

PREVIEW OF FIRST THREE PAGES
OF CHAPTER THIRTEEN

RELIEF AND REMEDIES [13.00.0]:

A. BURDENS [13.10.0]:

1. Burdens Generally [13.11.0]: State prisoners bear the burden of demonstrating entitlement to habeas relief. *Engle v. Isaac*, 456 U.S. 107, 134-35 (1982) (burden of justifying habeas relief rests with the prisoner); *Hawk v. Olson*, 326 U.S. 271, 279 (1945) (“Petitioner carries the burden in a collateral attack on a judgment”); *accord Whitney v. Craven*, 460 F.2d 1267, 1267 (9th Cir. 1972) (*per curiam*); *Schlette v. People of State of California*, 284 F.2d 827, 833-34 (9th Cir. 1960). Likewise, federal prisoners bear the burden of establishing that they are entitled to relief under 28 U.S.C. § 2255. *See Coloma v. Holder*, 445 F.3d 1282, 1284 (11th Cir. 2006); *Barnes v. U.S.*, 579 F.2d 364, 365 (5th Cir. 1978); *see also U.S. v. Trumblay*, 234 F.2d 273, 275 (7th Cir. 1956) (the § 2255 “movant must set forth facts and not merely conclusions”).
2. Burdens Under AEDPA [13.12.0]: In cases governed by AEDPA involving state prisoners, see generally Chapter Three, the burden rests with the habeas applicant to show that the state court applied clearly established Supreme Court precedent in an objectively unreasonable manner. *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002).
3. Burden of Establishing Error Not Harmless [13.13.0]: Even if a constitutional error is found (and aside from the deference afforded to state court adjudications under 28 U.S.C. § 2254(d) of AEDPA), the petitioner or movant is not entitled to relief if the error was harmless. On direct review, the government has the burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

On collateral review, however, the government’s burden is

lessened: In those proceedings, courts deem an error harmless so long as it did not have a “substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993); *see also U.S. v. Dominguez Benitez*, 542 U.S. 74, 81 n.7 (2004) (“When the Government has the burden of showing that constitutional trial error is harmless because it comes up on collateral view, the heightened interest in finality generally calls for the Government to meet the more lenient *Kotteakos* standard”). “When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had ‘substantial and injurious effect or influence in determining the jury’s verdict,’ that error is not harmless. And, the petitioner must win.” *O’Neal v. McAninch*, 513 U.S. 432, 436 (1995). The Court has explained that “[b]y ‘grave doubt’ we mean that, in the judge’s mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.” 513 U.S. at 435.

The Supreme Court has not expressly decided the controlling standard for harmless error in the context of a § 2255 proceeding: the *Chapman v. California*, 386 U.S. 18, 24 (1967) harmless-beyond-a-reasonable-doubt standard applied on direct appeal, or the less stringent test applied in § 2254 cases under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), requiring a showing that the error had a “substantial and injurious effect or influence in determining the jury’s verdict.” In one case, however, the Court assumed that the *Brecht* standard applies in all collateral proceedings, including § 2255. *U.S. v. Vonn*, 535 U.S. 55, 63 (2002) (describing *Brecht* as “the variant of harmless-error review applicable on collateral attack”). And notwithstanding the uncertainty in Supreme Court precedents, numerous courts of appeals have concluded that *Brecht* is the appropriate standard to use when conducting harmless-error analysis in a § 2255 case. *See U.S. v. Dago*, 441 F.3d 1238, 1246 (10th Cir. 2006); *U.S. v. Montalvo*, 331 F.3d 1052, 1057-58 (9th Cir. 2003); *Griffin v. U.S.*, 330 F.3d 733, 736 (6th Cir. 2003); *Ross v. U.S.*, 289 F.3d 677, 682 (11th Cir. 2002); *Santana-Madera v. U.S.*, 260 F.3d 133, 140 (2d Cir. 2001) (dicta).

With respect to some types of constitutional claims, the test for harmless error includes a prejudice component that subsumes the *Brecht* harmless error analysis. In these cases, a determination that there was a constitutional violation necessarily means that the error was not harmless. *See, e.g., Benn v. Lambert*, 283 F.3d 1040, 1052 n.6 (9th Cir. 2002) (*Brady* subsumes *Brecht*); *White v. Johnson*, 153 F.3d 197, 208 (5th Cir. 1998) (*Strickland* subsumes *Brecht*).

But some constitutional violations “by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless.” *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988). These are referred to as constituting structural error. Examples include a conflict of interest in representation throughout the entire proceeding, *Holloway v. Arkansas*, 435 U.S. 475 (1978); deprivation of counsel throughout the entire proceeding, *Chapman v. California*, 386 U.S. 18 (1963); the absence of counsel at arraignment proceedings, *White v. Maryland*, 373 U.S. 59 (1963); the unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986); trial by a biased judge, *Tumey v. Ohio*, 273 U.S. 510, 535 (1927); preventing the defendant from representing himself at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177-178 n.8 (1984); and refusing to afford the defendant a public trial, *Waller v. Georgia*, 467 U.S. 39, 49 (1984); *see also U.S. v. Kimbrel*, 532 F.3d 461, 469 (6th Cir. 2008) (“*Batson* errors represent structural errors”); *Williams v. Woodford*, 396 F.3d 1059, 1069 (9th Cir. 2005) (same).

B. HABEAS RELIEF GENERALLY [13.20.0]:

1. Wide Discretion in Choosing a Remedy [13.21.0]: Once the petitioner sustains his burden of demonstrating entitlement to federal habeas relief, the district court has wide discretion in choosing the appropriate remedy. This discretion is not unlimited, however. In deciding upon the appropriate scope of the remedy, the federal court must balance two separate habeas principles: to “dispose of the

matter as law and justice require,” 28 U.S.C. § 2243, and to avoid directly interfering with a state court’s conduct of state litigation. “Within the strictures of these principles, federal courts have most often granted the relief in habeas cases that has required the least intervention into the state criminal