No. _____

OCTOBER TERM, 2020

IN THE SUPREME COURT OF THE UNITED STATES

Joseph Weldon Smith, Petitioner,

v.

Renee Baker, Warden, et al., Respondents.

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

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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QUESTION PRESENTED

(Capital Case)

A panel of the Ninth Circuit Court of Appeals held petitioner Joseph Smith's capital sentencing jury was instructed in violation of *Stromberg v. California*, 283 U.S. 359 (1931), because one of the two alternative theories supporting the single aggravating factor in his case was invalid. But instead of determining the effect of the alternative-theory error on the actual sentencing jury's verdict, *see Brecht v. Abrahamson*, 507 U.S. 619, 627 (1993), the panel ignored the error and applied a Ninth Circuit test that simply asked whether a hypothetical jury would have found the aggravating factor were it properly instructed on the valid, narrower theory only.

The question presented is:

In applying harmless error review under *Brecht*, may a federal court disregard the prejudice resulting from *Stromberg* error, i.e., the jury's consideration of an invalid theory of liability, and instead ask only what a hypothetical jury instructed on a valid, narrower theory would have found?

LIST OF PARTIES

Petitioner Joseph Smith is a prisoner at Northern Nevada Correctional Center. Respondent Aaron Ford is the Attorney General of the State of Nevada. Respondent Perry Russell[1] is the warden of Northern Nevada Correctional Center.

[1] Warden Perry Russell is automatically substituted for former warden Renee Baker. *See* U.S. Sup. Ct. R. 35(3).

LIST OF RELATED PROCEEDINGS

DIRECTLY RELATED CASES

State v. Smith, District Court, Clark County, Nevada, Case No. C100991, Judgment of Conviction (March 5, 1993)

Smith v. State, Supreme Court of the State of Nevada, Case No. 24213, Opinion (881 P.2d 649 (September 28, 1994)) (*per curiam*)

State v. Smith, District Court, Clark County, Nevada, Case No. C100991, Amended Judgment of Conviction (May 7, 1996)

Smith v. State, Supreme Court of the State of Nevada, Case No. 228786, Opinion (953 P.2d 264 (January 22, 1998))

State v. Smith, District Court, Clark County, Nevada, Case No. C100991, Second Amended Judgment of Conviction (May 20, 1998)

State v. Smith, District Court, Clark County, Nevada, Case No. C100991, Findings of Fact, Conclusions of Law and Order denying Petition for Writ of Habeas Corpus (April 25, 2005)

Smith v. State, Supreme Court of the State of Nevada, Case No. 45302, Order of Affirmance (September 29, 2006)

State v. Smith, District Court, Clark County, Nevada, Case No. C100991, Findings of Fact, Conclusions of Law and Order denying Petition for Writ of Habeas Corpus (December 30, 2008)

Smith v. State, Supreme Court of the State of Nevada, Case No. 53113, Order of Affirmance (November 17, 2010)

Smith v. Baker, United States District Court, Case No 2:07-cv-00318-JCM-CWH, Order (2014 WL 994607 (March 13, 2014))

Smith v. Baker, United States District Court, Case No 2:07-cv-00318-JCM-CWH, Order Denying Reconsideration (2014 WL 5776212 (November 5, 2014))

Smith v. State, District Court, Clark County, Nevada, Case No. 91C100991, Findings of Fact, Conclusions of Law and Order denying Petition for Writ of Habeas Corpus (May 22, 2017)

Smith v. State, Supreme Court of the State of Nevada, Case No. 73373, Order of Affirmance (September 26, 2019)

Smith v. Baker, United States Court of Appeals for the Ninth Circuit, Case No. 14-99003, Opinion (960 F.3d 522 (May 21, 2020))

Smith v. Baker, United States Court of Appeals for the Ninth Circuit, Case No. 14-99003, Order and Amended Opinion (983 F.3d 383 (December 21, 2020))

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Joseph Smith, files this petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this capital case.

OPINIONS BELOW

The December 21, 2020 order of the court of appeals denying rehearing and rehearing en banc and amended opinion, which is reported at 983 F.3d 383, is set out at pages 1 to 55 of the Appendix. The May 21, 2020 opinion of the court of appeals, which is reported at 960 F.3d 522, is set out at pages 56 to 113 of the Appendix.

JURISDICTION

On March 19, 2020, this Court extended the time for filing future petitions for writs of certiorari to 150 days. The decision of the court of appeals was entered on May 21, 2020. A timely petition for rehearing and suggestion for rehearing en banc was denied on December 21, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

A general verdict is subject to challenge if the jury was instructed on alternative theories and may have relied on an invalid one. *Stromberg v. California*, 283 U.S. 359, 368–70 (1931). In 2008, this Court decided *Hedgpeth v. Pulido*, 555 U.S. 57, 61–62 (2008) (per curiam), which held "alternative-theory error[s]" were not structural errors and were thus subject to harmless error review. Accordingly, when a federal court reviews an alternative-theory error for harmlessness in federal habeas, the court must "ask whether the flaw in the instructions 'had a substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 58 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).

Since this Court's decision in *Hedgpeth*, there has been considerable confusion in the lower courts regarding how to properly apply *Brecht* to alternative-theory errors. That confusion has resulted in the circuits developing various tests and formulations for harmless error review of alternative-theory errors. The Ninth Circuit's version asks whether a hypothetical jury would have found the valid theory were it properly instructed, ignoring the invalid theory and its effect on the actual jury that decided the case. This Ninth Circuit test is a gross misapplication of *Brecht* and violates a defendant's Sixth Amendment right to a jury trial. When a federal court makes the only factual finding rendering a defendant eligible for the death penalty under the rubric of applying harmless error review, as the Ninth Circuit did in Mr. Smith's case, it improperly supplants the central role of the jury in our system of justice.

This Court's plenary review is needed to address the confusion in the lower courts, resolve the circuit split on the proper application of *Brecht* to alternative-theory errors, and ensure harmless error review is performed consistently with the Sixth Amendment's jury trial guarantee.

STATEMENT OF THE CASE

The trial court in Mr. Smith's case erroneously instructed the jury at the original penalty proceeding and again following remand on the sole aggravating factor supporting his two death sentences. That aggravating factor applies to cases that involve "torture, depravity of mind, or the mutilation of the victim." *See* Nev. Rev. Stat. 200.033(8). Although a single aggravating factor, it may be satisfied in any of the three stated ways. At both penalty hearings, the trial court failed to properly instruct the jury on the depravity-of-mind theory.[2] On direct appeal following the penalty retrial, the Nevada Supreme Court applied a sufficiency-of-the-evidence test and held the error harmless. On habeas review, the Ninth Circuit identified the error, faulted the state court's harmless error analysis, and then—following circuit precedent—applied a harmless error test that completely ignored the constitutional error and its effect on the jury, thereby violating Mr. Smith's Sixth Amendment right to a jury trial.

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[2] Between Mr. Smith's original penalty proceeding and the penalty retrial, the Nevada legislature amended the statute and removed depravity of mind as a means of satisfying the aggravating factor. *See* 1995 Nev. Stat. ch. 467, §§ 1–3, at 1490–91. Mr. Smith is the only person in Nevada who was sentenced to death based on depravity of mind following the legislative amendment.

State court proceedings

The State charged Mr. Smith with three counts of first-degree murder for the deaths of his wife and two stepdaughters.[3] According to the State, each victim was struck multiple times with a hammer and manually strangled. The jury convicted Mr. Smith on all three counts, and the case proceeded to a penalty trial. In addition to instructions on torture and mutilation, the court instructed the jury on the following definition of "depravity of mind":

> The condition of mind described as depravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhumane.

6EOR1446–49. The jury found two of the murders involved "torture, depravity of mind or the mutilation of the victim" and sentenced Mr. Smith to death for each. 7EOR1620–25. The jury sentenced Mr. Smith to life in prison for the third. 7EOR1619.

On direct appeal, the Nevada Supreme Court reversed the two death sentences, holding that the single aggravating factor found by the jury was unconstitutionally vague as applied. *Smith v. State*, 881 P.2d 649, 655–56 (Nev. 1994) (*Smith I*) (citing *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)). Specifically, the court held the trial court's failure to provide a required limiting instruction on the depravity-of-mind theory rendered that portion of the aggravating factor

[3] All references to the Excerpts of Record (EOR) refer to the record before the Ninth Circuit Court of Appeals.

invalid. Compounding the problem, the jury did not specify which of the alternative theories it had found, instead finding generally "torture, depravity of mind, *or* mutilation." *Id.* The Nevada Supreme Court vacated the death sentences and remanded the case for a second penalty trial on the single aggravating factor. *Id.* at 655–56.

Little changed at the second penalty trial. The State again argued the same single aggravating factor for both murders—torture, depravity of mind, or the mutilation of the victim. *Smith v. State*, 953 P.2d 264, 267 (Nev. 1998) (*Smith II*); App. at 167. And the trial court gave an identical instruction defining depravity of mind. *Id.* The only difference was one additional instruction, which presumably was an attempt by the trial court to comply with *Smith I*:

> In order to find depravity of mind you must find serious and depraved physical abuse beyond the act of killing itself.

Id. The jury was given no further guidance on what constituted "depravity of mind" or "serious and depraved physical abuse." *Id.*

The State relied extensively on depravity of mind when it argued in support of the aggravating factor. In the prosecutor's opening statement, he told the jury the murders involved depravity of mind and that the evidence would prove that aggravating factor beyond a reasonable doubt. 8EOR1969. The prosecutor asserted that "madness is loose in the world" and that "[m]adness was certainly loose in Henderson, Nevada" at the time of the murders. 8EOR1967. During closing argument, the prosecutor borrowed from the instruction defining depravity of mind,

telling the jury that "evil is easy and has infinite forms." 9EOR2253. He then utilized the instruction's terms of "evil" and "heinous" to describe the murders and characterized Mr. Smith as an "evil assailant." 9EOR2253–54; 9EOR2256. Specifically directing the jury to the instruction, the prosecutor read it aloud and noted that it "involve[d] many adjectives . . . most of which apply to this case." 9EOR2260. The prosecutor asserted both victims "were involved in murders where a factor was depravity of mind." 9EOR2263.

As for mutilation and torture, the State's presentation was sparse. The prosecutor relied on autopsy photos and the medical examiner's testimony about blunt-force injuries to establish both torture and mutilation. 9EOR2258–63. Regarding mutilation, the prosecutor conceded neither murder involved the lay understanding of mutilation. 9EOR2262. Rather, the prosecutor relied on Nevada's unique definition of "mutilate," which includes to "alter radically so as to make imperfect." 13EOR3497. Indeed, the trial court concluded as a matter of law that the State had shown neither mutilation nor torture for one of the murders. *Smith II*, 953 P.2d at 266; App. at 166.

The second jury found the aggravating factor existed for both murders. On a special verdict form for one of the murders, the jury checked a box next to depravity of mind. 13EOR3672. The other special verdict form had a check next to depravity

of mind and mutilation. 13EOR3673.[4] Mr. Smith was again sentenced to death. 13EOR3670–71.

On direct appeal, the Nevada Supreme Court again faulted the trial court for failing to properly instruct the jury on depravity of mind. *Smith II*, 953 P.2d at 266 ("An aggravating circumstance based upon depravity of mind must include torture or mutilation beyond the act of killing itself."); App. at 167. Because the invalid depravity-of-mind theory alone supported one of the two death sentences, the Nevada Supreme Court vacated that sentence and imposed in its place a sentence of life without the possibility of parole. *Id.* But the Nevada Supreme Court concluded the invalid theory did not infect the second death sentence, reasoning that "there was sufficient evidence from which a reasonable jury could conclude beyond a reasonable doubt that the [second murder] involved mutilation." *Id.* at 267–68; App. at 167–68.

Federal court proceedings

After unsuccessful post-conviction proceedings in state court, Mr. Smith filed an amended petition for writ of habeas corpus in the Federal District Court for the District of Nevada. 10EOR2766–11EOR2896. In Claim Eight of that petition, Mr. Smith argued that his death sentence was unconstitutional because the jurors

[4] Although the jury was instructed it had to be unanimous with respect to the single aggravating factor, it was not instructed that it had to be unanimous with respect to the three different theories of liability, i.e., torture, depravity of mind, or mutilation. 13EOR3500. As such, the check next to mutilation simply means at least one juror relied on this theory.

based their verdict, at least in part, on the invalid depravity-of-mind theory. 11EOR2822–24. The district court rejected this claim, concluding that any error was harmless. *Smith v. Baker*, No. 2:07-CV-00318-JCM, 2014 WL 994607, at *11–12 (D. Nev. Mar. 13, 2014); App. at 144–45.

The Ninth Circuit granted a certificate of appealability on this claim and concluded that Mr. Smith had demonstrated "*Stromberg* error"—the jury was instructed on alternative theories for the sole aggravating factor alleged, and "it is impossible to tell whether the jury split their votes between the invalid depravity theory and the valid mutilation theory." *Smith v. Baker*, 960 F.3d 522, 542 (9th Cir.); App. at 96; *modified*, 983 F.3d 383 (9th Cir. 2020); App. at 1–55. The Ninth Circuit then explained that the Nevada Supreme Court had improperly resolved the issue by "rel[ying] on its conclusion that the evidence was sufficient to support the mutilation theory." *Id.* at 543; App. at 98. Thus, the Ninth Circuit concluded, the Nevada Supreme Court had not engaged in "close appellate scrutiny," as "sufficiency of the evidence is not the issue; Smith's argument is that the jury may not have been unanimous." *Id.*

After this explanation, however, the Ninth Circuit proceeded to engage in exactly the analysis it had prohibited state courts from performing. *Id.* at 543–44; App. at 98–99. Under the guise of a harmlessness review under *Brecht*, the Ninth Circuit simply asked "'what the verdict would have been if the [proper] instruction had been given.'" *Smith*, 960 F.3d at 544; App. at 99. Reviewing the record for evidence of mutilation, the panel concluded the error was harmless. *Id.* Specifically,

the court pointed to testimony from the medical examiner about the victim's blunt-force injuries, including a laceration to her ear. *Id.* At no point in its analysis, however, did the Ninth Circuit consider the effect of the instructional error on Mr. Smith's actual jury. *See id.* at 543–44; App. at 98–99.

Following Mr. Smith's petition for rehearing and suggestion for rehearing en banc, the panel amended its opinion to include the following: "Here, we see no reason to suspect that the arguments presented by the State or the defense would have varied at all had the narrowed instruction been given. The evidence strongly supported a finding of 'mutilation beyond the act of killing itself' and mutilation was a subset of depravity under Nevada law at the time Smith's case was tried." *Smith v. Baker*, 983 F.3d 383, 405 (9th Cir. 2020); App. at 45.

REASONS FOR GRANTING THE PETITION

This Court should grant review to resolve a circuit split regarding the proper application of harmless error review to alternative-theory errors. *See* U.S. Sup. Ct. R. 10(a). Moreover, the harmlessness test for reviewing such errors that has emerged in the Ninth Circuit violates a defendant's Sixth Amendment right to a jury trial, and Mr. Smith's petition thus presents an important question of federal law. *See* U.S. Sup. Ct. R. 10(c). And Mr. Smith's petition provides an appropriate vehicle for resolving this recurring issue. For the reasons set forth below, this Court should grant the petition.

A. Certiorari review is necessary to resolve the circuit split arising from differing interpretations and applications of *Hedgpeth*.

This Court's per curiam decision in *Hedgpeth* did not elucidate precisely how a federal court should apply harmless error review in alternative-liability cases. The case was unique as both parties agreed the court of appeals had erred in concluding alternative-theory error was structural error. 555 U.S. at 58. And the parties agreed that the harmless error standard of *Brecht* applied. *Id.* The only question before this Court then was the petitioner's assertion that the court of appeals had "effectively engaged in the *Brecht* analysis, despite its clear description of the error as 'structural.'" *Id.* at 62. This Court rejected the argument and remanded to the court of appeals for it to apply *Brecht* in the first instance. *Id.*

Although this Court explained in *Hedgpeth* that a reviewing court finding alternative-theory error should apply *Brecht* and determine whether the error in the instructions had a substantial and injurious effect or influence in determining the jury's verdict, the majority did not provide any additional guidance.[5] *See Babb v. Lozowsky*, 719 F.3d 1019, 1034 (9th Cir. 2013) ("The Supreme Court in *Hedgpeth*

[5] This Court has provided additional guidance for applying *Brecht* in other contexts. For example, in *Neder v. United States*, 527 U.S. 1 (1999), this Court held a conviction may be upheld notwithstanding an omitted element in the jury instructions if the omission was harmless. Citing *Chapman v. California*, 386 U.S. 18, 24 (1967), this Court explained that an omitted element may be harmless if "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder*, 527 U.S. at 15. From this general proposition, this Court offered additional guidance as to when such an error would be harmless beyond a reasonable doubt, framing the question as "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Id.* at 19. Similar guidance with respect to the application of *Brecht* to alternative-theory error is necessary to resolve the circuit split.

provided no guidance regarding how to assess the impact of an erroneous instruction in the context of a general verdict."), *overruled on other grounds by Moore v. Helling*, 763 F.3d 1011, 1015 (9th Cir. 2014); *United States v. McKye*, 734 F.3d 1104, 1113 (10th Cir. 2013) (Briscoe, C.J., concurring) (noting *Hedgpeth* "did not explain how to apply" *Brecht* to alternative-theory error). Absent guidance, the circuits diverged in their interpretation and application of *Brecht* to alternative-theory errors.[6] *See McKye*, 734 F.3d at 1113 (Briscoe, C.J., concurring) (noting circuit split and various approaches); Erika A. Khalek, Note, *Searching for A Harmless Alternative: Applying the Harmless Error Standard to Alternative Theory Jury Instructions*, 83 Fordham L. Rev. 295 (2014) ("[T]he circuits are divided in their interpretation of this standard."). As explained below, the divergent approaches to performing harmless error review by the federal courts are not a mere matter of semantics.

Several circuits look at the totality of the circumstances to determine the effect of the alternative-theory error on the actual jury that decided the case. In the Third Circuit, for example, a reviewing court considers how the alternative-theory error impacted the actual jury's verdict. *See United States v. Andrews*, 681 F.3d 509, 521–22 (3d Cir. 2012). Under this approach, a reviewing court must consider

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[6] At least one state supreme court has identified the lack of guidance in *Hedgpeth* and the divergent approaches to harmless error review in alternative-theory error cases. *State v. Cody M.*, No. 20213, 2020 WL 5637608, at *9 (Conn. Sept. 21, 2020) (holding alternative-theory error harmless if jury necessarily found facts to support the conviction on a valid theory).

whether the evidence supporting a valid theory was overwhelming or relatively weak, whether the prosecution relied heavily on the improper theory, and whether the trial court's instructions on the improper theory were interwoven throughout the jury charge. *Id.* Similarly, in determining whether alternative-theory error is harmless in the Sixth Circuit, a reviewing court considers the prominence of the invalid theory at trial, including the prosecution's arguments in support of the invalid theory. *United States v. Kurlemann*, 736 F.3d 439, 450 (6th Cir. 2013) (noting invalid theory "appeared front and center" at trial presumably because it was easier of two theories to establish). The Fourth Circuit will find alternative-theory error harmless "if the evidence that the jury necessarily credited in order to convict the defendant under the instructions given . . . is such that the jury must have convicted the defendant on the legally adequate ground in addition to or instead of the legally inadequate ground." *Bereano v. United States*, 706 F.3d 568, 578 (4th Cir. 2013). And the Tenth Circuit holds "when there is legal error as to one basis for finding an element, the submission of an alternative theory for making that finding cannot sustain the verdict 'unless it is possible to determine the verdict rested on the valid ground.'" *McKye*, 734 F.3d at 1110 n.6.

Other circuits take a starkly different approach. The Fifth Circuit "permits a court to find harmlessness based solely on the strength of the evidence supporting the valid theory, regardless of the evidence presented in support of the invalid

theory." *United States v. Skilling*, 638 F.3d 480, 482 n.2 (5th Cir. 2011).[7] The Seventh Circuit permits the reviewing court to "make a 'de novo examination of the record as a whole' to decide whether a properly instructed jury would have arrived at the same verdict, absent the error." *Czech v. Melvin*, 904 F.3d 570, 577 (7th Cir. 2018); *but see Sorich v. United States*, 709 F.3d 670, 674–75 (7th Cir. 2013). And in the Ninth Circuit, a reviewing court simply asks "what the verdict would have been if the [proper] instruction had been given."[8] *Smith*, 983 F.3d at 405 (quoting *Valerio v. Crawford*, 306 F.3d 742, 762 (9th Cir. 2002) (en banc)); App. at 45. Absent from these three approaches is any consideration of the alternative-theory error itself or the prejudice resulting from the jury considering the invalid theory. *But cf.*

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[7] In *Skilling*, the Fifth Circuit looked to this Court's citation in *Hedgpeth* to cases supporting the proposition that alternative-theory errors are subject to harmless error review. *See* 555 U.S. at 60–61 (citing *Neder*, 527 U.S. 1; *California v. Roy*, 519 U.S. 2 (1996) (per curiam); *Pope v. Illinois*, 481 U.S. 497 (1987); *Rose v. Clark*, 478 U.S. 570 (1986)). The Fifth Circuit then adopted a test ostensibly derived from *Neder*—which involved an omitted element in a single theory of liability case—and applied it to alternative-theory error. *Skilling*, 638 F.3d at 481–82. To be sure, *Brecht* applies to both types of errors. But the specific guidance this Court provided in *Neder* to omitted-element error does not squarely address the prejudice that arises from alternative-theory error. As Chief Justice Roberts noted during oral argument in *Hedgpeth*: with alternative-theory error "you don't just have to fill in a missing piece of the puzzle, as in *Neder*. You have to—[the jurors] might have been working on an entirely different puzzle." Tr. of Oral Arg. 23.

[8] Confusion about the proper application of *Brecht* to alternative-theory errors has resulted in an intra-circuit split in the Ninth Circuit. *Compare Smith*, 983 F.3d at 405; App. at 44, *with Riley v. McDaniel*, 786 F.3d 719, 725–27 (9th Cir. 2015). In *Riley*, the Ninth Circuit did not ignore the invalid theory in its harmlessness analysis. Instead, the court considered the totality of the circumstances, including the prosecution's reliance on the invalid theory, in determining the effect or influence of the error on the actual jury that decided the case. *Id.* The *Riley* court explained "the relevant question is not simply whether we can be reasonably certain that the jury *could* have convicted Riley based on the valid theory of felony murder, but whether we can be reasonably certain that the jury did convict him based on the valid felony murder theory." 786 F.3d at 726 (cleaned up).

McDonnell v. United States, 136 S. Ct. 2355, 2374–75 (2016) ("Because the jury was not correctly instructed on the meaning of 'official act,' it may have convicted Governor McDonnell for conduct that is not unlawful. For that reason, we cannot conclude that the errors in the jury instructions were 'harmless beyond a reasonable doubt.'").

Three justices of this Court, dissenting in *Hedgpeth*, provided the clearest explanation of what alternative-theory error review should entail, and it is an approach the Third and Sixth Circuits most resemble. As noted above, the parties in *Hedgpeth* agreed that *Brecht* applied to the alternative-theory error in the case. The only question was whether the court of appeals had engaged in that review despite labeling the error "structural." Arguing that a remand was unnecessary, Justice Stevens in dissent—joined by Justices Souter and Ginsburg—reasoned the federal district court had correctly applied *Brecht* and that the appellate court's "result was substantially the same." *Hedgepeth*, 555 U.S. at 69 (Stevens, J., dissenting). Justice Stevens explained, "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." *Id.* at 65. Citing *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995), and *Kotteakos v. United States*, 328 U.S. 750, 763 (1946), Justice Stevens commended the district court because it "properly avoided substituting its judgment for the jury's." *Hedgpeth*, 555 U.S. at 66 (Stevens, J., dissenting). Justice

Stevens further explained: "[I]t is not the [reviewing] court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out." *Id.* (quoting *Kotteakos*, 328 U.S. at 763). "Thus, '[t]he inquiry cannot be merely whether there was enough to support the result' in the absence of the error." *Id.* (quoting *Kotteakos*, 328 U.S. at 765). Instead, "the proper question is 'whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.'" *Id.* (quoting *Kotteakos*, 328 U.S. at 765).

Notably, the *Hedgpeth* majority expressed no opinion regarding the district court's application of *Brecht*. Rather, the majority focused exclusively on the erroneous conclusion by the court of appeals that alternative-theory error was structural. 555 U.S. at 62. Presumably, if the *Hedgpeth* majority disagreed with how the district court applied *Brecht* or Justice Stevens's analysis regarding the proper application of *Brecht* to alternative-theory errors, the majority would have addressed its concerns before remanding to the court of appeals "for application of *Brecht* in the first instance." *Hedgpeth*, 555 U.S. at 62.

This Court's review is necessary to resolve this circuit split and harmonize the federal courts' application of harmless error review to alternative-theory errors. *See* U.S. Sup. Ct. R. 10(a).

B. The Ninth Circuit's harmless error test for alternative-theory errors infringes on the Sixth Amendment right to a jury trial.

Several circuits—including the Ninth Circuit—are encroaching on the role of the jury when reviewing alternative-theory error for harmlessness, by asking only whether the evidence is sufficient to find a valid theory of liability and ignoring any prejudice that occurred when the jury was improperly instructed on the invalid theory.[9] *See California v. Roy*, 519 U.S. 2, 7 (1996) (Scalia, J., concurring) ("The absence of a formal verdict on this point cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in that fashion would be to dispense with trial by jury."). As noted above, the Ninth Circuit's harmless error test for alternative-theory errors asks only "what the verdict would have been if the [proper] instruction had been given." *Smith*, 983 F.3d at 405 (quoting *Valerio*, 306 F.3d at 762); App. at 45. This Court's review is necessary to correct this misapplication of *Brecht* that impermissibly erodes a defendant's jury trial right. *See* U.S. Sup. Ct. R. 10(c).

This Court's harmless error jurisprudence has always scrupulously protected a defendant's constitutional right to a jury trial. *See Sullivan v. Louisiana*, 508 U.S.

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[9] The misapplication of *Brecht* in a manner that violates a defendant's Sixth Amendment right to a jury trial is an issue that has been and will continue to be raised before this Court absent its intervention. *See, e.g.*, Petition for Writ of Certiorari at 8–9, *Singh v. United States*, 140 S. Ct. 1265 (2020) (No. 19-572), 2019 WL 5692740, at *8–9; Petition for Writ of Certiorari at 16–19, *Black v. United States*, 131 S. Ct. 2932 (2011) (No. 10-1038), 2011 WL 567500, at *16–19; Petition for Writ of Certiorari at 14–16, *Sabhnani v. United States*, 131 S. Ct. 1000 (2011) (No. 10-475), 2010 WL 3973881, at *14–16. As discussed below, Mr. Smith's case is an excellent vehicle to address the issue because the alternative-theory error is readily apparent and the proper application of *Brecht* is outcome determinative in his case.

275, 279 (1993) (harmless-error review looks to "basis on which 'the jury *actually rested* its verdict'" (emphasis in original)); *Bollenbach v. United States*, 326 U.S. 607, 615 (1946) (cautioning against "presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty"). In *Bollenbach*, this Court recognized the "importance that trial by jury has in our Bill of Rights" and explained it would be improper to "substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance." *Id.*; *see United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 410 (1947) ("No matter how clear the evidence, [criminal defendants] are entitled to have the jury instructed in accordance with the standards which Congress has prescribed. To repeat, guilt is determined by the jury, not the court.").

This Court's application of the substantial-and-injurious-effect standard has similarly made clear the need to apply harmless error review consistent with the jury trial guarantee. *See, e.g., Kotteakos*, 328 U.S. at 763–68. As such, "it is not the appellate court's function to determine guilt or innocence" or "speculate upon probable reconviction and decide according to how the speculation comes out," because "[t]hose judgements are exclusively for the jury." *Id.* at 763. Accordingly, in weighing the error's effect, the "the crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting." *Id.* at 764. Under this totality-of-the-circumstances approach, a reviewing court must take account of what the error meant to the jury that rendered the verdict. *Id.* In other

words, an error should not be reviewed "singled out and standing alone, but in relation to all else that happened." *Id.*

This Court expressly adopted the *Kotteakos* harmless-error standard for reviewing non-structural constitutional errors during federal habeas proceedings. *Brecht*, 507 U.S. at 637–38. Accordingly, when this Court held in *Hedgpeth* that alternative-theory errors were subject to harmless error review under *Brecht*, it intended reviewing courts to engage in the comprehensive inquiry and analysis required under *Kotteakos*. *See Hedgpeth*, 555 U.S. at 65–66.

The Ninth Circuit's harmlessness review departs from this Court's jurisprudence. Instead of considering the alternative-theory error "in relation to all else that happened," *Kotteakos*, 328 U.S. at 764, the Ninth Circuit excises the error entirely from its harmless error analysis when it asks simply "what the verdict would have been if the [proper] instruction had been given." *Smith*, 983 F.3d at 405 (quoting *Valerio*, 306 F.3d at 762); App. at 45. This approach removes the error and its effect on the jury from the analysis in direct violation of *Kotteakos.*[10]

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[10] Notably, the Ninth Circuit employs a harmless error test that it recognizes would be unconstitutional were a state appellate court to do the same. When the penalty-phase factfinder is a jury rather than a judge, and instructional error occurs regarding an aggravating factor, the Ninth Circuit holds a state appellate court cannot act as a primary factfinder by "applying a corrected instruction to the evidence and determining de novo whether the state's evidence satisfied the aggravator." *Smith*, 983 F.3d at 405 (citing *Valerio*, 306 F.3d at 758); App. at 43; *see Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled by Ring v. Arizona*, 536 U.S. 584 (2002). Yet under the guise of applying *Brecht* harmless error review to alternative-theory errors, the Ninth Circuit fully embraces the very analytical approach it precludes state courts from applying. This error has been occurring for nearly 20 years and is unlikely to ever be remedied without the intervention of this Court, given the *Valerio* decision was issued by the Ninth Circuit sitting en banc.

In assessing the harmful effect of an alternative-theory error, a reviewing court must make a more searching inquiry than simply considering whether the jury could have found the valid theory if properly instructed. Such limited review, which ignores the alternative-theory error, fails to identify "whether *the error* had substantial and injurious effect or influence in determining the jury's verdict." *Hedgpeth*, 555 U.S. at 58 (quoting *Brecht*, 507 U.S. at 623) (emphasis added). The failure to consider the prejudice resulting from an invalid legal theory of liability removes the actual jury from the harmless error analysis. A reviewing court that further assumes the jury was properly instructed, as does the Ninth Circuit, hypothesizes a trial that never occurred and a jury verdict that was never rendered. A defendant's constitutional right to a jury trial proscribes such action. This Court's review is necessary to correct the misapplication of *Brecht* and the erosion of a defendant's Sixth Amendment right to trial by jury. *See* U.S. Sup. Ct. R. 10(c).

C. The proper application of *Brecht* is outcome determinative in Mr. Smith's case.

Had the Ninth Circuit engaged in a proper *Brecht* harmless error review in Mr. Smith's case, it would have "scrutinized the record, including the arguments of both parties, the evidence supporting their respective theories of the case, the jury instructions, . . . and the various parts of the jury's verdict." *Hedgpeth*, 555 U.S. at 65 (Stevens, J., dissenting). In other words, the proper analytical focus would have been on the effect or influence the error had on the actual jury that sentenced Mr.

Smith to death. Correctly analyzed, the alternative-theory error in Mr. Smith's case had a substantial and injurious effect or influence on the jury's verdict.

At Mr. Smith's second penalty trial, the invalid depravity-of-mind aggravating factor was interwoven throughout the entire proceeding. *See* 4EOR845, 7EOR1854, 8EOR1984, 9EOR2253–65. As noted above, in the prosecutor's opening statement, he told the jury that "madness is loose in the world" and that "[m]adness was certainly loose in Henderson, Nevada" at the time of the murders. 8EOR1967. Shortly after, the prosecutor explained he would show the murders involved depravity of mind. 8EOR1969. The prosecutor then outlined the evidence he intended to produce at trial and told the jury this evidence would "prove beyond a reasonable doubt that these murders . . . involve[d] torture, depravity of mind, or mutilation." 8EOR1984.

The State continued this theme during closing argument. The prosecutor first borrowed from the instruction defining depravity of mind and told the jury that "evil is easy and has infinite forms." 9EOR2253. He then utilized the instruction's terms of "evil" and "heinous" to describe the murders and characterized Mr. Smith as an "evil assailant." 9EOR2253–54; 9EOR2256. Directing the jury to the depravity-of-mind instruction, the prosecutor read it aloud and noted that it "involve[d] many adjectives . . . most of which apply to this case." 9EOR2260. In support of the depravity-of-mind theory, the prosecutor erroneously argued that "any blunt-force trauma amounts to serious and depraved physical abuse."

9EOR2261.[11] And the prosecutor asserted "both of these young victims were involved in murders where a factor was depravity of mind." 9EOR2263.

Given the charge and the prosecutor's argument, defense counsel was forced to discuss the invalid depravity-of-mind theory at length during closing argument. 9EOR2272–76. Defense counsel conceded that every murder "involves a certain amount of depravity of mind." 9EOR2272.

The invalid depravity-of-mind theory was so compelling that, with respect to one victim, a unanimous jury sentenced Mr. Smith to death based on that theory alone. The invalid theory would have been equally persuasive and weighty to that same jury when it found the depravity-of-mind theory with respect to the other victim. But this critical factor received no consideration whatsoever from the Ninth Circuit.

Meanwhile, the evidence in support of mutilation was weak. The State relied on evidence of blunt-force trauma and a laceration to an ear in support of mutilation. In response, defense counsel argued the injuries relied on by the State did not constitute mutilation. 9EOR2279–80. Defense counsel further argued that the injuries were not beyond the act of killing as required under Nevada law.

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[11] The prosecutor's argument was legally incorrect. The Nevada Supreme Court held in *Smith II*, 953 P.2d at 266–67; App. at 166–67, that serious and depraved physical abuse does not constitute depravity of mind. Thus, the Ninth Circuit erred when it relied on the "narrowed" instruction in *Robins v. State*, 798 P.2d 558, 570 (Nev. 1990), which permitted such a finding. As explained in *Smith II*, depravity of mind may only be found "where the murder involves torture or mutilation of the victim." *Smith II*, 953 P.2d at 266–67 (quoting *Jones v. State*, 817 P.2d 1179, 1181 (Nev. 1991)); App. at 166–67.

9EOR2279–80; 13EOR3496; *see* 9EOR2277–78.[12] Indeed, the prosecution's own theory was that Mr. Smith "bludgeoned each victim into submission . . . and strangled them to death." 8EOR1968. To wit, the prosecution advanced a theory of the case that encompassed a single course of action designed to bring about a single result and was inconsistent with a finding of the aggravating factor based on the mutilation theory.[13] The evidence of mutilation was not so overwhelming that an acquittal on the theory would have been irrational. *See United States v. Takhalov*, 827 F.3d 1307, 1320–22 (11th Cir.), *opinion modified on denial of reh'g*, 838 F.3d 1168 (11th Cir. 2016) ("The question is not whether the jury could still have convicted the defendants if the [proper] instruction had been given. The question is whether the jury could have acquitted them. And the evidence against the defendants here was not so overwhelming that an acquittal would have been irrational." (citing *Neder*, 527 U.S. at 19)).

Relying only on the evidence of blunt-force trauma contained in the medical examiner's testimony and autopsy photos showing a laceration to an ear, the Ninth Circuit substituted its judgment for that of Mr. Smith's jury and concluded the jury would have unanimously found mutilation. 983 F.3d at 405–06; App. at 45–46. But

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[12] The Ninth Circuit failed to address the requirement that mutilation must be beyond the act of killing itself, instead simply identifying the uncontested evidence of blunt-force trauma contained in the medical examiner's testimony and autopsy photos.

[13] This single-course-of-action theory allowed the prosecution to secure a deadly weapon sentence enhancement from the first jury. *Smith v. State*, 881 P.2d 649, 650 (Nev. 1994).

any suggestion that each juror would have found mutilation and found it to outweigh the mitigation evidence is mere speculation, given the more prominent role the invalid depravity-of-mind theory had in the case, and grave doubt exists as to whether this constitutional error was harmless.

When viewed under the proper lens, the invalid depravity-of-mind theory had a substantial and injurious effect on the *actual* jury's verdict. Mr. Smith's case thus represents a proper vehicle for this Court's review: a sole aggravating factor supports his death sentence, one of the alternative theories underlying that aggravating factor was invalid and thus constitutional error exists, and this Court's decision on the constitutionality of the Ninth Circuit's harmlessness analysis is outcome determinative for Mr. Smith's case.

CONCLUSION

For the foregoing reasons, Mr. Smith asks this Court to grant his petition for writ of certiorari and reverse the judgment of the Ninth Circuit Court of Appeals.

DATED this 19th day of May, 2021.

Respectfully submitted,

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