No. 20-8101

OCTOBER TERM, 2020

IN THE SUPREME COURT OF THE UNITED STATES

Joseph Weldon Smith, Petitioner,

v.

Renee Baker, Warden, et al., Respondent.

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

PETITIONER'S REPLY BRIEF

CAPITAL CASE

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ARGUMENT

A. The State misconstrues the legal question presented in Mr. Smith's petition.

The State spends much of its brief in opposition challenging an argument that Mr. Smith does not make—whether an "absolute certainty" test applies to alternative-theory errors. BIO at 1, 7, 11, 12, 15–16. Contrary to the State's suggestion, Mr. Smith does not advocate for an "absolute certainty" test, which this Court rejected in *Hedgpeth v. Pulido*, 555 U.S. 57, 62 (2008) (per curiam).

In his petition for writ of certiorari, Mr. Smith clearly acknowledged alternative-theory errors are not structural error and are instead subject to harmless error review. Pet. at 3 (citing *Hedgpeth*, 555 U.S. at 61–62); *see* Pet. at 11, 15–16, 19. Thus, "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.'" *Hedgpeth*, 555 U.S. at 58 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)). The question presented is whether a federal court may disregard the prejudice resulting from alternative-theory errors when applying harmless error review under *Brecht*.

B. There is a recognized split in the federal circuit courts of appeal.

The State initially contends there is no split in the federal circuit courts of appeal. *See* BIO at 12. Judges, commentators, and practitioners disagree. *See* Pet. at 12, 17. In the alternative, the State acknowledges the split but asserts it is the result of certain circuits "applying a rule that conflicts with this Court's decision on the issue in *Hedgpeth*." BIO at 5; *see id.* at 1, 15 ("The conflict lies in other circuits

not following *Hedgpeth* . . . ."). The State's acknowledgment of the split and its assertion that circuits are misapplying this Court's precedent are reasons to grant Mr. Smith's petition for writ of certiorari, not deny it. *See* U.S. Sup. Ct. R. 10(a), 10(b).

According to the State, alternative-theory harmless-error analysis simply asks "what a rational, properly instructed jury would have done in the absence of the error." BIO at 16. At least three circuits would agree with the State. *See* Pet. at 13–14 (citing decisions in the Fifth, Seventh, and Ninth Circuits). These circuits ignore the instructional error and any resulting prejudice flowing from that error. In several other circuits, however, a more searching inquiry is required, particularly with respect to the effect that the invalid legal theory had upon the jury that decided the case. *See* Pet. at 12–13 (citing decisions in the Third, Fourth, Sixth, and Tenth circuits).

The State attempts to straddle the circuit split when it argues against this Court's discretionary review. The State concedes that the Third Circuit considers the harmlessness of alternative-theory error in the context of the actual trial, *see United States v. Andrews*, 681 F.3d 509, 521–22 (3rd Cir. 2012), which stakes the Third Circuit on the opposite side of the split with the Ninth Circuit. Consistent with the State's formulation of the test under *Hedgpeth*, the Ninth Circuit simply inquires "what the verdict would have been if the [proper] instruction had been given." *Smith v. Baker*, 983 F.3d 383, 405 (9th Cir. 2020) (quoting *Valerio v. Crawford*, 306 F.3d 742, 762 (9th Cir. 2002) (en banc)); App. at 45. But the State

argues the Ninth Circuit's application of its test in Mr. Smith's case was "akin" to the Third Circuit's test, which considers the strength of the evidence at trial, the prosecution's reliance on the invalid theory, and whether the improper theory was interwoven throughout. *See Andrews*, 681 F.3d at 521–22. The State is wrong. In Mr. Smith's case, the Ninth Circuit simply inquired whether there was sufficient evidence for a properly instructed jury to find the valid theory of liability.[1] The Ninth Circuit's analysis did not consider the invalid theory or the prejudice resulting from that theory in the harmlessness inquiry.

The State's efforts to distinguish the Sixth Circuit also fail. The State does not dispute that, in conducting harmless error review, the Sixth Circuit considers the prominence of the invalid theory at trial, the prosecutor's reliance on the invalid theory in closing argument, and the trial court's treatment of the invalid theory. *See United States v. Kurlemann*, 736 F.3d 439, 450 (6th Cir. 2013). Instead, the State asserts the Ninth Circuit did the same when it ruled there was "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." *Smith*, 983 F.3d at 405; App. at 45. But this is precisely the issue presented in Mr. Smith's petition for writ of certiorari. The Ninth Circuit focused exclusively on a hypothetical properly instructed jury. There is no other fair reading of the court's decision. Both the

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[1] The Ninth Circuit did not conclude there was overwhelming evidence in support of the valid theory. The only reference to "overwhelming evidence" in the opinion is in a footnote where the Ninth Circuit rejected the State's characterization of the evidence as overwhelming. *See Smith*, 983 F.3d at 406 n.2; App. at 46.

prosecution and the defense argued extensively about the existence of the invalid theory during closing argument. *See* Pet. at 21–22. The Ninth Circuit ignored completely the prominence of the invalid theory and the significant reliance placed on the invalid theory by the prosecutor and the jury.

Regarding the Fourth and Tenth Circuits, the State does not attempt to square those decisions with its reading of *Hedgpeth* and merely suggests those circuits are at odds with this Court's precedent. Again, there is a recognized split of the circuits regarding the proper application of *Brecht* to alternative-theory errors.

The State does not assert that this important issue needs to percolate longer in the various circuits so other courts can weigh in, and the State fails to advance any other argument why certiorari should not be granted in this case.

CONCLUSION

For the reasons set forth in the petition and above, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

DATED this 2nd day of September, 2021.

Respectfully submitted,

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