NO. 07-544

IN THE SUPREME COURT OF THE UNITED STATES

CHRIS CHRONES, WARDEN, *Petitioner*,

v.

MICHAEL ROBERT PULIDO, *Respondent*.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Stromberg v. *California*, 283 U.S. 359 (1931), required the reversal of the judgment if a general verdict could have rested on an instruction that defined a constitutionally defective alternative theory of criminal liability. However, a modern line of cases, including *Neder* v. *United States*, 527 U.S. 1 (1999), establishes that error in instructing on an element of a charged crime is not "structural error," so as to require automatic reversal, but is instead "trial error" and, as such, may be harmless.

The question presented is:

Did the Ninth Circuit fail to conform to "clearly established" Supreme Court law, as required by 28 U.S.C. § 2254(d), when it granted habeas corpus relief by deeming an erroneous instruction on one of two alternative theories of guilt to be "structural error" requiring reversal because the jury might have relied on it?

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

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Chris Chrones, Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

Respondent was convicted of first-degree murder for the robbery-killing of a convenience store clerk. He claimed that a murder instruction allowed the jury to convict him as an accomplice even if he had aided in the robbery only after the killing. The California Supreme Court held any instructional error to be harmless because the jury, in also returning a separate "special circumstance" verdict, explicitly had found that respondent aided the robbery "during" the murder. Perceiving an ambiguity in another special-circumstance instruction, the Ninth Circuit rejected the state court's conclusion that the jury's special-circumstance finding had definitively cured the error in the murder instruction. Relying on circuit law it had derived from this Court's 1931 decision in *Stromberg* v. *California*, 283 U.S. 359 (1931), the Ninth Circuit

deemed the murder instruction to be "structural error" because it concerned an "alternative" theory of guilt—aiding and abetting, as opposed to direct perpetration—and held reversal was required because the court was not "absolutely certain" that the jury had not relied on the erroneous theory.

Stromberg concerned an instructional error qualitatively different from the error claimed here, so it is not "clearly established law" governing respondent's case. Instead—as four circuits have held—a line of cases stretching from *Rose* v. *Clark*, 478 U.S. 570 (1986), through *Neder* v. *United States*, 527 U.S. 1 (1999), clearly establishes that an erroneous instruction on an element of a crime is not "structural" and may be found harmless under traditional tests for prejudice. The Ninth Circuit's reaffirmation of its "structural error" rule in this case is particularly disturbing because it comes on the heels of this Court's holding just last Term in *Fry* v. *Pliler*, __ U.S. __, 127 S.Ct. 2321 (2007), that the relaxed harmless-error test of *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), applies in state-prisoner habeas corpus cases. Had it applied *Brecht's* test for actual prejudice instead of its own test of "absolute certainty," the Ninth Circuit would have been constrained to deny relief.

OPINIONS BELOW

The panel opinion of the court of appeal is reported at 487 F.3d 669. (App. to Pet. Cert. 1a.) The panel memorandum rejecting respondent's other habeas claims is unreported. (App. 25a.) The order denying rehearing and rehearing en banc is unreported. (App. 31a.) The orders of the district court are unreported. (App. 32a, 98a.) The opinion of the California Supreme Court is reported at 15 Cal. 4th 713, 936 P.2d 1235 (1997). (App. 101a.)

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2007. An order denying a petition for rehearing and rehearing

en banc was filed on July 18, 2007. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3.

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2254(d)(1) provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—[¶] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Pub. L. No. 104-132, Title I, § 104, 110 Stat. 1218 (1996).

STATEMENT OF THE CASE

1. The California Supreme Court summarized the events leading to respondent's conviction of first degree murder:

> Sometime between 1 a.m. and 5:30 a.m. on May 24, 1992, Ramon Flores, the cashier at a Shell gas station in San Mateo, was shot in the head with a single .45-caliber bullet, killing him within seconds. A neighbor heard a loud bang coming from the direction of the gas station around 3:45 a.m., then a voice yelling; he could not distinguish words, but told a police detective it sounded like the person was addressing someone else. A cash register taken from the store was found the next morning in some roadside bushes elsewhere in San Mateo. Defendant's fingerprints were on the cash register, as well as on an unopened can of Coke found on the store counter. No fingerprints of Michael Aragon, who defendant testified committed the killing, were identified on either the can or the register.
>
> Arrested on an unrelated auto theft charge, defendant volunteered that he had information about the Shell station robbery. He led police to a location where they found

discarded, unused .45-caliber cartridges, which bore ejection markings resembling those on a cartridge found on the gas station floor. Defendant made a series of inconsistent exculpatory statements to police, blaming the robbery and killing successively on a man named Carlos Vasquez, on a relative of defendant's named Eduardo Alarcon and, finally, on an unidentified Tongan man. In a telephone conversation from jail with his uncle, Michael Aragon, and Aragon's cohabitant, Laura Moore, however, defendant said he was alone during the robbery.

At the time of the killing, defendant was staying with Aragon, Moore and their children in their San Mateo home. While he was staying with them, Aragon, two of the children, and a neighbor saw defendant with a pistol, which the neighbor identified as a .45-caliber Colt. During that time, defendant twice observed that the nearby Shell station would be easy to rob because the attendant was always asleep. Aragon told defendant to get rid of the gun because he, Aragon, was on probation. He had been convicted in 1989 of burglary, possession of cocaine and contributing to the delinquency of a minor.

Aragon and Moore testified that defendant was at home when they went to bed around midnight on May 23, but was gone when they got up at around 3 a.m. to care for their baby. The next morning, Sunday, May 24, they awoke to find defendant asleep in the living room with his clothes and shoes on. He showed Aragon his wallet and said, "Look unc, almost all ones." Later that day, Moore discovered defendant was carrying a handgun and insisted he and Aragon dispose of it. At her direction, defendant took the gun apart; Moore then boiled the pieces in soapy water and put most of them in a bag, which defendant and Aragon threw away near Candlestick Park. Two pieces that Moore had retained to prevent reassembly were later given to police and identified as fitting a .45-caliber Colt.

After seeing a newspaper article about the killing, Aragon asked defendant if he committed it. Defendant denied he had, but a few days later, when Aragon asked again, defendant admitted the crime. He told Aragon he bought a Coke, then shot Flores in the face, took the register and later threw it in some bushes. In a letter from jail, however, defendant wrote to Moore, "If Michael is reading this, tell him I didn't kill that guy, I was just messing with him."

Defendant testified, blaming Aragon for the killing. Aragon, he stated, had seen where defendant kept the pistol. On the night of May 23, defendant and Aragon went out in Aragon's car; defendant thought the pistol was on the shelf where he usually kept it. They went to Hunters Point, where Aragon bought and smoked some cocaine. They left, but returned later for Aragon to buy and smoke more cocaine. Eventually the two arrived at the Shell station in San Mateo. Aragon went inside, defendant thought for matches or cigarettes. Defendant waited outside. He heard a gunshot and ran into the store. Aragon was holding defendant's gun. Flores was lying on the floor, bleeding from a large bullet wound in his face. Defendant yelled at his uncle, ran out of the store and got in the passenger seat of the car. A few seconds later, Aragon came out, holding the cash register in his left hand and the gun in his right hand. He threw the register on defendant's lap and drove away.

As they were driving away from the scene, Aragon told defendant to open the register. When defendant did not comply, Aragon pointed the gun at him and insisted. Defendant got a screwdriver from the back of the car and pried the register open. At Aragon's command defendant gave him the money and dumped the register in some bushes by the side of the road. Defendant denied touching a Coke can in the store that night; he suggested he might have touched the can on some earlier occasion when he

bought a drink at the store.

The defense also presented evidence casting doubt on Aragon's credibility. While admitting a prior drug possession conviction, Aragon denied he was still using cocaine at the time of the killing. However, Aragon's sister (defendant's aunt) testified he came to her house on Sunday, May 24 or Monday, May 25, at which time he was "on something," but did not smell of alcohol. Her son described Aragon as acting paranoid and smelling of crack cocaine. The sister opined Aragon was a liar and a thief. A police detective testified that, when first interviewed, Aragon said he had gotten up at 12:15 a.m. Sunday to take care of the baby. When Aragon and Moore were later interviewed together at the police station, both said it was around 3 a.m. During a discussion about the time period in which the killing occurred, Aragon said to Moore, "That's when I was with you, remember?"

The jury convicted defendant of robbery and first degree murder, and found true a robbery-murder special-circumstance allegation. ([Cal. Penal Code] §§ 211, 187, 189, 190.2, subd. (a)(17)(A).) The jury was unable to reach a verdict on allegations of personal gun use and personal infliction of great bodily injury. ([Cal. Penal Code] §§ 1203.075, 12022.5, subd. (a).) Defendant was sentenced to a life term without the possibility of parole.

The Court of Appeal affirmed the murder conviction and sentence. [*People* v. *Pulido*, 52 Cal. Rptr. 2d 373 (Ct. App. 1996) (officially depublished).] The court rejected defendant's contention . . . that the trial court should, sua sponte, have instructed the jury defendant was not liable for the murder if he formed the intent to aid and abet the robbery only after Flores was killed. The Court of Appeal reasoned that because one who intentionally assists a robber in the asportation of the stolen property is under [California law], guilty of robbery, and because a killing in

> the commission of robbery is first degree murder under section 189, "[i]t is unnecessary for the jury to determine whether the intent to aid and abet the underlying felony preceded the killing. . . ."

(App. 102a-105a.)

2. The California Supreme Court unanimously affirmed the judgment. (App. 120a.) Notwithstanding the lack of an instruction stating that the felony-murder rule does not apply to persons who aid and abet the felony only after the perpetrator kills, the court held that reversal was not required because "the omitted issue was resolved adversely to defendant under other, properly given instructions." (App. 102a.) It explained:

> [T]he jury was instructed that the robbery-murder special-circumstance allegation could not be found true unless defendant was engaged in the robbery *at the time of the killing*. In a modified form of CALJIC No. 8.80.1 (1990 new) . . . the jury was directed to determine whether or not "the murder was committed *while the defendant was engaged or was an accomplice in*" robbery, attempted robbery or the immediate flight from robbery. (Italics added.) In the special circumstance verdict, consistent with this instruction, the jury found "that the said defendant, Michael Robert Pulido, engaged in or was an accomplice in the commission of or attempted commission of robbery *during the commission of crime charged in count 1* [murder]." (Italics added.) By its special circumstance verdict the jury thus found—explicitly, unanimously and necessarily—that defendant's involvement in the robbery, whether as direct perpetrator or as aider and abettor, commenced before or during the killing of Flores.

(App. 116a.)

3. In November 1996, respondent sought federal habeas corpus relief under 28 U.S.C. § 2254. In March 2005, the district court granted the writ. (App. 32a, 97a.) It ruled that the state supreme court's harmless-error finding was "contrary to" and

an "unreasonable" application of "clearly established" Supreme Court precedent. (App. 52a-67a). The district court noted "confusion" in one of the special circumstance instructions. (App. 56a.) Because of a typographical error substituting "or" for "and," the instruction allowed a true finding of the special circumstance on either one of the following two predicate findings, rather than both: (1) "the murder was committed while the defendant was engaged in . . . the robbery"; (2) "the murder was committed in order to carry out . . . the . . . robbery. . . ." (App. 56a; see App. 8a.) Observing that the jury could have relied only on the latter prong of the instruction, the district court concluded that the special circumstance verdict did not necessarily prove that the jury found that respondent had joined the robbery before or during the killing. (App. 56a-57a.) According to the district court, the mistake in the instruction undermined the California Supreme Court's reliance on the special-circumstance instructions in reaching its conclusion that the error in the first-degree murder instructions was harmless. (App. 63a-64a.)[1/]

The district court rejected a further argument by the Warden. Noting that a separate special-circumstance instruction allowed the jurors to find respondent liable as an aider and abetter only if he intended to kill or acted with "reckless indifference to human life" and as a "major participant" in the robbery (App. 57a-58a), the Warden argued that the felony-murder instruction was harmless because the jury could not have found that respondent acted with reckless indifference to life and as a major participant in the robbery without believing that he aided

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1. The parties and the federal district court treated the wording of the instruction as relevant only to the question of whether the claimed constitutional error in the felony-murder instruction was prejudicial. And respondent has never claimed that the typographical error in the special-circumstance instruction somehow rendered it unconstitutional, too. Such a claim would be unavailable to him now, for he never "fairly presented" it to the state supreme court and forfeited it under state procedural law.

the robbery before the killing. The district court disagreed. (App. 57a-59a.) Additionally, the district court viewed questions and answers between the jury and trial court during jury deliberations as an indication that the jury was uncertain whether respondent was guilty of felony murder if he aided and abetted the robbery only after the killing. (App. 59a-63a.) The district court noted that in finding the instructional error harmless the state supreme court did not weigh the evidence supporting the defense theory of only post-killing involvement. (App. 63a.) The district court concluded that the error in the felony-murder instruction had a substantial and injurious effect on the jury's verdict under the habeas corpus harmless-error rule of *Brecht* v. *Abrahamson*, 507 U.S. 619, 637. (App. 65a-67a.)

4. The Warden appealed to the Court of Appeals for the Ninth Circuit, which affirmed the grant of the writ in a published per curiam opinion with two concurring opinions. (App. 1a.) The court relied on *Lara* v. *Ryan*, 455 F.3d 1080 (9th Cir. 2006)—a derivative of *Stromberg* v. *California*, 238 U.S. 359 (1931)—for the proposition that "when a jury delivers a general verdict that may rest either on a legally valid or legally invalid ground[,] . . . the verdict may not stand when there is no way to determine its basis." *Lara* v. *Ryan*, 455 F.3d at 1085 (citations omitted). *Lara* said instructional error on an alternative theory of guilt is "structural," *id.* at 1086, but recognized a "limited exception" to the rule of automatic reversal: "reversal may not be required if 'it is *absolutely certain*' that the jury relied upon the legally correct theory to convict the defendant." *Id.* at 1085 (citations omitted.) Accepting respondent's argument that the error in the felony-murder instruction was structural under *Lara* (App. 11a), the circuit court found reversible error:

> Here, the jury instructions leave open the possibility that the jury convicted Pulido on a legally impermissible theory, namely, that the defendant joined the robbery only after Flores was killed. The typographical error in the

> contemporaneity instruction relied upon by the California Supreme Court introduces doubt into any inference to be drawn from the jury's finding as to the special circumstance. Because, unlike in *Lara*, we cannot be "absolutely certain" that the jury found that Pulido's crime of robbery was committed contemporaneously with the murder, the verdict must be reversed.

(App. 11a-12a (emphasis added).)

Judge O'Scannlain concurred in the judgment, stating that "*Lara's* attempt to distinguish instructions involving impermissible alternative theories from other instructional errors is logically unsustainable and inconsistent with Supreme Court precedent." (App. 15a.) "*Lara* should be overruled to correct our erroneous instructional error jurisprudence—if not by our court sitting en banc then, in due course, by the Supreme Court." (App. 15a.) Judge Thomas concurred in the majority's finding of structural error, added that the granting of the writ "would be the right result even under a harmless error standard," and disagreed "that *Lara* should be overruled." (App. 15a-16a.)

6. On July 18, 2007, the court of appeals denied the Warden's petition for rehearing and rehearing en banc. (App. 31a.) On July 30, 2007, the court granted the Warden's motion to stay the mandate.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S RULE THAT ALTERNATIVE LEGAL THEORY ERROR IS STRUCTURAL IS NOT BASED ON CLEARLY ESTABLISHED SUPREME COURT AUTHORITY AND CONFLICTS WITH THE LAW IN FOUR OTHER CIRCUITS.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), federal habeas relief may be based only on "clearly established" law as determined by the Supreme Court. 28 U.S.C. § 2254(d). That standard is satisfied only by the holdings of this Court's cases, not mere dicta. *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000). Nor is it satisfied when the Court's holdings are "ambiguous," *Mitchell* v. *Esparza*, 540 U.S. 12, 17 (2003), or "exhibit a lack of clarity," *Lockyer* v. *Andrade*, 538 U.S. 63, 72 (2003). And it is not satisfied when a cited Supreme Court holding does not clearly apply in the context of the case at hand. See *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004).

In this case, the court of appeals overturned a conviction of first-degree murder by deeming an erroneous instruction on an alternative theory of guilt to be structural error. The court so held despite (1) manifest uncertainty whether any Supreme Court precedent has held that structural error occurs when an instruction presents an alternative theory of guilt that violates only state law; (2) a clearly established line of modern Supreme Court holdings that instructional error on an element of a crime is not structural error but instead is reviewed under traditional standards for harmlessness; (3) the court of appeals' own acknowledgment that "it is not readily apparent how to resolve the tension between" this Court's decisions in this area, *Keating* v. *Hood*, 191 F.3d 1053, 1064 n.17 (9th Cir. 1999); and (4) the fact that four other circuits analyze such error for harmlessness.

Certiorari is necessary to settle an important and recurring

issue concerning the availability of harmless error review for defective instructions on an alternative theory of criminal liability. Review is necessary also to ensure uniformity of decision by the federal circuit courts, to enforce AEDPA limitations on habeas corpus, and to confirm this Court's jurisprudence establishing that an erroneous instruction on the elements of a crime may be harmless.

A. The *Stromberg* Line Of Decisions Does Not Clearly Establish The Ninth Circuit's Rule That Alternative Legal Theory Error Is Structural.

The Ninth Circuit's structural error approach to alternative legal theory error derives primarily from *Sandstrom* v. *Montana*, 442 U.S. 510, 526 (1979). See *Lara* v. *Ryan*, 455 F.3d at 1085. *Sandstrom* relied, in turn, on *Stromberg* v. *California*, 283 U.S. 359. *Sandstrom*, 442 U.S. at 526. *Stromberg* stated:

> As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. . . . It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the federal Constitution, the conviction cannot be upheld.

Stromberg v. *California*, 283 U.S. at 368.

In *Griffin* v. *United States*, 502 U.S. 46, 53 (1991), the Court observed that "[t]his language, and the holding of *Stromberg*, do

not necessarily stand for anything more than the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground."

It is at best unclear whether *Stromberg* applies whenever an instruction presents a legally erroneous alternative theory, as the Ninth Circuit characterized the error here. *Stromberg* concerned a conviction that could have rested on an instruction that criminalized constitutionally protected speech. See *Stromberg*, 283 U.S. at 368-70. *Yates* v. *United States*, 354 U.S. 298 (1957), *overruled on other grounds by Burks* v. *United States*, 437 U.S. 1, 2 (1978), applied *Stromberg* to reverse a conviction based upon conduct post-dating a statutory time limit. However, *Yates* addressed a statutory, not a constitutional violation and, as such, was "an unexplained extension" of *Stromberg*. *Griffin* v. *United States*, 502 U.S. at 55-56; see *Zant* v. *Stephens*, 462 U.S. 862, 881-82 (1983) (finding cases under *Stromberg* include those where the verdict "may have rested exclusively on the insufficient ground," and those where the verdict "rested on *both* a constitutional and an unconstitutional ground"). *Yates* thus does not clearly establish a constitutional rule binding on the States, rather than a supervisory-power rule binding only on lower federal courts. Cf. *Goeke* v. *Branch*, 514 U.S. 115, 119 (1995) (per curiam) (distinguishing the Court's supervisory rules from constitutional rules applicable to states).

Were *Stromberg*, even as extended by *Yates*, to be deemed "clearly established" law for AEDPA purposes, its principle still would encompass only convictions for conduct that the State lacks the power to punish as crime. See *Stromberg*, 283 U.S. at 368 (characterizing the issue as whether any of the possible bases for conviction "could not constitute a lawful foundation for a criminal prosecution"); see also *United States* v. *Holly*, 488 F.3d 1298, 1306-07 n.3 (10th Cir. 2007) (distinguishing *Stromberg* as a rule "primarily confined to grounds for

conviction that are legally erroneous in their entirety"); *Evanchyk* v. *Stewart*, 340 F.3d 933, 941 n.2 (9th Cir. 2003) (distinguishing *Stromberg-Yates* because "[t]hose cases involved jury instructions for crimes based on facially invalid or legally impossible theories, or 'non-existent' crimes"); *Clark* v. *Crosby*, 335 F.3d 1303, 1310 (11th Cir. 2003) (holding, where conviction could have rested on finding of attempted felony murder, a non-crime under state law, *Stromberg-Yates* was not clearly established, given defendant did not contend "a conviction for attempted felony, as such, would violate the Constitution").

Moreover, *Griffin* indicates that *Stromberg* may define only a particular species of constitutional error, not a category of structural error. 502 U.S. at 53. Even *Sandstrom*, the case on which the Ninth Circuit relied in *Lara* to formulate its structural error rule, cited *Stromberg* only for the principle that the availability of a correct legal theory does not mean the jury used the correct theory, rather than an incorrect theory, as the basis for the verdict. *Sandstrom* v. *Montana*, 442 U.S. at 526. *Sandstrom* declined to consider whether the error in such a case would be harmless. *Id.* at 527. Review is required of the Ninth Circuit's notion that the *Stromberg* line of authority compels a finding of structural error whenever a trial court presents the jury with an erroneous alternative theory of guilt.

B. The Ninth Circuit's Structural-Error Rule Conflicts With The Court's Modern Harmless-Error Jurisprudence.

The Court's jurisprudence simply can no longer be said to clearly establish, if it ever did, that it is structural error to instruct erroneously on an alternative theory of guilt.

Arizona v. *Fulminante*, 499 U.S. 279, 306 (1991), the seminal case distinguishing structural error from trial error, made clear that most constitutional errors can be harmless. Indeed, *Rose* v. *Clark*, 478 U.S. 570, 579, already had established a "strong presumption" that constitutional violations at trial are subject

to harmless error analysis when the defendant had counsel and was tried by an impartial adjudicator. Under *Rose*, the Court consistently has viewed instructional error concerning an element of a crime to be subject to harmless-error review. *Neder* v. *United States*, 527 U.S. 1 (omission of element of materiality for fraud); *Johnson* v. *United States*, 520 U.S. 461 (1997) (omission of element of materiality for perjury); *California* v. *Roy*, 519 U.S. 2 (1996) (per curiam) (omission of element of intent for aiding and abetting); *Yates* v. *Evatt*, 500 U.S. 391 (1991) (mandatory rebuttable presumption on element of malice), *overruled on another ground by Estelle* v. *McGuire*, 502 U.S. 62, 72 n.4 (1991)); *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam) (mandatory conclusive presumption on element of intent); *Rose* v. *Clark*, 478 U.S. 570 (mandatory rebuttable presumption on element of malice).[2/] *Rose* specifically found that error of the type that occurred in *Sandstrom* can be harmless. 478 U.S. at 572, 580.

On direct review, the test for prejudice is whether the error was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). In a federal habeas corpus case, the harmless-error test is less stringent: the court determines whether the error "'had a substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht* v. *Abrahamson*, 507 U.S. at 631; see *California* v. *Roy*, 519 U.S. at 5-6. *Brecht* applies to habeas corpus cases whether or not the state court tested the error for harmlessness under *Chapman*. *Fry* v. *Pliler*, __ U.S. __, 127 S. Ct. 2321, 2328.

In developing its *Rose* jurisprudence, the Court has not endorsed the Ninth Circuit's notion that a special test of prejudice ("absolutely certain") applies when an instruction can be characterized as a legally erroneous theory (alternative or

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2. The sole exception is a defective reasonable doubt instruction, which "vitiates all the jury's findings." *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993).

otherwise). *Rose* and its progeny do not articulate a standard of review for harmlessness more stringent than the reasonable-doubt standard of *Chapman*. And the Court has consistently rebuffed arguments that the issue of whether to perform harmless error review depends on how courts can characterize the particular instructional error at hand. See *Neder*, 527 U.S. at 11-13 (instructional error involving an element of the offense may be harmless regardless of whether the error is characterized as a "mandatory rebuttable presumption," "mandatory conclusive presumption," "misstatement of an element," "omission of an element," or failure to obtain a "complete verdict").

In *California* v. *Roy*, 519 U.S. at 5, the trial court erred by failing to include intent to aid as an element in its aiding and abetting instruction. *Roy* recognized that the error could with equal facility be called a misdescription of an element or an omitted element. *Id.* It did not matter: the error was subject to harmless error analysis. *Id.*

In *Pope* v. *Illinois*, 481 U.S. 497 (1987), the trial court should have instructed the jury to decide whether a reasonable person would find serious literary, artistic, political, or scientific value in allegedly obscene material. *Id.* at 500-01. Instead, the trial court told the jury to decide whether ordinary adults in the State of Illinois would view the material as obscene. *Id.* at 499. The instruction was unconstitutional because it allowed the jury to apply "a state community standard." *Id.* at 503. Although the instruction presented the jury with a legally erroneous theory, the Court held the error "comparable to" the one in *Rose* v. *Clark*. *Pope*, 481 U.S. at 502. As such, it was subject to harmless error analysis. *Id.* at 502-03.

Like *Stromberg*, but unlike *Rose*, the defective instruction in *Pope* allowed the jury to convict based on constitutionally protected conduct. Unlike *Stromberg*, and like *Rose*, *Pope* did not involve a legally erroneous alternative basis for finding an element of the crime. *Pope* found the defective instruction

indistinguishable from the one in *Rose* for purposes of harmless error analysis. The lesson is unmistakable: after *Rose*, an erroneous instruction on an element of the offense may be harmless regardless of whether the conviction might be based on conduct that the Constitution protects and regardless of whether the instruction can be characterized as an erroneous legal theory, alternative or otherwise.

At the very least, an unresolved conflict between the *Stromberg* and *Rose* line of cases demonstrates that the Ninth Circuit's structural-error rule is not clearly established. See *Lockyer* v. *Andrade*, 538 U.S. at 71-73 (no clearly established law where some Supreme Court cases had held that the Eighth Amendment does not apply to sentences in terms of years, some had upheld sentences, and one had found a lengthy sentence unconstitutional). See also *Williams* v. *Taylor*, 529 U.S. at 412 (stating "clearly established" standard is equivalent to an "old rule" under *Teague* v. *Lane*, 489 U.S. 288 (1989), but determined by Supreme Court precedent); cf. *Graham* v. *Collins*, 506 U.S. 461, 467 (1993) (holding a rule is "new" under *Teague* unless reasonable jurists hearing the petitioner's claim at the time conviction became final would have felt compelled by existing precedent to rule in his favor).

The Ninth Circuit's structural-error rule conflicts in still other ways with this Court's recent harmless error jurisprudence. In *Neder*, the Court rejected the defendant's argument that instructional error affecting an element could be harmless only if, inter alia, other facts necessarily found by the jury were the "functional equivalent" of the omitted, misdescribed, or presumed element. The Court said the defendant's approach would "import into the initial structural-error determination (*i.e.*, whether an error is structural) a case-by-case approach that is more consistent with our traditional harmless-error inquiry (*i.e.*, whether an error is harmless). Under our cases, a constitutional error is either structural or it is not." *Neder*, 527 U.S. at 14.

The Ninth Circuit's rule suffers from the same "case-by-case" approach rejected in *Neder*. The Ninth Circuit's rule requires federal courts to distinguish instructions that present legally erroneous alternative theories from instructions that otherwise erroneously state elements of the charged offense. The former are deemed structural and require reversal unless a court is "absolutely certain" they are harmless; the latter are mere trial error and, as such, subject to traditional, more forgiving harmless error analysis. Thus, in deciding which errors to place in which category, courts must determine structural error with the case-by-case method *Neder* disapproved.

Of course, there is no assurance that any legitimate distinction could be found between the two types of errors. The Ninth Circuit merely assumes without explanation that alternative legal theory error is different from other erroneous instructions on elements of an offense. See *Lara* v. *Ryan*, 455 F.3d at 1086 ("[T]he trial court did not merely omit or misstate an element of the charged offense. Rather, its error was structural, because it enabled the jury to deliver a general verdict that potentially rested on different *theories of guilt*, at least one of which was constitutionally invalid." (Citation to *Sandstrom* omitted.)). Given the virtually limitless number of definitions of crimes and, by the same token, legal theories of criminal liability, there is virtually no limit to alternative legal theory error. The Ninth Circuit's insistence on this purported distinction among instructional errors presents an intractable, recurrent problem.

The *Lara* rule is doctrinally incoherent in two ways. First, *Lara* creates a unique form of structural error—one that may be harmless. Second, *Lara* conflates structural error with non-error. According to the Ninth Circuit, alternative legal theory error is structural, but harmless, if the jury did not actually rely on the legally erroneous theory. *Lara*, 455 F.3d at 1087. This principle runs afoul of the test for instructional error, which is whether a reasonable likelihood exists that the jury applied the

instruction in a way that violates the Constitution. See *Estelle* v. *McGuire*, 502 U.S. at 72. If an instruction misdescribes an alternative legal theory but the jury did not rely on the theory, no reasonable likelihood exists that the jury applied the instruction in a way that violates the Constitution, and thus no federal error exists. The Ninth Circuit's *Lara* rule has the remarkable dual capacity to make structural error out of non-constitutional error and to make harmless error out of structural error.

Perhaps most significantly, the Ninth Circuit's rule creates a potentially enormous exception to this Court's rule that a federal habeas court must analyze trial errors for harmlessness using the standard of *Brecht* v. *Abrahamson*, 507 U.S 619. *Fry* v. *Pliler*, __ U.S. at __, 127 S. Ct. at 2328. According to the circuit court, *Fry*'s command to apply *Brecht* disappears whenever a federal habeas court characterizes a defective instruction as a legally erroneous alternative theory and, as such, as "structural error." Because this method (or non-method) of finding supposedly structural error knows virtually no limits (as suggested above), it invites a wholesale negation of *Fry* whenever instructional error occurs.

C. The Ninth Circuit's Rule Conflicts With Decisions By Four Other Federal Circuit Courts.

Four circuits have held that the *Neder* approach trumps the *Stromberg* approach.

In *Quigley* v. *Vose*, 834 F.2d 14, 15 (1st Cir. 1987) (per curiam), the defendant contended that the trial court erred by "direct[ing] a mandatory conclusion as to intent (an essential element of the second degree murder charge) once certain predicate facts were found." To distinguish *Rose* v. *Clark*, 478 U.S. 579, which "clearly established that [such] a defect in the jury instructions does not 'automatically require reversal,'" the defendant in *Quigley* argued that *Stromberg*, not *Rose*,

governed. *Quigley*, 834 F.2d at 16. The circuit court disagreed, stating that "petitioner's assertion reduces to the strange claim that, because the jury here received both a 'good' charge and a 'bad' charge on the issue, the error was somehow more pernicious than in *Rose*—where the *only* charge on the critical issue was a mistaken one. That assertion cannot possibly be right, so it is plainly wrong." *Id.*

In *Becht* v. *United States*, 403 F.3d 541 (8th Cir. 2005), the defendant challenged his conviction for possessing child pornography because an instruction defined child pornography in a way later found to be unconstitutional under the First Amendment. *Id.* at 543-44. In considering harmless-error review, the Eighth Circuit found that *Rose* and not *Stromberg* controlled, placing particular reliance on *Pope*. *Id.* at 546-49. "*Stromberg* . . . establishes that there is 'error' in [a legally erroneous alternative theory] case; it does not speak to whether the error may be harmless." *Id.* at 548. "It would be anomalous to read *Stromberg* to preclude harmless-error review in Becht's case because the jury *also* was given the option to convict based on a constitutionally *valid* theory that Becht possessed images of actual children." *Id.*

In *United States* v. *Holly*, 488 F.3d 1298, the defendant was convicted of aggravated sexual abuse after the jury was instructed correctly on a "force" theory but incorrectly on a "fear" theory. *Id.* at 1299, 1302-04. Following *Neder* and *Rose* and distinguishing *Stromberg*, the Tenth Circuit decided the error was subject to a finding of harmlessness. *Id.* at 1304-11. It found *Stromberg* inapplicable because the instructional error in that case "'could not constitute a lawful foundation for a criminal prosecution.'" *Id.* at 1306-07.

In *Clark* v. *Crosby*, 335 F.3d at 1310, the defendant's conviction could have rested on a finding of attempted felony murder, a non-crime under state law. The Eleventh Circuit held that *Stromberg-Yates* was not clearly established Supreme Court precedent governing the question of harmless error, given that

the defendant did not contend that "a conviction for attempted felony murder, as such, would violate the Constitution." *Id.* See also *Parker* v. *Secretary for Department of Corrections*, 331 F.3d 764, 778 (11th Cir. 2003) ("*Stromberg* cannot foreclose harmless error review altogether, because an independent basis for a jury's verdict is not insufficient if the relevant error is, considered separately, harmless.").

All these decisions conflict with the Ninth Circuit's structural error rule. No other circuit has adopted its rule.

D. The Error Was Harmless Under *Brecht*.

The Ninth Circuit's adherence to *Stromberg* improperly determined the outcome of this case. Had the court applied *Brecht*, the outcome would have been different for at least two reasons.

1. The Verdict Form And The Instructions Show Harmlessness.

Because of the trial court's substitution of "or" for "and" in one of the special circumstance instructions (CALJIC No. 8.81.17), the jury had to make only one, rather than both, of the following findings to find the special circumstance true: "'1. The murder was committed while the defendant was engaged in . . . a robbery; *or* 2. The murder was committed in order to carry out or advance the . . . robbery or to facilitate the escape therefrom or to avoid detection. . . ." (App. 8a-9a, n.4.) The Ninth Circuit found that, "[p]aradoxical though it may seem" (App. 10a), the jury could have relied on the literal wording of the second prong and therefore could have failed to make the contemporaneity finding stated in the verdict form.

The interpretation of the special circumstance that the court of appeals attributed to the jury is not paradoxical. It is irrational. As the court of appeals acknowledged, the contemporaneity finding required for the special circumstance was stated both in the instruction (CALJIC No. 8.80.1) that

preceded the mistaken one and in the verdict form returned by the jury. (App. 9a; see App. 46a-47a, 55a.) During deliberations, the jury asked several questions about the law. (App. 59a-62a.) None of the inquiries suggests that the jury had trouble understanding the special-circumstance instructions. And nothing in the jury's questions or the court's responses remotely imply that the jury thought it could make a finding about respondent's participation in the robbery by finding something Aragon did alone. Neither of the parties suggested to the jury that it could adopt such an interpretation of the special-circumstance instructions. The only reasonable conclusion is that the jury interpreted the superficially problematic language in the instruction ("the murder was committed in order to carry out . . . the . . . robbery. . . .") to mean that respondent had to commit the murder in order to carry out the robbery.

2. The Findings Of Reckless Indifference To Life And Major Participation In The Robbery Show Harmlessness.

Respondent's defense was inconsistent with the jury's finding that he acted with "reckless indifference to human life" and aided the robbery as a "major participant." No jury would have concluded that an unarmed 16-year-old exhibited reckless indifference to human life merely by fleeing a homicide scene while the murderer stood by with a smoking gun. Nor would any jury have concluded that whatever minimal help respondent gave Aragon in the car amounted to major participation in the robbery. The uneventful getaway was of minimal importance compared to the actual killing and the removal of the cash register. The prosecutor never suggested in argument that the jury could find the special circumstance true based on respondent's actions after the killing.

The evidence of respondent's pre-killing participation was powerful. The murder weapon was his. His fingerprints were on the cash register and the drawer inside it. When speaking to

the police the day after the killing, respondent knew that Flores had been shot near the nose. Respondent led the police to where the unused bullets from the gun had been discarded. Other unused bullets were in respondent's car.

Most significantly, the police found respondent's thumb print on an unopened can of Coke on the counter inside the store. Respondent suggested that he could have touched the Coke can on a previous visit to the store. In closing argument to the jury, defense counsel disparaged that notion and speculated that respondent inadvertently touched the Coke can when he ran into the store after the shooting. Neither story explained how the Coke can got from the refrigerator case behind the cashier to the counter. Respondent himself provided the answer, in an unguarded moment a week after the killing. He told Aragon that he had bought a soda, left the store, returned, saw the cashier sleeping, asked him for another soda, then killed him. Thus, respondent's own words showed how respondent got Flores into position where he could be shot. Likewise, regardless of whether respondent or Aragon was the actual shooter, respondent's thumb print on the Coke can pointed heavily to his pre-killing involvement in the robbery.

In light of the evidence, the special-circumstance finding establishes that the jury believed that respondent aided and abetted the robbery before the killing. Likewise, the jury would have convicted respondent of first degree murder had it been given correct instructions on felony murder.

Under the *Brecht* standard, the instructional error did not have a substantial and injurious effect or influence on the jury's verdict. Accordingly, the Ninth Circuit's "absolute certainty" rule of harmlessness led to an unwarranted grant of the writ of habeas corpus.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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