

No. 07-544

IN THE SUPREME COURT OF THE UNITED STATES

CHRIS CHRONES, Warden,

Petitioner

v.

MICHAEL PULIDO,

Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the rule of *Stromberg v. California*, 283 U.S. 359 (1931), require reversal where a case goes to the jury on a legally unauthorized theory and the reviewing court cannot be certain whether the conviction rests upon the unconstitutional theory or on a valid alternative theory?
2. Where a habeas court cannot determine whether jurors relied on an unconstitutional ground or on a valid alternative theory, does that uncertainty necessarily represent a “grave doubt,” indicating that the error had a “substantial and injurious effect or influence” under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and *O’Neal v. McAninch*, 513 U.S. 432 (1995)?
3. Under *Brecht* and *O’Neal*, is there necessarily “grave doubt” as to the effect of submission of a legally unauthorized theory, where: (a) the reviewing court cannot determine whether the verdict rests upon the unconstitutional theory or on a valid alternative theory; (b) there is evidentiary support for the legally invalid theory; (c) the evidence as to the legally valid theory is in conflict; (d) the invalid theory rests on direct evidence, while the valid theory rests upon inference and conjecture; and (e) the jurors’ multiple queries during deliberations, the judge’s inadequate responses to those questions, and the jurors’ deadlock on a separate allegation of personal firearm use strongly suggest that some jurors relied upon the invalid theory?

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STATEMENT OF THE CASE

Like petitioner, Cert. Pet. 3-6, respondent Michael Pulido accepts the California Supreme Court’s summary of the trial evidence. App. 102a-105a.¹

Michael Pulido was 16 at the time of the charged homicide. App. 32a. 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 (the “late joiner” theory).

¹ Record citations are to the Appendix to the Petition for Writ of Certiorari (“App.”) and to the parties’ respective Excerpts of Record (“State ER” and “Pulido ER”), filed in the Ninth Circuit .

Over its five days of deliberations, the jury submitted numerous queries concerning an aider/abettor's liability under a felony-murder theory. The jury ultimately convicted Pulido of first-degree murder, robbery, and a robbery felony-murder "special circumstance." However, the jurors deadlocked, either 8-4 or 4-8, on an enhancement allegation of personal use of a firearm, indicating that some jurors based their murder verdict upon an aiding/abetting theory. App. 33a, 5a; State ER 376-377. The court sentenced Pulido to life without possibility of parole.

On direct appeal, the California Supreme Court repudiated the "late joiner" theory; it concluded that assistance in a robbery would not support felony-murder liability if that assistance occurred only after the homicide. *People v. Pulido*, 15 Cal.4th 713, 936 P.2d 1235 (1997); App. 101a-120a. However, the state court declared the submission of that unauthorized theory harmless based on the assumption that the special circumstance verdict indicated that the murder occurred "while" Pulido was a participant in the robbery. App. 116a-117a.

Pulido filed a pro se petition for a writ of habeas corpus, 28 U.S.C. § 2254. The district court granted the writ in an extensive opinion. App. 32a-97a. Upon reviewing the complete jury charge, the district court recognized that, 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. The district court found: (1) that the state court decision was "contrary to" and an "unreasonable application" of clearly established federal law, *id.*, § 2254(d)(1), App. 52a-65a; and

(2) that the instructional error had a “substantial and injurious effect or influence” under *Brecht v. Abrahamson*, 503 U.S. 619 (1993). App. 65a-67a.

The U.S. Court of Appeals for the Ninth Circuit affirmed the district court’s judgment granting the writ. *Pulido v. Chrones*, 487 F.3d 669 (9th Cir. 2007); App. 1a-24a. Under *Stromberg v. California*, 283 U.S. 359 (1931), and its progeny, the murder conviction could not stand because the Circuit could not be certain whether the jurors had relied upon a legally unauthorized ground (the “late joiner” theory) or upon a valid alternative theory (assistance in the robbery contemporaneous with the killing). App. 8a-12a.² The state petitioned for rehearing en banc, but “no judge of the [Circuit] requested a vote on it.” App. 31a.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

This is not a cert-worthy case because the *Stromberg* rule is consistent with recent harmless error jurisprudence, including *Neder v. United States*, 527 U.S. 1 (1999), and because the disposition would be the same under any standard, as reflected in the district court’s finding of prejudice under *Brecht v. Abrahamson*, 503 U.S. 619 (1993). This is a case of conceded constitutional error – the submission of a theory of murder liability not authorized under state law. While the state attempts to portray a collision between divergent prejudice standards, the disposition of this

² In a separate concurrence, Judge O’Scanlion urged re-examination of the *Stromberg* rule. App. 12a-15a. In another concurrence, Judge Thomas defended the *Stromberg* rule, App. 24a, but also explained that the result would be the same under a more wide-ranging harmless error analysis, App. 15a-23a.

case actually turns upon more pedestrian matters, which are neither cert-worthy nor reasonably susceptible to dispute.

The state is attempting to use this case as a vehicle for reconsideration of the *Stromberg* rule-- the longstanding doctrine requiring reversal when a reviewing court cannot determine whether a verdict rested upon an unconstitutional ground. The reiteration of that rule in such cases as *Mills v. Maryland*, 486 U.S. 367 (1988), and *Griffin v. United States*, 502 U.S. 46 (1991), attests to its continuing viability. The rationale of the *Stromberg* line is entirely consistent with contemporary jurisprudence: Where the instructions allowed the jurors to base a conviction on a legally invalid but factually supported scenario, any further “harmless error” review is necessarily fruitless, for there is no “object” to which to apply that analysis. *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

The *Stromberg* rule remains clearly established law, regardless of whether it is conceived as a form of “structural defect” or simply as defining a circumstance which requires a finding of prejudice under any harmless error standard. *Stromberg* is comparable to *Neder v. United States*, 527 U.S. 1, 19 (1999). Although omission of an element is susceptible to harmless error review, that error cannot be harmless if the omitted element was factually disputed. So too, when a reviewing court is uncertain whether or not the jurors relied upon a factually supported, but legally unauthorized, ground of conviction, there is necessarily both a “reasonable doubt,” *Chapman v. California*, 386 U.S. 18 (1967), and a “grave doubt” as to the error’s effect on the verdict, *O’Neal v. McAninch*, 513 U.S. 432 (1995).

The result here would be the same, even under a more fluid prejudice analysis, as the district court's decision demonstrates, App. 38a-67a. The state tried Pulido primarily on the theory that he alone robbed the store and personally shot the clerk. Pulido maintained that his uncle Michael Aragon committed the robbery and murder and that he assisted his uncle only after the shooting, during his flight from the scene. We know that some of the jurors rejected the prosecution's personal commission theory and instead relied on some form of aiding/abetting, because they deadlocked on an enhancement allegation of personal firearm use. The state's arguments rest on the notion that those jurors who rejected the personal use allegation convicted Pulido of murder on the basis of a factual theory not advanced in either side's evidence – i.e., that Pulido's uncle committed the murder, but that Pulido participated in the robbery in some unspecified way from the beginning. Although the defective instructions allowed them to find Pulido liable for felony-murder even if they believed his account, the state insists that the jurors instead developed an entirely new narrative of the events.

The state also ignores the affirmative indicia that these jurors focused on the invalid "late joiner" theory. Again and again throughout their deliberations, the jurors posed questions concerning the scope of aiding/abetting liability under the felony-murder instructions. But the judge did nothing to dispel the instructions' erroneous message that any participation in the robbery would subject Pulido to felony-murder liability, even if that assistance occurred only after the shooting. In view of the recognized materiality of mid-deliberation queries as windows into the

jurors' thinking, e.g., *Bollenbach v. United States*, 326 U.S. 607, 612-613 (1946), a finding of prejudice is inescapable under *Brecht* or any other standard.

Because Pulido's entitlement to relief under a traditional *Brecht* analysis is so clear, this case represents an exceptionally poor vehicle for examination of any broader questions concerning the *Stromberg* rule.

I. UNDER THE WELL-SETTLED RULE OF *STROMBERG V. CALIFORNIA*, SUBMISSION OF AN UNCONSTITUTIONAL GROUND TO A JURY REQUIRES REVERSAL WHERE THE REVIEWING COURT CANNOT DETERMINE WHETHER THE JURORS RELIED ON THE UNAUTHORIZED GROUND OR ON A VALID ALTERNATIVE GROUND.

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 (2001); *In re Winship*, 397 U.S. 358 (1970); see also *United States v. Gaudin*, 515 U.S. 506 (1995) (duty to instruct accurately on elements of offense). The state has "tacitly conceded: that instructional error occurred because there was a reasonable likelihood that the jury misapplied the law [citation] of felony murder by failing to find beyond a reasonable doubt that [Pulido] aided and abetted the robbery before the murder."³

1. The state faults the Circuit Court for relying upon a longstanding doctrine, which this Court has never questioned, much less overruled: Where a case goes to a jury on an unconstitutional ground, a general verdict of conviction cannot stand if the reviewing court is uncertain whether the conviction rested upon the invalid theory

³ *Pulido v. Lamarque*, 9th Cir. No. 05-15916, [State's] Appellant's Opening Br., p. *52 [2005 WL 3128204].

or on a legally valid alternative ground. The Court first articulated the rule in *Stromberg v. California*, 283 U.S. 359, 368 (1931), and has applied it at least a dozen times over the intervening decades. *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); *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. 367, 376-377 (1988); accord *Boyde v. California*, 494 U.S. 370, 379-380 (1990); *Chiarella v. United States*, 445 U.S. 222, 237 fn. 21 (1980) (each recognizing the rule). The judgment may stand, however, where the record affirmatively shows that the jury made the necessary findings for the valid alternative theory, such as where the jurors returned a separate verdict corresponding to the valid ground. *Zant v. Stephens*, 462 U.S. 862, 881 (1983).

The state attempts to confine the *Stromberg* rule to “convictions for conduct that the State lacks the authority to punish as crime.” Cert. Pet. 13. However, this Court has consistently formulated the rule in terms of “general-verdict convictions that may have rested on an unconstitutional ground. [Citations.]” *Griffin v. United States*, 502 U.S. 46, 55 (1991). It has not distinguished between theories directed to conduct which the state can never punish (such as constitutionally protected speech)

and those directed to acts which the legislature simply has not criminalized under the relevant statute.⁴

While *Stromberg* and some other cases have involved First Amendment or similar claims, the Court has also applied the same analysis to due process and other constitutional violations which have nothing to do with any protected conduct. E.g. *Williams v. North Carolina*, 317 U.S. at 291-304 (alternative theory for bigamy conviction violated full-faith-and-credit clause); *Leary v. United States*, 395 U.S. at 29-32 (alternative theory for marijuana transportation relied on unconstitutional presumption of knowledge of illegal importation); *Stirone v. United States*, 361 U.S. at 216-219 (submission of alternative ground not considered by the grand jury or charged in indictment).⁵ Although each of these cases redressed submission of a constitutionally defective theory, none involved constitutionally protected conduct.⁶

The state argues that this Court has implicitly overruled *Stromberg* and its many progeny in a line of cases commencing with *Rose v. Clark*, 478 U.S. 570

⁴ E.g., *Chiarella v. United States*, 445 U.S. at 237 fn. 2: “We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct.”

⁵ *Stirone* too involved the absence of the requisite authorization for one of the prosecution’s theories. In *Stirone*, the government relied on a factual scenario which had not been authorized by the grand jury. In *Pulido*, it relied on a scenario which had not been authorized by the legislature.

⁶ E.g., *Leary* at 54: “[N]othing in what we hold today implies any constitutional disability in Congress to deal with the marijuana traffic by other means.”

(1986).⁷ But subsequent events belie that suggestion. Two years after *Rose*, the Court applied the *Stromberg* rule in finding an improper penalty phase instruction reversible: “With respect to findings of guilt on criminal charges, the 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 its verdict. [Citations.]” *Mills v. Maryland*, 486 U.S. 367, 376 (1988).

In yet another post-*Rose* opinion, the Court reiterated: “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).⁸ The Court expressed no misgivings on that rule’s continued application to constitutionally defective legal theories, but declined to extend it to the quite-different situation of a *factually unsupported* alternative ground.⁹ The Court described the distinction between factually unsupported and legally erroneous theories as a “clear line” which “happens to be a line that makes

⁷ *Rose* applied the *Chapman* harmless error standard, *Chapman v. California*, 386 U.S. 18 (1967), to an unconstitutional rebuttable presumption of malice.

⁸ *Griffin* also post-dates *Arizona v. Fulminante*, 499 U.S. 279 (1991), where the Court first adopted the current nomenclature distinguishing “trial errors” from “structural defects.”

⁹ The Court did express reservations about *Yates v. United States*, 354 U.S. 298 (1957), which had extended the *Stromberg* approach to a legal error which (unlike the one here) did not involve any constitutional violation (an alternative predicate act which was time-barred). *Griffin*, 502 U.S. at 51-56. Ultimately, however, the Court had no occasion to reconsider the validity of *Yates*, but simply found it inapplicable to factually-unsupported theories. *Griffin* at 56.

good sense.” *Griffin* 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 experience will save them from that error.” *Ibid.*, emphasis in original.

Because *Griffin* ratified the longstanding application of the *Stromberg* rule to constitutionally defective legal theories, such as the unauthorized “late joiner” theory, those cases represents binding and “clearly established” precedents, 28 U.S.C. § 2254(d)(1), under elementary principles of stare decisis. “[I]f the ‘precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.’ [Citation.]” *Tenet v. Doe*, 544 U.S. 1, 10-11 (2005).¹⁰

II. UNCERTAINTY REGARDING THE GROUND FOR A VERDICT REQUIRES REVERSAL UNDER *STROMBERG*, REGARDLESS OF WHETHER THE ERROR IS DEEMED A “STRUCTURAL DEFECT” OR A “TRIAL ERROR.” LIKE *NEDER*, *STROMBERG* DEFINES A CIRCUMSTANCE WHICH REQUIRES A FINDING OF PREJUDICE, EVEN UNDER A HARMLESS ERROR REVIEW.

1. The state portrays this case as presenting a stark choice between classification of the unauthorized theory as a “structural defect” or as a “trial error.” However important that distinction may be in some cases, here it is nothing more

¹⁰ As discussed in Part II, there is no such tension here in the first place, because *Stromberg* and its progeny are consistent with the reasoning of recent harmless error cases, such as *Neder v. United States*, 527 U.S. 1 (1999).

than an academic question of nomenclature. Under either characterization, the rule requiring reversal when a court cannot determine whether the conviction rested on an unconstitutional legal theory continues to make “good sense,” *Griffin*, 502 U.S. at 59, and is consistent with the reasoning of the Court’s recent harmless error jurisprudence.

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 v. United States*, 527 U.S. 1, 19 (1999). “Harmless-error review looks, we have said, to the basis on which ‘the jury *actually rested* its verdict.’ [Citation.]” *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis in *Sullivan*). Omission of a discrete element lends itself to such a review; submission of a separate unauthorized ground for conviction does not, unless the record discloses the actual basis for the verdict.

In the typical *Neder* situation, the state relies on an alleged set of facts which could legitimately support a conviction. But, due to the instruction’s omission of an element, the jury makes some, but not all, of the requisite findings concerning the charged episode. If the evidence as to the omitted element was *uncontested*, such that no rational juror could fail to find that element, affirmance of the verdict entails no derogation of the constitutional right at stake. *Neder*, 527 U.S. at 15-19.

Conversely, however, in a *Stromberg* situation, the jury is presented with multiple episodes or alternative factual scenarios, one of which could not legitimately support a conviction. If the record establishes that the jurors “actually rested” their

verdict on a valid ground, then the reviewing court can and should find the error harmless. But if the court cannot tell which scenario was the basis for the verdict, there is no room for further harmless error review, because the court lacks the essential means necessary for that analysis. As with a defective instruction defining the reasonable doubt standard, that uncertainty leaves the reviewing court with “no *object*, so to speak, upon which harmless-error scrutiny can operate.” *Sullivan v. Louisiana*, 508 U.S. at 280, emphasis in original.

That said, recognition of the unsuitability of a harmless error finding in these circumstances does not necessarily compel characterization of submission of an unauthorized legal theory as a form of “structural defect.” The *Stromberg* rule may just as easily be understood as a categorical application of prejudice analysis. Submission of an unauthorized theory is harmless where the record establishes that the jurors relied on the valid ground¹¹ and prejudicial where the court cannot determine which ground was the basis for the verdict, as in this case.

The *Stromberg* rule, properly understood, is similar to *Neder*. *Neder* represents more than the “soundbite” that omission of an element is subject to harmless error review. It directs *how* a court must conduct that review:

[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*

¹¹ E.g., *Zant v. Stephens*, 462 U.S. 862, 881 (1983); *Lara v. Ryan*, 455 F.3d 1080, 1086-1087 (9th Cir. 2006).

raised evidence sufficient to support a contrary finding-it should not find the error harmless. Neder, 527 U.S. at 19, emphasis added.

Thus, *Neder* prescribes a rigorous standard, which forbids any judicial reweighing of conflicting evidence or inferences. That limitation is necessary to avoid ““a denigration of the constitutional rights involved’ [citation].” *Neder* at 19.

The state’s reliance on *Neder* is surprising, because Pulido’s entitlement to relief under that analysis is readily apparent. As the district court explained, the question whether Pulido joined in the robbery before or after the shooting was very much in dispute. There was no direct evidence indicating such a role, and Pulido himself flatly denied any foreknowledge of his uncle’s plan to rob the establishment. Under *Neder*, the contested character of that crucial prerequisite to felony-murder liability squarely precludes any finding of harmless error, and the judgment granting habeas relief should be upheld on that ground alone. App. 63a.

Neder also demonstrates the continued viability of the analogous *Stromberg* rule. Just as the contested character of the evidence on an omitted element categorically requires a finding of prejudice, *Neder*, 527 U.S. at 19, the same is true of a reviewing court’s uncertainty whether the jurors based their verdict on an unconstitutional ground.

Where an appellate court cannot ascertain the actual basis for a general verdict, it necessarily harbors a reasonable doubt whether the invalid theory “contributed to the verdict” under *Chapman v. California*, 386 U.S. 18, 24 (1967). Similarly, where the issue arises on habeas, that uncertainty denotes a “grave doubt”

whether the error had a “substantial and injurious effect or influence in determining the jury’s verdict.” *O’Neal v. McAninch*, 513 U.S. 432, 435 (1995); *Brecht v. Abrahamson*, 507 U.S. 619, 627 (1993). Uncertainty is the essence of the “grave doubt” which satisfies the *Brecht-O’Neal* 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 435.¹²

Because uncertainty whether a verdict rested on an unconstitutional ground compels a finding of prejudice under either a *Chapman* or *Brecht* standard, the doctrinal question which the state attempts to pose amounts to nothing but a debate over nomenclature. Regardless of whether submission of an unconstitutional theory is deemed a “structural defect” or *Stromberg* simply represents an application of prejudice analysis to a particular species of “trial error,” the *substance* of the *Stromberg* rule remains as compelling today as it was 75 years ago.

2. Because there is no conflict between *Stromberg* and harmless error analysis, the putative circuit split suggested by the state largely disappears. The *Stromberg* rule is alive and well in other circuits. E.g., *United States v. Shellef*, 507 F.3d 82, 107-109 (2nd Cir. 2007); *United States v. Ellyson*, 326 F.3d 522, 530-531 (4th Cir. 2003); *United States v. Peterson*, 236 F.3d 848, 857 (7th Cir. 2001) (each

¹² 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 relied on a valid alternative ground, and it is neither necessary nor appropriate for it to engage in any reweighing of the evidence.

reversing under *Stromberg*, where court could not determine whether jury relied on invalid legal theory).¹³ However, some of those courts explicitly treat *Stromberg* as an application of harmless error analysis. E.g., *Ellyson*, at 530-531.

United States v. Holly, 488 F.3d 1298 (10th Cir. 2007), and *Parker v. Secretary, Dept. of Corrections*, 331 F.3d 764 (11th Cir. 2003), involved delivery of *partially deficient* instructions on an otherwise valid ground. Each circuit recognized that the *Stromberg* rule would govern in a case, such as Pulido's, where one alternative ground for conviction was "legally erroneous in [its] entirety. [Citations.]" *Holly* at 1305-1306 & fn. 3; see also *Parker* at 777-778 & fn. 10. The courts limited their harmless error review "to the erroneously instructed ground considered separately," because *Stromberg* precluded reliance on the valid alternative ground. *Holly* at 1306. "An error with regard to one independent basis for the jury's verdict cannot be rendered harmless solely because of the availability of the other basis," for that would "eviscerate[]" the *Stromberg* rule. *Parker* at 778; accord *Holly* at 1306-1307 & fn. 6.¹⁴

¹³ The state points to a 1987 First Circuit opinion which had viewed *Rose v. Clark* as implicitly overruling the *Stromberg* cases. *Quigley v. Vose*, 834 F.2d 14 (1st Cir. 1987). But, as discussed in Part I, this Court's subsequent decisions in *Mills v. Maryland* (1988) and *Griffin v. United States* (1991) have proven that assessment wrong. The First Circuit's more recent case law appears to recognize the continued vitality of the *Stromberg* rule. E.g., *United States v. Bailey*, 405 F.3d 102, 109-110 (1st Cir. 2005).

¹⁴ To the extent that there is conflict in the case law, it appears to be within the Eleventh Circuit. *Parker* recognized that reliance on a valid alternative ground to cure submission of a defective theory would contravene "clearly established federal law," *Parker*, 331 F.3d at 779, but a roughly contemporaneous opinion of a separate panel questioned the application of that rule to a legally inadequate theory,

Becht v. United States, 408 F.3d 541, 549-550 (8th Cir. 2005) too is readily distinguishable. An instruction allowing a child pornography conviction if the photos “appeared” to depict real children was plainly harmless, because there was no evidentiary support for the invalid theory, while the evidence that the images were of “actual minors” was not susceptible to dispute. Pulido has no quarrel with the proposition that submission of an invalid theory is harmless if there is no factual support for it. That result is consistent with *Griffin*’s confidence in jurors’ ability to weed out factually unsupported theories, *Griffin*, 502 U.S. at 509, and *Neder*’s harmless error finding concerning omission of an uncontested element, *Neder*, 527 U.S. at 19.

Even if there are potential questions on the outer perimeters of *Stromberg* (e.g., its application to partially deficient theories), this case poses no such issues. The “late joiner” theory was invalid in its entirety, rather than just misdescribed (cf. *Holly*, 488 F.3d at 1305-1306 & fn. 3); there was evidentiary support for the invalid theory (contrast *Becht*, 408 F.3d at 549-550); and the evidence supporting the valid theory (contemporaneous assistance) was in conflict (*Holly* at 1310-1311). The ultimate disposition of Pulido’s claim would be the same in any circuit.

Clark v. Crosby, 335 F.3d 1303 (11th Cir. 2003). In any event, *Clark* too is distinguishable because the panel proceeded on the premise that the unauthorized theory there did not involve any constitutional violation, *id.* at 1310, while here the state has conceded that the misinstruction infringed Pulido’s due process right to jury determination of every element of the offense. *Pulido v. Lamarque*, 9th Cir. No. 05-15916, [State’s] Appellant’s Opening Br., p. *52 [2005 WL 3128204]

III. THIS CASE PRESENTS NO CERT-WORTHY QUESTION ON AEDPA'S APPLICATION TO A STATE COURT'S HARMLESS ERROR CONCLUSION. UNDER *FRY V. PLILER*, NO SUCH SEPARATE ANALYSIS IS NECESSARY, AND, IN ANY EVENT, THE STATE COURT'S FAILURE TO CONSIDER THE COMPLETE SPECIAL CIRCUMSTANCE INSTRUCTIONS WAS OBJECTIVELY UNREASONABLE.

The state attempts to recast the *Stromberg* rule as presenting issues under the AEDPA standard, 28 U.S.C. § 2254(d)(1). For three distinct reasons, this case poses no review-worthy issues under § 2254(d)(1).

1. This Court's recent decision in *Fry v. Pliler*, ___ U.S. ___, 127 S.Ct. 2321 (2007), has rendered § 2254(d)(1) largely irrelevant to a habeas court's assessment of whether constitutional error was prejudicial. In its pre-*Fry* decision, the district court here conducted an exhaustive two-stage prejudice analysis: It first applied § 2254(d)(1) and found that the state court's harmless error conclusion represented an objectively unreasonable application of the *Chapman* standard, which should have applied on Pulido's direct appeal. App. 52a-65a. The district court then conducted a separate independent review and determined that the error had a "substantial and injurious effect" under the *Brecht* standard. App. 65a-67a.

Fry, however, makes clear that this unwieldy two-stage prejudice review was not necessary. When a habeas court finds constitutional error, it can proceed directly to its own determination of prejudice under *Brecht*: "[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*, 127 S.Ct. at 2327, emphasis in original. Regardless of whether that prejudice analysis should be limited to the *Stromberg*

inquiry or should involve a more far-ranging examination of the entire record (as in the district court decision), the § 2254(d)(1) standard does not enter into the picture.

2. Nor does this case pose any doctrinal conflict between the California Supreme Court's and the Ninth Circuit's respective formulations of the framework for review of submission of an invalid alternative ground. The state court did not review the error under *Chapman*, but under a line of state authorities which looked to whether a jury's other findings cured a misinstruction, App. 116a-117a. The *standards* which the state and federal courts employed were substantively similar in their focus on whether the special circumstance established that the jurors relied upon the valid alternative theory. The true reason for the disparate dispositions of Pulido's state appeal and federal petition has little to do with the formulation of the standard. Instead, this case turns on the more mundane case-specific process of comparing the defective felony-murder instructions with those on the special circumstance.

3. "The cornerstone of the California Supreme Court's determination that the failure to instruct on the timing element could not have been prejudicial to [Pulido] was the jury's special circumstance verdict." App. 55a (dist. ct. opn.). The state court mistakenly assumed that the special circumstance verdict required a finding that Pulido's participation in the robbery was contemporaneous with the shooting. App. 116a-117a. If the judge had delivered the standard instructions on the special circumstance, that assumption would have been defensible. The problem was that both the oral and written instructions allowed the jurors to return a special circumstance verdict without making any such contemporaneity finding. The

California Supreme Court had looked only to the first sentence of the “Introductory” special circumstance instruction, which described that charge as “murder ... committed while the defendant was engaged in or was an accomplice in the commission or the immediate flight after committing or attempting to commit robbery.” App. 116a-117a.; State ER 221. But the subsequent substantive instruction, which listed the specific criteria for the special circumstance, allowed a verdict either if the killing occurred while Pulido was a participant in the robbery “or” if the murder was committed to “advance” the robbery. App. 8a fn. 4; State ER 223. “[U]nder the second theory, the jury could have found that the special circumstance applied to Petitioner because the murder was committed in order to carry out a robbery which Petitioner aided and abetted only after the killing occurred.” App. 56a-57a (dist. ct. opn.); see also App. 10a-11a (9th Cir. opn.).

Every judge who was aware of this defect – i.e., the substitution of the disjunctive “or” for the conjunctive “and” – has agreed that the special circumstance did not require a finding that Pulido’s participation was contemporaneous with the killing.¹⁵ The problem with the state court’s disposition has less to do with its construction of any particular passage than with its reliance on an introductory snippet without reviewing the complete instructions on the special circumstance.

¹⁵ Since he concurred in the judgment, App. 12a, even Judge O’Scanlion (who urged reconsideration of the *Stromberg* rule) evidently agreed that the special circumstance did *not* reflect a finding of contemporaneous participation. Had he agreed with the state’s reading, he presumably would have voted to deny relief under *Lara v. Ryan*, 455 F.3d 1080, 1086-1087 (9th Cir. 2006).

Even if (notwithstanding *Fry v. Pliler*), a separate § 2254(d)(1) review of the harmless error finding was necessary, application of that standard is extraordinarily easy in this case (and certainly poses no cert-worthy issue). The “well-established proposition” at stake here is “that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.” [Citation.]” *Boyd v. California*, 494 U.S. 370, 378 (1990).¹⁶ If a state court is to embrace some other verdict as proof the jurors made a finding curing the misinstruction on the principal charge, it is incumbent upon that court to review the complete instructions on the supposedly-curative separate charge, rather than just an isolated snippet.¹⁷ The error is especially glaring because the “while” language was in a general “Introductory” instruction, while it was the subsequent substantive instruction detailing the specific criteria for special circumstance which allowed a verdict as long as the murder “advanced” the robbery. In jury instructions, as in contracts and statutes, the specific prevails over the general. *Bollenbach v. United States*, 326 U.S. 607, 611-612 (1946).

¹⁶ Accord, e.g., *Middleton v. McNeil*, 541 U.S. 433, 437 (2004); *Kansas v. Marsh*, ___ U.S. ___, 126 S.Ct. 2516, 2527 fn. 6 (2006).

¹⁷ *Penry v. Johnson*, 532 U.S. 782, 803-084 (2001), found a state reviewing court’s reliance on the alleged curative effect of a supplemental instruction “objectively unreasonable” under similar circumstances. The supplemental instruction was itself subject to “two possible” interpretations, and even the assertedly curative construction “made the jury charge as a whole internally contradictory.” *Id.* at 797-799. Similarly here, “[o]nce the entire record is considered ..., it becomes apparent that the supposedly curative instruction actually aggravated, rather than curing, the instructional error.” App. 17a-18a (Judge Thomas’ concurring opn. in 9th Cir.).

A state court's disposition is objectively unreasonable under AEDPA *where that court fails to consider the complete record relevant to a claim*. Such failures have represented the most common cause of this Court's findings of unreasonable state court decisions. E.g., *Williams v. Taylor*, 529 U.S. 362, 397 (2000) (“the State Supreme Court’s prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence”); *Wiggins v. Smith*, 539 U.S. 510, 527-529 (2003) (failure to consider whether information in social service records “would lead a reasonable attorney to investigate further” and reliance on erroneous assumption as to contents of those records); *Rompilla v. Beard*, 545 U.S. 374, 388-390 (2005) (findings of adequate investigation unreasonable where state courts did not address counsel’s failure to review file of prior conviction); *Miller-El v. Dretke*, 545 U.S. 231, 240-266 (2005) (rejection of *Batson* claim unreasonable where state court ignored disparate treatment of white and black jurors and history of discriminatory practices). Here too, the state court “based its conclusion, in part, on a clear factual error,” *Wiggins* at 529 – i.e., that the special circumstance verdict required a finding of contemporaneous participation in the robbery.

The state court’s reliance on the special circumstance as proof of harmlessness, without considering the complete special circumstance instructions, falls squarely within the “unreasonable application” category, as the district court and the Ninth Circuit properly found. App. 54a-59a, 8a-11a.

IV. THIS CASE IS NOT A SUITABLE VEHICLE FOR RECONSIDERATION OF THE STROMBERG RULE OR ITS RELATIONSHIP TO THE BRECHT STANDARD, BECAUSE THE ERROR WAS PLAINLY PREJUDICIAL UNDER BRECHT UNDER THE TOTALITY OF CIRCUMSTANCES.

As discussed in Part II, when a *Stromberg* inquiry leaves a habeas court uncertain whether the jurors relied on an unconstitutional theory, that uncertainty is tantamount to a “grave doubt” as to the error’s effect, for purposes of the *Brecht-O’Neal* standard,¹⁸ and no further prejudice analysis is necessary. But the result here will be the same even under a more expansive harmless error review of the totality of circumstances. That is exactly the type of review which the district court conducted in finding the requisite “substantial and injurious effect” under *Brecht*. App. 65a-67a; see also App. 51a-65a.¹⁹ Pulido submits that five factors, considered cumulatively, compel a finding of prejudice under any standard.

1. **The other verdicts do not resolve whether some jurors relied on the unauthorized “late joiner” theory.** The 8-4 or 4-8 deadlock on the personal firearm use allegation demonstrates that some jurors rejected the prosecution’s primary theory that Pulido personally robbed the store and shot the clerk. App. 33a. While those jurors necessarily based their murder verdict on an aiding/abetting theory, the verdicts do not indicate whether they relied on the invalid “late joiner” theory of assistance in the robbery after the shooting or on the legitimate alternative ground of

¹⁸ *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *O’Neal v. McAnich*, 513 U.S. 432 (1995)

¹⁹ In his Ninth Circuit concurrence, Judge Thomas similarly “emphasize[d] that the result the majority reaches would be the right result even under a harmless error standard.” App. 17a-23a.

assistance prior to or during the shooting. As discussed in Part III, the special circumstance verdict does not resolve the matter, because the substantive instructions on that charge did not require any finding of contemporaneous assistance.

The state also relies on the special circumstance on an alternative rationale. The state maintains that, since the special circumstance required “reckless indifference” to life and assistance as a “major participant” in the robbery, the jurors rejected Pulido’s testimony that he only assisted his uncle after the shooting. Cert. Pet. 22-23. No court, state or federal, has adopted that reading of the special circumstance verdict. The California Supreme Court pointedly did not rely on the “reckless indifference”/ “major participant” rationale, but only on its mistaken assumption that the instructions required that the killing occur “while” Pulido was a participant in the robbery. App. 116a-117a. As the district court observed: “Based on the plain language of the instruction and a common sense analysis of the evidence, the jury could have found that Petitioner acted with reckless indifference to the victim’s life if Petitioner knew the victim had been shot but failed to come to his aid.” App. 58a (summarizing multiple California cases finding reckless indifference “based on an aider and abettor’s failure to act without knowing whether the victim is dead or still alive”); see also Judge Thomas concur. opn., App. 19a-20a.²⁰

2. There was evidentiary support for the invalid legal theory. Pulido admitted prying the stolen register open, while his uncle drove away from the site of

²⁰ Moreover, one theme of the prosecutor’s cross-examination of Pulido was that he had shown such indifference by failing to check on the stricken victim’s condition or call “911.” Pulido ER 147, 158-161B.

the murder, and then disposing of the register in a field. That admitted assistance to Aragon during his flight from the crime, prior to reaching a “place of temporary safety,” rendered Pulido guilty of robbery as an aider/abettor. The instructions’ erroneous “late joiner” theory, in turn, subjected him to felony murder liability, even though he joined in the robbery only after the homicide. Thus, although the “late joiner” theory was legally insufficient, it was, nonetheless, factually supported. Especially since it was based on the defendant’s own testimony, the jurors could easily have relied on that invalid theory to convict him of murder.

3. The evidence supporting the legally valid theory was contested. As discussed in Part II, omission of an element is harmless where that element rested on uncontroverted evidence, but not “where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding.” *Neder v. United States*, 527 U.S. at 19. Similarly, submission of an invalid ground for conviction may be harmless where the evidence supporting the valid alternative was uncontroverted. But that is certainly not the case here. Pulido vehemently denied any knowledge of or participation in the robbery prior to or during the shooting.

4. The legally invalid theory was supported by direct evidence, while the valid alternative ground rested on inference and speculation. It is much more plausible that the jurors relied on the invalid “late joiner” theory than that they relied on the valid alternative of contemporaneous assistance, for the latter theory did not correspond to any witness’ account or to either side’s view of the evidence.

There was circumstantial evidence from which the prosecution constructed a narrative in which Pulido alone committed the robbery and murder. The split vote on the personal firearm use allegation reflects that some, but not all, the jurors found that scenario convincing. But, as summarized by the district court, there was substantial “contrary evidence.” App. 63a. Pulido’s own testimony provided an alternative narrative in which Aragon murdered the attendant and Pulido assisted his uncle only after the killing.

Reasonable jurors could plausibly have found either of these scenarios. But the state asks this Court to presume that those jurors who rejected the personal use allegation instead devised an entirely new story of their own creation.²¹ Because it bears little resemblance to the evidence, the state’s theory raises a host of questions as to what exactly the jurors supposedly found Pulido did and when he did it.

The vice of these instructions was that they relieved the jurors of the necessity of deciding *when* Pulido joined the robbery. Because Pulido’s admitted assistance to Aragon after the shooting would have appeared sufficient to subject him to felony murder liability under the erroneous instructions, the jurors could stop there.

5. The jurors’ many questions during deliberations and the court’s inadequate responses strongly suggest that some jurors relied on the “late joiner” theory. Over their five days of deliberations, the jurors submitted multiple

²¹ As noted by the district court, App. 65a, a further problem is that most of the assertedly “powerful” evidence cited by the state, Cert. Pet. 22-23, either supported the theory that Pulido himself shot the attendant (which some jurors rejected by their vote on the firearm use allegation) or indicated simply that he had some involvement in the crime, without resolving *when* that assistance occurred.

queries on the scope of an aider/abettor's liability under the felony-murder instructions. State ER 347-363. The trial court either resubmitted or referred the jurors back to the same instructions which erroneously indicated that felony-murder liability attached even to someone who joined in the robbery only after the murder by assisting the robber/killer in his flight with the stolen goods. App. 59a-63a.

The judge stated he was "unable to answer" the jurors' question whether aiding/abetting required "'knowledge of the purpose' ... prior to ... or during the commission of the crime." As the district court commented, "This question goes to the crux of the timing element of aiding and abetting felony murder about which the California Supreme Court later found the jury was incorrectly instructed." App. 61a.

The jurors also submitted two diagrams representing alternative understandings of the criteria for felony-murder liability and asked "which is correct?" State ER 357-359. As the district court summarized, one of those alternatives would have allowed felony-murder liability "if [Pulido] only 'facilitate[d] by aiding.' Because the definition of aiding contained in the felony murder and robbery instructions omitted the crucial timing element, this prong would not represent a legally correct option. The court did not remedy this misconception or otherwise dispel the jury's confusion," but "simply referr[ed] the jurors back to the erroneous instruction which prompted their questions in the first place..." App. 62a-63a.²²

²² As Judge Thomas noted, "this question demonstrates that at least some jurors believed that Pulido developed knowledge and intent only after the actual theft had occurred..." App. 22a-23a.

“When a jury makes explicit its difficulties, a trial judge should clear them away with concrete accuracy.” *Bollenbach v. United States*, 326 U.S. 607, 612-613 (1946). But the judge’s responses here were either uninformative or made things worse by underscoring the notion that felony-murder liability extended to anyone who aided in the robbery. Because the unanswered questions reveal that the jurors had focused on the erroneous theory, a finding of prejudice is inexorable. *Ibid*; *Shafer v. South Carolina*, 532 U.S. 36, 52-53 (2001); *Simmons v. South Carolina*, 512 U.S. 154, 160, 170 fn. 10 (1994).

Especially when these jurors’ queries are considered with the other factors discussed here, it is manifest that there is “grave doubt” and thus that the constitutional error had a “substantial and injurious effect or influence in determining the jury’s verdict.” *O’Neal*, 513 U.S. at 438; *Brecht*, 507 U.S. at 637.

Because the result will be the same under either a categorical prejudice standard (limited to the *Stromberg* inquiry) or under a more broad totality-of-circumstances review (as in the district court opinion), this case would be an unsuitable one for this Court to pick to resolve any questions concerning the viability of the *Stromberg* rule or its relation to *Brecht* prejudice analysis. This Court’s usual practice is to avoid deciding any such broad question, involving reconsideration of its own precedents, where it is possible to resolve a matter on more narrow, case-specific grounds. Were it to grant certiorari, the Court would have to conduct a fact-

intensive review of the record, because a finding of prejudice under a totality-of-circumstances analysis would moot the *Stromberg*-related questions.

There is no cause for reconsideration of *Stromberg* and its progeny. The *Stromberg* rule is consistent with the lessons of this Court's "structural defect" cases (such as *Sullivan v. Louisiana*) and of its harmless error authorities (such as *Neder v. United States* and *O'Neal v. McAninch*). But, even if the Court believes that some re-examination of *Stromberg* may be in order, this is not the case to do it, because the disposition here would be the same under any form of prejudice analysis.

CONCLUSION

For the foregoing reasons, respondent Michael Pulido respectfully urges this Court to deny a writ of certiorari.

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Respectfully submitted,

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