No. 07-544

In The
Supreme Court of the United States

CHRIS CHRONES, Warden,

Petitioner,

v.

MICHAEL PULIDO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

J. BRADLEY O'CONNELL*
Assistant Director
FIRST DISTRICT APPELLATE PROJECT
730 Harrison Street, Suite 201
San Francisco, California 94107
Telephone: (415) 495-3119
Fax: (415) 495-0166
E-mail: jboc@fdap.org
Counsel for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Under *Stromberg v. California*, 283 U.S. 359 (1931), and numerous subsequent opinions, submission of a legally unauthorized theory of liability requires reversal where the reviewing court cannot be certain whether the jury's general verdict rests upon the unconstitutional theory or on a legally valid alternative theory. This case concerns the relationship between the *Stromberg* rule and harmless error analysis:

> Where a habeas court is unable to determine whether a verdict rests upon a legally unauthorized, but factually supported, theory or on a legally valid, but factually contested, alternative theory, does that uncertainty necessarily represent a "grave doubt" as to the error's effect, which entitles the defendant to habeas relief under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and *O'Neal v. McAnnich*, 513 U.S. 432 (1995)?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

RESPONDENT'S BRIEF ON THE MERITS

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

The Fourteenth Amendment, § 1, provides, in pertinent part: ". . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. The State Trial

1. Trial evidence. Michael Pulido was tried on charges of first-degree murder, Cal. Pen. Code § 189, and robbery, *id*. § 211, as well as a robbery felony-murder "special circumstance," *id*. § 190.2(a)(17)(A),[1] and sentence-enhancing allegations of personal use of a firearm and personal infliction of great bodily injury, *id*. §§ 12022.5(a), 1203.075. The charges arose out of a robbery and fatal shooting of a clerk at a gas station/convenience store.

[1] In California, a "special circumstance" finding authorizes either capital punishment or a sentence of life without possibility of parole (LWOP). Cal. Pen. Code § 190.2(a); cf. *id*. § 190.5 (authorizing LWOP for defendant under age 18).

Like petitioner, PBM 2-5,[2] Pulido accepts the California Supreme Court's summary of the trial evidence, Pet.App. 102a-105a, which both the district and circuit courts also adopted, Pet.App. 34a-37a, 2a-5a. Consequently, Pulido will forego a full summary of that evidence here, Supreme Court Rule 24.2, and will provide only a very brief distillation of the most salient facts bearing on the "late joiner" theory at issue here.

Michael Pulido was 16 at the time of the homicide. Pet.App. 32a; RT 308. The prosecution tried this case principally on the theory that Pulido alone committed the robbery and shot the attendant. Pulido's principal accuser was his uncle Michael Aragon,[3] who reported that Pulido made a number of

---

[2] References are as follows: Appendix to the Petition for Writ of Certiorari ("Pet.App."); Joint Appendix ("JA"); Reporter's Transcript ("RT"); Petitioner's Brief on Merits ("PBM"); Amicus Curiae Brief of Solicitor General ("SG"); Amicus Curiae Brief of Criminal Justice Legal Foundation ("CJLF").

[3] Pulido had been staying with his uncle for several weeks while Pulido's guardian, his grandmother, was traveling out of the state. RT 424-426, 718-722, 695-696. Pulido's own father had left when Pulido was a child, and Aragon was like a father or an older brother to him. RT 972, 1466-1467. A child/adolescent psychiatrist testified that Aragon was one of the most important people in Pulido's life, and Pulido would lie to protect him. Pet.App. 76a; RT 1468-1469, 1474, 1477.

Aragon had prior convictions of burglary, cocaine possession, and contributing to the delinquency of a minor, and was on probation. Pet.App. 103a. Aragon's sister described him as a liar, a thief, and a manipulator. Pet.App. 76a; RT 881.

incriminating statements about robbing the station. Pulido however, testified that it was *Aragon* who robbed and shot the attendant. Pulido had been riding with Aragon and remained in the car when Aragon went into the store. Pulido had no foreknowledge of his uncle's plans and rushed into the store when he heard the shot. Pulido only reluctantly assisted Aragon during his flight *after* the killing, by prying open the stolen cash register and then disposing of the register in some roadside bushes. Pet.App. 104a; see RT 934-942, 976-977, 1009-1025, 1322.[4]

2. Instructions and argument. The murder charge went to the jury on three alternative theories: (a) that Pulido personally shot the victim; (b) that Pulido aided and abetted in the robbery prior to or during the principal perpetrator's shooting of the victim; or (c) that Pulido aided in the robbery only after the shooting by assisting in the asportation of the stolen goods during the flight from the scene (the "late joiner" theory).

---

[4] Either the next morning or the following day, Aragon showed up at his sister's house. His shirt was torn, he was glassy-eyed, and (according to the sister's son) he smelled of crack cocaine and appeared "antsy" and "paranoid." Pet.App. 105a; RT 871-873, 884-885.

Aragon later told the police he had been at home with his girlfriend Laura Moore and their infant the night of the crime. He initially said that they had awoken at 12:15 am to feed the baby, but in a later interview he moved the time to 3:00 am, Pet.App. 105a; RT 911, much closer to the apparent hour of the murder (approximately 3:45 am), Pet.App. 102a.

The "late joiner" theory was conveyed through multiple instructions. California's then-extant pattern instructions ("CALJIC") defined any killing during a robbery as felony-murder and imposed liability on any aider/abettor in the robbery, JA 10-11. For purposes of aider/abettor liability, the instructions stated that a robbery "continues so long as the stolen property is being carried away to a place of temporary safety." JA 21. A special instruction added: "For purposes of determining whether the defendant is guilty of robbery felony murder[,] the robbery continues until the robber has reached a position of temporary safety, with or without the stolen property." JA 23.

The prosecutor argued to the jury that Pulido alone committed the robbery and murder and that "Michael Aragon had nothing to do with this murder." RT 1731; see Pet.App. 79a; RT 1669-1671, 1679-1681, 1718. The prosecutor touched only passingly on aiding/abetting, stating that those instructions were given "just in case," but that it would be a "stretch . . . to believe the defendant is guilty not as the shooter but as an aider and abettor." RT 1660-1661. Though he continued to deride Pulido's testimony, the prosecutor also argued that, if believed, Pulido's account would support aider/abettor liability under the felony-murder instructions. "In other words[,] *you have to believe the defendant[']s story for this*. The defendant came up on the stand and gave you one more whopper and said, he wasn't the actual shooter. He was sitting out on top of the hood. *Again, the felony*

murder a place [sic] *the rule applies*." RT 1661, emphasis added.[5]

3. The jurors' queries and verdicts. Pulido's possible liability as an aider/abettor was evidently the primary focus of the jury's five days of deliberations. As detailed in the district court opinion, Pet.App. 59a-63a, the jurors submitted question after question concerning the scope of aider/abettor liability for felony-murder, including some which touched closely on the timing of any assistance which "facilitated" a robbery. JA 33-49. The judge confirmed that felony-murder liability attached to anyone who aided in the *robbery*, not merely to someone who aided in the murder. JA 48-49. However, the trial court was "unable to answer" the jury's question whether aiding/abetting required "'knowledge of unlawful purpose' . . . prior to . . . or during the commission of the crime." JA 41, 43.

In their most elaborate query, the jurors stated, "Felony homicide def[in]ition is unclear to us." The jurors submitted two diagrams reflecting "different interpretations" of the felony-murder aiding/abetting instruction and asked "which is correct?" JA 36-38.

[5] Though he gave an example of the "wheel man" in a bank robbery to illustrate the felony-murder rule, the prosecutor did not attempt to identify any way in which the evidence here indicated that Pulido somehow assisted his uncle *prior to the shooting*. Instead, the prosecutor returned to his primary theme that "I don't think [aiding/abetting] applies here," because Pulido acted alone. RT 1661-1662.

Diagram B contemplated murder liability for "Any" of three possible roles: "Actively commit robbery"; "Robbery intended"; or "Facilitate by aiding." JA 38 (full capitalization omitted).[6] As with the jurors' "before or during" query, JA 43, the trial court declined to answer the question directly and suggested that the jurors "reread" the relevant instructions, JA 39.

The jury ultimately returned verdicts convicting Pulido of murder and robbery and finding the "special circumstance" true. JA 55-57. However, the jurors deadlocked, either 8-4 or 4-8, on the firearm use and infliction of injury allegations. Pet.App. 33a.[7] Unlike the murder and robbery counts and the "special circumstance," those allegations required findings of *personal* firearm use and infliction of injury, rather than aiding and abetting, JA 27-30; see Cal. Pen. Code §§ 12022.5(a), 1203.075. The trial court sentenced Pulido to life imprisonment without possibility of parole.

---

[6] In contrast, Diagram A contemplated liability for "either" of two possible roles, the latter of which combined two of those listed in Diagram B: "Actively commit robbery"; or "Both robbery intended and facilitates by aiding." JA 37 (underlining in original; full capitalization omitted).

[7] As directed by the trial court, the jurors reported only that their division was 8-4, not which way that vote leaned. RT 2006-2007.

B. The State Appeal

On direct appeal, the California Supreme Court repudiated the "late joiner" theory and held that assistance in a robbery would not support felony-murder liability under state law if that assistance occurred only after the homicide. *People v. Pulido*, 15 Cal.4th 713, 719-726 [936 P.2d 1235, 63 Cal.Rptr.2d 625] (1997); Pet.App. 101a-120a; see 106a-115a. It found the jury instructions "defective" and misleading, Pet.App. 117a-119a & fn. 5, in authorizing felony-murder liability for "a person who aids and abets only in the asportation phase of robbery, after the killing is complete. . . . [T]hat implication would be incorrect." Pet.App. 118a-119a.

The state court declared the submission of that unauthorized theory harmless. The court quoted the introductory sentence of the special circumstance instructions which referred to a murder committed "while the defendant was engaged in or was an accomplice in" a robbery. Pet.App. 116a; see JA 12. The state supreme court construed the special circumstance verdict as proof that the jurors found "that defendant's involvement in the robbery, whether as direct perpetrator or as aider and abettor, commenced before or during the killing." Pet.App. 116a.[8]

---

[8] As the Solicitor General notes, the state supreme court did not apply the *Chapman* "harmless beyond a reasonable doubt" test, *Chapman v. California*, 386 U.S. 18 (1967). SG 30; see Pet.App. 53a (district court decision). Instead, it relied on state

(Continued on following page)

C. Federal Habeas Proceedings

Pulido filed a pro se petition for a writ of habeas corpus, 28 U.S.C. § 2254. The state "tacitly conceded" that the submission of the unauthorized "late joiner" theory represented federal constitutional error[9] and defended the judgment solely on harmless error grounds.

The district court granted the writ in an extensive opinion. *Pulido v. Lamarque*, 2005 WL 6142229 (N.D. Cal. 2005) (unreported); Pet.App. 32a-97a. The district court conducted a two-stage harmless error analysis. First, it applied the AEDPA[10]/28 U.S.C. § 2254(d)(1) standard and found that the state court's harmless error declaration was both "contrary to" and an "unreasonable application" of the *Chapman* standard, which should have applied on direct appeal. Pet.App. 52a-65a. Second, the district court found that the instructional error had a "substantial and injurious effect or influence" under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Pet.App. 65a-67a.

The district court recognized a defect in the special circumstance instructions, which fatally undercut the state court's conclusion that the special

---

authorities allowing affirmance "if other parts of the verdict demonstrate that the jury necessarily found the defendant guilty on a proper theory. [Citation.]" Pet.App. 117a.

[9] Appellant's Opening Br. at 52, *Pulido v. Lamarque*, 9th Cir. No. 05-15916 [2005 WL 3128204].

[10] Anti-Terrorism & Effective Death Penalty Act.

circumstance verdict cured the misinstruction on the underlying murder count. In the form submitted to Pulido's jurors, the special circumstance instructions did *not* require a finding of participation in the robbery contemporaneous with the killing. Both the oral and written versions of the substantive instruction stating the criteria for the robbery felony-murder special circumstance required such a verdict either: 1) if "the murder was committed while the defendant was engaged" in robbery or attempted robbery; "or" 2) if it "was committed in order to carry out or advance" the robbery "or to facilitate the escape therefrom or to avoid detection."[11] As the state has subsequently conceded, the instructions were defective in presenting these two requirements in the disjunctive ("or") – "a mistake the California Supreme Court had not detected." PBM 9 fn. 2.[12] The second of

---

[11] "To find that the special circumstance, referred to in these instructions as murder in the commission of robbery is true, it must be proved:

> 1. The murder was committed while the defendant was engaged in the commission or attempted commission of a robbery; **or**
>
> 2. The murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the robbery was merely incidental to the commission of the murder." JA 14; RT 1643, emphasis added.

[12] The state court had quoted only the verdict form and the introductory sentence of the several pages of instructions on the special circumstance, Pet.App. 116a; JA 12, 56, and had not

(Continued on following page)

these alternatives authorized a special circumstance verdict without any finding that Pulido's own role in the robbery was contemporaneous with the killing. Consequently, contrary to the state court's assumption, the special circumstance verdict did not provide any assurance that the jurors found any pre-killing assistance in the robbery. Pet.App. 55a-57a.

The district court also reviewed the sequence of juror queries and responses by the trial court, especially the jurors' two diagrams positing alternative interpretations of felony-murder liability. JA 36-38. One of the options in Diagram B represented an unauthorized theory, based on merely "facilitat[ing]" a robbery which the defendant had not intended. Pet.App. 61a-63a; JA 38.[13] The trial court did not "remedy this misconception," but "simply referr[ed] the jurors back to the erroneous instruction." Pet.App. 62a-63a. Nor did it answer the jurors' "crucial question" whether an aider/abettor must have "'knowledge of the purpose' . . . prior to . . . or during the commission of the crime," though that query went "to the crux of" the underlying misinstruction on the timing requirement. Pet.App. 61a; JA 41, 43.

---

examined the substantive instruction stating the requirements for a verdict, JA 14.

[13] "[T]he jury's Diagram B . . . asks whether [Pulido] could be found guilty of felony murder if he only 'facilitate[d] by aiding.' Because the definition of aiding and abetting contained in the felony murder and robbery instructions omitted the crucial timing element, this prong would not represent a legally correct option." Pet.App. 62a.

Finally, because the evidence was in conflict whether Pulido had assisted in the robbery prior to the shooting, the omitted timing requirement was contested, rather than uncontroverted, under *Neder v. United States*, 527 U.S. 1, 19 (1999). Pet.App. 63a.

Together, the uncertainty as to the actual basis of the verdict, the conflicting evidence on the timing of Pulido's involvement, and the queries suggesting the jurors' focus on the invalid theory demonstrated that the misinstruction had a "substantial and injurious effect or influence" under the *Brecht* standard. Pet.App. 65a-67a.[14] The district court entered judgment granting relief on the instructional claim. Pet.App. 97a.[15]

---

[14] "Because the Court cannot be reasonably certain that the jury, if required to do so, would have found that [Pulido's] involvement in the robbery preceded the victim's death, the Court is left with 'grave doubt as to the likely effect of [the] error on the jury's verdict.' " Pet.App. 66a, citing *O'Neal v. McAnnich*, 513 U.S. 432, 435 (1995).

[15] The district court also considered and rejected several non-instructional habeas claims, including prosecutorial vouching for Aragon and a perjured testimony claim, based on a key prosecution witness' recantation. Pet.App. 67a-96a. At trial, Aragon's girlfriend Laura Moore had backed up Aragon's alibi that he was home with her and their baby at the time of the shooting. But, almost three years after trial, Moore contacted the lead police detective on her own initiative "to set the record straight." She averred that Aragon had left late that night, ostensibly to buy cigarettes, and had not yet returned by 2:00 am when she awoke to feed the baby. Pet.App. 71a-73a. The district court also noted additional evidence, not before the jury, probative of Aragon's involvement in the crime. Aragon had

(Continued on following page)

The Ninth Circuit affirmed that judgment in a per curiam opinion. *Pulido v. Chrones*, 487 F.3d 669 (9th Cir. 2007); Pet.App. 1a-24a. It held that the submission of the unauthorized "late joiner" theory required reversal, unless the court could be certain that the jurors actually relied upon a legally valid alternative ground. Like the district court, the circuit found that the special circumstance verdict did not provide any such assurance. The concededly-defective version of the special circumstance instructions did not require any finding that Pulido's own participation in the robbery was contemporaneous with the killing. Because the record did not establish that the jurors actually relied on a valid theory of contemporaneous aiding/abetting, that uncertainty required reversal of the murder conviction, under *Stromberg v. California*, 283 U.S. 359 (1931), and subsequent cases. Pet.App. 11a-12a.

The Ninth Circuit's *Stromberg* analysis relied on essentially the same case-specific circumstances as

---

failed a lie detector test. Pet.App. 76a. The trial court also had excluded evidence of a similar uncharged offense, in which Aragon "took a cash register" from a convenience store "by tearing the wires out of the wall, the same modus operandi used at [this] convenience store." Pet.App. 76a; see RT 66-73.

In upholding the district court's denial of relief on both the perjured testimony and prosecutorial vouching claims, the Ninth Circuit emphasized that the deadlock on the personal gun use allegation demonstrated that the jurors "must have rejected Aragon's testimony" and "apparently believed that Aragon was the shooter." Pet.App. 28a, 26a.

the district court's finding of prejudice under the *Brecht* standard. But, like several prior Ninth Circuit cases, the per curiam opinion characterized the submission of an unauthorized theory as a "structural" error, which could only be harmless where the record established that the jurors had actually relied on a proper ground. Pet.App. 11a.[16]

There were two separate concurring opinions. Though bound by the earlier Ninth Circuit cases, Judge O'Scannlain criticized the circuit's treatment of submission of invalid theories as structural and argued that it should be subject to harmless error review on the same terms as other misinstructions on elements. Pet.App. 12a-15a.

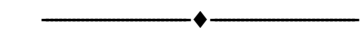
Judge Thomas defended the Ninth Circuit's application of the *Stromberg* rule to unauthorized alternative theories. Pet.App. 15a, 24a. But he also "wr[o]te separately to emphasize that the result the majority reaches would be the right result even under a harmless error standard." Pet.App. 15a. Like the district court, Judge Thomas observed that the "supposedly curative" special circumstance instruction "compound[ed] rather than alleviat[ed]" the risk that the jurors convicted "even while accepting Pulido's theory of after-the-fact assistance." The trial court

---

[16] Accord, e.g., *Lara v. Ryan*, 455 F.3d 1080, 1085-1087 (9th Cir. 2006); *Martinez v. Garcia*, 379 F.3d 1034, 1038-1041 (9th Cir. 2004), cert. den., 543 U.S. 1054 (2005); *Suniga v. Bunnell*, 998 F.2d 664, 667, 669 (9th Cir. 1993).

exacerbated those errors by merely "referr[ing] the jurors back to their flawed and inconsistent instructions," Pet.App. 22a-23a.

The full Ninth Circuit denied the state's petition for rehearing en banc, with no judge requesting a vote. Pet.App. 31a.



SUMMARY OF ARGUMENT

This is a case of conceded constitutional error – the submission of an unauthorized theory extending felony-murder liability to an aider/abettor who only joined in the robbery after the principal perpetrator's killing of the victim. The district court found the error prejudicial under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), while the Ninth Circuit reached the same result under *Stromberg v. California*, 283 U.S. 359 (1931), requiring reversal where the record does not establish whether the jury relied upon a legally unauthorized theory or on a valid alternative ground. While the Ninth Circuit characterized the error as "structural," the *Stromberg* rule is better understood as prescribing the proper application of prejudice review to an invalid theory. This Court should affirm because, though the Ninth Circuit may have employed the wrong nomenclature, it made the same

case-specific determinations necessary to a finding of prejudice under *Brecht*.[17]

In both civil and criminal cases, this Court has long held that a general verdict cannot stand where a case goes to a jury on multiple theories, one of which is legally unauthorized, and the record does not indicate whether the jurors relied upon the unauthorized theory or upon a valid, alternative ground. *Stromberg v. California*, 283 U.S. at 367-368; see Part II, *post* (discussing analogous civil cases). As recently as 1991, the Court reaffirmed the applicability of that standard to legally unauthorized (as opposed to factually unsupported) grounds of liability. *Griffin v. United States,* 502 U.S. 46 (1991).

This Court's harmless error jurisprudence has developed side-by-side with its many cases applying

---

[17] The district court first found that the state supreme court's harmless error declaration was an unreasonable application of *Chapman v. California*, 386 U.S. 18 (1967), under 28 U.S.C. § 2254(d)(1) and then conducted a separate prejudice analysis under *Brecht*. This Court has subsequently clarified that this two-stage approach is unnecessary because the *Brecht* analysis "obviously subsumes" any "AEDPA/*Chapman*" review of the state court's finding of harmlessness. *Fry v. Pliler*, 551 U.S. ___, 127 S.Ct. 2321, 2327 (2007). Consequently, although the state attempts to cast its arguments in the language of AEDPA, Pulido will focus the prejudice inquiry strictly on *Brecht*, in accordance with *Fry*. In any event, because the state court failed to consider the complete instructions and ignored other crucial aspects of the record, its decision was a classic "unreasonable application," as discussed in the district court decision, Pet.App. 54a-65a. See Part III, *post*.

the *Stromberg* rule and rests on similar principles of respect for the right to jury determination of contested facts. Although removal of an element from the jury is subject to harmless error review, that error is necessarily prejudicial where the evidence on the omitted element was in conflict. *Neder v. United States*, 527 U.S. 1, 19 (1999).

Both the district and circuit courts granted habeas relief because the record did not establish whether the jurors relied upon the unauthorized "late joiner" theory or on a legally valid alternative ground. The deadlock on the personal firearm use allegation indicated that some jurors relied on aiding/abetting, and the evidence on the timing of Pulido's assistance in the robbery was in conflict. The jury's other verdicts did not resolve that uncertainty because the defective special circumstance instructions did not require any finding of contemporaneous participation.

Despite the district and circuit courts' common focus on the uncertainty concerning the basis for the murder verdict, the courts nominally applied different standards. The district court framed its review as a traditional harmless error inquiry under *Brecht*, Pet.App. 65a-67a, while the Ninth Circuit described its application of the *Stromberg* rule as a form of "structural defect" analysis, Pet.App. 11a-12a.

The state has seized upon the Ninth Circuit's "structural defect" label and argues that the *Stromberg* rule is inconsistent with contemporary harmless error cases. The state contends that, like other

instructional errors affecting elements, submission of a legally unauthorized theory is subject to *Chapman* harmless error review on direct appeal and to the *Brecht* "substantial and injurious influence" standard on habeas review.

Pulido submits that both the state and the Ninth Circuit are half right. In view of this Court's limitation of the "structural defect" category to errors which are wholly exempt from harmless error analysis, submission of an unauthorized theory represents a form of "trial error." But *Stromberg* is fully compatible with contemporary harmless error authorities.

Stromberg is best understood as defining a rigorous form of harmless error review, analogous to *Neder*'s rule that omission of an element cannot be harmless if that element was factually disputed. *Neder v. United States*, 527 U.S. at 19. So too, where a case goes to a jury on multiple theories and the reviewing court is unable to determine whether the jury relied upon a legally unauthorized theory or upon a valid alternative ground, that uncertainty necessarily represents both a "reasonable doubt" (*Chapman*) and a "grave doubt" (*Brecht*), as to the error's effect on the verdict.

Although the Ninth Circuit was mistaken in its "structural defect" nomenclature, it is unnecessary for this Court to remand the matter, because the *substance* of the Ninth Circuit's analysis was correct. See Part IV, *post*. By applying a *Stromberg* analysis and determining that the record did not establish that the

jurors actually relied on a correct ground, the Ninth Circuit conducted exactly the inquiry required by *Brecht*. Because the Ninth Circuit has already made the requisite findings for *Brecht* prejudice, a remand would be an unnecessary exercise, and this Court should affirm the judgments of both lower courts granting habeas relief.

ARGUMENT

I. *STROMBERG V. CALIFORNIA* IS FULLY CONSISTENT WITH CONTEMPORARY HARMLESS ERROR ANALYSIS. WHERE A REVIEWING COURT CANNOT DETERMINE WHETHER THE JURORS RELIED UPON A LEGALLY UNAUTHORIZED THEORY OR ON A VALID ALTERNATIVE GROUND, THAT UNCERTAINTY REPRESENTS BOTH A "REASONABLE DOUBT" AND A "GRAVE DOUBT" AS TO THE ERROR'S EFFECT ON THE VERDICT.

A. The Conceded Constitutional Error.

Michael Pulido testified that his uncle Michael Aragon robbed the convenience store and shot the clerk. Pulido, who had remained outside in the car, had no knowledge of his uncle's robbery plans until he heard the shot and ran inside. However, he admitted assisting his uncle during the flight after the shooting – by prying open the stolen cash register and giving Aragon the cash and by disposing of the register in some roadside bushes. The prosecution tried

Pulido primarily on the theory that he alone committed the robbery and murder and that Aragon had "nothing to do" with the crime. RT 1731, 1669. But the prosecutor also passingly argued that, even if the jurors believed Pulido's "story," he was still guilty of felony murder as an aider/abettor. RT 1661.

As correctly distilled by the Solicitor General, "the case was submitted on two valid theories (respondent personally killed the victim or aided and abetted the robbery contemporaneously) and one invalid theory (respondent aided and abetted the robbery only after the killing occurred)." SG 15. On direct appeal, the California Supreme Court squarely repudiated the instructions' "late joiner" theory and held that post-killing participation in a robbery could not support felony-murder liability, but the state court declared the misinstruction harmless. Pet.App. 106a-120a.

There is no dispute that allowing a jury to convict a defendant based on conduct which does not come within the state's definition of the offense violates elementary principles of due process. *Fiore v. White*, 531 U.S. 225, 228-229 (2001); *In re Winship*, 397 U.S. 358, 364 (1970); see also *United States v. Gaudin*, 515 U.S. 506 (1995) (duty to instruct accurately on elements of offense). As the Solicitor General states, "conviction for a non-existent crime would violate the Due Process Clause." SG 16 (citing *Fiore* and

Gaudin). As it did below,[18] the state has conceded, "Unconstitutional instructional error occurred . . . because there was a reasonable likelihood that the jury found respondent guilty of felony murder by using an incorrect theory of accomplice liability – one that did not require the jury to find that respondent had aided and abetted robbery before the killing." PBM 11; see also PBM 18 (citing *Boyde v. California*, 494 U.S. 370, 380 (1990); *Estelle v. McGuire*, 502 U.S. 62, 72 & fn. 4 (1991)).[19]

It is evident that a substantial number of jurors rejected the prosecution's primary theory of personal commission and convicted Pulido as an aider/abettor. After submitting multiple questions concerning the erroneous felony-murder instructions, JA 33-54, the jurors ultimately deadlocked, either 8-4 or 4-8, on enhancing allegations of *personal* firearm use and personal infliction of great bodily injury, RT 2006-2007; see JA 27-30 (instructions on enhancements).

---

[18] Appellant's Opening Br. at 52, *Pulido v. Lamarque*, 9th Cir. No. 05-15916 [2005 WL 3128204].

[19] Both the state supreme court's repudiation of the instructions' "late joiner" theory, Pet.App. 118a-119a & fn. 5, and the state's express concession of constitutional error under the "reasonable likelihood" standard distinguish this from another habeas case, set for argument on the same date (Oct. 15, 2008). Compare Brief for Petitioner at i, 25-40, *Waddington v. Sarausad*, No. 07-772 [2008 WL 2219954] (state court upheld instructions as correct statement of accomplice liability, and state disputes circuit court's holding that instructions were ambiguous and misleading).

As the Solicitor General observes, the erroneous "late joiner" instructions implicate both the *Stromberg* line of cases on submission of an unconstitutional alternative theory, *Stromberg v. California*, 283 U.S. 359 (1931); *Griffin v. United States*, 502 U.S. 46 (1991); and the *Rose-Neder* line on misinstruction on an element of the offense, *Rose v. Clark*, 478 U.S. 570 (1986); *Neder v. United States,* 527 U.S. 1 (1999). SG 22. The state and the Solicitor General attempt to portray these as conflicting lines of authorities and urge this Court to repudiate the *Stromberg* rule. Unfortunately, the Ninth Circuit may have contributed to confusion on this score by describing *Stromberg* as a form of "structural defect" analysis.

In fact, there is no inconsistency between *Stromberg* and harmless error review. Rather than state any rule of automatic reversal, *Stromberg* defines the proper harmless error inquiry for submission of an invalid alternative theory (much as *Neder* defines the scope of such review for omission of an element).

B. The *Stromberg* Rule Requires Reversal Where the Reviewing Court Cannot Determine Whether a General Verdict Rests on an Unconstitutional Theory or on a Valid Alternative Ground.

"[T]he Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two

grounds was relied upon by the jury in reaching the verdict. [Citations.]" *Mills v. Maryland*, 486 U.S. 367, 376 (1988). The Court first articulated the rule in *Stromberg v. California*, 283 U.S. 359, 367-368 (1931), and has applied it at least a dozen times over the intervening decades.[20]

"A host of our decisions . . . has applied . . . 'the rule of the *Stromberg* case' to general-verdict convictions that may have rested on an unconstitutional ground. [Citations.]" *Griffin v. United States*, 502 U.S. 46, 55 (1991). These have included all manner of unconstitutional theories, ranging from First Amendment error in *Stromberg* itself to circumvention of grand jury consideration, *Stirone v. United States*, 361 U.S. at 216-219, violation of the Full-Faith-and-Credit Clause, *Williams v. North Carolina*, 317 U.S. at 291-304, Eighth Amendment error, *Mills v. Maryland*, 486 U.S. at 376-377, and due process

[20] *Williams v. North Carolina*, 317 U.S. 287, 292 (1942); *Pierce v. United States*, 314 U.S. 306, 310 (1941); *Cramer v. United States*, 325 U.S. 1, 36 fn. 45 (1945); *Thomas v. Collins*, 323 U.S. 516, 528-529 (1945); *Terminello v. City of Chicago*, 337 U.S. 1, 5 (1949); *Yates v. United States*, 354 U.S. 298, 311-312 (1957) (overruled on other grounds, *Burks v. United States*, 437 U.S. 1, 8 (1978)); *Stirone v. United States*, 361 U.S. 212, 217-219 (1960); *Street v. New York*, 394 U.S. 576, 585-588 (1969); *Leary v. United States*, 395 U.S. 6, 31-32 (1969); *Bachellar v. Maryland*, 397 U.S. 564, 570-571 (1970); *Clay v. United States*, 403 U.S. 698, 704-705 (1971); *Jenkins v. Georgia*, 418 U.S. 153, 157-158 (1974); *Mills v. Maryland*, 486 U.S. at 376-377; accord *Boyde v. California*, 494 U.S. at 379-380; *Chiarella v. United States*, 445 U.S. 222, 237 fn. 21 (1980) (each recognizing the rule).

errors, e.g., *Leary v. United States*, 395 U.S. at 29-32, such as occurred here.

Over the years, the Court has refined the *Stromberg* rule. Submission of an unconstitutional or otherwise legally-unauthorized alternative ground is not reversible per se. Reversal is required only "on a record that [leaves] the reviewing court uncertain as to the actual ground on which the jury's decision rested." *Zant v. Stephens*, 462 U.S. 862, 881 (1983); see also *Griffin*, 502 U.S. at 52-56. The judgment may stand where the record affirmatively shows that the jurors made the necessary findings for the valid alternative theory, such as where they returned a separate verdict corresponding to the valid ground. *Zant* at 881.

Stromberg requires reversal only where the defect in the theory is one of *legal invalidity*, rather than insufficient factual support. *Griffin*, 502 U.S. at 56-60. The state asserts that *Griffin* "mentioned *Stromberg*'s rule of alternative-legal-theory error . . . , but again only to distinguish it." PBM 32. The Court did a good deal more than that. More so than any prior case, *Griffin* explained the rationale of the *Stromberg* rule and reaffirmed its continuing application to submission of theories which fall outside the scope of the offense or violate other constitutional precepts.

The distinction between factually unsupported and legally erroneous theories represents a "clear line" which "happens to be a line that makes good

sense." *Griffin*, 502 U.S. at 59. While "jurors *are* well equipped to analyze the evidence [citation]" and weed out factually unsupported theories, they are not similarly "equipped" to avoid legally insufficient grounds, such as a theory that "fails to come within the statutory definition of the crime." Hence, "there is no reason to think that their own intelligence and expertise will save them from that error." *Ibid.*, emphasis in original.[21]

The timing of *Griffin*'s ratification of the *Stromberg* rule is noteworthy. Like *Mills v. Maryland*, 486 U.S. at 376-377 (which applied *Stromberg* to erroneous penalty phase instructions), *Griffin* post-dates this Court's initial cases on the applicability of harmless error analysis to improper presumptions and other defective instructions on elements. *Rose v. Clark*, 478 U.S. 570 (1986); *Pope v. Illinois*, 481 U.S. 497 (1987).[22] Moreover, this Court decided *Griffin* just

---

[21] The Solicitor General states, "Unlike in *Griffin*, 'the continued adherence to the holding[s] in *Yates*' and *Stromberg is* potentially at issue in this case." SG 15, emphasis in original; but cf. *Griffin*, 502 U.S. at 56 (referring only to *Yates*). The Court did question *Yates*' extension of the *Stromberg* approach to a theory which was legally improper (a time-barred alternative ground for conviction) but which did not violate due process or any other constitutional rule. *Griffin* at 55-56; see *Yates v. United States*, 354 U.S. at 311-312. But the Court expressed no misgivings about *Stromberg*'s continuing application to constitutional error, such as submission of a ground outside the scope of the correct definition of the offense. *Griffin* at 59.

[22] See also *Carella v. California*, 491 U.S. 263 (1989); *Yates v. Evatt*, 500 U.S. 391 (1991).

eight months after *Arizona v. Fulminante*, 499 U.S. 279, 306-312 (1991), which developed the contemporary "trial error"/"structural defect" framework for determining the applicability of harmless error analysis. The *Griffin* Court plainly saw no inconsistency between the *Stromberg* rule and the principles of its harmless error jurisprudence. Instead, both lines of cases rest upon a similar respect for the jurors' constitutional prerogative to determine contested facts.

C. Harmless Error Analysis Does Not Permit a Reviewing Court to Substitute Itself for the Jury. Under *Neder*, the Removal of an Element from the Jury Cannot Be Harmless Where the Evidence on That Element Was in Conflict.

1. Standards of prejudice. There are two dimensions to any harmless error inquiry. The first is the basic standard to be applied by the reviewing court – that is, the degree of assurance necessary for a court to declare an error harmless. In *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), the Court formulated the prejudice inquiry for appellate review of federal criminal convictions as whether an "error had substantial and injurious effect or influence in determining the jury's verdict."

Two decades later, the Court adopted a more rigorous standard for review of constitutional errors in both state and federal trials. That now-familiar

test requires reversal unless the state can "prove beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

However, where the issue arises on federal habeas review of a state conviction, the federal court should apply the *Kotteakos* "substantial and injurious effect or influence" test, rather than the *Chapman* standard applicable on direct appeal. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). In *O'Neal v. McAnnich*, 513 U.S. 432 (1995), the Court elaborated on the degree of certainty required for a prejudice finding under *Brecht*: Where the habeas court has "grave doubt" whether the error affected the verdict, such that it views the matter as in "equipoise," that uncertainty satisfies the *Brecht* test and entitles the petitioner to habeas relief. *O'Neal* at 435-438, 444-445; see also *Kotteakos*, 328 U.S. at 765.

2. Scope of harmless error review of instructional error. The other dimension of harmless error/prejudice analysis is the specific inquiry necessary for a particular category of error. While *Chapman* and *Brecht* define the degrees of assurance necessary for harmless error determinations for direct appeals and habeas review respectively, the *Rose-Neder* cases address more specifically the scope of harmless error review of various forms of instructional error. Most errors in instructing on the elements of a charged offense are susceptible to harmless error review. *Rose v. Clark*, 478 U.S. 570 (1986); *Carella v. California*, 491 U.S. 263 (1989);

Yates v. Evatt, 500 U.S. 391 (1991) (each involving improper presumption concerning an element); *Pope v. Illinois*, 481 U.S. 497 (1987) (misstatement of standard for determination of one element);[23] *California v. Roy*, 519 U.S. 2 (1996) (misstatement of intent element); *Neder v. United States*, 527 U.S. 1 (1999) (omission of one element); *Washington v. Recuenco*, 548 U.S. 212 (2006) (failure to submit enhancement).

However, the Court has drawn the line at submission of a constitutionally inadequate definition of the "reasonable doubt" burden of proof. *Sullivan v. Louisiana,* 508 U.S. 275 (1993). Because "a misdescription of the burden of proof . . . vitiates *all* the jury's findings[,] . . . [a] reviewing court can only engage in pure speculation – its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" *Id*. at 281, emphasis in original (quoting *Rose v. Clark*, 478 U.S. at 578).

---

[23] *Pope* involved a misstatement of the standard for determining whether allegedly obscene materials violated community norms. *Pope* at 500-503. While the state has attempted to characterize *Pope* as an invalid "theory" case (and to suggest that it represents a departure from *Stromberg*), PBM 14, 33, this Court's own subsequent description of *Pope* as a "misstatement of element" is much closer to the mark. *Neder v. United States*, 527 U.S. at 10; see also SG 20. (*Pope* would be more relevant to the present case if it had involved submission of two alternative bases for conviction – e.g., two distinct books or films, one of which represented constitutionally protected speech.)

In both "structural defect" cases, such as *Sullivan*, and "trial error" cases, such as *Rose* and *Neder*, the Court has scrupulously respected the jurors' constitutionally-prescribed role as arbiters of the facts, especially when the evidence is in conflict. The Court has not allowed reviewing courts to invade the jurors' province by substituting their own assessments of the weight of conflicting evidence for actual determination of those facts by jurors.

> Harmless-error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee. [Citations.] *Sullivan*, 508 U.S. at 279-280, emphasis in original.

The state has aptly described *Neder v. United States* as the "culminat[ion]" of this "modern line" of cases, PBM 15. Beyond its classification of removal of an element as a form of "trial error," *Neder* defined *how* a court must conduct its harmless error review. Consistent with its earlier refusals to allow the "wrong entity" to substitute itself for the jury, *Rose*, 478 U.S. at 578; *Sullivan*, 508 U.S. at 281, the Court

recognized that any harmless error inquiry must respect "the jury trial guarantee," lest the appellate court "'become in effect a second jury to determine whether the defendant is guilty.' [Citation.]" *Neder*, 527 U.S. at 19. To avoid any "'denigration of the constitutional rights involved' [citation]," *ibid*., the Court prescribed a rigorous framework, *which requires a finding of prejudice when the evidence on the omitted element is in conflict or genuinely disputed*:

> [S]afeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error – for example, *where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – it should not find the error harmless. Neder*, 527 U.S. at 19, emphasis added.

That standard forbids any judicial reweighing of conflicting evidence or inferences. "Rather a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Neder*, 527 U.S. at 19. Thus, the court determines whether the evidence was disputed or in conflict, such that the omitted element presented a genuine factual question for jury. That determination is similar to those which courts make every day in assessing whether the evidence is sufficient to permit

a defense theory or a lesser included offense to go to the jury.[24] As in those contexts, the dispositive inquiry is simply whether there is a "disputed issue of fact" on the relevant question. Cf. *Sansone v. United States*, 380 U.S. 343, 351, 353 (1965).[25] If so, then the "controverted" character of the evidence going to the omitted element compels a finding of prejudice. *Neder* at 18-19.

D. Like *Neder*, the *Apprendi* Line of Cases Reflects the Court's Refusal to Allow Judges to Supplant Jurors in Making Crucial Factual Determinations.

Although it concerns the scope of the right to jury trial, rather than the standards for review of

---

[24] Indeed, in *Rose*, this Court compared harmless error review of an unconstitutional presumption to the type of limited assessment of the evidence incident to a decision to submit a lesser included offense. *Rose v. Clark*, 478 U.S. at 581-582 & fn. 10. "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. [Citations.] A parallel rule has been applied in the context of a lesser included offense instruction [citations]." *Mathews v. United States*, 485 U.S. 58, 63 (1988).

[25] As the Court admonished over a century ago, the sufficiency review incident to submission of a defense or lesser offense does *not* entail any weighing of conflicting testimony, credibility assessments, or the like. "If there were some appreciable evidence upon that subject, its proper weight and credibility were for the jury." *Stevenson v. United States*, 162 U.S. 313, 316 (1896). It "is not for the court to say, nor is it for the court to decide upon the weight to be given to them. . . ." *Id.* at 322.

violations of that right, this Court's *Apprendi* line also deserves brief mention. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005); *Cunningham v. California*, 549 U.S. 270 (2007). The Court's initial development of the *Apprendi* doctrine was roughly contemporaneous with its decision in *Neder v. United States*.[26] *Apprendi* reflects the same vigilance against judicial usurpation of jurors' constitutional prerogative as finders of fact, which guided *Neder*'s formulation of the harmless error framework for omission of an element. See *Apprendi*, 530 U.S. at 476-480; *Blakely*, 542 U.S. at 305-308.

Just as a trial judge may not make additional factual determinations which increase the sentence beyond that authorized by the jurors' verdict (*Apprendi*), neither may a reviewing court, under the guise of harmless error, make its own factual determinations on an element which was improperly removed from the jury, when the evidence on that element was "contested" (*Neder*).

---

[26] During the same Term as *Neder*, the Court decided a case which proved to be a crucial precursor to *Apprendi*. *Jones v. United States*, 526 U.S. 227, 239-252 (1999) (construing statute as requiring jury determination of sentencing-enhancing fact to avoid possible constitutional infirmity). The following Term, it decided *Apprendi* itself.

E. The *Stromberg* Rule Is Consistent with the Court's Harmless Error Jurisprudence.

The *Stromberg-Griffin* rule, the *Rose-Neder* harmless error cases, and the *Apprendi* cases all rest upon a common understanding of "the need to give intelligible content to the right of jury trial." *Blakely v. Washington*, 542 U.S. at 305. We rely upon jurors to do two things: 1) to make findings of historical fact (that is, to determine what happened), guided by the reasonable doubt burden of proof; and 2) to apply the law, as stated in the judge's instructions, to those factual findings.

In assessing the effect of errors which distort the latter function (e.g., misstatement of an element, submission of an invalid legal theory), the Court has steadfastly refused to allow reviewing court judges to supplant the jurors' preeminent factfinding role by declaring errors harmless based upon their own assessments of conflicting evidence.

The state and the Solicitor General each perceive the *Stromberg* rule and *Neder*-type harmless error analysis as mutually exclusive. Ironically, in positing this dichotomy between the two, their analysis mirrors that of the Ninth Circuit opinions which they are seeking to overturn. Pet.App. 11a.

There is no tension between the *Stromberg* rule and harmless error analysis. Because a court can frequently determine that a verdict rests on a proper ground, *Stromberg* is better understood as

an application of harmless error review, rather than as a structural defect rule. Where a court's review of the record leaves it uncertain whether the jurors relied on the valid or the invalid theory, that uncertainty necessarily represents both a "reasonable doubt" (*Chapman*) and a "grave doubt" (*Brecht-O'Neal*) as to the error's effect.

The state and the Solicitor General each emphasize that it makes no sense to allow harmless error review where the only theory of liability is defective (such as where the instructions omit an element), but to require automatic reversal where the jury receives both valid and invalid theories. PBM 12, 27; SG 11, 22-25. Properly understood, the *Stromberg* rule does not result in any such anomaly.

In the typical omitted element situation, the jury is presented with an alleged factual scenario which could legitimately support a conviction, but the jurors receive an incomplete checklist of the findings necessary for that offense. See *Neder*, 527 U.S. at 12 ("absence of a complete verdict"). Where "an omitted element is supported by uncontroverted evidence" – e.g., the federally insured status of a bank, the victim's status as a police officer, or (in *Neder*) the "materiality" of a failure to report $5.5 million in income – "the erroneous instruction is properly found to be harmless." *Id*. at 17, 18. Conversely, "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – [the court] should not find the error harmless." *Id*. at 19.

Submission of a theory allowing a conviction on a factual scenario falling outside the scope of the offense will also typically involve a misstatement of one or more elements of the offense.[27] But it presents additional, more acute problems, which call for an approach to prejudice which incorporates the lessons of both the *Stromberg-Griffin* and the *Rose-Neder* lines. "Reliance" on the erroneous "late joiner" instructions means something more than a mere failure to check off one of the required findings. These jurors may have sifted through the conflicting evidence and concluded that Pulido played no role in the crime until after the shooting. Submission of an invalid theory poses the risk that the jurors may well have convicted on the basis of findings of historical fact which should have entitled the defendant to an acquittal.

The *Stromberg* rule reflects this Court's appreciation that the Constitution cannot tolerate such a risk that a defendant was convicted based upon findings of a factual scenario falling outside the scope of the offense. *Stromberg* represents a *categorical* application of harmless error analysis, comparable to *Neder*. Just as the contested character of the evidence on an omitted element requires a finding of prejudice, *Neder*, 527 U.S. at 19, the same is true of a reviewing

[27] See SG 22 (acknowledging that the error implicates both *Stromberg* and *Rose-Neder* "paradigms").

court's uncertainty whether the jurors based their verdict on an unconstitutional ground.

F. Where a Court's *Stromberg* Review of the Record Does Not Disclose the Actual Basis of the Jurors' Verdict, That Uncertainty Necessarily Represents Both a "Reasonable Doubt" (*Chapman*) and a "Grave Doubt" (*Brecht-O'Neal*) as to the Error's Effect on the Verdict.

Where the record provides the requisite certainty that the jurors actually relied on the valid ground, the error will be harmless. Together, the *Stromberg-Griffin* and *Rose-Neder* lines provide several tools for that determination. The reviewing court should consider: the relationship of other verdicts to the valid theory; whether there is any evidentiary support for the invalid theory; whether the evidence on the valid theory is uncontroverted or in conflict; and whether there are any affirmative indicia of the jurors' thinking.

First, submission of an invalid theory will be harmless where the jurors returned another verdict which required them to make the necessary factual findings corresponding to the valid theory. *Zant v. Stephens*, 462 U.S. at 881.[28]

---

[28] *Lara v. Ryan*, 455 F.3d 1080, 1086-1087 (9th Cir. 2006), the principal case discussed in the Ninth Circuit opinion, Pet.App. 11a, is a prime example. The instructions submitted an

(Continued on following page)

Second, we can generally be confident in jurors' ability to weed out *factually insufficient* alternative grounds. *Griffin*, 502 U.S. at 59-60. Where a legally unauthorized theory is also factually unsupported, the error will ordinarily be harmless, as several circuit courts have held.[29] Conversely, where there is evidence supporting the legally invalid theory (such as Pulido's testimony that he aided his uncle only after the shooting), the risk remains that the jurors may have convicted based upon the erroneous ground.[30]

Third, by analogy to *Neder*, the court should also consider the state of the evidence concerning the *valid* alternative theory. As in the omitted element context, that inquiry does not involve any reweighing of conflicting evidence, but simply an assessment of whether the evidence on the valid theory was "uncontroverted" or "contested." *Neder*, 527 U.S. at 18, 19. When the evidence on the valid ground is in conflict,

---

invalid "implied malice" theory of attempted murder, which did not require any finding of specific intent to kill. But the jurors also returned a separate enhancement verdict that the attempted murder was premeditated and thus also necessarily found the requisite intent to kill. See also, e.g., *LaFevers v. Gibson*, 182 F.3d 705, 716 (10th Cir. 1999).

[29] E.g., *United States v. Edwards*, 303 F.3d 606, 641 (5th Cir. 2002); *United States v. Holly*, 488 F.3d 1298, 1306 fn. 5 (10th Cir. 2007), cert. den., ___ U.S. ___, 128 S.Ct. 1870 (2008).

[30] E.g., *People v. Martinez*, 83 N.Y.2d 26, 37 [628 N.E.2d 1320, 607 N.Y.S.2d 610] (1993).

the court "should not find the error harmless." *Neder* at 19.[31]

Finally, as with other errors, the court should also examine any *affirmative indicia of the jurors' thinking,* such as juror queries touching on the erroneous instructions, *Bollenbach v. United States*, 326 U.S. 607, 612-613 (1946); *Shafer v. South Carolina*, 532 U.S. 36, 52-53 (2001); *Simmons v. South Carolina*, 512 U.S. 154, 160, 170 fn. 10 (1994), or mixed verdicts on related charges, *Olden v. Kentucky*, 488 U.S. 227, 233 (1988).

In many cases, those tools will provide the requisite certainty that the jurors actually based their verdict on the valid alternative theory. But where that review leaves the court uncertain as to the actual basis for the verdict, then it has taken harmless error as far as respect for the "jury trial guarantee," *Neder*, 527 U.S. at 19, will permit. Where there is evidentiary support for the invalid theory, the valid theory is controverted, and no other verdict conclusively establishes which theory the jurors adopted, that uncertainty compels a finding of prejudice under

---

[31] In cases such as this, where the valid and invalid theories rest upon mutually exclusive factual scenarios, the *Neder* inquiry into whether the evidence on the valid theory was contested will simply be the flip side of the *Griffin* assessment of the existence of evidentiary support for the invalid theory. The same testimony which supported the "late joiner" theory also brought the evidence on the valid alternative ground into conflict. See Pet.App. 63a (district court decision).

either a *Chapman* or a *Brecht* standard. That is especially so, if there are additional indicia (such as the juror queries here) suggesting the jurors' focus on the erroneous instructions.

A number of lower courts, both state and federal, have already harmonized *Stromberg* with harmless error review in this fashion. See *United States v. Ellyson*, 326 F.3d 522, 530-531 (4th Cir. 2003) (describing *Stromberg* analysis as "harmless error" review). Instruction on a defective theory will be harmless either where another verdict establishes the jurors' reliance on a proper ground, where the invalid theory is factually unsupported, or where the defect goes to an uncontested element. *United States v. Holly*, 488 F.3d at 1304-1307 & fn. 5; *Parker v. Secretary for Dept. of Corrections*, 331 F.3d 764, 776-779 (11th Cir. 2003).[32] But a reviewing court cannot uphold a general verdict based solely on the strength of the evidence on the valid ground. *Holly* at 1307 fn. 6; *Parker* at 778. "'[A] reasonable doubt arises [under *Chapman*], where, although the jury was instructed on alternate theories, there is no basis in the record for concluding that the verdict was based on a valid ground.' [Citations.]" (*People v. Sanchez* (2001) 86

[32] Cert. den. sub. nom., *Parker v. Crosby*, 540 U.S. 1222 (2004).

Cal.App.4th 970, 980 [103 Cal.Rptr.2d 809], emphasis added.[33]

Similar principles apply where the issue arises on habeas review. Where the habeas court cannot determine whether the verdict rests on the valid or the invalid ground, there is necessarily a "grave doubt" whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *O'Neal v. McAnnich*, 513 U.S. at 435; *Brecht v. Abrahamson*, 507 U.S. at 627. *Stromberg* requires reversal where the record leaves the reviewing court "uncertain" which ground was basis of the jurors' verdict. *Zant v. Stephens*, 462 U.S. at 881; *Mills v. Maryland*, 486 U.S. at 376. Uncertainty is also the essence of the "grave doubt" which satisfies the *Brecht* standard. "[T]he *uncertain* judge should treat the error, not as if it were harmless, but as if it affected the verdict. . . ." *O'Neal* at 435, emphasis added.[34]

---

[33] Accord, e.g., *Campos v. Bravo*, 141 N.M. 801, 807 [161 P.3d 846] (2007); *Crespin v. People*, 721 P.2d 688, 691-692 (Colo. 1986); *United States v. Hastings*, 134 F.3d 235, 242 (4th Cir. 1998), cert. den. sub. nom., *Phillips v. United States*, 523 U.S. 1143 (1998).

[34] Recognition of the equivalence of the *Stromberg* inquiry with *Brecht* prejudice is also consistent with *O'Neal*'s observation that "our rule avoids the need for judges to read lengthy records to determine prejudice in every habeas case." *O'Neal* at 443. When a case goes to the jury on a legally unauthorized ground, a habeas court can properly confine its prejudice review to whether the verdicts affirmatively establish that the jurors

(Continued on following page)

The *Kotteakos-Brecht* standard too prohibits a reviewing court from supplanting the jury by reweighing conflicting evidence under the guise of harmless error review:

> [I]t is not the appellate court's function to determine guilt or innocence. [Citations.] Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. *Kotteakos v. United States*, 328 U.S. at 763.

Accordingly, circuit courts applying *Brecht* have refused to reweigh conflicting evidence in assessing the effect of such errors (whether characterized as removal of an element or presentation of an unauthorized theory). Any such judicial factfinding "invade[s] the province of the jury." "It is neither the proper role for a state supreme court, nor for this Court [on habeas review], to stand in the place of the jury, weighing competing evidence and deciding that some evidence is more believable than others." *Barker v. Yukins*, 199 F.3d 867, 874-875 (6th Cir. 1999), cert. den., 530 U.S. 1229 (2000).[35]

---

relied on a valid alternative ground, whether there is any evidentiary support for the invalid theory, and whether the evidence on the valid theory is uncontroverted or in conflict. But it is neither necessary nor appropriate for it to reweigh conflicting evidence.

[35] See also, e.g., *Laird v. Horn*, 414 F.3d 419, 429 (3rd Cir. 2005), cert. den. sub. nom., *Beard v. Laird*, 546 U.S. 1146 (2006) ("Although there is clearly sufficient evidence to sustain [the valid theory], we cannot substitute ourselves for the jury by

(Continued on following page)

In the end, there is no tension between the *Stromberg-Griffin* rule governing invalid alternative theories and the harmless error principles generally applicable to other instructional errors, such as omitted elements. The two sets of rules work in tandem. When a habeas court's *Stromberg* review leaves it uncertain whether the jurors relied on a factually-supported but legally invalid theory or upon a valid but factually-contested alternative theory, that uncertainty is necessarily tantamount to a "grave doubt" as to the error's effect and entitles a habeas petitioner to relief under *Brecht* and *O'Neal*.

II. THIS COURT'S APPLICATION OF A *STROMBERG*-LIKE STANDARD TO SUBMISSION OF UNAUTHORIZED THEORIES OF LIABILITY IN *CIVIL* TRIALS FURTHER DEMONSTRATES ITS CONSISTENCY WITH THE *KOTTEAKOS-BRECHT* STANDARD. ANY ABANDONMENT OF *STROMBERG* WOULD HAVE GRAVE CONSEQUENCES FOR CIVIL, AS WELL AS CRIMINAL, APPELLATE PRACTICE.

The principle that a general verdict cannot stand in the face of uncertainty whether it rests on a legally unauthorized theory is not unique to criminal cases, nor is it dependent upon any concepts of "structural

---

speculating about what portion of the testimony the jury believed").

defect" or heightened standards of review for criminal cases.

This Court has long prescribed the identical rule for redress of the submission of unauthorized alternative theories in *civil* trials. As the Court stated in reversing an antitrust judgment due to submission of an invalid conspiracy theory: "Since we hold erroneous one theory of liability upon which the general verdict may have rested . . . it is unnecessary for us to explore the legality of the other theories." Because the verdict's "'generality prevents us from perceiving upon which plea they found. . . . the verdict cannot be upheld. . . .'" *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962) (quoting *Maryland v. Baldwin*, 112 U.S. 490, 493 (1884)). The Court has applied that rule to unauthorized alternative theories of liability in a variety of civil contexts. *United New York & New Jersey Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613, 619 (1959) (Jones Act); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459-460 (1993) (antitrust); *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 384 (1991) (antitrust); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 822 (1985) (civil rights/42 U.S.C. § 1983). The Court has also applied the same principles to erroneous theories for calculation of damages.

Memphis Community School Dist. v. Stachura, 477 U.S. 299, 312 (1986) (civil rights/§ 1983).[36]

There has already been a recognized cross-pollination between the *Stromberg* rule and its civil counterpart. The Court relied upon *Stromberg* in holding that "independent evidence" supporting a valid alternative ground could not render harmless the submission of an unauthorized theory of § 1983 liability: "the general verdict yields no opportunity for determining whether liability was premised on the independent evidence, or solely on the inference sanctioned by the [erroneous] instruction. [Citing *Stromberg*.]" *City of Oklahoma City v. Tuttle*, 471 U.S. at 822.

1. Consistency with *Kotteakos*. The Court's longstanding application of a *Stromberg*-like rule to unauthorized theories of civil liability has two important consequences for this case. First, it demonstrates *Stromberg*'s compatibility with the "substantial and injurious influence"/"grave doubt" habeas prejudice standard. *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *O'Neal v. McAnnich*, 513 U.S. 432 (1995). That standard derives from *Kotteakos v. United States,* 328 U.S. 750 (1946). *Kotteakos*, in turn, construed a generic federal harmless error statute, *applicable to*

[36] "When damages instructions are faulty and the verdict does not reveal the means by which the jury calculated damages, '[the] error in the charge is difficult, if not impossible, to correct without retrial, in light of the jury's general verdict.' [Citation.]" *Memphis Community School Dist.* at 312.

both civil and criminal appeals. Former 28 U.S.C. § 391, precursor to current § 2111; see *O'Neal*, 513 U.S. at 441.

Though *Kotteakos* was a federal criminal appeal, it has guided the Court's prejudice and harmless error determinations in civil cases as well. *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 37 (1963) (evidentiary error prejudicial); *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553-554 & fn. 4 (1984) (alleged juror misstatement on voir dire harmless). To the extent the two differ, the standard must be *more* rigorous in the criminal/habeas context (i.e., less forgiving of error), due to the liberty interests at stake. *O'Neal*, 513 U.S. at 440-441; *Kotteakos,* 328 U.S. at 762-763.

This Court's cases applying a *Stromberg*-like rule to unauthorized theories in civil cases demonstrate the compatibility of that analysis with the harmless error principles generally applicable to civil appeals.[37] The *Stromberg* rule also necessarily satisfies the similar *Kotteakos-Brecht-O'Neal* habeas prejudice standard. In both contexts, uncertainty (or, in the language of *Kotteakos* and *O'Neal*, "grave doubt") whether a general verdict rests on an unauthorized theory or on a valid alternative ground compels a finding of prejudice.

---

[37] See *Memphis Community School Dist. v. Stachura*, 477 U.S. at 312 (citing 28 U.S.C. § 2111, in finding that erroneous damages instruction was not harmless).

2. Civil consequences of any abandonment of *Stromberg*. A second consequence of this Court's longstanding application of a *Stromberg*-like standard in civil cases is that *any repudiation of the Stromberg rule in criminal/habeas cases will necessarily carry over into the civil sphere*. The Court has recognized the parallel between these civil cases and *Stromberg*, *City of Oklahoma City v. Tuttle*, 471 U.S. at 822; it has relied on *Kotteakos* in civil cases, *Tipton v. Socony Mobil Oil Co.*, 375 U.S. at 37; *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. at 553-554 & fn. 4; and it has admonished that the *Kotteakos-Brecht* habeas standard must be at least as rigorous as civil appellate standards, *O'Neal*, 513 U.S. at 440-441; *Kotteakos,* 382 U.S. at 762-763. Consequently, any abandonment of the *Stromberg-Griffin* rule here would also doom the similar civil rule, illustrated by such cases as *Sunkist Growers*, *Sandy Hook Pilots*, and *Tuttle*.

Submission of invalid theories occurs at least as frequently in civil trials, as in criminal ones. The problem is especially acute when plaintiffs "push the envelope," either by presenting an unauthorized alternative theory of liability for a federal cause of action or by presenting a tort or other state law claim that is pre-empted by federal law. An abandonment of the Court's historic approach to general verdicts would frustrate the ability of businesses, municipalities, and other civil defendants to seek redress from liability judgments and punitive damages awards in these situations.

The risk is not a hypothetical one. On at least three occasions in recent years, business litigants have sought certiorari on claims that some lower courts have eroded the rigorous *Stromberg*-like standard of *Sunkist Growers* and *Sandy Hook Pilots* and replaced it with a more loosely-defined harmless error review. Pet. for Writ of Certiorari at 16-20, *Union Pacific Railroad Co. v. Barber*, No. 04-47 [2004 WL 1559799], cert. den., 543 U.S. 940 (2004);[38] Pet. for Writ of Certiorari at 7-8, *Advanta Corp. v. Riseman*, No. 02-882 [2002 WL 32133789], cert. den., 537 U.S. 1190 (2003); Pet. for Writ of Certiorari at 3-4, 8-9, *Mitsubishi Electric Corp. v. Ampex Corp.*, No. 99-1287 [2000 WL 34014313], cert. den., 529 U.S. 1054 (2000). The Court's re-examination of the status of the *Stromberg* rule in this habeas case necessarily puts the parallel civil standard into play as well.

Until now, in both civil and criminal contexts, the Court has taken the position that submission of an unauthorized theory requires reversal, where the record does not reveal the actual basis of the jury's general verdict. Because that rule has served the principles of fundamental fairness common to both

---

[38] In *Union Pacific Railroad*, the American Association of Railroads (AAR) also submitted an amicus brief urging the Court to grant certiorari in order to preserve the *Sunkist Growers*/*Sandy Hook Pilots* standard against any further such erosion. Brief of Amicus Curiae AAR at 28-30, *Union Pacific Railroad Co. v. Barber*, No. 04-47 [2004 WL 2070874].

civil and criminal trials, the Court should take this opportunity to re-affirm it.

III. UNDER *FRY V. PLILER*, THE *BRECHT* STANDARD GOVERNS HABEAS REVIEW OF HARMLESS ERROR, AND NO SEPARATE § 2254(D)(1) REVIEW IS NECESSARY.

A. *Brecht* Subsumes AEDPA Review of Harmlessness and Renders Any Separate § 2254(d)(1) Inquiry Unnecessary.

Chapman ordinarily governs a state appellate court's harmless error review, while *Brecht* governs on federal habeas review. The Court recently clarified that it is *not* necessary to conduct a separate AEDPA/28 U.S.C. § 2254(d)(1) review of the reasonableness of the state court's harmless error determination in addition to the habeas court's own independent examination under the more lenient *Brecht* standard: "[I]t certainly makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former." *Fry v. Pliler*, 551 U.S. ___, 127 S.Ct. 2321, 2327 (2007), emphasis in original.

As a practical matter, *Fry* renders § 2254(d)(1) largely irrelevant to a habeas court's assessment of harmless error. When the court has found constitutional error – such as here, where the state has conceded error under the "reasonable likelihood"

standard, PBM 11, 18, 22, 26 – a federal court should proceed directly to its own *Brecht* review. In view of *Fry*, the state's attempt to frame its bid to overturn *Stromberg* in the language of AEDPA, PBM 11-16, adds nothing to its argument. Indeed, elsewhere the state appears to recognize that the real question is *Brecht*, not AEDPA, because the specific disposition it requests is a remand for the Ninth Circuit to re-examine the case under *Brecht*, PBM 38; see also SG 30-31.

B. The State Court Unreasonably Failed to Consider the Complete Jury Instructions, the Jurors' Queries, and the Conflicting Evidence.

Even were a separate § 2254(d)(1) analysis necessary, the state supreme court's harmless error declaration easily meets that standard, as discussed at length in the district court's pre-*Fry* decision. Pet.App. 54a-65a.

The state court's crucial error was not its choice of standards,[39] but its failure to consider the *complete*

[39] Preliminarily, this is *not* a case where the state court applied *Chapman* – as the Solicitor General correctly notes, SG 30. Ironically, the state supreme court too applied a *Stromberg*-type analysis, framing the question as whether "other parts of the verdict demonstrate that the jury necessarily found the defendant guilty on a proper theory." Pet.App. 117a (citing *People v. Guiton*, 4 Cal.4th 1116, 1130 [847 P.2d 45, 17 Cal.Rptr.2d 365] (1993), which in turn relied on *Griffin v. United States*, 502 U.S.

(Continued on following page)

special circumstance instructions in declaring that they cured the error in the underlying felony-murder instructions. It quoted the first sentence of an "Introductory" special circumstance instruction, Pet.App. 116a; JA 12, without considering the subsequent substantive instruction on the specific criteria for that charge, JA 14.[40] As discussed in the district court and circuit opinions, the state court did not realize that, due to the disjunctive ("or" rather than "and") formulation, the substantive instruction authorized a special circumstance verdict without any finding that the killing was contemporaneous with Pulido's own assistance in the robbery. See Pet.App. 56a-57a, 8a & fn. 4, 10a-11a, 17a-18a.

A state court's reliance on the supposedly-curative effect of some other instruction is "objectively unreasonable" under § 2254(d)(1), where that other instruction is itself ambiguous, "internally contradictory," or otherwise defective. *Penry v. Johnson*, 532 U.S. 782, 797-800, 803-804 (2001). More generally, a state court's disposition is unreasonable under AEDPA where that court fails to consider the complete record relevant to a claim or relies on a factually mistaken understanding of its contents. Indeed, such failures have represented the most common cause of this Court's findings of unreasonable

---

46 (1991)). Consequently, whether the *Stromberg* rule is "clearly established" is beside the point. Cf. PBM 15.

[40] Cf. *Boyde v. California*, 494 U.S. at 378 ("'a single instruction . . . may not be judged in artificial isolation'").

state court decisions. E.g., *Williams v. Taylor*, 529 U.S. 362, 397 (2000) (state court "failed to evaluate the totality of the available mitigation evidence").[41]

As the district court observed, the state court also failed to consider the substantial "contrary evidence" that Pulido did not assist in the robbery until after the shooting, Pet.App. 63a. Nor did it consider the multiple queries demonstrating the jurors' focus on the erroneous felony-murder aiding/abetting instructions "and how the trial court's answers would have compounded the jury's confusion." Pet.App. 64a; see Pet.App. 59a-63a; JA 33-54. In sum, the state court "'did not undertake a careful, balanced evaluation' of the jury instructions and the record as a whole. [Citations.]" Pet.App. 54a.

Thus, *Fry* eliminates any need for a separate 2254(d)(1) review, and, even were one necessary, this is a classic "unreasonable application" case.

---

[41] See also *Wiggins v. Smith*, 539 U.S. 510, 527-529 (2003) (failure to consider information in social service records); *Rompilla v. Beard*, 545 U.S. 374, 388-390 (2005) (counsel's failure to review file of prior conviction); *Miller-El v. Dretke*, 545 U.S. 231, 240-266 (2005) (state court ignored disparate treatment of white and black jurors).

IV. THIS COURT SHOULD AFFIRM THE DISPOSITION BECAUSE, ALTHOUGH THE NINTH CIRCUIT LABELED ITS REVIEW DIFFERENTLY, ITS ACTUAL SUBSTANTIVE DETERMINATIONS CORRESPOND TO A FINDING OF PREJUDICE UNDER THE *BRECHT* STANDARD.

The Ninth Circuit properly applied the *Stromberg* rule. Because the record did not establish that the jurors had actually relied on a legitimate theory of contemporaneous aiding/abetting, it affirmed the district court's disposition granting habeas relief. However, while the district court had expressly cast its similar determination as a finding of "grave doubt" and "substantial and injurious influence" under the *Brecht-O'Neal* standard, Pet.App. 65a-67a, the Ninth Circuit described the effect of the misinstruction as "structural," Pet.App. 11a.

As the Solicitor General has stated in another context, the disposition of this case should not turn on "semantics." SG 22. The flaw in the Ninth Circuit's opinion was one of nomenclature, rather than substance. The deadlock on personal firearm use demonstrated that some jurors found "Pulido did not personally murder [the victim]." Pet.App. 5a. Pulido's account of post-killing assistance in the robbery provided evidentiary support for the invalid theory and brought the evidence on the valid theory of

contemporaneous assistance into conflict.[42] Under these circumstances, the dispositive question was whether any other verdict established that the jurors relied on the valid ground. The circuit court properly focused its inquiry on the assertedly-curative effect of the special circumstance instructions. Because the special circumstance instructions did not require any such finding of contemporaneous assistance (due to the conceded defect in the substantive body of those instructions), and nothing else in the record provided the requisite assurance that the jurors had relied on a valid ground, the circuit court affirmed the grant of habeas relief. Pet.App. 8a-12a. These are exactly the determinations which satisfy the *Brecht* prejudice standard, even though the Ninth Circuit did not label its review as a *Brecht* analysis. Under the circumstances of this case, there are no additional or different inquiries which could change the outcome.[43]

---

[42] As the district court explained, the conflicting evidence on the timing of Pulido's assistance precluded a finding of harmless error on *Neder* grounds, because Pulido "'contested the omitted element and raised evidence sufficient to support a contrary finding.'" Pet.App. 63a, quoting *Neder*, 527 U.S. at 19.

[43] The only prejudice factor not fully addressed in the per curiam opinion was the presence of affirmative indicia of the jurors' reasoning – i.e., the juror queries. (The district court discussed those queries at length, Pet.App. 59a-63a, as did Judge Thomas in his separate concurring opinion in the Ninth Circuit, Pet.App. 22a-23a.) But the state has conceded that the trial court provided "confusing answers to the jury's questions" and that those exchanges have contributed to the reasonable likelihood "that the jury applied the instructions in an

(Continued on following page)

This Court should affirm the judgments of both the circuit and district courts. Because the circuit court has already conducted the correct substantive analysis, albeit under a different label, a remand to revisit those same questions, under different nomenclature, would serve no purpose.

V. IF THE COURT CONCLUDES THAT THE NINTH CIRCUIT'S FINDINGS ARE NOT EQUIVALENT TO A *BRECHT* PREJUDICE DETERMINATION, THEN THIS COURT SHOULD REMAND THE MATTER TO THE CIRCUIT TO CONDUCT A *BRECHT* INQUIRY IN THE FIRST INSTANCE.

For the reasons stated in Part IV, though it gave its analysis a different label, the Ninth Circuit's determinations were the functional equivalent of a

---

unconstitutional way." PBM 18. Indeed, the jurors' alternative diagrams on felony-murder and their question whether an aider/abettor must have "knowledge of unlawful purpose" prior to the crime both appear directed to the liability of a defendant who had not "intended" robbery but later "facilitate[d]" that offense, JA 36-38, 41 – exactly the situation posed by the "late joiner" theory. Consequently, it is inconceivable that consideration of those queries will dispel or mitigate the circuit's uncertainty regarding the actual basis of the verdict. On the contrary, the likely impact of addition of the juror queries to the review will be to move the circuit from a position of mere "equipoise," *O'Neal v. McAnnich*, 513 U.S. at 435, to a recognition of a high likelihood that a substantial group of jurors (4 or 8) actually relied on the invalid theory. Either way, the disposition will be the same.

finding of prejudice under *Brecht* and *O'Neal*. Nonetheless, if this Court disagrees, then respondent concurs that the proper disposition would be a remand to the circuit to conduct that analysis under the proper standard. Both the state and the Solicitor General have requested such a remand, and the Solicitor General has expressly added that "the United States does not take any position" on whether the misinstruction here should be held prejudicial or harmless under *Brecht*. PBM 38; SG 31.[44]

As the Solicitor General notes, SG 31, where this Court has found that a circuit court or state appellate court failed to conduct a prejudice analysis or reviewed prejudice under an erroneous standard, it typically remands the case to that court to conduct such review under the appropriate standard. "Although we 'plainly have the authority' to decide whether, on the facts of a particular case, a constitutional error was harmless . . . , we 'do so sparingly.' [Citation.]" *Rose v. Clark*, 478 U.S. at 584; *Pope v. Illinois*, 481 U.S. at 504. A remand is "our normal

[44] The only brief which seemingly expects this Court to conduct its own *Brecht* analysis in the first instance is that of a non-party, amicus CJLF. CJLF 15-23. Yet CJLF is also proposing a very loosely defined form of harmless error review, involving credibility judgments and reweighing of conflicting evidence. CJLF 19-21. Not only is CJLF's conception of prejudice review contrary to the lessons of *Neder* and other cases. Its argument also demonstrates why any prejudice assessment involving close review of the complete trial record should be conducted by the circuit court in the first instance.

practice where the court below has not yet passed on the harmlessness of any error." *Neder v. United States*, 527 U.S. at 25; see also, e.g., *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Calderon v. Coleman*, 525 U.S. 141, 147 (1998); *California v. Roy*, 519 U.S. at 6; *Washington v. Recuenco*, 548 U.S. at 222. There is no cause to depart from that "normal practice" here.

CONCLUSION

This Court should re-affirm the *Stromberg* rule as fully consistent with its contemporary harmless error jurisprudence. The Ninth Circuit has already conducted a *Stromberg* review and has determined that the record does not establish whether the jurors relied on the valid or the invalid theory. Because the circuit court has already made the appropriate substantive determinations and its uncertainty as to the actual basis of the verdict is tantamount to a "grave doubt" under *Brecht* and *O'Neal*, this Court should affirm that decision. Alternatively, the Court should remand the matter to the Ninth Circuit for reconsideration under the *Brecht* standard.

For the foregoing reasons, respondent Michael Pulido respectfully asks this Court to affirm the judgments of the district and circuit courts.

Dated: July 11, 2008 Respectfully submitted,

J. BRADLEY O'CONNELL
Assistant Director
Counsel of Record for Respondent