Court has said that virtually no limits are placed upon what evidence a capital defendant may offer to mitigate his or her sentence.<sup>6</sup> *Penry* error occurs when the jury is precluded from giving full meaning and effect to the defendant’s evidence during deliberations and in making their sentence, usually through poorly written jury instructions.<sup>7</sup> The wording of these jury questions may preclude full consideration of mitigation evidence, resulting in *Penry* error.<sup>8</sup> Throughout this Comment, the term “mitigation error” will be used in reference to errors that preclude core elements of mitigation evidence,<sup>9</sup> namely *Lockett* error and *Penry* error.<sup>10</sup>

In order to logically and effectively show why the United States Supreme Court should adopt the “harmless beyond a reasonable doubt” standard articulated in *Chapman v. California*,<sup>11</sup> this Comment proceeds in six parts. Part I discusses the general background of capital punishment cases. Part II looks at the foundational capital sentencing mitigation cases. Part III examines three key ingredients in capital habeas harmless error review. Part IV surveys the circuit split. Part V argues that the Court should reject the *Brecht* standard and adopt the

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3. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (“[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” (emphasis in original)).

4. *See id.*

5. *See infra* Part I.B.1.

6. *Lockett*, 438 U.S. at 604; *accord Payne v. Tennessee*, 501 U.S. 808, 822 (1991).

7. *See infra* Part I.B.2.

8. *See Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 328 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

9. *See infra* Part I.B.

10. *See infra* Part II.

11. 386 U.S. 18, 24 (1967).

*Chapman* standard for habeas review of mitigation errors. Finally, part VI considers the impact of mitigation error upon jurors.

## I. HOW DIFFERENT IS DEATH? AN OVERVIEW OF A CAPITAL PUNISHMENT CASE

The 1970s was a tumultuous era for this nation's capital punishment jurisprudence: 1972 saw a de facto moratorium on the death penalty initiated by the Court in *Furman v. Georgia*,<sup>12</sup> followed by its resuscitation a short four years later in *Gregg v. Georgia*.<sup>13</sup> Only two years after *Gregg*, the Court decided another landmark case that protected a capital defendant's right to present mitigation evidence: *Lockett v. Ohio*.<sup>14</sup> In *Lockett* the Court offered a surprising—and prophetic—slover of self-deprecation: “The signals from this Court have not . . . always been easy to decipher. The States now deserve the clearest guidance that the Court can provide; we have an obligation to reconcile previously differing views in order to provide that guidance.”<sup>15</sup> Ironically, Chief Justice Burger wrote these words in a plurality opinion that was followed by four separate opinions.<sup>16</sup> Unfortunately, the Court's capital punishment jurisprudence remains foggy and complex, providing fodder for circuit splits and scholarship.

When the United States Supreme Court discussed the idea that death is different in *Furman v. Georgia*,<sup>17</sup> it began a conversation in United States jurisprudence that philosophers had long been debating.<sup>18</sup> The

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12. 408 U.S. 238 (1972) (per curiam) (holding that the death penalty statutes at issue violated the Eighth and Fourteenth Amendments).

13. 428 U.S. 153, 169 (1976) (holding that the death penalty does not violate the constitution).

14. 438 U.S. 586 (1978) (plurality opinion).

15. *Id.* at 602.

16. *See id.* Justices Blackmun and Marshall each filed separate, concurring opinions. *See id.* at 613 (Blackmun, J., concurring); *id.* at 619 (Marshall, J., concurring). Justices Rehnquist and White each filed a separate opinion, concurring in part and dissenting in part. *See id.* at 628 (Rehnquist, J., concurring in part and dissenting in part); *id.* at 621 (White, J., concurring in part and dissenting in part).

17. Kevin Michael Miller, Note, *Romano v. Oklahoma: The Requirement of Jury's Sense of Responsibility and Reliability in Capital Sentencing*, 44 CATH. U. L. REV. 1307, 1319–20 (1995) (noting that *Furman v. Georgia* began the “death is different” dialogue); *see also Lockett*, 438 U.S. at 605 (“[T]he imposition of death by public authority is so profoundly different from all other penalties . . .”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (“The penalty of death is qualitatively different from a sentence of imprisonment, however long.”).

18. *See generally* ALBERT CAMUS, RESISTANCE, REBELLION, AND DEATH 173–234 (Justin O'Brien trans., 1960) (1957) (critiquing the purported justifications of capital punishment); *Exodus* 20:13 (“You shall not murder.”); IMMANUEL KANT, THE PHILOSOPHY OF LAW 194–204 (photo. reprint, 1965) (1797) (discussing the necessity of the death penalty); THE QUR'AN 6:151 (“[D]o not

moral, intellectual, and legal battle continues in the nation's discourse—a quick Internet news search reveals hundreds of articles discussing various aspects of the complex topic.<sup>19</sup> Questions surrounding the cost and efficacy of capital punishment abound.<sup>20</sup> Death penalty cases play by both substantively and procedurally different rules than non-capital cases. The procedural differences are readily apparent in two significant ways: the qualification of the jury<sup>21</sup> and the bifurcation of the trial into two phases.<sup>22</sup>

A. *The Procedural Posture of Capital Cases: Death Qualification and Trial Bifurcation*

In order to set the table for this discussion, a high-level overview of a capital trial is in order. Such an attempt at clarity is inherently plagued from the outset, however, because each state has a unique statutory scheme. This background, then, will provide only a 30,000-foot view of a landscape that could be mapped by the inch; it looks first at (1) the death qualification of a capital jury and (2) the bifurcation of capital cases.

1. *The Death Qualification of Juries: Removing Jurors at the Extremes*

In 1986, the United States Supreme Court gave states permission to qualify juries by removing jurors who categorically opposed the death

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take the life god has made sacred, except by right.”); Hugo Adam Bedau, *Bentham's Utilitarian Critique of the Death Penalty*, 74 J. CRIM. L. & CRIMINOLOGY 1033 (1983) (analyzing the development of Bentham's critique of capital punishment).

19. See generally Editorial, *End the Death Penalty*, SEATTLE TIMES, Feb. 16, 2014, at A14; *Ban the Death Penalty*, BLOOMBERGVIEW (Feb. 23, 2014, 9:11 PM), [www.bloombergview.com/articles/2014-02-23/ban-the-death-penalty](http://www.bloombergview.com/articles/2014-02-23/ban-the-death-penalty); *Death for the Mentally Disabled*, THE ECONOMIST (Mar. 4, 2014, 3:22 PM), [www.economist.com/blogs/democracyinamerica/2014/03/capitalpunishment](http://www.economist.com/blogs/democracyinamerica/2014/03/capitalpunishment); Tal Kopan, *'Ground Zero' for the Death Penalty*, POLITICO (Feb. 26, 2014, 6:12 AM), [www.politico.com/story/2014/02/death-penalty-missouri-103973.html](http://www.politico.com/story/2014/02/death-penalty-missouri-103973.html); Michael Lipka, *Support for Death Penalty Drops Among Americans*, PEW RES. CENTER (Feb. 12, 2014), [www.pewresearch.org/fact-tank/2014/02/12/support-for-death-penalty-drops-among-americans/](http://www.pewresearch.org/fact-tank/2014/02/12/support-for-death-penalty-drops-among-americans/).

20. See generally Justin F. Marceau & Hollis A. Whitson, *The Cost of Colorado's Death Penalty*, 3 UNIV. DENVER CRIM. L. REV. 145 (2013) (comparing the court cost of death penalty cases to non-death penalty cases for similar crimes, concluding that the high costs fails to yield measurable benefits).

21. See *Lockhart v. McCree*, 476 U.S. 162, 173 (1986) (noting that while death qualification possesses serious flaws, the Constitution does not prohibit states from death qualifying juries).

22. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (stating that in order to ensure that “the penalty of death not be imposed in an arbitrary or capricious manner,” capital trials should proceed in a bifurcated proceeding).

penalty.<sup>23</sup> In a typical jury trial, a large number of potential jurors are called to the courthouse.<sup>24</sup> While each state's process varies in detail, the basic methodology is the same: counsel for each party questions potential jurors and exercises its peremptory challenges<sup>25</sup> and challenges for cause.<sup>26</sup> While states may increase the number of peremptory challenges available during capital cases,<sup>27</sup> the process differs from noncapital cases in one significant way: each juror may be qualified, meaning that they must be willing to consider sentencing the defendant to death.<sup>28</sup> Let that statement soak in for a moment. Seated jurors certainly will be free to make whatever choice they deem most fair after the sentencing phase; but at voir dire, all jurors who emphatically oppose the death penalty are removed, as are those who categorically think that the death penalty *should* be imposed.<sup>29</sup> This selection process is aimed at removing the jurors at the extremes, hopefully creating a jury that will give meaningful effect to all of the aggravating and mitigating circumstances presented during the trial. However, the process raises some questions surrounding whether the defendant is actually tried by a jury of his or her peers; such questions exceed the scope of this Comment.

## 2. *A Two-Step Dance: The Bifurcation of the Capital Trial*

The second major difference in death penalty cases is the bifurcated structure. Death penalty cases take the form of two distinct trials.<sup>30</sup> In

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23. *Lockhart v. McCree*, 476 U.S. 162, 173 (1986) (noting that the Constitution allows the states to death qualify capital juries).

24. As an extreme example, the jury pool for the James Holmes trial following the 2012 Aurora, Colorado movie theater shooting started at 6,000. Trevor Hughes, *6,000 to be Called for Aurora Theater Shooting Jury Pool*, COLORADOAN.COM (Oct. 7, 2013), <http://www.coloradoan.com/article/20131007/NEWS01/310070027/6-000-called-Aurora-theater-shooting-jury-pool>.

25. BLACK'S LAW DICTIONARY 261–62 (9th ed. 2009) (defining peremptory challenge as “[o]ne of a party’s limited number of challenges that do not need to be supported by a reason”).

26. *Id.* (defining challenge for cause as “[a] party’s challenge supported by a specified reason, such as bias or prejudice, that would disqualify that potential juror”). For a statutory example, see WASH. REV. CODE § 10.95.050 (2013).

27. See DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION 230–32 (2006).

28. *Lockhart*, 476 U.S. at 173 (1986).

29. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (“[A] capital defendant may challenge for cause any prospective juror [that] will automatically vote for the death penalty in every case . . . .”); see generally *Lockhart*, 476 U.S. 162 (1986) (upholding Arkansas’s statutory scheme that allowed the prosecution to remove jurors “who stated that they could not under any circumstance vote for the imposition of the death penalty”).

30. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (holding that capital trials should proceed in a

part one—the guilt phase—the elements of the crime must be proven beyond a reasonable doubt.<sup>31</sup> Death penalty cases and non-death penalty cases are substantively the same during the guilt phase. If guilt is established, the death penalty trial moves to part two. In part two—the sentencing, or penalty, phase—the prosecution attempts to convince the jury that the defendant should receive the death penalty due to the aggravating factors in the case, while the defense will present mitigating evidence in order to convince the jury that the defendant deserves a sentence less than death.<sup>32</sup> This second phase distinguishes capital cases from noncapital cases.

Non-capital criminal cases address the sentence in a separate hearing once guilt has been established; these sentencing hearings must occur “without unnecessary delay.”<sup>33</sup> In federal (and some state) cases, series of reports and memoranda will be written and submitted to the court.<sup>34</sup> No witnesses will be called, and while it is possible to present new evidence, this is rarely done.<sup>35</sup>

If “death is different,” then death sentencing must also be different.<sup>36</sup> In the sentencing phase of capital cases—colloquially called the “death phase”<sup>37</sup>—the prosecution highlights the aggravating factors of the crime in an effort to convince the jury that the only reasonable

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bifurcated proceeding in order to ensure that the penalty of death is fairly imposed); *see, e.g.*, TEX. CODE. CRIM. PROC. ANN. art. 37.071, § 2(a)(1) (West 2013) (“If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment without parole.”).

31. *See In re Winship*, 397 U.S. 358, 364 (1970) (“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

32. For a collection of statutory schemes that the Court has both upheld and struck down, see James L. Buchwalter, Annotation, *Validity, Construction, and Application of Aggravating and Mitigating Provisions of Death Penalty Statutes—Supreme Court Cases*, 21 A.L.R. FED. 2d 1 (2007).

33. FED. R. CRIM. P. 32(b)(1).

34. FED. R. CRIM. P. 32(i); *see also* REV. CODE. WASH. § 9.94A.500 (2014).

35. FED. R. CRIM. P. 32(i)(2).

36. *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978) (plurality opinion) (“We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed. . . . [T]he imposition of death by public authority is so profoundly different from all other penalties. . . .”); *see also* Miller, *supra* note 17 at 1319–20 (noting that *Furman v. Georgia* began the “death is different” dialogue).

37. *See, e.g.*, *Laws v. Armontrout*, 863 F.2d 1377, 1390 (8th Cir. 1988) (quoting trial dialogue using “death phase”).

punishment for the defendant is death.<sup>38</sup> The defense will present a host of mitigating factors in order to convince the jury that the defendant deserves a punishment *less* than death.<sup>39</sup> This may include evidence of a troubled family history,<sup>40</sup> emotional disturbance,<sup>41</sup> wrongful incarceration,<sup>42</sup> photographs of family members,<sup>43</sup> or parental abandonment,<sup>44</sup> among other evidence.<sup>45</sup> While the defense has wide latitude to present mitigating evidence, the evidence must be relevant.<sup>46</sup> The United States Supreme Court sets a low bar for relevance:

[T]he meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context, and thus the general evidentiary standard—any tendency to make the existence of fact that is of consequence to the determination of the action more probable or less probable than it would be without evidence—applies.<sup>47</sup>

Thus, the defendant may present for mitigation any evidence relevant under that individual state's rules of evidence, or federally, under Federal Rule of Evidence 401.

Whereas non-capital cases function as a whole, capital cases are procedurally unique, both because the jury must be death qualified and because the trial is bifurcated into the guilt phase and the sentencing phase. Capital cases are also substantively different than noncapital

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38. See Sharon Turlington, *Completely Unguided Discretion: Admitting Non-Statutory Aggravating and Non-Statutory Mitigating Evidence in Capital Sentencing Trials*, 6 PIERCE L. REV. 469, 470 (2008) (noting the procedural safeguard of state statutory schemes listing aggravating factors that make a defendant eligible for the death penalty).

39. *Id.*

40. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (“Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation.”).

41. *Id.*

42. See *Dixon v. Houk*, 737 F.3d 1003, 1011 (6th Cir. 2013) (noting that wrongful incarceration is valid mitigation evidence).

43. See *State v. Conway*, 848 N.E.2d 810, 827–28 (Ohio 2006) (noting that photographs should be permitted as a part of the defendant's mitigation presentation).

44. See *Nelson v. Quarterman*, 472 F.3d 287, 306 (5th Cir. 2006) (noting that abandonment as a child constitutes valid mitigation evidence).

45. See Terry M. Lenamon, *Terry Lenamon's List of State Death Penalty Mitigation Statutes (Full Text)*, TERRY LENAMON ON THE DEATH PENALTY (May 10, 2010), <http://www.jdsupra.com/post/fileServer.aspx?fName=d61d8c7b-896b-4c1a-bd87-f86425206b45.pdf> (compiling the various state statutes defining mitigation evidence).

46. *Lockett v. Ohio*, 438 U.S. 586, 605 & n.12 (1978) (plurality opinion) (“Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of the offense.”).

47. *Tennard v. Dretke*, 542 U.S. 274, 284 (2004) (internal citations omitted).



cases because of the additional evidence of aggravating and mitigating factors presented during the sentencing phase of the trial.

### B. *The Capital Defendant's Right to Present Mitigating Evidence*

As the Court's capital punishment jurisprudence has grown, so has the concept of mitigation. Not long after *Gregg v. Georgia*,<sup>48</sup> in which the Court ended the de facto moratorium on capital punishment,<sup>49</sup> the Court recognized that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."<sup>50</sup> The Court then began developing its mitigation jurisprudence, and in so doing, required that the jury be permitted three elements of mitigation evidence: (1) the ability to hear the evidence, (2) the ability to give meaningful effect to the evidence, and (3) the ability to consider the individual characteristics of the defendant.

#### 1. *The Jury Must Be Able to Hear the Mitigation Evidence*

At a fundamental level, the sentencer must be given the opportunity to hear the defense's presentation of mitigation evidence.<sup>51</sup> This is the most apparent requirement of mitigation—it makes sense that the evidence must be *heard* in order to obtain any effect upon the jury's decision making. Thus, the judge cannot preclude the defendant from presenting mitigation evidence. In order to put logical restraints on the scope of the mitigating evidence, it must meet the low threshold for relevance.<sup>52</sup> The Court has deemed evidence "relevant" that shows healthy adjustment to prison,<sup>53</sup> evidence of a disturbed childhood,<sup>54</sup> emotional disturbance,<sup>55</sup> and wrongful incarceration,<sup>56</sup> to name a few.<sup>57</sup> In fact, the Court noted

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48. 428 U.S. 153 (1976).

49. *Id.* at 187 ("We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.").

50. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

51. *See Lockett*, 438 U.S. at 605.

52. *See Tennard v. Dretke*, 542 U.S. 274, 285 (2004).

53. *See Skipper v. South Carolina*, 476 US 1, 7 (1986).

54. *See Eddings v. Oklahoma*, 455 U.S. 104, 113–16 (1982).

55. *Id.*

56. *See Dixon v. Houk*, 737 F.3d 1003, 1011 (6th Cir. 2013).

the expansive possibilities of mitigating evidence when it said that “virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.”<sup>58</sup> This wide latitude provides the defense with nearly limitless opportunities to present relevant evidence that may lead the jury to believe that the defendant deserves a punishment less than death. The omission of such evidence is often called *Lockett* error.<sup>59</sup>

## 2. *The Jury Must Be Able to Give Meaningful Effect to the Mitigation Evidence*

Once the jury has heard the evidence, it must be able to give “meaningful effect” to the evidence.<sup>60</sup> In fact, the Court has said that “when a jury is not permitted to give meaningful effect or a reasoned moral response to a defendant’s mitigation evidence—because it is forbidden from doing so by statute or a judicial interpretation of a statute—the sentencing process is fatally flawed.”<sup>61</sup> The Court requires, then, that the jury not only *hear* the evidence, but that it is able to consider the evidence during sentencing. Accurate jury instructions are important to ensure that the “meaningful effect” element is met.<sup>62</sup> Flawed jury instructions can deny the jury the ability to give meaningful effect to mitigation evidence, and have provoked much litigation especially in the form of special issue questions.<sup>63</sup> This problem has plagued the Texas capital punishment statute, and will be discussed in depth in Part II.B. In some states, such as Texas, the jury will be presented with special issues in the jury instructions.<sup>64</sup> The Texas special

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57. See *supra* Part I.A.2.

58. *Payne v. Tennessee*, 501 U.S. 808, 822 (1991).

59. See, e.g., *Eddings*, 455 U.S. at 120 n.1 (1982) (referring to this type of mitigation error as *Lockett* error).

60. *Abul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007).

61. *Id.* (internal quotation marks omitted).

62. See *infra* Part II.B.

63. See *Smith v. Texas*, 550 U.S. 297, 316 (2007) (noting that the special issue questions in Texas’s capital punishment statute do not allow for adequate consideration of mitigation evidence); see also *Quarterman*, 550 U.S. at 253–54 (granting habeas relief because of a reasonable likelihood that the jury instructions prevented jurors from giving meaningful effect to mitigation evidence); *Penry I*, 492 U.S. 302, 328 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002) (invalidating flawed jury instructions prevent jurors from giving full consideration to mitigation evidence); *Mills v. Maryland*, 486 U.S. 367, 375 (1988) (invalidating Maryland’s capital punishment statute because it failed to allow jurors to properly consider mitigation evidence); *Bell v. Ohio*, 438 U.S. 637, 642 (1978) (holding that the Ohio death penalty statute failed to permit jurors to give meaningful effect to mitigation evidence).

64. *Smith*, 550 U.S. at 300 (“Under Texas law the jury verdict form provides special-issue

issues will pose a series of questions, and if the jury responds “yes” to each of the special issues, then the defendant must be sentenced to death.<sup>65</sup> In order to comport with *Lockett*, these special issues must be written so as to allow for the consideration of the mitigation evidence.<sup>66</sup> A failure to do so may violate the Eighth and Fourteenth Amendments<sup>67</sup> of the United States Constitution,<sup>68</sup> rendering the instructions unconstitutional; such violations are called *Penry* error,<sup>69</sup> which can be understood as a form of *Lockett* error.

*Mills v. Maryland*<sup>70</sup> provides a good example of such *Penry* error.<sup>71</sup> In *Mills*, the lower court gave jury instructions that dealt with both the aggravating and mitigating factors presented during the sentencing phase; jurors were instructed to fill out the jury form in order to return the verdict.<sup>72</sup> The instructions were confusing and the Court held that they deprived the jurors of giving the mitigation evidence meaningful effect.<sup>73</sup> In arriving at its decision, the Court said:

We conclude that there is a substantial probability that reasonable jurors, upon receiving the judge’s instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance. Under our cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk.<sup>74</sup>

The Court remanded the case for resentencing in compliance with its

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questions to guide the jury in determining whether the death penalty should be imposed.”).

65. *Id.* at 301.

66. *See Penry I*, 492 U.S. at 328.

67. U.S. CONST. amend. VIII (prohibition of cruel and unusual punishment); U.S. CONST. amend. XIV (equal protection of the laws).

68. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (“[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”).

69. *Penry I*, 492 U.S. at 328.

70. 486 U.S. 367 (1988).

71. *Id.* at 377–80.

72. *Id.* at 370.

73. *Id.* at 384.

74. *Id.*

opinion.<sup>75</sup> This case shows the importance of ensuring that the jury instructions provide a proper vehicle to give meaningful effect to the presented mitigation evidence.

3. *The Jury Must Give Individual Consideration to the Facts of the Case and Characteristics of the Defendant*

Sentencing schemes must take into account the unique facts of each case and each defendant.<sup>76</sup> This idea, known as individualization, was at the heart of the Court's de facto death penalty moratorium in *Furman v. Georgia*.<sup>77</sup> The Court's per curiam opinion in *Furman* held that capital punishment violates the Eighth Amendment.<sup>78</sup> While the *Furman* per curiam opinion was only one paragraph long, the concurrences and dissents rolled on for over one hundred pages.<sup>79</sup> Two Justices concluded that capital punishment always violates the Eighth Amendment;<sup>80</sup> three Justices were unwilling categorically find that capital punishment violates the Eighth Amendment, but held that discretionary sentencing violates the Eighth Amendment because discretionary sentencing statutes are "pregnant with discrimination."<sup>81</sup> The remaining four Justices dissented, arguing that capital punishment had always been constitutional and should remain a proper punishment for serious crimes.<sup>82</sup> *Furman* created confusion among states regarding how to properly sentence a defendant to death without running afoul of the Eighth Amendment.<sup>83</sup>

In *Gregg v. Georgia*<sup>84</sup> the Court revisited capital punishment's constitutionality and ended the de facto moratorium.<sup>85</sup> Soon thereafter,

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75. *Id.*

76. *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976).

77. 408 U.S. 238 (1972) (per curiam).

78. *Id.* at 238.

79. *See generally Furman*, 408 U.S. 238.

80. *Id.* at 305–06 (Brennan, J., concurring).

81. *Id.* at 257 (Douglas, J., concurring).

82. *Id.* at 375–405 (Burger, J., dissenting); *id.* at 407 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting).

83. *See Lockett v. Ohio*, 438 U.S. 586, 598–600 (1978) (plurality opinion) (“[T]he variety of opinions supporting the judgment in *Furman* engendered confusion . . . .”); *see also Furman*, 408 U.S. at 403 (Burger, J., dissenting) (“Since there is not majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo.”).

84. 428 U.S. 153 (1976).

85. *Id.* at 169.

*Woodson v. North Carolina*<sup>86</sup> Court struck down North Carolina's statutory scheme that required the death sentence as the penalty for first degree murder.<sup>87</sup> It reasoned that the jury must be given sentencing discretion and allowed to exercise restraint.<sup>88</sup> The mandatory death penalty scheme had been ineffective because United States history had shown that jurors, "with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict."<sup>89</sup> Later, the Court in *Arizona v. Ring*<sup>90</sup> held that the jury—not the judge—must find the statutorily defined aggravating factors necessary to sentence the defendant to death.<sup>91</sup>

The rationale applied in *Woodson* and *Ring* became known as individualization,<sup>92</sup> and is regarded as one of the "fundamental commandments" of capital sentencing.<sup>93</sup> Individualization mandates that each juror be able to consider and give effect to the individual facts of the case and characteristics of the defendant,<sup>94</sup> mitigating factors included.<sup>95</sup> This individualization rationale is at the heart of *Penry* error.

## II. THE FOUNDATIONAL MITIGATION CASES

A complete discussion of mitigation error in capital punishment cases requires an examination of the essential cases in mitigation

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86. 428 U.S. 280 (1976).

87. *Id.* at 301.

88. *Id.* at 304.

89. *Id.* at 293.

90. 536 U.S. 584 (2002).

91. *Id.* at 609 ("Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' . . . the Sixth Amendment requires that they be found by a jury." (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 495 n.19 (2000))).

92. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.").

93. Scott. E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1148 (1991).

94. *Nelson v. Quarterman*, 472 F.3d 287, 293 (5th Cir. 2006) ("The immediate post-*Furman* Supreme Court cases addressing this and other sentencing schemes attempted to strike a balance between satisfying two competing constitutional requirements—the requirement of 'individualized sentencing' that takes into account the unique facts of each case and each defendant, and the requirement of preventing the arbitrary imposition of the death penalty that can result from giving the sentencer unfettered discretion.").

95. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

jurisprudence: *Lockett v. Ohio*<sup>96</sup> and *Penry v. Lynaugh*.<sup>97</sup>

A. *Lockett v. Ohio: A Defendant Can Present Any Mitigation Evidence*

Any meaningful conversation about mitigation in capital cases necessarily involves *Lockett v. Ohio*.<sup>98</sup> *Lockett* is to mitigation as *Miranda*<sup>99</sup> is to post-arrest silence.<sup>100</sup> The case provides us with this key language that serves as the progenitor of mitigation jurisprudence:

[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.<sup>101</sup>

While this language came from the plurality of the Court, the rationale has since been affirmed and lies as the foundation of mitigation doctrine.<sup>102</sup>

In *Lockett*, Sandra Lockett and several of her friends conspired to rob a pawnshop in Akron, Ohio.<sup>103</sup> A plan was created whereby one person would enter the shop and distract the store clerk by attempting to pawn a ring.<sup>104</sup> Meanwhile, another accomplice named Al Parker would enter and ask to see a gun.<sup>105</sup> After loading the gun with ammunition he carried, Parker would holdup the pawnbroker while others took the

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96. 438 U.S. 586 (1978).

97. *Penry I*, 492 U.S. 302 (1989).

98. 438 U.S. 586 (1978).

99. *See* *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966) (requiring that police advise arrestees of their right to silence and counsel and providing the most broadly recognized protection of the Fifth Amendment).

100. U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

101. *Lockett*, 438 U.S. at 604.

102. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (“In *Lockett* . . . the plurality . . . stated the rule we apply today . . .”); *see also* *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (“There is no disputing that this . . . [Court] requires that in capital cases ‘the sentence . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.’”).

103. *Lockett*, 438 U.S. at 590.

104. *Id.*

105. *Id.*

shop's money.<sup>106</sup> All went according to plan until Parker announced the "stickup."<sup>107</sup> Upon hearing the declaration, the pawnbroker tried to grab the gun from Parker's hand<sup>108</sup>—it discharged and killed the pawnbroker.<sup>109</sup> Parker ran out of the pawnshop and jumped into the waiting get-away vehicle, driven by Lockett.<sup>110</sup> They were both apprehended soon thereafter.<sup>111</sup>

Lockett and Parker were charged with aggravated murder, along with the statutorily specified aggravating specifications.<sup>112</sup> The Ohio death penalty statute required that upon a conviction of aggravated murder the trial judge impose the death sentence *unless*, after

[C]onsidering the nature and circumstances of the offense and [the defendant's] history, character, and condition, he found by a preponderance of the evidence that (1) the victim had induced or facilitated the offense, (2) it was unlikely that [the defendant] would have committed the offense but for the fact that she was under duress, coercion, or strong provocation or (3) the offense was "primarily the product of [defendant's] psychosis or mental deficiency."<sup>113</sup>

In a successful effort to avoid the death penalty, Parker took a plea deal that required him to testify against Lockett.<sup>114</sup> Lockett was subsequently convicted.<sup>115</sup> During the sentencing phase she presented mitigation evidence pertaining to her background, criminal history, and intelligence.<sup>116</sup> She was subsequently sentenced to death.<sup>117</sup>

Lockett appealed her sentence, claiming that Ohio's death penalty statute violated the Eighth and Fourteenth Amendments of the United States Constitution because the statute failed to allow the sentencer the opportunity to consider the mitigating circumstances.<sup>118</sup> The Court agreed with Lockett, noting that the death penalty is "profoundly

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106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 591.

112. *Id.* at 589 (quoting OHIO REV. CODE ANN. §§ 2929.03, 2929.04 (1975)).

113. *Id.* at 593–94 (internal quotation marks omitted).

114. *Id.* at 591.

115. *Id.* at 593.

116. *Id.* at 594.

117. *Id.*

118. *Id.* at 602.

different from all other penalties,” and requires that each defendant be treated uniquely and given a sentence that best aligns with their crime and individual characteristics.<sup>119</sup>

This opinion from the *Lockett* plurality was later affirmed and solidified by the Court in *Skipper v. South Carolina*,<sup>120</sup> firmly establishing that a defendant *must* be permitted to present, as mitigating evidence, any relevant information that might influence a jury to return a sentence less than death.<sup>121</sup> The omission of such evidence has been deemed *Lockett* error.<sup>122</sup>

*B. Penry I and Penry II Require that the Jury Be Able to Give Meaningful Effect to the Mitigation Evidence*

While the *Lockett* Court addressed what types of mitigation evidence the defendant must be permitted to present, *Penry I*<sup>123</sup> and *Penry II*<sup>124</sup> addressed another problem: how a jury can give full and meaningful effect to the defendant’s evidence.<sup>125</sup> Both *Penry I* and *Penry II* dealt with Texas’s use of “special issue” questions as a method for helping the jury determine the sentence.

In *Penry I*, Pamela Carpenter was brutally beaten, raped, and stabbed to death with a pair of scissors in a small Texas town in 1979.<sup>126</sup> Just before her death, while receiving emergency care, Carpenter provided a description of her assailant.<sup>127</sup> Her narrative led the police to John Paul Penry, a recent parolee who had been convicted of rape.<sup>128</sup> The police detained Penry and he confessed.<sup>129</sup> As a child, Penry was diagnosed with organic brain damage, and according to expert testimony, his I.Q. was 54.<sup>130</sup> His mental difficulties gave him a mental age of six and one

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119. *Id.* at 605.

120. 476 U.S. 1 (1986).

121. *Id.* at 4 (“There is no disputing that this . . . [Court] requires that in capital cases the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” (emphasis in original) (internal quotations omitted))).

122. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 120 n.1 (1982).

123. *Penry I*, 492 U.S. 302 (1989).

124. *Penry v. Johnson (Penry II)*, 532 U.S. 782 (2001).

125. *Id.* at 786; *Penry I*, 492 U.S. at 307.

126. *Penry I*, 492 U.S. at 307.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 308.



half years; Penry was twenty-two at the commission of the crime.<sup>131</sup> In spite of this evidence, the jury found Penry competent to stand trial, and he was convicted of capital murder largely on the basis of his voluntary confessions.<sup>132</sup>

During the penalty phase of the trial, Penry presented mitigating evidence regarding his mental deficiencies and childhood abuse. Dr. Jose Garcia provided expert testimony for Penry.<sup>133</sup> He testified about Penry's moderate retardation due to brain damage (caused from birth or childhood beatings).<sup>134</sup> Dr. Garcia also testified that a brain disorder at the time of the attack made it impossible for him to understand the gravity of his actions.<sup>135</sup>

Penry's mother testified that Penry struggled in school and failed to even finish first grade.<sup>136</sup> Penry's sister spoke of how their mother had frequently beaten Penry over the head with a belt and locked him in his room for long periods of time; she also said that Penry was in and out of hospitals.<sup>137</sup> The state presented rebuttal evidence, arguing for Penry's culpability in spite of such mitigation.<sup>138</sup>

At the close of the penalty phase of the trial, the jury was presented with three "special issues," according to the Texas death penalty statute.<sup>139</sup> The jury was asked to respond "yes" or "no" to the following special issues:

- (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
- (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
- (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.<sup>140</sup>

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131. *Id.*

132. *Id.* at 308–10.

133. *Id.* at 308–09.

134. *Id.*

135. *Id.*

136. *Id.* at 309.

137. *Id.*

138. *Id.*

139. TEX. CODE. CRIM. PROC. art. 37.071 § 2(b) (1989).

140. *Penry I*, 492 U.S. at 310; TEX. CODE. CRIM. PROC. art. 37.071 § 2(b) (1989).

If the jury unanimously responded “yes” to all three of the special issues, then the jury was to return a sentence of death; otherwise, the jury was to sentence Penry to life in prison.<sup>141</sup> The jury answered “yes” to all of the special issues and Penry was sentenced to death.<sup>142</sup> After a series of appeals, the United States Supreme Court granted certiorari on the question of whether the special issues adequately allowed the jury to take into consideration Penry’s mitigation evidence.<sup>143</sup>

Penry argued that the special issues did not allow the jury to give meaningful effect to his mitigation evidence, claiming that the “evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its ‘reasoned moral response’ to that evidence in determining whether death was the appropriate punishment.”<sup>144</sup> The Court agreed, stating that the special issues denied the jurors the ability to express the view that, in light of the mitigating circumstances, Penry deserved a life sentence rather than the death penalty.<sup>145</sup> In finding the Texas special issues inadequate, the Court reasoned that “a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence.”<sup>146</sup> The Court concluded its analysis of *Penry* by stating that sentencers must be able to “consider and give effect to mitigating evidence of mental retardation” when determining whether or not to impose the death penalty.<sup>147</sup> Behold, the birth of *Penry* error.

In 1990, roughly one year after the Court remanded *Penry I*, Penry again stood before a sentencing jury.<sup>148</sup> The jury received *the same* special issues.<sup>149</sup> In light of the Court’s admonishment in *Penry I*, the judge gave this supplemental instruction in an effort to remedy the prior defect and clarify the role of Penry’s mitigation evidence:

You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in

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141. *Penry I*, 492 U.S. at 310.

142. *Id.* at 311.

143. *Id.* at 313. Penry also argued that capital punishment constitutes cruel and unusual punishment under the Eighth Amendment. That issue exceeds the scope of this Comment.

144. *Id.* at 322.

145. *Id.* at 322–26.

146. *Id.* at 326.

147. *Id.* at 340.

148. *Penry II*, 532 U.S. at 788–89.

149. *Id.*

both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.<sup>150</sup>

After two and a half hours of deliberation, the jury delivered a sentence of death.<sup>151</sup> In reviewing the special issues in conjunction with the added supplemental instruction, the Court again held that the instructions failed to give the jury a "vehicle for expressing its 'reasoned moral response' to [the mitigation] evidence in rendering its sentencing decision."<sup>152</sup> The Court noted that the jury could not possibly follow both the special issues and the supplemental instruction.<sup>153</sup>

Taken together, *Penry I* and *Penry II* stand for the notion that the sentencing instructions to a jury at the conclusion of the penalty phase must allow the jury to give meaningful effect to the mitigation evidence provided. If the jury cannot meaningfully consider the breadth of mitigation evidence presented at trial, the defendant is, in effect, stripped of the right to present mitigation evidence. What good is the presentation of evidence if it cannot be considered? Such errors are collectively referred to as *Penry* error.<sup>154</sup>

### III. THREE KEY INGREDIENTS OF HARMLESS ERROR REVIEW IN CAPITAL HABEAS CASES

Before looking at the circuit split that precipitates this Comment, it is important to understand three key ingredients in this discussion:

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150. *Id.* at 789–90.

151. *Id.* at 790.

152. *Penry I*, 492 U.S. at 328.

153. *Penry II*, 532 U.S. at 800.

154. *Smith v. Texas*, 550 U.S. 297, 301 (2007) ("We refer to the inadequacy of the special-issue instructions as *Penry* error.").

*Chapman v. California*,<sup>155</sup> *Brecht v. Abrahamson*,<sup>156</sup> and the Antiterrorism and Effective Death Penalty Act of 1996.<sup>157</sup>

A. *Chapman v. California and the Harmless Beyond a Reasonable Doubt Standard for Constitutional Violations*

*Chapman v. California*<sup>158</sup> has long determined the error analysis for constitutional errors on direct review: it requires that the state prove that the error was harmless beyond a reasonable doubt.<sup>159</sup> In *Chapman*, Ruth Elizabeth Chapman was convicted in California of first degree murder, kidnapping, and larceny; she was sentenced to life in prison.<sup>160</sup> The state constitution specifically permitted the prosecution to comment on the defendant's silence during trial—i.e., post-*Miranda* silence—in violation of the Fifth Amendment protections of the United States Constitution.<sup>161</sup> Chapman appealed, arguing that the provision violated her Fifth Amendment rights.<sup>162</sup> While Chapman's case was on appeal in the state courts, the United States Supreme Court issued its opinion in *Griffin v. California*,<sup>163</sup> wherein the Court held that any comment or reference to the defendant's silence violated the protections of the Fifth Amendment, rendering California's state constitutional permission in violation of the federal constitution.<sup>164</sup>

The *Griffin* Court held the provision unconstitutional, making the issue in *Chapman* whether harmless error review should apply to such a violation. The Court held that harmless error review *does* apply to constitutional violations, but it placed the burden upon the beneficiary of the error.<sup>165</sup> The Court also set a difficult burden for proving harmless error: “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>166</sup> Due to the substantial rights at stake, the *Chapman*

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155. 386 U.S. 18 (1967).

156. 507 U.S. 619 (1993).

157. Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254 (2012).

158. 386 U.S. 18.

159. *Id.* at 24.

160. *Id.* at 18–19.

161. *Id.* at 19.

162. *Id.* at 19–20.

163. 380 U.S. 609 (1965).

164. *Id.* at 613.

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

166. *Id.* at 24.

Court adopted the common law rule that placed the burden upon the beneficiary of the error to prove that no injury was suffered from the party potentially prejudiced by the error.<sup>167</sup> Until *Brecht, Chapman* was the standard for harmless error review for constitutional errors.<sup>168</sup>

*B. Brecht v. Abrahamson Reduces the State's Burden by Requiring the Defense to Prove Substantial and Injurious Effect*

In *Brecht*, Todd Brecht was charged with first degree murder in Wisconsin.<sup>169</sup> At the trial, Brecht admitted to shooting the victim, but claimed that it was an accident.<sup>170</sup> In an effort to impeach Brecht, the prosecution used Brecht's post-*Miranda* silence by arguing that if the shooting actually was an accident, Brecht would have told someone immediately.<sup>171</sup> The prosecution pointed out that he did not call for help, that he drove off, that he lied to the arresting police officer, and that Brecht was silent post-arraignment and pre-trial, after he had been Mirandized.<sup>172</sup> The defense raised objections to such references, but all were overruled.<sup>173</sup> The jury subsequently sentenced Brecht to life in prison.<sup>174</sup> On direct appeal, the Wisconsin Supreme Court agreed with Brecht that the use of his post-*Miranda* silence violated the Fifth Amendment of the United States Constitution but upheld his conviction, reasoning that the error was harmless.<sup>175</sup>

After exhausting his state appeals, Brecht filed a habeas corpus petition under 28 U.S.C. § 2254.<sup>176</sup> The Seventh Circuit held that *Chapman* should not apply to habeas petitions seeking to correct errors where the prosecution used post-arrest silence as inculcating evidence.<sup>177</sup> The Seventh Circuit adopted the standard from *Kotteakos v. United States*,<sup>178</sup> which requires that the defendant show that the error

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167. *Id.*

168. *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993) ("Since our landmark decision in *Chapman v. California* . . . we have applied the harmless-beyond-a-reasonable-doubt standard in reviewing claims of constitutional error of the trial type.").

169. *Id.* at 624.

170. *Id.*

171. *Id.* at 624–25.

172. *Id.*

173. *Id.* at 625.

174. *Id.*

175. *Id.* at 626.

176. *Id.*

177. *Id.* at 627.

178. 328 U.S. 750 (1946).

caused substantial and injurious effect.<sup>179</sup> Brecht appealed, the United States Supreme Court granted certiorari, affirmed the Seventh Circuit's adoption of the *Kotteakos* standard, and applied it to all violations of post-arrest silence on petition from state courts.<sup>180</sup> The Court reasoned that prior to the collateral attack, two state courts reviewed their case and applied the harmless beyond a reasonable doubt standard, so a lesser standard should apply on habeas appeal in order to promote judicial economy.<sup>181</sup>

The Court reasoned that the *Chapman* standard set too great of a burden upon the state and imposed significant social and financial costs upon the judiciary.<sup>182</sup> The Court then set aside the *Chapman* standard for collateral attacks in habeas corpus review, making it easier to find harmless error.<sup>183</sup> Instead of requiring the state to show that the error was "harmful beyond a reasonable doubt,"<sup>184</sup> the Court shifted the burden to the defendant, requiring the defendant to show that the error resulted in "substantial and injurious effect or influence in determining the jury's verdict."<sup>185</sup>

The *Brecht* Court separated constitutional errors in habeas cases into two categories: trial error and structural error.<sup>186</sup> Trial errors occur "during the presentation of the case to the jury,"<sup>187</sup> and are subject to harmless-error review due to their lack of bearing upon a constitutional right. While generally protective of constitutional rights, the Court concedes that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless."<sup>188</sup> If a defendant thinks that an error was *not* harmless, but negatively impacted the defendant's case, the defendant must show that the error had a substantial and injurious effect upon the jury's arrival at the verdict.<sup>189</sup>

The Court views structural errors more severely: "At the other end of

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179. *Id.* at 776.

180. *Brecht*, 507 U.S. at 638.

181. *Id.* at 636–38.

182. *Id.* at 637.

183. *Id.* at 637–38.

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

185. *Brecht*, 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

186. *Id.* at 629–30.

187. *Arizona v. Fulminante*, 499 U.S. 279, 307 (1991).

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

189. *Brecht*, 507 U.S. at 637.

the spectrum of constitutional errors lie ‘structural defects in the constitution of the trial mechanism, which defy analysis by ‘harmless-error’ standards.’”<sup>190</sup> The Court is loath to find structural error and has done so only in a limited number of memorable cases.<sup>191</sup> Should a reviewing court find that the error was structural, the decision must be automatically reversed.<sup>192</sup> This is no small consequence, leading the courts to infrequently deem errors structural.<sup>193</sup>

*Chapman* still controls the harmless error review of constitutional error in direct review, but *Brecht* now controls in collateral attacks.<sup>194</sup> The Court has not determined what harmless error standard applies to mitigation errors in capital habeas cases.

C. *The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)*

Congress tightened the belt on federal habeas corpus review when it passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>195</sup> In an effort to promote judicial economy and grant broader deference to state courts,<sup>196</sup> Congress passed AEDPA with this key provision:

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

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190. *Id.* at 629.

191. *See Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (holding that a deficient reasonable doubt instruction deprives the defendant’s right to fair trial under the Sixth Amendment); *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986) (holding that excluding a potential grand juror on the basis of race violates the Equal Protection Clause); *Waller v. Georgia*, 467 U.S. 39, 47–48 (1984) (holding that the Sixth Amendment grants litigants the right to a public trial); *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984) (holding that the Sixth Amendment grants a defendant the right to represent himself pro se); *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963) (holding that failing to provide indigent defendants with counsel violates the Sixth Amendment); *Payne v. Arkansas*, 356 U.S. 560, 561 (1958) (holding that a coerced confession violates the Fifth Amendment); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (holding that a defendant has the right to an impartial decision maker, and the failure to provide a neutral decision maker violates due process).

192. *See Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993).

193. *See* DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION 230–32 (2006).

194. *See Brecht*, 507 U.S. at 622–23.

195. 28 U.S.C. § 2254 (2012).

196. H.R. REP. NO. 104-23, at 9–10 (1995) (noting the intent to reduce the delay and abuse of repetitive filings, and the intent to promote comity with the states).

involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.<sup>197</sup>

This provision set a remarkably high bar for habeas petitioners collaterally attacking<sup>198</sup> their state court judgments, requiring that they not only show that an error occurred, but that the state court unreasonably applied clearly established federal law.<sup>199</sup> AEDPA's high standard grants significant deference to state court determinations: "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt."<sup>200</sup> The petitioner bears the burden of proving that the state court unreasonably applied clearly established law, even when the state court fails to give any rationale for its decision.<sup>201</sup> The 1996 amendments were "designed to curb the abuse of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation in capital cases."<sup>202</sup>

While a thorough discussion of AEDPA exceeds the scope of this Comment,<sup>203</sup> excluding any mention of its constricting effect upon collateral attacks would be remiss. AEDPA's diminution of habeas corpus reviews ties the hands of federal courts asked to issue the writ, and imposes a weighty burden upon habeas petitioners. This adds to the task of habeas defendants seeking to reverse the state court's mitigation error. Undoubtedly, judicial economy and comity between the state and federal systems are central to an effective judiciary; however, "errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the federal writ."<sup>204</sup> To

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197. 28 U.S.C. § 2254(d)(1), (2) (2012).

198. A collateral attack is an "attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective." BLACK'S LAW DICTIONARY 298 (9th ed. 2009).

199. 28 U.S.C. § 2254(d).

200. See *Cullen v. Pinholster*, \_\_U.S.\_\_, 131 S. Ct. 1388, 1398 (2011) (citations omitted).

201. See *Harrington v. Richter*, \_\_U.S.\_\_, 131 S. Ct. 770, 784 (2011) (describing the application of AEDPA).

202. H.R. REP. NO. 104-23, at 8 (1995).

203. For a more thorough discussion of AEDPA and its impact on habeas corpus petitions, see generally Jeffery S. Jacobi, *Mostly Harmless: An Analysis of Post-AEDPA Federal Habeas Corpus Review of State Harmless Error Determinations*, 105 MICH. L. REV. 805 (2007).

204. *Williams v. Taylor*, 529 U.S. 362, 375 (2000).



preserve the fundamental fairness necessary for an effective and respected judiciary, cases that meet AEDPA's high standard should not then be subject to *Brecht's* harmless error standard.

#### IV. THE SPLIT AND THE NEED FOR CLARITY

The Court has yet to determine whether harmless error review can ever apply to capital cases on collateral attack. It has, however, determined that the standard promulgated in *Brecht v. Abrahamson*<sup>205</sup>—the plaintiff must show that the constitutional error had “substantial and injurious effect upon the jury’s verdict”<sup>206</sup>—applies to errors in *non-capital* cases. The current debate among the circuits is whether or not the *Brecht* harmless error standard should apply to capital cases being collaterally attacked. The United States Courts of Appeals are split over the issue in a rather one-sided manner. Seven circuits apply the *Brecht* standard to collateral attacks of mitigation errors<sup>207</sup>—only the Fifth Circuit holds otherwise.<sup>208</sup> The remaining circuits have yet to weigh in.<sup>209</sup> The Fifth Circuit’s decision in *Nelson v. Quarterman*<sup>210</sup> firmly placed that circuit on the lonely side of a large split.

Recent years have seen several denied certiorari petitions seeking resolution of the divisive issue of whether mitigation error should be subject to harmless error review as described in *Brecht*.<sup>211</sup> These petitioners lack guidance from the United States Courts of Appeals due to the rather one-sided split. A brief and chronological summary of the split is in order.

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205. 507 U.S. 619 (1993).

206. *Id.* at 637 (citing *Kotteakos v. United States*, 328 U.S. 750, 775 (1946)).

207. *See* *Dixon v. Houk*, 737 F.3d 1003, 1011 (6th Cir. 2013) (holding that mitigation errors are subject to harmless review); *Jones v. Basinger*, 635 F.3d 1030, 1052 (7th Cir. 2011) (same); *Williams v. Norris*, 612 F.3d 941, 948 (8th Cir. 2010) (same); *Ferguson v. Sec’y for Dep’t of Corr.*, 580 F.3d 1183, 1200 (11th Cir. 2009) (same); *Sims v. Brown*, 425 F.3d 560, 570 (9th Cir. 2005) (same); *Jones v. Polk*, 401 F.3d 257, 265 (4th Cir. 2005) (same); *Bryson v. Ward*, 187 F.3d 1193, 1205 (10th Cir. 1999) (same); *supra* Part II.A.

208. *See Nelson v. Quarterman*, 472 F.3d 287, 314 (5th Cir. 2006) (“Finally, we reject the State’s argument that any *Penry* error in this case is subject to harmless-error analysis . . .”).

209. Several searches on Westlaw using keywords “mitigation,” “mitigation error,” “harmless error,” “substantial and injurious effect,” “*Lockett*,” and “capital,” failed to reveal results from the First, Second, and Third circuits. *See also* Petition for Writ of Certiorari, *Thaler v. McGowen*, 133 S. Ct. 647 (2012) (No. 12-82), at 14–21.

210. *Id.*

211. Petition for Writ of Certiorari, *Thaler v. McGowen*, 133 S. Ct. 647 (2012) (No. 12-82); Petitioner’s Reply to Respondent’s Brief in Opposition to Petition for Writ of *Certiorari* to the Court of Criminal Appeals of Texas, *Campbell v. Texas*, 134 S. Ct. 53 (2013) (No. 12-8631).

A. *Survey of the Split*

The Tenth Circuit, in *Bryson v. Ward*,<sup>212</sup> led the charge in the issue of whether harmless error review applies in capital habeas cases. In *Bryson*, the defendant assisted in murdering the husband of a woman with whom he was romantically involved.<sup>213</sup> Bryson confessed and was convicted of capital murder.<sup>214</sup> During the sentencing phase of the trial, Bryson sought to present a videotape of his confession as mitigation evidence, but the trial court excluded the tape.<sup>215</sup> While the Tenth Circuit agreed that the exclusion of the videotape violated *Lockett*, it concluded that the “application of a harmless error analysis . . . [is] not ‘an unreasonable application of clearly established’ Supreme Court precedent,”<sup>216</sup> thereby failing to meet AEDPA’s standard. It further concluded that *Brecht* applied to mitigation errors, and that the exclusion of the tape did not have a substantial and injurious effect upon the jury’s verdict.<sup>217</sup>

The Fourth Circuit, in *Jones v. Polk*,<sup>218</sup> explicitly rejected the *Chapman* standard and applied the *Brecht* harmless error standard. In *Jones*, the defendant had been convicted of first degree murder for killing his adult son.<sup>219</sup> During the sentencing phase, the North Carolina trial court refused to allow one of Jones’s relatives to testify that “Jones had expressed remorse about the murder.”<sup>220</sup> While a violation of *Lockett v. Ohio*, the Supreme Court of North Carolina held that the error was “harmless beyond a reasonable doubt,” the harmless error standard applied in *Chapman*.<sup>221</sup> In affirming the North Carolina high court, the Fourth Circuit said that the Supreme Court of North Carolina unreasonably applied the *Chapman* standard.<sup>222</sup> The court corrected the error, applying the *Brecht* standard and concluding that the mitigation error did not have a “substantial and injurious effect” upon Jones.<sup>223</sup>

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212. 187 F.3d 1193 (10th Cir. 1999).

213. *Id.* at 1197–99.

214. *Id.* at 1199.

215. *Id.* at 1204–05.

216. *Id.* at 1205 (quoting 28 U.S.C. § 2254(d)(1) (2012)).

217. *Id.*

218. 401 F.3d 257 (4th Cir. 2005).

219. *Id.* at 259–60.

220. *Id.* at 261.

221. *Id.*

222. *Id.* at 265.

223. *Id.*

The Ninth Circuit initially required remand for mitigation errors,<sup>224</sup> but has since changed its ways. In *Sims v. Brown*,<sup>225</sup> Mitchell Sims was convicted of capital murder and sentenced to death for the gruesome killing of a Domino's Pizza delivery person.<sup>226</sup> Sims presented extensive mitigation evidence that revealed childhood physical and sexual abuse, chronic depression, forced incest, and rape.<sup>227</sup> In its closing statements during the sentencing phase, the prosecution incorrectly stated the law of mitigation, mischaracterizing how the jury should view the mitigation evidence.<sup>228</sup> The Ninth Circuit recognized the error, but rejected the application of *Chapman*, asserting that *Brecht* controlled and that the statements had a substantial and injurious effect upon the jury.<sup>229</sup>

The Fifth Circuit, in *Nelson v. Quarterman*,<sup>230</sup> squarely rejected harmless error review in habeas review of a capital case.<sup>231</sup> *Nelson* will be discussed in detail in Part IV.C.

The Eleventh Circuit registered its opinion in *Ferguson v. Secretary for Department of Corrections*.<sup>232</sup> In *Ferguson*, the defendant was convicted of eight first degree murders that took place in Florida.<sup>233</sup> During the sentencing phase of the trial, the judge told the jury that he would later instruct them as to the mitigation factors that they "may consider," as codified in the statutory scheme.<sup>234</sup> Ferguson claimed that the court erred by not allowing non-statutory mitigation evidence,<sup>235</sup> a violation of *Hitchcock v. Dugger*,<sup>236</sup> which required that juries be permitted to consider such evidence.<sup>237</sup> The Eleventh Circuit applied the *Brecht* harmless error standard, finding that the denial of the mitigation factors did not have a substantial and injurious effect upon the jury's verdict.<sup>238</sup>

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224. See *Coleman v. Calderon*, 150 F.3d 1105, 1118–19 (9th Cir. 1998).

225. 425 F.3d 560 (9th Cir. 2005).

226. *Id.* at 563–64.

227. *Id.* at 566–67.

228. *Id.* at 600–01.

229. *Id.* at 570–71, 600–01.

230. 472 F.3d 287, 314 (5th Cir. 2006).

231. *Id.*

232. 580 F.3d 1183 (11th Cir. 2009).

233. *Id.* at 1189.

234. *Id.* at 1200.

235. *Id.*

236. 481 U.S. 393 (1987).

237. See *id.* at 398–99.

238. See *Ferguson*, 580 F.3d at 1203.

The Eighth Circuit, in *Williams v. Norris*,<sup>239</sup> jumped into the melee. In *Williams*, the defendant escaped prison in Arkansas, shot and killed a man, and then stole the deceased's guns and truck.<sup>240</sup> He eluded police for a day and was then captured.<sup>241</sup> He was convicted of capital murder, and during the sentencing phase of his trial, Williams sought to present testimony regarding the prison's negligence as a mitigating factor.<sup>242</sup> While the Eighth Circuit did say that "[e]ven if there was an error in denying this claim, it was harmless,"<sup>243</sup> it did not base its holding on either *Brecht* or *Chapman*. It merely asserted that harmless error review applies.

The Seventh Circuit dealt with the question of harmless error review in capital habeas cases in *Jones v. Basinger*.<sup>244</sup> In *Jones*, the defendant was convicted in Indiana for multiple murders that occurred during a robbery.<sup>245</sup> The prosecution had presented "detailed and damning double-hearsay," which was admitted despite the defense counsel's repeated objections.<sup>246</sup> The district court denied Jones's habeas corpus petition;<sup>247</sup> the Seventh Circuit disagreed and applied the *Brecht* standard to show that the hearsay had substantial and injurious effect upon the defendant.<sup>248</sup>

The Sixth Circuit similarly applies the *Brecht* standard and will be discussed at length in Part IV.B.

In order to better understand the role of harmless error review in capital cases and to help us arrive at the appropriate application of harmless error review, this Comment looks at the Sixth Circuit and Fifth Circuit as examples of either side of the split. The Sixth Circuit represents the side of the split that applies *Brecht* harmless error review to mitigation error, while the Fifth Circuit shows a circuit that refuses to apply harmless error review.

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239. 612 F.3d 941 (8th Cir. 2010).

240. *Id.* at 945.

241. *Id.*

242. *Id.* at 946.

243. *Id.* at 948 (citing *McGehee v. Norris*, 588 F.3d 1185, 1197 (8th Cir. 2009)).

244. 635 F.3d 1030 (7th Cir. 2011).

245. *Id.* at 1035.

246. *Id.* at 1037.

247. *Id.* at 1035.

248. *Id.* at 1052–56.

B. *The Sixth Circuit Adopts the Brecht Harmless Error Standard*

The Sixth Circuit, in *Dixon v. Houk*,<sup>249</sup> recently re-affirmed its allegiance to the populous side of the split over whether *Brecht* applies in capital habeas cases.<sup>250</sup> *Dixon* provides both a good and troubling example of why the *Brecht* standard provides faulty results. The example is good because it shows how the *Brecht* standard will allow a death sentence to stand in spite of the trial court omitting highly relevant mitigation evidence. *Dixon* is a troubling example because the egregious nature of the murder may cloud the courts' vision regarding the deleterious effects of omitting mitigation evidence. Bad facts make bad law, and *Dixon* underscores this adage.

The facts of this case are particularly gut wrenching. Archie Dixon was convicted of first degree murder for tying the victim to a bed, beating him, stealing his wallet and car, and driving him out of town where Dixon then buried him alive.<sup>251</sup> As is true with many capital cases, the facts surrounding the murder are quite unpleasant.

However, particularly gruesome facts do not bear upon what mitigation evidence the defendant may offer to the jury. In Dixon's case, he had a compelling story to tell. While only nineteen years old with no adult criminal record, Dixon spent 234 nights in jail after he was wrongfully charged with rape and aggravated burglary.<sup>252</sup> Three months into his unlawful prison term, Dixon's psychological examination revealed anxiety, depression, personal family problems, and the doctor expressed doubts about Dixon's emotional stability.<sup>253</sup> Eight months into his term, Dixon was exonerated after DNA and fingerprint evidence removed any doubt of his innocence.<sup>254</sup>

Only four months after his release, Dixon committed the murder for which he was convicted,<sup>255</sup> and the jury sentenced him to death.<sup>256</sup> During the mitigation phase of the trial, Dixon sought to inform the jury of this wrongful conviction—including the associated depression,

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249. 737 F.3d 1003 (6th Cir. 2013).

250. *See id.* at 1011; *Campbell v. Bradshaw*, 674 F.3d 578, 596–97 (6th Cir. 2012) (adopting harmless error review without providing rationale for its decision).

251. *Dixon*, 737 F.3d at 1006.

252. *Id.* at 1014 (Merrit, J., dissenting).

253. *Id.* (citing to report of defense mitigation specialist).

254. *Id.*

255. *Id.* at 1006 (majority opinion).

256. *Id.*

anxiety, and emotional instability—as mitigation evidence.<sup>257</sup> The court denied him the chance to present the evidence,<sup>258</sup> directly contravening the *Lockett* mandate that capital defendants be able to present to the jury any mitigation evidence “that might serve as a basis for a sentence less than death.”<sup>259</sup> The Ohio Supreme Court found that the trial court *did* commit *Lockett* error, but determined that the error was harmless and would not have affected the sentence.<sup>260</sup> That court briefly stated that “[t]he trial court should have permitted this evidence to be submitted for the jury’s consideration as a mitigating factor . . . because it fits within the history, character, and background of the offender. Nevertheless, our independent reassessment of the sentence will minimize any prejudicial impact.”<sup>261</sup>

Dixon filed a habeas corpus petition, and ultimately the Sixth Circuit affirmed the Ohio Supreme Court’s harmless error determination, citing *Brecht* as the bar that the petitioner must overcome.<sup>262</sup> The Sixth Circuit provided nothing more than a cursory two sentences backing up this determination:

Given the specific facts of Dixon’s crime and the compelling aggravating evidence in this case, evidence of Dixon’s prior wrongful incarceration due to unrelated rape allegations would, at best, have been negligibly mitigating. We do not believe that its exclusion had any substantial effect on Dixon’s sentencing. The Ohio Supreme Court’s conclusion that the exclusion of Dixon’s wrongful incarceration was harmless is therefore not contrary to clearly established federal law.<sup>263</sup>

At the time of publication, Dixon sits on death row in Ohio.<sup>264</sup>

When the jury sentenced Dixon to death, they were completely unaware of his harrowing experience in jail and the associated psychological problems. Would the jury have sentenced Dixon to death had they known about this wrongful imprisonment and correlated psychological problems? This unanswerable question lies at the heart of

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257. *Id.* at 1008.

258. *Id.*

259. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

260. *Dixon*, 737 F.3d at 1011.

261. *State v. Dixon*, 805 N.E.2d 1042, 1057 (Ohio 2004) (citations omitted) (internal quotation marks omitted).

262. *Id.*

263. *Dixon*, 737 F.3d at 1011 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 639 (1993)).

264. *Death Row Inmates*, OHIO DEP’T OF REHABILITATION & CORRECTION (Mar. 16, 2014), <http://www.drc.ohio.gov/public/deathrow.htm>.

the issue with *Brecht* harmless error review. When the stakes could not be higher—when a life hangs in the balance—the courts that apply *Brecht* become willing to exchange their value judgment for that of the entire jury. Because only one juror would need to find that the wrongful imprisonment was enough to give Dixon a sentence less than death,<sup>265</sup> denying all twelve jurors the chance to hear admittedly relevant mitigation evidence is to “substitute [the court’s] moral judgment for the jury’s.”<sup>266</sup>

C. *The Fifth Circuit Rejects Harmless Error Review: Nelson v. Quarterman*

In *Nelson v. Quarterman*,<sup>267</sup> the Fifth Circuit tackled the issue of harmless error head-on in a case even more gut-wrenching than *Dixon*. In *Nelson*, defendant Billy Ray Nelson was convicted in a capital trial for the brutal sexual assault and murder of his neighbor, Charla Wheat.<sup>268</sup> Nelson had tricked Wheat and her roommate, Carol Maynard, into letting him into their apartment to use the phone.<sup>269</sup> Once inside, he cut the telephone wire, stabbed Wheat, and ushered both women into the bedroom.<sup>270</sup> He then forced them to perform sexual acts with him; he subsequently stabbed them both.<sup>271</sup> Maynard acted dead on the floor while Wheat resisted and screamed; Nelson stabbed Wheat until she died.<sup>272</sup> Maynard survived.<sup>273</sup>

During the sentencing phase of the trial, Nelson presented voluminous mitigation evidence: childhood neglect, abandonment by his mother when he was fourteen, significant substance abuse, troubled relationships with women and family, psychiatric evidence of borderline personality disorder, and separation from his child.<sup>274</sup> The jury instructions were in the form of special issue questions:

- (1) whether the conduct of the defendant that caused the death of

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265. See *Andres v. United States*, 333 U.S. 740, 748 (1948) (“In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury.”).

266. *Nelson v. Quarterman*, 472 F.3d 287, 315 (5th Cir. 2006).

267. *Id.*

268. *Id.* at 290.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 304–05.

the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result (“the deliberateness special issue”); and

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society (“the future-dangerousness special issue”).<sup>275</sup>

The Fifth Circuit determined that these special issue questions failed to adequately allow the jurors to give meaningful effect to the mitigation evidence that Nelson presented.<sup>276</sup> It reasoned that “although the jury may have been able to give *partial* effect to this evidence through the deliberateness special issue, there is a reasonable likelihood that it was unable to give full effect to this evidence.”<sup>277</sup>

The court then addressed the issue of whether harmless error review could ever be applied to mitigation error. The court noted that “the Supreme Court has *never* applied a harmless-error analysis to a *Penry* claim or given any indication that harmless error might apply in its long line of post-*Furman* cases addressing the jury’s ability to give full effect to a capital defendant’s mitigating evidence.”<sup>278</sup> The court argued that the Supreme Court has never applied harmless-error analysis to mitigation error because “*Penry* error deprives the jury of a vehicle for expressing its reasoned *moral* response to the defendant’s background, character, and crime.”<sup>279</sup> The court differentiated the determinations of fact permitted by the special issue questions from the *moral* issues central to the jury giving meaningful effect to the presented mitigation evidence.<sup>280</sup> While the court did not expressly hold that *Penry* error requires automatic reversal,<sup>281</sup> it reasoned that because such errors prevent the jury from expressing its reasoned moral response by giving meaningful effect to the mitigation evidence, such errors cannot be subject to harmless error review; such analysis allows the court to “substitute its own moral judgment for the jury’s.”<sup>282</sup>

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275. *Id.* at 290 (quoting TEX. CODE. CRIM. PROC. art. 37.071(b) (1991)).

276. *Id.* at 307–14.

277. *Id.* at 307 (emphasis in original).

278. *Id.* at 314 (emphasis in original).

279. *Id.* (internal quotation marks omitted) (internal citations omitted).

280. *Id.*

281. While the majority left such a conclusion to inference, the concurrence left nothing to the imagination: “Under principles of law clearly established by the Supreme Court’s decisions, the constitutional violation in this case was a ‘structural defect’ that cannot be analyzed as harmless ‘trial error.’” *Nelson v. Quarterman*, 472 F.3d 287, 332 (5th Cir. 2006) (Dennis, J., concurring).

282. *Id.* at 315.



The Fifth Circuit's rationale for rejecting *Brecht* ultimately rests in the notion that the determination to take a person's life—the burden placed upon capital juries—is a moral determination that should lie solely in the hands of the jury, not those of the judge.<sup>283</sup> When an error is committed and the reviewing court must determine the effect the mitigating evidence would have had on the jury, the appellate judge then takes on the role of the juror. This is to substitute the moral judgment of jury with that of the judge—an untenable result. This logic drives the argument that a low harmless error standard should not apply to habeas review of capital cases.

#### V. HARMLESS ERROR REVIEW SHOULD REQUIRE THE STATE TO PROVE THAT THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

This Comment argues that harmless error review should only apply to capital mitigation errors during habeas corpus review when the state proves that the error was harmless beyond a reasonable doubt. The Court has yet to determine whether harmless error review ever applies to such mitigation errors<sup>284</sup> and the Court has never extended its holding in *Brecht* to capital cases. *Brecht*'s harmless error standard places the burden of proof upon the defendant to show that the error had a “substantial and injurious effect or influence in determining the jury’s verdict.”<sup>285</sup> This requires nothing of the state and places a significant burden upon the defendant. Considering the high stakes of capital punishment cases and that the Court has not considered the *Brecht* standard’s application to capital cases,<sup>286</sup> the Court should instead apply the *Chapman* standard—requiring the state to prove that the error was

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283. See *Schriro v. Summerlin*, 542 U.S. 348, 358–60 (2004) (Breyer, J., dissenting) (four justices arguing that a jury should make a decision to sentence a defendant to death); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (requiring a jury to find the aggravating factors necessary to qualify a defendant for the death penalty); *id.* at 614 (Breyer, J., concurring) (“I therefore conclude that the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death.”).

284. *Smith v. Texas*, 550 U.S. 297, 316 (2007) (Souter, J., concurring) (noting that the Supreme Court has never decided “whether harmless error review is ever appropriate” with mitigation error during collateral review).

285. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

286. The text of the *Brecht* opinion never mentions capital punishment, and Justice Souter admitted that the Supreme Court has never determined whether harmless error review applies to mitigation error. See *Smith v. Texas*, 550 U.S. 297, 316 (2007).

“harmless beyond a reasonable doubt”<sup>287</sup>—to mitigation errors in capital habeas corpus cases. This standard places the burden on the state, requiring the state to show the harmlessness of the mitigation error.

At the foundation of harmless error review lays the understanding that although the trial court committed an error, the impact of the error may be de minimus and does not alter the outcome of the case.<sup>288</sup> This approach to errors appeals to logic and judicial economy. As one commentator pointed out, nearly every defendant could find at least some error in his or her trial:

Almost every criminal defendant who is found guilty can find some mistake in the proceedings leading to his conviction. Because reversal for all such errors would be too costly and would undermine public confidence in the criminal justice system, courts and legislatures have developed ‘harmless error’ rules that uphold a decision tainted by error if the error is found not to have affected the outcome at trial. The rules, contained in both common law and statutes, reach even those errors that affect the constitutional rights of the defendant.<sup>289</sup>

Were the courts to apply a stricter error analysis to all petitions—such as automatic remand for all errors—our system would incur massive costs and enormous delays, rendering an already slow system nearly ineffective.<sup>290</sup> Harmless error review, while incredibly complex and often inconsistently applied,<sup>291</sup> finds proper application in many aspects of this nation’s jurisprudence. If an error was committed that simply did not harm the outcome of the case, what value is a re-trial? In the presence of innocuous mistakes, harmless error review serves its purpose well.

While harmless error review has a role in non-capital cases, its use in capital cases requires care and caution in order to avoid specious results.

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

288. FED. R. CIV. P. 61 (“Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party’s substantial rights.”).

289. James C. Scoville, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. CHI. L. REV. 740, 740 (1987).

290. Some commentators suggest that mitigation errors require automatic remand. *See, e.g.*, Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 314 (1991).

291. *See generally* ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* (1970).

Not only is death different,<sup>292</sup> so is the effect of error in capital cases. The *Lockett* Court understood this when it said:

Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques—probation, parole, work furloughs, to name a few—and various post-conviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.<sup>293</sup>

The Court recognized the irrevocable nature of the death penalty and the need to consider this difference when shaping the contours of capital jurisprudence. Thus, when error occurs in a capital case, the proper remedy should be cautiously considered.

Mitigation error—whether the jury is prevented from hearing evidence the defense wishes to present or the jury instructions prevent the jury from giving full and meaningful effect to the presented evidence<sup>294</sup>—invites harm that far exceeds that of any other criminal case: the possibility of a wrongful death. In determining that a mitigation error was harmless, the judge replaces his or her judgment for that of the jury,<sup>295</sup> essentially asserting that had the jury heard the mitigation evidence, it could not have swayed *even one* of the jurors. This flies in the face of the individualization requirement of mitigation consideration.<sup>296</sup> Mitigation errors in capital cases do not merely increase the chance of a negative outcome for the defendant,<sup>297</sup> but they reduce a chance at life.<sup>298</sup>

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292. See *supra* Part I.

293. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion).

294. See *supra* Part I.B.

295. *Nelson v. Quarterman*, 472 F.3d 287, 315 (5th Cir. 2006).

296. See *supra* Part I.B.3.

297. In a noncapital case, error creates the possibility for the miscarriage of justice in the form of a wrongful conviction or an improper sentence. In the mitigation phase of a capital case the stakes—literally life or death—could not be higher.

298. For a discussion on the loss of chance doctrine, a tort theory applied to medical malpractice cases, see generally *Herskovits v. Group Health Coop.*, 99 Wash. 2d 609, 664 P.2d 474 (1983); Alice Férot, *The Theory of Loss of Chance: Between Reticence and Acceptance*, 8 FIU L. Rev. 591

These high stakes require an error standard that matches the gravity of harm. While seven circuits think that *Brecht* harmless error review should apply to capital cases,<sup>299</sup> this Comment argues that such an application is misguided. *Chapman v. California*<sup>300</sup> provides the better harmless error standard for capital cases—that the state must prove that the error was harmless beyond a reasonable doubt.

A. *Brecht Should Not Apply to Mitigation Errors Because it Fails to Consider the Heightened Consequences of Capital Cases*

In *Brecht*, discussed above in Part IV.A, the defendant confessed guilt but claimed that the shooting was accidental.<sup>301</sup> During the trial, the prosecution referred to Brecht's pre-*Miranda* failure to tell anyone that the shooting was accidental, and also pointed to his post-*Miranda* silence on the issue.<sup>302</sup> Brecht was convicted, but appealed on the basis that referring to his post-*Miranda* silence violated due process.<sup>303</sup> Applying the *Chapman* standard—constitutional errors require reversal unless they are “harmless beyond a reasonable doubt”<sup>304</sup>—the Wisconsin Supreme Court affirmed the conviction, holding that the use of his silence was a constitutional violation that had no impact on the jury's verdict.<sup>305</sup> Brecht filed a writ of habeas corpus and the Supreme Court affirmed the conviction, reasoning that the *Chapman* standard set too high of a burden upon the state and imposed significant social and financial costs to the judicial system.<sup>306</sup> The Court then set aside the *Chapman* standard for collateral attacks in habeas corpus petitions and shifted the burden to the defendant, requiring them to show that the error resulted in “substantial and injurious effect or influence in determining the jury's verdict.”<sup>307</sup>

It is vitally important to remember the facts of this case when considering whether the *Brecht* harmless error standard should extend to

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(2013); and Matthew Wurdeman, *Loss-of-Chance Doctrine in Washington: From Herskovits to Mohr and the Need for Clarification*, 89 WASH. L. REV. 603 (2014).

299. See *supra* Part IV.A.

300. 386 U.S. 18, 24 (1967).

301. *Brecht v. Abrahamson*, 507 U.S. 619, 624 (1993).

302. *Id.* at 624–25.

303. *Id.* at 626.

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

305. The Wisconsin Court of Appeals had reversed the trial court's conviction. *Brecht*, 507 U.S. at 626.

306. *Id.* at 637.

307. *Id.* at 637–38.

capital cases. In *Brecht*, the issue was a so-called *Doyle* error: using a person's lawful right to silence<sup>308</sup> against that person at trial.<sup>309</sup> *Brecht* was not a capital punishment case and accordingly did not deal with errors that could result in the ultimate deprivation of one's liberty: death. The stakes of the error analysis lacked the gravity of a capital case because death was not a possible punishment.

Rather than apply the *Chapman* standard of review, the *Brecht* Court concluded that a less rigid standard should apply.<sup>310</sup> This resulted in the adoption of the *Kotteakos*<sup>311</sup> standard,<sup>312</sup> which required the appellant to show that the error had a "substantial and injurious effect or influence in determining the jury's verdict."<sup>313</sup> Not only does this place an incredible burden upon the petitioner, but the plain language of *Brecht* shows that Court intended that the standard be applied to the jury's verdict, not capital sentences.<sup>314</sup> In framing the issue, the Court noted that the issue in *Brecht* was whether the use of *Brecht*'s post-*Miranda* silence "had substantial and injurious effect or influence in determining the jury's verdict."<sup>315</sup> The Court did not expressly consider that the standard would be applied in a markedly different context—capital sentencing—with a drastically heightened potential consequence.

*B. The Brecht Standard Fails to Protect the Jury's Ability to Hear and Give Meaningful Effect to Mitigation Evidence*

Applying the less stringent harmless error review adopted in *Brecht* to capital cases undermines *Lockett*<sup>316</sup> and *Penry*,<sup>317</sup> the foundational mitigation cases. The *Lockett* Court granted expansive deference to the defendant as to the scope of mitigating evidence the defendant could introduce, requiring that in "all but the rarest kind of capital case, [the sentencer must] not be precluded from considering, *as a mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a

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308. U.S. CONST. amend. VI.

309. *Brecht*, 507 U.S. at 623–24.

310. *Id.* at 637.

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

312. *Brecht*, 507 U.S. at 637.

313. *Kotteakos*, 328 U.S. at 776.

314. *Brecht*, 507 U.S. at 638.

315. *Id.* at 638 (quotation marks omitted).

316. *Lockett v. Ohio*, 438 U.S. 586 (1978).

317. *Penry I*, 492 U.S. 302 (1989).

sentence less than death.”<sup>318</sup> The Court also expressed extreme risk aversion to the death penalty when a jury might impose a lesser sentence.<sup>319</sup> *Penry* required that the sentencer be “provided with a vehicle for expressing its ‘reasoned moral response’ to that [mitigating] evidence.”<sup>320</sup>

While the Court’s rationale in *Brecht* appeals to logic, judicial economy, and respect for the state court’s determination under the facts of that case, applying the same analysis to capital cases may result in outcomes contrary to the principles established in *Lockett* and *Penry* regarding the necessity of preserving the jury’s ability to hear and give meaningful effect to mitigation evidence. Applying the same error standard to capital cases ignores the fundamentally unique nature of a capital case and requires a thoughtful and intentional decision as to which error standard should apply. As Justice Souter noted in his concurrence in *Smith v. Texas*,<sup>321</sup> the Supreme Court has never determined whether *Brecht*’s harmless error standard should ever apply to mitigation error in habeas review.<sup>322</sup>

C. *The Chapman “Harmless Beyond a Reasonable Doubt” Standard Satisfies the Need for Judicial Economy While Respecting the Gravity of Capital Punishment*

The Court should determine that collateral attacks are subject to a less stringent harmless error review. While the notion that “collateral review is different from direct review resounds throughout our habeas jurisprudence,”<sup>323</sup> and AEDPA raised the bar for collateral attacks even higher,<sup>324</sup> the Court should find a pleasant corollary in noting that capital collateral review of a constitutional deprivation differs greatly from noncapital cases where the defendant’s life does not hang in the balance. The stakes are significantly higher and the negative implications of error cannot be overstated. Because of the severe implications of finding

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318. *Lockett*, 438 U.S. at 604 (emphasis in original).

319. *Penry I*, 492 U.S. at 328 (“Our reasoning in *Lockett* . . . thus compels a remand for resentencing so that we do not ‘risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.’” (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 119 (1982) (O’Connor, J., concurring))).

320. *Id.* at 328 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)).

321. 550 U.S. 297, 316 (2007).

322. *Id.*

323. *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993).

324. *See supra* Part III.C.

structural error—a court must vacate the sentence and conduct a new punishment phase of the trial—circuits are understandably hesitant to call an error structural. Requiring an entirely new sentencing trial for a clearly insignificant and harmless error flies in the face of judicial economy and defies logic. Yet, rather than responding to this severe outcome by quickly calling errors harmless, the circuits need a harmless error analysis that handles the particularities of capital cases.

The Court in *Brecht* rightly noted that collateral attacks in habeas cases ask much of the federal courts.<sup>325</sup> In habeas cases the petitioner has necessarily exhausted all state remedies,<sup>326</sup> and the petitioner should not be permitted to re-litigate the case when justice was properly applied by the state. However, the liberty interest at stake in capital cases must be distinguished from other constitutional errors with lesser consequences.

If *Brecht* harmless error review should not apply to habeas review of capital cases, what standard should apply? While it is tempting to argue that mitigation error requires automatic remand,<sup>327</sup> it would be remarkably inefficient and illogical to require remand in a case where reasonable minds would agree that no prejudice occurred. Imagine a case, for example, where the defendant introduced significant evidence pertaining to his difficult upbringing and abuse. In an effort to drive home his point, the defendant wanted to share a lengthy story about how his father took his teddy bear and threw it against the wall when in a rage. The judge did not allow this story, because the defendant had already discussed his father's anger and abuse at length, telling several stories. Should this case be remanded because the judge did not allow this mitigation evidence, which clearly fits within the ambit of *Lockett's* vast range of admissible mitigation evidence? This Comment argues not. Even though such evidence may meet the low threshold of relevance, its probative value would be miniscule. Therefore, an appropriate standard is necessary, one that considers the high consequences of capital sentencing, but also takes a rational approach to promoting judicial economy.

Applying the *Chapman* standard to collateral attacks of habeas cases takes into account that death is different while balancing issues of comity and judicial economy. The standard would require that the state

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325. *Brecht*, 507 U.S. at 637–38.

326. 28 U.S.C. § 2254(b)(1)(A) (2012) (“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 unless it appears that—the applicant has exhausted the remedies available in the courts of the State . . .”).

327. See generally Marla L. Mitchell, *The Wizardry of Harmless Error: Brain, Heart, Courage Required When Reviewing Capital Sentences*, 4 KAN. J.L. & PUB. POL'Y 51 (1994).

prove the harmlessness of the error, rather than adding to the burden of the defendant. The standard would take into account the unique nature of death while also considering that collateral attack is different. The “harmless beyond a reasonable doubt” standard would also recognize the legislative intent<sup>328</sup> behind AEDPA’s habeas constriction by continuing to permit harmless error review in capital punishment cases and granting deference to the state courts.

When the Supreme Court requires that “the sentencer . . . [must] not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death,”<sup>329</sup> the Court should similarly require that the state prove beyond a reasonable doubt that excluding such mitigation evidence was harmless. With the stakes as high as death and in light of the understanding that capital cases are different,<sup>330</sup> making the defendant show that the mitigation error had a substantial and injurious effect on the jury’s determination of the sentence perversely denies the jury a chance to provide a reasoned moral response and it reduces the defendant’s chance at receiving a sentence less than death. Requiring the defendant to prove substantial and injurious effect shifts the burden in a way that cuts against fundamental understanding of who carries the burden of proof in criminal cases.<sup>331</sup> Placing the burden upon the potentially harmed party is contrary to the “original common-law harmless-error rule [that] put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.”<sup>332</sup>

When looking at the emphatic language of *Lockett* and *Penry*, applying the *Brecht* harmless error standard to mitigation errors drastically undercuts the force and effect of these essential cases.<sup>333</sup> The

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328. H.R. REP. NO. 104-23 (1995) (seeking increase judicial economy and comity with the states).

329. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

330. *See supra* Part I.

331. *See In re Winship*, 397 U.S. 358, 364 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

332. *Chapman v. California*, 386 U.S. 18, 24 (1967) (citing generally 1 WIGMORE, EVIDENCE § 21 (3d ed. 1940)).

333. *See Penry I*, 492 U.S. 302, 317 (1989) (“Our decisions . . . have reaffirmed that the Eighth Amendment mandates an individualized assessment of the appropriateness of the death penalty.”); *Lockett*, 438 U.S. at 604 (“[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of



Court should apply the *Chapman* harmless beyond a reasonable doubt standard to capital habeas review of mitigation errors. Another reason for applying the *Chapman* standard exists: the impact upon capital jurors.

#### VI. THE HARM TO CAPITAL JURIES FURTHER SHOWS THAT CAPITAL SENTENCING REQUIRES A HIGH HARMLESS ERROR STANDARD

Most thought and analysis regarding capital punishment revolves around the victims and defendants, and understandably so. Theirs are the lives ended and changed; their stories are the ones told on television and written about in the papers. However, focusing on these victims and defendants overlooks another key player in capital cases, one who is rarely seen or discussed: the capital jury. Studies analyzing the impact of capital jury participation reveal rather shocking results.<sup>334</sup>

Society asks much of capital jurors. They are subjected to weeks or months of odious and graphic stories, and sometimes sequestered from normal life.<sup>335</sup> They are asked to not only hear the horrifying details of a case, but also to participate in the story by determining the future of the defendant. Capital jurors must sit through weeks of trial and testimony, hearing the stories of the victim and engaging with the story of the defendant, and ultimately, these average people are given the power to snuff out that person's life or send them to prison forever. As research and scholarship increasingly study the effects of participating on a capital jury, some have referred to jurors as the "unrecognized victims of the death penalty."<sup>336</sup>

Listening to testimony and viewing evidence that often contains gruesome images and explicit videos can result in significant

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the offense that the defendant proffers as a basis for a sentence less than death." (emphasis in original)).

334. See generally Theodore B. Feldman & Roger A. Bell, *Juror Stress: Identification and Intervention*, 21 BULL. AM. ACAD. PSYCHIATRY & L. 409 (1993); Stanley M. Kaplan & Carolyn Winget, *The Occupational Hazards of Jury Duty*, 20 BULL. AM. ACAD. PSYCHIATRY & L. 325 (1992).

335. See, e.g., *Turner v. Louisiana*, 379 U.S. 466, 467–68 (1965) ("The members of the jury were sequestered in accordance with Louisiana law during the course of the trial, and were 'placed in charge of the Sheriff' by the trial judge.").

336. Janvier Slick, *The Weight of 'Playing God': In Capital Punishment Cases, Jurors are Punished*, THE OREGONIAN, October 14, 2011, at B5; see also Paula Mitchell, *The Weight of Capital Punishment on Jurors, Justices, Governors and Executioners*, VERDICT, <http://verdict.justia.com/2013/10/25/weight-capital-punishment-jurors-justices-governors-executioners> (last visited May 9, 2014).

psychological harm. In a *New York Times* article, William Glaberson profiled the jurors involved in the horrific Petit family murder in Cheshire, Connecticut.<sup>337</sup> The twelve jurors spent two months listening to the harrowing details of the murderer's intrusion into the victims' home, the rape and strangulation of the mother and the subsequent burning of the children.<sup>338</sup> The jurors saw pictures. They lived in that horrific night for two months, and spent the subsequent months attempting to revive normalcy in their lives. One juror said "I am beginning to feel I am going to go to my grave with this."<sup>339</sup> Another juror recounts flashbacks to the trial occurring during dinner parties; yet another related compulsively checking window and door locks, also telling of disturbing nightmares.<sup>340</sup> The jurors spoke sympathetically about those who would serve on subsequent capital juries because of the traumatic experiences those jurors would face.<sup>341</sup>

Academic research of juries shows the significant impact upon capital jurors' psyches.<sup>342</sup> One study found psychological trauma in two-thirds of jurors.<sup>343</sup> Another study found that jurors who impose the death penalty experience higher rates of post-traumatic stress disorder (PTSD) than do those who impose a life imprisonment sentence.<sup>344</sup> The second study found generalized experiences of loneliness, regret, nightmares and other sleep issues, and increased use of drugs and alcohol.<sup>345</sup>

The judiciary must recognize the heightened burden placed upon jurors in capital trials. The constitutional guarantee of jury trials in criminal cases<sup>346</sup> requires jurors to listen to and engage with troubling information and images. A significant part of recognizing this burden is to respect the juror. It becomes vitally important, then, that the judiciary not only ensure that the defendant has the ability to present relevant mitigation evidence to the jury, but that the jury is given the chance to make a fully informed decision about whether or not to sentence the

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337. William Glaberson, *Harrowing Cheshire Case Still Haunts Jurors*, N.Y. TIMES, Jan. 2, 2011, at MB1.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. Kaplan & Winget, *supra* note 334.

343. *Id.*

344. Michael E. Antonio, *Stress and the Capital Jury: How Male and Female Jurors React to Serving on a Murder Trial*, 29 JUST. SYS. J. 396, 397 (2008).

345. *Id.*

346. U.S. CONST. amend. VI.

defendant to death. This not only comports with *Penry*,<sup>347</sup> it minimizes the potential traumatic effect of jury service.

With juror impact well documented, it seems remarkably unjust to ask the jury to sentence the defendant to death without the relevant mitigating evidence that the defendant seeks to introduce. Considering the significant impact upon jurors in capital cases, a juror could suffer from even greater emotional and psychological trauma should a juror later find out that they sentenced a person to death without knowing all of the relevant and constitutionally required mitigation evidence. Imagine, for a moment, the potential psychological damage upon a juror who sentenced a person to death and later discovered that material mitigation evidence had been hidden that would have altered their decision.

Of course, not all mitigation errors are inherently structural and require remand. Remand not only would subject a whole new set of jurors to the same traumatizing experience, it would further increase the costs of a wildly expensive process.<sup>348</sup> Such automatic remand cuts against efforts at judicial economy. However, the *Brecht* standard, which requires that the defendant prove that the mitigation error had “substantial and injurious effect,”<sup>349</sup> sets too low a bar. The Court should require the state to prove that the mitigation error was harmless beyond a reasonable doubt—the *Chapman* standard<sup>350</sup>—which would consider the severe nature of capital cases while only further burdening the judiciary in meritorious cases. Such an approach balances the need for judicial economy and respect for the gravity of capital punishment. Applying the *Chapman* standard would incentivize trial courts to ensure that all potentially relevant mitigation evidence was admitted; this would ensure that jurors were able to make a decision that not only resulted in justice for the defendant, but that comported with that juror’s conscience and minimized negative psychological impact.

To call mitigation error harmless is to claim to understand how the omitted evidence would have impacted the jury’s deliberations after the sentencing phase. It is to replace the jury’s response with that of the

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347. *Nelson v. Quarterman*, 472 F.3d 287, 314 (5th Cir. 2005).

348. See Richard C. Dieter, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis*, DEATH PENALTY INFORMATION CENTER 14–18 (October 2009), <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf>.

349. *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993).

350. *Chapman v. California*, 386 U.S. 18, 24 (1967) (“[B]efore 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.”).

judge, a trade prohibited by the mitigation jurisprudence of this nation that requires individualization and the reasoned moral response of each juror.

## CONCLUSION

The use of harmless error review when considering mitigation errors during collateral attack is a divisive issue that the Court has yet to address, in spite of numerous certiorari petitions and pleas from the states. Six circuits hold that mitigation errors should be considered trial errors and subject to the *Brecht* harmless error standard during habeas review, one holds that harmless error review should apply (without saying what standard); only one argues that harmless error review has no place in the mitigation context. The Court should clarify this muddy issue by determining that *Chapman v. California* offers the appropriate standard: that the state must prove that the mitigation error was harmless beyond a reasonable doubt. The Supreme Court is “satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.”<sup>351</sup> In response to this difference and the impact upon jurors, the Court should adopt the higher *Chapman* “harmless beyond a reasonable doubt” standard when reviewing mitigation errors in capital habeas cases.

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351. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).