SUPREME COURT OF THE UNITED STATES

No. 06–5247

JOHN FRANCIS FRY, PETITIONER *v.* CHERYL K. PLILER, WARDEN

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

[June 11, 2007]

JUSTICE BREYER, concurring in part and dissenting in part.

I agree with the Court that *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), sets forth the proper standard of review. Cf. *id.*, at 643 (STEVENS, J., concurring). At the same time, I agree with JUSTICE STEVENS that we should consider the application of the standard, that the error was not harmless, and that "*Chambers* error is by nature prejudicial." *Ante*, at 3 (opinion concurring in part and dissenting in part) (citing *Chambers* v. *Mississippi*, 410 U. S. 284 (1973)). Cf. *Kyles* v. *Whitley*, 514 U. S. 419, 435 (1995) (similar statement as to errors under *Brady* v. *Maryland*, 373 U. S. 83 (1963)). Nonetheless, I would remand this case rather than reversing the Court of Appeals.

My reason arises out of the fact that here, for purposes of deciding whether *Chambers* error exists, the question of harm is inextricably tied to other aspects of the trial court's determination. The underlying evidentiary judgment at issue involved a weighing of the probative value of proffered evidence against, *e.g.*, its cumulative nature, its tendency to confuse or to prejudice the jury, or the likelihood that it will simply waste the jury's time. See App. 96–97; Cal. Evid. Code Ann. §352 (West 1995); cf. Fed. Rule Evid. 403. In this context, to find a *Chambers* error a

court must take account *both* of the way in which (and extent to which) the trial court misweighed the relevant admissibility factors *and* of the extent to which doing so harmed the defendant. Moreover, to find this kind of error harmless, as the Court of Appeals found it, should preclude the possibility of a *Chambers* error; but to find this kind of error harmful does not guarantee the contrary. A garden-variety nonharmless misapplication of evidentiary principles normally will not rise to the level of a constitutional, *Chambers*, mistake. Cf., *e.g.*, *United States* v. *Scheffer*, 523 U. S. 303, 308 (1998).

All this, it seems to me, requires reconsideration by the Court of Appeals of its *Chambers* determination. I would not consider the question whether that exclusion of evidence amounted to *Chambers* error because that question is not before us, see *ante*, at 3, n. 1 (opinion of the Court). But the logically inseparable question of harm is before us; and that, I believe, is sufficient.

I would remand the case to the Ninth Circuit so that, taking account of the points JUSTICE STEVENS raises, *ante*, at 1–4, it can reconsider whether there was an error of admissibility sufficiently serious to violate *Chambers*. I therefore join the Court's opinion except as to footnote 1 and Part II–B, and I join JUSTICE STEVENS' opinion in part.