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Limiting the Availability of Habeas Corpus Relief for Burden-Shifting Errors--Fourth Circuit Avoids Harmless Error Analysis With a Fundamentally Unfair Standard: Fulton v. Warden, Maryland Penitentiary

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LIMITING THE AVAILABILITY OF HABEAS CORPUS RELIEF FOR BURDEN-SHIFTING ERRORS—FOURTH CIRCUIT AVOIDS HARMLESS ERROR ANALYSIS WITH A FUNDAMENTALLY UNFAIR STANDARD: FULTON v. WARDEN, MARYLAND PENITENTIARY

Federal habeas corpus,¹ once merely a jurisdictional remedy for federal prisoners only,² currently enables one convicted of a

¹ See C. WRIGHT, LAW OF FEDERAL COURTS § 53 (4th ed. 1983). The writ of habeas corpus is a post-conviction vehicle by which one being held in custody may challenge the legal authority of that detention. Id. Stemming from the common law writ by which thirteenth century courts compelled the attendance of necessary parties to the proceedings, it eventually evolved into an independent civil proceeding designed to challenge allegedly illegal detentions. See 3 W. LAFAYE & J. ISRAEL, CRIMINAL PROCEDURE § 27.1(b), at 285-88 (1984). The availability of the remedy was considered important enough by the Framers to warrant protection under the Constitution. See U.S. CONST. art. I, § 9, cl. 2 ("[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in [c]ases of Rebellion or Invasion the public Safety may require it"). It is unclear, however, whether the power of the federal courts to issue the writ is constitutionally rooted or only statutory in nature. See L. YACKLE, POSTCONVICTION REMEDIES § 17, at 77-80 (1981). Several commentators have taken the position that the Framers intended to protect only the availability of habeas relief for federal prisoners, see, e.g., W. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS 40 (1893); W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 26 (1980), a common practice of state courts until it was held to be an unauthorized infringement upon federal authority in Ableman v. Booth, 62 U.S. (21 How.) 506, 523-26 (1859). Others have taken the view that the Suspension Clause is an independent source of judicial power, directing both state and federal courts to issue the writ when appropriate. See, e.g., Paschal, The Constitution and Habeas Corpus, 1970 DUKE L.J. 605, 607. While the Supreme Court has never had occasion to determine authoritatively the question inasmuch as the habeas jurisdiction of the federal courts has been statutorily authorized since the passage of the Judiciary Act of 1789, see infra notes 2-3, several of the Court's opinions imply that it may well be constitutionally rooted, see, e.g., Sanders v. United States, 373 U.S. 1, 11-12 (1963) (statutory restrictions on "the traditional liberality of the writ . . . might raise serious constitutional questions"); Jones v. Cunningham, 371 U.S. 236, 238 (1963) (jurisdictional statute "implements the constitutional command" of availability of writ)(dictum).

² See L. YACKLE, supra note 1, § 19, at 84; Comment, Development of Federal Habeas Corpus Since Stone v. Powell, 1979 Wis. L. Rev. 1145, 1147. The statutory authority of the federal courts to issue a writ of habeas corpus was granted by the Judiciary Act of 1789, see Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82. The original Act, by its terms, was available only to those held in allegedly unlawful federal custody. See Ex parte Dorr, 44 U.S. 103, 105 (1845). Patterned largely after English habeas practice, the scope of the courts' authority under the statute was interpreted as allowing the writ to issue only if the

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crime in state court to attack collaterally the conviction in federal court based on a violation of a federal right. Until recently, once the necessary prerequisites to gain review were overcome, a show-
ing by the petitioner that constitutional error had occurred at the trial stage generally resulted in a grant of the writ of habeas corpus. However, the doctrine of harmless error now enables fed-

Court, 411 U.S. 345, 351 (1973) (petitioner in “custody” although released on his own recognizance); Strait v. Laird, 406 U.S. 341, 345-46 (1972) (military reservist in “custody” of superior officers); Jones v. Cunningham, 371 U.S. 236, 243 (1963) (prisoner in “custody” although paroled). A petitioner also must be able to show a violation of the Constitution or a federal law or treaty. See 28 U.S.C. § 2254(a) (1982). Additionally, a petitioner must have exhausted all available and effective remedies open to a state prisoner in state court, Slayton v. Smith, 404 U.S. 53, 54 (1971); Ex parte Royall, 117 U.S. 241, 251 (1886); see 28 U.S.C. § 2254(b), (c) (1982), even if there has been a clear violation of some constitutional right, see Duckworth v. Serrano, 454 U.S. 1, 2-4 (1981) (per curiam). If the claim before the federal court differs from that presented to the state court, or if the petition contains both exhausted and unexhausted claims, the exhaustion requirement will not be met. See Rose v. Lundy, 455 U.S. 509, 522 (1982) (mixed petition); Picard v. Conner, 404 U.S. 270, 278 (1971) (different claim). Finally, the most complex and confusing requirements involve situations in which petitioners are foreclosed from state review of their claims because of a failure to raise an objection during the trial stage. See Reed v. Ross, 104 S. Ct. 2901, 2906 (1984); Engle v. Isaac, 456 U.S. 107, 116 (1982); Wainwright v. Sykes, 433 U.S. 72, 75 (1977). In Wainwright, the Court held that a defendant’s failure to make a contemporaneous objection would bar habeas relief unless a showing of “cause” for the failure to object and “prejudice” resulting from the error was made. 433 U.S. at 87. Subsequent decisions have not clarified the parameters of “cause” and “prejudice,” and appear to be somewhat inconsistent. Compare Reed v. Ross, 104 S. Ct. 2901, 2912 (1984) (novelty of burden-shifting claim sufficient reason for “cause”) with Engle v. Isaac, 456 U.S. 107, 133 (1982) (claim that shifting of burden of proving self-defense to defendant not novel). It should be noted, however, that when a state appellate court addresses a constitutional claim on the merits despite a procedural default, that default will no longer be a bar to federal habeas relief. See County Court of Ulster County v. Allen, 442 U.S. 140, 154 (1979). For an in-depth discussion on the requirements necessary to gain habeas review, see L. Yackle, supra note 1, §§ 41-104.


See 3 W. Lafave & J. Israel, supra note 1, § 26.6(a), at 257-61; R. Traynor, The Riddle of Harmless Error 14 (1970); Goldberg, Harmless Error: Constitutional Sneak Thief, 71 J. Crim. L. & Criminology 421, 422-23 (1980); Note, Harmful Use of Harmless Error in Criminal Cases, 64 Cornell L. Rev. 538, 540 (1979) [hereinafter cited as Cornell Note]. Generally, harmless error has been defined as error that does not affect the outcome of a trial, see Note, Harmless Constitutional Error, 20 Stan. L. Rev. 83, 83 (1967) [hereinafter cited as Stanford Note], or as error that does not result in a substantial wrong or a miscarriage of justice, see Goldberg, supra, at 422; see also 1 J. Wigmore, Wigmore on Evidence § 21, at 392-94 (3d ed. 1940) (discussing approaches and proposals for defining error).

Under early common law in the United States, even the most trivial of errors was presumed to prejudice the defendant, and required an automatic reversal of the conviction. R. Traynor, supra, at 13; see 3 W. Lafave & J. Israel, supra note 1, § 26.6(a), at 257. This was the result of the adoption by American courts of the English Exchequer Rule, generally believed to have been first enunciated in Crease v. Barrett, 149 Eng. Rep. 1353, 1359 (1835). See 1 J. Wigmore, supra, § 21, at 367-68; Goldberg, supra, at 422. But see R. Traynor,
eral appellate courts to deem most constitutional errors harmless, with automatic reversal required for only a limited number of enumerated types of errors. Presently, the Supreme Court requires

supra, at 4-8 (rule created by subsequent misreading of Crease). Applications of the rule often produced absurd results. See, e.g., People v. St. Clair, 56 Cal. 405, 407 (1880) (conviction reversed because the letter “a” left out of “larceny” in indictment); Williams v. State, 27 Wis. 402, 403 (1871) (conviction reversed because words “and dignity” omitted from indictment that stated offense was “against the peace of the State”).

As a result of the rigid application of the rule, “the criminal trial became a game for sowing reversible error in the record.” Kotteakos v. United States, 328 U.S. 750, 759 (1946). By deliberately making errors adverse to their own cause during trial, counsel were assured of a new trial in case of defeat. Gibbs, Prejudicial Error: Admissions and Exclusions of Evidence in the Federal Courts, 3 Vll. L. Rev. 48, 49 (1957). Responding to a reform movement by several distinguished members of the bar, see Kotteakos, 328 U.S. at 758-60 & nn.10-14; Goldberg, supra, at 422 & n.15, Congress enacted § 269 of the Judicial Code, requiring courts to ignore “technical errors, defects, or exceptions which do not affect the substantial rights of the parties,” see Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181.

Commentators have questioned whether the Court’s subsequent decisions have retained the Chapman test for harmless error. See, e.g., Field, Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of Rationale, 125 U. Pa. L. Rev. 15, 16 (1976) (viewing cases as applying three different tests); Goldberg, supra note 6, at 427-28 (reading opinions as subtle rearrangements of words and ideas as process of eroding constitutional rights); Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988, 1015-18 (1973) (interpreting post-Chapman cases as gradual erosion of prosecutor’s burden of proving harmless of error).

reversal for errors that either violate rights considered as “basic to a fair trial,” or whose prejudicial scope is not “readily identifiable.”9 Nevertheless, the Court has been unable to agree as to whether automatic reversal is necessary when jury instructions unconstitutionally shift the burden of proof on an element of the crime charged to the defendant.10 While the federal courts of ap-

9 See Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978) (deprivation of right to effective counsel not subject to principled review of possible prejudicial effect); Chapman v. California, 386 U.S. 18, 23 & n.8 (1967) (citing examples of “constitutional rights . . . so basic to a fair trial that their infraction can never be . . . harmless error”); see also supra note 8.


In In re Winship, 397 U.S. 358 (1970), the Supreme Court held that the Due Process Clause protects an accused from being adjudged guilty in a criminal trial except upon proof beyond a reasonable doubt of all the facts necessary to constitute the crime charged. Id. at 364. Since the Winship decision, the Court has found jury instructions unconstitutional under the standard set forth in Winship in a variety of contexts. See, e.g., Sandstrom v. Montana, 442 U.S. 510, 522-24 (1979) (instruction that “[t]he law presumes that a person intends the necessary and natural consequences of his acts” may have been interpreted as
HARMLESS ERROR ANALYSIS

The courts generally have not applied different standards for reversal on habeas, as opposed to direct, review once such a constitutional violation has been found to have occurred. Recently, however, in resolving the issue, the courts have taken different approaches in addressing the question of burden-shifting or conclusive presumption by jury; Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975) (instructions placing burden on defendant to prove provocation to reduce murder to manslaughter unconstitutional when malice is essential element under state definition of murder); Cool v. United States, 409 U.S. 100, 104 (1972) (instruction to jury to ignore defense testimony unless it believed testimony true beyond reasonable doubt relieved prosecution’s burden of proof). Yet, the Court has been unable to reach a consensus as to whether unconstitutional instructions may ever be deemed harmless. See, e.g., Koehler, 104 S. Ct. at 1673; Johnson, 460 U.S. at 87-88.

1 See, e.g., Patterson v. Austin, 728 F.2d 1389, 1396 (11th Cir. 1984) (burden-shifting instruction may be harmless when overwhelming evidence of guilt present); Engle v. Koehler, 707 F.2d 241, 246 (6th Cir. 1983) (instruction that shifts burden of proof on intent “can be extremely prejudicial even if overall proof of intent or malice is substantial” if defendant disputes intent), aff’d without opinion by an equally divided Court, 104 S. Ct. 1673 (1984); United States v. Harrigan, 588 F.2d 860, 863 (1st Cir. 1978) (harmless error doctrine could not prevent reversal when erroneous instruction might have been difference between conviction and acquittal); Trimble v. Stynchcombe, 481 F.2d 1175, 1176 (5th Cir. 1973) (per curiam) (harmless error principle inapplicable when alibi and reasonable-doubt instructions “wholly inconsistent”).

There appear to be several different approaches to resolving the question of whether a burden-shifting error was harmless. One approach makes harmlessness dependent upon whether the subject of the instruction was a disputed issue at trial. See, e.g., In re Hamilton, 721 F.2d 1189, 1191 (9th Cir. 1983) (instruction that shifts burden of proof on intent cannot be harmless if intent at issue); Krzeminski v. Perini, 614 F.2d 121, 125 (6th Cir.) (erroneous instruction on intent harmless when defendant concedes intent), cert. denied, 449 U.S. 866 (1980). A second approach goes beyond the “disputed issue” question to ask whether there was overwhelming evidence of guilt. See, e.g., Lamb v. Jernigan, 683 F.2d 1332, 1342 (11th Cir. 1982) (erroneous instruction harmless when evidence of guilt overwhelming), cert. denied, 460 U.S. 1024 (1983); United States v. Alston, 551 F.2d 315, 320 & n.24 (D.C. Cir. 1976) (burden-shifting alibi instructions not harmless when sole evidence was credibility of witnesses, but strong evidence of guilt may support finding of no prejudice). Another approach is to find such errors harmful per se. See, e.g., Hammontree v. Phelps, 605 F.2d 1371, 1380 (9th Cir. 1979) (burden-shifting intent instructions may never be harmless); Trimble v. Stynchcombe, 481 F.2d 1175, 1176 (5th Cir. 1973) (per curiam) (inconsistent instructions on alibi and reasonable-doubt instructions “wholly inconsistent”).

12 L. YACKLE, supra note 1, § 94; see, e.g., Phillips v. Rose, 690 F.2d 79, 81 (6th Cir. 1982) (remanding for issuance of conditional writ of habeas corpus because Sandstrom error found not to be harmless); Lamb v. Jernigan, 683 F.2d 1332, 1342 (11th Cir. 1982) (overwhelming evidence of guilt rendered burden-shifting error harmless); Dietz v. Solem, 640 F.2d 128, 130-31 (8th Cir. 1981) (Sandstrom error may be attacked in habeas corpus proceeding on issue of burden shifting); cf. Milton v. Wainwright, 407 U.S. 371, 373 (1972) (affirming denial of habeas corpus relief because allegedly erroneous admission of confession was harmless beyond reasonable doubt); Wilson v. Estelle, 625 F.2d 1158, 1159-60 (5th Cir. 1980) (petition for habeas corpus properly denied because any error in admitting prior conviction was harmless beyond reasonable doubt), cert. denied, 451 U.S. 912 (1981). Compare Francis v. Franklin, 105 S. Ct. 1965, 1977 (1985) (affirming grant of habeas corpus relief when burden-shifting error not harmless) with Sandstrom v. Montana, 442 U.S. 510, 527 (1979) (reversing, on direct review, state court conviction due to unconstitutional in-
Fulton v. Warden, Maryland Penitentiary, the Court of Appeals for the Fourth Circuit, after determining that constitutionally erroneous burden-shifting instructions are not subject to automatic reversal, held that harmless error analysis is improper when the appeal results from a denial of a writ of habeas corpus. Instead, the court required the petitioners to meet the higher standard of demonstrating that the constitutionally erroneous instructions had rendered the trial fundamentally unfair.

Fulton involved consolidated appeals from denials of writs of habeas corpus to two defendants, each of whom had been convicted in state court on unrelated charges of first-degree murder. At their trials, the defendants each produced some evidence in support of an alibi defense. The jury instructions in each case placed the burden of proof as to the alibi defenses on the defendants. Having been found guilty, each defendant sought habeas corpus relief in federal district court by challenging the constitutionality of the instructions. The district court in each case held that although the challenged instructions were indeed unconstitutional, they were harmless.

On appeal, the Court of Appeals for the Fourth Circuit affirmed the district court's denials of habeas corpus relief. Writing for the majority, Chief Judge Winter noted the unconstitutionality of the instructions, pointing out the conflict existing among the circuits whether burden-shifting errors can ever be harmless.
including that "there is no per se rule of reversal" for such constitutional violations. Judge Winter noted that a consideration of the record as a whole in each case was required to determine the impact of the errors. The court then determined that because the appeals arose from habeas corpus proceedings, the proper standard of review was whether the errors had rendered the state trials fundamentally unfair, a "more demanding standard" than required on direct review of a criminal conviction. After reviewing the record of each case, the court concluded that in light of the evidence, neither trial was rendered fundamentally unfair by the respective error, and therefore affirmed both convictions.

In a dissenting opinion, Judge Phillips contended that any instruction that effectively shifts to the defendant the burden of proving an essential element of the crime charged is per se harmful, and thus any inquiry into harmlessness is inappropriate. Judge Phillips, however, did not discuss the majority's imposition of a "fundamentally unfair" requirement, noting instead that "[t]he majority affirms the denial of habeas corpus relief in both of these cases on the basis that in each . . . [the error] was harmless beyond a reasonable doubt . . . ."

Although the Fulton court correctly noted that one seeking to overturn a criminal conviction for allegedly erroneous jury instructions bears a heavier burden on collateral review than on direct appeal, it is submitted that this distinction relates only to the ne-

26 744 F.2d at 1032. The Fulton court stated that "strict harmless error analysis is not wholly appropriate" on collateral review of erroneous jury instructions. Id. The court reasoned that because on collateral review a petitioner must meet a higher level of proof than is required on direct review, the proper test is not the "less demanding" one of harmlessness, but whether the trial was rendered fundamentally unfair. See id.
27 See id. at 1032-34.
28 See id. at 1034 (Phillips, J., dissenting).
29 Id. (Phillips, J., dissenting).
cessity of establishing an error of constitutional dimension on collateral attack. Therefore, the court's application of a "fundamentally unfair" standard for reversal, after it conceded the unconstitutionality of the instructions in question, was improper. This Comment will first discuss the difference between the burdens that must be borne by defendants seeking to overturn an adverse decision upon direct and collateral review. The Comment will then examine the support relied on by the Fulton court and conclude that in its determination of whether conceded constitutional error is sufficient to require reversal on collateral review, the court erroneously applied the standard used by the Supreme Court to determine if constitutional error is present.

DIRECT VERSUS COLLATERAL REVIEW

It is well settled that a federal appellate court's power of review of a state conviction is "the narrow one of due process, and not the broad exercise of supervisory power that [it] would possess in regard to [its] own trial court." A federal appellate court may reverse the judgment of a district court within its jurisdiction even though the error was not of constitutional dimension, but the exercise of such supervisory powers on collateral review of a state court judgment is prohibited. To prevail on a collateral attack of a state criminal conviction, a petitioner usually must establish the

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violation of some constitutional right. Thus, a petitioner must demonstrate either an identifiable violation of a fundamental constitutional right made applicable to the states by the fourteenth amendment, or a trial error which "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

In determining whether a constitutional violation has occurred as a result of erroneous jury instructions, a reviewing court must first consider the challenged portion of the instructions in isolation to determine whether it could reasonably have been understood by the jury in a manner inconsistent with the accused's due process rights. The court must then review that portion in the context of the jury charge as a whole to determine whether other instructions might have compensated for the erroneous portion so that no reasonable juror could have understood the charge in an unconstitutional manner. This two-part procedural inquiry is aimed primarily at determining whether an accused has been afforded a "fundamentally fair" trial.

LACK OF PRECEDENT

Although the Supreme Court has deemed harmless error anal-

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33 Smith v. Phillips, 455 U.S. 209, 221 (1982); Cupp v. Naughten, 414 U.S. 141, 146 (1973). Although habeas relief may conceivably exist when a state prisoner is imprisoned in violation of a federal law or treaty, see 28 U.S.C. § 2254(a) (1982); supra note 3, virtually all habeas actions by state prisoners involve federal constitutional claims, see supra note 3.


37 Francis, 105 S. Ct. at 1971. Compare Sandstrom v. Montana, 442 U.S. 510, 517 (1979) (given lack of qualifying instructions as to legal effect of presumption, instruction unconstitutional when jury could have interpreted in unconstitutional manner) with Cupp v. Naughten, 414 U.S. 141, 149 (1973) (instruction that "witness is presumed to speak the truth" cured by instruction that witness could be discredited by his own manner or words).

ysis appropriate in habeas corpus proceedings, the Fulton court determined that such an analysis is inappropriate in the context of collateral review of a constitutionally erroneous jury charge. The court relied implicitly on Henderson v. Kibbe, in which the Supreme Court stated that a habeas corpus petitioner bears the heavy burden of showing fundamental unfairness due to allegedly erroneous jury instructions. However, a careful reading of Henderson demonstrates that the question of fundamental fairness, in a due process context, is merely a determination of whether constitutional error was present at trial. Unlike the Fulton court, the

39 See, e.g., Moore v. Illinois, 434 U.S. 220, 232 (1977) (after determining violation of right to counsel at pretrial corporeal identification, Court remanded to determine whether error was harmless or writ of habeas corpus should issue); Milton v. Wainwright, 407 U.S. 371, 372 (1972) (even if testimony concerning confession by habeas petitioner should have been excluded, "record clearly reveals that any error in its admission was harmless beyond a reasonable doubt"); see also L. Yackle, supra note 1, § 90, at 219-20 (1985 Supp.) (discussing several approaches used by courts in analyzing habeas petitioners' claims for reversible constitutional error). In Krzeminski v. Perini, 614 F.2d 121 (6th Cir.), cert denied, 949 U.S. 866 (1980), the court noted two tests for harmless constitutional error on a petition for habeas relief: (1) "whether the error was 'harmless beyond a reasonable doubt'" (citing Chapman and Harrington); and (2) "whether 'in light of the totality of the circumstances...the defendant received a constitutionally fair trial'" (quoting Kentucky v. Whorton, 441 U.S. 786, 789 (1979) (per curiam)). Krzeminski, 614 F.2d at 125. The court continued by noting that "[i]n theory, the Chapman-Harrington test is triggered only upon a demonstration of constitutional error while the 'totality of the circumstances' approach is used to determine whether admitted error was egregious enough to reach constitutional proportions in the first place." Id.

40 See Fulton, 744 F.2d at 1032. See Fulton, 744 F.2d at 1032. The Fulton court cited the previous Fourth Circuit decision of Morris v. Maryland, 715 F.2d 106 (4th Cir. 1983), as support. Fulton, 744 F.2d at 1032. Morris, however, relied on the Henderson decision for the point for which it was cited by the Fulton court. See Morris, 715 F.2d at 108.

41 Henderson, 431 U.S. at 154-55. Id. at 154-57. Standing alone, the Henderson Court's oft-quoted statement that "[t]he burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal," id. at 154, could possibly be read as requiring a habeas petitioner to show something more than "simple" constitutional error, see, e.g., Fulton, 744 F.2d at 1032 (standard is whether instructional error tainted while proceeding such that conviction violates due process); Morris v. Maryland, 715 F.2d 106, 108 (4th Cir. 1983) ("habeas petitioner must meet a 'stricter standard of proof...to show [constitutional] infirmity' than is required on direct review of a criminal conviction") (quoting Cooper v. North Carolina, 702 F.2d 481, 483 n.2 (4th Cir. 1983)). However, it is submitted that such an interpretation can be supported only if "plain error" as used by the Court in that statement is construed as referring to constitutional error. This analysis of the meaning of the oft-quoted statement is clear when read in the context of the paragraph in which it is found. The Court continued: "[t]he question in such a collateral proceeding is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,' not merely whether 'the instruction is undesirable,
Henderson Court specifically found that no constitutional error had been committed. Therefore, the Fulton court's contention erroneous, or even universally condemned," Cooper, 702 F.2d at 484 (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). By "undesirable, erroneous, or even 'universally condemned,'" it is submitted, the Court was specifically not referring to errors of constitutional dimension. Moreover, a careful reading of Cupp reveals that the Cupp Court was merely contrasting the ability of a federal appellate court to reverse inferior federal courts in an exercise of supervisory power with the inability of a federal court to reverse a state criminal conviction absent some constitutional violation. See Cupp, 414 U.S. at 146. Thus, the two statements by the Henderson Court, when read in conjunction and with an understanding of the language quoted from Cupp, establish that the Court was referring to the necessity of a showing by the petitioner of some violation of constitutional rights before habeas corpus relief is justified. This is apparently the manner in which other courts have interpreted Henderson, as several have applied harmless error analysis in habeas cases after finding constitutional error present. See, e.g., In re Hamilton, 721 F.2d 1189, 1190-91 (9th Cir. 1983) (case remanded to lower court which was instructed to grant habeas writ if lower court's shifting burden on issue of intent to defendant was not harmless); Engle v. Koehler, 707 F.2d 241, 244-46 (6th Cir. 1983) (instructions which shifted to defendant burden of proof regarding malice put to harmless error test). In fact, several courts have applied harmless error analysis in habeas cases after citing Henderson in an earlier portion of the opinion. See, e.g., Lamb v. Jernigan, 683 F.2d 1332, 1339, 1342-43 (11th Cir. 1982) (in light of overwhelming proof of defendant's guilt, erroneous instructions were harmless); Dietz v. Solem, 640 F.2d 126, 130, 131 (8th Cir. 1981) (instruction which unconstitutionally shifted burden of proof to defendant subject to harmless error test); Simmons v. Dalsheim, 543 F. Supp. 729, 738, 748-49 (S.D.N.Y. 1982) (some constitutional violations do not demand an "automatic reversal"), aff'd, 702 F.2d 423 (2d Cir. 1983); Rogers v. Redman, 457 F. Supp. 929, 931, 935 (D. Del. 1978) (instructions which required defendants to prove alibi defense by a preponderance not harmless).

"Compare Henderson, 431 U.S. at 156-57 (no constitutional error committed by omission of more complete instructions on causation) with Fulton, 744 F.2d at 1031 (expressing "little doubt" that burden-shifting instructions were constitutionally infirm and noting that state conceded constitutional error). The fact that the Court failed to find any error of constitutional dimension in Henderson necessarily calls into question the statement made in Morris v. Maryland, 715 F.2d 106, 109 (4th Cir. 1983), and quoted in Fulton, that "our task on this appeal is not to apply the harmless error analysis of Chapman v. California, . . . but rather the test laid down by Henderson v. Kibbe." Morris, 715 F.2d at 109 (quoted in Fulton, 744 F.2d at 1032). It is possible that the Morris court meant that if the "fundamentally unfair" test of Henderson is met, the question of whether the error was harmless under the Chapman test is necessarily answered in the negative, since, upon determining that constitutional error was present, the Morris court granted the writ of habeas corpus without further discussion. See Morris, 715 F.2d at 111. If this is the case, it is submitted that the Fulton court simply misconstrued Morris.

However, it is more likely that the Morris court construed Henderson as requiring a more stringent standard for reversal than Chapman, because the statement previously alluded to was made in the context of a discussion pertaining to the distinction between direct and collateral review. See Morris, 715 F.2d at 108-09. It is submitted that if this is the correct view of the Morris rationale, then the Fulton court merely exacerbated an erroneous interpretation of Henderson. It is difficult to imagine that the Henderson decision, which involved the search for constitutional error, was meant to displace Chapman, which involved the question of whether a constitutional error was harmless. Compare Henderson, 431 U.S. at 156-57 with Chapman, 386 U.S. at 26. Although Henderson was a habeas corpus
that a habeas corpus petitioner must show fundamental unfairness resulting from erroneous instructions in addition to constitutional error is without support.\textsuperscript{46} To the contrary, the position taken by the \textit{Fulton} court is directly at odds with several other Supreme Court decisions in which erroneous instructions were deemed to rise to the level of constitutional error.\textsuperscript{48} It is submitted that there are practical consequences in the application of the standard of reversal enunciated by the \textit{Fulton} court that adversely affect a habeas corpus petitioner's rights. The Supreme Court has held that the beneficiary of a constitutional error bears the burden of

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\textsuperscript{45} See supra notes 39-40 and accompanying text. In addition to citing \textit{Henderson}, the \textit{Fulton} court supported its position with a portion of the dissenting opinion of Justice Stevens in \textit{Rose} v. \textit{Lundy}, 455 U.S. 509 (1982). \textit{See Fulton}, 744 F.2d at 1032 & n.6 (citing \textit{Rose} v. \textit{Lundy}, 455 U.S. 509, 543-44 & n.8 (1982) (Stevens, J., dissenting)). Paraphrasing Justice Stevens, the court stated that "[t]here are errors that cannot be considered harmless on direct review but are nevertheless insufficient to render a trial so unfair as to justify use of the habeas corpus remedy." \textit{Fulton}, 744 F.2d at 1032. It is submitted, however, that this reliance is misplaced with respect to the errors in \textit{Fulton}. Although Justice Stevens did state that there exist some constitutional errors "that are important enough to require reversal on direct appeal but do not reveal the kind of fundamental unfairness to the accused that will support a collateral attack on a final judgment," \textit{Rose}, 455 U.S. at 543 (Stevens, J., dissenting), Justice Stevens stated that the claims that belonged in this category are only those that contravene constitutional rights prospectively, see \textit{id.} at 543 n.8 (Stevens, J., dissenting). The reasonable-doubt requirement was held by the Court to warrant retroactive application, \textit{see Ivan v. City of New York}, 407 U.S. 203, 204 (1972), as was the prohibition against burden-shifting instructions, \textit{see Hankerson v. North Carolina}, 432 U.S. 233, 240 (1977). It is therefore submitted that Justice Stevens remarks provide no support for the holding of the \textit{Fulton} court.

\textsuperscript{46} See, e.g., \textit{Francis v. Franklin}, 105 S. Ct. 1965, 1973 (1985) (erroneous charge which shifted burden of proof on issue of intent held reversible error); \textit{Mullaney v. Wilbur}, 421 U.S. 684, 703-04 (1975) (instructions to jury which, pursuant to state law, obligated defendant to show heat of passion violated due process). Despite the fact that both \textit{Francis} and \textit{Mullaney} involved habeas corpus petitions, in neither case did the Supreme Court even allude to a requirement other than a showing of constitutional error. \textit{See Francis}, 105 S. Ct. at 1972-77; \textit{Mullaney}, 421 U.S. at 697-707. In \textit{Mullaney}, once the Court had determined that constitutional error had been committed, it granted the writ of habeas corpus without further inquiry. \textit{See 421 U.S. at 703-04. In \textit{Francis}, once the presence of constitutional error had been determined, the Court turned to the question of whether the lower court had properly applied harmless error analysis. \textit{See 105 S.Ct. at 1977. Although the Court found it unnecessary to determine the propriety of applying harmless error analysis to burden-shifting errors since the lower court was held to have correctly decided that the errors were not harmless, it is submitted that, had a more stringent standard than harmless error been appropriate in a habeas case, the Supreme Court would have remanded the case to the lower court for that determination instead of affirming, or at least would have made some reference to the appropriate standard.}
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convincing a reviewing court, beyond a reasonable doubt, that the error was harmless. However, under the Fulton standard, the burden of establishing fundamental unfairness is borne by the petitioner, the victim of constitutional error. Since the Fulton court's "fundamentally unfair" standard for reversal effectively displaces any harmless error inquiry, the practical effect of such an approach is to shift once again the burden of proof to the defendant, compounding the original trial error.

**CONCLUSION**

In Fulton v. Warden, Maryland Penitentiary, the Fourth Circuit set a standard by which concededly unconstitutional burden-shifting instructions that might be reversible on direct appeal may not merit reversal on collateral review. Although there may be some truth to the recent speculation of commentators that the Supreme Court has begun to limit the availability of habeas corpus relief, there is currently no precedent for the Fulton court's suggestion that a petitioner who complies with the procedural requirements of habeas corpus and alleges that the instructions at his trial were unconstitutional must establish something more than the unconstitutionality of those instructions to merit reversal of his conviction. By holding harmless error analysis inapplicable to burden-shifting errors and obliterating the requirement that the prosecution bear the burden of showing harmlessness, the Fourth Circuit has succeeded only in exacerbating the original constitutional error. In light of the fact that harmless error analysis is routinely applied by the courts on collateral as well as direct review of all constitutional errors not subject to automatic reversal, the Fourth

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47 See Chapman, 386 U.S. at 24.
48 See Fulton, 744 F.2d at 1032.
49 See id.; see also supra note 23.
50 See supra notes 43-45 and accompanying text.
51 See supra notes 45-46.
Circuit, without precedential support, has effectively singled out burden-shifting errors as requiring some higher standard for reversal than other constitutional errors.

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