HEDGPETH, WARDEN *v.* PULIDO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07–544. Argued October 15, 2008—Decided December 2, 2008

Respondent Pulido was convicted by a California jury of felony murder. On direct appeal, the California Supreme Court found invalid one of the alternative theories of guilt on which the jury had been instructed, but upheld the conviction on the grounds that the error was harmless. The District Court disagreed and granted Pulido federal habeas relief, concluding that, under *Brecht* v. *Abrahamson*, 507 U. S. 619, 623, the invalid theory had a "'substantial and injurious effect or influence in determining the jury's verdict.'" The Ninth Circuit affirmed but on a different ground, ruling that instructing a jury on multiple theories of guilt, one of which is legally improper, is "structural" error not subject to harmless-error review. The Ninth Circuit held that Pulido's conviction must be set aside because it could not determine with "absolute certainty" that he was convicted under a proper theory. Pulido now agrees with the State that the Ninth Circuit erred and that *Brecht*'s harmless-error standard governs, but he maintains that the Court of Appeals effectively engaged in the *Brecht* analysis.

Held: The Ninth Circuit erred by categorizing the error as structural rather than applying *Brecht.* This Court has previously held that various forms of instructional error, such as omitting or misstating an element of an offense, are not structural but instead trial errors subject to harmless-error review. See, *e. g., Neder* v. *United States*, 527 U. S. 1; *California* v. *Roy*, 519 U. S. 2 *(per curiam); Pope* v. *Illinois*, 481 U. S. 497; *Rose* v. *Clark*, 478 U. S. 570. And *Neder* made clear that harmless-error analysis applies to instructional errors so long as the error at issue does not categorically "vitiat[e] all the jury's findings." 527 U. S., at 11. An instructional error arising in the context of multiple theories of guilt no more vitiates *all* the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted. Pulido's argument that the Ninth Circuit effectively engaged in the *Brecht* analysis is rejected. That court mentioned *Brecht* only briefly in a footnote, agreed with Pulido's alternative argument that the error was structural and not subject to harmless-error review, and applied an "absolute certainty" standard that is plainly inconsistent with *Brecht.*

487 F. 3d 669, vacated and remanded.

Jeremy Friedlander, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *Edmund G. Brown, Jr.*, Attorney General, *Dane R. Gillette*, Chief Assistant Attorney General, *Manuel Medeiros*, State Solicitor General, *Gerald A. Engler*, Senior Assistant Attorney General, *Donald E. de Nicola*, Deputy State Solicitor General, and *Peggy S. Ruffra*, Supervising Deputy Attorney General.

Pratik A. Shah argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were former *Solicitor General Clement*, former *Assistant Attorney General Fisher*, *Deputy Solicitor General Dreeben*, and *Deborah Watson*.

J. Bradley O'Connell, by appointment of the Court, 552 U. S. 1294, argued the cause and filed a brief for respondent.*

Per Curiam.

A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one. See *Stromberg* v. *California*, 283 U. S. 359 (1931); *Yates* v. *United States*, 354 U. S. 298 (1957). In this case the Court of Appeals for the Ninth Circuit held that such an error is "structural error," requiring that the conviction be set aside on collateral review without regard to whether the flaw in the instructions prejudiced the defendant. The parties now agree that the Court of Appeals was wrong to categorize this type of error as "structural." They further agree that a reviewing court finding such error should ask whether the flaw in the instructions "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht* v. *Abrahamson*, 507 U. S. 619, 623 (1993) (internal quotation marks omitted). We agree as well and so hold.

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***Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

Per Curiam

Respondent Michael Pulido was convicted by a California jury of felony murder. On direct appeal, Pulido sought to vacate his conviction on the ground that the jury instructions were erroneous: They permitted the jury to find him guilty of felony murder if he formed the intent to aid and abet the underlying felony before the murder, but they also permitted the jury to find him guilty if he formed that intent only after the murder. The California Supreme Court agreed with Pulido that the latter theory was invalid under California law, but upheld the conviction on the ground that Pulido was not prejudiced by the error. *People* v. *Pulido,* 15 Cal. 4th 713, 727, 936 P. 2d 1235, 1243–1244 (1997). Pulido sought federal habeas relief, which the District Court granted after concluding that instructing the jury on the invalid theory had a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Pulido* v. *Lamarque,* No. C 99–4933 CW (PR) (ND Cal., Mar. 24, 2005), App. to Pet. for Cert. 65a–66a (quoting *Brecht, supra,* at 637).

The State appealed, and the Court of Appeals affirmed. *Pulido* v. *Chrones,* 487 F. 3d 669 (2007) *(per curiam).* On appeal, Pulido argued the District Court's *Brecht* analysis was correct, but in the alternative sought to avoid the harmless-error inquiry altogether. In support of that alternative argument, he maintained that when a jury returns a general verdict after being instructed on both a valid and an invalid theory, the conviction must be automatically set aside, without asking whether the invalid instruction was harmless. The Court of Appeals recognized that the *Brecht* "substantial and injurious effect" standard governs harmless-error analysis on federal habeas, 487 F. 3d, at 673, n. 3 (internal quotation marks omitted), but agreed with Pulido that instructing a jury on multiple theories of guilt, one of which is legally improper, was "structural" error exempting the instructions as a whole from harmless-error review, *id.,* at 675–676. Such error instead required setting aside the conviction on habeas unless the reviewing court

could determine with "'absolute certainty'" that the defendant was convicted under a proper theory. *Id.*, at 676 (quoting *Lara* v. *Ryan*, 455 F. 3d 1080, 1086 (CA9 2006)). Because the instructions "le[ft] open the possibility" that the jury convicted Pulido on the impermissible ground, the court concluded that the verdict must be reversed. 487 F. 3d, at 676. We granted certiorari. *Chrones* v. *Pulido*, 552 U. S. 1230 (2008).

The Ninth Circuit precedent on which the Court of Appeals relied, see *Lara* v. *Ryan, supra,* based its structural-error analysis upon a line of our cases beginning with *Stromberg. Stromberg* addressed the validity of a general verdict that rested on an instruction that the petitioner could be found guilty for displaying a red flag as "'a sign, symbol, or emblem of opposition to organized government, or [a]s an invitation or stimulus to anarchistic action, or [a]s [a]n aid to propaganda that is of a seditious character.'" 283 U. S., at 363. After holding that the first clause of the instruction proscribed constitutionally protected conduct, we concluded that the petitioner's conviction must be reversed because "it [wa]s impossible to say under which clause of the [instruction] the conviction was obtained." *Id.*, at 368. In *Yates* v. *United States, supra,* we extended this reasoning to a conviction resting on multiple theories of guilt when one of those theories is not unconstitutional, but is otherwise legally flawed.

Both *Stromberg* and *Yates* were decided before we concluded in *Chapman* v. *California*, 386 U. S. 18 (1967), that constitutional errors can be harmless. Accordingly, neither *Stromberg* nor *Yates* had reason to address whether the instructional errors they identified could be reviewed for harmlessness, or instead required automatic reversal. In a series of post-*Chapman* cases, however, we concluded that various forms of instructional error are not structural but instead trial errors subject to harmless-error review. See, *e. g., Neder* v. *United States*, 527 U. S. 1 (1999) (omission of

an element of an offense); *California* v. *Roy,* 519 U. S. 2 (1996) *(per curiam)* (erroneous aider and abettor instruction); *Pope* v. *Illinois,* 481 U. S. 497 (1987) (misstatement of an element of an offense); *Rose* v. *Clark,* 478 U. S. 570 (1986) (erroneous burden shifting as to an element of an offense).

Although these cases did not arise in the context of a jury instructed on multiple theories of guilt, one of which is improper, nothing in them suggests that a different harmless-error analysis should govern in that particular context. To the contrary, we emphasized in *Rose* that "while there are some errors to which [harmless-error analysis] does not apply, they are the exception and not the rule." *Id.,* at 578. And *Neder* makes clear that harmless-error analysis applies to instructional errors so long as the error at issue does not categorically " 'vitiat[e] *all* the jury's findings.' " 527 U. S., at 11 (quoting *Sullivan* v. *Louisiana,* 508 U. S. 275, 281 (1993) (erroneous reasonable-doubt instructions constitute structural error)). An instructional error arising in the context of multiple theories of guilt no more vitiates *all* the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted.

In fact, drawing a distinction between alternative-theory error and the instructional errors in *Neder, Roy, Pope,* and *Rose* would be "patently illogical," given that such a distinction " 'reduces to the strange claim that, because the jury . . . received both a "good" charge and a "bad" charge on the issue, the error was somehow more pernicious than . . . where the *only* charge on the critical issue was a mistaken one.' " 487 F. 3d, at 677–678 (O'Scannlain, J., concurring specially) (quoting *Quigley* v. *Vose,* 834 F. 2d 14, 16 (CA1 1987) *(per curiam)*); see also *Becht* v. *United States,* 403 F. 3d 541, 548 (CA8 2005) (same), cert. denied, 546 U. S. 1177 (2006).

Pulido now agrees with the State that the Court of Appeals erred by treating the instructional error in this case as structural, and that the required prejudice analysis should

be governed by *Brecht*'s "substantial and injurious effect"
standard. See Brief for Respondent 17 ("[T]he Ninth Cir-
cuit was mistaken in its 'structural defect' nomenclature");
Tr. of Oral Arg. 27 ("We acknowledge that this is a trial error
and is subject to the Brecht prejudice standard"). So do we.

Pulido nonetheless maintains we should affirm because the
Court of Appeals effectively engaged in the *Brecht* analysis,
despite its clear description of the error as "structural."
But despite full briefing on the applicability of *Brecht*, the
Court of Appeals mentioned *Brecht* only briefly in a footnote,
see 487 F. 3d, at 673, n. 3, and then went on to agree with
Pulido's alternative assertion that "the instructional error
was structural and therefore not subject to harmless error
review," *id.*, at 675–676. The court also stated that the con-
viction had to be overturned unless the court was "'abso-
lutely certain'" that the jury relied on a valid ground. *Id.*,
at 676. Such a determination would appear to be a finding
that no violation had occurred at all, rather than that any
error was harmless. In any event, an "absolute certainty"
standard is plainly inconsistent with *Brecht.* Accordingly,
we express no view on whether Pulido is entitled to habeas
relief, but rather remand to the Court of Appeals for applica-
tion of *Brecht* in the first instance.*

The judgment is vacated, and the case is remanded for
further proceedings consistent with this opinion.

It is so ordered.

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*The dissent maintains the Court of Appeals "undertook a searching
review of the parties' evidence and the jury instructions to determine the
error's effect on the jury." *Post*, at 68 (opinion of STEVENS, J.). But the
Court of Appeals reached its conclusion based solely on the existence of
a typographical error in the special circumstances instructions, without
addressing any of the State's arguments that the typographical error was
harmless in light of the record as a whole. There was no need for that
court to address those arguments, of course, because of its mistaken con-
clusion that the instructional error was structural. Under such circum-
stances, remand is the appropriate course.

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUS-
TICE GINSBURG join, dissenting.

The Court of Appeals misused the term "structural error"
in its opinion affirming the District Court's order granting
Pulido's application for a writ of habeas corpus. But the
court's misnomer was inconsequential because its decision
rested on substantially the same analysis as the District
Court's, which correctly applied the standards set forth in
Kotteakos v. *United States*, 328 U. S. 750 (1946), *Brecht* v.
Abrahamson, 507 U. S. 619 (1993), and *O'Neal* v. *McAninch*,
513 U. S. 432 (1995). The Court of Appeals' decision there-
fore did not warrant this Court's review and does not now
merit a remand to require that court to repeat its analysis.
In my opinion, the interest in expediting the conclusion of
this protracted litigation outweighs the interest in correcting
a misnomer.

Respondent Michael Pulido was charged with felony mur-
der for robbing a gas station and killing the attendant. At
trial, the State argued that Pulido acted alone. Pulido
maintained that his uncle was the principal actor and that he
had no knowledge of his uncle's plan when the two arrived
at the gas station. While he was waiting in the car, Pulido
claimed, he heard a shot and ran into the store. At that
point, his uncle insisted that Pulido help him pry open the
stolen cash register and dispose of it, and Pulido reluctantly
complied. The jury convicted Pulido of felony murder, but
it was unable to reach a verdict on the charges that Pulido
personally used a firearm and intentionally inflicted great
bodily harm.

As a matter of California law, felony-murder liability ex-
tends to all persons jointly engaged in the commission of a
felony at the time of a killing when one of the joint actors
kills in furtherance of the common design. *People* v. *Pulido*,
15 Cal. 4th 713, 716, 936 P. 2d 1235, 1236 (1997). But a per-
son is not guilty of felony murder if he is only a "late-joining"
aider and abettor—*i. e.*, if he did not himself commit the mur-

der and his participation in the underlying felony did not
begin until after the victim was killed. *Ibid.* In this case,
the trial court's instructions erroneously permitted the jury
to find Pulido guilty on such a theory, as they did not require
the jury to find either that Pulido committed the murder or
that he aided and abetted the underlying robbery before the
murder was committed. Because the instructions allowed
the jury to convict Pulido of felony murder for conduct that
does not amount to that offense, their inclusion was constitu-
tional error.

On direct appeal, the California Supreme Court agreed
with Pulido that the late-joiner theory was an invalid theory
of felony-murder liability. *Ibid.* It nevertheless held that
any error in the trial court's instructions was harmless. Ac-
cording to the court, the jury found that Pulido had been
engaged in the robbery at the time of the killing because the
robbery-murder special-circumstance instruction stated that
"the murder was committed *while the defendant was en-
gaged*" in the "commission of or attempted commission of [a]
robbery." *Id.,* at 727, 936 P. 2d, at 1243 (citing Cal. Penal
Code Ann. § 190.2(a)(17) (internal quotation marks omitted)).
Based on that portion of the instruction, the court concluded
that the special-circumstance verdict "demonstrates the jury
did not accept the theory [Pulido] joined the robbery only
after [the victim] was killed," and it therefore held that Pul-
ido was not prejudiced by the error. 15 Cal. 4th, at 727, 936
P. 2d, at 1244.

In reaching that conclusion, however, the California Su-
preme Court failed to take into account the entire special-
circumstance instruction. A typographical error in that in-
struction in fact permitted the jury to find the special
circumstance of robbery-murder true if it found *either* that
the murder was committed while the defendant was engaged
in the commission of a robbery *or* that it "was committed in
order to carry out or advance the commission of the crime
of robbery or to facilitate the escape therefrom or to avoid

STEVENS, J., dissenting

detection"—a finding entirely consistent with the late-joiner theory. App. 14. Thus, as the State concedes, the erroneous instructions made it "reasonably likely" that the jury convicted Pulido on the impermissible theory. Brief for Petitioner 18.

After exhausting his state postconviction remedies,[1] Pulido sought a writ of habeas corpus in Federal District Court. The District Court recognized the erroneous disjunctive in the special-circumstance instruction that the California Supreme Court had overlooked, and it held that the state court's conclusion that Pulido was not prejudiced by erroneous instructions was "an objectively unreasonable application of clearly established federal law." *Pulido* v. *Lamarque*, No. C 99–4933 CW (PR) (ND Cal., Mar. 24, 2005), App. to Pet. for Cert. 64a.

The District Court then considered the effect of that error on the jury. Correctly relying on *Brecht*, the District Court began its analysis by noting that a federal habeas petitioner "is not entitled to habeas relief unless the State court's error resulted in actual prejudice, that is, the error had a 'substantial and injurious effect or influence in determining the jury's verdict.'" App. to Pet. for Cert. 65a (quoting *Brecht*, 507 U. S., at 637). If an error had a substantial influence, or if "the record is so evenly balanced that a conscientious judge is in 'grave doubt'" as to whether it had such an effect, the conviction must be reversed. App. to Pet. for Cert. 65a (quoting *O'Neal*, 513 U. S., at 438).

To determine whether the error was harmless under this standard, the District Court scrutinized the record, including the arguments of both parties, the evidence supporting their respective theories of the case, the jury instructions, the jury's questions to the trial court, and the various parts of the jury's verdict. App. to Pet. for Cert. 65a–66a.

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[1] The California Supreme Court summarily denied Pulido's state petition for a writ of habeas corpus. See *Pulido* v. *Chrones*, 487 F. 3d 669, 672 (CA9 2007) *(per curiam)*.

Throughout this inquiry, the District Court properly avoided
substituting its judgment for the jury's. As we cautioned in
Kotteakos, in undertaking harmless-error analysis "it is not
the [reviewing] court's function to determine guilt or inno-
cence. Nor is it to speculate upon probable reconviction and
decide according to how the speculation comes out." 328
U. S., at 763 (citations omitted). Thus, "[t]he inquiry cannot
be merely whether there was enough to support the result"
in the absence of the error. *Id.*, at 765. Rather, the proper
question is "whether the error itself had substantial influ-
ence. If so, or if one is left in grave doubt, the conviction
cannot stand." *Ibid.;* accord, *O'Neal*, 513 U. S., at 437.

That was precisely the question addressed by the District
Court when it sought to ascertain what the jury actually
found. The court concluded that, while it is "possible" that
the jury found that Pulido aided and abetted the robbery
before the victim was killed, the court had "no way of deter-
mining whether this was the case." App. to Pet. for Cert.
66a. Because that uncertainty left the court with " 'grave
doubt as to the likely effect of [the] error on the jury's ver-
dict,' " it faithfully applied the standard mandated by *Kot-
teakos* and *O'Neal* and found that the error was not harmless.
App. to Pet. for Cert. 66a (quoting *O'Neal*, 513 U. S., at 435).

On appeal, Pulido contended that the judgment of the Dis-
trict Court should be affirmed whether the instructional
error was viewed as structural error or as trial error. Brief
for Appellee and Cross-Appellant in No. 05–15916 etc. (CA9),
pp. 53–64 (hereinafter Appellee's Brief). He argued that
the error was not harmless under *Brecht* and *O'Neal* because
the substantial evidence that supported the invalid theory
made it likely that the jury convicted him on that basis. Ap-
pellee's Brief 55–64. In particular, Pulido noted that the
"injurious effect" of this type of error "is greatest when the
instruction compromises the defense by appearing to extend
liability even to the factual scenario suggested by the de-

fense evidence," as was true in this case. *Id.*, at 57 (internal quotation marks omitted; emphasis deleted). At oral argument, the parties' contentions similarly focused on the *Brecht* standard and the result that harmless-error analysis required.

Less than two months after oral argument, and before the Court of Appeals issued its decision in this case, a different panel of the Ninth Circuit decided *Lara* v. *Ryan*, 455 F. 3d 1080 (2006). Lara was convicted of attempted murder by a jury that had been instructed that it could find him guilty under either an express malice theory or an implied malice theory, the second of which is legally invalid. *Id.*, at 1082. The Ninth Circuit described the erroneous instruction as a "structural error," but it held that such an error does not necessitate reversal when a reviewing court can "determine with absolute certainty" that the defendant was not convicted under the erroneous theory. *Id.*, at 1086. Because the jury "made a specific finding that Lara attempted to murder willfully, deliberately, and with premeditation," the court concluded that it necessarily relied on the valid instruction and that reversal was therefore not required. *Id.*, at 1086–1087.

In those limited instances in which this Court has found an error "structural," we have done so because the error defies analysis by harmless-error standards. See *Arizona* v. *Fulminante*, 499 U. S. 279, 309 (1991); see also *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 150 (2006) (quoting *Sullivan* v. *Louisiana*, 508 U. S. 275, 282 (1993); *United States* v. *Cronic*, 466 U. S. 648, 659, and n. 25 (1984)). Indeed, it is because the consequences " 'are necessarily unquantifiable and indeterminate' " that automatic reversal is required when such errors occur. *Gonzalez-Lopez*, 548 U. S., at 150 (quoting *Sullivan*, 508 U. S., at 282). That the court in *Lara* could be " ' "*absolutely certain*" that the jury relied upon the legally correct theory,' " 455 F. 3d, at 1085,

shows both that the error was susceptible of harmless-error analysis and that the court in fact found the error harmless despite repeatedly referring to it as "structural."

Citing *Lara,* the Court of Appeals' *per curiam* opinion labeled the erroneous instruction in this case a structural error.[2] As in *Lara,* the court then undertook a searching review of the parties' evidence and the jury instructions to determine the error's effect on the jury. Noting, among other things, that "[t]he 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," the court concluded that "the jury instructions leave open the possibility that the jury convicted Pulido on a legally impermissible theory." *Pulido* v. *Chrones,* 487 F. 3d 669, 676 (CA9 2007) *(per curiam).* That possibility of reliance on the erroneous instruction is the "substantial and injurious effect" to which *Brecht* refers. Thus, although the Court of Appeals called the error in this case by the wrong name, it performed substantially the same analysis and reached the same conclusion as the District Court did when it applied the standard prescribed by *Brecht.*[3]

Judge Thomas concurred separately both to defend the *Lara* decision and to demonstrate that harmless-error analysis also supports the panel's result. 487 F. 3d, at 678–683. Unlike the District Court, Judge Thomas applied the

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[2] The Court of Appeals' opinion asserts that Pulido argued that the error was structural under *Lara* v. *Ryan,* 455 F. 3d 1080 (CA9 2006). But due to the timing of the *Lara* decision, the parties did not raise arguments relying on that precedent until their postargument supplemental briefing. As discussed above, the parties' arguments had initially focused on the proper application of *Brecht* v. *Abrahamson,* 507 U. S. 619 (1993).

[3] The Court of Appeals in fact cited *Brecht* and recited the proper standard in a footnote before turning its attention to *Lara:* "If there is constitutional error, we consider whether the error was harmless; that is, whether the error had a '"substantial and injurious effect or influence in determining the jury's verdict."'" 487 F. 3d, at 673, n. 3.

harmless-error standard announced in *Chapman* v. *California*, 386 U. S. 18 (1967), instead of looking to *Brecht.* 487 F. 3d, at 678. But his analysis similarly establishes that at least some jurors very likely relied on the impermissible late-joiner theory. *Id.*, at 679–683.

The record before us clearly supports that conclusion. Indeed, even petitioner admits that the ambiguity in the robbery and murder instructions and the trial court's confusing answers to the jury's questions "combined to make it reasonably likely that the jury applied the instructions in an unconstitutional way." Brief for Petitioner 18. That reasonable likelihood is sufficient to support the conclusion that the error was not harmless under *Brecht.*

Because the District Court's analysis was correct and the Court of Appeals' result was substantially the same, I think this Court's decision to remand for the purpose of obtaining a third analysis of the harmless-error issue is a misuse of scarce judicial resources. I would therefore affirm the judgment of the Court of Appeals.