SUPREME COURT OF THE UNITED STATES

No. 03–167

UNITED STATES, PETITIONER *v.* CARLOS DOMINGUEZ BENITEZ

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

[June 14, 2004]

JUSTICE SCALIA, concurring in the judgment.

I agree with much of the Court's opinion and concur in its disposition of the case. I do not, however, agree with its holding that respondent need not show prejudice by a preponderance of the evidence. *Ante*, at 9, n. 9.

By my count, this Court has adopted no fewer than four assertedly different standards of probability relating to the assessment of whether the outcome of trial *would* have been different *if* error had not occurred, or *if* omitted evidence had been included. See *Chapman* v. *California,* 386 U. S. 18, 24 (1967) (adopting "harmless beyond a reasonable doubt" standard for preserving, on direct review, conviction obtained in a trial where constitutional error occurred); *Brecht* v. *Abrahamson,* 507 U. S. 619, 637 (1993) (rejecting *Chapman* in favor of the less defendant-friendly "'substantial and injurious effect or influence'" standard of *Kotteakos* v. *United States,* 328 U. S. 750 (1946), for overturning conviction on collateral review); *United States* v. *Agurs,* 427 U. S. 97, 111–113 (1976) (rejecting *Kotteakos* for overturning conviction on the basis of *Brady* violations, in favor of an even less defendant-friendly standard later described in *Strickland* v. *Washington,* 466 U. S. 668, 694 (1984), as a "reasonable probability"); *id.*, at 693–694 (distinguishing the "reasonable probability" standard from the *still yet* less defendant-friendly "more likely than not" stan-

dard applicable to claims of newly discovered evidence). See generally *Kyles* v. *Whitley,* 514 U. S. 419, 434–436 (1995). Such ineffable gradations of probability seem to me quite beyond the ability of the judicial mind (or any mind) to grasp, and thus harmful rather than helpful to the consistency and rationality of judicial decisionmaking. That is especially so when they are applied to the hypothesizing of events that never in fact occurred. Such an enterprise is not factfinding, but closer to divination.

For purposes of estimating what *would* have happened, it seems to me that the only serviceable standards are the traditional "beyond a reasonable doubt" and "more likely than not." We should not pretend to a higher degree of precision. I would not, therefore, extend our "reasonable probability" standard to the plain-error context. I would hold that, where a defendant has failed to object at trial, and thus has the burden of proving that a mistake he failed to prevent had an effect on his substantial rights, he must show that effect to be probable, that is, more likely than not.