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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-544, Hedgpeth versus Pulido.

Mr. Friedlander.

ORAL ARGUMENT OF JEREMY FRIEDLANDER

ON BEHALF OF THE PETITIONER

MR. FRIEDLANDER: Mr. Chief Justice, and may it please the Court:

Respondent has agreed with us that the ninth circuit was wrong when it said that the error here and the one in Stromberg were structural defects.

The remaining question is whether Respondent can salvage the Stromberg rule by making it part of a proper harmless error test as he attempts to do.

His harmless error test is wrong for several reasons, but the Stromberg part of it is wrong for basically one reason. He makes the Stromberg rule into a rule of harmless error, and it is not even a correct rule of error.

This Court has defined "instructional error" to require not merely a mistake in instruction, but a reasonable likelihood that the jury misapplied the law. So when Respondent says, invoking Stromberg, that to instruct the jury on valid and invalid theories is

1 harmless error if the jury adopted a valid theory, what
2 Respondent is saying is nothing more than that no error
3 occurred in the first place because the jury found
4 everything it needed to find in order to convict and,
5 therefore, did not misapply the law.

6 JUSTICE SCALIA: Do that again, will you?

7 MR. FRIEDLANDER: We need to have a
8 reasonable likelihood that the jury misapplied the law.
9 That's how we get to error. Respondent invokes
10 Stromberg to say if the jury is instructed a right way
11 and a wrong way and they went the right way, we have
12 harmless error.

13 No. What we really have is no error at all.
14 Because there is -- the -- the jury did not misapply the
15 law. Moreover, Stromberg is not even a correct rule of
16 error. Because under Stromberg you have error if the
17 jury could have misapplied the law.

18 JUSTICE STEVENS: Mr. Friedlander, can I
19 interrupt you? You are saying no error occurred, and on
20 page 11 of your brief you say, "An unconstitutional
21 instructional error occurred in this case because there
22 was a reasonable likelihood the jury found," and so
23 forth and so on.

24 MR. FRIEDLANDER: Yes. I agree that error
25 occurred in this case. What I'm trying to argue here is
26 that Respondent is entirely off base in importing the

1 Stromberg rule into a harmless error determination.
2 Stromberg is, at most, a rule of error. The jury went
3 the wrong way. That is a rule of error, but it is not
4 even a correct rule of error because under Stromberg you
5 say, could the jury have gone the wrong way; whereas,
6 under this Court's modern precedent you have to have a
7 reasonable likelihood that the jury --

8 JUSTICE STEVENS: But you said that's what
9 happened here. That's what your brief says.

10 MR. FRIEDLANDER: Yes. I agree that there
11 was an error here but not because of Stromberg. Because
12 this was a reasonable likelihood that the jury
13 misapplied the law.

14 JUSTICE BREYER: But you should have said
15 "no" to the question, I think. Because I thought the
16 question -- whatever it was, you are saying that there
17 isn't a reasonable likelihood that its error influenced
18 the outcome. No? You are not saying that?

19 MR. FRIEDLANDER: There is a reasonable
20 likelihood that the jury misapplied the law. That's the
21 error question.

22 JUSTICE BREYER: Yes.

23 MR. FRIEDLANDER: Then the harmless error
24 question is: Given that they misapplied the law, do we
25 know under the requisite degree of certainty -- Chapman

1 on direct review, Brecht here -- that they would still
2 have found him guilty of felony murder under a proper
3 instruction?

4 JUSTICE STEVENS: Do you agree that the
5 California Supreme Court gave an incorrect explanation
6 to the answer to that question? They said there was no
7 harmless error because the -- the jury made a specific
8 finding that rebutted that, and that finding depended on
9 the difference between the word "and" and "or."

10 MR. FRIEDLANDER: I'm not sure I followed
11 the last part of the question, but I agree with you if
12 what you are saying is that the California Supreme
13 Court, in effect, applied a Stromberg-like test. They
14 said "necessarily resolved."

15 JUSTICE STEVENS: No. I'm -- I'm
16 questioning the basis for the Supreme Court's conclusion
17 that the error was harmless.

18 MR. FRIEDLANDER: Their basis for the
19 conclusion was the jury's "special circumstance"
20 finding.

21 JUSTICE STEVENS: Right.

22 MR. FRIEDLANDER: Now, they did not
23 consider, when they made that "special" -- when they
24 interpreted that "special circumstance," the "and/or"
25 mistake that was embedded in the instructions.

1 JUSTICE STEVENS: Which meant that the jury
2 really hadn't answered the question they thought it had
3 answered.

4 MR. FRIEDLANDER: No, it didn't mean that.
5 We don't agree with that. We don't believe that that is
6 a correct interpretation of the instruction.

7 But let me skip past that if you'll allow
8 me. Even if you -- even if you absent any meaning from
9 that "special circumstance" finding -- okay, and we
10 don't agree with that but even if you did -- you had at
11 a minimum here a --

12 JUSTICE STEVENS: If you do that, you are
13 removing the basis for the California Supreme Court's
14 decision.

15 MR. FRIEDLANDER: Well --

16 JUSTICE STEVENS: Is that not right?

17 MR. FRIEDLANDER: The basis --

18 JUSTICE STEVENS: At least it's articulated
19 the basis --

20 MR. FRIEDLANDER: The basis for the
21 California Supreme Court --

22 JUSTICE STEVENS: The basis --

23 MR. FRIEDLANDER: I think -- I think that --

24 JUSTICE STEVENS: -- for the decision was a
25 -- was a specific finding --

26 MR. FRIEDLANDER: The reasoning behind the

1 decision, yes, I think that's right.

2 JUSTICE STEVENS: All right.

3 MR. FRIEDLANDER: Okay. But it doesn't
4 matter because we are going to apply Brecht anyway.

5 JUSTICE ALITO: Could you clarify the -- the
6 category of cases that would be affected if your
7 argument is accepted? There would be -- an error would
8 be -- would not be harmless under Brecht if it had a
9 substantial or -- or injurious effect, right?

10 MR. FRIEDLANDER: Sure.

11 JUSTICE ALITO: Now, what is the standard
12 under California law for submitting a theory of
13 liability to the jury? Presumably, you have to have
14 some evidence in support of it.

15 MR. FRIEDLANDER: I'm not sure I understand
16 the question. I think that goes to the question of
17 whether there is error in the first place in submitting
18 a factually unsupported theory.

19 JUSTICE ALITO: Well, you are -- you are
20 arguing that there are instances in which, when a theory
21 of liability is submitted to the jury, the error -- and
22 it's erroneous -- the error can be harmless.

23 MR. FRIEDLANDER: Yes.

24 JUSTICE ALITO: Correct? Now, what are the
25 -- what is the standard under California law for

1 submitting the theory of liability to the jury in the
2 first place? You have to have -- presumably, there has
3 to be some evidence in support of that, right? How
4 much?

5 MR. FRIEDLANDER: I don't think -- I don't
6 think I know the answer to that question. It would
7 certainly be error under California State law if there
8 is a reasonable -- if they have the same reasonable
9 likelihood standard that the Federal courts have, if
10 there is a reasonable likelihood that the jury
11 misapplied the law.

12 Now, in a -- but you seem to be focusing on
13 an evidentiary sufficiency, and I think that's governed
14 by Griffith where if you -- if you have an insufficient
15 -- if you have insufficient evidence to support the
16 theory, then it's inappropriate --

17 JUSTICE ALITO: What I'm asking is: When is
18 there going to be a case in which a theory of liability
19 is submitted to the jury and it's -- and it's erroneous
20 -- multiple theories are submitted; one is erroneous.
21 And yet it would turn out that the submission of the
22 erroneous theory did not have a substantial or injurious
23 effect.

24 MR. FRIEDLANDER: This one -- this case --
25 this case was submitted to the jury on two alternative

1 theories: One of them correct, pre- killing aiding and
2 abetting; one of them incorrect, post-killing aiding and
3 abetting. And it didn't have a substantial injurious
4 effect because we know that at an absolute minimum here
5 the jury found that the defendant acted -- aided and
6 abetted robbery with reckless indifference to human life
7 and was a major participant in the robbery. And those
8 findings were not compatible with post-killing aiding
9 and abetting.

10 JUSTICE GINSBURG: I thought there was --
11 that there was this -- there were three possibilities,
12 and one was that the defendant didn't do anything
13 before, didn't do anything during, but was simply an
14 accessory after the fact.

15 If the jury believed that, then there was no
16 way they could convict him of the crime that he was
17 convicted of.

18 MR. FRIEDLANDER: Well, the jury rejected
19 accessory after the fact but --

20 JUSTICE GINSBURG: How do we know that? Was
21 there a special verdict?

22 MR. FRIEDLANDER: They were instructed on
23 accessory after the fact as a lesser offense and they
24 found in essence robbery and felony murder.

25 JUSTICE SOUTER: No, but they found the

1 greater offense, so there would have been no need for
2 them to go to the lesser included offense. And the
3 trouble is -- and I think the problem that we are having
4 is that in finding the greater offense, they may have
5 done so under a theory of accomplice liability that was
6 consistent with the accomplice simply coming in at a
7 late stage in the proceedings.

8 MR. FRIEDLANDER: Yes. That's right.

9 JUSTICE SOUTER: I mean, that's the
10 difficulty we are having.

11 MR. FRIEDLANDER: Yes. There is a
12 reasonable likelihood that in deciding felony murder
13 they failed to decide that he engaged in the robbery
14 before the killing.

15 JUSTICE SOUTER: Right.

16 MR. FRIEDLANDER: However, they went and
17 found the special circumstance in which they found
18 reckless -- aiding and abetting with reckless
19 indifference to human life and as a major participant.

20 JUSTICE SOUTER: I thought the -- the
21 difficulty with using that as a means of answering the
22 first error was that the way the special circumstance
23 instruction was phrased, they could have found the
24 special circumstance without finding anything more than
25 that he came in at a late stage.

1 MR. FRIEDLANDER: No. That's not correct.
2 I don't believe that's correct. It is true that part of
3 the instruction, that and/or difficulty, focused on a
4 different question, a different point, said that if you
5 -- if they -- I'm blanking out but --

6 JUSTICE SOUTER: I thought the second -- go
7 ahead.

8 MR. FRIEDLANDER: It didn't address the
9 reckless indifference to human life and the major
10 participant, but that was embedded in the instructions,
11 and from the start the courts that have looked at this
12 and have reached this question have all agreed that
13 there was a jury finding of reckless indifference to
14 human life and major participant, and they have
15 disagreed as to what it might have meant. Okay? Now,
16 the U.S. district court --

17 JUSTICE GINSBURG: How do we -- was this --
18 how do we know what the jury found? They just came in
19 with a guilty verdict; is that right?

20 MR. FRIEDLANDER: No. They came in with a
21 special circumstance finding. The special circumstance
22 finding that this was --

23 JUSTICE STEVENS: Isn't the special
24 circumstance finding the one that had the word "or" in
25 it, and therefore allowed the jury to give a post-
26 killing interpretation of the event.

1 MR. FRIEDLANDER: No. The special --

2 JUSTICE STEVENS: Isn't that was what the
3 California Supreme Court relied on?

4 JUSTICE KENNEDY: I agree with Justice
5 Stevens. I thought that was the whole problem, the "or"
6 and the "and" is the problem for you.

7 MR. FRIEDLANDER: The -- I'll read from JA
8 14. This is the special circumstance instruction that
9 was -- was mistaken: "The murder was committed while
10 the defendant was engaged in the commission or attempted
11 commission of a robbery, or the murder was committed in
12 order to carry out or advance the commission of the
13 crime of robbery, et cetera."

14 Now, that -- that finding alone we agree if
15 you -- if you -- if you just follow that finding, that
16 doesn't implicate the defendant. But you have to read
17 at JA 13, the instruction -- JA 13: "The defendant with
18 reckless indifference to human life and as a major
19 participant aided and abetted in the commission of a
20 robbery which resulted in the death of Flores." That's
21 at JA 13.

22 So there were multiple findings here. And
23 -- and the district court which -- this is at the bottom
24 of the first paragraph of JA 13.

25 JUSTICE SOUTER: Yes, but isn't -- maybe I'm

1 not getting it. Help me out here. One possibility
2 under -- under the instruction at JA 13 is "or assisted
3 in the crime of robbery." And the other instructions
4 because they are erroneous leave open the possibility of
5 finding that he assisted in the crime of robbery only if
6 he came in late. And that's why it does not solve the
7 original error.

8 MR. FRIEDLANDER: No. The -- the problem
9 with the -- I think you're mixing up two things here.

10 JUSTICE SOUTER: I may be doing that.

11 MR. FRIEDLANDER: The felony murder
12 instructions did not speak to this question of
13 contemporaneity. They left it open. That was error.
14 We acknowledge that that was error. Okay? So they
15 arguably find felony murder, aiding and abetting felony
16 murder based on post-killing aiding and abetting. Now,
17 the jury has to get to the special circumstance finding,
18 right?

19 JUSTICE SOUTER: Yes.

20 MR. FRIEDLANDER: And now it has to decide,
21 among other things, as I -- as I read to you, "did he
22 aid and abet robbery with reckless indifference to human
23 life and as a major participant in the commission of a
24 robbery which resulted in the death of Flores?" That's
25 at JA 13. So what we --

1 JUSTICE SOUTER: Where does it say that he
2 must have assisted prior to the late stage --

3 MR. FRIEDLANDER: It doesn't. It doesn't
4 say that.

5 JUSTICE SOUTER: Then that doesn't cure the
6 error.

7 MR. FRIEDLANDER: Yes, it does, and the
8 reason that it does is because the harmless error test
9 is not whether the jury actually made the finding that
10 it needed to make; rather, the harmless error test is do
11 we know from the evidence and from the findings that the
12 jury would have made the findings that it was required
13 to make had it been properly instructed?

14 CHIEF JUSTICE ROBERTS: It seems to me that
15 you're arguing one of two things: First, that there was
16 no error at all under Stromberg; or second, that if
17 there was error, it was harmless error. And I thought
18 the case was about whether or not the Ninth Circuit
19 erred in concluding that harmless error analysis didn't
20 apply to a Stromberg error.

21 MR. FRIEDLANDER: Yes. I'm not arguing the
22 first point. I -- I concede there was error. I just
23 wanted to make the point that Stromberg itself is an
24 incorrect rule of error. But I can see that that's led
25 us down a path that I didn't need to go down.

1 Now, we are certainly arguing harmless
2 error. As for the Ninth Circuit's opinion, we said --
3 the Ninth Circuit said this is structural error. We
4 don't even start a harmless error analysis.

5 JUSTICE GINSBURG: The district court didn't
6 say that.

7 MR. FRIEDLANDER: No, it did not. And --
8 and we said that's wrong. This is trial error, not
9 structural error.

10 JUSTICE GINSBURG: So if we were to say,
11 Ninth Circuit, you were wrong, but the district court
12 was right --

13 MR. FRIEDLANDER: Well, the district court
14 was right to the extent that it found it to be trial
15 error. It was wrong to the extent that it found it to
16 be prejudicial trial error. But Respondent has agreed
17 with us that this is not structural error, that we need
18 to do a harmless error analysis, and what Respondent has
19 done is import into this harmless error analysis we are
20 saying the Stromberg rule; and it doesn't belong there.

21 The Stromberg rule is not a proper rule of
22 harmless error. It's at most a rule of error. I'd
23 like --

24 JUSTICE STEVENS: But do you not agree that
25 the harmless error -- the -- the rationale of the

1 California Supreme Court was incorrect?

2 MR. FRIEDLANDER: Was the rationale
3 incorrect? If --

4 JUSTICE STEVENS: In the harmless error
5 analysis. Actually, I'm saying I'm agreeing with you
6 that there should have been harmless error. Did it
7 perform the proper --

8 MR. FRIEDLANDER: It was incorrect in the
9 way that you're thinking it is incorrect, but it was
10 Also incorrect in another way. It was incorrect in a
11 way that it applied too strict a standard. It said has
12 this question been necessarily resolved; and it said
13 yes, it has been necessarily resolved. Well, that's not
14 the question. The harmless error question --

15 JUSTICE STEVENS: The -- answer was
16 incorrect, too, wasn't it? And that answer was
17 incorrect?

18 MR. FRIEDLANDER: That answer was incorrect;
19 and as well as what you're thinking, it was incorrect,
20 in that they premised it on a factual basis that was not
21 in fact the case. But I better reserve time for
22 rebuttal.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 Mr. Shah.

25 ORAL ARGUMENT OF PRATIK A. SHAH

1 ON BEHALF OF THE UNITED STATES,
2 AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONER

4 MR. SHAH: Mr. Chief Justice, and may it
5 please the Court:

6 I think the Chief Justice framed the main
7 issue in this case properly. Consistent with the last
8 two decades of this Court's instructional error
9 jurisprudence, the Court should hold that the type of
10 error at issue is not structural and is subject to
11 harmless error review.

12 The Ninth Circuit's contrary interpretation
13 of Stromberg creates the untenable result that adding an
14 invalid theory -- adding a valid theory to an invalid
15 one somehow makes the error worse. Even Respondent now
16 rejects that interpretation. It follows that this Court
17 should reverse the Ninth Circuit and remand for
18 application of harmless error review under Brecht.

19 The main issue --

20 JUSTICE GINSBURG: That's what the district
21 judge did, right?

22 MR. SHAH: Yes, Your Honor. The district
23 court did apply harmless error review under Brecht. The
24 court of appeals, of course, did not.

25 JUSTICE GINSBURG: It could just review the

1 district court's decision using the standards that the
2 district court used?

3 MR. SHAH: This Court could do that, but the
4 longstanding and customary practice of this Court is
5 that when the court of appeals does not address the
6 harmless error question, that it remands to that court.
7 It did that in *Rose V. Clark*, in *Pope V. Illinois* and
8 *California V. Roy*, and more recently in *Recuenco*.

9 And in several of those cases the
10 intermediate court or the district court, in the habeas
11 context, did address it and the court of appeals didn't
12 in all of those cases that the Court did remand for
13 application of harmless error review.

14 JUSTICE GINSBURG: I wasn't questioning
15 that. The issue, is the United States position say
16 structural error was wrong, harmless error was right,
17 and then just have the Ninth Circuit review the district
18 court's decision that held that there was harmless error
19 the way it would ordinarily review a district court
20 decision?

21 MR. SHAH: Yes, Your Honor, but I would add
22 that this Court should also clarify the scope of that
23 harmless error inquiry. I think there are two important
24 principles. There is no logical reason to apply a
25 narrower form of harmless error review in this case than

1 the Court did in Neder.

2 So I think that this Court should clarify
3 that the principles of harmlessness articulated in Neder
4 should apply on remand to the Ninth Circuit. I think
5 two of those principles bear mention.

6 First, the question is not what the jury
7 actually or necessarily found, but rather, it
8 encompasses what a rationale jury would have found
9 absent the error.

10 And I think the second important point for
11 this Court to clarify is that harmlessness review is not
12 limited to cases -- is not limited to cases where the
13 relevant elements are undisputed, but rather even when
14 disputed, a reviewing court should consider the entire
15 record and determine whether, in light of the jury
16 findings, there is sufficient evidence to support a
17 contrary verdict. And then it should remand, Your
18 Honor, to the court of appeals to apply those
19 principles.

20 JUSTICE SCALIA: Why do you say in light of
21 the jury finding when you have disavowed any necessity
22 that the jury had found this?

23 MR. SHAH: Well, Your Honor, we do --

24 JUSTICE SCALIA: I mean "in light of the
25 jury finding," why don't you just drop that?

1 MR. SHAH: Well, Your Honor, we think it's
2 important because there are certain jury findings that
3 we know the jury made in this case. The jury returned a
4 special circumstance verdict. And we know based upon
5 that verdict that at a minimum, the jury found that
6 Respondent was a major participant in the crime -- just
7 taking the facts of this case, the Respondent was a
8 major participant in the robbery, that he exhibited a
9 reckless disregard for human life.

10 And we also know that the jury rejected a
11 duress defense. The jury was instructed on that
12 defense, and yet the jury came back guilty.

13 So I don't think that the -- that the
14 inquiry should take place in a vacuum, but, of course,
15 the reviewing court should have the benefit of the
16 limited jury findings that we do know were made, and
17 then apply the sufficiency inquiry in light of those
18 jury findings. There is no reason to disregard the jury
19 findings that were made.

20 CHIEF JUSTICE ROBERTS: Suppose it's not, in
21 the abstract anyway, necessarily true that this case
22 follows a fortiori, because here, at least you have a
23 valid theory. I mean, that may make it a harder case,
24 because the jury may have based its entire verdict on an
25 invalid theory.

1 It may be more difficult than a situation
2 where you've got a theory of the case that is invalid
3 because a particular element is missing. And you can
4 look and see whether or not that was harmless or not.

5 MR. SHAH: I would disagree, Mr. Chief
6 Justice. I think there are two possibilities in a case
7 with alternative theories. One possibility is that the
8 jury relies upon the defective instruction. For
9 example, there is one element omitted just like the
10 instruction in Neder. If that's what the jury had done,
11 then this case is no different than Neder, no better, no
12 worse, right.

13 The other possibility, however, is that the
14 jury relies on the completely valid theory. If the jury
15 relied on the completely valid theory, then there is
16 even less of a problem than Neder. There is no problem
17 at all.

18 So I don't see how the error in this
19 alternative valid theory and defective theory
20 circumstance could be any --

21 JUSTICE STEVENS: The difference is when you
22 only got one theory, you know what he relied on. When
23 you got alternatives, how do you know which one he
24 relied on?

25 MR. SHAH: Well, you don't -- you don't,

1 Your Honor. And that's what the reviewing court has to
2 decide. But in either scenario, if it -- if you assume
3 that the jury relied on the defective theory, then we
4 are in the same box as in Neder, and the reviewing court
5 would decide whether there was -- you know, they would
6 apply the harmless error review to the missing element
7 and decide whether there was sufficient evidence to
8 render that error harmless; or the court could ask,
9 well, is there uncontraverted or overwhelming evidence
10 that the defendant would have been found guilty under
11 the valid theory.

12 And that would also be a permissible
13 inquiry.

14 CHIEF JUSTICE ROBERTS: Well, I guess,
15 though, the point is that when you have invalid and
16 valid theories, it may be a little harder than Neder,
17 because they don't have to make any findings under the
18 valid theory. In other words, you don't just have to
19 fill in a missing piece of the puzzle, as in Neder. You
20 have to -- they may have been working on an entirely
21 different puzzle.

22 MR. SHAH: Well, Your Honor, in almost all
23 conceivable cases there is going to be at least some
24 overlap between -- between the two theories. And what
25 the -- the reason why that's relevant is because you

1 know that when the jury has returned a general verdict
2 of guilt, they have necessarily found beyond a
3 reasonable doubt that each of those elements has been
4 satisfied.

5 JUSTICE STEVENS: No. But in this case the
6 question is whether the uncle did it or the nephew did
7 it. And if there is a lot of doubt about -- about -- if
8 there is substantial reason to believe maybe it was the
9 uncle, they might have taken the easy case out. I think
10 this is vastly different from a single theory case.

11 MR. SHAH: Well, Your honor, here's why --

12 JUSTICE STEVENS: Because it's an -- there
13 is plenty of evidence that he might have been guilty
14 after the fact. There is just no doubt about that. But
15 there is doubt about the former.

16 MR. SHAH: Your Honor, here's why I think
17 the cases aren't that different, because, you know, at a
18 minimum from the general verdict of guilt if you take a
19 case like this, you know that the jury found that there
20 was an unlawful killing. You know that the jury found
21 that there was a robbery. You know that the jury found
22 that Respondent was involved in the robbery. The only
23 element that we don't know --

24 JUSTICE STEVENS: Perhaps after -- after the
25 death occurred. That's all we really know.

1 MR. SHAH: It is possible that the jury
2 would have found that, and that's the question that the
3 reviewing court would perform in harmless error review,
4 just like if there -- basically that is the exact same
5 question the Court would form, would do under Neder if
6 the timing element were omitted all together. The
7 reviewing court would look at the evidence and decide is
8 there sufficient evidence to support an after-the-fact
9 participation.

10 CHIEF JUSTICE ROBERTS: So what we are
11 talking about, in other words, is the application of
12 harmless error, which may or may not be harder in the
13 multiple theory case, and not the question of whether
14 harmless error analysis should be applied.

15 MR. SHAH: Yes, Your Honor. That's going to
16 be completely fact dependent whether it's harder or not.
17 But I think analytically it's exactly the same as in
18 Neder. Certainly no worse.

19 JUSTICE ALITO: Aren't there going to be
20 cases in which there's enough evidence to support the
21 submission of a theory of liability to the jury, but so
22 little that the court is going to be able to say that
23 it's harmless under -- that the submission of the
24 invalid theory was harmless under Brecht?

25 MR. SHAH: Yes. I mean, you can image in a

1 case -- take Neder. If the Neder instruction, the one
2 omitting the materiality element, was submitted to the
3 jury certainly enough evidence to support it, and then
4 there was another valid theory --

5 JUSTICE ALITO: There is difference. An
6 element of the defense has to be submitted to the jury.
7 And it may be that that it's -- the element is
8 undisputed, but a theory of liability isn't going to be
9 submitted to the jury unless there is some evidence to
10 support it.

11 MR. SHAH: Well, Your Honor, if -- if there
12 is some evidence to support it, if we were in a direct
13 review context, that's the inquiry that Neder says. So
14 on a clean slate it might be that if there is sufficient
15 evidence to support a contrary verdict, that that would
16 end the inquiry.

17 But in many of these cases we are going to
18 know that the jury has made at least some findings, has
19 found some of the elements. And that might inform the
20 harmless error inquiry, just like in this as we know
21 that the jury has found things like a respondent was a
22 major participant, exhibited a reckless disregard for
23 human life, discounted a significant portion of this --
24 of his statement by rejecting the duress defense.

25 If there are no further questions, Your

1 Honor.

2 CHIEF JUSTICE ROBERTS: Thank you, Mr. Shah.
3 Mr. O'Connell.

4 ORAL ARGUMENT OF J. BRADLEY O'CONNELL
5 ON BEHALF OF THE RESPONDENT

6 MR. O'CONNELL: Mr. Chief Justice, and may
7 it please the Court:

8 Unlike the Sarausad case argued earlier this
9 morning, this is a case of conceded constitutional error
10 under the reasonable likelihood standard, the same
11 question that consumed so much of the Sarausad argument.

12 We acknowledge that this is a trial error
13 and is subject to the Brecht prejudice standard. And as
14 I believe Justice Souter commented during the Sarausad
15 argument, in a Brecht situation, the defendant wins the
16 benefit of the doubt. That is a lesson of this Court's
17 decision.

18 JUSTICE BREYER: I agree with that. And my
19 question is going to be -- at some point, both of you
20 seem to agree with that so -- pretty much, it's a
21 harmless error standard of review. I think I wrote a
22 case on that, which says that the defendant --

23 MR. O'CONNELL: Yes. You wrote on O'Neal,
24 Your Honor.

25 JUSTICE BREYER: Right. So why don't we

1 just send it back and say apply the standard?

2 MR. O'CONNELL: Your Honor, although the
3 Ninth Circuit admittedly used a structural defect
4 nomenclature with which we don't agree, we believe that
5 the Court can't -- that upon considering both the Ninth
6 Circuit decision and the district court decision, this
7 Court can affirm because the inquiry which the Ninth
8 Circuit did conduct was actually a case-specific
9 inquiry, not really a structural defect inquiry, and
10 when an examination of the evidence and the verdicts and
11 the instructions and anything else indicative of the
12 jury's thinking still leaves the court uncertain whether
13 the jurors relied on the valid or the invalid theory,
14 that's a substantial and injurious influence. That is
15 grave doubt. That is equipoise, in the language of Your
16 Honor's opinion.

17 JUSTICE BREYER: You're saying that I should
18 have grave doubt myself and any judge would have to. He
19 made an argument here I think that wasn't such a bad
20 one. He said look at page 14 and you'll see the
21 mistake, you know, in the joint appendix.

22 MR. O'CONNELL: Yes, Your Honor.

23 JUSTICE BREYER: There it is. And it's
24 absolutely wrong. The basic instruction under the law
25 says you have to be engaged in the crime and you have to

1 have a certain state of intent. You have to have
2 committed this murder in order to help the crime or at
3 least in order to escape.

4 MR. O'CONNELL: Yes, Your Honor.

5 JUSTICE BREYER: So that's wrong. Put them
6 together, but then look at the instruction on page 13,
7 which he actually gave, and the one on 13 really does
8 seem to say that, or more so. It says, you can only
9 apply -- jury, you can only apply this special
10 instruction if two things are true: First, in lines 9
11 through 12 of that instruction, it seems to repeat that
12 you have to be engaged in the crime. And then just
13 before that, it says, and you have to have one of two
14 states of mind. You have to either intend to kill the
15 person or at least be recklessly indifferent. And since
16 that's what we said on page 13, the fact we made a
17 mistake on page 14 doesn't matter that much. That's one
18 of his arguments that I'm sure they have a lot of
19 evidentiary ones and a bunch of other ones.

20 MR. O'CONNELL: Your Honor, I think the
21 answer to that question is in the underlying trial
22 reporter's transcript at pages 1015 to 1016, the
23 district attorney's cross-examination of Mr. Pulido.
24 The district attorney developed the theme quite
25 effectively that, even under Mr. Pulido's own account,

1 he exhibited reckless indifference because he saw the
2 mortally wounded victim lying there, and the D.A. said,
3 did you try to resuscitate him? Have you ever had a CPR
4 class? I did once. Well, did you do CPR on him? No.
5 Did you call 9-11? You didn't care whether he lived or
6 died, did you?

7 So this entire line of cross-examination, to
8 which the district attorney came back again, though
9 somewhat less dramatically, at 1330 of the transcript
10 and again at 1337 to 1338, commenting that he -- that
11 Mr. Pulido did not go back in at some later point to
12 check on the victim's condition, that entire line of
13 cross-examination encouraged the theme that even under
14 Mr. Pulido's own account of the facts, he showed
15 reckless indifference. And --

16 CHIEF JUSTICE ROBERTS: So the error wasn't
17 harmless. And that's an argument you can make before
18 the Ninth Circuit on remand.

19 MR. O'CONNELL: That certainly is an
20 argument that if the Court -- if the Court is convinced
21 that the Ninth Circuit's analysis in substance --
22 because I realize the nomenclature -- the nomenclature
23 was inconsistent with harmless error, and I'm not going
24 to defend that. If the Court is convinced that the
25 substance of the Ninth Circuit's analysis was so far

1 removed from what harmless error analysis requires in
2 this context, we agree that the usual course would be to
3 send it back.

4 CHIEF JUSTICE ROBERTS: Well, why don't we
5 just take them at their word? As you say, they are
6 applying the wrong nomenclature. It would be easy
7 enough for them when they get it back to say, oh, we
8 meant, you know, harmless error under Brecht. But that
9 seems to me to be at least an open question.

10 MR. O'CONNELL: Your Honor, I think I could
11 best answer that by offering my own critique of the
12 Ninth Circuit opinion and -- which may explain why it
13 may be unnecessary. In my opinion, what the analysis
14 that the Ninth Circuit conducted was equivalent to a
15 sufficient analysis -- equivalent to the point of
16 equipoise discussed in O'Neal. That is to say, it
17 reviewed the evidence and said -- and the verdicts and
18 the instructions -- and said we're uncertain, we can't
19 tell which way the jury went.

20 My critique of the Ninth Circuit's -- at
21 least its per curiam opinion, as opposed to one of the
22 concurring opinions, is that in fact this is not just a
23 general verdict case. We know a great deal about the
24 jurors' thinking in this case. We know that by a vote
25 of either 8-4 or 4-8, the jurors rejected the

1 prosecution's primary theory, which was that Pulido
2 personally shot the victim and that, in the prosecutor's
3 words, Aragon had nothing to do with this, Aragon wasn't
4 there, Aragon isn't a murderer.

5 We also know -- and this will be another
6 echo of the Sarausad case -- we also know that
7 throughout their five days of deliberations, the jurors
8 submitted question after question directed to what are
9 now -- what are concededly defective erroneous
10 instructions, and moreover, those questions focused
11 right in on the defect in the instructions and in
12 particular the timing of Mr. Pulido's assistance.

13 And I refer the Court in particular to the
14 jurors' handwritten diagrams of alternative conceptions
15 of felony-murder aiding and abetting liability, which
16 are at 36 to 38 of the joint appendix, and also the
17 jurors' question at page 41 of the joint appendix
18 whether -- this goes right -- this goes, as the district
19 court said, to the crux of the issue: Does the
20 defendant have to have knowledge before or during the
21 crime of the -- of the unlawful purpose of the
22 perpetrator? And as to both of those questions the
23 judge said: Go back and reread those same instructions,
24 which of course were erroneous.

25 So my critique of the Ninth Circuit opinion,

1 which is again slightly different, I think, than the
2 State's, would be that it neglected to mention that
3 compelling evidence that in fact the jurors actually
4 found a set of facts corresponding to the invalid late
5 joiner theory, because in my view what -- the analysis
6 the Ninth Circuit conducted gets us to a point of
7 equipoise, and that's enough for Brecht. The defect in
8 the Ninth Circuit's analysis is they neglected to also
9 factor in those juror queries, and in my view the juror
10 queries move us from a state of equipoise to a very high
11 probability that the jurors relied on the -- and adopted
12 a factual scenario corresponding to an invalid theory.

13 CHIEF JUSTICE ROBERTS: Under Brecht, you
14 have the burden of showing a substantial injurious
15 effect.

16 MR. O'CONNELL: Well, actually, Your Honor,
17 as understand O'Neal the Court specifically renounced
18 describing it as a burden, and in fact said that we are
19 not going to use the "burden" terminology, and rather
20 than talk about allocating burdens, we are going to
21 address it from the perspective of the judge and say, if
22 the judge is in equipoise, that is sufficient.

23 We also know that -- drawing upon the
24 relationship between the Brecht standard and others, we
25 know that a Strickland standard is deemed to -- that if

1 you have Strickland prejudice, you don't have to go
2 through a separate Brecht analysis. Because of
3 Strickland, reasonable probability also satisfies
4 Brecht's substantial and injurious influence. Well,
5 this Court has said again and again, in construing
6 Strickland, it does not require a more likely than not
7 showing; it simply requires a showing sufficient to
8 undermine confidence in the outcome. And --

9 CHIEF JUSTICE ROBERTS: So you think you win
10 under Brecht?

11 MR. O'CONNELL: I think we will under
12 Brecht, Your Honor.

13 CHIEF JUSTICE ROBERTS: You think the Ninth
14 Circuit, although it didn't use that label, actually
15 applied the Brecht standard?

16 MR. O'CONNELL: In substance, it did even
17 though, as I said, I will -- I can't -- I can't run from
18 the language the Ninth Circuit actually used.

19 CHIEF JUSTICE ROBERTS: Sure. Well, then it
20 seems to me you agree with your friend that the Brecht
21 standard -- and the government -- that the Brecht
22 standard applies.

23 MR. O'CONNELL: Yes, we do, Your Honor.

24 CHIEF JUSTICE ROBERTS: And all the fight is
25 over is whether the Ninth Circuit applied that standard

1 or not?

2 MR. O'CONNELL: Yes, Your Honor, whether it
3 applied it in substance.

4 CHIEF JUSTICE ROBERTS: Why don't we just
5 send it back and ask them? Say: We can't tell. The
6 parties are having disagreement about what you did.
7 What did you do?

8 MR. O'CONNELL: Your Honor, as I said a
9 little earlier, if I fail to persuade the Court that the
10 substance of what the Ninth Circuit did was --
11 effectively satisfied Brecht as interpreted in O'Neal,
12 then I agree that's an appropriate course, and we
13 indicated that in the final section of our brief. There
14 is not --

15 JUSTICE BREYER: I'm not sure that would be
16 -- I mean, what worries me is proliferating arguments
17 among judges. Why not just say, you know, apply Brecht.
18 I'd like it with the O'Neal clause because it seems to me
19 the O'Neal clause applies.

20 MR. O'CONNELL: I agree, Your Honor.

21 JUSTICE BREYER: Just go do it. And then
22 they can say "we already did it," or they can say "we
23 didn't already do it, but we'll do it now." Let them
24 say what they want to say.

25 MR. O'CONNELL: Your Honor -- and, again, I

1 don't -- I don't strenuously object to that because, as
2 I've mentioned if the court -- if the court remains,
3 remains of the view that what the Ninth Circuit did was
4 simply incompatible with Brecht, then I agree it should
5 be sent back and I -- and I understand why that might be
6 the Court's inclination. Let me offer another angle for
7 why what the Ninth Circuit did is entirely compatible
8 with Brecht.

9 In civil cases, this Court routinely applies
10 the same sort of general verdict analysis which in
11 criminal cases has become to be known as the Stromberg
12 line. In fact, it did it as recently this summer in the
13 Exxon Valdez case. Now civil cases don't have Chapman,
14 they don't have structural defect; civil cases are
15 subject to a harmless error standard which ultimately
16 goes back to the identical statute which was construed
17 in Kotteakos.

18 And going back to the opinion of the Court
19 in O'Neal, in addressing the relationship between
20 Kotteakos/Brecht harmless error review and civil
21 harmless error review, the Court indicated, I think
22 rather strongly, that those standards are either
23 equivalent or to the extent that they differ, the
24 Brecht/Kotteakos standard is less forgiving of error
25 because of the liberty interest at stake. Now that

1 means two things. From a retrospective point of view of
2 simply construing this Court's different lines of cases,
3 I think it demonstrates that this general verdict
4 analysis is entirely consistent with a Kotteakos type
5 harmless error analysis, but it also has some
6 perspective implications, because if this Court were to
7 wholly disavow that type of analysis and say that has
8 nothing to do with harmless error review, that's going
9 to impact civil cases, too; and obviously in all this
10 Court's opinions, the Court is considering not only the
11 immediate case, but what is going to happen if we -- if
12 we rule one way or another.

13 So this case -- this case supports a finding
14 of prejudice under that O'Neal equipoise and as for the
15 Ninth Circuit did, that's not what it called it, it even
16 more strongly supports prejudice when one factors in the
17 rest of the record, notably the juror -- the juror
18 queries and another item which I think may be responsive
19 to some of Justice Alito's earlier questions, which is
20 the strength of the evidence on the various theories.

21 There were three theories and obviously
22 there was evidence in support of the prosecution's main
23 theory that Pulido shot the victim himself. There was
24 evidence -- obviously there was substantial evidence in
25 the form of Pulido's own testimony in support of the

1 invalid late-joiner theory. Out of these the one theory
2 that had least support in the record before the jury was
3 the valid aiding and abetting theory, because no witness
4 testified to a scenario in which Pulido assisted in some
5 fashion or another prior to the shooting; nor did the
6 prosecutor attempt to develop that type of scenario in
7 argument because the prosecutor was very clear:
8 Prosecutor said you're going to get aiding and abetting
9 instructions just in case. They only apply -- if --
10 they only come into play if you were to believe the
11 defendant's story which was a real whopper; but if you
12 believe the defendant's story, the felony murder rule
13 applies.

14 But then the prosecutor immediately went
15 back, "but I don't think it applies at all, Aragon
16 wasn't there. Aragon didn't do it. Pulido did it," and
17 prosecutor went back to his primary theory.

18 So the theory which the -- present in the
19 instructions was least before the jury, was the valid
20 aiding and abetting theory, yet defining this conceded
21 error harmless depends on the notion either that the
22 jury actually adopted a pre-shooting aiding or abetting
23 or that they necessarily would have adopted one if
24 properly instructed.

25 There is one final point I'd like to make,

1 which is there is a qualitative aspect to Brecht; and
2 when one has an error under which the defense testimony
3 even if believed renders the defendant guilty
4 erroneously, that derails the entire defense. That it
5 seems to me is the quintessential substantial and
6 injurious influence; because it practically renders the
7 trial a nullity by erroneously telling the jury even if
8 you find this set of facts, the defendant is guilty.

9 So for these reasons and additionally for
10 the very thorough prejudice analysis found in the
11 district court opinion, we urge the Court to affirm,
12 despite the Ninth Circuit's inapt nomenclature, but in
13 the event the Court is dissatisfied with that
14 explanation, we have acknowledged that the appropriate
15 course in that instance would be to send it back under
16 Brecht.

17 Unless the Court has any further questions,
18 I'm prepared to submit.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 Mr. O'Connell.

21 MR. O'CONNELL: Thank you, Your Honor.

22 CHIEF JUSTICE ROBERTS: Mr. Friedlander, you
23 have three minutes remaining.

24 REBUTTAL ARGUMENT OF JEREMY FRIEDLANDER
25 ON BEHALF OF THE PETITIONER

1 MR. FRIEDLANDER: We agree that we need to
2 do Brecht. We disagree on what Brecht is. Respondent
3 is telling you that Brecht is the error test, whether
4 the jury relied on the valid or invalid theory. That's
5 what he says Brecht is. In Calderon v Coleman, this
6 Court said there is a difference between the error test
7 and the harmless error test.

8 All these questions that the jury asked went
9 to the question of error. Did the jury misapply the law
10 by failing to find a contemporaneity aspect of felony
11 murder? They did not go to the harmless error question
12 of what the jury would have done had it been properly
13 instructed.

14 We urge the Court in remanding the case to
15 make clear that the error analysis must be kept separate
16 from the harmless error analysis. This is a mistake
17 Judge Thomas made in his concurring opinion. We -- he
18 assumes -- he sees a mistake in an instruction; he
19 assumes that the mistake rises to the level of
20 constitutional error; and then he does a prejudice
21 analysis by deciding whether the mistake caused the jury
22 to misapply the law. In other words, he -- he applies
23 an error analysis to decide prejudice. And what he does
24 is he includes all this evidence of the questions the
25 jury asked when those questions went only to the

1 misapplication of law that was the error, and did
2 nothing to show the basis of the jury's special
3 circumstance finding, which is the heart of the harmless
4 error determination here. If there are no further
5 questions.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 Mr. Friedlander. The case is submitted.

8 (Whereupon, at 11:50 a.m., the case in the
9 above-entitled matter was submitted.)

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