No. 20-8101

IN THE

Supreme Court of the United States

JOSEPH WELDON SMITH,

Petitioner,

v.

PERRY RUSSELL, WARDEN, *et al.*,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED
(Capital Case)

Whether the Ninth Circuit correctly determined that an error in how the jury instructions defined the aggravating circumstances is harmless.

PARTIES

Joseph Weldon Smith is the Petitioner and an inmate at Northern Nevada Correctional Center. Respondent Perry Russell is the warden of Northern Nevada Correctional Center. Aaron D. Ford, the Attorney General of the State of Nevada, is a Respondent not named in the caption, and he joins this brief in full.

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INTRODUCTION

Petitioner Joseph Weldon Smith seeks review of the Ninth Circuit's determination that he failed to show actual prejudice on his claim of error under *Stromberg v. California*, 283 U.S. 359 (1931)—an error that occurs when the jury uses a general verdict form that does not distinguish between alternative theories of guilt and one of those theories is later determined to be invalid. But he fails to identify a viable split of authority that requires this Court's resolution. If there is a split, it is the result of other circuits misapplying the rule this Court established in *Hedgpeth v. Pulido*, 555 U.S. 57 (2008).

This Court long ago rejected the idea that a claim of instructional error can only be harmless if the record allows the reviewing court to determine with absolute certainty that the jury found the facts required for a conviction. Rather, harmless error analysis for claims of instructional error—including claims of *Stromberg* error—focuses on what the jury *would have done* in the absence of the improper instruction. *See Hedgpeth*, 555 U.S. at 61 (quoting *Pulido v. Chrones*, 487 F.3d 669, 677-78 (9th Cir. 2007) (O'Scannlain, J., concurring specially) (noting that it "would be patently illogical to treat *Stromberg* error as somehow more pernicious than other kinds of instructional error") (internal quotation marks omitted); *see also Neder v. United States*, 527 U.S. 1 (1999); *California v. Roy*, 519 U.S. 2 (1996); *Pope v. Illinois*, 481 U.S. 497 (1987); *Rose v. Clark*, 478 U.S. 570 (1986).

And that question—what a rationale, properly instructed jury would have done—is what Ninth Circuit focused on in this case. Thus, the Ninth Circuit's

decision identified and applied the correct rule. The only split that conceivably exists here is the result of lower courts failing to adhere to what this Court already said in *Hedgpeth*. And this Court should wait to address that issue until it is squarely presented with a decision that conflicts with *Hedgpeth*.

This Court should deny the petition.

STATEMENT OF THE CASE

Smith murdered his wife, Judith, and stepdaughters, Kristy and Wendy. App. 006. "[A]ll three victims died from asphyxia due to manual strangulation." App. 010. But Smith also beat them with a hammer. App. 010. And the injuries Smith inflicted on Wendy with the hammer, as "graphically illustrated" by photographs and testimony of the medical examiner, resulted in extensive injuries to her head and face, including "a total of thirty-two head lacerations" and "a large laceration inside the ear that almost cut the outer ear in two" on the left side of her head. App. 010-11, 046.

The jury sentenced Smith to life without a possibility of parole for murdering his wife, but it found a single aggravating circumstance and sentenced Smith to death for murdering his stepdaughters. App. 018. The Nevada Supreme Court affirmed his convictions but vacated the death sentences on appeal, remanding for a new sentencing hearing, due to vagueness in how the trial court defined part of the aggravating circumstance. App. 018, 037.

On remand, the State presented evidence "establish[ing] that strangulation was the cause of Wendy's death," but that "Smith struck Wendy in the head with a

claw hammer at least 16 times prior to strangling her, that her skull was fractured in several places, and that her ear was nearly cut in two." App. at 145-46. After the close of evidence, the district court permitted the State to pursue theories of aggravation for torture, mutilation, and depravity of mind for the murder of Wendy, but only a theory of depravity of mind for Kristy. App. 018-19, 165.

The trial court instructed the second jury that "to find torture or mutilation of the victim you must find that there was torture or mutilation beyond that act of the killing itself." App. 038. And the trial court further instructed that "to find depravity of mind you must find serious and depraved physical abuse beyond the act of killing itself." App. 038 (emphasis from opinion omitted). The trial court separately defined mutilation as meaning "to cut off or permanently destroy a limb or essential part of the body or to cut off or alter radically so as to make imperfect." App. 038, 167. But the trial court did not further define "serious and depraved physical abuse." App. 038. And neither the jury instructions nor verdict form required that the jury unanimously agree on a theory of torture, mutilation, or theory of depravity of mind with respect to the murder of Wendy. App. 039.

The jury returned death sentences on both counts, indicating on the verdict form that it found mutilation and depravity of mind for the murder of Wendy and depravity of mind for Kristy. App. 019, 165.

On appeal, the Nevada Supreme Court vacated the death sentence for the murder of Kristy because "[a]n aggravating circumstance based upon depravity of mind must include torture or mutilation beyond the act of killing itself." App. 019,

167. However, because the district court properly instructed the jury on mutilation and the record contained "sufficient evidence from which a reasonable jury could conclude beyond a reasonable doubt that the murder of Wendy involved mutilation," the Nevada Supreme Court affirmed the death sentence for the murder of Wendy. App. 019, 167.

Smith raised his challenge to the jury instructions in a federal habeas petition. The federal district court denied relief because (1) the error Smith complained of was one of only state law that could not be reviewed on federal habeas review, and (2) any error was harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). App. 143-45.

Smith appealed. But the Ninth Circuit affirmed. After determining that *Stromberg* error occurred and that the Nevada Supreme Court failed to undertake an analysis that would have cured the error, the court recognized that it needed to conduct a harmless error analysis under *Brecht*.

The court then articulated *Brecht*'s standard of review and the test for assessing harmlessness of a claim of instructional error.[1] App. 044. This, the court said, required it to ask "whether 'the actual instruction had a 'substantial and injurious effect or influence' on the jury's verdict, in comparison to what the verdict would have been if the narrowed instruction had been given.'" App. 044 (citation

[1] To ensure clarity, throughout this brief Respondents refer to *Brecht*, and *Chapman v. California*, 386 U.S. 18 (1967), as setting out "standards of review" for harmless error. In contrast, Respondents refer to the question the court must evaluate in determining the harmlessness of an error as a "test." This distinction is critical. As the analysis below shows, the "test" for harmless error focuses on whether a rational, properly instructed jury would have reached the same verdict. *See infra* Part I(A)(2). But the standard of review is dependent upon the procedural posture of the case: *Chapman* provides the standard of review for addressing harmless error on direct appeal, and *Brecht* provides the standard of review for assessing harmlessness on collateral review.

omitted). In other words, the court determined that it must compare the result of Smith's sentencing hearing with what the verdict would have been if the trial court had given a narrower instruction that required the jury to find torture or mutilation in order to find depravity of mind. App. 044-45.

Then, before embarking on an in-depth discussion of the evidence of mutilation in the trial record, the court acknowledged that it considered the arguments of the parties and saw "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." App. 045. And the court concluded its discussion on the evidence of mutilation in the record by indicating its confidence that "the invalid instruction did not have a substantial and injurious effect on the verdict." App. 045-46.

REASONS FOR DENYING THE PETITION

I. THE PETITION FAILS TO IDENTIFY A VIABLE SPLIT OF AUTHORITY.

Smith attempts to establish that a split exists on the application of harmless error to a claim of *Stromberg* error. But no viable split exists. If there is a split, it is the result of other circuits applying a rule that conflicts with this Court's decision on the issue in *Hedgpeth*.

A. Instructional error and harmless error in general.

A survey of this Court's precedents on instructional error and harmless error review exposes fundamental flaws in Smith's petition. Questions about what the jury actually did based on an allegedly erroneous instruction relate to whether a reversible, constitutional error exists, not whether such an error is harmless. In

contrast, harmless error analysis focuses on whether the outcome would have been different in the absence of the error.

And the degree to which the reviewing court must be convinced that the outcome would have been different depends on the procedural posture of the case. On direct review, the government must be able to prove beyond a reasonable doubt that a properly instructed jury would have reached the same verdict. *Neder*, 527 U. at 18-19. And on collateral review, the standard of review changes to *Brecht*, but the underlying test remains the same. *Hedgpeth*, 555 U.S. at 61; *Roy*, 519 U.S. at 5.

When those issues are fleshed out, they show that Smith fails to identify a viable split of authority.

1. Instructional error only violates due process when there is a reasonable probability the jury applied the instructions in an unconstitutional manner.

This Court reiterated in *Estelle v. McGuire*, 502 U.S. 62 (1991), that federal habeas corpus review does not allow for federal courts to review questions of state law. *Id.* at 68. As a result, that an "instruction was allegedly incorrect under state law is not a basis for habeas relief." *Id.* at 71. Rather, the question federal courts must ask when reviewing jury instructions in a proceeding brought under 28 U.S.C. §2254 "is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" *Id.* at 72 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)).

To establish reversible instructional error, a petitioner "must be established not merely that the instruction is undesirable, erroneous, or even universally

condemned, but that it violated some [constitutional right]." *Id.* at 72 (internal quotations omitted). And, after reviewing "the context of the instructions as a whole and the trial record," the court reviews "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Id.* at 72 (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)).

In other words, the legal standard for deciding whether an erroneous instruction results in reversible federal constitutional error dispenses with the likelihood that the jury relied upon the instructions that articulated the improper theory. *See*, *e.g.*, *Hedgpeth*, 555 U.S. at 62 (noting that requiring absolute certainty that a jury relied on a valid theory "would appear to be a finding that no violation had occurred at all, rather than that any error was harmless"). But as is explained below, the question of harmlessness focuses on whether the outcome would have been different if the jury had been properly instructed.

2. Instructional errors, including *Stromberg* error, are reviewable for harmlessness.

In *Rose*, this Court addressed whether a violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979)—the inclusion of a presumption on the issue of malice in jury instructions that improperly shifts the burden of proof to the defendant—can be reviewed for harmless error under *Chapman*. 478 U.S. at 572. It can. This Court recognized this to be true because in some circumstances the predicate facts necessary to prove the presumption will also satisfy proof of the related element, rendering the instruction setting out the presumption superfluous. *Id.* at 580-81.

But this Court did not stop there; it went on to acknowledge that "[i]t would further neither justice nor the purposes of the *Sandstrom* rule to reverse a conviction" in a case where the evidence supporting an inference of malice "is overpowering." *Id.* at 581-82. And it further indicated that *Chapman* requires review of the record as a whole and quoted Justice Powell's dissent from *Connecticut v. Johnson*, 460 U.S. 73 (1983), for the proposition that "the inquiry is whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury *would have* found it unnecessary to rely on the presumption." *Id.* at 583 (emphasis added).

Then, in *Pope*, this Court reviewed the question whether jury instructions defining obscenity violated the First Amendment in light of *Miller v. California*, 413 U.S. 15 (1973). *Pope* involved two individuals that Illinois charged with violating obscenity laws by selling certain magazines in an adult bookstore. *Pope*, 481 U.S. at 499. However, both defendants objected that the statute they were charged under violated *Miller* because whether something met the standard for obscenity was to be evaluated based on "contemporary community standards of decency," rather than under an objective standard. *Id.* The trial court overruled the objection and instructed the juries according to the statute. *Id.* The juries found both defendants guilty, and the lower state appellate court rejected the "contention that the issue of value must be determined on an objective basis and not by reference to contemporary community standards" on appeal. *Id.* at 499-500.

This Court granted certiorari after the Illinois Supreme Court denied review. *Id.* at 500. By that time, Illinois had mooted the question on the constitutionality of

the statute by adopting a new statute, but this Court concluded that the jury instructions, which tracked the former statute, were unconstitutional. *Id*. at 501-02. This left the Court to address the question "whether the convictions should be reversed outright or are subject to salvage if the erroneous instruction is found to be harmless error." *Id.*

This Court determined that harmless error applied but declined to answer the ultimate question on harmlessness. *Id.* at 502-03. Instead, the Court remanded, while indicating that "if a reviewing court concludes that *no rational juror*, *if properly instructed*, could find value in the magazines, the convictions should stand." *Id*. at 503-04 (emphasis added).

Next, in *Carella v. California*, 491 U.S. 263 (1989), a case involving jury instructions that included a conclusive presumption that relieved the government of its burden of proving an element of the offense beyond a reasonable doubt, the Court reversed and remanded under *Rose*. But Justice Scalia wrote a significant concurring opinion. *Carella*, 491 U.S. at 267-73 (Scalia, J., concurring). He wrote separately, joined by three other justices, to advance the view that a court could only find an the instructional error harmless if "the predicate facts relied upon in the instruction, or other facts necessarily found by the jury, are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact. . . ." *Id.* at 271. According to Justice Scalia, only in such circumstances could a court find the error harmless because "making those findings is functionally equivalent to finding the element required to be presumed" and, therefore, the error

can be deemed harmless under *Chapman* because "the jury found the facts necessary to support the conviction." *Id*. Otherwise, a finding of harmless error would deprive the defendant of his right to a determination from a jury that every element of the offense had been proven beyond a reasonable doubt. *Id*. at 272-73.

Some lower courts began to rely upon Justice Scalia's concurrence in *Carella* as persuasive authority when addressing harmlessness of instructional error. But that changed when this Court decided *Roy* and *Neder*. In both of those cases, this Court definitively rejected arguments that aligned with Justice Scalia's *Carella* concurrence.

In *Roy*, the Ninth Circuit applied a hybrid of the *Carella* concurrence and this Court's case law on the standard of review for harmless error on collateral review. *Roy*, 519 U.S. at 4-5. This Court reversed, concluding the Ninth Circuit erred by applying the *Carella* concurrence. *Id*. at 5-6. Instead, this Court instructed that the question of harmless error on collateral review must be addressed under *Brecht*'s "grave doubt" standard of review. *Id*.

And in *Neder*, this Court addressed the issue of a trial court omitting an essential element of the offense from the instructions. 527 U.S. at 4. Neder argued that Sixth Amendment principles precluded a harmless error analysis because that would deprive the defendant of his right to a jury determination on whether the government proved the omitted element. *Id*. at 10-11. But a majority of the Court rejected Neder's argument, concluding that the omission of an element from the jury charge may be deemed harmless under *Chapman*. *Id*. at 11-18. And the Court

further held that the proper test for determining whether the error is harmless focuses on whether "*a rational jury would have* found the defendant guilty" in the absence of the error. *Id*. at 18 (emphasis added).

Finally, in *Hedgpeth*, this Court acknowledged that it would be "patently illogical" to suggest that an error resulting from a trial court instructing a jury on two different charges—one good and one bad—is "somehow more pernicious" than a trial court giving the jury a single, erroneous charge. *Hedgpeth*, 555 U.S. at 61 (quoting *Pulido*, 487 F.3d at 677-78 (O'Scannlain, J., concurring specially)). And this Court plainly stated that making harmlessness dependent upon a reviewing court's absolute certainty that the jury's verdict actually rested on a valid ground "is plainly inconsistent with *Brecht*." *Id*. at 62. As a result, *Hedgpeth* requires application of the same test for harmless error to claims like Smith's that the Court applied in *Neder*, *Roy*, *Pope*, and *Rose*. *Id*. at 61. And as is laid out above, in each of those cases, this Court focused on assessing the impact of the erroneous instruction by asking whether a properly instructed jury would have reached a different result.

These precedents establish two fundamentally important points that control the issue in this case. First, the correct test for assessing the harmlessness of an instructional error is whether a rational, properly-instructed jury would have reached the same result. Second, because this case is on collateral review, that question must be addressed under the *Brecht* "grave doubt" standard of review.

B. There is no viable split.

Smith asserts that "[t]his Court's per curiam decision in *Hedgpeth* did not elucidate precisely how a federal court should apply harmless error review in alternative liability cases." Pet. at 11. He is wrong. This Court squarely rejected the proposition that a reviewing court needs to be absolutely certain that a jury's verdict rested on a valid theory and held that the well-established test for harmless error that it had applied in prior instructional error cases also applies to claims of *Stromberg* error. *Hedgpeth*, 555 U.S at 60-62.

Then, attempting to identify a split of authority on the application of *Hedgpeth*, Smith contrasts decisions from the Third, Fourth, Sixth, and Tenth circuits that "look at the totality of the circumstances to determine the effect of the alternative-theory error on the actual jury that decided the case," with decisions of the Fifth, Seventh, and Ninth circuits that "take a starkly different approach." Pet. at 12-16. But Smith's characterizations of the cases that purportedly conflict with the decision in this case miss the mark.

First, he cites *United States v. Andrews*, 681 F.3d 509 (3d Cir. 2012), noting that under the Third Circuit's decision "a reviewing court must consider 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 interwoven throughout the jury charge." Pet. at 12-13. But tellingly, he omits the preceding sentence from *Andrews* and fails to

explain how that decisions is materially different from what the Ninth Circuit did here.

In *Andrews*, the Third Circuit stated, "Where there is a clear alternative theory of guilt, supported by overwhelming evidence, a defendant likely cannot show that an instruction permitting the jury to convict on an improper basis was not harmless error." 681 F.3d at 521. And the Court suggested that looking to the government's and the trial court's use of the improper theory becomes important if the "evidence on the valid alternative theory is relatively weak." *Id*. at 522. Finally, the court concluded that Andrews could not establish that the error was not harmless because (1) overwhelming evidence supported the valid theory, and (2) that the invalid theory was not interwoven with the jury charge. *Id*. at 525-26.[2]

Similarly, after finding error here, the Ninth Circuit identified the nature of the error within the instructions. App. 042. And akin to the Third Circuit's recognition that a petitioner likely will be unable to establish harmless error where a valid theory is supported by overwhelming evidence, the Ninth Circuit ultimately determined that the error was harmless in light of the overwhelming evidence "graphically illustrat[ing]" that satisfied Nevada's definition of mutilation. App. at

[2]*Andrews* is technically a plain error case. But similar to the *Brecht* harmless error standard of review, the plain error analysis requires a showing "that there is a reasonable probability that the error affected the outcome of the trial." *Andrews*, 681 F.3d at 521. And contrary to Smith's argument that *Andrews* conflicts with the Ninth Circuit's consideration of what a hypothetical, properly instructed jury would have done, the Third Circuit held, in the alternative, that "any reasonably jury would have found all of the elements of post-*Skilling* honest services fraud beyond a reasonable doubt had it been instructed that the fraudulent scheme must involve bribery or kickbacks." *Id*. at 526-27.

045-46. Thus, Smith has not identified a real dispute between the Third and Ninth circuits; he just disagrees with the Ninth Circuit's view of the evidence in this case.

Second, Smith relies upon *United States v. Kurlemann*, 736 F.3d 439, 450 (6th Cir. 2013),[3] to assert that in the Sixth Circuit "a reviewing court considers the prominence of the invalid theory at trial, including the prosecutions arguments in support of the invalid theory." But the Ninth Circuit also noted that it considered the parties' arguments before concluding that (1) it saw "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," and (2) that the overwhelming nature of the evidence of mutilation left the court "confident the invalid instruction did not have a substantial and injurious effect on the jury's verdict." App. 045-46. Thus, there is no conflict between the Ninth Circuit's decision and *Kurleman*; Smith just disagrees with the outcome the Ninth Circuit reached.

Third, Smith quotes the Fourth Circuit's decision in *Bereano v. United States*, 706 F.3d 568 (4th Cir. 2013), and the Tenth Circuit's decision in *United States v. McKye*, 734 F.3d 1104 (10th Cir. 2013), for the proposition that the reviewing court can find an error if the jury necessarily found the facts required to prove the viable theory. Pet. at 13. To the extent those decision merely hold that a reviewing court may find a *Stromberg* error harmless when the Court can determine that the jury necessarily found facts that support a valid theory, they create no conflict with the

[3] *Kurlman* is also distinguishable because it is a direct appeal case—the Sixth Circuit rejected the government's harmless error argument because the government failed to show the error was harmless beyond a reasonable doubt. 736 F.3d at 450.

Ninth Circuit's decision in this case. There is no disagreement that an error would at least be harmless—if there is any error at all—when a reviewing court can determine that the jury's verdict rests on a valid theory. *Cf. Hedgpeth*, 555 U.S. at 62 (noting that when a court can determine that the juror relied on a valid theory, "[s]uch a determination would appear to be a finding that no violation had occurred at all, rather than that any error was harmless"). But any case holding that such a showing is a prerequisite to finding a *Stromberg* error harmless is squarely in conflict with *Hedgpeth*: "[A]n 'absolute certainty' standard is plainly inconsistent with *Brecht*." *Id*.

In light of the foregoing, Smith fails to identify a viable split of authority that requires this Court's intervention. The conflict lies in other circuits not following *Hedgpeth*, which this Court can address when its presented with a decision that conflicts with *Hedgpeth*.[4]

C. *Roy*, *Neder*, and *Hedgpeth* Rejected the Argument Smith Advances About the Sixth Amendment.

Smith tries to buttress his challenge to the Ninth Circuit's analysis by arguing that the Ninth Circuit's harmless error determination violates the Sixth Amendment. Pet. at 17-20. But that is just a roundabout way of saying that, unless a reviewing court can necessarily determine that the jury found the facts required to support a

[4] Smith also asserts that there is an internal conflict in the Ninth Circuit. Pet. at 14 n.8. But that conflict is also the result of the Ninth Circuit incorrectly applying the equivalent of an "absolute certainty" test. There is no need for this Court to address that here. The Ninth Circuit can decide on its own whether a conflict exists that needs to be addressed in a future *en banc* opinion, or this Court can wait to address the issue until it is squarely presented with a Ninth Circuit decision repeating those past errors.

valid theory, the error cannot be deemed harmless. That was the foundational premise of Justice Scalia's concurrence in *Carella*. And this Court squarely rejected the idea that such a showing is a prerequisite to finding instructional error harmless in *Roy* and *Neder*.

In *Roy*, this Court held that the Ninth Circuit erred by applying the *Carella* concurrence in applying harmless error review on collateral review. *Roy*, 519 U.S. at 4-6. Then, in *Neder*, this Court squarely rejected the argument that a Sixth Amendment violation occurs when an instructional error prevents the reviewing court from determining with certainty that the jury found the facts necessary for a conviction. *Neder*, 527 U.S. at 10-18.

And after acknowledging that the test from *Roy* and *Neder* applies to *Stromberg* error as well, *Hedgpeth* squarely held that "an 'absolute certainty' standard is plainly inconsistent with *Brecht*." *Hedgpeth*, 555 U.S. at 61-62. Thus, Smith's attempt to challenge the Ninth Circuit's opinion as violating his Sixth Amendment right to trial by jury is unfounded.

II. THE PETITION SEEKS ERROR CORRECTION.

For decades, this Court has repeatedly recognized that instructional error is susceptible to review for harmless error. *See supra* Part I(A)(2). And it has repeatedly held that the correct test for assessing whether the error is harmless is determining what a rationale, properly instructed jury would have done in the absence of the error. *Id.* Finally, it made clear that the same test applies when assessing whether a *Stromberg* error is harmless. *Id.*

Thus, the Ninth Circuit did precisely what this Court's opinions on harmless error prescribe. It articulated and applied the right rule, determining that the error was harmless after considering the error it found against the overwhelming evidence supporting the remaining valid theory that Smith mutilated Wendy. Smith just disagrees with the outcome.

* * *

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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