No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

ROMAN ANDREYEVICH GLUKHOY

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. When a defendant is convicted after a trial court instructs a jury on two theories of guilt, one of which is legally correct and one legally incorrect, how does the reviewing court determine whether the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18? Does the reviewing court consider the likelihood that the jury applied the erroneous instruction or only the strength of the evidence to support a guilty verdict using the correct instruction?

PARTIES TO THE PROCEEDING IN THIS COURT

ROMAN ANDREYEVICH GLUKHOY, Petitioner

STATE OF CALIFORNIA, Respondent

PRIOR PROCEEDINGS RELATED TO THIS CASE

People v. Roman Andreyevich Glukhoy, Placer County Superior Court No. 62129389B.

People v. Roman Andreyevich Glukhoy et al., California Court of Appeal, Third Appellate District, No C084169. Judgment affirmed April18, 2022.

People v. Roman Andreyevich Glukhoy, California Supreme Court, No. S274792. Petition for review dismissed May 31, 2023.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner ROMAN ANDREYEVICH GLUKHOY (hereinafter "Glukhoy"), through his counsel of record, Mark Goldrosen, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the California Court of Appeal was partially published at 77 Cal.App.5th 576, 292 Cal.Rptr.3d 623 (2022). The entire opinion is attached hereto as Appendix A. The California Supreme Court's order dismissing Glukhoy's petition for review is attached as Appendix B.

STATEMENT OF JURISDICTION

The California Court of Appeal entered its decision affirming the judgment against petitioner on April 18, 2022. Petitioner timely filed a petition for review in the California Supreme Court. On July 27, 2002 that petition was granted and held for *In re Lopez* 14 Cal.5th 562, 306 Cal.Rptr.3d 348 (2023). On May 31, 2023, the California Supreme Court dismissed review and remanded the case to the Court of Appeal. Remittitur issued on June 1, 2023.

The jurisdiction of this Court is invoked under 28. U.S.C. section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

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 . . .; 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:

> 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.

STATEMENT OF THE CASE

In the early morning of April 2, 2014, Glukhoy, his twin brother, and a friend drove to Auburn to steal from unlocked cars parked on the street. When the police arrived, Glukhoy drove off in a BMW with his brother and friend in passenger seats. 3 RT 868-69, 872, 1067-70. Glukhoy led the police on a high speed chase that ended when he spun out and collided into an embankment in a landscaped area. 3 RT 88-79, 881-86, 903.

By the time the police arrived at the scene of the collision, Glukhoy and his passengers had fled. About an hour later, the police learned that a truck had been stolen from a neighborhood not far from where the BMW had crashed. 4 RT 1137, 1140-41.) Glukhoy's brother was driving the truck with Glokhoy in the rear passenger seat. Glukhoy's brother led the police on a second high-speed chase that ended when the

brother ran a red light at high speed and collided with a small Kia, killing its two occupants. 4 RT 1357; 7 RT 2231-2238.

Glukhoy was charged with two counts of aiding and abetting second degree murder, along with other less serious offenses. 2 CT 367-363. The trial court instructed the jury on two theories of liability: (1) directly aiding and abetting his brother's commission of implied malice murder and (2) aiding and abetting his brother in the willful evading of a peace officer with wanton disregard, for which implied malice murder was a natural and probable consequence. The jury returned a general verdict, finding Glukhoy guilty of both counts of second degree murder. He was sentenced to 30 years to life in state prison. 6 CT 1722-25.

On September 30, 2018, California Governor Brown signed into law Senate Bill 1437, which abrogated the natural and probable consequences doctrine as a theory of murder liability. Later, on October 5, 2021, the governor signed into law Senate Bill 775, allowing a defendant to challenge on direct appeal a conviction based on the now-invalidated natural and probable consequences doctrine. As a result of the change in the law, it was error for Glukhoy's jury to have been instructed on the natural and probable consequences doctrine as a theory of murder liability. The issue raised in this petition concerns how a reviewing court should determine prejudice under *Chapman* v. *California* when there is alternative-theory instructional error.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

On direct appeal, counsel argued that the Glukhoy's murder convictions should be reversed because it could not be determined, beyond a reasonable doubt, that the verdict was untainted by the legally incorrect instruction on the natural and probable consequences doctrine. AOB at 50-54; Supp. AOB at 13. In the supplemental opening brief, counsel cited to *People v. Thompkins*, 50 Cal.App.5th 365, 398-99, 264 Cal.Rptr.3d 186 (2020) as authority for finding prejudice. *Thompkins* held that alternative-theory instructional error violated the federal Constitution and should be evaluated under *Chapman v. California*, 386 U.S. 18 (1967).

The California Court of Appeal agreed that there was constitutional error, but found that it was harmless. Exhibit A at 42-60.

After the judgement was affirmed, counsel for Glukhoy timely filed a petition for review in the California Supreme Court. Again, counsel argued that the invalid instruction regarding the natural and probable consequences doctrine was federal constitutional error under the Sixth and Fourteenth Amendments, requiring reversal of the murder convictions. Pet. for Rev. at 35-43. After initially granting review and holding the case for *In re Lopez* 14 Cal.5th 562, 306 Cal.Rptr.3d 348 (2023), which raised the same issue, the California Supreme Court dismissed the petition.

REASONS FOR GRANTING THE PETITION

Rule 10(c) of the Rules of the Supreme Court identifies the following as a

compelling reason why this Court may choose to review a decision of a state court of last resort on certiorari:

> a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioner submits that here the California Court of Appeal decided an important question of federal law, that has not been, but should be, settled by this Court. How a reviewing court should determine prejudice when there is alternative-theory instructional error is an important question that arises in many cases, especially murder cases where the prosecution often relies on multiple theories of liability. Should the reviewing court consider whether the jury actually applied the erroneous instruction or only whether there was sufficient evidence to support a guilty verdict using the correct instruction? That question has not been answered in a uniform manner by different lower courts, and clarification from this Court is desperately needed.

I.

THIS COURT SHOULD GRANT CERTIORARI TO SETTLE THE IMPORTANT QUESTION OF HOW REVIEWING COURTS SHOULD ASSESS PREJUDICE WHEN A JURY WAS INSTRUCTED ON TWO THEORIES OF GUILT, ONE OF WHICH WAS LEGALLY CORRECT AND ONE LEGALLY INCORRECT.

In *Hedgepoth v. Pulido*, 555 U.S. 57, 58 (2008), this Court stated that "[a] conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." Such error was held not to be "structural," but a constitutional trial error that could be reviewed for harmlessness. *See also Skilling v. United States*, 561 U.S. 358, 414 (2010), citing *Yates v. United States*, 354 U.S. 298 (1957) (constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory).

No opinion of this Court, however, has clarified the test the reviewing court should apply when considering alternative-theory instructional error on direct appeal. *United States v. Skilling*, 638 F.3d 480, 481(5th Cir. 2011) (The Supreme Court "did not specifically identify the harmless-error standard that is applicable to alternative-theory errors."); s*ee also United States v. Coppola*, 671 F.3d 220, 237, n. 12 (2d Cir. 2012) ("The Supreme Court in *Skilling* did not specify the standard applicable to harmless error review in this context."). Should the reviewing court seek to determine whether the jury relied on the invalid theory of liability in convicting the defendant? Or should the reviewing court look only at whether there was sufficient evidence to convict the

defendant under the valid theory, even if the jury did not actually rely on it?

The absence of a clear test has caused confusion in the lower courts. That confusion is evident from the lack of uniformity in opinions issued by different California appellate courts. In *People v. Thompkins*, the jury was instructed on an erroneous "kill zone" theory of liability for attempted murder. *Thompkins* articulated the test for harmlessness as follows:

> the question is not whether we think it clear beyond a reasonable doubt that the defendants were actually guilty of five attempted murders based on the valid theory, but whether we can say, beyond a reasonable doubt, the jury's actual verdicts were not tainted by the inaccurate jury instruction. We focus on the likelihood that the jury relied on the kill zone instruction in reaching its verdicts, not simply the likelihood of defendants' guilt under a legally correct theory.

Id. at 399.

As authority for this standard of review, *Thompkins* relied on this Court's opinion in *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). *Sullivan* explained that: "Consistent with the jury-trial guarantee, the question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Ibid*. "Harmless-error review" under *Chapman* looks to

> the basis on which "the jury actually rested its verdict." [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support

that verdict might be—would violate the jury-trial guarantee.

Ibid.

Thus, *Thompkins*' standard of review is focused on the defendant's constitutional right to actually have a verdict determined by a jury. If the jury likely relied on the invalid theory to convict, the error was prejudicial. It would not matter that there was strong evidence to support the conviction under the valid theory if the jury did not consider that theory.

In Glukhoy's case, there was a strong indication that the jury convicted him of second degree murder based on the invalid natural and probable consequences doctrine. During closing argument, the prosecutor described the natural and probable consequences doctrine as the easiest way for the jury to convict Glukhoy. "And the other way is this natural and probable consequence. This is sort of the least common denominator under these facts. I think it's easiest to get to and it's clearest to get to second degree murder for defendant Roman under this natural and probable consequence." 8 RT 2572. Later the prosecutor reiterated this point. "It's even easier to get to second degree murder through what is known as a natural and probable consequence doctrine." 8 RT 2578. "So what is this? How does it work?" The prosecutor then carefully explained how the jury could use the doctrine to convict Glukhoy of second degree murder. 8 RT 2578-80.

Despite the jury being urged to apply the invalid theory of liability, the Court of Appeal in Glukhoy's case found that the alternative-theory instructional error was harmless. It disagreed with *Thompkins* regarding the appropriate standard of review,

holding that focusing on whether the instructional error impacted the verdict was too narrow. Exhibit A at 48-49. Instead, the Court of Appeal found the error harmless after determining beyond a reasonable doubt that the jury would have found Glukhoy guilty under the valid theory – directly aiding and abetting his brother in committing two implied malice murders – despite no indication that the jury considered that theory in its deliberations.

In *In re Lopez*, *supra*, 14 Cal5th at 584, the California Supreme Court initially noted "the complexity of this area of the law." It then sought to clarify the meaning of the harmless beyond a reasonable doubt standard in circumstances involving alternative-theory errors. *Lopez* disapproved *Thompkins*, holding that reversal is not mandated even when there are indications the jury considered the invalid theory because the prosecutor relied on it in closing argument or the jury referenced it in deliberations. *Id*. at 584. Rather, "[a] reviewing court must determine whether any rational jury would have found the defendant guilty based on a valid theory if the jury had been properly instructed." *Ibid*.

The flaw in *Lopez*'s analysis, however, is that it is contrary to *Sullivan*'s emphasis on a defendant's right to jury-trial guarantee. It allows a defendant's conviction to be affirmed without the jury ever determining guilt under a valid theory of liability. *Sullivan* was concerned that a reviewing court not "hypothesize a guilty verdict that was never in fact rendered." *Sullivan v. Louisiana*, *supra*, 508 U.S. at 279. That concern is not remedied by *Lopez*'s holding regarding the standard for assessing prejudice.

The need for clarifying the appropriate standard of review for alternative-theory instructional error is also evident from the lack of uniformity in circuit court opinions. "[T]he federal circuit courts are divided in their applications" of the test for whether alternative-instructional error was harmless. Erika A. Khalek, *Searching for a Harmless Alternative: Applying the Harmless Error Standard to Alternative Theory Jury Instructions*, 83 Fordham L. Rev. 295 (2014).

For example, in *United States v. McKye*, 734 F.3d, 1104, 1110 n.6 (10th Cir. 2013), the Tenth Circuit stated that "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' or 'the jury necessarily made the findings required to support a conviction on the valid ground.'" Quoting *United States v. Holly*, 488 F.3d 1298, 1305-06 (10th Cir.2007); *see also United States v. Post*, 950 F.Supp.2d 519, 532 (S.D.N.Y. 2013) (Review focused on whether guilty verdict was attributable to instructional error, not whether guilty verdict would have been returned in absence of the error); *United States v. Ravenell*, 66 F.4th 472, 491-92 (4th Cir. 2023) (Alternative-instructional error was harmless "because there [was] no reason to conclude that Ravenell's conviction rests on an invalid legal ground.")

In contrast, other circuits focus on the strength of the evidence to support a guilty verdict under the correct instruction. *See, e.g., United States v. Skilling*, *supra*, 638 F.3d at 482 (alternative-theory instructional error harmless if reviewing court can conclude

beyond a reasonable doubt that the "jury verdict would have been the same absent the error" or "if the jury, in convicting on an invalid theory of guilt, necessarily found facts establishing guilt on a valid theory"); *United States v. Cannon*, 987 F.3d 924, 948-49 (11th Cir. 2021) (alternative-theory instructional error harmless because invalid and valid theories were "intertwined and co-extensive").

CONCLUSION

This Court should grant certiorari review to determine the proper standard for determining prejudice when there is alternative-theory instructional error. The current state of the law is problematic because the diverging tests among the courts create the potential for inconsistent relief for defendants on appeal.

DATED: August 21, 2023 RESPECTFULLY SUBMITTED:

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ROMAN ANDREYEVICH GLUKHOY