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**In the Supreme Court of the United States**

**FILED**

**JAN 10 2008**

CHRIS CHRONES, WARDEN, *Petitioner*, OFFICE OF THE CLERK  
SUPREME COURT, U.S.

v.

MICHAEL ROBERT PULIDO, *Respondent*.

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

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**PETITIONER'S REPLY BRIEF**

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**TABLE OF CONTENTS**

	<b>Page</b>
PETITIONER'S REPLY BRIEF	1
1. CERTIORARI IS REQUIRED TO DECIDE WHETHER <i>STROMBERG V. CALIFORNIA</i> CONSTITUTES CLEARLY ESTABLISHED PRECEDENT AFTER <i>ROSE V. CLARK</i>	1
2. RESPONDENT FAILS TO HARMONIZE <i>STROMBERG</i> WITH THIS COURT'S MODERN HARMLESS ERROR JURISPRUDENCE	3
3. THE NINTH CIRCUIT'S RULE CONFLICTS WITH THE RULE IN FOUR CIRCUITS	5
4. THE NINTH CIRCUIT'S STRUCTURAL-ERROR RULE IS INCONSISTENT WITH THE DEFERENTIAL FEDERAL HABEAS REVIEW REQUIRED IN THIS AND MANY CASES	7
5. <i>BRECHT</i> REQUIRES A FINDING OF HARMLESS ERROR	8
CONCLUSION	12

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Arizona v. Fulminante</i> 499 U.S. 276 (1991)	2
<i>Becht v. United States</i> 408 F.3d 541 (8th Cir. 2005)	6
<i>Brecht v. Abrahamson</i> 507 U.S. 619 (1993)	7-10
<i>Calderon v. Coleman</i> 525 U.S. 141 (1998)	5
<i>California v. Roy</i> 519 U.S. 2 (1996)	3
<i>Chapman v. California</i> 386 U.S. 18 (1967)	7, 8
<i>Estelle v. McGuire</i> 502 U.S. 62 (1991)	5
<i>Fry v. Pliler</i> __ U.S. __, 127 S. Ct. 2321 (2007)	7, 8
<i>Griffin v. United States</i> 502 U.S. 46 (1991)	2, 6
<i>Lara v. Ryan</i> 455 F.3d 1080 (9th Cir. 2006)	1, 8

**TABLE OF AUTHORITIES (continued)**

	<b>Page</b>
<i>Mills v. Maryland</i> 486 U.S. 367 (1988)	2
<i>Neder v. United States</i> 527 U.S. 1 (1999)	3-6
<i>Parker v. Secretary, Dept. of Corrections</i> 331 F.3d 764 (11th Cir. 2003)	6
<i>Pope v. Illinois</i> 481 U.S. 497 (1987)	3, 6
<i>Quigley v. Vose</i> 834 F.2d 14 (1st Cir. 1987)	6
<i>Rose v. Clark</i> 478 U.S. 570 (1986)	2, 4-6
<i>Sandstrom v. Montana</i> 442 U.S. 510 (1979)	1
<i>Stromberg v. California</i> 238 U.S. 359 (1931)	1-6
<i>United States v. Bailey</i> 405 F.3d 102 (1st Cir. 2005)	6
<i>United States v. Holly</i> 488 F.3d 1298 (10th Cir. 2007)	6
<i>Yates v. Evatt</i> 500 U.S. 391 (1991)	6

**TABLE OF AUTHORITIES (continued)**

	<b>Page</b>
<i>Yates v. United States</i> 354 U.S. 208 (1957)	2
 <b>Statutes</b>	
United States Code, Title 28	
§ 2254	7
§ 2254(d)(1)	7

**In the Supreme Court of the United States**

No. 07-544

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CHRIS CHRONES, WARDEN, *Petitioner*,

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MICHAEL ROBERT PULIDO, *Respondent*.

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**PETITIONER'S REPLY BRIEF**

**1. CERTIORARI IS REQUIRED TO DECIDE WHETHER  
STROMBERG V. CALIFORNIA CONSTITUTES  
CLEARLY ESTABLISHED PRECEDENT AFTER ROSE  
V. CLARK**

Respondent's conviction of first degree murder was reversed under the Ninth Circuit's rule that a jury instruction on a legally erroneous alternative theory is structural error requiring the reviewing court to be "absolutely certain" the jury did not rely on the erroneous theory to convict. App. 10a-11a; *Lara v. Ryan*, 455 F.3d 1080 (9th Cir. 2006). Its rule traces to *Stromberg v. California*, 238 U.S. 359, 368 (1931), which held that reversal is required if one of the multiple grounds for conviction is constitutionally invalid and a reviewing court cannot determine on which ground the jury relied. See *Lara*, 455 F.3d at 1085 (citing *Sandstrom v. Montana*, 442 U.S. 510, 526 (1979), citing

*Stromberg*).

Respondent contends that *Stromberg* remains clearly established law, despite *Stromberg*'s unresolved dichotomy with this Court's established harmless error test, see *Rose v. Clark*, 478 U.S. 570 (1986), and the Court's established principle that structural error is never harmless while trial error can be, see *Arizona v. Fulminante*, 499 U.S. 276 (1991). He relies on two post-*Rose* cases: *Mills v. Maryland*, 486 U.S. 367, 376 (1988), and *Griffin v. United States*, 502 U.S. 46, 55 (1991). Opp. at 9-10. Yet neither decision mentioned *Rose* or *Fulminante*. And neither decision considered whether an erroneous legal theory can be harmless.

*Mills* interpreted instructions and verdict forms to make a determination of error. Its approving citation of *Stromberg*, see 486 U.S. at 376, involved no consideration of the question petitioner presents here or of the impact of *Rose* on harmless error analysis. *Griffin* merely distinguished *Stromberg*, finding that it does not mandate reversal when an instruction on an alternative factual theory is unsupported by substantial evidence. See *Griffin*, 502 U.S. at 56 (no known case "set aside a general verdict because one of the possible bases of conviction was neither unconstitutional as in *Stromberg*, nor even illegal as in *Yates [v. United States]*, [354 U.S. 208 (1957)], but merely unsupported by sufficient evidence.")

That the Court in two post-*Rose* decisions addressed faulty instructions without the need to consider whether *Rose* undermined *Stromberg* hardly reflects reaffirmation of the latter. Under *Stromberg*, reversal is always required when a reviewing court cannot know whether a conviction rests on an unconstitutional theory. Under *Rose* and its progeny, reversal is *not* always required even when a reviewing court *does* know

that a conviction *does* rest on an unconstitutional theory. That these apparent non-intersecting lines of Supreme Court authority coexist without explanation of one another only highlights the need to resolve the question in this case.

Respondent's Brief in Opposition labors to make these parallel lines of authority intersect. His efforts, like those of the Ninth Circuit, only demonstrate the ever-deepening confusion and incoherence of the Ninth Circuit's "alternate theory" rule.

## **2. RESPONDENT FAILS TO HARMONIZE *STROMBERG* WITH THIS COURT'S MODERN HARMLESS ERROR JURISPRUDENCE**

The Ninth Circuit's structural-error rule distinguishes instructions that state an erroneous legal theory from instructions that erroneously state an element needed to convict. See Pet. at 18. *Pope v. Illinois*, 481 U.S. 497, 499-503 (1987), however, found instructional error could be harmless even though the infirm instruction gave the jury no choice but to rest a guilty verdict on an unconstitutional theory. Further, *Neder v. United States*, 527 U.S. 1, 11-13 (1999), and *California v. Roy*, 519 U.S. 2, 5 (1996), each rejected the notion that an instructional error is structural depending on how the error is labeled. The Ninth Circuit's distinction between legal theory error and other erroneous instructions on elements of the offense is just the kind of artificial labeling *Neder* and *Roy* condemned.

Respondent ignores *Pope* and *Roy* altogether. As for *Neder*, respondent views that decision as only a short jump from *Stromberg*. He reads *Neder* as holding that an erroneous instruction on an element of an offense requires reversal when the evidence of the element is

“contested,” see 527 U.S. at 19, and concludes that “the same is true [per *Stromberg*] of a reviewing court’s uncertainty whether the jurors based their verdict on an unconstitutional ground.” Opp. at 12-13. But *Neder*’s reference to the circumstance of a “contested” element as an “example” did not formulate a precise test for determining if instructional error is actually harmless. See *Rose v. Clark*, 478 U.S. at 583-84 (the fact that defendant denied acting with the requisite intent “does not dispose of the harmless error question.”). The harmless error test also must take account, indispensably, of the findings the jury actually made. Here, if the jury found with respect to the “special circumstance” that respondent aided the robbery during the killing, the erroneous failure to find the contemporaneity element of aiding and abetting felony murder would be harmless—as petitioner tacitly acknowledges, Opp. at 18—even though respondent contested the contemporaneity element and raised evidence sufficient to support a finding in his favor. In such manner, a jury finding can render an instructional error harmless regardless of the evidence in the defendant’s favor because the finding shows that the jury rejected that evidence and, thus, would have made the required finding under a proper instruction.

More generally, respondent’s analysis confuses two inquiries that *Neder* kept separate: (1) can instructional error be harmless and, (2) if so, was it actually harmless? See *Neder*, 527 U.S. at 8-15 (instructional omission of an element may be harmless error); *id.* at 15-20 (error actually harmless). To say, as *Neder* does, that an instructional error may prove to be prejudicial depending upon the evidence, is not to say, as *Stromberg* does, that an unconstitutional instruction must be prejudicial when the jury may have relied on it. By

collapsing the question of whether an error can be harmless into the question of whether an error actually is harmless, respondent and the Ninth Circuit conflate error and harm. Error occurs when the jury misapplies the law. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Harm occurs when a reviewing court cannot conclude that the result would have been the same had the jury not misapplied the law. *Neder*, 527 U.S. at 18.

In sum, respondent attempts to harmonize *Neder* with *Stromberg* not only by confusing the apples of harm with the oranges of error but by substituting fake apples (i.e., an incorrect prejudice test) for the real thing. Even if *Stromberg* in the unconstitutional-theory context itself conflated error with harm, like the Ninth Circuit did with the instructions in this case, certiorari is warranted because *McGuire*, *Rose*, and *Rose*'s several progeny, including *Neder*, firmly and clearly separate those two concepts. See *Calderon v. Coleman*, 525 U.S. 141, 146-147 (1998) (per curiam) (the test for instructional error "is not a substitute for the *Brecht* harmless-error test").

### 3. THE NINTH CIRCUIT'S RULE CONFLICTS WITH THE RULE IN FOUR CIRCUITS

Respondent asserts, "The *Stromberg* rule is alive and well in other circuits." Opp. at 14. He cites three decisions, none of which consider *Stromberg* in light of *Rose*. Thus, respondent fails to refute petitioner's demonstration that the latter decision undermines the former.

Respondent finds support, in two of the circuit decisions cited by petitioner, for the principle that "[a]n 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.” Opp. at 15 (citing *United States v. Holly*, 488 F.3d 1298, 1306-07 (10th Cir. 2007), and *Parker v. Secretary, Dept. of Corrections*, 331 F.3d 764, 778 (11th Cir. 2003)). The cited limitation on harmless error analysis is correct, but it is one that *Rose* imposes as firmly as *Stromberg*. See *Yates v. Evatt*, 500 U.S. 391, 399, 406 (1991) (state supreme court misapplied harmless error test when it asked whether jury would have found it unnecessary to rely on the erroneous mandatory presumption regarding the element of malice). That *Rose* and *Stromberg* can produce identical results in some cases hardly resolves the conflict between the two. Moreover, both *Holly* and *Parker* used *Rose*, not *Stromberg*, to govern harmless error analysis when, as here, a jury could have convicted based on a legally erroneous theory. *Quigley v. Vose*, 834 F.2d 14 (1st Cir. 1987), established the same approach in the First Circuit. Respondent contends that *United States v. Bailey*, 405 F.3d 102, 109-10 (1st Cir. 2005), “recognize[s] the continued vitality of the *Stromberg* rule in the First Circuit” (Opp. at 15, n. 13), yet *Bailey* mentioned neither *Stromberg* nor *Rose* and simply found no error.

Respondent seeks to distinguish *Becht v. United States*, 408 F.3d 541 (8th Cir. 2005), another decision cited by petitioner as evidence of a circuit split, by characterizing it as a *Griffin* case based on insufficient evidence supporting the erroneous theory on which the jury was instructed. Opp. at 16. But *Becht* only obliquely mentioned *Griffin* and forthrightly stated that in alternate legal theory cases *Stromberg* governs only the question of error, whereas *Rose*, *Pope*, and *Neder*

govern prejudice. *Id.* at 548-49.

**4. THE NINTH CIRCUIT'S STRUCTURAL-ERROR RULE IS INCONSISTENT WITH THE DEFERENTIAL FEDERAL HABEAS REVIEW REQUIRED IN THIS AND MANY CASES**

Respondent argues that the application of the forgiving *Brecht v. Abrahamson* harmless-error test on habeas corpus (as required by *Fry v. Pliler*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 2321, 2328 (2007)) subsumes the question of whether the state court reasonably applied the stricter test of *Chapman v. California*. He ignores the fact that in this case the Ninth Circuit has replaced both *Brecht* and *Chapman* with its “absolute certainty” test of structural error.

*Fry v. Pliler* held:

[I]n § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the “substantial and injurious effect” standard set forth in *Brecht*, 507 U.S. 619 . . . [631 (1993)] whether or not the state appellate court recognized the error and reviewed it for harmlessness under the “harmless beyond a reasonable doubt” standard set forth in *Chapman* [*v. California*], 386 U.S. 18 . . . [1967].

*Fry* noted that it may be unnecessary for a federal habeas court to decide (as otherwise required under § 2254(d)(1)) whether the state appellate court unreasonably applied clearly established federal law, namely, the *Chapman* standard. *Fry*, 127 S. Ct. at 2327. To respondent, “*Fry* . . . has rendered § 2254(d)(1) largely irrelevant to a habeas court’s assessment of whether constitutional error was prejudicial.” Opp. at 17. The argument puts respondent in a self-

contradictory position. He claims that the predominance of *Fry* in the harmless error field makes review of the Ninth Circuit's rule unnecessary, yet he approves of the rule for undercutting the predominance of *Fry* by making it irrelevant to the prejudice question in this case and in a myriad of other instructional error cases.

In the Ninth Circuit, the supposed rule that "alternate legal theory" error is structural has two main consequences. First, on direct appeal of federal convictions, "absolute certainty," not *Chapman*, is the mandated harmless error standard. Second, on federal habeas review of state convictions, "absolute certainty" replaces the *Brecht* test—notwithstanding *Fry*. The latter has particularly significant impact because the test for harmless error under *Brecht* differs enormously from the Ninth Circuit's "absolute certainty" test. *Brecht* frequently may permit a finding of harmlessness, as in *Fry* itself. The "absolute certainty" test allows that finding only where, in effect, no error actually occurred because the jury did not rely on the erroneous legal theory. See Cert. Pet. at 18-19; *Lara v. Ryan*, 455 F.3d at 1087.

Although it suggests a distinction between its view of "alternate legal theory" instructional error and instructional error involving other elements, the Ninth Circuit's effort to cabin its structural-error rule is largely incoherent. As demonstrated in this case, the elasticity of the rule has great potential to undermine deferential review of harmless error in federal habeas corpus cases.

## 5. *BRECHT* REQUIRES A FINDING OF HARMLESS ERROR

Respondent argues that *Brecht* compels a grant of the writ in his case. Opp. at 22. If that were true, respondent could have no substantial objection to this Court directing the Ninth Circuit to do what it never did: apply *Brecht*. Respondent can maintain his objection only by reformulating the prejudice question as “whether some juror relied on the unauthorized ‘late joiner’ theory.” Opp. at 22.

That is not the prejudice question or, for that matter, even the error question. The jury convicted respondent of felony murder without finding he aided and abetted the robbery before the killing. Whether or not “some juror relied on the . . . ‘late joiner’ theory,” the error was that the jury failed to rule out that theory with respect to felony murder. And the prejudice question focuses not on whether a juror might have relied on the improper theory, but rather on what the jury actually did—weigh evidence, consider arguments, and make findings (right and wrong)—insofar as that shows what the jury would have done under a proper felony-murder instruction. The error is harmless if, given all the relevant circumstances, the jury would have found the contemporaneity element of aiding and abetting felony murder had it been correctly instructed on that element.

All the reasons respondent gives for why the judgment of conviction falls under *Brecht* are overturned with recognition of his fundamental misconception that error is tantamount to prejudice. The most that respondent’s five factors show is that the jury erroneously failed to find the contemporaneity element necessary to convict respondent of aiding and abetting felony murder. For example, respondent points to the questions the jury asked about the “late joiner”

theory. Opp. at 25-27. But its questions concerned only felony murder, not the special circumstance. The questions the jury asked only show the error. Failing to distinguish the jury's consideration of the charged crime from its consideration of the special circumstance (even though the jury had to find the first before considering the second), respondent again conflates error and harm.

Noting that the California Supreme Court did not consider the "and/or" defect in one of the special circumstance instructions, respondent argues that court failed to consider all the relevant circumstances in interpreting the jury's special circumstance finding. Opp. at 18-19. Yet, respondent himself fails to interpret the defective instruction in the context of the other instructions, the arguments of counsel, and the evidence. Respondent, like the lower federal courts, ignores the fact that the prosecutor did not rely on the "and/or" defect and even told the jury to apply a standard unduly favorable to the defense. If respondent was not the shooter, the prosecutor said, the special circumstance would be true only if "when the killing occurred, the defendant . . . intended to kill—he knew that was going to happen and he wanted it to happen." ER 271; RT 1663. Respondent also ignores his fingerprint on the Coke can on the front counter inside the store and defense counsel's attempt to substitute an explanation for the manifestly unreasonable one respondent offered—highly probative evidence of pre-killing involvement.

To reconcile his claim of prejudice under *Brecht* with the jury's finding of reckless indifference to human life and major participation in the robbery, respondent deems it significant that the state supreme court did not rely on that finding. Opp. at 23. That court had no need to do so, given its conclusion that the special

circumstance verdict amounted to the missing contemporaneity finding. Respondent notes state case law sustaining a reckless-indifference/major-participant finding based, supposedly, on an accomplice's "failure to act without knowing whether the victim is dead or still alive' . . . ." Opp. at 23. The jury was not instructed on any such principle and the prosecutor never suggested that mere failure to act could support a finding of reckless indifference and major participation.

\* \* \*

Among all the federal circuit courts of appeal, the Ninth Circuit alone maintains a rule that eviscerates the distinction between structural and trial error in many cases involving instructions on elements of the charged offense. That rule elides the deferential harmless error test applicable to federal habeas corpus. The circuit court's attempted restructuring of harmless error analysis requires review in light of this Court's established law.

**CONCLUSION**

For the foregoing reason, the petition for a writ of certiorari should be granted.

Dated: January 9, 2008

Respectfully submitted,

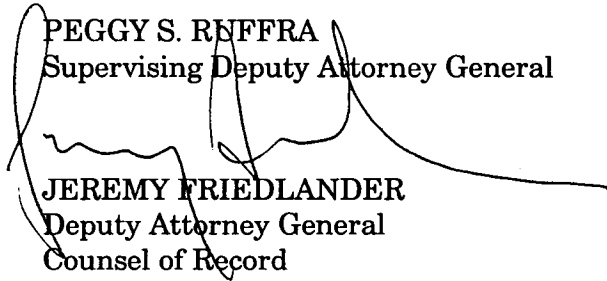
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