SUPREME COURT OF THE UNITED STATES

No. 91–7358

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

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

[April 21, 1993]

JUSTICE STEVENS, concurring.

The Fourteenth Amendment prohibits the deprivation of liberty "without due process of law"; that guarantee is the source of the federal right to challenge state criminal convictions that result from fundamentally unfair trial proceedings. Neither the term "due process," nor the concept of fundamental unfairness itself, is susceptible of precise and categorical definition, and no single test can guarantee that a judge will grant or deny habeas relief when faced with a similar set of facts. Every allegation of due process denied depends on the specific process provided, and it is familiar learning that all "claims of constitutional error are not fungible." *Rose* v. *Lundy*, 455 U. S. 509, 543 (1982) (STEVENS, J., dissenting). As the Court correctly notes, constitutional due process violations vary dramatically in significance; harmless trial errors are at one end of a broad spectrum, and what the Court has characterized as "structural" defects—those that make a trial fundamentally unfair even if they do not affect the outcome of the proceeding—are at "the other end of the spectrum," *ante*, at 8. Although Members of the Court have disagreed about the seriousness of the due process violation identified in *Doyle* v. *Ohio*, 426 U. S. 610 (1976), in this case we unanimously agree that a constitutional violation occurred; moreover, we also all agree that some version of harmless-error analysis is appropriate.

We disagree, however, about whether the same form of harmless-error analysis should apply in a collateral attack as on a direct appeal, and, if not, what the collateral attack standard should be for an error of this kind. The answer to the first question follows from our long history of distinguishing between collateral and direct review, see, *e.g.*, *Sunal* v. *Large*, 332 U. S. 174, 178 (1947), and confining collateral relief to cases that involve fundamental defects or omissions inconsistent with the rudimentary demands of fair procedure. See, *e.g., United States* v. *Timmreck*, 441 U. S. 780, 783 (1979), and cases cited therein. The Court answers the second question by endorsing Justice Rutledge's thoughtful opinion for the Court in *Kotteakos* v. *United States*, 328 U. S. 750 (1946). *Ante*, at 1, 17. Because that standard accords with the statutory rule for reviewing other trial errors that affect substantial rights; places the burden on prosecutors to explain why those errors were harmless; requires a habeas court to review the entire record *de novo* in determining whether the error influenced the jury's deliberations; and leaves considerable latitude for the exercise of judgment by federal courts, I am convinced that our answer is correct. I write separately only to emphasize that the standard is appropriately demanding.

As the Court notes, *ante*, at 10, n. 7, the *Kotteakos* standard is grounded in the 1919 federal harmless-error statute. Congress had responded to the widespread concern that federal appellate courts had become "impregnable citadels of technicality," *Kotteakos*, 328 U. S., at 759, by issuing a general command to treat error as harmless unless it "is of such a character that its natural effect is to prejudice a litigant's substantial rights." *Id.*, at 760–761. *Kotteakos* plainly stated that unless an error is merely "technical," the burden of sustaining a verdict by demonstrating that the error was harmless rests on

the prosecution.[1] A constitutional violation, of course, would never fall in the "technical" category.

Of particular importance, the statutory command requires the reviewing court to evaluate the error in the context of the entire trial record. As the Court explained: "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations." *Id.*, at 762.

To apply the *Kotteakos* standard properly, the reviewing court must, therefore, make a *de novo* examination of the trial record. The Court faithfully engages in such *de novo* review today, see *ante*, at 17–18, just as the plurality did in the dispositive portion of its analysis in *Wright* v. *West*, 505 U. S. ___, ___–___ (1992) (opinion of THOMAS, J.) (slip op., at 17–18). The *Kotteakos* requirement of *de novo* review of errors that prejudice substantial rights—as all

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[1]"It is also important to note that the purpose of the bill in its final form was stated authoritatively to be `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.' H. R. Rep. No. 913, 65th Cong., 3d Sess., 1. 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 under it.' *Ibid.; Bruno* v. *United States*, [308 U. S. 287, 294 (1939)]; *Weiler* v. *United States*, 323 U. S. 606, 611 [(1945)]." *Kotteakos* v. *United States*, 328 U. S. 750, 760–761 (1946).

constitutional errors surely do—is thus entirely consistent with the Court's longstanding commitment to the *de novo* standard of review of mixed questions of law and fact in habeas corpus proceedings. See *Wright* v. *West*, 505 U. S., at ___–___ (O'CONNOR, J., concurring in judgment) (slip op., at 2–7).

The purpose of reviewing the entire record is, of course, to consider all the ways that error can infect the course of a trial. Although THE CHIEF JUSTICE properly quotes the phrase applied to the errors in *Kotteakos* (" `substantial and injurious effect or influence in determining the jury's verdict' "), *ante*, at 1, 6, 16, 18, we would misread *Kotteakos* itself if we endorsed only a single-minded focus on how the error may (or may not) have affected the jury's verdict. The habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place.[2] *Kotteakos* is full of warnings to avoid that result. It requires a reviewing court to decide that "the error did not influence the jury," *id.*, at 764, and that "the judgment was not substantially swayed by the error," *id.*, at 765. In a passage that should be kept in mind by all courts that review trial transcripts, Justice Rutledge wrote that the question is *not*

> "were they [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.
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> "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.

[2] "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Id.*, at 765.

> 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." *Id.*, at 764 (citations omitted).

The *Kotteakos* standard that will now apply on collateral review is less stringent than the *Chapman* v. *California*, 386 U. S. 18 (1967), standard applied on direct review. Given the critical importance of the faculty of judgment in administering either standard, however, that difference is less significant than it might seem—a point well illustrated by the differing opinions expressed by THE CHIEF JUSTICE and by JUSTICE KENNEDY in *Arizona* v. *Fulminante*, 499 U. S. ___, ___, ___ (1991). While THE CHIEF JUSTICE considered the admission of the defendant's confession harmless error under *Chapman*, see 499 U. S., at ___ (dissenting opinion) (slip op., at 10–11), JUSTICE KENNEDY's cogent analysis demonstrated that the error could not reasonably have been viewed as harmless under a standard even more relaxed than the one we announce today. See *id.*, at ___ (opinion concurring in judgment) (slip op., at 1–2). In the end, the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied.

Although our adoption of *Kotteakos* does impose a new standard in this context, it is a standard that will always require "the discrimination . . . of judgment transcending confinement by formula or precise rule. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 240 [(1940)]." [3] 328 U. S., at 761. In my own

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[3]Justice Rutledge continued: "That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter

judgment, for the reasons explained by THE CHIEF JUSTICE, the *Doyle* error that took place in respondent's trial did not have a substantial and injurious effect or influence in determining the jury's verdict. Accordingly, I concur in the Court's opinion and judgment.

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hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another." *Id.*, at 761.