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The Not-so-Great Writ: An Analysis of Recent Tenth Circuit Decisions Reflecting the Current Difficulty in Obtaining Habeas Corpus Relief for State Prisonsers

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INTRODUCTION: THE EXPANSION AND CONTRACTION OF HABEAS CORPUS IN AMERICA

A writ of habeas corpus directs prison officials to bring a prisoner before a judge to determine whether the prisoner is being held unlawfully.[1] Based on the simple idea that nobody should be confined in violation of the Constitution,[2] the writ does not require a court to determine a prisoner's innocence or guilt, but the writ guards against illegal imprisonment.[3] Therefore, while put into action by individual prisoners who hope for their own release, the writ of habeas corpus functions as an important mechanism of enforcing structural reform within the criminal justice system.[4] In Anglo-American legal history, habeas corpus—The Great Writ—"has been for centuries esteemed the best and only sufficient defence [sic] of personal freedom."[5]

Despite the writ's acknowledged importance in "protecting constitutional rights,"[6] the United States Supreme Court and Congress have substantially contracted the availability of habeas relief for state prisoners over the last several decades. Two recent decisions by the United States Court of Appeals for the Tenth Circuit,[7] *Herrera v. LeMaster*[8] and *Johnson v. McKune*,[9] reflect the current difficulty state prisoners face in obtaining habeas relief. In *Herrera*, the Tenth Circuit held that a habeas

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1. BLACK'S LAW DICTIONARY 715 (7th ed. 1999); *see* Jones v. Cunningham, 371 U.S. 236, 238 (1963) ("In England, as in the United States, the chief use of habeas corpus has been to seek the release of persons held in actual, physical custody in prison or jail."); ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 1 (N.Y. Univ. Press 2001); RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.10 (2d ed. 1992).

2. Deborah L. Stahlkopf, *A Dark Day for Habeas Corpus: Successive Petitions Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, 40 ARIZ. L. REV. 1115, 1118-19 (1998).

3. *See* Walker v. Wainwright, 390 U.S. 335, 336 (1968) ("[T]he great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention."); Price v. Johnston, 334 U.S. 266, 291 (1948) ("The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned.").

4. *See* LARRY W. YACKLE, FEDERAL COURTS 425 (1999) ("Federal habeas corpus for state prisoners is largely the product of the Supreme Court's efforts in the middle decades of this century to improve the quality of state criminal justice.").

5. *See Ex parte* Yerger, 75 U.S. 85, 95-96 (1868).

6. Slack v. McDaniel, 529 U.S. 473, 483 (2000).

7. This paper surveys the cases decided by the Tenth Circuit between September 1, 2001 and August 31, 2002.

8. 301 F.3d 1192 (10th Cir. 2002).

9. 288 F.3d 1187 (10th Cir. 2002).

court, in assessing the harmlessness of a constitutional violation, is to apply the less demanding harmless-error standard normally required in habeas cases even when a state court fails to apply the required and more demanding harmless-error standard on direct review.[10] In *Johnson,* the Tenth Circuit held that a habeas petitioner, convicted with the help of a jury instruction later found unconstitutional by the United States Supreme Court, could not have that subsequent Supreme Court decision applied retroactively to his petition.[11] Both of these cases, therefore, are emblematic of the current contraction of habeas law, a trend that runs counter to the general expansion of the writ's availability in American legal history.

At the very beginning of our nation, the founding fathers recognized the importance of habeas corpus as a safeguard against a new and powerful central government,[12] and provided for its protection within the Constitution.[13] Due to its position as "the symbol and guardian of individual liberty,"[14] the writ of habeas corpus has demonstrated a propensity for progressive expansion.[15] The United States Supreme Court recognized the writ's capacity for liberal growth, noting in *Ex Parte Yerger* that "the general spirit and genius of our institution has tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States."[16]

The expansion of the writ of habeas corpus was particularly dramatic during two periods in American history. Immediately after the Civil War, Congress created the statutory writ of habeas corpus, enabling a prisoner tried in a state court to ask for a writ of habeas corpus in federal court based on constitutional errors or violations of federal law.[17] Prior to this legislation, the writ only applied to federal prisoners, and to the exclusion of state prisoners.[18] This statutory expansion of the common law writ grew out of a concern that the defeated Southern states were limiting the rights of black citizens.[19]

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10. *Herrera*, 301 F.3d at 1193-94, 1198-99.

11. *Johnson*, 288 F.3d at 1189-90, 1200 (considering whether to apply *Sandstrom v. Montana*, 442 U.S. 510 (1979)).

12. THE FEDERALIST No. 84, at 154 (Alexander Hamilton) (M. Walter Dunne 1901) (noting the importance of habeas corpus as a protection against the "the practice of arbitrary imprisonments," which Hamilton labeled one of the "favorite and most formidable instruments of tyranny").

13. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

14. Peyton v. Rowe, 391 U.S. 54, 58 (1968).

15. *See, e.g.*, Mercado v. United States, 183 F.2d 486, 487 (5th Cir. 1950) ("[H]abeas corpus has long been regarded as a proceeding in which a liberal judicial attitude is peculiarly appropriate in view of the broadly remedial nature of the writ.").

16. *Yerger*, 75 U.S. at 102.

17. Joseph L. Hoffman, *Justices Weave Intricate Web of Habeas Corpus Decisions*, 37 TRIAL 62, 62 (2001).

18. *Ex parte* Bollman, 8 U.S. 75, 98-99 (1807).

19. Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 339 (1997).

Then, nearly one hundred years later, the Warren Court further transformed the statutory writ of habeas corpus with a series of decisions that removed many of the practical procedural hurdles faced by state prisoners.[20] These critical decisions altered the balance of power in the field of criminal law[21] and "the writ became an effective tool for enforcing federal constitutional standards in the states by allowing federal courts to determine whether a state criminal prosecution fully complied with the more exacting federal rules of constitutional criminal procedure."[22] As a result of the Warren Court's work, federal courts became the watchdogs against constitutional violations in state courts.[23] However, the rapid expansion of habeas relief also led to a significant backlash—one that continues nearly forty years later.[24]

The Supreme Court under Chief Justice Rehnquist reexamined many of the principles of habeas relief established by the Warren Court.[25] Through a series of cases in the early 1990s, the Court constricted the scope of the statutory writ of habeas corpus and reversed many of the effects of the landmark decisions of the Warren Court.[26] The decisions of the Rehnquist Court undeniably contracted the availability of writs of habeas corpus.[27] Today, federal courts routinely deny the petitions of many prisoners with valid constitutional claims.[28] But despite these limitations on habeas relief erected by the Rehnquist Court, Congress subsequently passed legislation creating another set of procedural hurdles.[29]

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20. *See, e.g.*, Sanders v. United States, 373 U.S. 1, 17-18 (1963) (formulating a new test to be applied in determining whether successor petitions would be dismissed; a successor petition would be granted unless the petitioner had knowledge of a constitutional claim and yet purposely failed to raise that claim); Fay v. Noia, 372 U.S. 391, 398-99, 438-39 (1963) (holding that a procedural error was not sufficient grounds for denying a petitioner habeas relief unless the state procedural rules were "deliberately bypassed"); Townsend v. Sain, 372 U.S. 293, 317 (1963) (using the reasoning from *Fay* to hold that a petitioner for habeas relief was allowed a full evidentiary hearing during the collateral appeal to federal court, unless the petitioner deliberately bypassed state procedural rules).

21. Hartman & Nyden, *supra* note 19, at 340.

22. Hoffman, *supra* note 17, at 62.

23. Hartman & Nyden, *supra* note 19, at 340.

24. *See id.* at 342-52.

25. *See id.* at 342.

26. *Id.*; *see* Brecht v. Abrahamson, 507 U.S. 619, 631-32, 638 (1993) (adopting a separate, less stringent harmless error standard for collateral review); Keeney v. Tamayo-Reyes, 504 U.S. 1, 5-6 (1992) (changing the "deliberate bypass" standard of *Faye v. Noia* and *Townsend v. Sain* to one of "cause and prejudice"); Coleman v. Thompson, 501 U.S. 722, 729-35 (1991) (limiting *Fay v. Noia* by declining to review questions of federal law where the state court decision rests on independent state law grounds); McClesky v. Zant, 499 U.S. 467, 494-95 (1991) (holding that the standard for evaluating successor petitions is also "cause and prejudice"); Teague v. Lane, 489 U.S. 288, 299-310 (1989) (implying that a decision of the Supreme Court is not to be applied retroactively to habeas corpus cases, unless the decision announces a "new rule").

27. David Gottlieb & Randall Coyne, *Habeas Corpus Practice in State and Federal Courts*, 31 N.M. L. REV. 201, 201 (2001).

28. *Id.*

29. *Id.* at 202.

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA")[30] in response to the bombing in Oklahoma City.[31] Intending to stop "abuse of the writ," Congress designed the AEDPA to bar habeas relief for certain claims.[32] The AEDPA included a bar on successive petitions,[33] a statute of limitations,[34] and a standard of review.[35] Although some commentators feel that the AEDPA was merely a codification of the Rehnquist Court's habeas corpus decisions,[36] federal courts must still wrestle to integrate the statute's language with the extensive case law regarding habeas corpus.[37]

It was during this transitional period, marked by an ongoing contraction of habeas corpus and evolving judicial adaptation to the AEDPA, that the Tenth Circuit Court of Appeals decided the two cases that are the focus of this survey. *Herrera* and *Johnson* reveal that the Tenth Circuit adopted a strict interpretation of the rules surrounding the statutory writ of habeas corpus and that the court is willing to aid in the relatively recent contraction of the availability of habeas relief for state prisoners.[38] Part I of this survey introduces the concept of harmless-error standards and the Tenth Circuit's application of the current standard in *Herrera.* Part II discusses the current limit on applying Supreme Court decisions announcing new rules of criminal procedure retroactively to habeas proceedings and the Tenth Circuit's analysis of retroactivity in *Johnson.*

I. THE HARMLESS-ERROR STANDARD IN HABEAS CORPUS PROCEEDINGS

A. *Background: A History of the Harmless-Error Standard in Habeas Corpus Proceedings*

Even where a state admits in a habeas proceeding that a constitutional error was committed, the state can argue that the error was harmless.[39] Until recently, federal courts used the same standard for judging constitutional violations during habeas proceedings as they used on di-

30. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

31. *See* Stahlkopf, *supra* note 2, at 1117.

32. *Id.*

33. 28 U.S.C. § 2244(a)-(c) (2000).

34. *Id.* § 2244(d)(1).

35. *Id.* § 2254(d)(1).

36. *See, e.g.*, Gottlieb & Coyne, *supra* note 27, at 202 (reporting Professor Gottlieb's opinion that AEDPA "can be read primarily as a codification of much of the Court's work").

37. *See id.* at 203 (discussing the difficulties federal courts face in trying to apply AEDPA's bar on successive petitions given their prior decisions on the issue).

38. *See Herrera*, 301 F.3d at 1192; *Johnson*, 288 F.3d at 1187.

39. *See* Brecht v. Abrahamson, 507 U.S. 619, 652 (1993) (O'Connor, J., dissenting) ("By now it goes without saying that harmless-error review is of almost universal application; there are few errors that may not be forgiven as harmless."); YACKLE, *supra* note 4, at 451 ("If federal courts determine that prisoners' claims are meritorious, they nonetheless withhold relief if the error was harmless.").

rect appeal.[40] That standard required relief from a constitutional error unless the state could prove the violation was "harmless beyond a reasonable doubt."[41] The United States Supreme Court announced this high standard in *Chapman v. California*,[42] and emphasized the constitutional importance of the harmless-error rule.[43]

In 1993, in *Brecht v. Abrahamson*,[44] the United States Supreme Court adopted a new standard for evaluating constitutional errors on federal habeas review.[45] In his murder trial, the defendant, Todd Brecht, admitted that he shot his brother-in-law, but asserted that it was an accident.[46] The prosecutor, however, presented Brecht's silence at the time of his arrest as evidence of his guilt and the jury found Brecht guilty of first-degree murder.[47] On direct appeal, the Wisconsin Court of Appeals set aside the conviction, finding that Brecht's constitutional rights were violated by the prosecutor's use of Brecht's choice to exercise his Fifth Amendment right to silence.[48] The Wisconsin Supreme Court reinstated the conviction even though it found that the State had violated Brecht's due process rights because it found that the error was "harmless beyond a reasonable doubt."[49]

On habeas review, the district court used the same standard used by the Wisconsin Supreme Court and found that the error was not "harmless beyond a reasonable doubt."[50] The United States Court of Appeals for the Seventh Circuit reversed, declaring that the "harmless beyond a reasonable doubt" standard was only applicable to direct review.[51] Further, the Seventh Circuit held that for habeas corpus review the test is whether the error "had [a] substantial and injurious effect or influence in determining the jury's verdict."[52] The United States Supreme Court affirmed the holding of the Seventh Circuit,[53] adopting the language originally

40. Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2409 (1993) ("In a number of cases, the Court applied the *Chapman* test in habeas corpus just as on direct review."). *See, e.g.*, Rose v. Clark, 478 U.S. 570, 579-80 (1986) (finding that a jury instruction that shifted the burden of proof on the element of malice and that a prisoner challenged in a habeas proceeding did not violate the *Chapman* test).

41. Graham v. Wilson, 828 F.2d 656, 660 (10th Cir. 1987) ("[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (quoting Deleware v. Van Arsdall, 475 U.S. 673, 681 (1996))).

42. 386 U.S. 18, 24 (1967).

43. *Chapman*, 386 U.S. at 21 (stating that the harmless-error standard protects rights "rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the 'independent' federal courts would be the 'guardians of those rights.'").

44. 507 U.S. 619, 619 (1993).

45. *Brecht*, 507 U.S. at 630-31, 637-38.

46. *Id.* at 624.

47. *Id.* at 624-25.

48. *Id.* at 625-26.

49. *Id.* at 626 (quoting State v. Brecht, 421 N.W.2d 96, 104 (Wis. 1988)).

50. *Id.*

51. *Id.*

52. *Id.* at 626-27 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

53. *Id.* at 639.

used in *Kotteakos v. United States*[54] to assess errors that do not affect constitutional rights.[55] The *Brecht* decision leaves federal courts with two different harmless-error standards: the more stringent *Chapman* standard for direct review, and the less stringent *Brecht* standard for use during habeas proceedings.[56] The Court provided a detailed rationale for the two-tiered system of harmless-error standards.[57]

Writing for the majority of the justices on the Court, Chief Justice Rehnquist distinguished the standard used for harmless error on direct review from the standard federal courts are to use in habeas proceedings.[58] Because habeas review is limited to preventing serious breakdowns in the criminal justice system, the majority opinion adopted a less stringent standard for harmless error in habeas proceedings.[59] The Court identified "the State's interest in the finality of convictions that have survived direct review within the state court system" as a principal rationale for having a separate harmless-error standard for collateral review.[60] Applying the same standard to both types of review could lead to "the frustration of 'society's interest in the prompt administration of justice.'"[61] The Court was also concerned that it respect the interests of comity and federalism.[62] The Court also justified the dual standard on the assumption that state courts would apply the more stringent *Chapman* standard and thus it would be duplicitous for a federal court to apply the same standard in habeas proceedings.[63]

Just three years after the Court declared its new harmless-error standard in *Brecht*, Congress handed the federal courts another potential standard when it passed the AEDPA.[64] The AEDPA states that a federal court shall not issue a writ of habeas corpus unless the state court, on direct review of a conviction, has either used an "unreasonable application" of, or come to a decision "contrary to," Supreme Court precedent.[65] In *Herrera,* the Tenth Circuit addressed two questions concerning the application of harmless-error analysis during habeas review.[66] First, it had to decide whether the standard articulated in *Brecht* remained intact

54. 328 U.S. 750 (1946).
55. *Kotteakos*, 328 U.S. at 764-65.
56. *See Chapman*, 386 U.S. at 21; *Brecht*, 507 U.S. at 623.
57. *See Brecht*, 507 U.S. at 627-39.
58. *Id.* at 634.
59. *See id.* at 637.
60. *Id.* at 635.
61. *Id.* at 637 (citing United States v. Mechanik, 475 U.S. 66, 72 (1986)).
62. *Id.* at 636.
63. *Id.* ("[I]t 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.").
64. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).
65. 28 U.S.C. § 2254(d)(1) (2000).
66. 301 F.3d 1192, 1195 n.6 (10th Cir. 2002).

or whether the AEDPA abrogated *Brecht*.[67] Second, the court had to decide what standard to apply, *Brecht* or *Chapman*, when a state court did not apply the more stringent *Chapman* standard on direct review.[68]

B. *Whether the Harmless-Error Standard of* Brecht *Is Still Good Law After the AEDPA*

1. Tenth Circuit: *Herrera v. LeMaster*[69]

a. Facts

Ruben Robert Herrera was sentenced to life in prison after he was convicted in a New Mexico state court "of first degree murder and aggravated assault."[70] On direct appeal, Herrera claimed that police officers had illegally searched his home.[71] Therefore, he argued, the admission at trial of evidence seized during the illegal search violated his Fourth Amendment rights.[72] The New Mexico Supreme Court agreed that the search warrant did not meet constitutional standards.[73] Nonetheless, it concluded the error was harmless.[74] In reaching this conclusion, the New Mexico Supreme Court did not use the "harmless beyond a reasonable doubt" standard required by the United States Supreme Court in *Chapman*.[75]

Herrera then filed a petition for a writ of habeas corpus, asking for relief based on the illegal search.[76] A magistrate recommended denying relief, basing his conclusion on a *Brecht* analysis of the illegal search.[77] The district court adopted this recommendation, and Herrera appealed to the Tenth Circuit Court of Appeals, arguing that the passage of the AEDPA eliminated the requirement of a *Brecht* harmless-error analysis.[78] Herrera hinged his argument on the ambiguous wording of the statute.[79] Specifically, the AEDPA states that "[a]n application for a writ of habeas corpus . . . shall not be granted . . . unless the adjudication of the claim resulted in a decision that was *contrary to, or involved an unreasonable application of, clearly established Federal law*, as determined by

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67. *Herrera*, 301 F.3d at 1195 n.6.
68. *Id.*
69. 301 F.3d 1192.
70. *Herrera*, 301 F.3d at 1194.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* (referring to the standard adopted in *Chapman*, 386 U.S. at 24). The New Mexico Supreme Court instead based its harmless error conclusion on *State v. Moore*, 612 P.2d 1314, 1315 (N.M. 1980). *Id.*
76. *Id.*
77. *Id.* (noting the magistrate's recommendation that Herrera's petition be dismissed with prejudice).
78. *Id.*
79. *Id.* at 1194-95.

the Supreme Court of the United States."[80] Herrera argued that the statutory requirements supplanted the standard articulated in *Brecht*.[81] He claimed he was entitled to habeas relief because the state court decision was "contrary to clearly established federal law" because the court did not use the required *Chapman* standard on direct review.[82] Herrera argued that because the statute does not require any analysis for a constitutional error beyond that required by the statute, Congress eliminated the *Brecht* standard.[83]

b. Decision

In deciding whether the AEDPA eliminated the *Brecht* analysis and created a new standard for harmless-error review in habeas proceedings, the Tenth Circuit compared the language of the statute and the legislative intent behind its passage with the United States Supreme Court's reasoning in *Brecht*.[84] The Tenth Circuit pointed out that the Supreme Court recognized the importance of the principle that "collateral review is different from direct review" in habeas corpus jurisprudence.[85] The Supreme Court also identified four concerns that justify use of the less stringent standard during habeas proceedings.[86] First is "the State's interest in the finality of convictions."[87] Second and third are concerns of "comity and federalism."[88] The Court reasoned, in *Brecht*, that federal review after a state court has already reviewed a case for constitutional error would frustrate both the state's authority in the field of criminal law and its efforts to enforce constitutional rights.[89] Finally, granting the writ liberally "'degrades the prominence of the trial itself,' and at the same time encourages habeas petitioners to relitigate their claims on collateral review."[90]

The Tenth Circuit then compared this set of rationales to the concerns that led Congress to pass the AEDPA.[91] In order to assess Congress's intent, the Tenth Circuit looked to two recent Supreme Court cases that identified the policy concerns underlying the passage of the Act.[92] In one case, the Supreme Court declared that the "AEDPA's pur-

80. 28 U.S.C. § 2254(d)(1) (emphasis added).
81. *Herrera*, 301 F.3d at 1198-99.
82. *Id.* at 1195 n.6.
83. *Id.* at 1199. For example, the AEDPA does not require that the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623 (quoting *Kotteakos*, 328 U.S. at 776); *see* 28 U.S.C. § 2254.
84. *Herrera*, 301 F.3d at 1197.
85. *Id.* (quoting *Brecht*, 507 U.S. at 633).
86. *Brecht*, 507 U.S. at 635.
87. *Id.*
88. *Id.*
89. *Id.* (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982)).
90. *Id.* (quoting *Engle*, 456 U.S. at 127).
91. *Herrera*, 301 F.3d at 1198.
92. *Id.* (referring to a case involving Michael Williams, *Williams v. Taylor*, 529 U.S. 420 (2000), and a case involving Terry Williams, *Williams v. Taylor*, 529 U.S. 362 (2000)).

pose [was] to further the principles of comity, finality, and federalism," and emphasized that "[t]here [was] no doubt Congress intended [the] AEDPA to advance these doctrines."[93] Furthermore, in another case, the Supreme Court said that "Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law."[94] Equating this set of concerns with the rationales underlying the decision in *Brecht*, the Tenth Circuit held that the AEDPA did not eliminate the harmless-error standard set forth in *Brecht*.[95] The court declared that if it held otherwise, it would frustrate Congress's intent to "raise the bar with respect to availability of federal habeas relief."[96]

2. Circuits Supporting the Decision of the Tenth Circuit in *Herrera*

Two other circuits have spoken explicitly on the issue of whether the *Brecht* harmless-error standard still applies after passage of the AEDPA.[97] Both the First and Sixth Circuits agree with the Tenth Circuit that *Brecht* remains the appropriate standard for federal habeas review of the harmlessness of constitutional errors.[98]

a. First Circuit: *Sanna v. Dipaolo*[99]

Sanna was convicted of first-degree murder.[100] He argued that he was entitled to habeas corpus relief because the state court denied him due process when it did not properly instruct the jury about all of the effects a conclusion that Sanna was intoxicated might have on its verdict.[101] In addressing the possible constitutional error, the First Circuit Court of Appeals noted the confusion about the survival of *Brecht*, then summarily stated: "[W]e have consistently employed *Brecht* in cases arising under the AEDPA. We reaffirm that praxis today and hold that the *Brecht* standard applies in conjunction with the AEDPA amendments."[102] The court applied that standard and found that the instructions did not have a substantial or injurious effect on the jury because the petitioner's defense at trial was mistaken identity and because the trial court gave a supplemental instruction that cured most of the problems with the original instructions.[103]

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93. *Id.* (quoting *Williams*, 529 U.S. at 436).
94. *Id.* (quoting *Williams*, 529 U.S. at 386).
95. *Herrera*, 301 F.3d at 1200.
96. *Id.* at 1199.
97. *See* Sanna v. Diapaolo, 265 F.3d 1, 14 (1st Cir. 2001); Nevers v. Killinger, 169 F.3d 352, 371 (6th Cir. 1999).
98. *See Sanna*, 265 F.3d at 14; *Nevers*, 169 F.3d at 371.
99. 265 F.3d 1 (1st Cir. 2001).
100. *Sanna*, 265 F.3d at 5.
101. *Id.*
102. *Id.* at 14 (citations omitted).
103. *Id.* at 15.

b. Sixth Circuit: *Nevers v. Killinger*[104]

Nevers was convicted of second-degree murder.[105] He was a police officer and the charge was widely publicized before the trial.[106] The trial court, however, refused to grant Nevers a change of venue.[107] A district court granted his petition for a federal writ of habeas corpus.[108] On appeal, the Sixth Circuit Court of Appeals concluded that "when the issue before the federal habeas court is the state court's finding of harmless error, the test set out by the Supreme Court in *Kotteakos* and explicitly reiterated in *Brecht* quite precisely captures Congress's intent as expressed in AEDPA and, therefore, continues to be applicable."[109] The appellate court affirmed the district court's decision to grant Nevers the writ based on extraneous influences on the jury, but reversed its "reasoning and conclusions . . . that Nevers was denied a fair trial because of pretrial publicity."[110]

3. Circuits Reserving the Question of Whether the AEDPA Eliminated the *Brecht* Harmless-Error Standard

a. Eighth Circuit: *Whitmore v. Kemna*[111]

Defendant Whitmore was convicted of robbery in the first degree and three counts of armed criminal action, based on an armed robbery of a flower shop, and subsequently sentenced to eighty years in prison.[112] In Whitmore's appeal for post-conviction relief, the Missouri Court of Appeals found that the prosecution had unconstitutionally used Whitmore's post-arrest silence and request for an attorney at his trial.[113] However, utilizing the "beyond a reasonable doubt" standard, the court held that the error was harmless.[114] Whitmore then applied for a federal writ of habeas corpus.[115] The federal district court denied him relief under the *Brecht* harmless-error standard.[116] However, the district court also questioned the continuing validity of the *Brecht* standard in light of the AEDPA.[117]

104. 169 F.3d 352 (6th Cir. 1999).
105. *Nevers*, 169 F.3d at 354.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 371.
110. *Id.* at 354.
111. 213 F.3d 431 (8th Cir. 2000).
112. *Whitmore*, 213 F.3d at 432.
113. *Id.* at 433.
114. *Id.*
115. *Id.* at 432.
116. *Id.* at 433.
117. *Id.*

In reviewing the district court's use of the *Brecht* standard, the Eighth Circuit Court of Appeals expressed similar doubts about the continuing vitality of the standard.[118] The court was "not convinced that the AEDPA did not abrogate the requirement that federal habeas courts conduct a harmless-error analysis under *Brecht*."[119] The court commented that the "AEDPA is unambiguous as to the scope of federal court review, limiting such review (at least as compared with past practice) in order to effect the intent of Congress to expedite habeas proceedings with appropriate deference to state court determinations."[120] The doubts expressed by the court, however, are dicta, since the court found that Whitmore's conviction would stand under either the *Brecht* or AEDPA standards.[121]

Three circuit courts have joined the Eighth Circuit in reserving judgment about the continuing vitality of *Brecht* after the passage of the AEDPA.

b. Second Circuit: *Noble v. Kelly*[122]

In *Noble*, the Second Circuit Court of Appeals asked "whether a federal habeas court should continue to apply *Brecht* or determine instead whether the state court's decision was 'contrary to, or involved an unreasonable application of' *Chapman*."[123] In that case, the defendant was convicted of attempted murder after a trial court excluded the testimony of a witness who would have testified to the defendant's whereabouts at the time of the shooting at issue.[124] The defendant requested habeas relief on the ground that the trial court erred when it excluded the witness's testimony.[125] The court did not decide which standard should apply because it was able to find reversible error under either standard.[126]

c. Fifth Circuit: *Tucker v. Johnson*[127]

In *Tucker*, the defendant was convicted of murder and "sentenced to death."[128] He argued that he was entitled to habeas relief because the prosecutor introduced an audiotape of the defendant's confession, which included his confession to crimes that were not at issue in that murder trial.[129] The Fifth Circuit Court of Appeals recognized the confusion over whether "the standard in *Brecht* [was] still viable after the enactment of

118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. 246 F.3d 93 (2d Cir. 2001).
123. *Noble*, 246 F.3d at 101 n.5 (quoting 28 U.S.C. § 2254(d)(1)).
124. *Id.* at 95.
125. *See id.*
126. *Id.* at 101 & n.5.
127. 242 F.3d 617 (5th Cir. 2001).
128. *Tucker*, 242 F.3d at 619.
129. *Id.* at 628.

the AEDPA."[130] The court, however, sidestepped the issue of *Brecht*'s continued validity by finding that the defendant had not proven that he was "entitled to relief under either standard."[131] The court relied on the defendant's "confession, the overwhelming evidence of [his] guilt, and the fact that the State did not emphasize the other crimes."[132]

d. Seventh Circuit: *Denny v. Gudmanson*[133]

Finally, in *Denny*, the defendant was convicted of murder after incriminating statements that his brother made were admitted at their joint trial.[134] The Seventh Circuit expressed some doubt "that the *Brecht* standard . . . survived the passage of the AEDPA."[135] However, the court decided not to "weigh in on the debate at this juncture."[136] It found that admitting the statements the defendant's brother made was harmless under the *Brecht* standard because the evidence of the defendant's guilt was overwhelming.[137]

4. Analysis

Despite the potential that those circuits that express doubt about the continuing vitality of *Brecht* could split the circuits, the general direction of federal courts of appeals is toward affirming the view adopted by the Tenth Circuit. The continuing vitality of *Brecht* after the AEDPA hardly seems open to controversy. Congress intended to further comity, finality of litigation, and federalism through the passage of the AEDPA,[138] which coincides with the Supreme Court's justifications for adopting the less stringent harmless-error standard in *Brecht*.[139] The Tenth Circuit was, therefore, correct when it equated the policy concerns underlying the AEDPA and *Brecht*.[140] One might wish that the drafters of the AEDPA would have paid more attention to the relevant language of *Brecht* and directly addressed the issue of whether *Brecht* remained binding authority.[141] Yet the statute's silence regarding *Brecht* may itself be an indication that the drafters intended to retain the *Brecht* standard.[142] However,

130. *Id.* at 629 n.16.
131. *Id.*
132. *Id.* at 629.
133. 252 F.3d 896 (7th Cir. 2001).
134. *Denny*, 252 F.3d at 898.
135. *Id.* at 905 n.4.
136. *Id.*
137. *Id.*
138. *Williams*, 529 U.S. at 436.
139. *Brecht*, 507 U.S. at 635.
140. *See Herrera*, 301 F.3d at 1198.
141. *See* Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 222 (1998) (discussing the difficulty in interpreting 28 U.S.C. § 2254(d), in light of the lack of insightful legislative history and the drafters' vague and inconsistent statements on the topic).
142. *See* Penry v. Johnson, 532 U.S. 782, 784 (2001) (applying the AEDPA standard to a state court's ruling and finding it not unreasonable, then commenting that relief would also not be available because *Brecht* analysis would lead to the same result).

despite any shortcomings in the statutory language, one can hardly argue against the notion that Congress intended the AEDPA to restrict the availability of writs of habeas corpus.[143] As the Tenth Circuit noted, a ruling that replaces the high bar of *Brecht* with an interpretation of the AEDPA that expands the availability of habeas relief would frustrate the legislators' intentions.[144]

The lingering confusion about the effect of the AEDPA on the applicability of *Brecht* may have more to do with ideological opposition to the Act itself than a misunderstanding of Congress's intent in limiting habeas relief.[145] In addition, the disagreement may stem from dissatisfaction with the ephemeral nature of harmless-error standards, which involve statements that judges must struggle to "operationalize."[146]

C. *Whether a Habeas Court Should Still Apply the* Brecht *Test If the State Court Failed to Apply the Required* Chapman *Test on Direct Review*

Although the question of the continued existence of *Brecht* has created some confusion among the circuits, the second question addressed by the Tenth Circuit in *Herrera*[147] presented a knottier problem. In *Brecht*, where the Supreme Court first formulated the less stringent standard for use in federal habeas proceedings, the state court had already applied the more stringent *Chapman* rule on direct review.[148] The Tenth Circuit, in *Herrera*, addressed whether the less stringent harmless-error standard of *Brecht* applies in a habeas proceeding when the state court did not apply the *Chapman* standard on direct review.[149]

1. Tenth Circuit: *Herrera v. LeMaster*[150]

a. Facts

Ruben Robert Herrera was sentenced to life in prison after being convicted in a New Mexico state court of first-degree murder and aggra-

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143. *See* Andrea A. Kochan, *The Antiterrorism and Effective Death Penalty Act of 1996: Habeas Corpus Reform?*, 52 WASH. U. J. URB. & CONTEMP. L. 399, 409 (1997) ("[I]t is evident that prisoners' habeas rights are now bound by a myriad of stringent restrictions.").

144. *Herrera*, 301 F.3d at 1199.

145. *See, e.g.*, Yin, *supra* note 141, at 206-07 (discussing the "virulent condemnation" of *Teague v. Lane*, 489 U.S. 288 (1989), which limited the retroactive application of Supreme Court decisions in habeas review and that some argue was codified in the AEDPA; identifying ideological dissatisfaction as the possible source of the discomfort).

146. *See* Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 17-19 (2002) (discussing the difficulties with different methods used by appellate courts to determine whether an error was harmless).

147. *Herrera*, 301 F.3d at 1195 n.6 ("[W]e address on rehearing whether a federal court on habeas review should assess harmlessness under *Chapman* or *Brecht* when the state court has failed to apply *Chapman*.").

148. *See Brecht*, 507 U.S. at 625-26.

149. *Herrera*, 301 F.3d at 1195 n.6.

150. 301 F.3d 1192 (10th Cir. 2002).

vated assault.[151] On direct appeal, Herrera argued that his Fourth Amendment rights had been violated when the police illegally searched his home.[152] The New Mexico Supreme Court agreed with Herrera, but concluded the error was harmless.[153] In deciding that the constitutional violation was harmless, the New Mexico Supreme Court did not use the "harmless beyond a reasonable doubt" standard required by the United States Supreme Court in *Chapman*.[154] Herrera then filed a petition for a writ of habeas corpus, asking for relief based on the State's illegal search.[155] A magistrate recommended denying him relief, basing his conclusion on a *Brecht* analysis of the illegal search and finding that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict."[156] Herrera argued that because the state court had not analyzed the illegal search under the *Chapman* "beyond a reasonable doubt" standard, the harmless-error standard of *Brecht* should not apply on collateral review in habeas proceedings.[157] Instead, he claimed the federal habeas court had to apply the more stringent *Chapman* standard.[158]

b. Decision

The Tenth Circuit Court of Appeals disagreed with Herrera and held that *Brecht* applies even where the state court on direct review failed to use the appropriate harmless-error standard.[159] In reaching its conclusion, the Tenth Circuit relied principally on two authorities. First, the court looked to the Supreme Court's opinion in *Brecht*.[160] Writing for the majority in *Brecht*, Chief Justice Rehnquist stated that the "less onerous harmless-error" analysis was better suited to "the considerations underlying our habeas jurisprudence."[161] Justice Stevens, in his concurring opinion, emphasized that the *Brecht* standard, while less stringent than the "beyond a reasonable doubt" standard of *Chapman*, is nonetheless "appropriately demanding."[162] In particular, Justice Stevens noted that the *Brecht* standard still "places the burden on prosecutors to explain why those errors were harmless; requires a habeas court to review the entire

151. *Herrera*, 301 F.3d at 1194.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* The court noted that it was not barred by *Stone v. Powell*, 428 U.S. 465 (1976), from reviewing Herrera's Fourth Amendment claim since he did not receive a "full and fair opportunity to litigate his Fourth Amendment claim" since the state court failed to apply the *Chapman* standard in reviewing the constitutional error at issue. *Id.* at 1195 n.4. *Stone* held that a state prisoner may not raise a Fourth Amendment claim in habeas proceedings when the state "provided an opportunity for full and fair litigation." *Stone*, 428 U.S. at 481-82.
156. *Herrera*, 301 F.3d at 1194.
157. *Id.*
158. *Id.* at 1194-95.
159. *Id.* at 1200.
160. *Id.* at 1199.
161. *Brecht*, 507 U.S. at 623.
162. *Id.* at 641 (Stevens, J., concurring).

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."[163] The Tenth Circuit concluded that the "broad language" used in the opinion indicated the Court's intention to make *Brecht* applicable to all federal habeas review of state court decisions, whether or not the state court applied *Chapman* on direct review.[164]

The Tenth Circuit also relied on dicta from a Supreme Court case that was decided after *Brecht*.[165] In *Penry v. Johnson*,[166] the Supreme Court reviewed a habeas petition made by a prisoner who claimed that his Fifth Amendment rights had been violated during a trial in a state court.[167] Because the state court did not find that the State had violated the constitution, it did not undertake a harmless error analysis.[168] The Supreme Court agreed there was no constitutional violation, but added in dicta that if the State had committed such an error, the proper test for harmlessness during habeas review was the *Brecht* standard.[169] Even though Penry never received the benefit of the *Chapman* standard on direct review, the Court indicated that it was willing to use the *Brecht* standard on collateral review.[170]

2. Eighth Circuit: *Orndorff v. Lockhart*[171]

a. Facts

Michael Ray Orndorff was convicted of murder.[172] After he appealed his conviction to the Arkansas Supreme Court, he discovered that the prosecutor had hypnotized a key witness to aid her recall.[173] The state court did not conduct a harmless error analysis under any standard because Orndorff did not discover the constitutional violation until after his direct appeal ended.[174] Orndorff petitioned for habeas relief based on the argument that the state violated his "[S]ixth [A]mendment right to confront the witnesses against him" by preventing him from questioning the witness about the hypnosis.[175] The federal district court agreed that the State committed a constitutional error when it did not inform Orndorff of

163. *Id.* at 640-41 (Stevens, J., concurring).
164. *Herrera*, 301 F.3d at 1199.
165. *Id.* at 1199-1200.
166. 532 U.S. 782 (2001).
167. *Penry*, 532 U.S. at 793.
168. *See id.* at 791.
169. *Id.* at 795.
170. *Id.*
171. 998 F.2d 1426 (8th Cir. 1993).
172. *Orndorff*, 998 F.2d at 1428.
173. *Id.* at 1429.
174. *Id.* at 1430.
175. *Id.*

the hypnosis, but found the error harmless, upheld the murder conviction and denied habeas relief.[176]

b. Decision

On review of the district court's denial of habeas relief, the Eighth Circuit Court of Appeals began by addressing the question of whether the *Brecht* harmless-error standard applies, where the state court failed to apply any prior harmless-error standard at all.[177] The Eighth Circuit held that the *Brecht* harmless-error standard only applies where the state court has conducted an analysis under the *Chapman* harmless-error standard on direct review.[178] In reaching this conclusion, the court first looked at the facts underlying the Supreme Court's holding in *Brecht.*[179] The Eighth Circuit noted that courts reviewed the constitutional errors in *Brecht* four times under the *Chapman* standard before the case reached the Supreme Court.[180] The Eighth Circuit also found support for the limited application of *Brecht* in the Supreme Court's strong assertion that "[s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman.*"[181] In other words, the Eighth Circuit reasoned that a primary rationale for mandating the high bar of *Brecht* for collateral review was the assumption that the state court would apply the lower bar of *Chapman* on direct review.[182] The Eighth Circuit, therefore, applied the harmless error standard of *Chapman* since the appellate court was the first court to address the violation of Orndorff's constitutional rights.[183] The Eighth Circuit concluded that the testimony of the witness who had been hypnotized might have influenced the jury's decision and, consequently, reversed the district court's decision to deny Orndorff habeas relief.[184]

3. Other Circuits Supporting the Decision of the Tenth Circuit in *Herrera*

The Eighth Circuit is swimming against the tide of federal court opinion. Six other circuits have addressed the applicability of the *Brecht* harmless error standard when there is no *Chapman* analysis on direct review.[185] All six have come out in favor of using *Brecht* even when the

176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* (explaining that the analysis was conducted by two state appellate courts, a federal district court, and a federal court of appeals).
181. *Id.* (alteration in original) (quoting *Brecht*, 507 U.S. at 636).
182. *Id.*
183. *Id.*
184. *Id.* at 1436.
185. *See* Hassine v. Zimmerman, 160 F.3d 941 (3d Cir. 1998); Hogue v. Johnson, 131 F.3d 466 (5th Cir. 1997); Sherman v. Smith, 89 F.3d 1134 (4th Cir. 1996); Brewer v. Reynolds, 51 F.3d 1519 (10th Cir. 1995); Tyson v. Trigg, 50 F.3d 436 (7th Cir. 1995); Horsley v. Alabama, 45 F.3d 1486 (11th Cir. 1995).

state court did not use the proper harmless-error standard on direct review.[186] In addition, two other circuits have expressly declined the opportunity to rule on the issue.[187]

a. Third Circuit: *Hassine v. Zimmerman*[188]

In *Hassine*, the petitioner was convicted of first-degree murder and other crimes after a prosecutor made two references in his closing arguments to the petitioner's silence after he was arrested.[189] The Third Circuit gave four reasons for holding that the less stringent harmless-error standard of *Brecht* applies on habeas review even when the state court failed to use the more stringent *Chapman* standard on direct review.[190] First, the court looked to the plain language of the *Brecht* decision and noted that the Supreme Court "never restricted the issues or the holding in *Brecht* to situations where a petitioner has already had his or her claim evaluated by the state courts under *Chapman*."[191]

Second, the Third Circuit separated the facts of *Brecht* from the holding.[192] It noted that the "holding was based primarily on a finding--apart from the particular facts or history of the case--that 'the costs of applying the *Chapman* standard on federal habeas outweigh the additional deterrent effect, if any, that would be derived from its application on collateral review.'"[193] The Third Circuit claimed that the Supreme Court in *Brecht* was driven primarily by concerns about the "nature and purpose of collateral review" and that those concerns were never explicitly linked to an assumption about whether or not a court performed a *Chapman* analysis on direct review.[194]

Third, the court in *Hassine* rejected the notion that the policy concerns identified in *Brecht* only come into play when a habeas court repeats the same harmless-error analysis conducted by the state court on direct review.[195] The Third Circuit reasoned that those concerns do not turn on the repeated application of the same standard, but instead on the fact that a state court has "rejected a defendant's direct appeal."[196]

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186. *Hassine*, 160 F.3d at 953; *Hogue*, 131 F.3d at 500; *Sherman*, 89 F.3d at 1142; *Brewer*, 51 F.3d at 1529; *Tyson*, 50 F.3d at 446; *Horsley*, 45 F.3d at 1492.

187. *See* Lyons v. Johnson, 99 F.3d 499 (2d Cir. 1996); Hanna v. Riveland, 87 F.3d 1034 (9th Cir. 1996).

188. 160 F.3d 941 (3d Cir. 1998).

189. *Hassine*, 160 F.3d at 945.

190. *Id.* at 951-53.

191. *Id.* at 951.

192. *See id.*

193. *Id.* (quoting *Brecht*, 507 U.S. at 636).

194. *Id.* at 952.

195. *Id.* at 952-53. The Supreme Court was concerned with comity, federalism, and showing respect for the ability state courts to interpret the Constitution in *Brecht*. *Brecht*, 507 U.S. at 620, 636.

196. *Hassine*, 160 F.3d at 952.

Lastly, the Third Circuit expressed concern about the practical effects of using *Chapman* in every habeas case where the state court failed to use *Chapman*.[197] In most circumstances a state court will not have found constitutional errors and, therefore, will not have occasion to use *Chapman*.[198] The court, therefore, reasoned that "any rule requiring *Chapman* to be used when the state courts fail to address harmless error would render *Brecht* inapplicable to the majority of habeas petitions."[199]

b. Fifth Circuit: *Hogue v. Johnson*[200]

In *Hogue*, the petitioner was convicted of murder and sentenced to death.[201] No state court reviewed the petitioner's claim that the State had committed a constitutional error during his trial.[202] The Fifth Circuit accepted *Brecht* as the appropriate harmless error standard even when a state court had not conducted a *Chapman* analysis.[203] Specifically, the Fifth Circuit noted that "the reasons given by the Supreme Court in *Brecht* for adopting the *Kotteakos v. United States* harmless error standard for federal habeas review of nonstructural constitutional errors in state criminal cases are fully applicable whether or not the state courts have conducted a *Chapman* harmless error review."[204]

4. Analysis

The principal objection to the decision in *Herrera*, and to the reasoning of the six other circuits that agree with that decision, is that it affords disparate treatment to similarly situated habeas petitioners. The *Herrera* decision leaves open the possibility that some habeas petitioners will receive an analysis of their constitutional claims under *Chapman*'s "beyond a reasonable doubt" standard, while others simply will not. Justice White recognized this discrepancy and expressed his disfavor in his dissent in *Brecht*.[205] He commented that "the same constitutional right is treated differently depending on whether its vindication is sought on direct or collateral review."[206] In other circumstances, the Supreme Court has strongly opposed such inequality.[207] Justice Powell, concurring in *Hankerson v. North Carolina*,[208] said that treating similarly situated defendants disparately "hardly comports with the ideal of 'administration

197. *Id.* at 953.
198. *Id.*
199. *Id.*
200. 131 F.3d 466 (5th Cir. 1997).
201. *Hogue*, 131 F.3d at 469.
202. *Id.* at 499.
203. *Id.*
204. *Id.* (citation omitted).
205. *Brecht*, 507 U.S. at 649 (White, J., dissenting).
206. *Id.*
207. *See, e.g.*, Hankerson v. North Carolina, 432 U.S. 233, 247 (1977); *Teague*, 489 U.S. at 315.
208. 432 U.S. 233 (1977).

of justice with an even hand.'"[209] In *Teague v. Lane*,[210] another seminal habeas corpus decision,[211] Justice O'Connor stated that "the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated."[212]

The federal courts may have found it easy to disregard the inherent inequality of inflexibly applying *Brecht* to all habeas proceedings because they suspect that when courts apply them there is little practical difference between the two standards. The Tenth Circuit seemed to argue this point in *Herrera* when it pointed out that the Supreme Court had stated that "[g]iven the critical importance of the faculty of judgment in administering either standard, however, that difference is less significant than it might seem."[213] However, the Tenth Circuit takes seemingly inconsistent positions by vigorously defending expansive application of the *Brecht* standard while at the same time arguing that it really does not make a practical difference in habeas proceedings.

II. RETROACTIVITY IN HABEAS CORPUS PROCEEDINGS

The second major habeas issue recently addressed by the United States Court of Appeals for the Tenth Circuit concerns the issue of retroactivity of Supreme Court decisions to habeas petitions filed before the relevant change in the law. In *Johnson v. McKune*,[214] the Tenth Circuit held that it would not apply a Supreme Court decision that found a Kansas jury instruction unconstitutional retroactively to the habeas petition of a man who was convicted after a court gave a jury that instruction.[215] A brief examination of the history of retroactivity doctrines is necessary in order to understand the full significance of that holding.

A. Background: A History of Retroactivity Doctrines in Habeas Corpus Proceedings

Retroactivity—whether a new rule should control the outcome of cases decided before the new rule was announced—has a long been the subject of debate in legal circles.[216] William Blackstone expressed a view that is known as the declaratory theory, which posits that the duty of a judge is not to "pronounce a new law, but to maintain and expound the

209. *Hankerson*, 432 U.S. at 247 (Powell, J., concurring) (quoting Desist v. United States, 394 U.S. 244, 255 (1969) (Douglas, J., dissenting)).

210. 489 U.S. 288 (1989).

211. Vivian Berger, *Justice Delayed or Justice Denied? – A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1701 (1990). "A series of decisions, beginning with the seminal *Teague v. Lane* in February 1989, have now established that no new rule of criminal procedure may be announced or applied retroactively by habeas courts unless it falls within one of two very narrow exceptions." *Id.* (citation omitted).

212. *Teague*, 489 U.S. at 315.

213. *Herrera*, 301 F.3d at 1198 (quoting *Brecht*, 507 U.S. at 643).

214. 288 F.3d 1187 (2002).

215. *Johnson*, 288 F.3d at 1200.

216. Yin, *supra* note 141, at 210.

old one."[217] The strength of the declaratory theory had the simple idea that if "a law was declared unconstitutional," then it "should never have been the law."[218] In contrast to the declaratory theory is the notion that judges do not find law, but actively make it.[219] The tension between those two theories has played out repeatedly through the years, as judges have had to decide between applying new rules retroactively or only prospectively.[220]

The struggle between retroactive and prospective applications of law in the context of habeas proceedings emerged in the Supreme Court's decision in *Linkletter v. Walker*.[221] In *Linkletter*, the Court faced the question of whether *Mapp v. Ohio*,[222] which extended the rule that excludes evidence obtained in violation of the Fourth Amendment to the states, applied retroactively to collateral appeals.[223] Police officers searched the petitioner's home and "place of business" and seized evidence without the authorization of a search warrant.[224] The petitioner was convicted of robbery.[225] The state supreme court and the United States Supreme Court affirmed the conviction; however, a year later, the United States Supreme Court decided *Mapp*.[226] The petitioner then applied for habeas relief, but was denied such relief by both the state and federal courts.[227] In holding that *Mapp* did not apply retroactively, the Court held that future questions of retroactivity need to be decided on a case-by-case basis.[228]

In two strongly worded opinions in the years following *Linkletter*, Justice Harlan argued against this case-by-case determination of retroactivity.[229] Instead, he advocated for separate standards for direct and col-

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217. *Id.* at 210 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *69).

218. *Id.* at 211.

219. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 191 (Henry Hart ed., 1954) (1832).

220. Yin, *supra* note 141, at 211.

221. 381 U.S. 618 (1965).

222. 367 U.S. 643 (1961).

223. *Linkletter*, 381 U.S. at 636.

224. *Id.* at 621.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 629 ("Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.").

229. *See* Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting) (pointing to the "incompatible rules and inconsistent principles" of *Linkletter* and urging the creation of different rules for cases that are subject to direct review at the time of the new decision and for cases that are subject to collateral review); Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part) (arguing that the Court should bar retroactive application of new rules on collateral review, except for rules with a substantive effect on due process or that are "implicit in the concept of ordered liberty").

lateral review.[230] On collateral review, Justice Harlan argued, new rules should never be retroactively applied unless they are "new rules of substantive due process" or "watershed procedural rules."[231]

Twenty-two years after Justice Harlan's dissent in *Mackey*, a plurality of the Court adopted his retroactivity analysis.[232] In *Teague v. Lane*,[233] a black man was convicted of attempted murder and other crimes by a jury made up entirely of white people.[234] A district court denied him habeas relief even though a prosecutor used all of his peremptory challenges to exclude potential jurors who were black.[235] A circuit court also denied the petitioner relief because it concluded that he was not entitled to rely on a discrimination case that the Supreme Court had decided since the district court's judgment of conviction.[236]

The Supreme Court held that new constitutional rules of criminal procedure are generally not retroactively applicable to cases on collateral review.[237] The Court then defined a "new rule" as one that "breaks new ground or imposes a new obligation on the States or the Federal Government" or one that was not "dictated by precedent existing at the time the defendant's conviction became final."[238] However, the Court created two exceptions to this general standard of nonretroactivity.[239] A new rule may be retroactively applied if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or if it "requires the observance of those procedures that . . . are implicit in the concept of ordered liberty."[240]

The Court identified two policy concerns supporting this hard line on retroactivity.[241] First, the Court noted the burden that applying decisions retroactively places on states, requiring them to "marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards."[242] Second, a conservative approach to retroactivity respects the desire states have to see final resolutions of their criminal proceedings.[243]

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230. *Desist*, 394 U.S. at 263 (Harlan, J., dissenting); *Mackey*, 401 U.S. at 679-80, 691-93 (Harlan, J., concurring in part and dissenting in part).
231. Yin, *supra* note 141, at 216.
232. *See id.* at 219.
233. 489 U.S. 288 (1989).
234. *Teague*, 489 U.S. at 292-93.
235. *Id.* at 293.
236. *Id.* at 294.
237. *Id.* at 310.
238. *Id.* at 301.
239. *Id.* at 311.
240. *Id.* at 307 (alteration in original) (internal quotations omitted) (Harlan, J., dissenting in part and concurring in part) (quoting *Mackey*, 401 U.S. at 693).
241. *Id.* at 310.
242. *Id.*
243. *See id.*

In practice, a *Teague* retroactivity analysis typically involves two steps.[244] First, a habeas court determines if the Supreme Court holding under consideration announced a new procedural rule.[245] If not, then the holding can be applied retroactively.[246] Second, if the holding is considered a new rule, the reviewing court must decide if the rule fits within either of the two *Teague* exceptions.[247] If the Supreme Court decision falls under one of the two exceptions, then it can be applied retroactively on collateral review.[248] If not, then the Supreme Court decision will not be applied retroactively to the habeas proceeding.[249] The Tenth Circuit engaged in this two-step analysis in *Johnson v. McKune*.[250]

B. *Whether the Supreme Court's Decision in* Sandstrom *Announced a New Rule*

1. Tenth Circuit: *Johnson v. McKune*[251]

a. Facts

A jury found Noble Leroy Johnson guilty of murder in 1976 and sentenced him to life in prison.[252] At the trial, the jury received an instruction concerning the intent element of the crime of murder, which stated: "There is a presumption that a person intends all the natural and probable consequences of his voluntary acts. This presumption is overcome if you are persuaded by the evidence that the contrary is true."[253] Two years after Johnson made a direct appeal to the Kansas Supreme Court, the United States Supreme Court held, in *Sandstrom v. Montana*,[254] that the type of jury instruction given in Johnson's case violates the Due Process Clause.[255] In particular, the Court expressed concern that a juror "could easily have viewed such an instruction as mandatory."[256] Further, such instructions potentially shift the burden of persuasion, forcing the defendant to prove he "lacked the requisite mental state" to commit the crime.[257]

In his petition for a writ of habeas corpus, Johnson argued that his due process rights had been unconstitutionally violated because the state

244. See Johnson, 288 F.3d at 1195-96.
245. *Id.* at 1196.
246. *Id.* at 1197.
247. *Id.*
248. *Id.*
249. *See id.* at 1199-1200 (holding that the decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979), was neither a "wellspring" principle nor a "watershed rule," therefore it was not to be applied retroactively in collateral review proceedings, and Johnson's claim was properly denied).
250. 288 F.3d 1187, 1195-1200 (10th Cir. 2002).
251. 288 F.3d 1187.
252. *Johnson*, 288 F.3d at 1189.
253. *Id.* at 1191.
254. 442 U.S. 510 (1979).
255. *See Sandstrom*, 442 U.S. at 518-20.
256. *Id.* at 515.
257. *Id.* at 524.

had been improperly relieved of the burden of proving the intent element of the crime he was charged with committing.[258] The success of Johnson's petition hinged upon a retroactive application of the holding in *Sandstrom* since at the time of Johnson's conviction and direct appeal, *Sandstrom* had not yet been decided and, therefore, the jury instruction that the court gave in his case was not considered unconstitutional.[259] In Johnson's habeas proceeding, the federal district court applied the two-part analysis dictated by *Teague* and declared that (1) *Sandstrom* announced a new rule, and (2) the rule did not fall within one of the two exceptions to the general rule of nonretroactivity.[260]

b. Decision

On appeal, the Tenth Circuit Court of Appeals affirmed the district court's decision.[261] In deciding that *Sandstrom* created a new rule, the Tenth Circuit looked both to the language in *Teague* and to other Supreme Court decisions that expounded upon the definition of a new rule.[262] In *Teague*, the Supreme Court declared that a rule meets the standard for newness if it "breaks new ground or imposes a new obligation on the States or the Federal government" or if it "was not *dictated* by precedent existing at the time the defendant's conviction became final."[263] In other words, a rule is not new where a trial court, even before the actual formulation of the rule, would nonetheless "have felt compelled by existing precedent to conclude that the rule [the defendant] seeks [to have a court apply] was required by the Constitution."[264]

Applying the Supreme Court's definition of a new rule to the *Sandstrom* holding, the Tenth Circuit found no persuasive indications that the decision "was dictated or compelled by precedent as contemplated by *Teague*."[265] The court acknowledged the strong influence that the Supreme Court decision *In re Winship*[266] had on the *Sandstrom* ruling.[267] *Winship* held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[268] However, the *Johnson* Court determined that the Supreme Court's admittedly heavy reliance on *Winship* in *Sandstrom* did not rise to the level of compulsion required by *Teague* to find that a rule was not new.[269] Therefore,

258. *Johnson*, 288 F.3d at 1189, 1193.
259. *Id.* at 1189.
260. *Id.* at 1189-90.
261. *Id.* at 1189.
262. *Id.* at 1195-97.
263. *Teague*, 489 U.S. at 301.
264. O'Dell v. Netherland, 521 U.S. 151, 156 (1997).
265. *Johnson*, 288 F.3d at 1196.
266. 397 U.S. 358 (1970).
267. *Johnson*, 288 F.3d at 1196.
268. *Winship*, 397 U.S. at 364.
269. *Johnson*, 288 F.3d at 1196.

in the Tenth Circuit's opinion, the Supreme Court's holding in *Sandstrom* pronounced a new rule.[270]

c. Judge Henry's Dissent

Judge Henry concluded that *Sandstrom* did not create a new rule for the purposes of a *Teague* analysis.[271] Judge Henry analyzed three previous Supreme Court decisions and determined that the combination of those holdings compelled the result in *Sandstrom*.[272] In *Winship*, the Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the accused] is charged."[273] In *Morissette v. United States*,[274] the Court held a jury instruction that allowed the jury to presume intent to steal based on the defendant's voluntary act of taking property unconstitutional.[275] Finally, in *Mullaney v. Wilbur*,[276] the Court charged the government with proving that there was no heat of passion in a murder case in order to comply with the Due Process Clause.[277] According to Judge Henry, the combined weight of those Supreme Court decisions should have dictated the result in *Sandstrom*.[278] Therefore, in his opinion, the *Sandstrom* decision was "hardly surprising" and should not be labeled a new rule in the context of a *Teague* analysis.[279]

2. Other Circuits Finding that *Sandstrom* Announced a New Rule

Apart from the Tenth Circuit, three other circuit courts have decided that the rule articulated in *Sandstrom* was a new rule for the purpose of analyzing whether to apply a rule retroactively.[280] However, none of those three courts explored the issue as fully as the Tenth Circuit did, which led Judge Henry to question the strength of their agreement with the Tenth Circuit in his dissent in *Johnson*.[281]

a. Sixth Circuit: *Cain v. Redman*[282]

Cain was convicted of first degree murder.[283] At his trial, the judge instructed the jury that the law implies the malice necessary to convict a

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270. *See id.*
271. *Id.* at 1203 (Henry, J., dissenting).
272. *Id.* (Henry, J., dissenting) (quoting Saffle v. Parks, 494 U.S. 484, 491 (1990)).
273. *Id.* (Henry, J., dissenting) (quoting *Winship*, 397 U.S. at 364).
274. 342 U.S. 246 (1952).
275. *Morrissette*, 342 U.S. at 275-76.
276. 421 U.S. 684 (1975).
277. *Johnson*, 288 F.3d at 1204.
278. *Id.*
279. *Id.* at 1204, 1205.
280. *See, e.g.*, Cain v. Redman, 947 F.2d 817 (6th Cir. 1991); Prihoda v. McCaughtry, 910 F.2d 1379 (7th Cir. 1990); Hall v. Kelso, 892 F.2d 1541 (11th Cir. 1990).
281. *Johnson*, 288 F.3d at 1202-05.
282. 947 F.2d 817 (6th Cir. 1991).
283. *Cain*, 947 F.2d at 818.

defendant of murder when a defendant "killed another suddenly without provocation."[284] The district court dismissed a petition that Cain filed for a writ of habeas corpus based on a magistrate's conclusion that a court could not apply *Sandstrom* retroactively to his case.[285] In *Cain*, the Sixth Circuit held the rule articulated in *Sandstrom* was a new rule because the jury instruction that the Court invalidated in *Sandstrom* was very prevalent just prior to the Court's decision.[286] The circuit court reasoned that the constitutionality of the instruction was 'susceptible to debate among reasonable minds."[287] The sheer number of jurisdictions not recognizing any Supreme Court precedent that would compel the invalidation of the jury instruction led the Sixth Circuit to conclude that the decision in *Sandstrom* created a new rule of criminal procedure.[288]

b. Seventh Circuit: *Prihoda v. McCaughtry*[289]

Prihoda petitioned for habeas relief from his convictions of armed robbery and murder in the first degree.[290] He argued that the trial judge gave a pattern instruction to the jury that shifted the burden from the State to him and required him to prove that he did not intend to kill the person whose death was at issue.[291] A district court dismissed Prihoda's petition.[292] Prior to Prihoda's petition, the Seventh Circuit had on three occasions held that the pattern instruction the trial court gave in Prihoda's case did not violate the Constitution.[293] Based on these decisions, the Seventh Circuit concluded that a state court would not have concluded that the instruction was unconstitutional under the precedent that existed at the time Prihoda's conviction became final.[294] The Court in *Prihoda* declared, "[a]ny federal decision holding instruction 1100 unconstitutional therefore would be a new rule for purposes of *Teague* and could not be applied on collateral review."[295] The circuit court affirmed the district court's decision.[296]

c. Eleventh Circuit: *Hall v. Kelso*[297]

Hall was convicted of felony murder after a trial court instructed a jury that "acts of a person of sound mind and discretion are presumed to

284. *Id.* at 819.
285. *Id.* at 819-20.
286. *Id.* at 821.
287. *Id.*
288. *Id.*
289. 910 F.2d 1379 (7th Cir. 1990).
290. *Prihoda*, 910 F.2d at 1381.
291. *Id.*
292. *Id.*
293. *Id.* at 1382.
294. *Id.*
295. *Id.*
296. *Id.* at 1387.
297. 892 F.2d 1541 (11th Cir. 1990).

be the product of the person's will."[298] A district court denied Hall a writ of habeas corpus.[299] In a footnote, the Eleventh Circuit indicated that *Sandstrom* created a new rule.[300] The court held "that *Teague* [was] no bar to the application of *Sandstrom*"[301] because the rule developed from *Sandstrom* is a "bedrock, axiomatic and elementary [constitutional] principle"[302] that "diminishes the 'likelihood of an [in]accurate conviction.'"[303] The Eleventh Circuit reversed the district court's decision to deny Hall habeas relief.[304]

3. First Circuit: *Mains v. Hall*[305]

Robert Mains was convicted of first degree murder and "unlawfully carrying a firearm."[306] He petitioned for habeas relief twice.[307] In his second petition Mains claimed that the instruction the trial judge gave the jury about the malice element of murder violated the Due Process Clause because it shifted the burden of proof from the State to him.[308] The district court dismissed the second petition and Mains appealed to the First Circuit Court of Appeals.[309] In *Mains*, the First Circuit wrote that since *Sandstrom* was a "lineal descendant of *Winship*," it could not be classified as a new rule.[310] *Winship* held that the state bears the burden of proving all of the elements of a crime beyond a reasonable doubt.[311] The holding in *Sandstrom*, according to the First Circuit, simply applied the premise articulated in *Winship* to jury instructions that create presumptions of facts.[312] In other words, the court concluded that presumptive jury instructions violate the Constitution in the precise manner prohibited by *Winship* if they relieve the state of its burden of persuading the jury of each element of a crime charged.[313] Therefore, the *Sandstrom* holding was not a "new rule" and the circuit court affirmed the district court's decision.[314]

298. *Hall*, 892 F.2d at 1542.
299. *Id.* at 1543.
300. *Id.* at 1543 n.1.
301. *Id.*
302. *Id.* (quoting Yates v. Aiken, 484 U.S. 211, 213 (1988)).
303. *Id.* (quoting *Teague*, 489 U.S. at 313).
304. *Id.* at 1543.
305. 75 F.3d 10 (1st Cir. 1996).
306. *Mains*, 75 F.3d at 11.
307. *Id.*
308. *Id.* at 12.
309. *Id.*
310. *Id.* at 14 (quoting Gilmore v. Taylor, 508 U.S. 333, 343 (1993)).
311. *Winship*, 397 U.S. at 364.
312. *Mains*, 75 F.3d at 14.
313. *See id.*
314. *Id.* at 14-15.

4. Analysis

a. Tenth Circuit's Reliance on Holdings from the Seventh and Eleventh Circuits

The Tenth Circuit's reliance on the Seventh Circuit and Eleventh Circuit is unjustified due to its misreading of both cases. In particular *Prihoda* did not involve the type of jury instruction at issue in *Sandstrom* and *Johnson*,[315] while the court in *Hall* never addressed whether or not *Sandstrom* was a new rule.[316] In *Prihoda*, the Seventh Circuit stated that any rule making jury instruction 1100 unconstitutional would constitute a new rule.[317] In order to equate the *Prihoda* holding with the *Johnson* holding, the jury instructions at issue in those cases must *both* be similar to the instruction found unconstitutional by the Supreme Court in *Sandstrom*. However, the jury instruction at issue in *Prihoda* does not correspond to the type of instruction held unconstitutional in *Sandstrom*.[318] In fact, the Seventh Circuit had previously ruled that the jury instruction used in *Prihoda* remained valid after *Sandstrom*.[319] Therefore, the Tenth Circuit's citation of the ruling in *Prihoda* as support for the notion that *Sandstrom* created a new rule seems tenuous at best.

The Tenth Circuit stated that in *Hall*, the Eleventh Circuit endorsed the idea that *Sandstrom* created a new rule.[320] The Eleventh Circuit's line of reasoning and identification of *Sandstrom* as a "bedrock" principle[321] indicates that the court merely assumed *Sandstrom* created a new rule and jumped immediately to the second *Teague* question: whether *Sandstrom* fits within one of the exceptions to the general rule in *Teague*.[322] In other words, the Eleventh Circuit never squarely addressed the preliminary question as to whether or not *Sandstrom* created a new rule.[323]

b. Continuing Confusion Over What Rules Are New

The fact that the circuit courts of appeals disagree about whether *Sandstrom* announced a new rule is not surprising, considering the difficulty the Supreme Court has had settling on a single definition of a new rule.[324] Commentators acknowledge the difficulty in applying the princi-

315. *Johnson*, 288 F.3d at 1202 (Henry, J., dissenting) (calling the decision in *Prihoda*, "irrelevant to the question before our panel").

316. *Id.* at 1203 (Henry, J., dissenting) ("[T]he Eleventh Circuit had no reason to consider whether *Sandstrom* actually constituted a 'new rule.'").

317. *Prihoda*, 910 F.2d at 1382.

318. *See Johnson*, 288 F.3d at 1202 (Henry, J., dissenting).

319. *See* Fencl v. Abrahamson, 841 F.2d 760, 770 (7th Cir. 1988).

320. *Johnson*, 288 F.3d at 1196.

321. *Hall*, 892 F.2d at 1543 n.1.

322. *See Johnson*, 288 F.3d at 1195-96.

323. *Id.* at 1202-03 (Henry, J., dissenting).

324. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 25.5 (4th ed. 2001).

ple.[325] The source of the confusion can be traced to the plurality opinion in *Teague*, which admitted that "[i]t is . . . often difficult to determine when a case announces a new rule,"[326] then provided two different concepts of what constituted a new rule.[327] On one hand, the Court took a restrictive view of new rules when it stated that a rule is new when it "breaks new ground or imposes a new obligation on the States or the Federal Government."[328] On the other hand, the Court also adopted a more inclusive standard when it said that a rule is new if it was "not *dictated* by precedent existing at the time the defendant's convictions became final."[329] In the years since *Teague*, the Supreme Court has swung back and forth between expansive and restrictive definitions of what constitutes a new rule.[330] The ambiguity of the definition and this oscillation has created a myriad of intra-circuit and inter-circuit splits about the categorization of several Supreme Court rules.[331] Until the Supreme Court takes an opportunity to settle upon a single definition of "new rule," this trend of confusion among the circuits will likely persist.

C. *Whether the New Rule in* Sandstrom *Fits Within One of* Teague*'s Exceptions*

1. Tenth Circuit: *Johnson v. McKune*[332]

Once the court concluded that *Sandstrom* was a new rule for the purposes of *Teague* analysis, the general prohibition of retroactive use of a new rule applied.[333] In order to escape from this bar, Johnson claimed that the second *Teague* exception applied to the *Sandstrom* rule.[334] *Teague* allows courts to retroactively apply any new rule that "require[s] the observance of those procedures that . . . are implicit in the concept of ordered liberty."[335] The Tenth Circuit looked first to the *Teague* opinion for further clarification of the boundaries of this exception.[336] It noted that the Supreme Court took an extremely conservative approach to the exception because it reserved the exception for "watershed rules of

325. *See, e.g.*, Richard Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1735 (1991) (pointing out that critics call the new rule principle an "ill- defined and problematic legal concept").

326. *Teague*, 489 U.S. at 301.

327. *Id.*

328. *Id.*

329. *Id.*

330. *See* HERTZ & LIEBMAN, *supra* note 324, § 25.5.

331. Examples of Supreme Court holdings where the circuits have split over the issue of whether or not the announced rule was new or not, include *Estelle v. Smith*, 451 U.S. 454 (1981), *Mills v. Maryland*, 486 U.S. 367 (1988), *Cruz v. New York*, 481 U.S. 186 (1987), and *Wainwright v. Greenfield*, 474 U.S. 284 (1986).

332. 288 F.3d 1187 (10th Cir. 2002).

333. *Johnson*, 288 F.3d at 1197.

334. *See id.*

335. *Id.* (quoting *Teague*, 489 U.S. at 290).

336. *See id.*

criminal procedure."[337] The Court hoped to avoid the burden retroactively applying new rules of criminal procedure would place on states.[338] The Supreme Court expected only "a small core of rules" to fit within the second *Teague* exception.[339]

The Tenth Circuit concluded the new rule was *not* a "watershed rule."[340] Even though it acknowledged the possibility that the jury instruction the judge gave at Johnson's trial may have affected the reliability of the conviction,[341] the Tenth Circuit held that the rule needed to also meet the higher burden of "alter[ing] our understanding of the bedrock procedural elements essential to the fairness of a proceeding."[342] The court recognized that the Supreme Court's decision in *Sandstrom*, relying as it did on the reasoning in *Winship*, was built upon a foundation of "bedrock" principles of criminal procedure.[343] In *Yates v. Aiken*,[344] the Supreme Court called *Winship*'s requirement that a jury only convict a defendant with proof beyond a reasonable doubt of every necessary fact a "bedrock, axiomatic and elementary constitutional principle."[345] However, the Tenth Circuit distinguished between the building blocks of the *Sandstrom* decision and the *Sandstrom* rule itself and declared that "[n]ot every holding that draws on a wellspring rule is itself a wellspring holding."[346] The court concluded that the rule announced in *Sandstrom* lacked the "primacy and centrality" that was needed for the court to apply it retroactively to Johnson's habeas proceeding.[347]

2. Eleventh Circuit: *Hall v. Kelso*[348]

In *Hall*, a jury convicted the defendant of armed robbery and felony murder in the shooting death of a liquor store clerk.[349] The trial judge instructed the jury that "the acts of a person of sound mind and discretion are presumed to be the product of the person's will."[350] The Supreme Court had not decided *Sandstrom* and held such burden-shifting jury instructions unconstitutional until after Hall had exhausted his direct appeals.[351] Therefore, the Eleventh Circuit Court of Appeals had to apply *Sandstrom* retroactively in order to grant Hall's habeas petition.[352] The

337. *Id.* (quoting *Teague*, 489 U.S. at 311).
338. *Id.* at 1195.
339. *Id.* at 1198 (quoting Graham v. Collins, 506 U.S. 461, 477 (1993)).
340. *Id.* at 1200.
341. *Id.* at 1198.
342. *Id.* at 1198-99 (quoting Tyler v. Cain, 533 U.S. 656, 666 (2001)).
343. *Id.* at 1199.
344. 484 U.S. 211 (1988).
345. *Johnson*, 288 F.3d at 1199 (quoting *Yates*, 484 U.S. at 214).
346. *Id.* at 1199.
347. *Id.* at 1200 (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)).
348. 892 F.2d 1541 (11th Cir. 1990).
349. *Hall*, 892 F.2d at 1542.
350. *Id.* at 1543.
351. *Id.* at 1543 n.1.
352. *See id.*

court justified the retroactive application with the same set of Supreme Court cases the Tenth Circuit used to argue against retroactive application.[353] The Eleventh Circuit called the burden-shifting prohibition of *Sandstrom* a "bedrock, 'axiomatic and elementary' [constitutional] principle,"[354] and held that *Teague* did not prevent it from applying *Sandstrom* retroactively.[355]

3. Analysis

The fact that the Tenth and Eleventh Circuits made similar arguments, yet reached different conclusions about whether the rule against burden-shifting jury instructions announced in *Sandstrom* should be applied retroactively to habeas proceedings, demonstrates that the resolution of this issue is not clear. Both courts compared the rule to the same elusive terms "bedrock," "axiomatic," and "watershed."[356] Although ideological differences between the judges who sit on the courts may partly explain this polarization of opinion, the differences between the facts in the two cases also stands out. In *Johnson*, the court did not indicate in its published opinion that Johnson's guilt was ever a question.[357] The damning testimony of his wife, plus his own rambling testimony, left little doubt that Johnson was responsible for the grisly murders of two of his neighbors. [358] On the other hand, the potential that Hall was innocent loomed in the background of his habeas proceeding. The court included Hall's plausible story that he was simply in the wrong place at the wrong time in its published opinion.[359] In fact, on direct appeal, the Georgia Supreme Court reversed Hall's armed robbery conviction and reduced his death sentence to life imprisonment.[360] Therefore, while the purpose of a habeas proceeding is not to determine a prisoner's guilt or innocence,[361] it is possible that habeas courts are in fact swayed by that question. Despite the supposed uniformity of *Teague*'s prohibition of retroactive application of new rules, the practical differences between that standard and *Linkletter*'s requirement of case-by-case analyses may be fewer than at first appear.

353. *See id.* at 1543 n.1, 1543-44; *Johnson*, 288 F.3d at 1199. Both courts considered *Winship*, *Sandstrom*, *Francis v. Franklin*, 471 U.S. 307 (1985), and *Yates*. *Hall*, 892 F.2d at 1543 n.1, 1543-44; *Johnson*, 288 F.3d at 1199.

354. *Hall*, 892 F.2d at 1543 n.1 (alteration in original) (quoting *Yates*, 484 U.S. at 214).

355. *Id.*

356. *Johnson*, 288 F.3d at 1199-1200; *Hall*, 892 F.2d at 1543 n.1.

357. *Johnson*, 288 F.3d 1187.

358. *See id.* at 1190.

359. *Hall*, 892 F.2d at 1542-43.

360. *Id.* at 1543.

361. *See* Walker v. Wainwright, 390 U.S. 335, 336 (1968) ("[T]he great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention.").

CONCLUSION

The English common law writ of habeas corpus gradually developed into "the symbol and guardian of individual liberty."[362] Its further development has been slowed, and potentially reversed, by recent Supreme Court decisions and the passage of the AEDPA. As the two cases from the Tenth Circuit that are analyzed in this survey reveal, the contraction has not yet ended. The Tenth Circuit has joined with other circuits in strictly interpreting the recent decisions of the Rehnquist Court, making it increasingly difficult for state prisoners to obtain habeas relief. In these two decisions, the Tenth Circuit let stand the use of an improper harmless-error standard on direct appeal of a prisoner's conviction, and allowed for the influence of a jury instruction that the Supreme Court later struck down as an unconstitutional violation of due process. While the net effects of these two decisions may be small by themselves, they are representative of a larger trend within the American judiciary of attacking the foundations of the Great Writ.

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362. Peyton v. Rowe, 391 U.S. 54, 58 (1968).

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