In Harm's Way—A Dismal State of Justice: The Legal Odyssey of Cesar Fierro†

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“What has been lost in the worship of abstract procedural principles is our concern for fairness and justice — our dedication to the Bill of Rights and the Fourteenth Amendment.”

—Stephen Reinhardt, Circuit Judge, United States Courts of Appeals for the Ninth Circuit. ††

INTRODUCTION

In our criminal justice system, the state bears the burden to prove each element of the offense beyond a reasonable doubt. This standard is dictated by the gravity of the possible penalty: imprisonment and, in capital cases, death. The integrity of the system is maintained by the panoply of constitutional rights guaranteed to a criminal defendant. Criminal trials, however, are not perfect. When a criminal conviction is tainted by an error that has occurred during trial, the criminal defendant must rely upon the post conviction process to correct the unreliable verdict. Accordingly, state and federal post-conviction proceedings play a unique and pivotal role in the outcome of a verdict grounded on error, since they represent a safety net and the last of defendant’s hope that an injustice may be corrected. But when the rules or doctrines to be applied in the reviewing process are vague or inherently abstract, when they lend themselves to inconsistent rulings, or judicial misapplication, the safety net diminishes and ultimately erodes.

This concept is illustrated by the harmless error doctrine—promulgated to prevent incongruous reversals based on technical or immaterial errors which did not affect the “substantial rights of the parties.” Originally, it was designed to prevent

†The phrase “A Dismal State of Justice,” is borrowed from a study conducted by the Texas Defender Service (TDS), a private non-profit organization established in 1995 by experienced Texas death penalty lawyers. Lethal Indifference, Texas Defender Service, Houston, Texas 9 (2002). The primary task and commitment of Texas Defender Service is to the representation of Texas death row inmates.

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abuses, and to strike a balance between judicial economy, respect for crime victims, and the protection of the rights of the accused. But the current application of the harmless error doctrine bears little resemblance to its original intent. Through judicial manipulations and misapplication, harmless error analysis today is applied to all types of errors, and under the current scheme, few constitutional errors in criminal trials escape harmless error analysis.

This article argues that the harmless error doctrine should not be applied to constitutional error; that to do so would be to disregard the basic tenets on which our system was founded, and to ultimately dilute the purpose and value of these constitutional guarantees. I believe that the history of these, grounded on a legitimate response to oppression and injustice, warrant strict adherence. When we create abstract doctrines like harmless error that can be easily manipulated we compromise the integrity of the Constitution and put the core of our value system in jeopardy.

The severe consequences of applying harmless error analysis to constitutional error is poignantly illustrated in the case of Cesar Roberto Fierro, a Mexican national confined to death row in Huntsville, Texas for the 1979 shooting death of an El Paso taxi driver. No physical evidence of any kind linked Fierro to the killing. The capital murder conviction rested on two shaky legs, a “confession” by Fierro himself, and the testimony of a psychologically impaired sixteen-year old. Since the conviction, Texas state courts have unanimously found that the El Paso police detective who investigated the crime, presented perjured testimony to Fierro’s trial judge and jury, and uncovered how he colluded with police officers in Ciudad Juarez (“Juarez”), Mexico to coerce the confession. In contrast to the detective’s perjured testimony, Fierro testified truthfully about how the police coerced the confession. Fierro has consistently maintained that the confession was coerced and that he is innocent. The record contains no evidence to the contrary. In 1996, pursuant to a writ of habeas corpus filed by Fierro, the Texas Court of Criminal Appeals concluded that Fierro’s Due Process rights were violated by the detective’s perjured testimony and that the false testimony was material, but inexplicably, the court held that the Due Process violation resulting from the detective’s perjured testimony was harmless error and denied Fierro relief.

Fierro’s story is riddled with inequities. From the outset, it chronicles a criminal justice system that is profoundly flawed; a fertile ground for injustice where official misconduct, judicial discretion and bias, vague rules and standards, and the misapplication of abstract doctrines often trump constitutional rights. But nowhere is the integrity of the system more tested than in capital cases where the penalty is irrevocable and the remedies fast eroding.

This article will focus solely on one of the pivotal failures of the legal system that convicted Fierro: the unprincipled 1996 decision of the Texas Court of Criminal Appeals. Part I provides a concise overview of the factual and procedural history of the case leading up to the 1996 decision. It describes at length the proceedings at the Motion to Suppress hearing and at the trial which resulted in Fierro’s conviction and the imposition of the death penalty. This part also includes a discussion of the direct appeal to the Texas Court of Criminal Appeals, and post

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conviction habeas corpus proceedings through 1994. Part II traces the origin of the harmless error rule providing a brief historical review and concluding with its development and recent expansions by the United States Supreme Court. Through a comprehensive analysis and review of five landmark cases, the article points to the inherent flaws in the application of the doctrine to constitutional error.

Part III analyzes and critiques the 1996 Court of Criminal Appeals decision. This part explains how the Court departed from precedent by adopting a new harmless error standard in state post conviction proceedings. It argues that regardless of what standard the court chose to adopt, the perjury which resulted in the admission of a coerced confession was not harmless, but harmful. This part demonstrates how the court focused not on the impact of the error on the verdict, but rather on the sufficiency of the evidence to convict—an approach that is contrary to the touchstone of harmless error review. This part further shows how this Court misconstrued the law in its result-oriented mentality. And, finally, through a review of excerpts of trial testimony, closing arguments, and the court’s charge to the jury, it conclusively shows how the admission of the coerced confession had a substantial and injurious effect on the jury’s verdict.

Part IV examines how the application of harmless error analysis to constitutional error is more ominous in the face of fast eroding federal post conviction remedies. It briefly depicts the appellate nightmare that followed in the aftermath of the 1996 decision. It shows how these proceedings coincided with the enactment of the Antiterrorism and Effective Death Penalty Act—a federal law which reformed habeas proceedings and further curtailed the rights of state prisoners in federal courts. This section demonstrates how esoteric procedural rules converged to create insurmountable obstacles and bar Fierro from any hope of justice in the federal courts. Finally, this section demonstrates how harmless error analysis allows wide latitude for judicial discretion and encourages misapplication and potential abuse. Specifically, it discusses the result-oriented mentality of the Fierro court, and the criticisms that have been leveled against it, as well as the Texas criminal justice system. The article concludes that the doctrine as applied to errors of constitutional dimension is inherently flawed because it operates within a criminal justice system that is itself riddled with inconsistency and arbitrariness.

I.

THE FALLABILITY OF HARMLESS ERROR—THE LEGAL ODYSSEY OF CESAR FIERRO

A. Factual History

The inequity of constitutional error and the grave consequences of reviewing it under the harmless error doctrine is well illustrated in the legal odyssey of Cesar Fierro—a complex procedural maze that has spanned over twenty five years, with the specter of injustice looming at every step. It began on February 27, 1979, when Border Patrol agents discovered the lifeless body of Nicolas Castanon in
an El Paso park, about one mile from the Mexican border. Authorities concluded that he had been shot to death. Four days later, the El Paso police arrested Ricardo Duran Cano and Robert Blanco Valencia Rodriguez in connection with the killing and held them on charges of capital murder. Although police urged the El Paso District Attorney's Office to seek capital murder indictments against both men, the prosecutors refused. Instead, the district attorney presented the case to a grand jury for indictments charging Cano and Rodriguez with unauthorized use of a motor vehicle. Although an El Paso County grand jury returned indictments against both men, the State successfully moved to dismiss the charges after Fierro's arrest for the same offense.

The El Paso police considered the investigation in Castanon's death closed following their presentment of the case against Cano and Rodriguez to the district attorney. It was not until five months later, when sixteen-year old Gerardo Olague implicated Cesar Fierro in the crime, that the police shifted their attention to Fierro.

According to the El Paso police, Olague paid an unsolicited visit to its headquarters on July 31, 1979 to give his account of the circumstances surrounding the homicide of Nicolas Castanon. Prior to taking Olague's statement, El Paso

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2. Id. at 7-8. The federal agents recovered Mr. Castanon's body at Modesto Gomez Park in El Paso. The agents promptly notified the El Paso police of their discovery. Through documents at the crime scene, the police identified the deceased as Nicolas Castanon, a driver with the Yellow Cab Taxi Company in El Paso, Texas. The police learned that Castanon had called in his last fare at approximately 2:25 a.m. that morning. Unable to locate Castanon's taxi, El Paso Police Detective Jose Bailon broadcast the information to the three major police departments in Juarez, Mexico. Within an hour, the Juarez Municipal Police notified Bailon that they had located the cab. The Juarez police agreed to secure the taxi and the surrounding area until the El Paso police arrived. Both, Bailon and Medrano, from the El Paso Police Department, soon arrived with a crime scene search van. Upon arrival, the two El Paso detectives accompanied a Juarez police officer in a canvas of the neighbourhood for witnesses. The trio interviewed Angel Padilla, a resident living directly across the street from where the cab was found. Padilla told the officers that some noises outside his window awoke him at approximately 4:00 a.m. that morning. When he looked outside, he saw two men getting out of the cab. He described to the officers the height, build, and clothing of both men. Padilla further agreed to give a statement to Medrano and, a few days later, to view a line-up at the El Paso Police Department. Id. at 7-8.

3. Id. at 9.

4. Id. The El Paso police developed leads on Cano and Rodriguez through an unrelated investigation into a stolen vehicle ring. The police knew the two suspects as heroin addicts, and that Rodriguez made a down payment on a car the week of the killing. Furthermore, he gave a false alibi to the police concerning his hereabouts on the night of the murder. Angel Padilla positively identified Rodriguez as the man exiting the driver's side of the cab the morning of the homicide, and gave a "strongly tentative" identification of Cano as the passenger. At a separate line-up, a toll-taker from the Stanton Bridge identified the two men as the occupants of the taxi on morning of the killing. Four days later, a magistrate found probable cause to arrest the two for capital murder. Id.

5. Statement of Facts (on file with the author).


7. Id. at 9-10. Detective Medrano explained that the police narrowed the list of suspects to Fierro through technical investigative techniques, such as process of elimination and gathering information from various individuals. At a later point in his testimony, Medrano conceded that Cesar Fierro did not become a suspect until Olague implicated him on July 31, 1979, which was five months after the homicide. When questioned about his earlier statement, Medrano explained that the police identified many suspects with the surname "Fierro." When asked how many, Medrano replied, "God Almighty, I don't remember." Through a Texas Open Records Act request during state habeas proceedings, Fierro's legal counsel obtained the El Paso police file on the investigation into the Castanon homicide. The file revealed that of nine early suspects, Cesar Fierro was the only one with the surname Fierro. In fact, Fierro's name appeared for the first time on July 31, 1979, the same day that Olague supplied it to the El Paso police. Id. at 10.
Police Detective James Holland brought Olague before a magistrate who advised him of his rights and appointed a lawyer to represent him.\(^8\)

In his statement to the detectives on July 31, 1979, Olague asserted that he witnessed Fierro shoot a taxi driver to death approximately six months earlier. Olague explained that Fierro and he were walking in the downtown area of El Paso at approximately 2:00 a.m. on February 27, when Olague hailed a cab to return home. According to Olague, Fierro joined him in the cab, sitting in the back while Olague sat in front with the driver, Castanon. The cab driver radioed his location and reported that he was going to Wooldridge on North Loop in El Paso. According to the notes and the testimony of the dispatcher, Castanon called in his last fare to Delta.\(^9\)

Olague further testified that, the cab driver traveled east on North Loop, then turned right onto Wooldridge Street. They were a short distance from Olague's house on Wooldridge when Fierro suddenly yelled "Stop!" and inexplicably shot the cab driver in the back of the head. The driver slumped into Olague's lap, and the cab careened into a yard until Olague put his foot on the brake.\(^10\)

Olague told the police that once he successfully stopped the car, Fierro and he switched seats. According to Olague's statement, Fierro ordered him out of the car and into the back seat so that Fierro could drive the cab. Fierro then drove the cab to a park, where he fired another shot into the body and left the deceased in the park. Afterwards, they drove across the border to Juarez, Mexico where they abandoned the cab. Olague stated that he saw Fierro throw the victim's jacket and watch out of the window during the drive into Juarez. After deserting the cab, Olague stayed with Fierro at the home of Fierro's parents for the next four to five days.\(^11\) In sum, Olague stated that in the five months following the homicide, he accompanied Fierro throughout El Paso, Juarez, and the interior of Mexico until they parted company in Parral, Mexico. In Parral, Olague spent the next few weeks without Fierro. He explained that he traveled alone between Parral and El Paso several times before he decided to give a statement to the police. At the same time, Olague attributed his delay in reporting the crime to being under the duress of Fierro.\(^12\)

After obtaining Olague's statement implicating Fierro in the murder, detectives Holland and Medrano contacted the prosecutor, Gary Weiser. Reviewing the statement, Weiser told the detectives that he believed probable cause existed to arrest Fierro, and suggested that they obtain an arrest warrant from a magistrate in El Paso.\(^13\) According to Weiser, the detectives told him that they could not arrest Fierro because they did not know his whereabouts. At a later suppression hearing, Weiser testified that he told the detectives that Fierro's name sounded familiar to him and that they should check the local jail. In fact, Fierro was detained at the El Paso jail

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\(^8\) \textit{Id.} at 10-11. The magistrate appointed local attorney James Butts to represent Olague. That same day, Butts discussed the case with Gary Weiser, First Assistant to the El Paso County District Attorney. Also, detective Holland took a statement from Olague at the Youth Services Division in Butts' presence just before noon.

\(^9\) \textit{Id.} at 10-12.

\(^10\) \textit{Id.} at 12.

\(^11\) \textit{Id.} at 12-13.

\(^12\) \textit{Id.} at 14.

\(^13\) \textit{Id.}
for violating his probation on a theft charge by possessing marijuana.\(^{14}\)

Instead of going to the jail next door to arrest Fierro, Holland and Medrano drove to Mexico for a breakfast meeting with the Juarez Police Comandante, Jorge Palacios. Medrano arrested Fierro at the jail on August 1, 1979 and secured a confession from him the same morning.\(^{15}\)

In their first meeting, Fierro told his lawyers how Medrano coerced him to give a false confession despite his innocence.\(^{16}\) To elicit this false confession, Medrano told Fierro that his parents were detained by the Juarez police and made threats regarding this detention.\(^{17}\) During the trial, however, Medrano would testify numerous times that he did not know that Fierro’s parents were detained for questioning by the Juarez police or that he used the detention as a threat to coerce the confession.\(^{18}\)

The State did not charge Olague with any involvement in the homicide. Rather, the El Paso District Attorney charged Olague with a single count of car burglary, despite his admission to participation in forty burglaries that he had admitted to in the several months, preceding Fierro’s arrest.\(^{19}\)

It is at this early stage of the legal proceedings that Fierro begins to encounter injustices which the Court of Criminal Appeals subsequently declined to correct. The El Paso police relied on the dubious testimony of Olague, and on the strength of Fierro’s “confession” to move forward against him. By so doing, it abandoned the pursuit of any possible leads contained in Olague’s statement which may have corroborated Fierro’s innocence.\(^{20}\) The misapplication of the harmless error doctrine by that court failed to correct the compounded inequities that evolved from the coerced confession.

**B. Motion to Suppress Hearing—The Anatomy of a Coerced Confession**

On November 29, 1979 Fierro’s attorney filed a motion to suppress Fierro’s

\(^{14}\) *Id.*  
\(^{15}\) *Id.*  
\(^{16}\) *Id.*  
\(^{17}\) *Id.* at 15. The widespread reputation of the Juarez police has been amply documented. See *infra* note 28 and accompanying text.  
\(^{18}\) *Id.* at 21.  
\(^{19}\) *Id.* at 11.  
\(^{20}\) *Id.* at 13. In his statement to police, Olague provided the name of the person who apparently drove Fierro and him to Chihuahua City less than a week after the homicide. A review of police records reveals that the police never questioned that witness to confirm the statement. From Chihuahua City, Olague and Fierro took a train to Zacatecas, Mexico. Olague told the police that he saw Fierro sell the murder weapon to a rancher in Carrillo, Mexico, about ten miles from Zacatecas. Again, the police never searched for the gun, thus dropping a significant lead in the search for the murder weapon. Further, at trial, Olague testified that the pants he was wearing on the morning of the killing were covered in blood from his contact with the body. He testified that he still wore the pants for house painting even though one leg was stained with dried blood. Although Olague claimed that he told El Paso Detectives Holland and Medrano about the pants, they never asked for them. Nor did the detectives question residents of the Wooldridge neighborhood to corroborate Olague’s story. In the state post-conviction proceedings, Fierro’s attorneys interviewed several of the neighborhood residents who stated that they never heard gunfire, nor observed a cab skidding out of control onto a lawn in their neighborhood. The record does not contain any report of a search by the police of the crime scene, nor does it appear that the police searched the area for any physical evidence of the crime, even though they had not recovered the bullet that caused one of the two wounds. *Id.* at 12-13.
confession. At the hearing, Fierro’s counsel presented seven witnesses: Cesar Fierro; Fierro’s mother, Socorro Reyna; Fierro’s step-father, Alfredo Murga; Fierro’s wife, Laticia Hernandez; a journalist from Juarez, Miguel Ramos; a licensed vocational nurse from the jail; and the El Paso County prosecutor, Gary Weiser.

Reyna, Fierro’s mother, testified that Comandante Palacios and eight other Juarez police officers raided her home at approximately three o’clock in the morning of August 1, 1979 and took her and her husband, Alfredo Murga, into custody. She affirmed that the Juarez police took away two letters, one from Cesar Fierro, and the other from her other son, Sergio Fierro. She also claimed that the police physically abused her and threatened to attach an electric generator, known as a “chicharra,” to her husband’s genitals. Both Reyna and her husband were held at the Juarez jail in separate cells until later that day. Reyna testified that Palacios released them from jail only after her son had already confessed to the murder in El Paso. She related that neither she nor her husband was charged with any offense.

Alfredo Murga, Fierro’s step-father, testified to the same sequence of events, naming Palacios as the officer in charge of the raid. Murga also testified that the Juarez police carried short machine guns during the invasion. In addition, he testified as to the treatment he received by the Juarez police. He recounted: “[t]hey try to beat me with a chicharra... an electric prod like they do with the cows over here.” When asked to describe a “chicharra,” he explained: “It is an electric generator with batteries, and they place it in your sex organs.” He testified that the Juarez police had threatened him with the chicharra but stopped short of using it. Murga, too, testified that they were released because the police told them that Cesar had confessed.

21. Id. at 18. Miguel Ramos, a reporter from Juarez, testified that he learned about the arrest and detention of Fierro’s parents from Reyna’s brother, who witnessed the raid on the home. Ramos agreed to help obtain information from the police. At the suppression hearing, Ramos testified that he saw Socorro Reyna at the police station and asked Palacios about it. At this point in the testimony, the State objected to hearsay, and Ramos was unable to respond. Id. at 19.

22. Id. at 18.

23. Id.

24. See Motion for Authorization to File a Successive Habeas Corpus Petition With the Western District of Texas In the Alternative Motion to Reopen 28 U.S.C. Proceedings at 18, (5th Cir. 1997)(97-000498).


26. Id. at 18-19.

27. Id. at 19.

28. Id. in 1991, when Fierro’s second habeas petition was pending in the federal courts, the Mexican government publicly acknowledged abuses of power among its police officers. Jorge Lopez Molinar, former Attorney General for the northern region of the State of Chihuahua, stated:

Since 1991, the Mexican government has acknowledged through the National Human Rights Commission that certain Juarez police officers abused their power and violated the human rights of Mexican citizens. The government has taken many steps towards preventing future abuses by these police officers. For example, indigent suspects now have the right to counsel when they are arrested. In the State of Chihuahua, a confession may only be used as evidence if it is given to prosecutors or the judge; a confession given only to the police cannot be used as evidence. In addition, the government created the National Commission of Human Rights. The Human Rights Commission for the State of Chihuahua was created in 1990.

Id. at 98.

On August 14, 2001, the Government of the United Mexican States filed an Amicus Curiae Brief in the
Fierro testified that Medrano arrested him the morning of August 1, 1979. After signing Fierro out of jail, Medrano brought him to the police station, and advised him that the police were charging him with the murder of a taxi driver. An hour later, Medrano and Holland brought Fierro before a magistrate, who advised him of his rights and issued a warrant for his arrest. Once returned to the jail, Medrano then resumed interrogating Fierro, speaking with him primarily in Spanish.

During the interrogation, Medrano ominously informed Fierro that the Juarez police had visited his family at their home in Juarez. He showed Fierro letters that the Juarez police had seized from his parents to prove they were in custody. Fierro testified that he confessed because he feared for his parents' lives. He believed that the only way his parents would not be harmed was if he did what the El Paso police told him to do, provide a confession. Before Fierro signed the

United States Court of Appeals for the Fifth Circuit in support of Cesar Fierro's request for reversal of the district court's decision and, in the alternative, a remand for further proceedings. The document acknowledged misconduct on the part of Mexican officials and indicated that Mexico had taken "progressive steps to prevent abuses of power by police officers within its borders." More importantly, it provided a window into the well-known practices of torture and brutality used in Juarez at the time of Fierro's case. "In 1979, the mere mention of Comandante Palacios caused Juarez citizens to shudder with fear. Palacios at one time worked with the secret police, 'an agency which lacked any official status,'...any citizen of Juarez over the age of thirty 'would be familiar with the reputation of Palacios...When citizens of Juarez hear the name of Palacios...they think of police brutality." Brief of Amici Curiae Government of the United Mexican States at 6-7, Fierro v. Johnson, 197 F.3d 147 (5th Cir. 1999) (No. 01-50400).

29. Petition for A Writ of Habeas Corpus, supra note 1, at 35.
30. Id. at 24.
31. Id. at 25.
32. Petition for A Writ of Habeas Corpus, supra note 1, at 19.
33. Statement of Facts, supra note 5 at 25. See also Petition for A Writ of Habeas Corpus, supra note 1, at 20. Fierro's testimony clearly indicated that he believed his parents were in danger from the Juarez police as the following excerpt of his testimony reveals:

Q: Why did you sign this confession?
A: Because of our letter...some letter he showed to me.
Q: Who were the letters from?
A: One was mine and the other was my brother's.
Q: And whom were those letters addressed to?
A: To my mother.
Q: Why were the letters so important?
A: Because she was the only one who had them.
Q: Where were the letters taken from?
A: It must have been from my mother.
Q: Were you told that your mother was incarcerated in Juarez?
A: Yes.
Q: And you have testified that the only reason you signed this confession is that you were fearful of your mother being incarcerated?
A: That's the way it was.
Q: And you were... what were you told would happen if you signed the confession?
A: My mother would remain in jail.
confession, Medrano made a telephone call to Palacios at the Juarez police station. Medrano then said to Fierro, “a certain person wants to talk to you,” and handed the phone to Fierro.  

Immediately after his telephone conversation with Palacios, Fierro told Medrano, “I’m ready to give a confession of the whole thing.” Fierro also testified that Medrano beat him around the head during the interrogation.

Although he claimed that he had never worked with Palacios before, Medrano admitted that the Juarez police and the El Paso police generally cooperated with one another. As Medrano put it, the two agencies frequently assisted each other as a “courtesy.”

Medrano and the lead prosecutor, Gary Weiser, were well aware of the reputation of Juarez police. When asked whether he thought Fierro was worried about the possibility that the Juarez police had arrested his mother, Medrano replied, “I would be concerned, wouldn’t you?” In closing argument, Weiser obliquely referred to the practices of the Mexican police:

I don’t think there’s any question but that the Juarez judicial police, if they were in the United States and operated the way they do in the United States, it would be all over. Unfortunately, they don’t utilize the same sort of constitution in Mexico that we do in the States. And I don’t for one moment condone actions that the Juarez police allegedly took in this case.

Weiser did not challenge the testimony concerning what the Juarez police did to Fierro’s parents in the early morning hours of August 1, 1979. Neither on cross-examination nor in argument did the prosecutor question the Juarez police raid, the seizure of the letters, or the unlawful confinement of Cesar Fierro’s parents. Instead, the prosecutor argued that these facts were irrelevant because the El Paso police were unaware of them.

At the conclusion of the suppression hearing, the court ruled that Fierro’s confession was not coerced, thus admissible at Fierro’s later trial.

The consequence of constitutional error is again illustrated in the court’s denial of the motion to suppress. By its misapplication of the harmless error doctrine,

Q: For clarification, Mr. Fierro, would you please repeat... why you signed the confession?
A: Because if I didn’t my mother would remain in the Juarez jail.
Q: Did somebody make that statement to you?
A: Yes.
Q: Who was that?
A: Medrano.

Fierro also testified that Medrano beat him around the head during the interrogation.

34. Statement of Facts, supra note 5, at 25.
35. Id. at 25.
37. Statement of Facts, supra note 5, at 27.
38. Id. at 27. When asked if he had heard about how the Juarez police operated, Medrano replied: “Oh, you can hear a lot of things.” However, the court sustained the prosecutor’s hearsay objections, thus precluding any further testimony on the matter. Id. at 27.
39. Id at 28.
40. Petition for A Writ of Habeas Corpus, supra note 1, at 21.
the Court of Criminal Appeals failed to play its pivotal role as a safety net to correct the injustices that began to unfurl during the early stages of litigation.

C. Trial: The Anatomy of a Coerced Confession Coupled with Perjured Testimony—Injustice Equals Tied Hands

The trial commenced before the 120th District Court for El Paso County. At the trial, the prosecutor, Gary Weiser, offered two pieces of evidence to connect Fierro to the murder of Nicolas Castanon: (1) the confession, and (2) the testimony of Olague. The prosecutor recognized that Olague could be viewed as an accomplice and stated to the trial court: "I think it would be committing reversible error if you didn't put in [an accomplice charge]." Under firmly established Texas law existing at the time, "[a] conviction could not be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."41

Olague contradicted himself about the times and sequences of events throughout his trial testimony. He added several details that did not appear in his statement to the police. These new facts helped explain some of the problems with the case. For instance, Olague testified at trial that he observed Cesar Fierro search the body of Nicolas Castanon, steal his wallet, and remove a watch from his arm. The testimony was particularly damaging, because, it substantiated a robbery, the offense underlying the capital murder indictment.42

However, when confronted with his failure to tell the police previously about his observations of the thefts, Olague attributed the discrepancy to psychological problems. He claimed to be psychologically impaired, even as he testified.43

Olague's testimony took another bizarre turn when he accused a juror of buying the CB radio that he had stolen at the Holiday Inn on the night of the murder. When asked to describe the pawnshop owner who purchased the CB, Olague pointed to a juror and said to her, "Well, can you talk to me?" Then, he said, "You can ask her (the juror) about how many stolen items that (Fierro) took.'44

With no new evidence to undermine the admissibility of Fierro's confession, Fierro's counsel submitted a radically truncated version of the evidence presented at the suppression hearing.45

Based upon the evidence presented, the jury convicted Fierro of capital murder and sentenced him to death on February 15, 1980.46

41. See Petition for A Writ of Habeas Corpus. supra note 1, at 44. TEX. CRIM. PROC. CODE ANN. § 38.14 (Vernon 1999).
42. Id. at 45-46.
43. Id. at 46.
44. Id. at 47.
45. Most significantly, Fierro's counsel refrained from calling Socorro Reyna to describe how Palacios seized the letters from her home during the raid. Likewise, Fierro was not called to explain how Medrano conveyed threats against Fierro's parents by showing him the letters. In contrast to the seven defense witnesses presented at the suppression hearing, Fierro's trial counsel called only one witness, Alfredo Murga, to testify on the issue of coercion. Id. at 51.
D. Fierro’s Appeals—The Anatomy of Corroborated Evidence Establishing Harmful Error

After the verdict and death sentence, Fierro filed a direct appeal to the highest criminal court in Texas - the Texas Court of Criminal Appeals.47 He argued that the evidence was insufficient to sustain a conviction for capital murder because it failed to establish beyond a reasonable doubt that he had committed murder in the process of committing the offense of aggravated robbery.48 Finally, Fierro’s lawyer argued that the trial court erred in admitting his confession because the confession was taken as a result of an illegal arrest in that the arrest warrant was issued pursuant to an affidavit which failed to state probable cause.49

The trial court, however, had entered specific findings that: 1) Neither Comandante Palacios nor any members of the Juarez judicial Police or any other members of other Mexican law enforcement agencies were acting as agents of the El Paso Police Department or under their direction; (2) Detective Medrano did not have any letters, nor did he show Ferro any letters prior to or during the confession; and (3) Detective Medrano did not tell Fierro that his failure to confess would mean that his mother or any other member of family would remain in jail.50 The Court of Criminal Appeals rejected Fierro’s claims and affirmed the trial court’s decision that sentenced Fierro to death. The court reasoned that it could not disturb any findings supported by the record and that the circumstances supported the trial court’s determination that the confessions was made voluntarily.51

Thus, the trial court’s findings based on testimony which was later conclusively held to be perjured caused the Court of Criminal Appeals to affirm the conviction – an injustice that the court failed to correct when years later it applied the harmless error doctrine to this constitutional error. As a result, Fierro’s case was hurled into a nightmare from which he has never emerged.

Between 1984 and 1993, Fierro exhausted every avenue of appeal available to him, both in the state as well as in the federal courts. All proved unsuccessful. He was scheduled for execution at least three times – the most recent on August 10, 1994.52 But on January 13, 1994, his luck appeared to turn. Fierro’s counsel made a written request under the Texas Open Records Act to review the prosecution file in the Fierro case.53 A supplemental offense report written by Detective Medrano was

47. According to the Texas Code of Criminal Procedure, “appeal of all cases in which the death penalty has been assessed shall be to the Court of Criminal appeals.” See Code of Criminal Procedure, Art. 4.04.
49. Id. at 313.
50. Id. at 316.
51. Id.
52. Applicant’s Brief on Submission at 5-6, Ex Parte Fierro, (Tex.Crim. App. 1994) (No.71-899).
53. Petition for A Writ of Habeas Corpus, supra note 1, at 79. The Texas Open Records Act (“TORA”) requires disclosure of all public records, unless the record falls within one of 23 exemptions. See TEX. GOV’T CODE ANN. § 552.010 (Vernon 2005). Prior to a 1997 amendment, the State widely invoked the TORA’s law enforcement exemption to withhold records of all investigations, whether open or closed. See generally Holmes v. Morales, 924 S.W. 2d 920 (Tex. 1990). In 1997, the Texas Legislature amended the TORA to allow access to law enforcement records, unless disclosure would unduly interfere with law enforcement or crime prevention. TEX. GOV. CODE ANN. § 552.108 (Vernon 2001).
among the documents the prosecutor produced in response to that request.\textsuperscript{54} The report clearly indicated that Detective Medrano had committed perjury during the suppression hearing and at trial.\textsuperscript{55} At both proceedings, Medrano had testified that Fierro's confession was not coerced, as Fierro had claimed from the outset, and that the El Paso police had no knowledge that Fierro's parents were imprisoned by the Juarez police. The newly found supplemental report indicated that Detective Medrano had been fully aware that Fierro's parents had been held in custody by the Juarez police. Not only did Detective Medrano have this information, but he obtained it from Comandante Palacios — the same person that Fierro’s parents and Miguel Ramos had identified by name as the Juarez police officer in charge of their confinement. The report further showed that, prior to their breakfast meeting, Comandante Palacios had previously told Detective Medrano that Fierro was incarcerated in the El Paso jail. Therefore, their breakfast meeting was obviously not for the purpose of locating Fierro, but rather to retrieve the letters which had been seized from Fierro’s mother by Comandante Palacios.

The report corroborated the claims of coerced confession that Fierro had made at this suppression hearing, and which had been substantiated by a number of witnesses — an issue at the heart of the defense theory.

Until January 14, 1994, the State concealed from Fierro the offense report submitted by Medrano, which substantiated the officer's perjury. The lead prosecutor from the trial maintained that the El Paso police concealed the report from him. Although Fierro’s lawyers were not certain that the District Attorney’s Office withheld the report, its contents led them to conclude that they would have used and remembered it had they seen it.\textsuperscript{56}

As a result of this new evidence, on July 26, 1994, Fierro filed a third application for writ of habeas corpus in the Court of Criminal Appeals and in the trial court challenging the constitutional validity of his confession.\textsuperscript{57} Without conducting a hearing, the trial court signed the State-authorized findings of fact and conclusions

\textsuperscript{54} Petition for A Writ of Habeas Corpus, \textit{supra} note 1, at 60-61.
\textsuperscript{55} See id. The supplemental report stated the following:
After undersigned officers, DETS. JIM HOLLAND and A. MEDRANO, investigating the murder case of the complainant and after taking the statement from JERRY ADRIAN OLAGUE of 226 Wooldridge, age 16... obtained the name of the individual by the name of CESAR ROBERTO FIERRO who in the statement given by OLAGUE was responsible for the murder of the complainant. ... After pinpointing the house, and questioned by the Juarez Police, officers returned OLAGUE who is 16 years of age back to the Y.S.D. Station. ... This date at 5:00 a.m. in the morning, DET. A. MEDRANO was called by phone by Comandante JORGE PALACIOS who stated that they had raided the house pointed out by OLAGUE this morning, August 1, 1979, and had in custody the mother of the suspect, CESAR FIERRO, her name being SOCORRO REYNA, and her common law husband, ALFREDO MURGA. He related to undersigned officer that after interrogation of the two whom they had in custody, he learned that the suspect, CESAR FIERRO, was in custody in the El Paso County Jail. Undersigned officer at that time called the County Jail and talked to SGT. ALARCON who confirmed that subject CESAR FIERRO indeed was in custody. He was arrested for a Probation Violation and was arrested in May. Officers will continue the investigation by further reports after making contact with subject CESAR ROBERTO FIERRO.

Id.

\textsuperscript{56} See id. at 65-66.
\textsuperscript{57} Applicant’s Brief on Submission, \textit{supra} note 52, at 6.
of law, submitted ex parte, on August 4, 1994. 58

The next day, though, in a per curiam order, the Court of Criminal Appeals stayed Fierro's execution and ordered his case submitted on the first two allegations in his habeas application. 59 Faced with this new evidence, the court ordered the trial court to conduct a hearing and enter findings of facts and conclusions of law. 60

Judge Marsh, the trial judge who presided over the habeas hearing, considered the testimony of former Juarez Police Comandante Palacios through a rogatory letter, 61 as well as live testimony of seventeen witnesses, and numerous exhibits, affidavits and pleadings in state post-conviction proceedings. 62 Among the exhibits was an affidavit submitted by Gary Weiser, the lead trial prosecutor, which stated that he would have moved to dismiss the case had he known about the testimony of Medrano since Medrano's testimony was the central evidentiary piece relied on by the prosecution in seeking Fierro's conviction and death sentence. 63 In light of the evidence presented during the course of the hearing, Judge Marsh made the following findings of fact:

1) That at the time of eliciting the Defendant's confession, Det. Medrano (now deceased) did have information that the Defendant's mother and step-father had been taken into custody by the Juarez police with the intent of holding them in order to coerce a confession from the Defendant, contrary to said Det. Medrano's testimony at the pre-trial suppression hearing. 64

58. Id.
59. Id.
60. See Petition for A Writ of Habeas Corpus, supra note 1, at 6.
61. Id. Courts in the United States do not have the authority to compel testimony from witnesses in a foreign country. Judges in the United States, however, may request such a testimony through a letter rogatory. To do so, the presiding judge submits a letter containing interrogatories (letter "rogatory") to a judge in a foreign country. The judge in the foreign country has the discretion to compel the witness to appear before her and give sworn responses to the letter rogatory. If such testimony effected, the foreign judge then transmits the responses to the judge in the United States for use as testimony in the pending action. See, e.g., TEX. R. CIV. PRO. 188; FED. R. CIV. PRO. 28.
62. See Fierro's Motion for Authorization to File a Successive Habeas Corpus with the Western District of Texas at 1, In re Fierro, (5th Cir. 1997) (97-000498).
63. Id. at 4. The prosecutor stated as follows:

I cannot dispute that the Juarez police detained Fierro's family in Mexico. During Fierro's trial, however, I argued that the Juarez police's arrest of Fierro's family was irrelevant, because the El Paso police neither knew about it nor communicated this information to Fierro. Having learned that Medrano in fact knew about the arrest and having reviewed the testimony presented at the suppression hearing and trial, I now believe the information about the family's arrest to be highly relevant. The record indicates that Detective Medrano put Fierro on the telephone with Juarez Police Comandante Palacios just before Fierro confessed. Based on the supplementary offense report dated July 31, 1979, the testimony presented at the suppression hearing and at trial, and the reputations of Medrano and the Juarez police, I believe that Medrano and Palacios colluded to coerce Fierro's confession.

Had I known at the time of Fierro's suppression hearing what I have since learned about the family's arrest, I would have joined in a motion to suppress the confession. Had the confession been suppressed, I would have moved to dismiss the case unless I could have corroborated Olague's testimony. My experience as a prosecutor indicates that the judge would have granted the motion as a matter of course.

Id.
2) That the District Attorney’s Office did not withhold this Supplemental Offense Report from the Attorneys for the Defendant.  

3) That Det. Medrano presented false testimony regarding the nature and extent of the cooperation between El Paso police and the Juarez police in this particular case, as it existed in 1979. There was no evidence produced to show that such practices are still taking place.  

Judge Marsh made the following conclusions of law:  

1) That there is a strong likelihood that the Defendant’s confession was coerced by actions of the Juarez police and by the knowledge and acquiescence of those actions by Det. Medrano.  

2) It is not the conclusion of this court that the Defendant should be released from these charges, but that he should be retried by another jury who will then render a verdict based on all the evidence, both old and new that has been developed at these hearings.  

The nine-member Texas Court of Criminal Appeals unanimously adopted Judge Marsh’s findings concluding that Fierro’s due process rights were violated by Medrano’s perjured testimony and that the false testimony was material. But incredibly, in a contentious 5-4 decision, the court held that the due process violation resulting from officer Medrano’s testimony was harmless error and denied relief.

II. HARMLESS ERROR—A VAGUE DOCTRINE RESULTS IN ARBITRARY AND DISPARATE RULINGS

A. Origins of the Harmless Error Doctrine

In order to fully understand the inexplicable opinion of the majority of the Court of Criminal Appeals, a brief excursus into “harmless error” doctrine is warranted. A plethora of articles written on the topic, however, is a testament to its

65. Id.  
66. Id.  
67. Id.  
68. Id.  
69. Ex Parte Fierro, 934 S.W.2d at 372. In 1996, the Texas Court of Criminal Appeals was composed of Chief Judge Michael McCormick, and eight Associate Judges: Charles Baird, Sam Houston Clinton, Sharon Keller, Frank Maloney, Stephen Mansfield, Lawrence Meyers, Morris Overstreet, and Bill White. The court gave the parties no indication that it was considering what became the decisive issue in the case—the harmless error standard. As the decision makes clear, the Court created and applied the standard for the first time in this case. It neither invited nor accepted briefs or oral argument on the issue before concluding that the due process violation arising from Medrano’s false testimony amounted to “harmless error” under standard. Adjudication thus occurred within the seclusion of chambers, and not in “state court proceedings” as required by Section 2254 (d). See Petition for A Writ of Habeas Corpus, supra note 1, at 106.  
70. Ex Parte Fierro, 934 S.W.2d at 372. The four dissenters of the Fierro decision were: Judges Clinton, Overstreet, Baird, and Maloney. Id. at 370.
continued controversy. Marked by a "tumultuous" history, today it continues to generate stinging criticism from practitioners, scholars, and jurists alike. Errors in trials are endemic in the criminal justice system, but the determination as to the importance of an error has "swung like a pendulum between two extremes." Justice Roger Traynor traced the development of the rule to two early 19th Century English cases. In the first case, the King's Bench declared that the erroneous admission of evidence required a new trial if "the case without such improper evidence were not clearly made out and the improper evidence might be

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72. See generally Linda E. Carter, The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court's "No Harm, No Foul" Debacle in Neder v. United States, 28 AM. J. CRIM. L. 229, 229-30 (2001) (arguing that the "harmless error doctrine has the dubious distinction of both lacking a sound analytical basis and representing an imprecise phrase"); Stephen H. Goldberg, Harmless Error: Constitutional Sneak Thief, 71 J. CRIM. L. & CRIMINOLOGY 421, 422 (1980) (stating that "the doctrine of harmless error destroys important constitutional and institutional values and therefore should be discarded"); James E. Wicht, III, There is no Such Thing as a Harmless Constitutional Error: Returning to the Rule of Automatic Reversal, 12 BYU J. PUB. L. 73, 75 (1997) (arguing that given the inherent difficulties of constitutional harmless error analysis and the resulting "lowering of the inherent value attached to those rights" we should return to a rule of automatic reversal); Charles J. Ogletree, Jr., The Supreme Court, 1990 Term, Comment; Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions, 105 HARV. L. REV. 152, 154 (1991) (arguing that the "application of the harmless error doctrine to coerced confessions is wrong."); Harry T. Edwards, Madison Lecture: To Err is Human, But not Always Harmless: When Should Legal Error be Tolerated? 70 N.Y.U. L. REV. 1167 (1995) (Judge Edwards, Chief Judge, United States Courts of Appeal for the District of Columbia Circuit explores the two ways in which a court may apply the doctrine: "guilt based approach," "effect-on-the-verbatim approach," arguing that given limitations inherent in the system and the nature of the rights at stake, the effect-on-the-verbatim approach is preferred); Charles S. Chapel, The Irony of Harmless Error, 51 OKLA L. REV. 501 (1998) (Judge Chapel, Presiding Judge of the Oklahoma Court of Criminal Appeals argues that the modern harmless error rule derives from two faulty premises, the combination of which results in an illogical rule that distorts the functions of both criminal trials and appellate review); David R. Dow & James Rytting, Can Constitutional Error be Harmless?, 2000 UTAH L. REV. 483 (2000) (arguing that harmless error doctrine is conceptually incoherent and, in light of that, constitutional error should not be subject to harmless error review).


73. Cf. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (The Court observed: "As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one.").

74. Greabe, supra note 71, at 822 (observing the English common-law approach to trial error in the eighteenth and nineteenth centuries).

supposed to have had an effect on the minds of the jury.”

In the second case, judges “weighed the evidence after an error was found, and reversed only if they thought the wrong party had won.” In the middle part of the nineteenth century, however, the rule requiring automatic reversals became predominant in English courts.

In an effort to discourage this rule of reversal, however, Parliament adopted the Judicature Act of 1873. Appellate judges continued to order new trials whenever the error appeared to have affected the jury’s decision. In 1907, in an effort to enforce the objectives of the 1873 Act, Parliament adopted the Criminal Appeal Act. Undeterred, English judges continued to reverse as before.

Appellate courts in the United States followed the English model and trials were often reversed as a result of trivial and, otherwise, insignificant errors. The automatic reversal rule by American courts was meant to “insure that the appellate court did not encroach upon the jury’s fact finding function by discounting the improperly admitted evidence and sustaining the verdict on its belief that the remaining evidence established guilt.” Abuse by the defense bar, which realized the vulnerability of even the most technical error, became widespread. Appellate judges “fearful of invading the province of the jury” retreated from their responsibilities, often reversing convictions of serious crimes on minor technical errors.

Many cases began to show the inherent flaw in the automatic reversal rule. In 1906, a Missouri case prompted the pendulum to begin a treacherous swing towards another extreme. A rape conviction based on ample undisputable and convincing evidence, including compelling testimony from the young victim, was reversed because the statutory language at the end of the charging indictment alleged

78. Traynor, supra note 75, at 4 (The rule in Doe governed until the Exchequer Court’s decision in Crease v. Barret, 149 Eng. Rep. 1353 (T.B. 1835)).
79. Traynor, supra note 75, at 8-9. A new criterion for civil litigation was established: A new trial shall not be granted on the ground of the misdirection of the jury or the improper admission or rejection of evidence, unless in the opinion of the court to which application is made, some substantial wrong or miscarriage has been thereby occasioned on the trial. Id at 9. As Justice Traynor explained, “the apparent purpose of this act was to encourage appellate judges to return to the rule of Doe v. Tyler, under which they weighed the evidence themselves after an error was found, and reversed only if they thought the wrong party had won.” Id.
80. Id.
81. Id. at 10.
82. Id. at 10-11. The Act stated: Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favor of the appellant, dismiss the appeal, if they considered that no substantial miscarriage of justice has actually occurred. Id.
83. Id. at 11.
84. Id. at 13.
86. See Kotteakos v. United States, 328 U.S. 750, 759 (1946) (“So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained.”).
87. Traynor, supra note 75, at 13.
88. Id. at 14. See also People v. Ross, 429 P.2d 606, 619 (Cal. 1967) (Traynor, C.J., dissenting) for a summary of reversals based on immaterial errors.
that the rape occurred “against the peace and dignity of state” rather than the required “against the peace and dignity of the state.”

In 1907, in direct response to these incongruous reversals based on “hypertechnicalities,” the American Bar Association (ABA) established a special committee which recommended the enactment of a statute designed to stop “reversals for technical defects in the procedure below.” In 1919, Congress adopted the federal harmless error rule intended “to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict.”

Under the original version, to be categorized as harmful, an error would have to directly affect the “substantial rights of the parties.” Today, little remains of the original intention of the drafters of the rule. After almost ninety years of judicial manipulation, the harmless error doctrine has been inexorably expanded and today will be applied to preclude the reversal of convictions grounded on even the most egregious constitutional errors such as the wrongful admission of a coerced confession.

B. Development of the Harmless Error Doctrine in the United States

Supreme Court—A Gradual Dilution of Fundamental Rights

The evolution of the harmless error doctrine from its original objective of precluding automatic reversals based on technicalities to its current expansive application to all types of errors, including constitutional error, has been gradual but steadfast in eroding fundamental rights.

In part, the problem was that the broad language of the 1919 harmless error statute offered little guidance to the appellate courts:

92. Ross, 429 P.2d at 619.
93. Bruno v. United States, 308 U.S. 287, 293 (1939), citing Ross, 429 P.2d at 620 and 28 U.S.C. § 391 (1911). The statute as originally enacted provided: “On the hearing of any appeal, certiorari, writ of error, or motion for new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.” Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181. The statute was subsequently amended and currently reads as follows: “On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.” 28 U.S.C. § 2111 (1994).

94. Edwards, supra note 72, at 1175 (Justice Edwards explains that as a result one of the prevailing tests for application of the harmless error doctrine derives, not from the rule itself, but from Justice Rutledge’s explanation of the rule in Kotteakos.). For Rutledge’s explanation, see infra notes 109-13 and accompanying text.

95. Edwards, supra note 72, at 1175 (Justice Edwards explains that as a result one of the prevailing tests for application of the harmless error doctrine derives, not from the rule itself, but from Justice Rutledge’s explanation of the rule in Kotteakos.). For Rutledge’s explanation, see infra notes 109-13 and accompanying text.

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be affected." For all practical purposes, the rule could be applied to technical errors and all types of defects that occurred in trial. But placed in the context within which the statute evolved – an environment of reform for the abuses that occurred under the automatic reversal rule—it is clear that the statute was designed to prevent reversals based on technical errors and defects like the one in the Missouri rape case. But, it was also clear by the language of the statute that it was explicitly designed to avoid diluting a defendant’s substantial rights.

By the mid 1940’s, the United States Supreme Court had explicitly considered or applied the 1919 harmless error statute in a number of criminal cases. Also, by this time, harmless error rules had been promulgated in both the Federal Rules of Civil Procedure, and the Federal Rules of Criminal Procedure. But between 1946 and 1995 the harmless error rule was legally transformed through five pivotal Supreme Court cases which had significant impact on the expansion of the rule.

1. Kotteakos – A Presumption that Harmless Error would not be Applied to Constitutional Error

In 1946, the federal harmless error statute – its history and purpose was the centerpiece of Justice Rutledge’s cogent analysis in Kotteakos v. United States. He recognized the concerns of the drafters of the 1919 statute: “The general object was simple, to substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed

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98. Id.
99. In Kotteakos, 328 U.S. at 757-64, Justice Rutledge explained in length the objective of the 1919 statute:

It comes down on its face to a very plain admonition: ‘Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects.’ The purpose of the bill he stated, is ‘to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be disregarded.’ But that this burden does not extend to all errors appears from the statement which follows immediately: ‘The proposed legislation affects only technical errors. If the error is of such a character that its natural effect is to prejudice a litigant’s substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation, rest upon the one who claims it.

Id. at 760.

100. Id. at 757 n.8.
101. Federal Rule of Civil Procedure 61 provides as follows:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.

FED. R. CIV. P 61.

102. FED. R. CRIM. PROC. 52(a) provides as follows: Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

103. 328 U.S. 750 (1946).
scheme of errors, especially in relation to procedure, will engender and reflect in a printed record.\(^{104}\)

Kotteakos and two other defendants were convicted of a single conspiracy to obtain loans under the National Housing Act by false and fraudulent statements.\(^{105}\) The defendants challenged the conviction alleging that undisputed trial evidence proved that there was not one single conspiracy, but at least eight separate conspiracies.\(^{106}\) The government admitted the separate and distinct conspiracies, but argued that the variance was not prejudicial to the defendants.\(^{107}\) The court of appeals affirmed the convictions holding that the error was not prejudicial "especially since guilt was so manifest, it was proper to join the conspiracies," and "to reverse the conviction would be a miscarriage of justice."\(^{108}\)

The U.S. Supreme Court reversed, holding that it was "highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict."\(^{109}\) The error in Kotteakos was not a "hypertechnicality" of the type complained of by the reformers of the system. Here, the error was in the initial indictment, permeating the whole trial, and the entire jury charge.\(^{110}\) The question posed by Justice Rutledge faced the issue squarely:

And the question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record. If when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.\(^{111}\)

The exception noted by Justice Rutledge in the last sentence created a presumption that constitutional violations could never be regarded as harmless error.\(^{112}\) As one commentator has aptly noted, for a number of years after Kotteakos,

\(^{104}\) Id. at 759.

\(^{105}\) Id. at 752.

\(^{106}\) Id. at 755.

\(^{107}\) Id. at 756.

\(^{108}\) Id. at 755.

\(^{109}\) Id. at 776.

\(^{110}\) Id. at 769.

\(^{111}\) Id. at 764 (citing Bruno v. United States, 308 U.S. 287, 294 (1939)) (italics added).

\(^{112}\) Greabe, supra note 71, at 824 (stating that this statement made by Justice Rutledge reflected the practice of the time—where convictions grounded on errors of constitutional dimension would be reversed (citing to WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 26.6(a))). See also Craig Goldblatt, Harmless Error as Constitutional Common Law: Congress’s Power to Reverse
the Supreme Court did not apply harmless error analysis to violations of constitutional dimension including coerced confessions or the right to counsel.\textsuperscript{113}

2. \textit{Chapman—"The first crack in the dam controlling the flow of Constitutional errors through the appellate process"}\textsuperscript{114}

In the early 1960's, however, the presumption that harmless error analysis would not be applied to constitutional errors began to be profoundly challenged by U.S. Supreme Court rulings. In 1963, in \textit{Fahy v. Connecticut},\textsuperscript{115} the Court reversed a conviction based on the admission of unconstitutionally obtained evidence which Connecticut's highest court deemed to have been harmless error.\textsuperscript{116} In reversing, the U.S. Supreme Court held that the erroneous admission of the evidence was prejudicial and, therefore, not harmless.\textsuperscript{117} In so ruling, however, the Court stated that it was not "concerned with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is reasonable possibility that the evidence complained of might have contributed to the conviction."\textsuperscript{118}

It was this language in \textit{Fahy} which the Court in \textit{Chapman v. California}\textsuperscript{119} applied in expanding the harmless error doctrine, explicitly "fashioning a harmless-constitutional error rule,"\textsuperscript{120} by affirming that not "all trial errors which violate the constitution automatically call for reversal."\textsuperscript{121}

In \textit{Chapman}, the defendants were convicted of aggravated robbery, kidnapping, and murder. One was sentenced to life, and one to death.\textsuperscript{122} Both defendants chose not to testify at their trial, and the State's attorney took advantage of a California statute that allowed the right to comment on the defendants' silence.\textsuperscript{123} During closing arguments, the State attorney made innumerable references to the defendants' failure to testify and inferences of their guilt resulting from this failure.\textsuperscript{124} The trial court charged the jury that it could draw adverse inferences from defendants' silence.\textsuperscript{125} After the trial, but before the defendants' case had been considered on appeal, the U.S. Supreme Court decided \textit{Griffin v. California},\textsuperscript{126} which struck down the California statute as unconstitutional under the Fifth Amendment.

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Arizona v. Fulminante, 60 U.CHI. L. REV. 985, 995 (1993) ("Prior to the 1960's, it generally was assumed that constitutional violations could never be regarded as harmless error." (citing YALE KAMISAR, WAYNE R. LAFAVE, AND JEROLD H. ISRAEL, MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, AND QUESTIONS 1500 (West 7th ed. 1990))).
113. \textit{See, e.g.}, White v. Maryland, 373 U.S. 59, 60 (1963); Hamilton v. Alabama, 368 U.S. 52, 55 (1961)).
114. Wicht, supra note at 72.
116. \textit{Id.} at 86.
117. \textit{Id.}
118. \textit{Id.} at 86-87.
119. 386 U.S. 18, 23 (1967).
120. \textit{Id.} at 22.
121. \textit{Id.} at 23.
122. \textit{Id.} at 19.
123. \textit{Id.}
124. \textit{Id.}
125. \textit{Id.}
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On appeal, the California Supreme Court admitted that defendants’ constitutional rights had been denied, but affirmed the conviction applying California’s harmless error statute, which precludes reversal unless “the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.”

The United States Supreme Court reversed the conviction, but in so doing expanded the harmless error rule to constitutional error. The defendants in Chapman urged the U.S. Supreme Court to hold that all federal constitutional errors regardless of the facts and circumstances must always be deemed harmful. The Court examined the harmless error statutes of the 50 states, as well as its federal counterpart, and declared that:

[N]one of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any likelihood of having changed the result of the trial. We conclude 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, not requiring the automatic reversal of the conviction.

Reversing the conviction, the Chapman court held “that before a constitutional error can be harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” Thus, by the pronouncement of this expanded harmless error standard, the Chapman court fundamentally rejected the argument that constitutional errors require automatic reversal of criminal convictions. And, since Chapman, the Court has repeatedly reaffirmed this principle.

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127. Chapman, 386 U.S. at 20. The California harmless-error statute provided as follows:

No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in the miscarriage of justice.

CAL. CONST. art. VI, § 4 ½ (1879).

128. Id. at 21-22.

129. Id. at 22. The federal rule is found at 28 U.S.C. §2111.

130. Id. at 22.

131. Id. at 24. Justice Traynor has aptly pointed out that the Chapman court chose not to apply either § 2111, the federal harmless statute, or the Federal Rule 52(a) though the question of harmless error arguably involved those provisions. He argues that the most plausible explanation as to why the Court chose the Fahy rule over the California harmless error statute is “that the Court lost sight of the controlling federal statute.” Traynor, supra note 75, at 8.


133. Rose, 478 U.S. at 576. In holding that since Chapman, the Court “has applied harmless-
Not surprisingly, the Chapman decision has been referred to as "the first crack in the dam controlling the flow of Constitutional errors through the appellate process." One commentator has referred to Chapman's harmless constitutional error as "among the most insidious of legal doctrines," and another has accurately pointed out that the extension of the doctrine in Chapman "has allowed the Court to dilute the practical effect of many important protections."
The Chapman Court has been criticized for its cavalier pronouncement that the standard it established, articulated as it was in broad and general terms, would be workable for reviewing courts. Instead, as the record has shown, "...[the] constitutional harmless error doctrine has been plagued by two central ambiguities since its inception: 1) uncertainty about the range of constitutional errors subject to harmless error review, and 2) within the class of errors subject to such review, uncertainty about how harmless error should be judged."

3. Fulminante: A Meaningless Dichotomy of Constitutional Error—Structural vs. Trial Error

In Arizona v. Fulminante, a "highly fractured Court," attempted to resolve one of the inherent ambiguities of the harmless error statute—the uncertainty as to the range of constitutional error subject to harmless error analysis. Oreste Fulminante was convicted and sentenced to death for the murder of his 11 year-old stepdaughter. While serving time in a federal prison for an unrelated crime, Fulminante had confessed the murder to Sarivola, a fellow inmate who was a paid informant for the FBI masquerading as a mob figure. Sarivola had offered him protection from other inmates in exchange for the truth. The Arizona Supreme Court held that the confession was coerced and its use against him barred by the equally vague" in explaining how courts should apply the second prong of the test. Greabe, supra note 71, at 826-27.

137. Wicht, supra note 72, at 80. ("The Court’s holding gave no indication that it was limited either to the facts of the case or to commenting upon a defendant’s failure to testify. The Court did not articulate an exhaustive list of every Constitutional right that could be subjected to harmless error analysis."). Id. at 80.

138. Gregory Mitchell, Against “Overwhelming” Appellate Activism: Constraining Harmless Error Review, 82 CAL. L. REV. 1335, 1335 (1994). Mr. Mitchell argues that appellate courts today apply one of the harmless error tests endorsed by the Supreme Court: whether the error had a likely impact on the verdict; whether the properly admitted evidence of guilt is so overwhelming that the verdict should stand regardless of the impact of the error; and, for the third test, the courts use a hybrid of the first two—balancing the impact of the error against the weight of the untainted evidence. Mitchell argues for uniformity to prevent disparate outcomes, and states that the “proper test for harm is the impact-on-the-verdict test because it limits the appellate court to reviewing the procedural fairness of a trial rather than the factual accuracy of the trial.” Id. at 1335. See also Edwards, supra note 72, at 1176 (stating that the Chapman Court did not attempt to define the entire class of constitutional errors subject to the rule).


140. Greabe, supra note 71, at 827. Mr. Greabe aptly explains: Fulminante contained three separate 5-4 majorities: one on an issue of substantive law, another on the applicability of harmless-error analysis, and a third on the correct outcome of harmless error analysis. Five members of the Court held that the confession at issue was coerced. Id. [Fulminante] at 285-288 (White, J., joined by Marshall, Blackmun, Stevens, and Scalia, JJ.). A different majority of five held that coerced confessions could in some circumstances be harmless. Id. [Fulminante] at 306-312 (Rehnquist, C.J., joined by O’Connor, Scalia, Kennedy, and Souter, JJ.) Finally, because a majority of the Court believed harmless error analysis appropriate, a third majority of five held that, on the facts at hand, Arizona had not shown the error harmless. Id. [Fulminante] at 295-302 (White, J., joined by Marshall, Blackmun, Stevens, and Kennedy, JJ.) (citations omitted).


142. Fulminante, 499 U.S. at 279.

143. Id.

144. Id.
Fifth and Fourteenth Amendments to the Constitution.\textsuperscript{145} It reversed the conviction and remanded for a new trial excluding the confession.\textsuperscript{146} In so holding, it noted that the Supreme Court's precedent precluded the use of harmless error to this analysis.\textsuperscript{147}

While the majority of the Supreme Court concluded that Fulminante's confession was coerced and affirmed the decision of the Arizona Supreme Court, it also concluded that the harmless error rule adopted in \textit{Chapman} was applicable to coerced confessions.\textsuperscript{148} In order to arrive at this conclusion, the majority distinguished constitutional deprivations that are "trial errors" from "structural defects."\textsuperscript{149} It defined "trial errors" as "those which occurred during the presentation of the case to the jury, and which may be therefore quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."\textsuperscript{150} "Structural defects, in the constitution of the trial mechanism,"\textsuperscript{151} on the other hand, "affect the framework within which the trial proceeds, rather than simply an error in the trial itself."\textsuperscript{152} An involuntary confession, the Court held, unlike a structural defect, is a "classic trial error . . . and subject to harmless error analysis."\textsuperscript{153}

\textit{Fulminante} is an opinion plagued with flaws, but one of the most insidious is its imperturbable pronouncement that coerced confessions—a fundamental violation of due process—is subject to harmless error analysis. Justices Marshall, Blackmun, and Stevens in their dissent referred to the dichotomy between "trial errors" and "structural errors" as "meaningless."\textsuperscript{154} But its use by the Court to justify its application to coerced confessions—an inexplicable departure—flies in the face of reason and conflicts directly with an explicit exception made by the \textit{Chapman} Court. It bears repeating: "there are some constitutional rights [coerced confessions, right to counsel, impartial judge] so basic to a fair trial that their infraction can never be treated as harmless."\textsuperscript{155}

\begin{itemize}
  \item \textsuperscript{145} Id. at 282.
  \item \textsuperscript{146} Id. at 279.
  \item \textsuperscript{147} Id.
  \item \textsuperscript{148} Id. at 306.
  \item \textsuperscript{149} Id.
  \item \textsuperscript{150} Id.
  \item \textsuperscript{151} Id. at 309.
  \item \textsuperscript{152} Id. at 310.
  \item \textsuperscript{153} Other constitutional deprivations which constitute "structural defects" were cited by the Court: Vasquez v. Hillery, 474 U.S. 254 (1986) (unlawful exclusion of members of the defendant's race from the grand jury); McKaskle v. Wiggins, 465 U.S. 168, 177-178 (1984) (the right to self-representation); Waller v. Georgia, 467 U.S. 39, 49 (1984) (the right to a public trial). \textit{Id.} at 310. The Court also included in this list the constitutional violations that had been explicitly listed in \textit{Chapman}: Gideon v. Wainwright and Tumey v. Ohio. See infra note 155.
  \item \textsuperscript{154} Id. at 290.
  \item \textsuperscript{155}\textit{Chapman}, 386 U.S. at 23. But as Professor Wicht has fittingly noted in \textit{Fulminante}, Chief Justice Rehnquist argued that \textit{Chapman} did not stand for the proposition that a coerced confession was subject to automatic reversal. He reasoned that the language, "[a]lthough our prior cases have indicated," combined with the fact that the cases were included in a footnote rather than in the text of the opinion, was more appropriately regarded as historical reference to the holdings of the cited cases than a mandate that they be excluded from the newly articulated rule of harmless error application. The Chief Justice reasoned that his opinion in \textit{Payne} v. \textit{Arkansas}, holding coerced confessions were not subject to harmless error analysis, involved a more lenient version of the harmless error rule than the one analyzed in \textit{Chapman}. The test considered in \textit{Payne} allowed the affirmation of a conviction if the properly admitted evidence, independent of the involuntary confession, was sufficient to sustain the verdict. Wicht, supra note 72, at 88.
\end{itemize}
As one commentator eloquently noted "there remains no defensible framework for determining which constitutional errors, if any, should be subject to harmless error analysis. Indeed, such framework is unlikely to be developed because, for harmless error purposes, constitutional errors are indistinguishable from one another."156

But while the test devised by the Fulminante court continues to be used by reviewing courts in their application of harmless error analysis,157 it also continues to be under close scrutiny by commentators and jurists alike. Professor Wicht has summarized some of the most profound flaws in the Fulminante test. First, the test is based on Chief Justice Rehnquist’s synthesis of prior harmless error cases since Chapman, but the conclusion he reached was unsupported by those cases.158

Secondly,

[P]erhaps even more problematic in the trial versus structural framework is the incorrect assumption that a reviewing court’s only concern is whether the error can be quantified. Indeed, the common bond shared by all constitutional rights is their significance in our system of justice. This truth is best demonstrated in the early cases refusing to apply the harmless error rule to constitutional error.159

Third, the Fulminante dichotomy violates the principle of stare decisis,160 a proposition made clear by the Fulminante minority.161

But assuming, for the sake of argument, that the trial and structural error dichotomy was based on a principled reasoning, it remains flawed for what Professor Ogletree aptly referred to as its failure to articulate “a persuasive rationale,” and for its “insufficient recognition of other values in our criminal justice system.”162 While both of these reasons may be of equal importance, the first has permitted reviewing courts to exercise much latitude in their efforts to place constitutional errors in one of the two categories dictated by the Fulminante dichotomy. Not surprisingly, rampant discretion has lead to inconsistent rulings, disparate outcomes, and decisions rooted more on arbitrary standards than in reason or law.

4. Brecht: The Dire Consequences of Rampant Discretion—A Return to the Less Onerous Kotteakos Standard to Assess the Harmfulness of an Error

An example of the dangerous latitude created by arbitrary standards is illustrated in the 1993 decision of Brecht v. Abrahamson,163 where the U.S. Supreme Court applied the Kotteakos harmless-error standard, instead of Chapman, in determining whether habeas relief should be granted because of unconstitutional

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156. Wicht, supra note 72, at 84.
157. Id.
158. Id. at 85.
159. Id.
160. Id. at 86-87.
161. Id.
162. Ogletree, supra note 72, at 162.
“trial error” on collateral review.164

In Brecht, the defendant was convicted of murder and sentenced to life imprisonment.165 At trial, he admitted shooting the victim but claimed that it was accidental.166 The Wisconsin Court of Appeals set aside the conviction on the ground that the State’s references to defendant’s post-Miranda silence violated due process under Doyle v. Ohio, and that the error was sufficiently “prejudicial to require reversal.”167

The Wisconsin Supreme Court agreed that the State had violated defendant’s due process, but citing to Chapman, determined that the error was “harmless beyond a reasonable doubt.”168 On habeas corpus review, the federal district court disagreed with the Wisconsin Supreme Court and set aside the conviction.169 The Court of Appeals for the Seventh Circuit reversed that court’s ruling and upheld the conviction. It agreed that defendant’s due process rights were violated but disagreed with the harmless-error standard applied by the federal district court.170 The U.S. Supreme Court affirmed the decision of the Court of Appeals upholding the conviction. It held that the Kotteakos standard—whether error “had a substantial and injurious influence in determining the jury’s verdict”—rather than Chapman’s “beyond a reasonable doubt” standard applied to Doyle constitutional error on collateral review.171

By applying the Kotteakos standard, the court scrutinized the effect of the error on the conviction utilizing a less onerous standard of harmfulness. In other words, under Chapman, before the constitutional error could be held to be harmless, the court would have to demonstrate that it was harmless beyond a reasonable doubt. While under Kotteakos, the court could find the error to be harmless unless it had a substantial and injurious influence in the determination of the jury’s verdict. The dire consequences of using vague and arbitrary standards are clearly illustrated in Brecht’s procedural history. During the post-conviction proceedings, both the Wisconsin Supreme Court as well as the United States Supreme Court declined to reverse the conviction, but each used a different standard. By applying Kotteakos, the Supreme Court in effect lowered the harmless error standard that should be applied to a review of constitutional error.

The Supreme Court bolstered this dramatic departure with a series of

164. In a direct appeal, the inmate raises issues related to rulings made by the trial court and reflected in the record. In a habeas corpus proceeding—collateral attack—the inmate may raise questions based on new evidence, and which generally involve facts that were not presented at trial. Petition for A Writ of Habeas Corpus, supra note 1, at 9.

165. Brecht, 507 U.S. at 625.

166. Id. at 624.

167. Id. at 626. (“the use for impeachment purposes of [a defendant’s] silence at the time of arrest and after receiving Miranda warnings, violate[s] the Due process Clause of the Fourteenth Amendment (citing Doyle v. Ohio, 426 U.S. 610 (1976)).


169. Id.

170. Id. at 626-27.

171. Id. at 637. “State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under Chapman, and state courts often occupy a superior vantage point from which to evaluate the effect of true error. See Rushen v. Spain, 464 U.S. 114, 120 (1983) (per curiam). For these reasons, it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless error review that Chapman requires state courts to engage in on direct review.” Brecht, 507 U.S. at 636.
presumably sound reasons. First, it distinguished direct from collateral review emphasizing the presumption of finality and legality which attaches to the conviction and sentence after all direct remedies have been exhausted.\textsuperscript{172} It noted the role of habeas proceedings, and while it acknowledged its importance in ensuring constitutional rights, it also stressed its role as secondary and limited.\textsuperscript{172} Further, it spoke of comity and federalism, and stated that "overturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under \textit{Chapman} undermines the State’s interest in finality and infringes upon their sovereignty over criminal matters."\textsuperscript{174} Finally, the Court addressed the "social costs" involved in the retrial of defendants whose convictions are reversed, including the additional investment of time and resources for all parties involved, the "erosion of memory," and "dispersion of witnesses" caused by the passing of time, and the "frustration of society’s interest in the prompt administration of justice."\textsuperscript{175}

This "imbalance of costs and benefits" in applying the \textit{Chapman} standard, the Court held, counseled in favor of applying the "less onerous" \textit{Kotteakos} standard which was "better tailored to the nature and purpose of collateral review and more likely to promote the considerations underlying our recent habeas cases. Moreover, because the \textit{Kotteakos} standard is grounded in the federal harmless error rule 28 U.S.C. Sec. 2111, federal courts may turn to an existing body of case law in applying it."\textsuperscript{176}

But despite presumably sound reasoning, this application of the less stringent standard to collateral review of constitutional harmless error was grounded on a significant flaw: the \textit{Kotteakos} standard developed in 1946 rested solidly on the federal harmless error statute, which in turn had been enacted to preclude automatic reversals based on "technical" errors.\textsuperscript{177} The error in \textit{Kotteakos} involved a non constitutional error in the trial procedure, and the opinion itself is replete with references to the spirit of the federal harmless error rule designed to disregard technical errors or defects which do not affect the "substantial rights of the parties."

As the \textit{Brecht} dissent aptly noted, "the majority’s decision to adopt this

\begin{flushleft}
\textsuperscript{172} \textit{Id.} at 633.
\textsuperscript{173} \textit{Id.}
\textsuperscript{174} \textit{Id.} at 637.
\textsuperscript{175} \textit{Id.} at 637 (citing United States v. Mechanik, 475 U.S. 66, 72 (1986)).
\textsuperscript{176} \textit{Id.} at 637-38. \textit{But see} John H. Blume and Stephen P. Garvey, \textit{Harmless Error in Federal Habeas Corpus after Brecht} v. Abrahamson, 35 WM. & MARY L. REV. 163 (1993). The authors argue that the Chief Justice’s confident prediction that the federal courts would have no difficulty in applying this standard giving the “existing body of case law,” has not panned out. The authors argue that while case law has developed around \textit{Kotteakos}, the guidance it offered was less than clear. For this proposition, the authors offer a number of cases showing how the various courts have differed in their application of the standard.

In short, the Chief Justice’s prediction to the contrary notwithstanding, the case law in the lower courts does not provide unequivocal guidance. Although there is general agreement that harmlessness must be shown to some probability, the courts disagree as to the degree of probability. Because \textit{Brecht} departs from the general and longstanding rule that constitutional error is to be evaluated under the stringent \textit{Chapman} test, courts should interpret the \textit{Brecht-Kotteakos} rule in the most demanding way possible, resolving any ambiguity in favor of protecting the rights of the petitioner. The degree of probability therefore should be that of ‘highly probable.’

\textit{Id.} at 172-73.

\textsuperscript{177} \textit{Brecht}, 507 U.S. at 641 (Stevens, J., dissenting).
\end{flushleft}
novel approach is far from inconsequential."\textsuperscript{178} The net result is that the harmless-error doctrine was broadened,\textsuperscript{179} but as with \textit{Fulminante}, the \textit{Brecht} court left unanswered questions which have undoubtedly added further confusion to the topography of harmless error jurisprudence. The court did not address the meaning and application of the standard, or the degree of certainty required for the court to find that the error had a substantial effect.\textsuperscript{180} Further, as noted by Justice O'Connor in her dissent, \textit{Brecht} altered a standard that not only had been applied to all types of constitutional error, but that may also be "critical to our faith in the reliability of the criminal process."\textsuperscript{181}

\textit{Brecht} made an important, though guarded exception: "Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict."\textsuperscript{182}

5. \textit{O'Neal: Retracting Harmless Error Doctrine From Its Broadest Reach}

Just two years after \textit{Brecht}, though, the Supreme Court decided \textit{O'Neal v. McAninch}.\textsuperscript{183} Robert O'Neal was convicted of murder, and other crimes.\textsuperscript{184} He filed a federal habeas corpus petition challenging the state convictions, and the Federal District Court granted the writ.\textsuperscript{185} On appeal, the Sixth Circuit disagreed with the District Court on one important exception which focused on juror "confusion" arising out of a jury instruction about the defendant's state of mind and a statement

\textsuperscript{178.  \textit{Id.} at 647 (White, J., dissenting). By invoking \textit{Kotteakos}, a standard which derived from a non-constitutional case, the Court now imposes the burden on the defendant to establish that the error is harmful; and, the Court extends the standard to all "trial" errors which are now subject to harmless error analysis under \textit{Fulminante}. \textit{Id.} at 647.}

\textsuperscript{179.  Edwards, \textit{supra} note 72, at 1181. Justice Edwards points out that the \textit{Brecht} majority went so far as to state that habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'"}

\textsuperscript{180.  James S. Liebman and Randy Hertz, \textit{Brecht v. Abrahamsson: Harmful Error in Habeas Corpus Law}, 84 J. CRIM. L. & CRIMINOLOGY 1109 (1994). With respect to the degree of certainty, the authors correctly argue that \textit{Brecht} failed to indicate whether the burden is "beyond a reasonable doubt," "by clear and convincing evidence," by a "preponderance of the evidence" or some alternative formulation such as a "high," "reasonable," or simple "probability." \textit{Id.} at 1135.}

\textsuperscript{181.  \textit{Brecht}, 507 U.S. at 650 (O'Connor, J., dissenting). (where the constitutional error at stake bears on accuracy, the \textit{Kotteakos} standard falls short because by "tolerating a greater probability that an error with the potential to undermine verdict accuracy was harmful, the court increases the likelihood that a conviction will be preserved despite an error that actually affected the reliability of the trial.") \textit{Id.} at 653. Justice O'Connor suggested that \textit{Chapman} should be reserved for errors directly related to accuracy, and the more lenient \textit{Kotteakos} standard could be applied to all others. \textit{She also criticized Brecht} for its failure to draw such a distinction and holding \textit{Kotteakos} applicable to all trial error, whether related to reliability or not. \textit{Id.} at 654.}

\textsuperscript{182.  \textit{Id.} at 638 n.9 (citing Greer v. Miller, 483 U.S. 756, 769 (1987) (Stevens, J., concurring). The Court went on to say that it was not presented with such a situation in \textit{Brecht}. In her dissent in \textit{Brecht}, Justice O'Connor acknowledges the exception as a "glimmer of hope" that \textit{Chapman} may remain applicable to some cases, but as she accurately points out, the Court's description of those cases suggests that its potential exception would be exceedingly narrow and unrelated to reliability concerns. \textit{Id.} at 654.}

\textsuperscript{183.  \textit{O'Neal v. McAninch}, 513 U.S. 432 (1995).}

\textsuperscript{184.  \textit{Id.} at 435.}

\textsuperscript{185.  \textit{Id.}}
made by the prosecutor. The Sixth Circuit assumed that the error, which misled the jury, violated the Constitution, but disregarded the error as harmless.

The Supreme Court disagreed and reversed, holding that "when a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win."

The Court proceeded to explain its reasoning by listing three considerations: First, it was supported by precedent; second, the decision was consistent with the basic purpose underlying the writ of habeas corpus; and, third, the administrative virtues of the rule it adopted.

O'Neal, decided shortly before the Texas Court of Criminal Appeals rendered its decision in the Fierro case, is important for a number of reasons. For one, it pulled "the harmless-error doctrine from its broadest reach" by offering a view of the doctrine "focused not on artificial categories of cases, but on notions of fundamental fairness." But perhaps most importantly, as Justice Edwards points out, it made an attempt to explain to appellate judges what they should do in their review of harmless error claims:

As an initial matter, we note that we deliberately phrase the issue in this case in terms of a judge's grave doubt, instead of in terms of 'burden of proof'. . . . We think it conceptually clearer for the judge to ask directly: "do, I the judge, think that the error substantially influenced the jury's decision?" than for the judge to try to put the same question in terms of proof burdens . . . Where the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error . . . the defendant must win . . . We are dealing here with an error of constitutional dimension -the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person. We also are assuming that the judge's conscientious answer to the question, "But did that error have a 'substantial and injurious effect or influence on the jury's decision?'" is, "It is extremely difficult to

186. Id.
187. Id.
188. Id.
189. Id. at 437-44. As to the first consideration, the Court explained that precedent did not suggest that civil and criminal harmless-error standard do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights. Id. at 438-41. As to the second, it stated that its conclusion was consistent with the basic purposes underlying the writ of habeas corpus, and that a legal rule requiring the issuance of the writ would avoid the grievous wrong of holding an individual in violation of the Constitution, thereby protecting individuals from unconstitutional convictions, and help guarantee the integrity of the criminal process by ensuring the fundamental fairness of a trial. Id. at 442-44. And, thirdly, it held that the adopted rule had administrative virtues in that it was consistent with the way previous courts had treated important trial errors, and avoided the need for judges to read lengthy trial records to determine prejudice in every habeas case. Id. at 444.
190. Edwards, supra note 72, at 1203. See also United States v. Olano, 507 U.S. 725, 741 (1993) (stating that under 52(a) of the Federal Rules of Criminal Procedure, the government bears the "burden of showing the absence of prejudice.").
191. Edwards, supra note 72, at 1202. "First, the Court makes it clear that, both under Chapman and Kotteakos, the government bears the burden of showing the absence of prejudice on any claim of harmless error. Second, the Court holds that the 'risk of doubt' always remains on the government, rejecting the statement to the contrary made only two years earlier in the Brecht v. Abrahamson. Third, the Court rules that the proper measure of harmlessness is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict,' not whether the record evidence is sufficient absent the error to warrant a verdict of guilt." Id. at 1202.
say.” In such circumstances, a legal rule requiring [reversal], will, at least often, avoid a grievous wrong. Such a rule thereby both protects individuals from unconstitutional convictions and helps to guarantee the integrity of the criminal process by assuring that trials are fundamentally fair. 192

By 1994 when Fierro filed his post conviction writ in the Court of Criminal Appeals pursuant to the supplemental report that had been discovered, the litany of errors subject to harmless error analysis had dramatically increased to include most constitutional errors. 193 As demonstrated by the review of the previous cases, habeas jurisprudence had taken the appearance of a “confused patchwork,” where different constitutional rights were treated in accordance with their status, and the same constitutional rights were treated differently depending on whether they were reviewed on a direct or collateral appeal. 194 Pivotal opinions, like Fulminante and Brecht, which lacked clear and consistent directives, had laid a fertile ground for misapplication, distortion, and drastic departures from precedent. In that vein, the 1996 decision of the Court of Criminal Appeals brings to mind the edict of the Queen of Hearts in Alice in Wonderland, “No! No! Sentence first, verdict afterwards.” 195 Like the capricious Queen’s mandate, the opinion has the dubious distinction of lacking both legal support and logical reasoning.

III.
LEGAL ANALYSIS AND CRITIQUE OF THE 1996 DECISION OF THE TEXAS COURT OF CRIMINAL APPEALS

A. The Dire Consequences of Fulminante’s Meaningless Dichotomy: Structural v. Trial Errors Not Readily Discerned by the Courts

As previously noted, in 1996, the Texas Court of Criminal Appeals unanimously adopted the perjured testimony findings, and concluded that Fierro’s due process rights were violated by Medrano’s perjured testimony and that the false testimony was material. Despite this finding, the court held that the due process violation resulting from officer Medrano’s testimony was harmless error and denied relief.

Following in the footsteps of Fulminante and Brecht, the majority reached its decision by departing from precedent and misconstruing the law. First, it categorized the knowing use of perjured testimony as “trial” rather than a “structural

192. Id. at 1202-03 (citations omitted). The author has taken the liberty of quoting verbatim the language from O’Neal as Justice Edwards wrote it. At the time Justice Edwards wrote this article, he was Chief Justice of the United States Courts of Appeal for the District of Columbia. Accordingly, the language he selected from O’Neal to make the point that it provided directives, is insightful from the perspective of how an appellate judge perceived the opinion to be useful in providing guidance to reviewing courts.

193. See supra note 133 and accompanying text.


error.” As a result, it concluded that the error was subject to harmless error analysis. This conclusion was reached through a cryptic and confusing discussion which wavered between two related but distinct points: whether the constitutional error was susceptible to harmless error analysis; and whether the Chapman or Brecht standard should be applied.

Relying on the Fulminante trial versus structural error dichotomy, the majority argued that the known use of perjured testimony is a “hallmark” trial error involving the presentation of evidence. Thus, the constitutional error does not taint the entire trial process because the jury will also consider non-perjured evidence uncorrupted by a constitutional violation. But in United States v. Agurs, the Supreme Court held that “a conviction obtained by the use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” The Fierro court further argued that the perjured testimony was not used as substantive evidence because the testimony in question related solely to the admissibility of the confession. Accordingly, the only harm that could possibly flow from that testimony was the admission into evidence of the coerced confession. The court then cited to Fulminante for the proposition that the improper admission of an involuntary confession is “trial error” subject to harmless error analysis.

This reasoning conveniently ignores the serious criticisms leveled against the Fulminante dichotomy. Under Fulminante, a trial error is susceptible to harmless error analysis, and a structural error requires automatic reversal. The court drew this distinction because presumably trial errors that occur during the presentation of evidence can be quantitatively assessed in the context of other evidence presented to determine whether its admission was harmless beyond a reasonable doubt. Structural errors on the other hand, are defects in the trial mechanism; they affect the framework within which the trial proceeds and “defy analysis by harmless error

196. Ex Parte Fierro, 934 S.W.2d at 373.
197. Id.
198. Id.
200. Ex Parte Fierro, 934 S.W.2d at 374.
201. Id. But see Ogletree, supra note 72, at 165-66. Professor Ogletree argues that Justice Rehnquist erred in subjecting coerced confessions to the harmless error rule because “the costs of over-inclusiveness of an automatic reversal for coerced confessions does not outweigh the costs of judicial inquiry. Operationally, coerced confessions generally are not susceptible to harmless error analysis because of the overwhelming, prejudicial effect such confessions have on jurors' beliefs. Chief Justice Rehnquist did not appreciate the true dimensions of the effects of a coerced confession on a jury. He contended that ‘[t]he admission of an involuntary confession is a 'trial error' similar both in degree and kind to the erroneous admission of other types of evidence.’ Id. at 165. Professor Ogletree further explains how the assertion made by the Chief Justice was not true. Id.
202. Ex Parte Fierro, 934 S.W.2d at 374.
203. Fulminante, 499 U.S. at 306-07 (Trial error "may be quantitatively assessed in the context of other evidence presented in order to determine whether its admission [is] harmless beyond a reasonable doubt.").
standards.\textsuperscript{204} The dissent in \textit{Fulminante} provided ample support for the proposition that the \textit{Fierro} majority should not have been so quick to categorize the due process violation as a trial error. The dissent argued that constitutional errors are not so readily classified into distinct categories: trial errors—susceptible to harmless error analysis; and structural errors—subject to automatic reversal.\textsuperscript{205} As an example they cited the court’s classification of the failure to instruct the jury on the presumption of innocence as a trial error, as opposed to the failure to instruct the jury on the reasonable doubt standard as an error not susceptible to harmless error analysis.\textsuperscript{206}

These cases cannot be reconciled by labeling the former ‘trial error’ and the latter not, for both concern the exact same stage in the true proceedings. Rather, these cases can be reconciled only by considering the nature of the right at issue and the effect of an error upon the trial.\textsuperscript{207}

The \textit{Fulminante} dissenters chastised the majority for abandoning the “axiomatic [proposition] that a defendant in a criminal case is deprived of Due Process of law if his conviction is founded, in whole or in part, upon an involuntary confession without regard for the truth or the falsity of the confession.”\textsuperscript{208} They noted that the harmless error analysis of other trial errors does not apply to coerced confessions because a “coerced confession is fundamentally different” from other types of erroneously admitted evidence to which the rule has been applied.\textsuperscript{209} The minority then correctly pointed to \textit{Chapman} which placed coerced confessions in the category of structural error by recognizing that “…some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error.”\textsuperscript{210}

Cesar Fierro’s capital murder conviction rests on two main pieces of evidence: Fierro’s confession, which he always maintained was coerced, and the dubious testimony of a psychologically impaired sixteen-year old. An argument can be made that under these facts, the violation of due process which permitted an otherwise coerced confession to be admitted, permeated the entire trial process; and given the inherent flaws of the \textit{Fulminante} dichotomy, and established precedent, this constitutional error cannot be so swiftly categorized as a “trial” error.

\textbf{B. The Decision Departed from Precedent When it Failed to Apply the Chapman Standard}

Once the \textit{Fierro} majority categorized the Due Process violation as a “trial” error, it proceeded to make an incredible pronouncement which departed drastically from previous practice. It held that since the trial error was subject to harmless error analysis, Fierro had the burden to prove by a preponderance of the evidence that the

\begin{itemize}
  \item \textsuperscript{204} \textit{Id.} at 309-10.
  \item \textsuperscript{205} \textit{Id.} at 291.
  \item \textsuperscript{206} \textit{Id.}
  \item \textsuperscript{207} \textit{Id.}
  \item \textsuperscript{208} \textit{Id.} at 288 (citing Rogers v. Richmond, 365 U.S. 534 (1961)).
  \item \textsuperscript{209} \textit{Id.}
  \item \textsuperscript{210} \textit{Chapman}, 386 U.S. at 24. \textit{But see supra} note 178 and accompanying text.
\end{itemize}
error contributed to his conviction.211 The majority acknowledged that “the federal habeas standard differs from our formulation of the state standard,”212 but, it proceeded to state that because it was not bound to apply federal harm standards to post-conviction writs, it would apply the state standard announced in Dutchover.213

This swift conclusion that federal law does not dictate the standard for measuring the harm of constitutional violations surfacing in state post-conviction proceedings is not supported by Supreme Court holdings.214 This sweeping and flawed presumption bears explaining. Article §11.07 of the Texas Code of Criminal Procedure is the exclusive state felony post-conviction judicial remedy.215 In direct appeal from a criminal conviction, once the appellant has shown harm, the State bears the burden and any error mandates reversal “unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment.”216

In Dutchover,217 the 1989 case alluded to in the opinion, the Court of Criminal Appeals held that in a collateral attack—where the burden is upon the applicant to establish the illegality of his restraint—it was appropriate to require the applicant to plead and prove facts showing the error did in fact contribute to his conviction or punishment.218

But in Ex Parte Adams,219 decided only eight months prior to Dutchover, the Texas court had explicitly carved out an exception to constitutional error involving the knowing use of perjured testimony.220 In doing so, the court adopted the standard of materiality elucidated by the United States Supreme Court in Bagley.221 Citing as well to Napue v. Illinois,222 and Giglio v. United States223, the

211. Ex Parte Fierro, 934 S.W.2d at 374-75.
212. Id. at 375 n.11.
214. See Petition for A Writ of Habeas Corpus, supra note 1, at 116 (citing Chapman, 386 U.S. at 21).

The application of a state harmless error rule is, of course, a state question where it involves only errors of state procedure or state law. But the error from which these petitioners suffered was a denial of rights guaranteed against invasion by the Fifth and Fourteen Amendments. . . . Whether a conviction for a crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the State of federally guaranteed rights. See also Yates v. Evatt, 500 U.S. 391, 406-07 (1991) (reversing a judgment denying post-conviction relief because the State courts applied a harmless error standard less rigorous to the State than required by Chapman).

216. Dutchover, 779 S.W.2d at 78. (citing TEX. R. APP. P. 81 (b)(2)).
217. Id.
218. Id.
219. Ex Parte Adams, 768 S.W.2d at 281.
220. Id. at 290.

The rule that a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury’s verdict derives from Napue v. Illinois, . . . Napue antedated
Ex Parte Adams court announced the standard to be utilized in evaluating the materiality of the false evidence: "A new trial is required if the false testimony could...in any reasonable likelihood have affected the judgment of the jury." The Ex Parte Adams court concluded that the harmless error analysis required under Texas Rule of Appellate Procedure 81(b)(2), which was "basically a codification of the harmless error rule of Chapman," would be applied in the case of perjured testimony.

In Agurs, the Supreme Court explained that the Chapman standard applies to assess the materiality of the State's knowing use of perjured testimony "not just because [it] involve[s] prosecutorial misconduct, but more importantly because [it] involves a corruption of the truth-seeking function of the trial process." Had the majority in Fierro followed its own reasoning in Ex Parte Adams and applied the Chapman standard, it would have been forced to hold that the

Chapman v. California, where the "harmless beyond a reasonable doubt" standard was established. The Court in Chapman noted that there was little, if any, difference between a rule formulated, as in Napue, in terms of "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction," and a rule "requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." It is therefore clear, as indeed the Government concedes, see Brief for United States 20, and 36-38, that this Court's precedents indicate that the standard of review applicable to the knowing use of perjured testimony is equivalent to the Chapman harmless-error standard.

Bagley, 473 U.S at 679 n.9. (citations omitted).

222. Napue v. Illinois, 360 U.S. 264, (1959). (The Court held that a prosecutor's failure to correct the false testimony of a witness concerning an offer of leniency the prosecution had extended to him was material: "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

223. Giglio v. United States, 405 U.S. 150 (1972). In Giglio, the Court reversed a conviction where the prosecutor failed to disclose evidence of an offer of leniency to a witness because his "credibility as a witness was...an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility." Id. at 154-55.

224. Adams, 768 S.W.2d at 292 (citing Giglio, 405 U.S. at 154).

225. On September 1, 1997, one year after the Court of Criminal Appeals decided Fierro, Texas Rule of Appellate Procedure 44.2 replaced former Rule 81 (b)(2) which had provided that any error mandated reversal "unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment." Rule 44.2 provides as follows: 44.2(a) Constitutional error. If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction of punishment. (b) Other Errors. Any other error, defect, irregularity, or variance that does not affect the substantial rights must be disregarded. 44(2)(b) is adopted almost verbatim from Federal Rule of Criminal Procedure 52(a).

David L. Richards, Former Justice of the Second Court of Appeals, Forth Worth, explains, however, that the seeming simplicity of the new rule is problematic in its application because it has presented some difficult questions for reviewing courts. "What errors must be addressed under the rule's analytical framework? Does a criminal statute or evidentiary rule with constitutional underpinnings constitute "constitutional error"? Does either party on appeal have a burden relative to the issue of harm? Exactly how are we to determine whether an error has affected a defendant's substantial rights?" See David L. Richards, The Continuing Evolution of the Harmless Error Doctrine: Texas Rule of Appellate Procedure 44.2, 42 S. TEX. L. REV. 763, 765-66 (2001) (reviewing the leading cases interpreting the rule and identifying the issues that have not yet been addressed by the courts.) Also, see Erika Plumlee, Comment, "To Err is Human"—But Is It Harmless?: Texas Rule of Appellate Procedure 81(b)(2) and the Court of Criminal Appeals' Effort to Fashion a Workable Standard of Review, 21 TEX. TECH L. REV 2205 (1990).

226. Agurs, 427 U.S. at 104.
knowing use of perjured testimony was harmful, not harmless. Under *Chapman*, as codified, in § 81 (b)(2), to affirm Fierro’s conviction, the court had to declare a belief that the error was harmless “beyond a reasonable doubt.” In other words, the court had to be able to say that the state had demonstrated beyond a reasonable doubt that Medrano’s perjured testimony which resulted in the coerced confession did not contribute to Fierro’s conviction.

But in light of all the evidence presented before Judge Marsh, particularly the affidavit submitted by the lead prosecutor, Gary Weiser, the court could not demonstrate that the error was harmless beyond a reasonable doubt. Recall the critical words of Weiser’s affidavit:

Had I known at the time of Fierro’s suppression hearing, what I have since learned about the family’s arrest, I would have joined in a motion to suppress the confession. Had the confession been suppressed, I would have moved to dismiss the case unless I could have corroborated Olague’s testimony. My experience as a prosecutor indicates that the judge would have granted the motion as a matter of course.

Accordingly, the court had to concede that Fierro had met the *Chapman* standard, but to circumvent the only plausible outcome—grant Fierro a new trial—the majority chose to adopt a different harmless error standard on collateral review.

By so doing, it adopted a harmless error standard more onerous to Fierro than allowed under federal law. The court framed its harmless error analysis as follows:

The difference between the *Chapman* and the habeas harmless error standard is the difference between a possibility and a probability. (See Gilday, 59 F.3d at 269). We agree that the applicant has met the *Chapman* standard. The error likely caused the admission into evidence of an involuntary confession, thus raising the possibility that the error contributed to the verdict. But, given Olague’s eye witness testimony and the lack of any real reason to doubt his credibility, it is more probable than not that the outcome of applicant’s trial would have been the same absent the confession. Under these circumstances, the applicant has failed to carry the burden of proving harm by a preponderance of the evidence.

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228. See Fierro’s Motion for Authorization to File a Successive Habeas Corpus with the Western District of Texas, *supra* note 62 at 4.
229. See id. for the full text of the affidavit.
230. See *Ex Parte Fierro*, 934 S.W.2d at 376.
232. See *Ex Parte Fierro*, 934 S.W.2d at 376. See also Petition for A Writ of Habeas Corpus, *supra* note 1, at 121. Aside from violating *Chapman* and its progeny, the analysis conflicts with federal law in two fundamental respects. First, its focus is sufficiency of the untainted evidence to support a finding of guilt, rather than the “effect or influence” of the tainted evidence on the verdict rendered. See *Brecht*, 507 U.S. at 637. In addition, it shifts the burden of establishing harmlessness to the party injured by the constitutional violation. O’Neal v. McAninch, 513 U.S. 432 (1995)).
In sum, by adopting the new standard, the Court of Criminal Appeals erroneously concluded that *Chapman* no longer controls the harmless error analysis in state post-conviction proceedings.\(^233\) Ignoring Agurs, the court instead applied the *Brecht-Kotteakos* standard which requires Fierro to show that the error "had substantial and injurious effect or influence in determining the jury's verdict."\(^234\) This less onerous standard of harmfulness in the federal habeas context, which the *Brecht* court justified under principles of "comity and federalism,"\(^235\) is inapplicable here. As one of the *Fierro* dissenters aptly noted: "there are no compelling reasons for this court to mimic the *Brecht* standard for harm, at least not for the kind of error we all agree occurred in the cause."\(^236\)

The Fierro court misconstrued the *Brecht-Kotteakos* standard. As Judge Clinton fittingly noted in his cogent dissent, consistent with the *Brecht* standard and the fact that in the state post-conviction habeas Fierro would bear the burden, the question that the majority should have asked was: "Has applicant shown a reasonable possibility that the constitutional error in this cause had 'substantial and injurious effect or influence in determining the jury's verdict'?"\(^237\) Instead, the majority asked whether Fierro could show by a preponderance of the evidence—or whether it is more likely than not, that the constitutional error contributed to the verdict.\(^238\)

*Brecht* did not require an applicant to prove harm at this level of confidence.\(^239\) To require it of Fierro is a "distortion" of the *Brecht* case, which Judge Clinton argued, derived from the majority's misreading of a First Circuit case\(^240\) cited for the proposition that "the difference between *Chapman* and the habeas standard is the difference between a possibility and a probability."\(^241\)

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233. Petition for A Writ of Habeas Corpus, *supra* note 1, at 119. Fierro's lawyers argued that after *Brecht*, courts throughout the United States continued to apply the *Chapman* standard to the review of false testimony claims, and provided specific cites to support their point. The Court of Criminal Appeals, however, was not persuaded, but chose to rely on two federal courts of appeal that had applied *Brecht* to review errors involving the State's failure to correct false testimony of civilian witnesses: Gilday v. Callahan, 59 F.3d 257(1st Cir. 1995), and Robinson v. Arvonio, 27 F.3d 887 (3rd Cir. 1994).


235. *Id.* at 635.

236. *Ex Parte Fierro*, 934 S.W.2d at 380.

237. *Id.* at 381 (citing *Brecht*, 507 U.S. at 637) (Clinton, J., dissenting). Judge Clinton explained that "one would expect this transposition of the *Brecht* standard because it raises the standard by which an applicant must show harm for state post-conviction habeas purposes in exactly the same proportion that *Brecht* reduces the standard by which the State must show an absence of harm in federal habeas application." *Id.*

238. *Id.*

239. *Id.*

240. *Id.* Judge Clinton was referring to Gilday v. Callahan, 59 F.3d 257 (1st Cir. 1995).

241. *Ex Parte Fierro*, 934 S.W.2d at 376. Judge Clinton stated that the *Gilday* court had borrowed that proposition from a passage in *O'neal* v. McAninch (see *supra* notes 207-216 and accompanying text):

but the passage did not speak to the question of what level of confidence harm had to be proved or disproved in order to justify habeas relief. It addresses only the issue of which party bears the loss if the record is insufficient to resolve the question of harm by whatever level of confidence (the Supreme Court simply did not say). Thus, both the First Circuit and the majority today are mistaken. *O'Neal* does not support the proposition that the difference between the standards in *Chapman* and *Brecht* is the 'difference between a possibility and a probability.' The only real difference between the two is that *Chapman* merely asks whether error 'contributed,' while under *Brecht* the federal habeas court must be able to say the
It bears noting that while the Brecht court rejected the Chapman standard for federal habeas review, it specifically cautioned state courts against “relaxing their own guard in reviewing constitutional error.” Accordingly, the rationale for imposing a more stringent harmless error standard in federal habeas proceedings does not justify doing so in state post-conviction proceedings.

The crucial point is that under any standard—whether Chapman or Brecht—the perjury which resulted in the erroneous admission of applicant’s detailed, explicit, coerced, involuntary confession was not immaterial, not harmless, but harmful. The Court’s reasoning is unsustained by logic. It bears repeating:

We agree that the applicant has met the Chapman standard. The error likely caused the admission into evidence of an involuntary confession thus raising the possibility that the error contributed to the verdict. But given Olague’s eye-witness testimony and the lack of any real reason to doubt his credibility, it is more probable than not that the outcome of applicant’s trial would have been the same absent the confession.

This language clearly indicates that the Fierro’s court approach to harmless error analysis focused not on the impact on the verdict actually rendered, but rather on the sufficiency of the evidence to convict. This view, as Fierro’s lawyers eloquently argued, is contrary to the touchstone of harmless error review as emphasized in Sullivan v. Louisiana:

Harmless-error review looks, we have said, to the basis on which the jury actually rested its verdict. The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Moreover, Justice Rutledge had unequivocally made this point in

error ‘substantially and injuriously affected or influenced the jury’s verdict’ before it can reverse a state conviction.


242. Petition for A Writ of Habeas Corpus, supra note 1, at 118.
243. Id.
244. Ex Parte Fierro, 934 S.W.2d at 386.
245. See Petition for A Writ of Habeas Corpus, supra note 1, at 122.
246. Ex Parte Fierro, 934 S.W.2d at 376.
247. Petition for A Writ of Habeas Corpus, supra note 1, at 122.
248. 508 U.S. 275 (1993). See Edwards, supra note 72, at 1167-68. Justice Edwards argues that a variety of factors, including the limited institutional competency of appellate courts and the vital nature of the individual rights at stake, demonstrate that the effect-on-the-verdict approach is to be preferred.
249. Sullivan, 508 U.S. at 279 (citations omitted).
Kotteakos:  
If when all is said and done, the [court’s] conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.  

Accordingly, the Fierro Court adopted the Brecht-Kotteakos standard, but it conveniently misapplied it and ignored the directives and admonishments made by the Kotteakos Court.

C. The Coerced Confession: A Substantial and Injurious Effect in Determining the Jury's Verdict

The Fierro court concluded that despite the constitutional error, the outcome of the case would have been the same since there was no reason to doubt the credibility of Olague’s testimony. In other words, even in the absence of the coerced confession, given Olague’s testimony, the jury would have found Fierro guilty. This assumption is not supported by the record. In fact, the detailed coerced confession fully corroborated Olague’s testimony, and given the manner in which the prosecution presented it to the jury, it is inconceivable that the jury could not have been convinced of Fierro’s guilt and convicted him of capital murder.

Olague himself had testified during the trial that he was psychologically impaired, and his perplexing conduct during that proceeding corroborated his statement. At trial, Olague’s testimony was replete with discrepancies and contradictions about the time and sequence of events. In the midst of responding to questions, he would unexplainably digress into unrelated topics.

Olague testified at trial that he observed Cesar Fierro search the body of Nicolas Castañon, steal his wallet, and remove a watch from his arm. The testimony was particularly damaging because it substantiated a robbery, the offense

250. Kotteakos, 328 U.S. at 764-765.  
251. Ex Parte Fierro, 934 S.W.2d at 375.  
252. See supra notes 41-45 and accompanying text.  
253. Petition for A Writ of Habeas Corpus, supra note 1, at 45.  
254. Id. at 45-46. More importantly, he added details that supported the State’s case, but which did not appear in his statement. For example, he testified that Cesar Fierro wore gloves during the homicide, and the police did not recover fingerprints. In addition, he testified that Fierro wore a moustache at the time, which he later shaved, and the witness who identified Cano and Rodriguez, the other suspects, stated that one of them had a moustache. None of these details appeared in Olague’s statement. The prosecutor elicited this information, never before reported by asking: “Do you recall if the defendant was wearing gloves that night,” to which Olague replied, “Yes.” When the prosecutor asked, “Did he do anything with that moustache after all this occurred?” Olague replied, “Yes. He shaved it.” Id.  
255. Id.
underlying the capital murder.256 When confronted with his failure to tell the police about the theft of the wallet and the watch, he attributed the discrepancy to his "psychological" problem.257 He said he was psychologically impaired even as he testified.258 But perhaps the most incredible statement which would defy anyone's perception of Olague as a "credible" witness for the prosecution was when he accused a juror of buying the CB radio he had stolen the night of the murder.

As asked to describe the pawnshop owner who purchased the CB, Olague pointed to a juror and said to her, "Well, can't you talk to me?" He said to Fierro's lawyer, "You can ask her about how many stolen items that [Fierro] took."259

The State called Gloria Tovar, a pawnshop owner, and not the juror Olague had confronted from the witness stand, and she positively identified Olague as having sold her the CB radio to her during the winter of that year.260 She testified that she had never seen Fierro inside her store.261 During the summation, the State acknowledged that Ms. Tovar and the juror Olague identified as the pawnshop broker looked nothing alike.262

In their appeal, Fierro's lawyers made an eloquent argument regarding the impact of the coerced confession as compared with Olague's testimony:

In contrast to the perplexing testimony of Olague, the State offered the confession of Cesar Fierro as a coherent narrative of the crime. Without the distractions of the inconsistencies, 'psychological problems,' and regressions to events unrelated in time or to the issue at hand, the confession contains details consistent with the testimony of Olague about the commission of the crime.263

In closing arguments, prosecutor explained that it was the burden of the State to establish beyond a reasonable doubt that Cesar Fierro committed the offense.264 He said, "on this the State relies on two main pieces of evidence: the Defendant's confession, and the sworn testimony of the eye-witness to his case, Jerry Olague."265 He explained how the jury could consider that evidence, in light of the accomplice charge they would receive:

But if you determine [Olague] is an accomplice, that doesn't really

256. Id.
257. Id.
258. Id.
259. Id. at 47.
260. Id. at 48.
261. Id.
262. Id.
263. Id. at 48-49. See also Ogletree, supra note 72, at 165-66 for a forceful argument as to why coerced confessions should not be subject to harmless error analysis.

It is the rare case in which jurors will discount the defendant's admission of the crime, even though the defense counsel points to other inconsistencies in the trial which may raise a reasonable doubt. In the majority of cases, the defense counsel must rely almost exclusively on procedural objections to the improper admission of the evidence. The trial becomes skewed, and appellate courts cannot meaningfully apply harmless error analysis.

Id. at 166.
264. Petition for A Writ of Habeas Corpus, supra note 1, at 54.
265. Id.
mean that much. All it means is if he is an accomplice, it says here in the final paragraph, ‘If you find that he is an accomplice, then before you can consider his testimony, you have to find two things.’ Number one, did you believe it’s true, which, of course you’d have to believe it was true from whether he’s an accomplice or not. And secondly, that there must be other evidence to connect the Defendant to the crime other than Olague’s testimony. Well, in this case there is a very strong piece of evidence that not only tends to connect the Defendant to the crime, but admits that the Defendant committed the crime. That is the confession.266

The prosecutor acknowledged the State’s burden of establishing that the confession was voluntary and noted accordingly:

The State put on two witnesses in regards to this confession. The first we put on was Detective Medrano, because he’s the one who took the confession. Of course, he’s the most important witness to put on in regards to the actual confession. Detective Medrano testified that there was no threat, no coercion, no promises, no beating, nothing; that they treated the man courteously. They gave him cigarettes and coffee. There is no evidence whatsoever in this case that this confession was not voluntary as according to Detective Medrano’s statement.267

In reviewing the impact of the coerced confession on the minds of the jury, the question the Texas Court of Criminal Appeals should have asked is: “whether there is a reasonable possibility that the constitutional error in this cause had a ‘substantial and injurious effect or influence in determining the jury’s verdict’?”268

The record speaks for itself.

For two days, the jury heard Olague’s perplexing testimony, observed his behavior on the stand, and heard him accuse one of their own as the person who bought the radio from him on the night of the murder. They heard from the Detective who took the confession who unequivocally told them under oath that there was no threat, no coercion; that Fierro was treated with courtesy, given cigarettes and coffee. They also heard portions of the confession that were read to them by the prosecutor who told them: Fierro has “admitted to capital murder... admitting to blowing the man’s brain out...admitting to stealing the watch, but not dragging the body.”269 Mindful that Olague was an incredulous witness, the prosecution relied on the coerced confession as a strong corroborating piece of evidence to Olague’s testimony: “Well, if you don’t believe Olague, you’ve got to convict the Defendant on his own testimony.”270 The Court charged the jury on the accomplice/witness rule:

[T]hat a conviction cannot be had upon the testimony of an

266. Id.
267. Id.
268. Ex Parte Fierro, 934 S.W.2d at 381 (Clinton, J., dissenting).
269. Id.
270. Petition for A Writ of Habeas Corpus, supra note 1, at 59.
accomplice unless [you] first believe that the accomplice's evidence is true and that it shows the Defendant is guilty of the offense charged against him, and even then you cannot convict unless the accomplice's testimony is corroborated by other evidence tending to connect the [D]efendant with the offense charged, and the corroboration is not sufficient if it merely shows the commission of the offense, but it must tend to connect the Defendant with its own commission.

Now, if you believe from the evidence beyond a reasonable doubt that an offense was committed and you further believe from the evidence that the witness, Gerald Olague, was an accomplice, or you have a reasonable doubt whether he was or not, as that term is defined in the foregoing instructions, then you cannot convict the Defendant upon the testimony of the said Gerald Olague unless you first believe that the testimony of the said Gerald Olague is true and that it shows the Defendant is guilty as charged in the indictment; and even then you cannot convict the Defendant unless you further believe that there is other evidence in the case, outside of the evidence of the said Gerald Olague tending to connect the Defendant with the commission of the offense charged in the indictment, and then from all the evidence you must believe beyond a reasonable doubt that the Defendant is guilty.

Unless you believe beyond a reasonable doubt that the alleged confession or statement introduced into evidence was voluntary made by the Defendant or if you have a reasonable doubt thereof, you shall not consider such alleged statement or confession for any purpose nor any evidence obtained as a result thereof.²⁷¹

As the jury retired to deliberate whether Fierro was guilty of capital murder beyond a reasonable doubt, the persuasive words of the prosecutor must have resonated in their minds. His closing argument provided them with a pretty clear road map: if they believed Olague was an accomplice, then before they considered his testimony, they must first believe it to be true, and then they must believe that there was other evidence to connect Fierro to the crime other than Olague's testimony.²⁷² The prosecutor told the jury in convincing and unequivocal terms: "Well, in this case, there is a very strong piece of evidence that not only tends to connect the Defendant to the crime, but admits that the Defendant committed the crime. That is the confession."²⁷³

Some of the concerns and questions the jury may have had are reflected in the record:

On February 14, 1980, at 1:16 p.m., the jury specifically requested that Fierro's confession and statement be provided to them. At

²⁷¹. Id.
²⁷². Id.
²⁷³. Id.
1:19 p.m., copies of the confession in both English and Spanish were so provided. At 1:58 p.m. the jury also requested a copy of Olague's written statement, but at 2:33 p.m. they were advised that since Olague's statement was not introduced into evidence, they could not review it.\textsuperscript{274}

The jury reached its unanimous verdict exactly at 2:53 p.m. It found Fierro guilty of capital murder and sentenced him to death.

In less than two hours the jury read Fierro's confession and unanimously made the decision to find him guilty beyond a reasonable doubt. This outcome is not surprising given the "injurious effect or influence" the impact of the constitutional error must have had on their verdict. As Judge Overstreet indicated in his stinging dissent:

One can have eyewitness testimonial evidence, circumstantial evidence, scientific evidence, and even videotaped evidence; but a confession explicitly admitting guilt signed by the defendant is the most powerful piece of evidence that can ever be introduced against him and will surely serve as the key that will lock the jailhouse door and provide the juice to power the electric chair; and in these more civilized times, the juice for the needle.\textsuperscript{275}

Although Fierro's court undermined the impact of the coerced confession on the jury's verdict, statistics indicate otherwise. A recent study of 125 "proven" false confessions revealed a startling finding:

more than four fifths (81\%) of the innocent defendants who chose to take their case to trial were wrongfully convicted 'beyond a reasonable doubt' even though their confession was ultimately demonstrated to be false. In other words, the factually innocent defendant who took his case to trial was approximately four times more likely to be convicted than acquitted, despite the many procedural safeguards of trial rights of American criminal defendants.\textsuperscript{276}

Further, the study made a number of shrewd observations that are fully corroborated by Fierro's case:

[A] suspect's confession sets in motion a virtually irrefutable presumption of guilt among criminal justice officials, the media, the public and lay jurors. A suspect who confesses—whether truthfully or falsely—will be treated more harshly at every stage of the criminal justice process. Once police obtain a confession, they typically close the investigation, clear the case as solved, and make no effort to pursue other possible leads—even if the confession is internally inconsistent, contradicted by external evidence or the

\textsuperscript{274} Ex Parte Fierro, 934 S.W.2d at 388.
\textsuperscript{275} Id.
result of coercive interrogation. Like police, prosecutors, rarely consider the possibility that an entirely innocent suspect has been made to confess falsely through the use of psychologically coercive and/or improper interrogation methods. When there is a confession, prosecutors tend to charge the defendant with the highest number and types of offenses and are far less likely to initiate or accept a plea bargain to a reduced charge. . . . Judges are conditioned to disbelieve claims of innocence and almost never suppress confessions, even highly questionable ones. If the defendant’s case goes to trial, the jury will treat the confession as more probative of the defendant’s guilt than virtually any other type of evidence, especially if—as in virtually all high profile cases—the confession receives negative publicity. Confession evidence (regardless of how it was obtained) is so biasing that juries will convict on the basis of the confession alone, even when significant or credible evidence confirms the disputed confession and considerable significant and credible evidence disconfirms it.”

Finally, the study aptly noted that a false confession is a biased piece of evidence that contaminates the case as it makes its way through the entire criminal justice system, and the type of error that becomes more difficult to correct, an observation that is if fully supported by what happened to Fierro in post-conviction proceedings.

IV.
PUBLIC POLICY REASONS WHY HARMLESS ERROR SHOULD NOT BE APPLIED TO CONSTITUTIONAL VIOLATIONS

A. The Application of Harmless Error Analysis to Constitutional Error is More Ominous in the Face of Fast Eroding Federal Post Conviction Remedies

That the Texas Court of Criminal Appeals, the state’s court of last resort, failed Fierro miserably is patently clear from the record. But, ironically, he fared no better in the federal level—traditionally the last glimmer of hope for the wrongfully convicted. For in the past two decades, both Congressional mandates and Supreme Court rulings have converged with the net effect of eroding individual rights, “elevating procedural rules over substantive values,” “erecting technical barriers that foreclose relief to persons with meritorious constitutional claims,” “reducing access to the federal courts,” and “placing the interests of the state ahead of those of its citizens.”

Sharply divided opinions by the high court and intentional distortions in the application of inherently vague doctrines like harmless error, have paved the road

277. Id. at 921-22 (citations omitted).
278. Id. at 923.
for injustice by result-oriented courts—all encouraged by the national interest in the “finality” of criminal cases.\(^{280}\) Finally, the Antiterrorism and Effective Death Penalty Act of 1996,\(^{281}\) and other direct attacks on the “The Great Writ” have all but eliminated a defendant’s right to have his case reviewed. The simple question of whether a defendant’s constitutional right was violated has succumbed under the weight of “arcane and almost impenetrable procedural rules.”\(^{282}\)

The refusal of the Texas Court of Criminal Appeals to grant Fierro relief hurled his case into a federal habeas maze illustrating how procedural rules have prevailed over substantive rights. After the Court of Criminal Appeals rendered its decision on September 11, 1996, it denied rehearing on November 27, 1996. On January 27, 1997 Fierro filed a petition for writ of certiorari in the United States Supreme Court, which was denied on June 27, 1997.\(^{283}\) The execution date was subsequently set for November 19, 1997.

Undeterred, Fierro filed a motion for leave to file a successive habeas corpus petition in the Fifth Circuit Court on October 20, 1997.\(^{284}\) He invoked the “gatekeeping” provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA).\(^{285}\) Fierro filed this motion within the one-year statute of limitations period which, if applicable to the successive habeas corpus petition, began to run on November 28, 1996, the day after the Texas Court of Criminal Appeal denied

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280. Id. Justice Reinhardt argues that the Rehnquist Court has placed great emphasis on unconstitutional doctrines such as the abuse of the writ, and “nostrums such as comity and finality.” Id. “Under the Rehnquist Court’s jurisprudence, these rules regularly prove decisive in limiting the rights of lower federal courts to redress constitutional violations, in shutting the doors of the courthouse to ordinary people.” Id. at 317.

281. See generally infra note 285 and accompanying text.

282. Id.


284. See generally supra note 24 and accompanying text.

285. 28 U.S.C. § 2244(b)(3)(A) (1996). The purpose of the AEDPA, as stated in the Act, was to: “deter terrorism, provide justice for victim, provide for an effective death penalty, and for other purposes.” The act was passed in response to the Oklahoma City Bombing, the bomb that exploded outside the Alfred P. Murrah Federal Building in Oklahoma City, killing approximately 167 on April 19, 1995. See Thomas C. Martin, Note, The Comprehensive Terrorism Prevention Act of 1995, 20 SETON HALL LEGIS. J. 201, 201-202 (1996). But the act had another political motivation which was to reform habeas corpus proceedings by state prisoners in federal court. The Act intended to 1) reduce the burden on federal courts with reference to needless evidentiary hearings; 2) encourage states to adopt adequate collateral remedies; and 3) reduce rising friction between state and federal judicial systems. Pub. L. No. 104-32, 110 Stat. 1214. See also Reinhardt, supra note 279, at 313.

The bill was enacted by Congress at the urging of President William Jefferson Clinton. In the AEDPA, Congress and the President enshrined the philosophy and habeas jurisdiclude of the Rehnquist Court in statutory law, codifying stringent barriers to review of all habeas petitions and particularly to second or successive petitions. The two branches of government each sought to appear tougher than the other in the war against terrorists, although no one bothered to explain how limiting the historic right of all state prisoners to habeas relief would help the federal government in the latest of its periodic “wars.” Nor did anyone much seem to care. There was an election in the horizon. And, furthermore, as of the time the AEDPA was adopted in 1996, President Clinton had yet to show the first glimmer of interest in curbing prosecutorial excesses that might infringe the rights of persons high or low. In fact, up to that point, President Clinton had not shown any interest in protecting the constitutional rights of any individual accused on wrongdoing.

Id. at 349.
The Fifth Circuit Court granted the rehearing in the state habeas proceedings. The Fifth Circuit Court granted the motion on November 11, 1997 after making prima facie findings that the factual predicate of the claims could not have been discovered previously through due diligence.\textsuperscript{286} Fierro filed his successive petition on February 27, 1998 in compliance with the district court's scheduling order. Fierro also filed a motion to vacate, on equitable grounds, the denial of his original federal habeas petition, which was filed within the docket of the 1987 federal habeas case and sought to set aside the 1988 district court's judgment denying habeas relief on the coerced confession claim on the grounds that the judgment was the result of the fraud by Medrano.\textsuperscript{287}

Because the motion was not brought within one year after the 1988 judgment, the motion was not filed under the fraud provisions of Rule 60(b)(3) of the Federal Rules of Civil Procedure. Instead, the motion relied on a federal court's inherent authority to set aside a judgment for fraud upon the court under the saving clause of Rule 60(b).\textsuperscript{288}

Once again, procedural rules prevailed. The district court denied the motion to vacate the denial of the earlier habeas corpus, reasoning that it was required to treat the Rule 60(b) motion as a second, or successive, habeas petition. The court concluded that it was without jurisdiction to consider the arguments in the motion because the Fifth Circuit's order authorizing Fierro to file a successive petition does not include the claims raised in a Rule 60(b) motion.\textsuperscript{289} Fierro appealed the district court's decision. However, the Fifth Circuit Court affirmed the district court's refusal to set aside its earlier judgment denying habeas relief on November 23, 1999.\textsuperscript{290}

\textsuperscript{286} See Order Authorizing the United State District Court for the Western District of Texas to Consider a Successive Habeas Corpus Application at 29, In re Fierro (5th Cir. 1997) (No. 97-00498).

For the following reason and as explained below, Cesar Roberto Fierro's execution, scheduled for November 19, 1997, is hereby STAYED pending further orders from the district court, and we AUTHORIZE him to file a successive habeas corpus application in the district court. . . Fierro has made a prima facie showing that his petition will raise claim base on new evidence that could not have been previously discovered through the exercise of due diligence and that the facts underlying the claim, if proved and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found him guilty of the underlying offense.

Id. Fierro was the first prisoner the Fifth Circuit found to have made a sufficiently strong showing of due diligence and innocence under AEDPA's rigorous standard to warrant the filing of a successive habeas corpus application. At that time, only five other cases nationwide were authorized by the federal courts of appeals to file a successive habeas petition. See On Petition for A Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit, at 12; Fierro v. Cockrell, 294 F. 3d 674 (2002) (No. 01-50400) [hereinafter 2001 Fierro Petition for a Writ of Certiorari].\textsuperscript{287}


Id. at 17.

Id.

Id.

See Fierro v. Johnson, 197 F. 3d 147 (5th Cir. 1999). Rehearing was denied on December 22, 1999.

Finally, we do recognize that Fierro argues that the Texas Court of Criminal Appeals seriously erred in its ruling related to the state trial court's finding that Officer Medrano gave false testimony. For example, Fierro argues that the Texas Court erred in its application of the harmless error standard. For the federal courts
Meanwhile, on April 8, 1998 the Attorney General moved to dismiss Fierro’s habeas corpus petition, arguing that since it was filed on February 27, 1998, it was barred by AEDPA’s one-year limitations provision.291 Alternatively, the Attorney General argued that the “due diligence” standard governing successive petitions had not been satisfied.292 As a result of this, the district court, on June 23, 2000, held that the petition was barred by the limitation period and, alternatively, was barred by the AEDPA’s due diligence requirement. Based on its procedural rulings, the district court dismissed with prejudice the due process and perjured testimony claims raised in the successive habeas petition. The court also dismissed without prejudice related claims that Fierro’s Sixth Amendment rights to the effective assistance of counsel at trial and on the direct appeal were violated.293 Therefore, Fierro’s successive habeas corpus application was summarily dismissed without an evidentiary hearing and without any review of the merits of the constitutional claims.294 On March 23, 2001 the district court declined to alter or amend its judgment and granted Fierro a Certificate of Appealability on both issues on May 3, 2001.295

Fierro appealed the district court’s decision alleging that he satisfied the AEDPA statute because he filed his motion within one year of the final judgment of his state petition, and that the limitations period should be equitably tolled in his case.296 He also claimed that his October 20, 1997 motion in the Fifth Circuit Court for authorization to file a successive habeas petition effectively initiated the federal habeas proceedings and thus satisfied the one-year statute of limitations.297 The Fifth Circuit Court, however, decided that a motion for authorization to file a successive petition is not itself an application for writ of habeas corpus and, as a consequence, its filing does not satisfy the limitations period under the AEDPA statute. The court also argued that the provisions governing successive habeas petitions implicitly recognize a distinction between a motion for authorization and an application for a writ of habeas corpus.298

to provide any relief based on these arguments, however, Fierro must allege some violation of a federal right. Any petition based on federal law will be governed by §2244(b) as a successive habeas petition. It is not appropriate for us to address these arguments in an appeal from the denial of a motion to vacate an earlier judgment. We therefore state no opinion as to the validity of any potential constitutional challenges to his continued detention. For the foregoing reason, the judgment of the district court is AFFIRMED.

291. 1999 Fierro Petition for Writ of Certiorari, supra note 287, at 13 (citing to AEDPA, 28 U.S.C. Sec.2244(d)(1)).
292. Id. at 13 (citing AEDPA 28 U.S.C. §2244(b)(2)(B)(i)).
293. Id. at 14.
294. Id.
295. Fierro, 294 F.3d at 679.
296. Id. at 679-80. The initial question here is whether Fierro has actually met the time requirements of the applicable statute of limitations. Under the AEDPA, state prisoners have one year in which to file petitions for a writ of habeas corpus in federal court. See 28 U.S.C. § 2244 (d)(1) . Because the statute is tolled during the pendency of state court petitions for post-conviction relief, however, the statute did not begin to run on Fierro’s petition until November 28, 1997, the date on which the judgment on his state habeas petition became final. See 28 U.S.C. § 2244(d)(2). It follows that the one-year limitations period expired on November 28, 1997 and that Fierro’s February 1998 petition was filed outside this period.
297. Id.
298. Id. at 680. Fierro argued that his motion for authorization should be deemed “an
Although the district court held that the petition was barred by the statute of limitation period and, alternatively, was also barred by the AEDPA's due diligence requirement, the Fifth Circuit Court affirmed the district court's decision solely on the limitations provision on June 13, 2002.299

The inherent circuitous nature of these proceedings illustrates how Fierro's meritorious constitutional claims and individual rights gradually eroded under the weight of technical barriers. Fierro's lawyers, however, have continued seeking justice for reversal of the decision that has kept Fierro from a fair trial. Therefore, a writ of certiorari was filed in the United States Supreme Court to review the judgment of the United States Court of Appeals for the Fifth Circuit on June 13, 2002, but on March 31, 2003, the United States Supreme Court denied the writ of certiorari.300

Since then, Fierro has been a party301 to the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States),302 a lawsuit brought by the Government of Mexico against the United States in the International Court of Justice.303 The lawsuit alleged that the United States violated the rights of José E. application for a writ of habeas corpus" that was filed within one year of the state court judgment because: (1) the motion is "indistinguishable" from (and is an "indivisible part of") his habeas petition and (2) the motion gave the state notice of the grounds for the petition.

Id. 299. See Fierro v. Cockrell, 294 F. 3d 674, 677 (5th Cir. 2002):

The question we address here is whether the district court erred in holding that Fierro's successive habeas petition is barred by the one-year statute of limitations under the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2244 (d)(1). We conclude that the petition was filed outside the applicable statute of limitations. We further conclude that Fierro has not demonstrated that equitable tolling of the limitations period is warranted in this case. Accordingly, we affirm the district court's dismissal of Fierro's petition...

Because we find that district court's judgment should be affirmed on this ground, we do not reach the district court's alternative finding that the factual predicate for Fierro's claim—that is, the evidence of Medrano's perjury at the suppression hearing—could have been discovered by Fierro's trial counsel through the exercise of due diligence.

In a recent newspaper article, Fierro's lawyers Dick Burr and Jean Terranova expressed their frustration and profound disappointment over this final blow to Fierro's case. "I feel so rotten about this part of the case," Burr said. "It wasn't like we were taking chances with [Fierro's] life. It never occurred to us that we were violating the statute. We didn't think it applied to subsequent petitions. There was no law on this." And Jean Terranova was quoted as saying: "It upsets me to think about it even now. Where is the harm in exercising a bit of equity in construing a law that has never been construed before? This wasn't some property case. A man's life was at stake." These quotes appear on the second of two articles regarding Fierro. See Mark Donald, Stuck in Habeas Hell, TEXAS LAWYER, May 9, 2005, Vol. 21. No. 10, p. 23. For the first part of the article, see May 2, 2005, Vol. 21, No. 9.


302. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S), 2003 ICJ 128 (Feb. 5). The proceedings were initiated on January 9, 2003 by the government of Mexico against the United States, alleging violations of the Vienna Convention on Consular Relations in the case of Jose Medellin and 53 other Mexican nationals sentenced to death in state criminal proceedings in the United States.

303. "Often referred to as the 'World Court,' the International Court of Justice [at the Hague-
Medellin, and other Mexican nationals sentenced to death in state criminal proceedings, by failing to notify these individuals of their rights to contact Mexican consulates under the Vienna Convention on Consular Relations.\textsuperscript{304}

On March 31, 2004, after a little more than a year of deliberations, the International Court ruled on \textit{Avena} and issued its judgment.\textsuperscript{305} The Court found that the United States government had failed to comply with the requirements of the Vienna Convention on Consular Relations, and it directed the United States courts to give the death row inmates "meaningful review" of their convictions and sentences, without applying procedural default rules to prevent consideration of the defendants' claims.\textsuperscript{306}

On December 10, 2004, the United States Supreme Court granted certiorari.

\textsuperscript{304} "The Vienna Convention on Consular Relations (Vienna Convention), opened for signature April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, is 'widely accepted as the standard for international practice of civilized nations, whether or not they are parties to the Convention.' DEP'T OF STATE TELEGRAM 40298 TO THE U.S. EMBASSY IN DAMASCUS (February 1975) reprinted in Luke T. Lee, \textit{Consular and Law Practice} 145 (2d ed. 1991)." Petition for Writ of Certiorari at 6, Medellin v. Dretke, 125 S. Ct. 686 (2004) [hereinafter Medellin Petition for Writ of Certiorari]. The Vienna Convention, a multilateral treaty to which the United States, and 164 other states (countries) are parties, requires the competent authorities of each party to inform the consulate of the other party if the latter party's national is arrested and requests that the consulate be notified. The convention also requires the authorities to forward any communication the arrested person addresses to the consulate, and to inform the person concerned without delay of his or her right to communicate with the consulate. The consular authorities have the right to visit and correspond with that person and to arrange for his or her legal representation. Vienna Convention on Consular Relations, art. 36(1), date of signing, 21 U.S.T. 77, 596 U.N.T.S. 261. The United States signed the Vienna Convention and its Optional Protocol Concerning the Compulsory Settlement of Disputes on April 24, 1963, which was duly ratified by the Senate on October 22, 1969. Medellin Petition for Writ of Certiorari, \textit{supra} note 304, at 6. "The Optional Protocol to the Vienna Convention on Consular Relations requires signatories to let the United Nations' highest tribunal, the International Court of Justice at the Hague, make the final decision when their citizens have been illegally denied the right to seek consulate assistance when jailed abroad." http://www.deathpenaltyinfo.org/article.php?did=1375&scid=64 (last visited Mar. 21, 2006).

305. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (March 31). "The Avena judgment built on the Court's earlier holdings in La Grand (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27) ("LaGrand Judgment"), which Germany also brought on the basis of the Optional Protocol, and in which the United States also fully participated." Medellin Petition for Writ of Certiorari, \textit{supra} note 304, at 6. One distinction was that in \textit{Avena}, unlike \textit{LaGrand}, the applicant was able to seek relief on the merits for nationals who had not yet been executed. \textit{Id.} at 6. The International Court made three basic findings in \textit{Avena}. First, it held that the United States breached Article 36(1)(b) in the cases of 51 of the Mexican Nationals by failing "to inform detained Mexican nationals of their rights under that paragraph, and "to notify Mexicans consular post of the[i]r detention." \textit{Avena}, 2004 I.C.J. at, paras. 106(1)-(2)(m) 153(4)(244A-245A, 272A), \textit{cited in} Medellin Petition for Writ of Certiorari, \textit{supra} note 304, at 6-7. Second, the Court held that in 49 cases, the United States had violated its obligations under Article 36(1)(a) "to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1(c) of that Article regarding the right of consular officers to visit their detained nationals. \textit{Id.} at paras. 106(3), 153(5)-(6)(245A, 273A). Finally, as to remedies, the Court first denied Mexico's request for annulment of the convictions and sentences, but held however, that the United States courts must provide review and reconsideration of the convictions and sentences tainted by the violations it had found. \textit{Id.} at paras.121-122, 153(9)(254A, 274A).

306. Medellin Petition for Writ of Certiorari, \textit{supra} note 304, at 6. The I.C.J. was especially critical of the doctrine of procedural default as practiced in the courts of the United States, which the court found had precluded meaningful review.
in the case of José Medellin to determine what effect the United States courts should give to the *Avena* judgment. After the Supreme Court granted certiorari and relying in part upon a memorandum issued by President George Bush, Medellin filed a successive state application for a writ of habeas corpus in the Texas Court of Criminal Appeals.

Fueled with hope from these events, Fierro filed a fourth state habeas writ on March 23, 2005 requesting relief based on *Avena* and President Bush’s executive determination. In a recent interview, Professor David R. Dow, one of Fierro’s lawyer said: “The determination, the ICJ decision, the obvious prejudice in Fierro’s case—all combine to give me substantial hope... But no, I’m never optimistic. There are more ways to lose than there are to win, which pretty much sums up all habeas litigation.”

The United States Supreme Court heard oral arguments in the Medellin case on March 29, 2005, and on May 23, 2005, it dismissed the writ as improvidently granted.

Professor Dow’s words may have been prophetic, for undoubtedly, the decision by the United States Supreme Court to dismiss Medellin will have an impact on Fierro’s pending state proceedings, and only time will tell whether it will

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307. Medellin v. Dretke, 543 U.S. 1032 (2004). José Medellin confessed to participating in the gang rape and murder of two girls in 1993. He was sentenced to death, and the Texas Court of Criminal Appeals affirmed on direct appeal. Medellin filed a state habeas petition claiming, for the first time, that Texas failed to comply with the provisions of the Vienna Convention on Consular Relations by failing to notify him of his right to consular access. The state trial court rejected this claim, and the Texas Court of Criminal Appeals summarily affirmed. Medellin then filed a habeas petition again raising the Vienna Convention claim in the U.S. District Court. This Court denied the petition and Medellin sought a certificate of appealability from the Court of Appeals for the Fifth Circuit. While this application was pending, however, the ICJ issued its judgment in *Avena*. The Court of Appeals denied Medellin’s application holding that the Vienna Convention dealt with relations between signatories and conferred no “individually enforceable right.” Further, it held that Medellin’s Vienna Convention claim was procedurally defaulted under *Breard v. Greene*, 523 U.S. 371 (1998) and the AEDPA, since it was never raised at trial. While the Court acknowledged the existence of the ICJ’s *Avena* judgment, it gave no dispositive effect to that judgment. Medellin v. Dretke, 371 F.3d 270, 279-80 (5th Cir. 2004).

308. On February 28, 2005, President Bush issued a memorandum to the Attorney General which stated in part:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) 2004 ICJ Rep. No. 128 (March 31, 2004), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.


309. Donald, supra note 303, at 23.

310. Id. at 23.


312. Medellin, 544 U.S. at 6:

In light of the possibility that the Texas Courts will provide Medellin with the review he seeks pursuant to the *Avena* judgment and the President’s memorandum, and the potential for review in this Court once the Texas courts have heard and decided Medellin’s pending action, we think it unwise to reach and resolve the multiple hindrances to dispositive answers to the questions presented here.
be a last glimmer of hope or despair.

B. Judicial Discretion: Politics Have Created a Results-Oriented Judiciary that Uses Its Discretion to Impose Death Even Where Unjustified. The Fierro Court was Particularly Results-Oriented

The legal odyssey of Cesar Fierro poignantly argues against the application of harmless error doctrine to constitutional error for a number of reasons, but as shown in this article, one pivotal reason is that its latitude for judicial discretion encourages misapplication and potential abuse—an abuse that is compounded in Texas where the criminal justice system is in a “dismal state.”

The unprincipled decision of the 1996 Texas Court of Criminal Appeals hurled Fierro’s case into an appellate nightmare—a tortuous maze riddled with legal obstacles and procedural hurdles. But its damaging impact reverberated as ominous foreboding of a bleak future for justice in Texas’s criminal court of last resort.

The opinion sparked not only vigorous internal dissent. Under the circumstances, a 5-4 decision explicitly implies divisiveness among the judges; but sharp division does not always automatically result in written dissents. In Fierro, however, the dissenters: Judges Clinton, Baird, Overstreet, and Maloney, all expressed their grave trepidation and condemnation of the majority’s decision. Even years later, the dissenters still attack the majority. Judge Overstreet, recently reminiscing on the opinion said:

The post conviction habeas process should provide the opportunity for the government to correct a wrong. In the criminal justice system in Texas, that opportunity (not burden) falls to the Texas Court of Criminal Appeals. And this Court failed miserably in the case of Cesar Fierro. It’s 5-4 error left the safety net of Article 11.071 with a gaping hole.

But despite cogent and persuasive arguments grounded on precedent and principles of equity and fundamental fairness, the dissenters were unable to sway the one solitary vote who could have saved Fierro from any further injustice. This is not surprising, given the composition of the court in 1996, and the political

313. See supra note †.
314. Ex Parte Fierro, 934 S.W.2d at 377-83.
315. Id. at 383-86.
316. Id. at 386-88.
317. Id. at 388-92.
318. Interview with Judge Morris Overstreet, Former Court of Criminal Appeals Justice, in Houston, Tex. (July 8, 2005). Article 11.071 is the section of the Texas Code of Criminal Procedure that establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death.
319. Take, for example, the following motion for reconsideration filed in the Court of Criminal Appeals by Richard A. Anderson, a frustrated defense lawyer:

The court has sanctioned conduct that strikes at the very heart of the basic American right to a fair and impartial jury. . . .The Court needs to hang out a sign on the Courthouse steps proclaiming, 'Abandon all hope Ye who enter here. . . .There is a fine line between whining and being genuinely concerned for the soul of a court and how the criminal justice system is perceived by the public, bench, and bar, and individuals outside the state of Texas. . . .It is hard to be enthused with reiterating
environment—aspects of the decision that did not escape some of its most avid critics.\textsuperscript{320}

Mirroring a dramatic shift in Texas’ statewide politics, the Court of Criminal Appeals went from all Democrat to all Republican between 1992 and 1999.\ldots Judge Stephen Mansfield, a candidate who decried reversals for what he called technicalities, was elected to the court in 1994 even though he lied during his campaign about his background.\ldots Mansfield’s duplicity was exposed before the election, but he won anyway. His falsehoods earned a public reprimand from the State Bar. Then, in 1998 he was arrested outside a University of Texas football game for scalping tickets after he had been warned by a police officer to stop.\ldots Sharon Keller… a former Dallas County appellate prosecutor with no judicial experience, Keller joined the state’s highest criminal court in the same month as Bush became governor. Of the eight cases since 1995 where the court has granted a new trial to a Death Row inmate, Keller on six occasions joined a bloc of judges voting to deny relief. Those six cases were reversed for a variety of reasons, including misconduct by police and prosecutors. The dissents generally maintained there was no error at all, or if there was error, it should be deemed harmless.

Although much external criticism has been leveled against the \textit{Fierro} decision, it is not alone.\textsuperscript{321} Many other decisions of this Court have been equally abysmal, prompting a nationwide attack on the Texas criminal justice system—an acerbic depiction of the disturbing flaws that plague it and its criminal court of last resort.\textsuperscript{322} Stephen Bright describes the Court as running “the fastest assembly line to death chamber in the country.”\textsuperscript{323}

The state’s highest criminal court\ldots is not only ignoring constitutional violations (as so many elected judges must do in order to stay in office), but is affirmatively engaged in denying rights to people. The court appoints lawyers incapable of preparing post-conviction petitions and filing them on time and

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\textsuperscript{320} Ken Armstrong & Steve Mills, \textit{Gatekeeper Court Keeps Gates Shut}, CHI. TRIB., June 12, 2000, at 1. This is a comprehensive and excellent article which provides a great overview of multiple aspects of the death penalty in Texas.\textit{See also James Kimberly, Once on Death Row, It Might Not Matter, HOUSTON CHRON., Feb. 6, 2001, at A1. This article describes other infamous Texas cases and further criticizes members of the Texas Court of Criminal Appeals such as Justices Sharon Keller, and Steve Mansfield.}

\textsuperscript{321} Armstrong & Mills, \textit{supra} note 324.

\textsuperscript{322} Id.

\textsuperscript{323} Stephen B. Bright, \textit{Death in Texas}, July 19, 1999, http://www.cedinet.demon.co.uk/cca-brig.htm, (last visited Mar. 21, 2006). At the time of this writing, Mr. Bright was the Director of the Southern Center for Human Rights in Atlanta, a well-known lawyer and professor. This article is a comprehensive expose of the disturbing flaws in the Texas death penalty system.
then punishes the condemned inmates for the incompetence of the lawyers it appointed. ... Amid the clamor or politicians and voters for more executions, the court's elected judges dispatch people to Texas's busy execution chamber with little or no serious review of their cases. Even when shocking injustices have been brought to their attention—such as lawyers sleeping while they were supposed to be defending a client at a capital trial—the court has upheld death sentences.\textsuperscript{324}

As his article aptly points out, a pivotal factor compounding the problems in Texas is that judges are elected in partisan elections which has a direct impact on two crucial aspects of death penalty litigation: the appointment of counsel and judicial bias. The first is beyond the scope of this paper, but judicial bias, arguably, affected the outcome of Fierro's case. Take, for example, the words of Judge Baird, one of the Fierro dissenters, who served eight years on the bench: "I think this is a remarkable case because I don't know of any place other than the Court of Criminal Appeals where you could find five individuals that would think this error was harmless under any standard of review."\textsuperscript{325} He further chastised the court for its "result-oriented mentality where the ends justify the means,"\textsuperscript{326} and in a 1999 stinging article that showcased the court, he stated: "The backbone of the criminal justice system is that everybody is treated fairly under the same rule of law. And this court is changing that."\textsuperscript{327} The article went on to state that "a trio of judges—Michael McCormick, Sharon Keller, and Stephen Mansfield—has turned the court into a vacation resort for the prosecution, an abrupt and recent drift that has more to do with the judges' individual biases than it does with any voter mandate."\textsuperscript{328}

Principles of fairness, equity, and justice—the underpinnings of the criminal justice system—are compromised when the reviewing process is not fully independent or is tainted by bias.\textsuperscript{329} The strong language leveled against the court—emanating in part, from one of its former members—lends veracity to the hard criticism it has incurred by the media. But Judge Baird is not alone in his observations regarding the impact of judicial bias. In a recent address to the American Bar Association, Justice Stevens expressed his concerns on this issue: "Persons who undertake the task of administering justice impartially should not be required—indeed, they should not be permitted—to finance campaigns or to curry the favor of voters by making predictions or promises about how they will decide cases before they have heard any evidence or argument. A campaign promise to "be tough on crime," or to "enforce the death penalty," is evidence of bias that should disqualify a candidate from sitting in criminal cases.\textsuperscript{330}

\textsuperscript{324} Id.
\textsuperscript{325} All Things Considered, July 6. 2000 (National Public Radio 2000) (transcript of the interview on file with the author). At the time of this interview, Justice Charles Baird, a Democrat had been defeated for re-election and was no longer sitting on the Court.
\textsuperscript{326} Eskenazi, supra note 323.
\textsuperscript{327} Id.
\textsuperscript{328} Id.
\textsuperscript{330} Justice John Paul Stevens, Address to the Opening Assembly, American Bar Association
Thus, it should not be surprising that the recently released Liebman study, a twenty-three year study on error rates in capital cases, should list "judicial bias" as the third most frequent reason that errors occur in capital cases.

As Professor White, a former Supreme Court Justice of the State of Tennessee, convincingly states: "[j]udicial bias, because it is so reprehensible may be the most horrific of the causes of capital punishment injustice." She further explained:

Judges who favor the death penalty and who decide cases in accordance with their biases will often influence the outcome in individual capital cases by their rulings. But a judge who favors the death penalty can have a much more devastating effect on the overall reliability and fairness of the capital justice system.

If pro-death judges desire appointments to higher courts during their careers, they may shy away from making the difficult, politically sensitive decisions that seem to pit them against capital punishment. The judge who wants to make his or her position on capital punishment known, for political reasons, may invite cases that demonstrate his or her fervor. They may assign inexperienced lawyers to defend those actual accused of capital crimes, or show inappropriate deference to the prosecutor. Some judges may even be incapable of shedding their own prejudices and unable to rule in a fair and objective manner.

Sadly, wrongful convictions, incompetent appointment of indigent defense lawyers, ineffective representation, unaccountable courts, recalcitrant judges, and a lack of meaningful judicial review has caused one commentator to refer to the to the

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331. Penny J. White, Errors and Ethics: Dilemmas in Death, 29 HOFSTRA L REV. 1265, 1273 (2001). The study found "that error was largely attributable to four factors, two of which account for the majority of errors. Incompetent defense lawyering and prosecutorial misconduct account for more than half of the errors in capital cases. The remaining errors are the result of judicial bias, legal error, or bias among jurors." Id. at 1274 (citations omitted). Professor White explained the results of this study which took place between 1973-1995:

[T]he findings of the study were staggering. Of the twenty-eight states whose death penalty cases were included in the study, only two states did not err at least fifty percent of the time during the three stages of judicial review in a capital case. Nationally, 'courts found serious, reversible error in nearly 7 of every 10' capital case that were fully reviewed during the twenty-three year study period. (citations omitted).

Id. at 1273.

332. Id. at 1285. "Serious error as defined by the study are those which 'undermine the reliability of a finding of guilt, or sentence of death'—an error which during this period occurred in more than two out of every three death penalty cases." Id. at 1273.

333. Id. at 1285. Professor White describes Justice Mansfield, one of the justices of the Fierro majority, as "a lawyer in Texas who challenged an incumbent appellate judge who had authored an unpopular opinion promising that if elected he would use the death penalty, harmless error, and frivolous appeal rules more frequently. See also Janet Elliot & Richard Connely, Mansfield: The Stealth Candiate: His Past Isn't What it Seems, TEX. LAW, Oct. 3, 1994, at 1.

334. White, supra note 331, at 1286 (citations omitted).
criminal process in Texas as having the "integrity of a professional wrestling
match."335

C. The High Stakes of Harmless Error in Capital Punishment

At the very core of Fierro's complex legal odyssey is a simple story of
fundamental injustice and unfairness— one that should rattle all the beliefs that we,
as Americans, hold regarding this great nation. The injustices cover a wide
spectrum: from the unscrupulous and reprehensible acts of both the Juarez and El
Paso police, to the unconscionable decision rendered by a court of jurists elected to
preserve and uphold the laws, to the numerous subsequent legal barriers fostered by
political motivation.

The application of harmless error analysis to all constitutional violations is
reprehensible, but in death penalty cases, like Fierro's, it is even more insidious
given the arbitrariness with which the penalty is imposed, and the many inherent
flaws existent in the criminal justice system.336

And while the topic of the death penalty is beyond the scope of this article,
the specter of death looming in Fierro's near future forces us to confront the stark
statistics. Texas is responsible for one-third of all executions in the United States
since 1976 and already claims one-third of all executions for 2005.337 Between 1976
and October 2002, 102 death row prisoners nationwide including seven in Texas
have been cleared of charges and freed from imprisonment.338 Between 1976 and
1994, the Texas Court of Criminal Appeals considered more than 600 death penalty
cases. It reversed the sentences or convictions in 125 of them, about one in five.339
Since 1994 when the composition of the court began to change drastically, the court
has considered nearly 300 capital cases and found reasons to reverse the sentences of
convictions in 11 of them— a reversal rate of less than 4 percent.340 Since Fierro

The arbitrariness of the death penalty has become increasingly apparent as
defendants guilty of multiple murders were spared a death sentence, while mentally
ill defendants and those guilty of far less egregious offenses were executed. In
Washington in 2003, Gary Ridgway pleaded guilty to killing 48 women and
received a life sentence. In New Jersey, Nurse Charles Cullen admitted to killing 17
people and was given a life sentence. On the other hand, people like David Hocker,
Kelsey Patterson, and James Hubbard were executed in 2004. Hocker was given a
one-day trial in Alabama, during which little evidence was presented about his
severe mental illness and suicidal desires. He had murdered his employer in 1998
and asked to be executed. Patterson was executed in Texas despite a highly unusual
recommendation for clemency from the Board of Pardons and Paroles. He had spent
much of his life in and out of state mental hospitals, suffered from paranoid
schizophrenia, and rambled unintelligibly at his execution. Hubbard was 74 years
old when he was executed in Alabama. He suffered from cancer, hypertension, and
spasms of dementia. He had been on death row for 27 years.
338. Supra note †.
339. Kimberly, supra note 324.
340. Id.
was convicted in 1980, Texas has executed 361 individuals—the most recent on March 22, 2006.\textsuperscript{341}

**CONCLUSION**

The harmless error doctrine was promulgated in an effort to balance the multiple interests that co-exist in the criminal justice system. As this article demonstrates, the doctrine was intended to preclude incongruous reversals based on technical errors. But its gradual expansion to constitutional error is a phenomenon that cannot be justified by reason or law. The underlying principles upon which this country was founded decried its application to constitutional errors because the deprivation of constitutional rights cannot be justifiably condoned as harmless—under any circumstances—but particularly in death penalty cases.\textsuperscript{342} Constitutional error, unlike all other technical errors, by definition always affect the substantial rights of the parties, and the failure to reverse dilutes the meaning of those rights, and tarnishes the very integrity of the system.\textsuperscript{343}

A contemporary analysis, however, cannot afford to ignore the role of all the players: the victims and their families, the prosecutor, the investigators, the court, the criminal defendant, the defense bar, and society at large.\textsuperscript{344} The criminal justice system does not operate in a vacuum. There are intervening factors that play an equally important role in the outcome of criminal cases: public pressure, political motivation, judicial economy, interest in speed and finality, severe budgetary constrains, and regrettably, judicial bias. Still, these interconnected factors cannot take precedence over blatant deprivations of constitutional rights which directly impact the integrity of the system. Not surprisingly, with respect to constitutional error, scholars and jurists have ardently argued for a return to the rule of automatic reversal—a position, I strongly support for many reasons—but in particular for those gleaned in Fierro’s case.

Undoubtedly, there is an inevitable social function to harmless error rules which its proponents have lauded: to avoid the expenditure of time and money that the reversal of a conviction entails.\textsuperscript{345} But, as shown in this article, intervening factors, often capricious and always to the detriment of the defendant, tend to tip the balance of interests in favor of the State. Whether an error has had an effect on the outcome of the case—a highly subjective inquiry—comes down to the application of

\textsuperscript{341} Texas Department of Criminal Justice, available at http://www.tdcj.state.tx.us/stat/executedoffenders.htm.

\textsuperscript{342} Professor Wicht, supra note 72, offers specific reasons why it should not be applied to constitutional error: (1) Subjecting constitutional errors to the harmless error doctrine violates the principle of stare decisis. \textit{Id.} at 86-93; (2) The appellate court cannot effectively weigh the impact of the constitutional error. \textit{Id.} at 93-97; (3) Subjecting constitutional rights to harmless error analysis lowers the value of constitutional rights. 97-100.

\textsuperscript{343} \textit{Id.} at 96 (citing Haynes v. Washington, 373 U.S. 503, 519 (1963)). “[U]nlike truly technical issues and rules, constitutional rights reflect the complex principles and values upon which our society and system of justice are based.” \textit{Id.}

\textsuperscript{344} For a discussion of the merits of automatic reversal and its effect on the courts, prosecutors, criminal defendants, and the public, see \textit{id.} at 100-08.

vague rules, misapplication of standards, inconsistent rulings, deviation from precedent, and lamentably, the composition of the deciding court.

Another important reason that counsels against the application of the doctrine to constitutional error is the appellate court’s inability to accurately assess the effect of the error on the jury. Professor Goldberg refers to this “usurpation of the jury function,” as one of “the greatest cost of the harmless constitutional error rule.” And while this is a danger that arguably plagues an appellate court’s review of all trial errors, the impact on constitutional error is clearly distinguishable from all others. As a commentator noted, evaluating the effect of a coerced confession upon the jury differs drastically from determining the effect of an insignificant technical error such as the omission of the word “the” from the indictment: “the former relegates the appellate court judges the impossible task of gleaning the full effect of a Constitutional error from the mere words spoken and evidence adduced at trial, while the latter merely requires a calculus of the role of the written indictment played in the jury’s determination of the defendant’s guilt.”

But more importantly, given the nature of a technical errors, applying harmless error review to such errors is in accordance with the original intent and goal for which the rule was designed.

Moreover, the failure to overturn convictions, arguably dependent on evidence produced by a constitutional error, can reinforce and even encourage governmental abuse. This would tarnish the integrity of the criminal justice system outweighing the ills of the substantive costs a reversal entails.

346. Goldberg, supra note 72, at 430. In his thought-provoking article, Professor Goldberg argues that the “decision making gulf between three appellate judges reading a transcript at their leisure in chambers and twelve citizens locked in a jury room is not bridged by an appellate judge’s intellectual understanding of the reasonable doubt standard.” Id. at 430.

347. Wicht, supra note 72, at 95-96.

348. Id. at 96. Professor Wicht’s reference is to a flawed indictment which reads: “against the peace and dignity of state,” as opposed to “against the peace and dignity of the state.” Id.

349. Id. Professor Wicht makes an insightful analogy between the role of the appellate court in using a trial transcript to determine the effect of constitutional error and a movie critic in evaluating a movie based only on the screenplay. As he cleverly notes:

The appellate court cannot observe the reactions of the witnesses, the defense lawyer, the prosecutor, the judge or, most importantly, the jurors to a Constitutional violation from merely reading the trial transcript. The transcript communicates only the words spoken and the evidence presented during trial. Such transcripts do not, and cannot, communicate the matter in which the words were spoken or the way in which the evidence was presented during the trial. For example, the trial transcript makes no distinction between testimony offered in a boisterous, hostile or angry manner an testimony offered in a shameful, bashful or reluctant manner. Despite their absence from the trial record, the influence of these and other details have on individual jurors and the jury as a whole can be tremendous.

Id. at 93-94.


351. As Judge Edwards, former Chief Judge of the U.S. Court of Appeals for the D. C. Circuit has aptly stated:

A failure to reverse will also diminish the constitutional proposition that a defendant in a criminal case is deprived of due process of law when his conviction is founded, in whole or in part, upon an involuntary confession. And this result will likely undermine the integrity of the criminal justice system by sending dubious messages to the police officer who brutalized the defendant and thereby gained the coerced confession, the prosecutor who introduced it into evidence at trial, and to the trial judge who erroneously admitted it.
As Fierro demonstrates, cases where harmless error doctrine is applied are "ripe with injustice" because the "doctrine is replete with discretion," and "[in] the context of the criminal justice system, the greatest and most frequent injustice occurs [where discretion is greatest], where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made."

In sum, departures from precedent, vague and inconsistent standards, great latitude in decision making, and political motivation, all counsel against applying harmless error analysis to constitutional error.

The Fierro case is disturbing for all the reasons expressed in this article, but perhaps the most poignant is the current opinion of Gary Weiser, the prosecutor who successfully persuaded Fierro's jury to convict him and sentence him to death. Asked in a recent interview, "Should Cesar Fierro be on death row today?" he replied:

No. Absolutely not. And it's not a function of whether or not he committed the crime, because I believe he did. I believe he committed that murder. It's a function of fundamental fairness in the Constitution of the United States and the guarantee that no defendant shall be convicted for an offense unless two things happen: one, that you can establish his guilt beyond a reasonable doubt; and, even more importantly, unless such is done within the guidelines of the law. And to take a man's confession, regardless of whether he committed the crime or not, under the circumstances under which Fierro's confession was purportedly taken violates due process. And this man should not be convicted.

For the last twenty five years, Fierro's case has been pummeled like a small boat in the throes of a stormy, intractable, and unpredictable sea. Since his conviction in 1980, the tide has unfailingly turned against him. Despite gargantuan efforts by his lawyers, and the slim hope of some minor victories, turbulent waters have brought its journey to the very edge of the precipice where it teeters on the brink of a fatal fall. From this precarious place, fundamental principles of justice seem remote and distant, and its imminent plunge will hurl our beliefs in the sanctity of our criminal justice system into a sea of disquieting despair.

Edwards, supra note 72 at 1169.
353. Id.
355. All Things Considered, supra note 329.
356. Id.