No. _____

In the
Supreme Court of the United States

Deon'te Reed, Justin Spentz, and Steven Golden,

Petitioners,

v.

United States of America,

Respondent.

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

Joint Petition for Writ of Certiorari

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Question Presented for Review

The Ninth Circuit Court of Appeals held Petitioners' juries were instructed in violation of *Stromberg v. California*, 283 U.S. 359 (1931), because one of the two alternative theories supporting their 18 U.S.C. § 924(c) convictions was invalid. But instead of determining the effect of the alternative-theory error on the actual jury's verdict, *see Brecht v. Abrahamson*, 507 U.S. 619, 627 (1993), the Ninth Circuit ignored the error and adopted an Eleventh Circuit test that holds § 924(c) instructional errors are per se harmless because a robbery conspiracy is "inextricably intertwined" with a drug trafficking conspiracy when the object of the robbery is drugs from a fake stash house.

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 whether the object of a robbery conspiracy was drugs?

Related Proceedings

Petitioners Deon'te Reed, Justin Spentz, and Steven Golden are co-defendants in a single federal criminal case from the District of Nevada. App. O: 72a–76a. Each Petitioner was charged and convicted of the same three counts: Count 1, conspiracy to commit Hobbs Act robbery; Count 2, conspiracy to possess with intent to distribute drugs; and Count 3, use of a firearm during a crime of violence under 18 U.S.C. § 924(c). App. K: 44a; App. M: 59a.

Each Petitioner moved to vacate their respective 18 U.S.C. § 924(c) convictions under 28 U.S.C. § 2255 in the District of Nevada. The district court denied each motion on its merits on September 30, 2020. App. E, F, G.

The Ninth Circuit affirmed the denials of § 2255 relief on September 14, 2022. App. B, C, D. The Ninth Circuit denied the Petitioners' consolidated motion for rehearing on November 21, 2022. App. A.

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Petition for Writ of Certiorari

Deon'te Reed, Justin Spentz, and Steven Golden jointly petition for a writ of certiorari to review judgments of the United States Court of Appeals for the Ninth Circuit. A joint petition is proper under Sup. Ct. R. 12.4, as Petitioners are co-defendants, convicted of the same counts, challenging identical issues.

Opinions Below

The opinion of the court of appeals as to Petitioner Reed is published in the Federal Reporter at *United States v. Reed*, 48 F.4th 1087 (9th Cir. 2022). App. B.

The opinions of the court of appeals as to Petitioners Spentz and Golden are not published in the Federal Reporter but reprinted at *United States v. Spentz*, No. 20-17318, 2022 WL 17225916 (9th Cir. Sept. 14, 2022) (unpublished), and *United States v. Golden*, No. 20-17319, 2022 WL 4233637 (9th Cir. Sept. 14, 2022) (unpublished). App. C, D.

The orders of the district court are unreported but reprinted at *United States v. Reed*, No. 2:08-CR-00164-KJD-GWF, 2020 WL 582094 (D. Nev. Sept. 30, 2020) (unpublished); *United States v. Spentz*, No. 2:08-CR-00164-KJD-GWF, 2020 WL 5820990 (D. Nev. Sept. 30, 2020) (unpublished); *United States v. Golden*, No. 2:08-CR-00164-KJD-GWF, 2020 WL 5820993 (D. Nev. Sept. 30, 2020) (unpublished). App. E, F, G.

Jurisdiction

The Ninth Circuit Court of Appeals entered its final orders denying Petitioners' consolidated motion for rehearing and affirming the denial of Petitioners' motions to vacate on November 21, 2022. App. A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This joint petition is timely per Sup. Ct. R. 13.1.

Constitutional and Statutory Provisions

1. U.S. Const. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

2. U.S. Const. amend. VI: "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 defense."

3. Title 18, Section 924(c), of the United States Code states, provides in relevant part:

   (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

   (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

   (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Introduction

The Ninth Circuit has joined with the Eleventh Circuit in adopting a novel per se rule for long-criticized "fake stash house" sting cases, where an undercover agent, pretending to be a drug courier, offers targeted persons the opportunity to rob a fictional drug stash-house. The stash-house does not exist; the agent determines the type and amount of drugs involved (here, 22 to 39 kilograms of cocaine) and how the house is allegedly guarded (here, by two armed men). In 2007, Petitioners Reed, Spentz, and Golden—all young African American men just out of high-school with either minimal or no criminal history—were ensnared in a sting. No actual robbery or drug distribution ever occurred.

After *Johnson v. United States*, 576 U.S. 591 (2015), Petitioners sought relief from their § 924(c) mandatory consecutive sentences by moving to vacate under 28 U.S.C. § 2255. Because the jury was permitted to base its § 924(c) verdict on conspiracy to commit Hobbs Act robbery, which no longer qualifies as a crime of violence post-*Johnson*, the § 924(c)'s verdicts were unconstitutional. But the Ninth Circuit affirmed by adopting an incorrect standard for analyzing constitutional jury instruction error. For cases involving fake stash houses, the Ninth Circuit held robbery conspiracies are "inextricably intertwined" with drug trafficking conspiracies. This holding conflicts with long-standing Supreme Court precedent and deepens a circuit split on the proper interpretation of this Court's Sixth Amendment caselaw.

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

Petitioners were indicted for conspiracy to commit Hobbs Act robbery and conspiracy to possess with intent to distribute drugs, along with an 18 U.S.C. § 924(c) charge identifying both conspiracies as the predicate offense. App. O: 72a–76a. At Petitioners' trials, their juries were instructed that, to convict on the § 924(c) charge, they must unanimously agree that *either* the robbery conspiracy *or* the drug conspiracy served as the predicate offense. App. L: 55a; App. N: 68a. The juries convicted on all three counts but were provided only general verdict forms that failed to reveal which § 924(c) predicate they unanimously found. App. K: 45a; App. M: 60a–61a. Petitioners were each sentenced to a mandatory five-year prison sentence on the § 924(c) count, consecutive to the prison terms imposed for the conspiracies, totaling: 20 years for Reed; 16 years for Spentz; and 16 years for Golden. App. H: 25a; App. I: 32a; App. J: 38a.

Petitioners sought relief from their § 924(c) mandatory consecutive sentences by moving to vacate under 28 U.S.C. § 2255, in light of *Johnson*, 576 U.S. 591. Because their juries were permitted to base their § 924(c) verdicts on conspiracy to commit Hobbs Act robbery, which no longer qualifies as a crime of violence post-*Johnson*, the § 924(c)'s verdicts were unconstitutional. But the district court held the constitutional instructional error was harmless because the conspiracies were "co-extensive." App. E: 16a–17a; App. F: 19a–20a; App. G: 22a–23a.

The Ninth Circuit affirmed by adopting an incorrect standard for analyzing constitutional jury instruction error, publishing its opinion for Petitioner Reed. App. B: 6a–9a (*United States v. Reed*, 48 F.4th 1082, 1087–88 (9th Cir. 2022)); App. C: 11a; App. D: 13a. The government conceded Hobbs Act robbery conspiracy does not qualify as a § 924(c) predicate. App. B: 6a. And the Circuit correctly recognized that the district court erroneously instructed the juries that Hobbs Act conspiracy could serve as the § 924(c) predicate. App. B: 7a; App. C 11a; App. D: 13a. The Circuit also acknowledged the instructional error required relief if it "had substantial and injurious effect or influence in determining the jury's verdict." App. B: 8a (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)). Yet the Circuit then adopted an erroneous standard for the *Brecht* analysis developed by the Eleventh Circuit to deny relief in fake stash-house stings. App. B: 9a (adopting test from *United States v. Cannon*, 987 F.3d 924, 932, 948–50 (11th Cir. 2021)). The Circuit also denied Petitioners' consolidated rehearing request. App. A: 1a.

Reasons for Granting the Petition

I. Certiorari review is necessary to resolve the circuit split arising from differing interpretations and applications of Sixth Amendment precedent.

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]" are not structural errors and are thus subject to harmless error review. Accordingly, when a federal court reviews an alternative-theory error for

harmlessness, 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 about 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. Because this split in authority concerns interpretation of this Court's precedent on an important federal question, certiorari review is warranted. *See* Sup. Ct. R. 10(a), (c).

A. This Court's precedent requires an individualized analysis of the effect of Sixth Amendment instructional errors on the jury.

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. 275, 279 (1993) (harmless-error review looks to "basis on which 'the jury actually rested its verdict'"); *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."); *see also California v. Roy*, 519 U.S. 2, 7 (1996) (Scalia, J., concurring in part) ("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.").

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 v. United States,* 328 U.S. 750, 763–68 (1946). "[I]t 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. In weighing the error's effect, the "[t]he 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 review 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.

B. The Circuits are widely diverging in their interpretation of this Court's Sixth Amendment precedent.

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 provided no additional guidance. *See Babb v. Lozowsky*, 719 F.3d 1019, 1034 (9th Cir. 2013) ("The Supreme Court in *Hedgpeth* 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. *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.").

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 whether the evidence supporting a valid theory was overwhelming or 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 supporting 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). 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." *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). 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. *Cf. McDonnell v. United States*, 579 U.S. 550, 579–80 (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. The parties in *Hedgpeth* agreed that *Brecht* applied to the alternative-theory error. 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." *Hedgpeth*, 555 U.S. at 69 (Stevens, J., dissenting). Justice Stevens

explained, "[t]o 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 to *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995), and *Kotteakos*, 328 U.S. at 763, 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 clarified: "[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 on 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, had the *Hedgpeth* majority disagreed with how the district court applied *Brecht* or Justice Stevens's analysis of 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 Sup. Ct. R. 10(a), (c).

II. The Eleventh and Ninth Circuits' rule violates the Fifth and Sixth Amendments by declaring instructional errors arising from fake stash house cases per se harmless instead of conducting an individualized review.

The Sixth Amendment "right includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan*, 508 U.S. at 277 (citation omitted). This right is "interrelated" to the Fifth Amendment's requirement that the jury's verdict be based on guilt proven beyond a reasonable doubt. *Id.* at 278. Thus, petitioners prejudiced by a general verdict premised on alternative theory instructions are denied their Fifth and Sixth Amendment rights to have a jury determine guilt beyond a reasonable doubt. *See Id.; see also Hedgpeth*, 555 U.S. at 58 (constitutional error occurs when a "jury was instructed on alternative theories of guilt and may have relied on an invalid one").

In accord with the Sixth Amendment, reviewing courts must consider the prejudicial effect an instructional error "had upon the guilty verdict in the case at hand"—"not what effect the constitutional error might generally be expected to have upon a reasonable jury." *Sullivan*, 508 U.S. at 279 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). It "is not enough" for a reviewing court to conclude "that a jury *would surely have found* petitioner guilty beyond a reasonable doubt." *Id.* Rather, the reviewing court must be assured the jury's verdict of guilt "beyond a

reasonable doubt *would surely not have been different* absent the constitutional error." *Id.*

A. Development of "inextricably intertwined" rule

The approach the Ninth Circuit applied here is unique to convictions arising from fake stash house robberies stings.[1] The three federal charges lodged against Petitioners here are three most commonly lodged against those ensnared in fake stash house sting cases: (1) conspiracy to commit Hobbs Act robbery (18 U.S.C. § 1951(a)); (2) conspiracy to possess with intent to distribute a controlled substance (21 U.S.C. § 846); and (3) use of a firearm during and in relation to the conspiracy to commit a crime of violence or conspiracy to commit a drug trafficking offense (18 U.S.C. § 924(c)). App. O: 72a–76a.

The Eleventh and Ninth Circuits' approach to assessing alternative theory instructional errors in fake stash house cases severely maligns Fifth and Sixth

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[1] This long-criticized sting tactic typically involves an undercover federal agent who pretends to be a drug courier and offers targeted persons the opportunity to rob a fictional drug stash house. Based on this fictional scenario, federal authorities create, orchestrate, and control the entire resulting conspiracy. This scenario is "highly susceptible to abuse," *United States v. Hare*, 820 F.3d 93, 103–04 (4th Cir. 2016), and has an established record of disproportionately affecting minority defendants, *United States v. Flowers*, 712 F. App'x 492, 508–11 (6th Cir. 2017) (Stranch, J., concurring) (listing studies and cases); *see also* Marc D. Esterow, Note, *Lead Us Not into Temptation: Stash House Stings and the Outrageous Government Conduct Defense*, 8 DREXEL L. REV. 1, 28–31 (2016); *United States v. Kindle*, 698 F.3d 401, 414 (7th Cir. 2012) (Posner., J, concurring and dissenting) (citing Katherine Tinto, *Undercover Policing, Overstated Culpability*, 34 CARDOZO L. REV. 1401 (2013)); Annie Sweeney & Jason Meisner, *'Stash house' stings have been discredited. Now, the convicted see a chance for redemption*, CHICAGO TRIBUNE, Mar. 5, 2021, https://www.chicagotribune.com/news/ criminal-justice/ctstash-house-defendants-compassionate-release-20210305-qiwa4codkzabhpsalorsns35ae-story.html.

Amendment rights to have a jury adjudicate guilt beyond a reasonable doubt. Both circuits avoided any inquiry into the substantial and injurious effect of the error under *Brecht*. Instead, these circuits hold robbery and drug conspiracies in fake stash house cases are inextricably intertwined, rendering instructional errors in these cases harmless per se. Applying this per se rule, appellate judges in the Eleventh and Ninth Circuits adjudicate guilt in the first instance, avoiding the critical question of whether the verdict "*would surely not have been different* absent the constitutional error." *Sullivan*, 508 U.S. at 279

1. The Eleventh Circuit

In *United States v. Canon*, 987 F.3d 924 (11th Cir. 2021), the Eleventh Circuit was asked to consider the prejudice defendants suffered from alternative-theory error in a fake stash house case. The *Canon* jurors were instructed to convict on the § 924(c) charge they must unanimously agree whether the government proved the defendant "used or carried a firearm during and in relation to a violence crime *or* a drug trafficking crime *or* both." *Id.* at 950. But after this Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), Hobbs Act conspiracy was no longer a viable predicate crime of violence under § 924(c). Defendants thus argued their § 924(c) convictions must be reversed because the alternative theory instruction permitted jurors to find the firearms "connected to the invalid Hobbs Act robbery conspiracy but not to the still-valid cocaine conspiracy." *Id.* at 948. The Eleventh Circuit denied relief by deeming the underlying conspiracy predicates "so inextricably intertwined that no rational juror *could have found* that [defendants] carried a firearm in relation to one predicate but not the other," as each predicate

was supported by sufficient evidence. *Id.* (emphasis added). The Eleventh Circuit failed to follow this Court's precedent requiring it to inquire whether the jury's verdict on the § 924(c) count "*would surely not have been different* absent the constitutional error." *Sullivan*, 508 U.S. at 280.

2. The Ninth Circuit

The Ninth Circuit adopted and repeated the Eleventh Circuit's erroneous per se rule. App. B: 9a. Petitioners faced the same trifecta of charges lodged against the *Canon* defendants, though the evidence suggested varying levels of culpability. App. O: 72a–76a. In each Petitioner's trial, the district court's pre-*Davis* instruction advised jurors a conviction on the § 924(c) charge required unanimous agreement that *either* the robbery conspiracy *or* the drug conspiracy served as the predicate offense. App. L: 55a; App. N: 68a. Petitioners were convicted on all charges, but the general verdict forms did not identify which conspiracy predicate for the § 924(c) charge jurors chose. App. K: 45a; App. M: 60a–61a.

Following *Canon*, the Ninth Circuit adopted "the concept of 'inexplicably intertwined' conspiracies to analyze whether a valid predicate offense served as a basis for a § 924(c) conviction." App. B: 9a ("The issue is whether the conspiracies are distinct such that the use of a firearm in the conspiracy to commit robbery also means that a firearm was used in the conspiracy to possess cocaine with intent to distribute. Logic and the record show that they were inextricably intertwined."); *see also* App. C: 11a; App. D: 13a. The Ninth Circuit thus assessed only whether sufficient evidence underlying the predicate robbery and drug conspiracies existed. App. B: 9a. The court did not inquire whether the alternative-theory instructional

error had a "substantial influence" on each verdict. *Hedgpeth*, 555 U.S. at 66 (Stevens, J., dissenting) (quoting *Kotteakos*, 328 U.S. at 765). The Ninth Circuit thus denied Petitioners their right to have a jury adjudicate guilt on the § 924(c) charge, violating the Fifth and Sixth Amendments. *See Sullivan*, 508 U.S. at 277.

B. Constitutional implications of the novel "inextricably intertwined" rule in fake stash house cases

The Eleventh and Ninth Circuits' application of a per se "inextricably intertwined" rule to defeat harmless error review in fake stash house cases violates the Fifth and Sixth Amendment rights to have a jury adjudicate guilt on a § 924(c) charge beyond a reasonable doubt. *See Sullivan*, 508 U.S. at 277. Though this Court has yet to elucidate how courts are to assess the prejudice of an erroneous alternative-theory instruction in general verdict cases, nothing in this Court's jurisprudence suggests this per se rule is constitutionally valid. *See Kotteakos*, 328 U.S. at 763–68. Judicial inquiry into whether the instructional error had substantial and injurious effect or influence must ensure it is jurors and not judges who adjudicate guilt. "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty"—a promise that "stands as one of the Constitution's most vital protections against arbitrary government." *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019).

The per se rule applied in fake stash house cases stands as an exception to traditional harmless error review in two critical ways. First, the rule allows appellate courts to adjudicate guilt. This violates due process by impermissibly relieving the government of its burden of proof, "subvert[ing] the presumption of

innocence accorded to accused persons" and "invad[ing] the truth-finding task assigned solely to juries in criminal cases." *Carella v. California*, 491 U.S. 263, 265 (1989) (citations omitted); *see also id.* at 269 (Scalia, J., concurring in judgment, joined by Brennan, J., Marshall, J., and Blackmon, J.) ("Findings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime." (cleaned up)). Second, the rule violates the Sixth Amendment by allowing appellate courts to "to arrogate to [themselves] a function that the defendant . . . can demand be performed by a jury." *Rose v. Clark*, 478 U.S. 570, 593 (1986) (Blackmun, J., dissenting, joined by Brennan, J. and Marshall, J.); *United States v. Miller*, 111 F.3d 747, 753 (10th Cir. 1997) ("No matter how overwhelming the evidence, our speculation as to the verdict a jury might reach may not substitute for an actual jury verdict." (citation omitted)).

Given the fundamental constitutional infringements the per se rule imposes, this Court's review and guidance is necessary.

III. This case presents an ideal vehicle for clarifying individualized harmless error review.

Petitioners each demonstrated the government's evidence and trial theory tied the underlying § 924(c) charges to the robbery conspiracy and not the drug conspiracy. *See Davis v. Ayala*, 576 U.S. 257, 268 (2015) (requiring habeas petitioner show "more than a 'reasonable possibility' that the error was harmful" (quoting *Brecht*, 507 U.S. at 637)). Having met their burden, Petitioners were entitled to meaningful review for harmless error.

This case thus presents the Court with an opportunity to rectify the novel carve-out the Ninth Circuit has joined in creating for fake stash house cases and to provide guidance to all federal courts on the analysis required to ensure instructional errors do not escape the Fifth and Sixth Amendments protections.

Conclusion

For these reasons, this petition for a writ of certiorari should be granted.

Dated this 17th day of February 2023.

Respectfully submitted,

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/s/ Cristen C. Thayer
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