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HARMLESS ERROR IN THE PENALTY PHASE OF A CAPITAL CASE: A DOCTRINE MISUNDERSTOOD AND MISAPPLIED

Linda E. Carter

The trial of the capital case is over. The defendant was convicted of murder. In the penalty phase, the State proved the aggravating circumstance of a murder in the course of a robbery. The defense introduced mitigating evidence of the defendant's financial stress and devotion to his family. The defense was precluded, however, from presenting evidence of the defendant's good adjustment to life in prison. The jury concluded that aggravating circumstances outweighed mitigating circumstances and the defendant was sentenced to death. On appeal, the court finds that it was constitutional error to refuse to admit the defense's evidence of the good adjustment to prison. Should the death verdict be reversed, or was the unconstitutional failure to admit mitigating evidence merely harmless error? This Article addresses the issues that arise in transferring the harmless error doctrine, developed in the context of a typical criminal trial, to the unique decision in the penalty phase of a capital case.

In the current climate of concern that capital cases are litigated for too many years, the harmless error doctrine is increasingly...
applied to speed the process to a conclusion. In the haste to apply the doctrine in the penalty phase of a capital case, the rationale for the doctrine is being ignored. The use of a harmless error analysis is premised on an ability to determine the effect of the error on the decision rendered. The effect of an error on the penalty phase decision, which usually requires a weighing of aggravating and mitigating factors, is significantly more difficult to assess than is the effect of an error on the decision that a particular element of a crime exists.

The application of the harmless error doctrine to the penalty phase of capital cases is probably a natural extension of the trend by the courts to subject an increasing number of errors to a harmless error analysis. By viewing the application of the harmless error doctrine in the penalty phase as completely analogous to harmless error in the guilt phase, however, courts have failed to analyze adequately the rationale of the doctrine.

This Article addresses the applicability of the harmless error doctrine to constitutional errors raised on direct review in the penalty phase of capital cases. The first section sets forth the history of applying the harmless error doctrine to constitutional error, as developed by the United States Supreme Court. The

Harris on death row, explain the reasons for the court proceedings and note that substantive challenges, such as the lack of mitigating medical testimony at the original trial, were legitimately raised through habeas proceedings. Id.

Arizona v. Fulminante, 111 S. Ct. 1246, 1264 (1991); see also infra text accompanying notes 29-37 (discussing recent Supreme Court decisions on the harmless error doctrine).

See, e.g., CAL. PENAL CODE § 190.3 (Deering 1985) (stating that trier of fact must decide if “aggravating circumstances outweigh mitigating circumstances”); see also statutes cited infra note 100.


The Supreme Court has recently held that a lesser harmless error standard will apply to constitutional error raised in federal habeas proceedings. Brecht v. Abrahamson, 113 S. Ct. 1710, 1718 (1993). For a discussion of this case, see infra notes 27-28 and accompanying text. This article specifically addresses the standard developed through cases on direct review. However, the basic concern of this Article, that the value-based decision in the penalty phase must be considered in deciding harmless error issues, is applicable to either standard.
second section discusses two major interpretational issues that plague harmless error analysis: (1) the meaning of the terminology that an error does not “contribute” to a verdict; and (2) when an error should be treated as per se reversible rather than subject to harmless error analysis.

The third section focuses on the applicability of the harmless error analysis to the penalty phase. This section is subdivided into three parts. The first subsection identifies the critical characteristics of the penalty phase proceeding. The second subsection questions the applicability of the harmless error doctrine to error in the penalty phase. Particular attention is given to the nature of the penalty decision and the rationale of the doctrine. The third subsection critiques the method of assessing the harm in the penalty phase.

Ultimately, the Article suggests that the value of the harmless error doctrine to the criminal justice system will be preserved if courts recognize that the value-based decision in the penalty phase stands in stark contrast to the fact-based decision in the “guilt phase” or trial. The difference in the nature of the decision rendered in the penalty phase merits consideration by the courts in assessing both the applicability of the doctrine and, if applicable, the harm of an error.

I. THE DEVELOPMENT OF THE HARMLESS ERROR STANDARD

Harmless error as a concept originated as a measure to lessen the impact of the Exchequer Rule.\(^7\) The Exchequer Rule resulted in reversal for almost all error in trials.\(^8\) In response, Parliament enacted a law in 1873 that set forth a standard for assessing harmless error. Error was reversible only if there was “some substantial wrong or miscarriage.”\(^9\)

In the United States, a harmless error doctrine began to emerge in the 1900s through statutory enactments on both the federal and


\(^8\) TRAYNOR, supra note 7, at 8; Goldberg, supra note 7, at 422; Philip J. Mause, HARMLESS CONSTITUTIONAL ERROR: THE IMPLICATIONS OF CHAPMAN V. CALIFORNIA, 53 MINN. L. REV. 519 (1969).

\(^9\) TRAYNOR, supra note 7, at 8-9; Goldberg, supra note 7, at 422.
state levels.\textsuperscript{10} The statutes spoke in the familiar language of "affecting the substantial right of a party"\textsuperscript{11} and "miscarriage of justice."\textsuperscript{12}

Federal constitutional error was not analyzed as harmless until the 1960s. In \textit{Fahy v. Connecticut},\textsuperscript{13} four Justices of the United States Supreme Court indicated that Fourth Amendment error should be subjected to a harmless error analysis.\textsuperscript{14} Subsequently, in \textit{Chapman v. California},\textsuperscript{15} the Court subjected a Fifth Amendment error to a harmless error analysis.\textsuperscript{16}

\textit{Chapman} is significant both for the standard that was promulgated by the Court for assessing harmless error and for the understanding of the standard which may be gleaned from the result reached in that case. The Fifth Amendment error in \textit{Chapman} was glaring. The prosecutor argued inferences to the jury that could be drawn from the defendants' silence, and the trial court instructed the jury that they could use the defendants' silence against them.\textsuperscript{17} According to the Supreme Court, a harmless error analysis meant assessing "whether there is a reasonable possibili-

\textsuperscript{10} TRAYNOR, supra note 7, at 14; Goldberg, supra note 7, at 422.
\textsuperscript{11} See, e.g., TRAYNOR, supra note 7, at 15 (describing federal statute's language that errors are harmless if they do not "affect the substantial rights of the parties").
\textsuperscript{13} 375 U.S. 85 (1963).
\textsuperscript{14} The majority held that erroneous admission of illegally seized evidence was prejudicial, \textit{and thus could not} be called harmless error. \textit{Id.} at 91-92. While the majority sidestepped the issue whether Fourth Amendment violations can ever be subject to harmless error analysis, the four dissenter urged that the harmless error standard should be applied here: whether the unconstitutional evidence could have changed the outcome of the trial. \textit{Id.} at 95.
\textsuperscript{15} 386 U.S. 18 (1967).
\textsuperscript{16} \textit{Id.} at 21-22.
\textsuperscript{17} The prosecutor "took full advantage of his right under the State Constitution to comment upon [defendants'] failure to testify, filling his argument to the jury from beginning to end with numerous references to their silence and inferences of their guilt resulting therefrom." \textit{Id.} at 19.

The trial court instructed the jury that a defendant in a criminal trial may not be compelled to testify. The \textit{jury may also take the defendant's failure to deny or explain evidence, which he could reasonably be expected to deny or explain, as tending to indicate the truth of the evidence and that the more unfavorable inferences to be drawn from the evidence are the more probable. \textit{Id.} at 19 n.2.
ty that the evidence complained of might have contributed to the conviction." The Court viewed this analysis as synonymous with a determination that "the error did not contribute to the verdict beyond a reasonable doubt." The standard, thus defined in Chapman, is also often cited as whether the error is "harmless beyond a reasonable doubt."

The Court in Chapman concluded that the error of commenting on the defendants' silence was not harmless. Despite the fact that there was properly admitted evidence to support the verdict, the Court found that the jurors were likely to have given significant weight to the impermissible inferences from the defendants' silence. The emphasis on the inference of guilt from the defendants' silence was apparent from the number and intensity of references to the silence. As a consequence, the Court felt that "honest, fair-minded jurors might very well have brought in not-guilty verdicts." Thus, the Court focused on the impact of the erroneously admitted evidence on the minds of jurors in reaching a decision and did not particularly address the strength of the properly admitted evidence. This seminal use of the harmless error doctrine stands as an example of how to assess whether an error contributed to the verdict.

In subsequent cases, the Supreme Court has defined and refined the parameters of the Chapman harmless error doctrine. In a

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18 Id. at 24 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)).
19 Id. at 24.
20 Id.
21 Id.
22 Id. at 25 ("[T]he case . . . presented a reasonably strong 'circumstantial web of evidence' against petitioners.").
23 Id.
24 Id. at 19.
25 Id. at 26.
26 The harmless error doctrine discussed in this Article is limited to situations where the doctrine is applied after the error is found to exist. Thus, if there is error because a confession was coerced in violation of the Constitution, the issue is whether the error was harmless. There are some constitutional errors, however, that incorporate a harmlessness standard into the definition of the error itself. For instance, in order to find ineffective assistance of counsel in the performance of an attorney in violation of the Sixth Amendment, there must be action by the attorney that does not fall within a range of "reasonably effective assistance," and the action must result in prejudice to the defendant. Strickland v. Washington, 466 U.S. 668, 687 (1984). If there is no prejudice, there is no error. This is a different situation conceptually from assessing the harmlessness of an error such as a
recent case, the Court limited the applicability of the *Chapman* standard for harmless error to direct review of constitutional error, excluding habeas corpus proceedings. The standard for assessing the harmlessness of constitutional error in federal habeas proceedings is now the same as the harmless error standard for nonconstitutional errors. There would, thus, be a somewhat different analysis for determining if an error is harmless when the issues arise in a federal habeas proceeding than the analysis for determining if an error is harmless on direct review. Nevertheless, the threshold question of determining if the harmless error doctrine applies at all implicates the same underlying rationale of the doctrine in both direct-review and habeas cases.

The threshold issue of when the harmless error doctrine is applicable, one of the most significant parameters of the *Chapman* doctrine, was recently summarized by the Supreme Court in a case on direct review. In *Arizona v. Fulminante,* the Court emphasized a distinction developed in a series of cases between "structural" errors and "trial" errors. Harmless error analysis is not appropriate for "structural" errors that affect the integrity of the entire process. In this instance, the outcome cannot be assumed to be reliable. Thus, errors such as a biased tribunal or depriva-

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28 The Court in *Brecht* held that the appropriate harmless error standard for federal habeas cases is the standard set forth in *Kotteakos v. United States,* 328 U.S. 750 (1946). That standard calls for error to be reversible if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht,* 113 S. Ct. at 1718 (quoting *Kotteakos,* 328 U.S. at 776). The *Kotteakos* standard is considered less demanding than the *Chapman* standard, which presumably results in fewer reversible errors for nonconstitutional errors than for constitutional errors.
30 Id. at 1264-65.
31 Id. The Court gave two examples of structural errors: a total deprivation of the right to counsel at trial, citing *Gideon v. Wainwright,* 372 U.S. 335 (1963); and a judge who is not impartial, citing *Tumey v. Ohio,* 273 U.S. 510 (1927). Id.
32 "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Fulminante,* 111 S. Ct. at 1264-86, (quoting *Rose v. Clark,* 478 U.S. 570, 577-78 (1986)).
tion of counsel cannot be subjected to a harmless error analysis. There are very few structural errors, however.

Almost all errors are classified as "trial" errors. The effect of a trial error on a verdict can presumably be determined. For example, Fourth Amendment error, which results in the admission of illegally seized evidence, is merely trial error. The harm from the admission of the evidence can arguably be calculated by separating the unconstitutional evidence from the properly admitted evidence. According to the Supreme Court, even Fifth Amendment error, as occurred in Fulminante where there was a coerced confession admitted at trial, is trial error. The Court noted in Fulminante that the effect of admitting an involuntary confession is determinable by assessing the other, properly admitted evidence.

Consistent with its expansive view of the harmless error doctrine, the Supreme Court has extended the Chapman doctrine to the penalty phase of capital cases. In Satterwhite v. Texas, the

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33 The Court in Fulminante stated that, with structural errors, "[t]he entire conduct of the trial from beginning to end is obviously affected." Id. at 1265. These other structural errors comprise "structural defect[s] affect[ing] the framework within which the trial proceeds, rather than simply an error in the trial process itself." Id.

34 The Fulminante Court lists the following structural errors: the total deprivation of the right to counsel at trial, the lack of an impartial judge, unlawful exclusion of members of the defendant's race from a grand jury, the right to self-representation, and the right to public trial. Id. at 1265. An erroneous instruction on the "beyond a reasonable doubt" standard, lessening the standard for conviction, was added to the list of structural errors in a recent decision. See Sullivan v. Louisiana, 113 S. Ct. 2078, 2083 (1993).

35 Fulminante, 111 S. Ct. at 1263. Moreover, the Court further separates Fourth Amendment claims from other constitutional errors because the Court views the reason to exclude the illegally seized evidence as independent of its effect on the reliability of the verdict.

36 Id. at 1265.

37 Id. at 1265-66. The Court viewed an unconstitutional coerced confession as "indistinguishable from that of a confession obtained in violation of the Sixth Amendment—of evidence seized in violation of the Fourth Amendment—or of a prosecutor's improper comment on a defendant's silence at trial in violation of the Fifth Amendment." Id. at 1265. The Court rejected the long-held view that the use of a coerced confession represented a more "fundamental" assault on the criminal justice system. Id.

38 Satterwhite v. Texas, 486 U.S. 249 (1988), was the first major death penalty case to employ the harmless error doctrine. However, two years before Satterwhite, in 1986, the Court addressed a harmless error issue in a death penalty proceeding. See Skipper v. South Carolina, 476 U.S. 1 (1986). In Skipper, however, the Court did not engage in a discussion of the applicability of the harmless error analysis. After finding error in the exclusion of defendant's proffered witnesses, who would have testified to defendant's "good adjustment"
Court applied a harmless error analysis to the erroneous admission of a psychiatrist's testimony in violation of the Sixth Amendment. The Court was unable to conclude that the evidence "did not influence the sentencing jury." The error was not harmless. The psychiatrist's testimony was important in the State's case to prove that, under the Texas statute, the defendant was "a continuing threat to society.

The harmless error test used by the Court in Satterwhite emphasized the impact of the improperly admitted evidence on the jurors' decision and not the weight of the properly admitted evidence. The Court rejected the Texas court's formulation that found the State's case "sufficient" without the unconstitutional evidence. The Court stated: "The question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"

to jail, the Court concluded that the error was reversible error. Id. at 8. The Court was addressing the harmless error issue in a dismissive fashion without directly facing the issue as in Satterwhite. The Court in Skipper appears to assume for the purposes of argument that harmless error analysis applies, whereas in Satterwhite, the Court had to actually decide the issue.

There was obvious debate on the Court over the applicability of the harmless error doctrine to an "Estelle" violation, where defense counsel was not advised of a psychiatric examination to determine future dangerousness of the defendant, in violation of the defendant's Sixth Amendment right to counsel at all critical stages. Id. at 252-68. Although concurring in the judgment, Justices Marshall, Brennan and, in part, Blackmun, disagreed with the majority's conclusion that harmless error should apply in this instance. Id. at 260-67 (Marshall, J., concurring). They recognized the different nature of the decision in the penalty phase, calling it "a discretionary, moral judgment involving a balancing of often intangible factors." Id. at 265. As a result of the different decision in the penalty phase, the effect of admitting the psychiatric testimony was too indeterminate. Id. The concurring Justices wrote: "Divining the effect of psychiatric testimony on a sentencer's determination whether death is an appropriate sentence is thus more in the province of soothsayers than appellate judges." Id. See also Kenneth A. Zimmern, Note, Satterwhite v. Texas: A Return to Arbitrary Sentencing?, 42 BAYLOR L. REV. 623 (1990) (criticizing the use of harmless error doctrine in Satterwhite).

46 Satterwhite, 486 U.S. at 260.
47 Id. at 258 (quoting TEXAS CODE CRIM. PROC. ANN. art. 37.071(b)(2) (West 1988)).
48 Id. at 258-60.
49 Id. at 258-59.
50 Id. (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).
Despite other evidence supporting a conclusion of future dangerousness, the Court held that the State could not prove that the erroneously admitted psychiatric testimony did not contribute to the verdict.\footnote{46} In \textit{Clemons v. Mississippi},\footnote{47} the Court declared it constitutional to apply a harmless error doctrine to a death verdict where there was error in weighing an invalid aggravating circumstance.\footnote{48} The Court cautioned, however, that it was not mandating the use of a harmless error test for penalty phase errors. The Court specifically stated that state courts may find that, in particular situations, harmless error analysis is "extremely speculative or impossible."\footnote{49}

The Supreme Court cases on the harmless error doctrine have defined the test and provided examples to guide its application. It is clear that the Court has given its imprimatur to applying the harmless error doctrine to most errors, including errors arising in

\footnote{46 Id. at 260. There was significant other evidence of future dangerousness introduced. Besides the testimony of the psychiatrist, Dr. Grigson, the evidence presented at the sentencing phase included: (1) four prior convictions for violent crimes; (2) character testimony from eight police officers that Satterwhite was not "peaceful and law-abiding"; (3) testimony from "Satterwhite's mother's former husband . . . that Satterwhite had once shot him during an argument"; and (4) testimony from a county psychologist that Satterwhite was unable "to feel empathy or guilt" and that he would be a "continuing threat to society." Id. at 259. Despite all of this evidence, the Court rejected the Texas Court of Criminal Appeals' approach that the introduction of Dr. Grigson's testimony was harmless because the other evidence was sufficient to support a sentence of death. Id. at 260. The Court also, however, in dicta, assumed that the above testimony, without Dr. Grigson's testimony, was sufficient. Id. at 258.}

\footnote{47 In \textit{Clemons}, the jury was instructed on two aggravating factors: "robbery for pecuniary gain" and "especially heinous, atrocious or cruel killing." Id. at 742. The "heinous" factor was later considered invalid. Id. at 743. It was unclear if the Mississippi Supreme Court had reweighed the aggravating and mitigating factors or if the court had applied a harmless error analysis in upholding the death verdict. Id. at 751-52. The United States Supreme Court reaffirmed the constitutionality of appellate reweighing of factors, but remanded in this case. Id. On the issue of reweighing, it was unclear if the Mississippi court had in fact reweighed the one aggravating factor against the mitigating evidence or if it had simply affirmed on the basis of a per se rule that a death verdict could stand if there was at least one valid aggravating circumstance. Id. The latter approach would violate the requirement that the legitimate factors be balanced against one another. Id. Similarly, with the harmless error analysis, it was unclear if the Mississippi court had properly considered the \textit{Chapman} standard. The United States Supreme Court implied that the error was unlikely to be harmless in this case where the "heinous" factor played a significant role. Id. at 753-54.}

\footnote{48 Id. at 754.}
the penalty phase of a capital case. There are still difficulties, however, in going from the concept of harmless error to its application. In part, the lack of clarity is due to variations in judging when a particular error "contributes" to the verdict in question. Another issue, of particular significance in the penalty phase, is whether the errors should be subject to the harmless error test at all, or whether the errors should be reversible per se. The next section addresses both of these issues as major interpretational hurdles in understanding what the Court means by "harmless beyond a reasonable doubt."

II. INTERPRETATIONAL QUANDARIES

Two major interpretational issues continue to surface. One is the relationship between the "harm" and the "correct result."

50 If the "correct result" is reached, should the error ever be viewed as harmful? The second issue is the basis for the decision to treat some errors as per se reversible and others as subject to a harmless error analysis. Is the difference truly a qualitative distinction? Both of these interpretational concerns are particularly important in applying the harmless error analysis to a penalty proceeding. The nature of each issue, as developed by the Supreme Court in non-capital cases and discussed by commentators, is presented in the following subsections as background to an analysis of the application of the harmless error doctrine to penalty proceedings in the next section.

A. HARMLESS BEYOND A REASONABLE DOUBT?

One of the most troubling aspects in interpreting the Chapman standard has been the relationship between the "harm" and the "correct result." In some cases, the Supreme Court has focused on whether the erroneously included or excluded evidence "contribut-

50 See, e.g., TRAYNOR, supra note 7, at 43 (discussing connection between "error" and "judgment" in federal statute); Goldberg, supra note 7, at 428 (discussing different interpretations of harmless error test); Stacy & Dayton, supra note 5, at 88-98 (criticizing Court's approach to harmless error and proposing that appropriate analysis would look at the purpose of the infringed right, whether a new trial can remedy the violation, and whether reversal serves a deterrence function).
ed” to the verdict. In other cases, the Court has emphasized whether the properly admitted evidence was “overwhelming.” Some commentators view the “contribute” test as quite different from the “overwhelming” test. Dissenting Justices, too, have criticized the use of the “overwhelming” test as being untrue to the “contribute” standard of Chapman. And yet, the Court’s majori-

51 See, e.g., Chapman v. California, 386 U.S. 18, 23 (1967) (“The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.”) (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963))); Satterwhite v. Texas, 486 U.S. 249, 255, 260 (1988) (noting that “a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury” and holding “it impossible to say beyond a reasonable doubt that [the psychiatrist’s] expert testimony on the issue of Satterwhite’s future dangerousness did not influence the sentencing jury”); Arizona v. Fulminante, 111 S. Ct. 1246, 1257-58 (1991) (defining issue as whether erroneously admitted confession “did not contribute” to conviction and rejecting state court’s finding that there was overwhelming evidence against defendant).

52 See, e.g., Harrington v. California, 396 U.S. 250, 254 (1969) (professing to be honoring Chapman and not “giving too much emphasis to ‘overwhelming evidence,’ ” but concluding that case was “so overwhelming” against Harrington that the error was harmless); Milton v. Wainwright, 407 U.S. 371, 377-78 (1972) (finding erroneously admitted evidence harmless because of “overwhelming evidence of guilt” against defendant); Schneble v. Florida, 405 U.S. 427, 431 (1972) (holding Bruton violation harmless because “independent evidence of guilt ... [was] overwhelming” and inadmissible confession cumulative).

53 See, e.g., Goldberg, supra note 7, at 427-28 (commenting on Harrington and Chapman). Professor Goldberg points out that, if in Harrington the Court focused only upon the erroneously admitted confession without considering the properly admitted evidence, it would be almost impossible to conclude that the confession “did not contribute to Harrington’s conviction.” Id. Professor Goldberg also points out that the Court had changed the Chapman test from one that “forced the prosecution to show beyond a reasonable doubt that the error did not contribute to the verdict, into a test which forced the defendant to show that the error was of such significance that without it the defendant would be entitled to a directed verdict of acquittal.” Id. at 425. Thus, if the change in focus from the erroneously admitted evidence to the properly admitted evidence shifts the burden of demonstrating the harm of the error to the defendant, almost all errors will be harmless. Id.

See also WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 27.6 (2d ed. 1992) (stating that, while overlap between focusing on effect of the error and properly admitted evidence is arguably consistent with Chapman, the “acid test” of whether there is real difference will be a case where properly admitted evidence is overwhelming, but erroneously admitted evidence was so emphasized that jurors would have viewed it as “highly significant”).

54 See, e.g., Harrington, 395 U.S. at 255-56 (Brennan, J., dissenting). Justice Brennan wrote that the Court, by looking to the overwhelming evidence against Harrington, “today overrules Chapman v. California.” Id. at 255. Justice Brennan clearly viewed the emphasis on the overwhelming evidence as qualitatively different from Chapman. Id. He believed Chapman meant “that for an error to be ‘harmless’ it must have made no contribution to a criminal conviction.” Id. If not, he was concerned that “constitutional error may be
ty has claimed that it is applying the *Chapman* standard in the same breath that it uses the “overwhelming” test.\(^{65}\)

Some of the Court’s confusion stems from its use of the word “contributes.” Although *Chapman* set forth the test of whether the erroneously admitted evidence did not contribute to the verdict,\(^{66}\) it is the application of that standard in subsequent cases that has given meaning to the word “contributes.” The Court has analyzed whether erroneously admitted evidence contributed to the verdict by looking at the character of that evidence.\(^{67}\) The character of the erroneously admitted evidence in turn has involved looking at the error in the context of the other evidence at trial.\(^{68}\) This is the point where the properly admitted evidence becomes a focal point under the *Chapman* test. Thus, for example, an analysis of whether an erroneously admitted confession contributed to the verdict requires looking at the effect of confessions in general as well as the other evidence of guilt admitted at trial.\(^{69}\)

Confessions insulated from attack” if the appellate courts were able to ignore the constitutional error because of overwhelming evidence. *Id.* at 256.

\(^{65}\) For example, in *Harrington*, 395 U.S. at 254, the Court states, “We do not depart from *Chapman*; nor do we dilute it by inference.” The Court went on to find, however, that there was overwhelming evidence against Harrington, and thus the erroneous admission of a confession implicating Harrington was harmless. *Id.* at 254.

\(^{66}\) See supra text accompanying notes 18-20.

\(^{67}\) Justice Brennan, dissenting in *Harrington*, referred to the “character and quality” of the evidence. *Harrington*, 395 U.S. at 256. The majority in *Satterwhite* emphasized the nature of the evidence, focusing on the fact that the erroneously admitted psychiatric testimony was so critical to the prosecution’s case in the penalty phase. *Satterwhite* v. Texas, 486 U.S. 249, 261 (1988). The majority opinion in *Fulminante* also noted the nature of the erroneously admitted evidence—a confession—as such significant evidence in a criminal case that the appellate court should have “exercise[d] extreme caution before determining that the admission . . . was harmless.” Arizona v. *Fulminante*, 111 S. Ct. 1246, 1257-58 (1991).

\(^{68}\) See, e.g., *Fulminante*, 111 S. Ct. at 1258-61 (using the “contributes” standard to analyze the effect of an erroneously admitted confession in light of all the evidence at trial); see also *Satterwhite*, 486 U.S. at 259-60 (analyzing the lack of significant other evidence of future dangerousness in determining whether erroneously admitted psychiatric evidence contributed to a finding of future dangerousness and concluding that the error was not harmless).

\(^{69}\) See, e.g., *Fulminante*, 111 S. Ct. at 1257-61. The *Fulminante* Court held that, without the erroneously admitted confession, the case against the defendant was weak. *Id.* at 1258. The *Fulminante* Court looked at the effect of the admission of the confession on the other evidence at trial and noted that, without the erroneously admitted confession, a second confession, also admitted in evidence, would have been considerably less convincing. *Id.* at 1259. The defendant had allegedly confessed to a jailhouse informant and then to the
are usually considered strong factors in jurors' minds. At the same time, there may be circumstances where a court could conclude that a particular confession was inconsequential to the jury's decision. The nature of the constitutional error and the properly admitted evidence at trial are, thus, intertwined in the Chapman standard.

Although intertwined, the Court's emphasis on one of the two threads—the nature of the constitutional error or the properly admitted evidence—significantly affects the result. When the Court has focused on the erroneously admitted or excluded evidence, emphasizing the significance of that evidence and analyzing whether that evidence "contributed" to the verdict, the Court has

informant's wife. Id. at 1258-59. The confession to the jailhouse informant was erroneously admitted at trial because it was found to have been coerced. Id. at 1252. The confession to the wife was suspect both because the context made it unlikely defendant would confess to her and because she had reasons to make up the confession to support the story of her jailhouse informant husband. Id. at 1259.

The Court further analyzed the effect of the admission of the impermissible confession on the sentencing decision and again found that the credibility of the second confession would have been doubtful without the first confession. Id. at 1280. With only the second, less credible confession, the Court believed there would be insufficient evidence to support an aggravating circumstance. Id.

60 See, e.g., id. at 1257 (referring to defendant's confession as "probably the most probative and damaging evidence that can be admitted against him!" and noting that "confessions have profound impact on the jury" (quoting Bruton v. United States, 391 U.S. 123, 139-40 (1968))).

61 See, e.g., Harrington, 395 U.S. at 254 (finding the unconstitutional admission of codefendants' confessions that implicated defendant was harmless error in light of the "overwhelming" evidence against defendant). But see id. at 257 (Brennan, J., dissenting) (arguing strenuously that one could not conclude that the two codefendants' confessions "did not contribute to Harrington's conviction"). See also Goldberg, supra note 7, at 427. Professor Goldberg convincingly points out that, if one looks at the nature of the evidence, the codefendants' confessions, "[i]t is difficult to imagine how any court . . . could determine beyond a reasonable doubt that the confessions . . . did not contribute to Harrington's conviction—particularly when those confessions described the fourth participant as 'the white guy.' " Id. at 257. Harrington was the only white man charged out of the group of defendants. Harrington, 395 U.S. at 250. See also Fulminante, 111 S. Ct. at 1258 ("In the case of a coerced confession . . . the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless.").
found that the error was not harmless.62 In contrast, when the Court has focused on the properly admitted evidence and analyzed whether that evidence created an overwhelming case against the defendant, the Court has found the error harmless.63 The differing emphasis by the Court may be due to philosophical differences about the goal of the harmless error doctrine.64

According to the Court in a recent case, the goal of the harmless error doctrine is to keep the judicial system focused on the defendant's guilt or innocence through a fair, but not error free trial.65 In Fulminante, the Court stated:

[T]he harmless-error doctrine is essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the

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62 See, e.g., Chapman v. California, 388 U.S. 18, 26 (1967) (holding that the Court could not conclude that improper comments on defendants' silence did not contribute to verdict); Satterwhite, 486 U.S. at 260 (holding that the Court could not conclude that a psychiatrist's testimony regarding defendant's future dangerousness "did not influence the sentencing jury"); Fulminante, 111 S. Ct. at 1258-59 (finding erroneously admitted confession affected believability of only other significant evidence against defendant; therefore, admission of confession was not harmless beyond reasonable doubt); see also Roy v. Hall, 521 F.2d 120 (1st Cir. 1975) (analyzing thoroughly the intertwining of ideas of "overwhelming evidence" with the "contributes" test). The Roy court found that, even though there were two other "confessions," admissibility of a third confession could not be harmless error. Id. at 124. The court first refuted the argument that the evidence was overwhelming by going through all the evidence for and against defendant. Id. at 122. The court next looked at four possible ways that the third confession was significant in establishing the case against the defendant. Id. at 122-23. The court then found a reasonable possibility that the confession would have contributed to the verdict. Id. at 123. Despite the finding on harmless error, the court ultimately found that there was no error in admitting the confession. Id. at 124.


64 For example, compare the majority view in Fulminante, 111 S. Ct. at 1265-66 (rejecting either a deterrence rationale or a concept that an involuntary confession is so "fundamental" a right in the course of holding that the harmless error analysis applies to an involuntary confession) with the dissenting view, id. at 1263-57 (White, J., dissenting) (stating that regardless of the ability to assess the impact of the error on the verdict, some rights represent "important values that are unrelated to the truth-seeking function of the trial," rendering harmless error analysis inappropriate).

65 Id. at 1246.
underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. 66

By equating a "fair" trial with one that correctly determines guilt or innocence, the Court has justified its emphasis on the overwhelming evidence of guilt. 67 In contrast, dissenting Justices have viewed a "fair" trial as incorporating a value in the process or a particular right. For example, the dissenters in Fulminante would have found the admission of a coerced confession reversible per se because a verdict based on such evidence would be "inconsistent with the thesis that ours is not an inquisitorial system of criminal justice." 68

The application of the harmless error doctrine shifts with the viewpoint of the court. If the goal is a correct determination of guilt or innocence, then many errors can be found harmless as long as there is sufficient justification for the verdict. If the goal includes honoring an inherent value in the right denied, then harmless error cannot be found as often. Otherwise the right denied will be slighted. 69 The same language from Chapman, thus, is interpreted differently based upon the underlying assumptions about a "fair" trial.

Another criticism of looking at the overwhelming nature of the evidence against the defendant is that the appellate court is usurping the jury's function. If the appellate court is analyzing whether the jury in a particular case reached the correct result, the court is necessarily re-evaluating the same evidence that the jurors

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66 Id. at 1264 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).
67 Ogletree, supra note 5, at 162-63.
68 Fulminante, 111 S. Ct. at 1256 (White, J., dissenting); see also Ogletree, supra note 5, at 163-72. While criticizing both the logic of applying harmless error to involuntary confessions that will almost, if not always, have contributed to the verdict and the logic and precedent for considering only the accuracy of verdict concerns, Professor Ogletree cogently expresses the societal concern, apart from accuracy, for a system free from reprehensible police techniques. Id. See also Stacy & Dayton, supra note 5, at 91-98 (proposing analysis that focuses on purpose of the right infringed).
69 This was Justice Brennan's concern in Harrington, where he noted that an "overwhelming" evidence test would mean that the constitutional rights of the defendants would be unprotected. Harrington v. California, 395 U.S. 250, 255 (1969) (Brennan, J., dissenting); see also Goldberg, supra note 7, at 438 ("The result of the harmless constitutional error doctrine at the trial court level is to encourage the diminution of rights against the government for all individuals against whom the state has an overwhelming case.").
had to evaluate.\textsuperscript{70} The problem with the appellate court conducting this evaluation is that the appellate justices did not hear or see the live testimony. They cannot evaluate the demeanor of the witnesses.\textsuperscript{71} Moreover, our system is based on lay jurors making the factfinding determinations, with the appellate courts reviewing errors of law.\textsuperscript{72} The overwhelming evidence approach skews the delicate balance between the trial and appellate roles.\textsuperscript{73}

B. HARMLESS OR PER SE REVERSIBLE?

The Supreme Court's approach to harmless error has also been criticized for making a distinction between "structural" and "trial" errors. The Court has created a distinction between a structural error that affects the "framework" of the trial and a trial error that affects the "process" of the trial.\textsuperscript{74} The "framework" includes an unbiased judge, counsel or self-representation, a public trial, a grand jury selected without race discrimination,\textsuperscript{75} and an instruction that accurately requires the standard of beyond a reasonable doubt.\textsuperscript{76} The "process" includes evidence introduced at trial and instructions given to the jury.\textsuperscript{77} The distinction is critical because trial errors are subject to the harmless error doctrine, but structur-

\textsuperscript{70} See Goldberg, supra note 7, at 429-31 (describing appellate court that focuses on the properly admitted evidence as "appellate jury" and explaining that appellate court is operating as the "primary factfinder" if it is assessing whether actual evidence at trial was "overwhelming").

\textsuperscript{71} See id. at 430 (describing demeanor only available to first-hand juror observation).

\textsuperscript{72} Appellate courts ordinarily only review the sufficiency or weight of the evidence as a matter of law. See id. at 427-32 (discussing usurpation of jury).

\textsuperscript{73} See id. at 429. Professor Goldberg states:

When an appellate court tests for harmlessness by reviewing the record to determine whether the remainder of the evidence is so overwhelming that the error did not contribute to the verdict, it sits as an appellate jury. . . . An appellate court defies common sense when it steps out of its traditional role as a reviewing court and attempts to operate as a primary factfinder.

\textsuperscript{74} See Arizona v. Fulminante, 111 S. Ct. 1246, 1264-65 (1991) (discussing constitutional errors which are not subject to harmless error standards); see also infra notes 29-37 and accompanying text (discussing Fulminante).

\textsuperscript{75} Fulminante, 111 S. Ct. at 1265.

\textsuperscript{76} Sullivan v. Louisiana, 113 S. Ct. 2078 (1993).

\textsuperscript{77} Fulminante, 111 S. Ct. at 1263.
al errors are per se reversible.

Professor Ogletree has pointed out that the premise underlying the distinction between structural and trial errors is inaccurate.\textsuperscript{78} As he discusses, the Court assumes that it is possible, or at least easier, to determine whether the result is correct if the error is a trial error and that it is impossible, or very difficult, to determine whether the result is correct if the error is a structural error.\textsuperscript{79} Professor Ogletree points out that, even with the structural error of a biased judge, the evidence against the defendant could be so overwhelming that there is no question about the correctness of the result.\textsuperscript{80} Thus, the assumption underlying the distinction between structural and trial errors—that one cannot determine the correctness of the result with structural errors—is simply wrong. Professor Ogletree explains that the assumption is flawed because the "structure" referred to in "structural error" is a fair trial.\textsuperscript{81} In turn, fair trial is defined in terms of the correctness of the result.\textsuperscript{82} Thus, in the end, a structural error is not very different from a trial error.\textsuperscript{83}

The Court has avoided the problem in logic identified by Professor Ogletree by focusing on the labels instead of the underlying reasoning for distinguishing trial and structural errors. The Court has acknowledged the reasoning that errors should be per se reversible when the prejudice is difficult to calculate, but only when describing accepted structural errors. For example, in *Fulminante*, the Court stated that structural errors "defy analysis by 'harmless-error' standards"\textsuperscript{84} and that a structural error means that the trial "'cannot reliably serve its function as a vehicle for determination of guilt or innocence.'"\textsuperscript{85} In contrast, the Court has treated the speculative nature of the harm as merely an aspect of whether the error in the particular case is harmless when speaking of trial errors. For example, in *Satterwhite*, although cautioning that it

\textsuperscript{78} Ogletree, \textit{supra} note 5, at 161.
\textsuperscript{79} \textit{Id.} at 159-60.
\textsuperscript{80} \textit{Id.} at 165.
\textsuperscript{81} \textit{Id.} at 164.
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.}
\textsuperscript{85} \textit{Id.} (quoting \textit{Rose v. Clark}, 478 U.S. 570, 577-78 (1986)).
might be difficult to assess the impact of error in a capital penalty phase, the Court found it constitutional to apply a harmless error analysis to the evidentiary error of unconstitutionally admitted psychiatric evidence.\textsuperscript{86}

The Court's analysis has become one of categorizing errors as structural or trial, based on an assumption that the harm of trial errors can be assessed by evaluating the other evidence at trial. The reasoning that an error should be treated as per se reversible if it is difficult or nearly impossible to calculate its effect is submerged in trial-structural nomenclature. The speculative impact of some errors simply makes it more difficult to declare an error harmless, but does not foreclose the inquiry.\textsuperscript{87}

Similarly, the laudable idea that certain errors affect such fundamental rights that they cannot be considered harmless is now an abandoned thought. The significance of the right is analyzed through the structural-trial error dichotomy. \textit{Fulminante} is the best example of this phenomenon. The Court analyzed the use of a coerced confession at trial in violation of the Fifth Amendment—long considered so sacrosanct that no such error could be harmless—as trial evidence.\textsuperscript{88} The Court focused only on the confession as one piece of evidence that could be segregated from the rest of the evidence and its impact thus assessed. The \textit{Fulminante} decision is certainly a powerful indicator that the Court is no longer valuing the nature of the right involved in its determi-


\textsuperscript{87} See, e.g., id. at 260-67 (Marshall, J., concurring in part and concurring in the judgment). Justice Marshall, joined by Justice Brennan and, in part, by Justice Blackmun, criticized the majority's conclusion that the harmless error doctrine should apply in \textit{Satterwhite}. The dissenters believed that a harmless error analysis should never apply to the admission of psychiatric testimony in violation of the Sixth Amendment right to counsel established in \textit{Estelle v. Smith}. Id. (citing Estelle v. Smith, 451 U.S. 454 (1981)).

Emphasizing both the nature of the decision in the penalty phase and the need for greater reliability in a death case, Justice Marshall argued that the penalty phase decision called for "a profoundly moral evaluation of the defendant's character and crime." \textit{Id.} at 261. According to Justice Marshall, a reviewing court, thus, engages in "a dangerously speculative enterprise" in "predicting the reaction of a sentencer to a proceeding untainted by constitutional error on the basis of a cold record." \textit{Id.} at 262. Justice Marshall also voiced concern with the reliability of a death sentence, noting that harmless error analysis impinges on reliability by allowing a court to substitute its judgment for what a trier would have done for an actual judgment by a constitutionally untainted sentencer. \textit{Id.}

\textsuperscript{88} See supra notes 36-37 and accompanying text (discussing effect of admission of involuntary confession).
nation whether to apply the harmless error analysis. The Court is, thus, placing great reliance on the structural-trial error categories for applying harmless error rather than an analysis of the symbolic significance of the right infringed. Interpretation of the structural-trial categories is resulting in subjecting more constitutional errors to the harmless error analysis. Few constitutional violations affect the framework, or structure, of the trial, as defined by the Court. This categorization is coupled with an increasing emphasis on equating harmless error with the correct result. The interpretation of the Chapman "contributes to the verdict" standard, although unsettled, appears to be moving in the direction of analyzing how overwhelming the case is against the defendant. Both of these ongoing interpretational quagmires affect the analysis of harmless error in the context of the penalty phase of a capital case. The next section addresses the use of the harmless error doctrine, with its rationale and current interpretational issues, in the penalty phase.

III. THE HARMLESS ERROR ANALYSIS IN THE PENALTY PHASE

In assessing the application of the harmless error analysis to a capital penalty phase, there are two critical areas of inquiry. First, should a harmless error analysis be applied to almost all penalty phase errors in the pervasive manner that it is applied to guilt phase errors? Second, when a harmless error analysis is applied to penalty phase errors, how should a court analyze the impact of an error on the penalty phase decisional process? Both questions hinge on an understanding of the difference in the nature of the decisional processes in the guilt and penalty phases. The discussion of these issues is subdivided into three subsections. The first sets forth a description of a penalty proceeding and the nature of

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89 Professor Ogletree and Professors Stacy and Dayton suggest that the better approach would be to analyze the purposes of the right at stake in lieu of focusing exclusively on the accuracy of the result. Their approaches would value the right involved as well as alleviate the logical flaws in the structural-trial dichotomy. See Ogletree, supra note 5, at 168-72 (raising issue of "societal interest" in protecting constitutional rights); Stacy & Dayton, supra note 5, at 91-98 (proposing an analysis that would consider (1) the impact of the error on the purpose of the right; (2) whether "redoing the process" will rectify the error; and (3) the import of deterrence).
the decisionmaking. The second subsection focuses on how the rationale of the doctrine supports applying the harmless error doctrine differentially to the penalty phase. The third subsection takes a practical look at how a court should assess the harm of an error in the penalty phase.

A. THE PENALTY PHASE DECISION

The penalty phase in a capital case is typically an evidentiary proceeding separate from the guilt phase.\(^90\) The proceeding is usually presented to the same jury that sat for the guilt phase,\(^91\) although a different jury may be impaneled,\(^92\) or a judge alone can preside.\(^93\) The prosecutor's role is to establish at least one statutory aggravating factor. Typical aggravating factors include murders committed during a serious felony, such as a robbery; committed for pecuniary gain; committed to prevent capture on another crime; or committed with a great risk of death to others besides the victim.\(^94\) In those jurisdictions where the aggravating factor is

\[^{90}\text{ See, e.g., CAL. PENAL CODE § 190.4(a) (Deering 1985); FLA. STAT. ANN. § 921.141(1) (West 1985 & Supp. 1993); TEX. CRIM. PROC. CODE ANN. art. 37.071 (West Supp. 1993).} \]

\[^{91}\text{ See, e.g., CAL. PENAL CODE § 190.4(c) (same jury for penalty); FLA. STAT. ANN. § 921.141(1) (penalty proceeding before "trial jury"); TEX. CRIM. PROC. CODE ANN. art. 37.071, § 2(a) (penalty proceeding before the "trial jury").} \]

\[^{92}\text{ See, e.g., CAL. PENAL CODE § 190.4(c) (new jury can be impaneled if "good cause" to dismiss original jury); FLA. STAT. ANN. § 921.141(1) (new jury may be impaneled if there is an "impossibility or inability" for trial jury to continue); N.J. STAT. ANN. § 2C:11-3(c)(1) (West Supp. 1993) (court may discharge guilt phase jury for "good cause" and impanel new jury).} \]

\[^{93}\text{ States are not uniform in their approaches to waiver of jury. For example, in some states, the defendant can waive the jury, although the prosecution may have to consent to the waiver. See, e.g., MO. ANN. STAT § 565.006 (Vernon Supp. 1993) (if state consents, defendant may waive penalty phase jury). In some states, the defendant can waive the jury, but only if there was a plea or a trial to the bench in the guilt phase. See, e.g., CAL. CONST. art. 1, § 16 and CAL. PENAL CODE § 190.4(b) (if defendant pleaded guilty or was tried by judge alone in guilt phase, defendant may waive penalty jury with consent of state); FLA. STAT. ANN. § 921.141(1) (if defendant pleaded guilty or waived jury for guilt phase, defendant may also waive penalty phase jury); N.J. STAT. ANN. § 2C:11-3(c)(1) (if defendant pleaded guilty or waived jury for guilt phase, court may conduct penalty proceeding without jury on motion of defendant and with consent of prosecution).} \]

\[^{94}\text{ An aggravating factor must be proved beyond a reasonable doubt. See, e.g., CAL. PENAL CODE § 190.4(a); N.J. STAT. ANN. § 2C:11-2(c)(2)(a). Aggravating factors, which elevate murder to capital murder, are statutorily listed. Typical aggravating factors include whether defendant has been convicted of another murder; whether the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim; whether} \]
established in the guilt phase, the prosecutor in the penalty phase may present other aggravating evidence, such as the defendant's prior convictions. The defense role in the penalty phase is to present mitigating evidence, such as physical or mental problems, absence of a criminal history, or youth. Although mitigating

the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated assault to the victim; whether the defendant committed the murder as consideration for receipt of anything of pecuniary value; whether the defendant procured the murder by payment or promise of anything of pecuniary value; whether the murder was committed to escape detection, apprehension, trial, punishment, or confinement for another offense; whether the murder was committed while the defendant was committing, attempting, or escaping a murder, robbery, sexual assault, arson, burglary, or kidnapping; whether the victim was a public servant engaged in the performance of his official duties or because of the victim's status as a public servant. N.J. STAT. ANN. 2C:11-3(c)(4). Florida's statutory factors comprise another representative list: the capital felony was committed by a person under sentence of imprisonment; the defendant was previously convicted of another capital felony or felony involving the use or threat of violence to the person; the defendant knowingly created a great risk of death to many people; the capital felony was committed while the defendant was engaged in, was an accomplice, was attempting, or was in flight after committing robbery, sexual battery, arson, burglary, kidnapping, aircraft piracy, or bombing; the capital felony was committed for purpose of avoiding or preventing arrest or escaping from custody; the capital felony was committed for pecuniary gain; the capital felony was committed to disrupt or hinder the exercise of any governmental function or law enforcement; the capital felony was especially heinous, atrocious, or cruel; the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. FLA. STAT. ANN. § 921.141(5).

In some states, the "aggravating factor" must be proved during the guilt phase of the trial. See, e.g., CAL. PENAL CODE § 190.4; TEX. PENAL CODE ANN. § 19.03 (West 1989 & Supp. 1993). In other states, the aggravating factor is proved during the penalty phase. See, e.g., N.J. STAT. ANN. § 2C:11-3(c)(2)(a).

Some states list a variety of factors that may be either aggravating or mitigating. See, e.g., CAL. PENAL CODE § 190.3(a)-(k). California's statute includes the following: the circumstances of crime for which defendant was convicted, including special circumstances per § 190.1; criminal activity which involved use or attempted use of force by defendant; prior felony convictions; extreme mental or emotional disturbance during offense; the victim's participation in defendant's homicidal conduct or act; whether defendant reasonably believed circumstances provided a moral justification or extenuation; whether defendant acted under extreme duress or substantial domination of another person; whether at time of offense the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease, defect, or effects of intoxication; defendant's age at time of crime; whether defendant was an accomplice to the offense or his relative minor participation; or any other circumstance which extenuates the gravity of the crime even though it not be a legal excuse. Id.
circumstances may be statutorily listed, the defense is also entitled to present evidence relevant to nonstatutory mitigating factors. Closing arguments are presented as in a typical trial. The most unusual feature of the penalty phase is the task for the jury or judge. Their decision involves a determination whether aggravating factors outweigh mitigating factors and, therefore, death is warranted. The decision is a judgment call on the relative weight of factors, unlike the assessment of the existence of facts in the guilt phase. The penalty phase decision, therefore,

97 Typical statutory lists of mitigating factors include: "the defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution; the victim solicited, participated in, or consented to the conduct which resulted in his death; the age of the defendant at the time of the murder; the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution; the defendant was under unusual and substantial duress insufficient to constitute a defense to prosecution; the defendant has no significant history of prior criminal activity; the defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder; or any other factor relevant to the defendant's character or record or the circumstances of the offense." N.J. STAT. ANN. § 2C:11-3(c)(5). See Fla. Ann. Stat. § 921.141(6) for a similar list.


100 The actual formulation of the decision varies. In some states, the sentencer must decide if the aggravating circumstances outweigh the mitigating circumstances. See, e.g., ARK. CODE ANN. § 5-4-803(a)(2) (Michie Supp. 1991); CAL. PENAL CODE § 190.3; N.J. STAT. ANN. § 2C:11-3(e)(3); OHIO REV. CODE ANN. § 2929.03(D)(1) (Anderson 1993). Arkansas additionally requires that the sentencer find that the "[a]ggravating circumstances justify a sentence of death beyond a reasonable doubt." ARK. CODE ANN. § 5-4-803(a)(3). In other states, the basic weighing formulation is reversed, requiring the sentencer to find that there are mitigating circumstances that outweigh the aggravating circumstances. See, e.g., Fla. STAT. ANN. § 921.141(2)-(3); ILL. ANN. STAT. ch. 720, para. 5/9-1(g) (Smith-Hurd Supp. 1993); MO. ANN. STAT. § 656.030(4)(3) (Vernon Supp. 1993). Texas has an unusual formulation where death can be imposed only if the jury answers three specific questions affirmatively. TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(b).

101 Like the formulation of the weighing decision, the precise judgment call varies, too. See, e.g., Blystone v. Pennsylvania, 494 U.S. 299 (1990) (upholding Pennsylvania statute that required sentencer to impose death if aggravating circumstances outweighed mitigating circumstances). In other states, the sentencer is expressly authorized to impose life
allows for more individual variation in the reasoning for the decision than is permitted in the guilt phase.  

The use of the mitigating factors by individual jurors also inserts variability into the process. Each juror may assess the value of a given mitigating circumstance individually and may weigh that mitigating circumstance as he or she chooses. For example, suppose the jury has found an aggravating circumstance of a double homicide to exist. The defense has presented three possible mitigating factors: (1) the defendant was abused as a child; (2) the defendant was addicted to drugs; and (3) the defendant is very remorseful. Juror 1 could decide that all three mitigating factors together outweigh the aggravating factor. Juror 2 could decide that the child abuse alone outweighs the aggravating factor. Juror 3 could decide that the child abuse and the addiction are strong mitigating factors, that the defendant was not really remorseful, and conclude that the mitigating factors do not outweigh the

imprisonment if that is deemed the appropriate penalty, regardless of the outcome of the weighing of aggravating and mitigating circumstances. See, e.g., Ark. Code Ann. § 5-4-603(a)(3) (sentencer must find that "[a]ggravating circumstances justify a sentence of death beyond a reasonable doubt"); Mo. Ann. Stat. § 565.030(4)(4) (sentencer may decide, even after weighing process, "under all of the circumstances not to assess and declare the punishment of death"); State v. Wood, 648 P.2d 71, 83-84 (Utah, 1982) (holding sentencer must decide, in addition to finding that aggravating circumstances outweigh mitigating circumstances, that death is appropriate penalty beyond a reasonable doubt), cert. denied, 459 U.S. 988 (1982).


Greater individual variation in the penalty reasoning is, in large part, a result of the requirement that there be individualized consideration of the defendant and his or her circumstances before a death sentence may be imposed. See Lockett v. Ohio, 438 U.S. 586 (1978). For further analysis of the seeming inconsistency between individualized consideration of the defendant and the need to avoid arbitrariness, see Scott E. Sundby, The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing, 38 U.C.L.A. L. Rev. 1147 (1991) (finding consistency in the dual constitutional requirements of individual consideration through mitigating circumstances and the channeling of discretion through regulating aggravating circumstances).


See McKoy v. North Carolina, 494 U.S. 433, 442-43 (1990) (holding it unconstitutional to require jurors to find unanimously that a mitigating circumstance exists and that each juror is entitled to consider mitigating evidence he or she considers relevant to the penalty decision).
aggravating factors. The result of the latitude given to the jurors is that there is much greater uncertainty in how a piece of evidence will be used.

The nature of the decision in the penalty phase is, thus, quite different from the decision in the guilt phase. In the guilt phase of a capital case, as in any other criminal trial, the jury or judge must reach a decision whether certain facts exist. Suppose, for example, that in order to convict a defendant of murder in the first degree, the factfinder must find that the defendant caused the death of a human being, with a purpose to kill, and with premeditation and deliberation. The factfinder is ultimately asked whether each element exists or not. Although the factfinder is making value judgments about the strength of the evidence to support each element, the ultimate finding is whether the facts that the defendant killed, with intent, and with premeditation and deliberation are true or not.

In contrast, the sentencer in a capital case must first find whether certain facts exist and then apply a value judgment to those facts. The judge or jury in the penalty phase must decide whether the evidence is convincing that an aggravating circumstance exists and whether any mitigating circumstances exist. These assessments by the judge or jury are essentially comparable to the factfinder’s task in the guilt phase in deciding if the elements of the crime exist. The sentencer, however, is asked to do

106 See, e.g., id. at 451 (Blackmun, J., concurring) (describing a scenario from Mills v. Maryland, 486 U.S. 367, 374 (1986), where “all 12 jurors agreed that some mitigating factors were present, and outweighed the factors in aggravation, but the jury was not unanimous as to the existence of any particular mitigating circumstance” as example of unconstitutional limitation on the consideration of mitigation).

107 States vary in the formulation of their murder statutes. See, e.g., OHIO REV. CODE ANN. § 2903.01(A) (Anderson 1992) (“No person shall purposely, and with prior calculation and design, cause the death of another.”).

108 States vary in the formulation of their murder statutes. See, e.g., CAL. PENAL CODE § 190.4(a); N.J. STAT. ANN. § 2C:11-3(c)(3) (West Supp. 1993); OHIO REV. CODE ANN. § 2929.03(B).

109 Although the decision of whether a mitigating factor exists is comparable to finding an element of a crime, there is one striking difference. Unlike a trial where all the jurors must agree that an element exists, jurors in the penalty phase are free to decide individually whether mitigating circumstances exist or not. See infra text accompanying notes 125-127 (discussing McKoy v. North Carolina, 494 U.S. 433 (1990), where the Court held it reversible error to require jurors to find a mitigating circumstance unanimously). There are also more subjective evaluations in determining if a mitigating circumstance exists than are typical in determining if an element of a crime exists. See WHITE, supra note 103, at 75 (noting that
more. The sentencer is asked to take the facts found—the aggravating and mitigating circumstances—and balance them against each other.\textsuperscript{109} The balancing is virtually unguided.\textsuperscript{110} The sentencer must make a value judgment whether one group of facts (aggravating circumstances) is greater, the same as, or less than another group of facts (the mitigating circumstances).\textsuperscript{111} Nothing comparable is asked of the factfinder in the guilt phase. The weighing in the penalty phase would be similar to asking the factfinder in the guilt phase to decide if, given that the elements of murder exist and that the elements of self-defense exist, either should outweigh the other. Needless to say, the factfinder in the guilt phase is not asked to make such a judgment call. The jury instructions will state that self-defense prevails if its elements are satisfied.\textsuperscript{112} The jurors are asked only to assess the existence of the elements of the defense and not whether, in their judgment, the defense should outweigh the crime.

The nature of the decision in the penalty phase—the value-based judgment call—cannot be ignored in applying the harmless error doctrine. The validity of the harmless error doctrine is based on the assumption that the effect of the error is determinable.\textsuperscript{113} If the effect of the error on the verdict is minimal, the error is harmless. If the effect of the error on the verdict is too speculative, the reliability of the verdict is suspect. Thus, if the defendant is denied counsel during a trial, the effect of that error is so pervasive

\textsuperscript{109} See supra text accompanying notes 100-101.

\textsuperscript{110} See WHITE, supra note 103, at 76.

\textsuperscript{111} See WHITE, supra note 103, at 75-76 (recognizing “value judgment” in weighing aggravating and mitigating circumstances); Mark Costanzo & Sally Costanzo, Jury Decision Making in the Capital Penalty Phase, 16 LAW & HUM. BEHAV. 185, 189-90 (1992) (suggesting penalty decision is “value-laden decision” which will be influenced by “fairness or group values,” whereas guilt decision is “factual” and influenced by “facts and information”); id. at 197-99 (noting penalty decision is “qualitatively different” from guilt determination); James C. Scoville, Comment, Deadly Mistakes: Harmless Error in Capital Sentencing, 54 U. CHI. L. REV. 740, 755-56 (1987) (proposing sentencer decide the importance of aggravating and mitigating circumstances).

\textsuperscript{112} See, e.g., CAL. PENAL CODE § 197 (noting situations where self-defense is justifiable homicide).

\textsuperscript{113} See Sullivan v. Louisiana, 113 S. Ct. 2078 (1993) (finding harmless error doctrine not appropriate where error is “unquantifiable and indeterminate”).
and difficult to calculate that the error cannot be declared harmless. The effect of an error in the weighing decision in the penalty phase of a capital case is as speculative a proposition as guessing what the effect is of trying a defendant without counsel. The individual choices jurors make about the existence of mitigating circumstances coupled with the unique weighing of factors creates a proceeding fundamentally different from a guilt trial.

An analysis of harmless error in the penalty phase should be refined to take into account the unique characteristics of the decision. The next two subsections discuss an approach to the use of the harmless error doctrine in the penalty phase that considers both the rationale of the doctrine and the nature of the penalty phase decision.

B. HARMLESS ERROR DOCTRINE RARELY APPROPRIATE IN PENALTY PHASE

The harmless error doctrine was developed and applied to constitutional error for sound reasons. If the Supreme Court is going to base its application of the harmless error doctrine on allegiance to its rationale, however, the doctrine must be used sparingly, if at all, in the penalty phase of a capital case. The Supreme Court recognized the difficulty of applying the harmless error doctrine in capital cases in both Satterwhite v. Texas and Clemons v. Mississippi. The Court's dichotomy between structural and trial errors, developed to identify those errors where the harmless error doctrine applies, must be interpreted based on the nature of the penalty phase decision.

Structural error, as understood in Fulminante, should remain reversible per se as in a typical trial. Thus, a biased judge or

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114 See Scoville, supra note 111, at 757 (suggesting harmless error doctrine should not apply to either constitutional or nonconstitutional error in penalty phase).
116 494 U.S. 738 (1990); see also supra notes 39-49 and accompanying text (discussing difficulty in applying harmless error doctrine).
118 Id. at 1264.
119 See supra notes 29-34 and accompanying text. But see Scoville, supra note 111, at 757, (suggesting that because court can determine the effect of structural errors, harmless error analysis would be more appropriate for those errors than it is for evidentiary errors).
denial of counsel in the penalty phase should result in an automatic reversal. These errors, which affect the framework of the penalty proceeding, are too invasive of the entire process to apply the harmless error doctrine reliably.

Additionally, however, the category of reversible per se errors should include a broader array of errors in the penalty phase than in the guilt phase. Structural errors are reversible per se because they pervade the entire process, rendering it difficult to assess the effect of the error. Thus, if the reasoning underlying the separation of structural from trial errors has any vitality, there is a sound case to be made that errors which contaminate the entire penalty phase process must be reversible per se as structural errors. Indeed, the Court in Clemons appeared to anticipate that errors in the penalty phase might create a problem in applying the harmless error doctrine. The Court encouraged an analysis by the state courts of the appropriateness of using a harmless error analysis. Consequently, where it is difficult to determine the effect of an error, legitimate grounds exist to treat the error as structural, even if the same error would be a trial error in the guilt phase. Instructional error and evidentiary error provide useful examples of the need to evaluate penalty phase error as reversible per se independent of the status of such error in a guilt proceeding.

Instructional error in the penalty phase, particularly error in instructing the jury on how to deal with aggravating and mitigating factors, has a more systemic effect in that phase than does an error in instructing the jury on how to assess evidence in the guilt phase. The Supreme Court recognized the systemic effect of an instructional error in the penalty phase in McKoy v. North Carolina. In McKoy, the Court held that it was reversible error to instruct jurors

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120 These are the examples of structural errors given by the Court in Fulminante. See supra notes 33-34 and accompanying text.
121 See supra notes 32-33 (discussing holding of Fulminante Court).
122 See supra notes 32-33 (discussing holding of Fulminante Court).
124 Id. ("In some situations, a state appellate court may conclude that peculiarities in a case make appellate reweighing or harmless error analysis extremely speculative or impossible.").
125 494 U.S. 433 (1990); see also Mills v. Maryland, 486 U.S. 367 (1988) (holding instructions were unconstitutional where it was possible for jury to understand that they could only consider mitigating circumstances found unanimously).
that they had to find a mitigating circumstance unanimously in order to consider it.\textsuperscript{126} Such an instruction, if followed, might have unconstitutionally precluded the consideration of mitigating circumstances determined to be important by the individual jurors.\textsuperscript{127} Other than in an extreme case, such as in \textit{McKoy} where jurors were literally precluded from considering mitigating evidence, however, lower courts generally have failed to consider the different nature of a penalty proceeding in assessing the impact of an erroneous instruction.

For example, in \textit{Delap v. Dugger},\textsuperscript{128} the Florida Supreme Court applied the harmless error analysis to an erroneous jury instruction without considering the nature of the decision as a value judgment. The trial court had instructed the jury only on statutory mitigating circumstances, leaving the impression that the jury could not consider nonstatutory mitigating factors.\textsuperscript{129} The Florida Supreme Court found the error harmless.\textsuperscript{130} According to the court, the error was offset by the introduction of the nonstatutory mitigating evidence, emphasis by the prosecutor that the evidence was relevant, and the lack of any direct instruction by the court to disregard such evidence.\textsuperscript{131} In addition, the court found that the nonstatutory mitigating circumstances of defendant's "'acceptable' "trial and prison conduct" and "'perhaps' "some remorse" were inconsequential given the five aggravating factors.\textsuperscript{132}

The latter reasoning indicates that the Florida court was implicitly assuming that all jurors would dismiss the nonstatutory mitigating evidence. Each juror can assess the mitigating factors differently in different combinations, however, and is ultimately making an independent value judgment about the penalty. As a result, the potential harm from excluding the mitigating evidence cannot be dismissed so easily. The mitigating evidence that the

\textsuperscript{126} \textit{McKoy}, 494 U.S. at 444.
\textsuperscript{127} \textit{Id.} at 442-43.
\textsuperscript{128} 513 So. 2d 659 (Fla. 1987).
\textsuperscript{129} \textit{Id.} at 661. The instruction said that "[t]he mitigating circumstances which you may consider, if established by the evidence, are these. . . ." \textit{Id.} at 661 n.4. The list that followed only included the statutorily prescribed mitigating circumstances.
\textsuperscript{130} \textit{Id.} at 663.
\textsuperscript{131} \textit{Id.} at 662.
\textsuperscript{132} \textit{Id.} at 662-63.
court perceived as unimportant might have affected the value judgment, based upon a sense of fairness or mercy rather than merely logical reasoning, of typical jurors. Each juror was entitled to value and weigh the mitigating factors presented in any fashion that the juror might choose. Thus, the Florida court ignored the variability that is built into the penalty phase decision process in its analysis of the effect of the instruction.

The effect of the variability in the penalty phase decision on the use of the harmless error doctrine cannot be underestimated. A harmless error analysis of evidentiary error, like instructional error, is affected by its variability. Unlike the assessment whether a piece of evidence has affected a decision that an element of a crime exists, where one can be more confident of the likely use of the evidence, the use of evidence in the penalty phase is unpredictable. The following example of evidence erroneously introduced in both the guilt and penalty phases of a trial illustrates this point.

Suppose that impermissible character evidence has been admitted in the guilt phase of a trial for first degree murder in a beating death. A witness testified that, one month before the crime in question, the defendant beat another victim unceasingly with a lead pipe until others intervened. The evidence is inadmissible for the purpose of drawing a character inference. If the evidence is erroneously admitted, we can assume that, if the jurors considered the testimony credible, they would use the evidence for any relevant purpose. The relevant purpose here would be to infer that, if the defendant brutally beat someone with a lead pipe, he is a violent person; if he is a violent person, it is more likely that he

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133 The same reasoning underlies the United States Supreme Court’s reversal in McKoy v. North Carolina, 494 U.S. 433 (1990). See supra text accompanying notes 125-127 (noting concern about failure to recognize that individual jurors may consider and weigh mitigating factors in varying ways during the penalty phase).

134 The Supreme Court has held that a state appellate court can constitutionally conduct its own “reweighing” of the mitigating and aggravating factors. Clemons v. Mississippi, 494 U.S. 738, 750 (1990). However, a court like the Florida court in Delap is not conducting an appellate reweighing. The court instead is finding no reversible error in the proceedings of the lower court. The review of proceedings in the lower court mandates that the appellate court must consider what jurors would do with the evidence.

135 For example, FED. R. EVID. 404(a) would prohibit an inference from the prior beating that the defendant was violent and therefore acted in conformity with that character trait on the occasion of the crime charged.
killed or intended to kill the victim in this case.\textsuperscript{136} Although the individual jurors will assess the strength of the evidence in drawing inferences from it, the use of the evidence is predictable based upon the jury's job of deciding whether the elements of the crime exist.

In contrast, suppose that the same impermissible character evidence is admitted in the penalty phase of a trial. How will the jurors use the evidence of violence? In establishing an aggravating circumstance, or refuting a mitigating circumstance, the jurors will use the testimony of the prior beating in essentially the same way as in the guilt phase. The evidence is predictably relevant to the existence of certain facts.\textsuperscript{137} However, the predictability fades when the jurors are asked to weigh the aggravating and mitigating factors. One juror might view the prior beating in conjunction with the present murder charge as an overwhelming indication that aggravating circumstances outweigh any mitigating circumstances. Another juror might view the prior beating as too far in the past to have any bearing on the decision. Yet another juror might view the prior beating as further evidence that the defendant suffered a deprived youth. Thus, the impact of the testimony of the prior beating on the more amorphous value judgment of whether the aggravating circumstances outweigh the mitigating circumstances is much less certain than the impact of similar evidence in a guilt determination.

Moreover, the concern that the harmless error doctrine results in the appellate court usurping the jurors' role\textsuperscript{138} is exacerbated in the penalty phase. When applying the harmless error doctrine to a typical criminal trial, or to the guilt phase of a capital case, the appellate court is assessing how typical or reasonable jurors used

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\textsuperscript{136} The jurors might also use the prior beating as evidence that the defendant is violent and deserves to be punished for the prior beating. This would not be a permissible use of the evidence and there would probably be a limiting instruction to that effect. Once again, however, this is a predictable use of the evidence in the guilt phase of the trial.

\textsuperscript{137} Although the use is basically predictable in terms of relevancy, it still may remain difficult to gauge whether such evidence "contributed" to the verdict in either the penalty phase or the guilt phase of the trial.

\textsuperscript{138} See supra notes 70-72 and accompanying text.
the evidence at trial in finding particular facts.\textsuperscript{139} In order to find the error harmless, the appellate court must conclude that, given all the evidence presented against the defendant, the erroneously admitted evidence did not contribute to the verdict. The appellate court accomplishes this task by assessing the reaction of reasonable jurors to the evidence. For example, suppose that evidence of drugs found in the kitchen of the defendant's girlfriend was erroneously admitted at defendant's trial for possession with intent to distribute a controlled substance. Also suppose there is evidence that defendant himself had drugs at his house, in his car, and on his person; that he possessed weighing and packaging paraphernalia; and that there was a tape recording of a transaction where defendant accepted money for drugs. An appellate court might conclude that no reasonable jury would have considered the drugs in the girlfriend's kitchen, even though marginally relevant, in finding the facts to be true that defendant possessed drugs and that defendant had an intent to distribute. The appellate court is not redeciding the case; it is judging the probability that evidence was used for a particular purpose.\textsuperscript{140}

\textsuperscript{139} The Court has emphasized that the appellate court is not to look at the impact of the constitutional error in a vacuum, but rather to look at its impact in the context of the actual case tried. Sullivan v. Louisiana, 113 S. Ct. 2078, 2081 (1993). In Sullivan, the Court held that "the question [Chapman] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." \textit{Id.} (discussing Chapman v. California, 386 U.S. 18 (1967)). By rejecting the approach of looking at the effect of the error on a "reasonable jury," the Court was speaking of the effect of the error alone. In assessing the effect of the constitutional error in "the case at hand," the Court had to necessarily assume that the jurors in the case at hand were reasonable or typical jurors. We do not document how individual jurors reasoned in a particular case. Consequently, appellate review is possible only by assuming how a reasonable juror would have responded to the evidence. The Court has recognized that it must assume the jurors in the case at hand were reasonable. \textit{See, e.g.}, \textit{Chapman}, 386 U.S. at 26 (noting the reaction of "honest, fair-minded jurors"). Similarly, in Harrington v. California, 395 U.S. 250 (1965), the Court referred to the effect of the unconstitutionally admitted evidence "on the minds of an average jury." \textit{Id.} at 254. Consequently, while this Article assumes that appellate review would focus on the reactions of jurors to the evidence in the case and not just the constitutional error in a vacuum, it also assumes that the appellate court must presume reasonable or typical reactions by those jurors.

\textsuperscript{140} The concern that a harmless error analysis usurps the jury's role is, in part, due to the nature of the inquiry. If the court is focusing on the correctness of the actual verdict in the case, the court is more likely to be in the position of appellate factfinder. \textit{See} Goldberg, \textit{supra} note 7, at 429; \textit{see also} Stacy & Dayton, \textit{supra} note 5, at 126-38 (criticizing approach
In the penalty phase, however, the appellate court would have to be able to conclude that erroneously admitted evidence did not enter into the individual value judgments of typical, reasonable jurors. The decision involves more intuition into judgment calls than assessing the probability of how evidence was used to find facts. Assume, for example, that evidence of defendant's prior involvement with drugs was erroneously admitted in the penalty phase. The appellate court is in the position of assessing, not the probability that the evidence was pertinent to a fact, but instead how jurors would react to the evidence. The appellate court's task is particularly complicated because the jurors are almost unguided in how they may use the evidence. The jurors may disregard it, count it as a major factor, or consider it a minor mitigator. The appellate court cannot assume that there is a uniform response to the evidence, unlike in the guilt phase where the use of the evidence is more defined. Because it is difficult to analyze the error from the usual angle of the typical jury, the appellate court is more likely to be in fact reweighing the factors as they view them, which usurps the trial jury's function.

The conceptual basis for routinely using the harmless error doctrine in the penalty phase thus rests on a crumbling foundation. The foundational block for the harmless error doctrine, that it is possible to determine the effect of the error on the verdict, is eroded. Applying the harmless error doctrine in a situation where the rationale does not fit will lead to unsupported results. The harmless error doctrine is only beneficial if there is confidence in of assessing actual jury's likely verdict and approach of assessing hypothetical jury's likely verdict, and suggesting a standard of whether the error would affect "a reasonable jury drawing all inferences in a defendant's favor" rather than a focus on the likely outcome).

See Scoville, supra note 111, at 755 (noting that appellate court is put in the position of guessing what a "'merciful' juror" would have done instead of the usual "'reasonable' juror").

See supra notes 103-105 and accompanying text (discussing use of mitigating factors by individual jurors).

The appellate court can constitutionally reweigh the aggravating and mitigating factors. See, e.g., Clemons v. Mississippi, 494 U.S. 738, 748-50 (1990). This is not true of the appellate review of a typical trial where such factfinding is not permissible. However, to the extent that the court is applying the harmless error doctrine in the review of the penalty phase, and not engaging in appellate reweighing, the appellate court should not be usurping the factfinder's function.
the reliability of the verdict. The confidence will be lacking in
penalty phase verdicts if the harmless error doctrine is routinely
applied. In particular, the primary reasoning underlying the
classification of errors as "structural"—that the systemic effect of
the error makes it difficult to assess the impact of the error—leads
to the conclusion that no error in the penalty phase should be
subjected to a harmless error analysis.

Although the rationale for utilizing a harmless error analysis
would reject its application to penalty phase errors, the Supreme
Court has already approved the use of a harmless error analysis in
the penalty phase in two cases. The Court appears wedded to
basing the applicability of the harmless error analysis on the
labeling of an error as "structural" or "trial." Consequently, it is
unlikely that an argument, as advanced above, that the reasoning
behind the doctrine logically leads to a conclusion that the effect of
even a trial error in the penalty phase cannot be satisfactorily
assessed, will prevail. However, even assuming that the use of the
harmless error doctrine in the penalty phase is defensible, courts
tend to apply the doctrine in a perfunctory fashion. At a minimum,
courts should begin to acknowledge the different nature of the
decision in the penalty phase in an assessment of harmless error.
Arguments based on the difficulty of assessing the effect of error in
the penalty phase should be recognized. The labels of "structural"
and "trial" error must not be rigidly applied to the exclusion of the
reasoning behind the Chapman doctrine. The final subsection
addresses how courts should approach an assessment of harmless
error in the penalty phase consistent with Chapman.

144 The reliability of a verdict of death is a consistent theme in the Supreme Court cases. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (noting that because there is a "qualitative difference" between death and a term of imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (recognizing need for a "greater degree of reliability" when the death sentence is imposed); Mills v. Maryland, 486 U.S. 367, 383-84 (1988) ("Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case."); see also WHITE, supra note 103, at 8 (discussing Supreme Court decisions establishing special guidelines to be used for the purpose of enhancing "reliability in capital sentencing").

146 Scoville, supra note 111, at 755-56.

147 See supra text accompanying notes 38-49 (discussing Satterwhite and Clemons).
C. APPLICATION OF HARMLESS ERROR ANALYSIS IN THE PENALTY PHASE

Despite the logical difficulty in assessing whether an error has contributed to the value-based decision in the penalty phase of capital cases as discussed in the preceding subsection, this subsection assumes that courts will continue to apply the harmless error doctrine to penalty phase errors. State courts now routinely apply a harmless error analysis to penalty phase error.\textsuperscript{147} There is a danger being realized in state court decisions that the unique nature of the value judgment being made in the penalty phase will not be factored into the assessment of the harm of a constitutional error. It is crucial to educate the courts to the importance of recognizing that a value judgment, and not a factfinding mission, is occurring in the penalty phase. This subsection proposes a more exacting analysis of harmless error in the penalty phase based upon adherence to the underlying rationale of the doctrine and acknowledgement of the value-based nature of the decision.

If the courts ignore the nature of the decision in the penalty phase, error will be viewed as harmless without a fair assessment of the impact of the error. The California Supreme Court, for example, has treated the penalty decision as though it were a guilt phase decision.\textsuperscript{148} Harmless error is assessed by considering whether the aggravating evidence would have outweighed mitigating evidence even without the offending error.\textsuperscript{149} For instance, in \textit{People v. Robertson},\textsuperscript{150} the court found that, if the trial court unconstitutionally failed to consider evidence of a lack of future

\textsuperscript{147} See, e.g., \textit{People v. Hamilton}, 756 P.2d 1348, 1360 (Cal. 1988) (holding that error in instruction that could have limited consideration of mitigating factors was harmless), \textit{cert. denied}, 489 U.S. 1040 (1989); \textit{Sireci v. State}, 587 So. 2d 450, 454-55 (Fla. 1991) (holding error of admitting testimony that defendant was “proud” of murder was harmless), \textit{cert. denied}, 112 S. Ct. 1500 (1992); \textit{State v. Bey}, 610 A.2d 814, 827-41 (N.J. 1992) (holding that errors, inter alia, of excluding defense psychologist’s report and admitting murder scene photograph were harmless); \textit{State v. Cook}, 605 N.E.2d 70, 83-84 (Ohio 1992) (holding that error of considering prior criminal record and psychiatric report on defendant was harmless); \textit{State v. DePew}, 528 N.E.2d 542, 555 (Ohio 1988) (holding that error of admitting photograph of defendant with a marijuana plant, which was emphasized by prosecutor in closing argument, was harmless), \textit{cert. denied}, 489 U.S. 1042 (1989).

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} \textit{Id.}

\textsuperscript{150} \textit{Id.}
dangerousness, such error was harmless in light of the aggravating evidence.\textsuperscript{151}

In cases such as \textit{Robertson}, the courts treat the harmless error issue as though it were merely a matter of the amount of evidence supporting or not supporting a particular conclusion. The courts fail to acknowledge the nature of the decision the jury is making in weighing the evidence. Thus, in \textit{Robertson}, the court should have considered whether, despite ample aggravating evidence, evidence of the lack of future dangerousness would have contributed to the moral judgment of the sentencer. Even in \textit{People v. Lucero},\textsuperscript{162} where the California Supreme Court found that the erroneous exclusion of psychological evidence in mitigation was not harmless because there was little aggravating evidence,\textsuperscript{153} the court failed to recognize the nature of the decision. The \textit{Lucero} court's emphasis was on the amount of mitigating and aggravating evidence rather than taking into account how the weighing decision is reached.\textsuperscript{154}

Courts should approach the issue of a harmless error analysis in the penalty phase in stages.\textsuperscript{155} The first issue is the applicability of the harmless error doctrine to the type of error involved, as

\textsuperscript{151} \textit{Id.} at 651. Despite statements by the trial judge to the contrary, the California Supreme Court held that the judge had considered the evidence defendant presented of his good adjustment to prison. \textit{Id.} The trial judge, for instance, stated: "The Court does not consider the fact that [the defendant] does not appear to pose a threat to society as long as he's confined to prison to be a factor either in aggravation or mitigation . . . ." \textit{Id.} The California Supreme Court, covering all bases, went on to address the harmless error issue in case the trial judge did not consider the mitigating evidence. \textit{Id.} at 653. In the course of its harmless error discussion, the California court reviewed the aggravating evidence at length and then concluded that the "lack of future dangerousness could not have affected its penalty determination." \textit{Id.}

\textsuperscript{152} 750 P.2d 1342 (Cal. 1988).

\textsuperscript{153} \textit{Id.} at 1353-57.

\textsuperscript{154} \textit{Id.} In \textit{Lucero}, the prosecution called only one witness in the penalty phase. \textit{Id.} at 1353. They called an expert, who testified to the flaws in psychological opinions, to refute the defendant's psychological evidence of impairment. \textit{Id.} The defendant presented mitigating evidence of lack of criminal history, problem childhood, "traumatic military experience," and mental illness. \textit{Id.} at 1352.

\textsuperscript{155} The fact that there are two stages is simply a restatement of the law as understood from \textit{Chapman}. The stages are first, whether the harmless error doctrine is applicable and second, if applicable, whether the error was harmless. These are the same stages identified from \textit{Chapman} and its progeny for all criminal cases. See LAFAVE \& ISRAEL, supra note 53, § 27.6, at 1167. However, the analysis of the issues in each stage must be tailored to the nature of the penalty phase decision.
discussed in the previous subsection. Rather than assuming that the harmless error doctrine will apply because the type of error is one where the doctrine would apply in the guilt phase, courts should independently assess the propriety of using harmless error analysis in the penalty phase. Thus, a court should ask whether the effect of the error is determinable in the context of the penalty phase, remembering the value judgment being made by the jurors in the penalty phase.

Second, if the court finds that the harmless error analysis is applicable, the court next must decide if, beyond a reasonable doubt, the error did not contribute to the penalty verdict. The penalty verdict is the decision that the aggravating circumstances outweighed the mitigating circumstances. This analysis calls for a clear differentiation of the nature of the decision in the penalty phase from the nature of the decision in the guilt phase. Courts should be focused on the effect of the error on the subjective value-based decision of the jurors in balancing aggravating and mitigating factors in contrast to the more objective, factual decision in the guilt phase.

As an example of the process courts should follow, consider the following penalty phase scenario. Suppose that the trial court refused to permit the defendant’s mother to testify in the penalty phase. She would have testified to physical abuse of defendant as a child. However, the court did permit a psychologist to testify for the defense. The psychologist testified to defendant’s abused childhood, based on her interviews with the defendant, his family, and psychological testing, and also testified to the effects of that abuse. Other mitigating evidence included defendant’s alcohol addiction and his remorse for the crime. Aggravating evidence included the nature of the murder and the defendant’s prior convictions for robbery and manslaughter. The statutory aggravating circumstance proved was a murder in the course of a rob-

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156 The court would also have a subsidiary issue of the harmlessness of the error to the decision of the existence of an aggravating or mitigating factor. This analysis would be much more parallel to the guilt phase analysis of harmless error. Regardless of the analysis of the harmlessness of the error for this decision, however, the court would ultimately have to assess the harmlessness of the error with regard to the balancing decision discussed in the text.
bery. The victim was killed in the course of a robbery that resulted in holding hostages for twenty-four hours. The penalty phase jury sentenced defendant to death in a “weighing” jurisdiction. On appeal, the court has found constitutional error in the refusal to admit the mother’s testimony. The remaining issue is whether the error was harmless.

The question for the appellate court in the first stage is whether the harmless error doctrine is applicable to the type of error found. This question revisits the conceptual issue, addressed in the previous subsection, that is largely ignored in the categorization of errors as “structural” or “trial.” If one uses the structural-trial dichotomy, the evidentiary error of excluding the mother’s testimony would undoubtedly be labeled a trial error. Without regard to the nature of the decision, the mother’s testimony would simply be viewed as comparable to the confession in Fulminante, or the psychological testimony in Satterwhite. As trial error, the harmless error doctrine would be applicable.

A more conceptually honest approach would ask whether, given the nature of the decisions in the penalty phase, it is possible, and therefore practicable, to determine the effect of the error. Because the “weighing” decision is so individual to each juror and reflects a value judgment, it is difficult to assess the “contribution” of any error. A court should ask whether it is conceivable to assess the effect of the exclusion of the mitigating testimony of the mother on the critical decisions in the penalty phase. The applicability of

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157 See supra note 94 (examining statutory aggravating factors, such as a murder in the course of a robbery).
158 See supra note 100 (showing typical weighing statutes).
159 The defendant has a constitutional right to have the sentencer consider statutory and nonstatutory mitigating evidence. See, e.g., Hitchcock v. Dugger, 481 U.S. 393, 399 (holding as error the lower court’s refusal to consider nonstatutory mitigating evidence, including past inhalation of car fumes, coming from a poor family, and being an “affectionate uncle”).
160 See supra notes 119-145 and accompanying text (discussing the structural-trial error dichotomy).
161 See supra notes 36-37 and accompanying text (discussing error analysis in Fulminante).
162 See supra notes 40-46 and accompanying text (discussing Satterwhite).
163 See supra text accompanying notes 136-137 (discussing jury’s inferences from evidence). Even the contribution of the error to the preliminary decision by the jurors of whether a mitigating circumstance exists poses problems because each juror may define individually what a mitigating circumstance is and whether it exists.
the harmless error doctrine should not be a foregone conclusion.

In this scenario, it would be quite difficult to assess the effect of the mother's testimony. Some jurors might consider the mother's testimony highly significant to the balance of aggravating and mitigating factors, as the words of the mother might carry greater weight than those of a dispassionate psychologist. Other jurors might view the mother as biased, adding little to the psychologist's summary. The mother's testimony is an example of the phenomenon, discussed in the previous subsection, of a typical trial error that should be treated as a per se reversible, structural error in the penalty phase on the basis of the rationale of the harmless error doctrine. Because of the reliance on the structural-trial labels in lieu of the rationale behind them, however, many courts would quickly label the mother's testimony as trial error. The Supreme Court similarly failed to recognize the different nature of the penalty phase when it applied the harmless error doctrine to the psychologist's testimony in Satterwhite. Consequently, with the Supreme Court's own failure to focus adequately on the different nature of the penalty phase, it is clear that the primary issue for litigation will not be whether the harmless error doctrine is applicable to types of errors, but rather whether individual errors are harmless.

The second stage of analysis is the application of the harmless error standard to the error in the case. The jurors are to decide if aggravating circumstances outweigh mitigating circumstances. Applying the Chapman standard, courts should ask whether there is a reasonable possibility that the excluded evidence would have contributed to that decision.

It is complicated to assess the harm resulting from an error affecting the weighing decision. The appellate court is now in

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164 See supra notes 39-46 and accompanying text (discussing Satterwhite).

165 There is also a preliminary decision made by the sentencer whether aggravating and mitigating circumstances exist. The decision whether a mitigating circumstance exists, although similar on the surface to the guilt phase decision, involves more variability. Nevertheless, an appellate court could pose the question, comparable to a guilt phase error, whether there is a likelihood that the excluded testimony of the mother would have contributed to a decision that a mitigating factor of an abused childhood existed. Here, the court would have to consider the nature of the evidence, the strength in the mother's knowledge, and the weakness in the obvious bias of the mother. The court would also have to consider the other evidence on point—the psychologist's testimony about the abused
the position of guessing how reasonable jurors would make a value judgment, instead of a fact-based decision. The court must assume a reasonable judgmental juror. In fact-based decisions, the court is able to assume a logical progression in reasoning from fact to conclusion. But the weighing decision calls for an assumption of the personal feelings of "reasonable" jurors towards the evidence. The Supreme Court has referred to the penalty phase decision as a "reasoned moral response." 

In the hypothetical scenario concerning the mother’s testimony about the defendant’s abused background, the appellate court must ask: Is there a reasonable possibility that the lack of the mother’s testimony contributed to the jurors’ reasoned moral or judgmental balance of aggravating and mitigating circumstances? This question is significantly more multifaceted than assessing the contribution of evidence to whether a mitigating circumstance or an element of a crime exists. The court must take into account the emotions, as well as the logical reasoning, of the “reasonable” juror.

Thus, in our scenario, the court must assess the likely reaction of jurors to the defendant’s own mother acknowledging physical background. Would reasonable jurors have recognized the mitigating circumstance of an abused background with just the psychologist’s testimony such that the mother’s testimony would not have mattered? Would reasonable jurors have rejected the mitigating circumstance on the basis of just the psychologist’s testimony and would the mother’s testimony, therefore, have contributed to a different decision? It is a more difficult assessment than that made in a typical guilt phase because each juror may, in essence, decide what constitutes a mitigating circumstance as well as whether the evidence supports a finding of that mitigating circumstance.

166 See Scoville, supra note 111, at 755 (referring to “merciful” jurors as the standard, but contrasting the merciful jurors with “reasonable” jurors). The author is correct that the jurors are permitted to include “mercy” in their decision because they are being asked a virtually unguided value judgment. On the other hand, an appellate court must assume an average, typical, or reasonable “merciful” juror in reviewing how the evidence or instructions were likely to be used. Otherwise, the appellate court is in a position of either second guessing particular jurors in a case or speculating on an infinite variety of reactions. This Article agrees that the appellate court must assume an average, typical, or reasonable juror, but it must assume an average, typical, or reasonable juror who is making a value-based decision.

167 The Supreme Court has held that it is constitutional to instruct jurors not to respond with “mere sympathy,” but only because any sympathy jurors feel must be a reaction to the evidence presented. California v. Brown, 479 U.S. 538, 542 (1987).

168 Saffle v. Parks, 494 U.S. 484, 493 (1990) (quoting Brown, 479 U.S. at 545 (O’Connor, J., concurring)). The Court, thus, recognized the combination of a value-based judgment call and logic by referring to the jurors’ task as a “reasoned moral response.” Id.
abuse of her son as well as the jurors' likely reaction to the murder itself and the hostage aspect of the crime. If the court properly focuses on whether it can find that the erroneous exclusion of the mother's testimony did not contribute to the death verdict, it seems unlikely that the court could conclude that the error was harmless. Although there is similar testimony from the psychologist, the nature of the evidence would probably affect reasonable jurors. The testimony of defendant's own mother is strong emotional evidence. Her mere presence on the witness stand may well affect jurors' views of the balance of aggravating and mitigating factors.

Even if the court focuses on whether there is overwhelming evidence to support the death verdict, it seems likely that the error is still not harmless. Although the defendant's prior crimes and hostage-taking present substantial aggravating evidence, the issue is whether there is overwhelming evidence that the aggravating factors outweigh the mitigating factors. To gauge whether the evidence is overwhelming in the penalty phase context, the court would have to conclude that the jurors would not be likely to place significant value on the mother's testimony in conjunction with the other mitigating evidence. Because jurors are free to value mitigating evidence as they choose, a court would be hard-pressed to conclude that reasonable jurors would not place substantial value on a mother's testimony about her son's background. Consequently, if the jurors had heard the mother's testimony, a court could not confidently find that the evidence was overwhelming that the aggravating factors outweighed the mitigating factors.

The nature of the penalty phase decision—the weighing of aggravating and mitigating circumstances—is thus critical in the analysis of harmless error. The harmlessness of the error is based on assessing how much the various pieces of evidence affect the
juries' intuitive feelings about the balance of aggravating and mitigating evidence. Although there is a logical component to the analysis, other intuitive or judgmental components also must be considered.\(^{172}\)

The distinct nature of the penalty phase decision necessitates a clearer delineation of the analysis of harmless error. It is important to understand the reasoning of courts from both a theoretical and a practical view. From a theoretical viewpoint, a clear analytical outline will foster a coherent, principled approach to the harmless error doctrine, which currently is lacking. Courts should, in the first stage, explain why certain errors are subject to harmless error analysis; mere labels of "structural" and "trial" errors are insufficient. Courts should also, in the second stage, clarify their use of the "contributes" standard. From a practical viewpoint, lawyers will be able to understand the merits of the issues and form their arguments with more cohesion based upon an understanding of the principles supporting a harmless error doctrine.

IV. CONCLUSION

The harmless error doctrine conserves judicial time. Judgments that did not affect the verdict are not reversed for error. The preservation of judgments, despite harmless error, promotes the integrity of our criminal justice system. But there is no integrity in a haphazard use of the harmless error doctrine. The doctrine should not be used solely as a vehicle to speed resolution of cases. The harmless error doctrine has a place in our legal system, but only within the boundaries of its legal rationale. If cut loose from its rationale, harmless error demeans the constitutional interests at stake.

The harmless error doctrine is only appropriate if the error's effect on the verdict is calculable. The value-based nature of the

\(^{172}\) For an explanation on a theoretical level of why both a logical and an emotional judgment is made by the jurors in the penalty phase, see Scott W. Howe, Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation, 26 GA. L. REV. 323 (1992) (explaining that penalty phase decision involves assessment of both the culpability and the just deserts of defendant, providing critique of Supreme Court cases, and offering insight into why the Court has trouble finding a principled approach in this area).
decision in the penalty phase of a capital case, weighing aggravating and mitigating factors, renders it difficult, at best, to calculate the effect of an error. A recognition that the value-based nature of the decision in the penalty phase is distinct from the factfinding nature of the guilt or innocence decision in a typical trial is the first step. An important second step will be court decisions on penalty phase error that reflect a better understanding of the purpose and rationale of the harmless error doctrine. The penalty phase verdict requires a harmless error analysis tailored to an understanding of the effect of constitutional error when the decision reflects a value judgment.