No. 07-544

IN THE

Supreme Court of the United States

CHRIS CHRONES, Warden,

Petitioner,

vs.

MICHAEL ROBERT PULIDO,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

When a jury instruction on felony murder omits an element of timing required by state law and the resulting conviction is challenged on federal habeas corpus, is the harmless error standard that of *Brecht* v. *Abrahamson* or must relief be granted unless the habeas court is "absolutely certain" the error was harmless?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The Ninth Circuit in this case failed to apply the clear holding of *Brecht* v. *Abrahamson*, 507 U. S. 619

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

(1993), on the standard of review applicable in habeas corpus proceedings. That standard has served our judicial system well in helping to insure that the "secondary and limited" remedy of collateral attack on final judgments is reserved for errors of real substance, not minor issues with only a speculative connection with the reliability of the verdict. Any cutting back on *Brecht* would be a step backward and would be contrary to the interests CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

Ramon Flores, a Shell gas station cashier in San Mateo, California, was killed with a single shot to the head with a .45 caliber bullet in May 1992. *People* v. *Pulido*, 15 Cal. 4th 713, 717, 936 P. 2d 1235, 1237 (1997). He died within seconds. *Ibid*. There were no witnesses to the shooting. *Ibid*.

The next morning, the cash register from the store was found in some roadside bushes. *Ibid*. Michael Pulido's fingerprints were on the register. *Ibid*. His fingerprints were also found on an unopened can of Coke found on the store counter. *Ibid*. A neighbor told police he had heard a loud bang and yelling come from the direction of the Shell station early in the morning of the murder. *Ibid*. He told police it sounded like a person was addressing someone else. *Ibid*.

Michael Pulido was arrested on an unrelated charge in June 1992. *People* v. *Pulido*, 52 Cal. Rptr. 2d 373, 376 (Ct. App. 1996).[2] Pulido, "hoping to avoid jail," volunteered information about the Shell station rob-

2. The opinion of the Court of Appeal for the First Appellate District has been superseded by grant of review and is cited only for its discussion of the facts of this case. See Cal. Rules of Court 8.1100(d)(1) & 8.1115.

bery. *Id*., at 376-377. He led police to a location where they found discarded, unused .45 caliber cartridges with markings similar to those found at the murder location. *Pulido*, 15 Cal. 4th, at 717, 936 P. 2d, at 1237. Pulido also made a series of inconsistent exculpatory statements attributing the robbery and murder to others, before finally blaming the killing on Michael Aragon, his uncle, with whom Pulido was living at the time of Flores' murder. *Id*., at 717-718, 936 P. 2d, at 1237.

At trial, Aragon testified against Pulido. *Id*., at 717, 936 P. 2d, at 1237. Aragon testified that a few days after the killing, Pulido had admitted to Aragon that he killed Flores. *Id*., at 718, 936 P. 2d, at 1237. Aragon testified Pulido told him he had bought a Coke, shot Flores in the face, took the register and then threw it in the bushes. *Ibid*. Aragon testified that on the morning of the killing, Aragon found Pulido asleep in the living room with his clothes on. *Id*., at 717, 936 P. 2d, at 1237. Aragon also claimed that the same morning Pulido had proudly displayed to Aragon a large number of $1 bills in his wallet. *Ibid*.

Pulido told a different story. Pulido testified that in the early morning of the murder, Aragon had taken Pulido to a park where Aragon smoked some cocaine. *Id*., at 718, 936 P. 2d, at 1238. After leaving the park, Aragon stopped at the Shell station to buy cigarettes or matches. *Ibid*. Pulido claimed Aragon murdered Flores while Pulido waited outside. *Ibid*. He claimed to have no knowledge that Aragon planned to rob the Shell station or kill Flores. *Ibid*. Pulido testified that it was Aragon who had taken the register, and it was only after Aragon threatened him with the gun that Pulido had opened the cash register. *Ibid*. Pulido specifically "denied touching a Coke can in the store that night." *Ibid*. To explain his fingerprints on the Coke can, Pulido suggested he might have touched the can when

he bought a drink at the Shell station on some earlier occasion. *Ibid*.

Prior to closing arguments, the jury was given relevant jury instructions. J. A. 4-11. From June 29, 1993, until the close of deliberations on July 2, 1993, the jury actively questioned the trial court as to the meaning of the jury instructions. *Id*., at 33-54. The first question asked the judge to clarify whether finding "aiding and abetting" as defined by the then-current standard instruction, CALJIC 3.01,[3] was equivalent to finding the defendant had committed robbery. *Id*., at 33. The trial court responded in the affirmative. *Id*., at 34. The next jury question concerned the definition of first-degree felony-murder aider and abettor liability under CALJIC 8.27. *Id*., at 36-38. Diagrams from the jury demonstrate jury confusion as to two possible theories of felony-murder aider and abettor liability the jury could use to convict Pulido. *Ibid*. The jury was instructed to "reread CALJIC 8.27 with the definition of aiding and abetting in mind from instruction 3.01." *Id*., at 39. CALJIC 3.01 stated, "Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting." *Id*., at 32. The next day, the jury asked whether an aider or abettor had to possess knowledge of the purpose of the crime "prior to the commission of the crime or during the commission of the crime." See *id*., at 41. The jury was instructed to read CALJIC 3.01. *Id*., at 43. The same day, the jury requested the trial court clarify whether the "crime" referred to in CALJIC 8.27 was the crime of murder or robbery. *Id*., at 48. The trial court instructed the jury that the "crime" was robbery. *Id*., at 49. The final questions from the jury

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3. The instruction was subsequently amended. See 1 California Jury Instructions, Criminal 3.01 (6th ed. 1996) (CALJIC).

came on July 1, 1993, and July 2, 1993, and concerned the instructions regarding other sentence enhancements. *Id.*, at 51, 53. The jury specifically asked if failure to find a "unanimous agreement on the use of a firearm and the 'bodily injury' [for murder or robbery] would *negate unanimity on the main counts themselves*." *Id.*, at 51 (emphasis added). The trial court instructed the jury that the court would still "receive the verdicts to which you do agree." *Id.*, at 54.

The jury convicted Pulido of robbery and first-degree murder. *Pulido*, 15 Cal. 4th, at 719, 936 P. 2d, at 1238; see also J. A. 55, 57. They also found true a robbery-murder special-circumstance allegation under Cal. Penal Code § 190.2(a)(17)(A). *Pulido*, 15 Cal. 4th, at 719, 936 P. 2d, at 1238. In the verdict form, the jury found "the defendant . . . engaged in or was an accomplice in the commission of or attempted commission of robbery *during the commission* of the crime charged in Count 1 . . . ." J. A. 56 (emphasis added, capitalization omitted). Count 1 was the murder. See J. A. 57. Pulido was sentenced to a life term without the possibility of parole. *Pulido*, 15 Cal. 4th, at 719, 936 P. 2d, at 1238. The Court of Appeal affirmed the sentence and conviction. *Ibid.*

In a unanimous decision, the California Supreme Court affirmed. *Id.*, at 716, 730, 936 P. 2d, at 1237, 1245. In affirming, the California court decided that California's felony-murder rule does not include those who joined a felonious enterprise after a murder was completed. *Id.*, at 722, 936 P. 2d, at 1240. Instead, the court ruled that, at a minimum, a nonkiller accomplice in a felony murder must have been "a conspirator or aider or abettor in the felony[,]" at the time of the killing. *Id.*, at 723, 936 P. 2d, at 1241.

The court also found that failure by the trial court to instruct the jury on this rule in the present case did

not prejudice Pulido. *Id.*, at 726-727, 936 P. 2d, at 1243. The court found Pulido did not suffer prejudice because the robbery-murder special-circumstance finding had supplied the missing element.

> "Postkilling assistance to Aragon, by itself, could not have been the basis for the jury's explicit finding defendant 'engaged in or was an accomplice in the commission of or attempted commission of robbery *during* the commission of [murder],' nor could it have satisfied the instructional requirement that 'the murder was committed *while* the defendant was engaged or was an accomplice in' robbery. (Italics added.) The special-circumstance finding thus demonstrates the jury did not accept the theory defendant joined the robbery only after Flores was killed. Any error in the failure specially to instruct on this issue was harmless." *Id.*, at 727, 936 P. 2d, at 1243-1244.

The court further concluded that because Pulido had not demonstrated prejudice, reversal was not required. *Id.*, at 727, 936 P. 2d, at 1244.

Pulido petitioned for federal habeas corpus in 1999, and the District Court granted the writ in 2005. J. A. 1. The District Court rejected the California Supreme Court's holding that the jury's special-circumstance verdict that Pulido was engaged in the robbery during the murder of Flores eliminated the possibility that the jury found Pulido guilty for a crime he committed after Flores had been murdered. App. to Pet. for Cert. 50a-51a. The District Court rejected the California Supreme Court's interpretation because an invalid robbery-murder special-circumstance instruction, which substituted "or" for "and," could have permitted the jury to find Pulido guilty of aiding or abetting felony murder if he participated in the robbery after Flores was killed. *Id.*, at 51a. Although the erroneous jury instructions

were not questioned by the jury during its deliberations, see J. A. 33-54, the District Court found failure to inform the jury of the "crucial timing element for felony murder accomplice liability amounted to federal constitutional error." App. to Pet. for Cert. at 51a. The District Court then found the California Supreme Court's decision that Pulido had not been prejudiced was an "objectively unreasonable application" of clearly established federal law. App. to Pet. for Cert. 64a. The District Court concluded that precedents of *Brecht* v. *Abrahamson,* 507 U. S. 619 (1993), and *O'Neal* v. *McAninch,* 513 U. S. 432 (1995), bound the court to grant habeas corpus relief because it could not be "reasonably certain" that the erroneous instruction did not have "substantial and injurious effect or influence in determining the jury's verdict." App. to Pet. for Cert. 65a-67a.

The Ninth Circuit affirmed in a *per curiam* decision. *Pulido* v. *Chrones*, 487 F. 3d 669, 670, 676 (CA9 2007). The Ninth Circuit relied on its decision in *Lara* v. *Ryan*, 455 F. 3d 1080 (CA9 2006), and not *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), for its harmless error standard. *Pulido*, *supra*, at 675-676. Instead of reviewing for "substantial and injurious effect or influence," the Ninth Circuit reasoned Pulido's conviction must be reversed because the court was not "absolutely certain" Pulido had been convicted under a valid legal theory. *Id*., at 676.

This Court granted certiorari on February 25, 2008.

SUMMARY OF ARGUMENT

This is a simple case. *Brecht* v. *Abrahamson* established that the harmless error standard of *Kotteakos* v. *United States* applies on habeas corpus to all errors except "structural" errors. The error in this case was

a simple mistake on the elements of felony murder in an unusual situation where the correct answer was not established until the present case reached the state's highest court.

This case is not different in kind from any other case misdescribing or omitting an element of a crime, errors that this Court has classified as "trial errors" subject to harmless error analysis. All such errors could be shoehorned into an "erroneous legal theory" mold just as easily as the one in this case.

Applying *Brecht* to this case, the error was harmless. Pulido's testimony that he joined the robbery only after the killing and only under duress is contradicted by the physical evidence and his own statement in a recorded phone call. The jury's questions indicate they were an active, probing jury but do not indicate any confusion on the point of, or any acceptance of, Pulido's "late joiner" theory. The error had no "substantial and injurious" effect on the verdict.

ARGUMENT

I. In a habeas case, *Brecht* applies to all but a narrow class of "structural" errors, regardless of what standard may apply on direct review.

> "The *Kotteakos* [v. *United States*, 328 U. S. 750, 776 (1946)] harmless-error standard is better tailored to the nature and purpose of collateral review than the *Chapman* [v. *California*, 386 U. S. 18, 24 (1967)] standard, and application of a less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence." *Brecht* v. *Abrahamson*, 507 U. S. 619, 623 (1993).

For 15 years now, it has been clearly established that *Kotteakos* is the standard for reviewing errors for harmlessness in federal habeas corpus proceedings. If the error in question is appropriate for harmless error analysis at all, *i.e.*, "error of the trial type," *Kotteakos* is the standard. See *id*., at 638.[4]

The only habeas cases to which the *Kotteakos* standard does not apply are the "structural" errors. See *id*., at 629. This class of errors is very narrow. There is a second group of errors to which *Kotteakos* would apply in theory but for which a harmless analysis would be superfluous, because an element of harmfulness is built in to the definition of the error. See *Kyles* v. *Whitley*, 514 U. S. 419, 435 (1995) (*Brady*); *Fry* v. *Pliler*, 551 U. S. __, 127 S. Ct. 2321, 2330-2331, 168 L. Ed. 2d 16, 27 (2007) (Breyer, J., concurring in part and dissenting in part).[5] *Amicus* CJLF has previously described these two groups of errors as the "error is never harmless" group and the "harmless is never error" group. See Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Fry* v. *Pliler*, No. 06-5247, pp. 4-5.

The *Brecht* rule is one of several limitations that have been placed on collateral attacks on final judgments in order to limit this drastic remedy to the cases

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4. *Brecht* does hedge an inch in a footnote regarding a hypothetical "deliberate and especially egregious error," *id*., at 638, n. 9, but no such error was at issue in *Lara*, and none is at issue in the present case.

5. In *Calderon* v. *Coleman*, 525 U. S. 141 (1998) (*per curiam*), a narrowly divided Court held that a finding of error under the standard of *Boyde* v. *California*, 494 U. S. 370 (1990), did not resolve the *Brecht* question. No court in the present case has done a *Boyde* analysis, so this case is not an occasion to reconsider *Coleman*.

where its most needed. Although Judge Friendly's proposal of limiting habeas to cases with a colorable claim of innocence has not been adopted, see Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 150 (1970), various limitations have restricted relief in categories of cases where an error is least likely to have resulted in the conviction of an innocent person.

First, *Stone* v. *Powell*, 428 U. S. 465 (1976), eliminated second-guessing on habeas of Fourth Amendment exclusionary rule claims considered in state court, a remedy almost exclusively for the guilty. *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), restricted, with exceptions, petitioners' ability to raise on federal habeas new claims so tangential to the main issues that competent counsel did not see fit to raise them at trial or on appeal. *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality opinion), restricted retroactive application of newly created rules of procedure. Congress limited the grant of habeas relief in cases where the federal question is subject to disagreement among reasonable jurists. See 28 U. S. C. § 2254(d). *Brecht* was part of this movement. See 507 U. S., at 634-636. Cases where the effect of the error is less than "substantial and injurious" are cases where the chance of the defendant being actually innocent is remote.

In *Lara* v. *Ryan*, 455 F. 3d 1080 (CA9 2006), the Ninth Circuit invented a new breed of harmless error analysis. This class of errors does not result in automatic reversal regardless of whether it caused any harm, as true structural errors do. See *McKaskle* v. *Wiggins*, 465 U. S. 168, 177, n. 8 (1984) (*Faretta* error). Instead, reversal may be avoided only on a showing of absolute certainty of no harm. See *Lara*, *supra*, at 1085. The standard was distilled from language in *Sandstrom* v. *Montana*, 442 U. S. 510, 526 (1979), *Zant*

v. *Stephens*, 462 U. S. 862, 881 (1983), *Yates* v. *United States*, 354 U. S. 298, 312 (1957), and *Stromberg* v. *California*, 283 U. S. 359, 368 (1931). Conspicuous by its absence from the *Lara* opinion is *any mention* of the controlling precedent on habeas harmless error analysis—*Brecht*.

Brecht unambiguously held that the harmless error standard used in direct review cases would no longer be applied on habeas corpus, and it discussed the habeas/direct distinction at some length. See 507 U. S., at 630-638. To see a federal court of appeals 13 years later blithely applying direct review precedents (*Sandstrom*, *Yates*, and *Stromberg*) in a habeas case with no mention of *Brecht* is remarkable, to put it mildly. In the present case, the Court of Appeals mentioned the controlling *Brecht* standard once in the beginning of the opinion, *Pulido* v. *Chrones*, 487 F. 3d 669, 673, n. 3 (CA9 2007), and then never used it. Such cavalier treatment of a limitation on the habeas court's authority is unusual but regrettably not unprecedented. See, *e.g.*, *Price* v. *Vincent*, 538 U. S. 634, 639 (2003) (Court of Appeals recited AEDPA standard and then ignored it).

Under *Brecht*, the threshold question is whether the error in question fits into the very narrow category of "structural error" or the much broader category of "trial error." See 507 U. S., at 629-630. If the latter, habeas relief cannot be granted unless the error " 'had substantial and injurious effect or influence in determining the jury's verdict,' " *id*., at 631 (quoting *Kotteakos*, 328 U. S., at 776), bearing in mind the *Kyles* caveat for some errors, the finding of error has already answered that question.

II. The error in the present case is an instruction omitting an element, an error of the trial type.

Carella v. *California*, 491 U. S. 263 (1989) (*per curiam*), was a "legally erroneous theory" case in the same strained sense as the present case. In that case, the jury was instructed that intent to steal a rented vehicle could be presumed from failure to return it 20 days after written demand and that embezzlement could be presumed from failure to return it 5 days after the end of the rental period. See *id*., at 264. Taking the first presumption, the jury could return a verdict of guilty if it found the required intent had been proved beyond a reasonable doubt or if it found that mere failure to return the car after the notice period had been so proved. See *id*., at 266. The latter was a legally erroneous theory because such presumptions are no longer allowed after *Sandstrom* v. *Montana*, 442 U. S. 510 (1979).

The opinion of the Court held that this error was subject to harmless error analysis, and, by citing *Rose* v. *Clark*, 478 U. S. 570 (1986), without elaboration, implied that the analysis was the same as any other harmless error case. See *Carella*, 491 U. S., at 266-267. Justice Scalia, concurring in the result, took issue with that implication and argued for a different analysis. See *id*., at 267.

After *Carella*, *California* v. *Roy*, 519 U. S. 2 (1996) (*per curiam*), confirmed that omission of an element was subject to standard *Brecht* analysis. See *id*., at 4-5. *Roy* is remarkably similar to the present case. *Roy* also involved the California felony-murder rule, and it also involved an ambiguity subsequently clarified by the California Supreme Court. See *id*., at 3. Roy's jury had been instructed that it was sufficient for conviction as an aider and abettor if Roy helped the perpetrator and

knew of his purpose. A later case held that the accomplice must also share the main perpetrator's criminal intent. See *ibid*.

The state appellate court and the Federal District Court both found the error harmless, the latter holding that "no rational juror could have found that Roy knew the confederate's purpose and helped him but also found that Roy did not *intend* to help him." *Ibid*. (emphasis in original). The Ninth Circuit reversed, and, as in the present case, it crafted a "special 'harmless error' standard," *id*., at 4, distilled from *Carella* and *O'Neal* v. *McAninch*, 513 U. S. 432 (1995). This was error. Although the special standard was "certainly consistent with the concurring opinion in *Carella*," *Roy*, 519 U. S., at 5-6, that opinion is not the law. *Brecht*, as explained in *O'Neal*, is *the* standard for harmlessness of "trial error" on habeas. See *id*., at 6.

Roy could be shoehorned into the "erroneous legal theory" model just as easily as the present case. On the face of the instruction, the jury could have convicted Roy on the erroneous theory that assistance plus knowledge of purpose equals aiding and abetting. The District Court correctly found the error harmless, though, upon evaluating the evidence and finding that no rational juror would have adopted that view of the case. See *id*., at 3.

Finally, *Neder* v. *United States*, 527 U. S. 1 (1999), rejects the notion of a special harmlessness standard for cases of this type. Neder was accused of filing a false tax return, among other offenses. "To obtain a conviction . . . , the Government must prove that the defendant filed a tax return 'which he does not believe to be true and correct as to every material matter.' 26 U. S. C. § 7206(1)." *Id*., at 16. Materiality is an element, along with falsity and mental state, and the failure to instruct the jury on that element was error.

See *id*., at 8. However, it was trial error, subject to harmless error analysis under the same standard as other trial errors. See *id*., at 15.

Neder's jury was presented with a legally impermissible theory in the same sense that the jury in the present case was. The jury could return a verdict of guilty if it was proved that Neder had knowingly filed a return that was false as to a material matter, a legally correct theory, or as to an immaterial matter, a legally erroneous theory. Filing a return that is false on an immaterial matter is not a crime, just as joining a robbery in which someone has already been killed is not felony murder in California. The error was harmless in *Neder* because five million dollars is so obviously material that sending the case back for retrial would be pointless. See *id*., at 15-17.

Neder considered and rejected the argument that there is a special harmlessness analysis for omitted elements gleaned from the plurality opinion in *Connecticut* v. *Johnson*, 460 U. S. 73 (1983), the *Carella* concurrence, and language in *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993). See *Neder*, 527 U. S., at 13-14. The Court rejected the proffered distinction between omission of an element and misdescription of an element, noting that a given instruction could frequently be characterized either way. See *id*., at 14 (quoting *Roy*). The error in *Roy* could be considered an error of misdescribing the mental element or omitting the intent element. The error in the present case could be considered one of misdescribing the timing element or omitting the contemporaneity element. *Washington* v. *Recuenco*, 548 U. S. 212 (2006), confirms that omission of an element is not structural error, applying *Neder* to a case where a sentencing factor equivalent to an element was not submitted to the jury. See *id*., at 220-222.

The purported distinction between erroneous legal theories and other instructional errors is equally malleable. As discussed above, *Carella*, *Roy*, and *Neder* could also be shaped into erroneous alternate legal theory cases with minimal effort. It is bad enough that routine questions of state law such as *Roy* and the present case are escalated to federal questions at all,[6] but to further exempt them from standard harmless error analysis based on a vague and flimsy distinction such as the one made in the present case is particularly intrusive into the operation of state criminal law.

The rule should be simple. A very small class of structural errors are never harmless. For everything else, including the present case, *Brecht* is the standard for harmless error on habeas corpus.

III. Applying *Brecht* to this case, the error is harmless.

A. The Harmless Error Standard.

> "If, when all is said and done, the [court's] conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . . But if one cannot say, with fair assurance, *after pondering all that happened without stripping the erroneous action from the whole*, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected

6. *Amicus* believes that under the *Boyde* standard there is no federal constitutional error in this case, but the State did not seek review on that point.

> by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos* v. *United States*, 328 U. S. 750, 764-765 (1946) (emphasis added).

As further clarified in *O'Neal* v. *McAninch*, 513 U. S. 432, 435 (1995), the reviewing court should assign the effect of the error to one of three categories. Either it had a substantial effect, it did not, or there is "grave doubt" whether it did. The latter "mean[s] that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." The third category "is unusual." *Ibid*. In the present case, when we ponder all that happened, we see no realistic possibility that the jury gave any credence to the defendant's "late joiner" theory. Therefore, the erroneous instruction that might, in theory, have permitted conviction under that theory had no substantial effect in this case.

B. Pulido's Trial.

The jury found Michael Pulido guilty of robbery, Cal. Penal Code § 211, and first-degree murder. Cal. Penal Code §§ 187, 189; see J. A. 55, 57. As part of Pulido's penalty enhancement, the jury found the special circumstance of murder in the course of a robbery. J. A. 56. Pulido's murder conviction was based on his role as a principal in the underlying robbery. *People* v. *Pulido*, 52 Cal. Rptr. 2d 373, 377 (Ct. App. 1996). The prosecution's theory of the case was that Pulido either acted alone, and was both the killer and the robber, or aided and abetted Aragon, knowing full well that Aragon intended to rob the Shell station. *Ibid*.; see also App. to Pet. for Cert. 38a. Pulido's defense was that he had been a "late joiner" to the robbery, and that Aragon acted alone in the robbery and the killing, and Pulido

had been coerced into opening the cash register. *Pulido*, *supra*, at 377. Pulido argued that he could only be convicted as an accessory after the fact with respect to the robbery. *Ibid.*; App. to Pet. for Cert. 38a.

The jury was instructed on murder, J. A. 8-9, first-degree felony murder, J. A. 10, aider-abettor liability for murder, J. A. 11, robbery, J. A. 19-20, aider-abettor liability for robbery, J. A. 21-25, and felony-murder liability while a robbery was still in progress. J. A. 26. The jury also received instructions on the "special circumstances" that could enhance Pulido's penalty for a murder that occurred during the commission of a robbery, J. A. 12-18, and received instructions on special allegations of personal use of a firearm, J. A. 27-28, and personal, intentional infliction of great bodily harm. J. A. 29-30. The jury did not receive an instruction that "a felony murder verdict could be based on an aiding and abetting theory only if [defendant] aided and abetted the robbery before the infliction of the fatal wound" for the simple reason that Pulido did not request such an instruction. See *People* v. *Pulido*, 15 Cal. 4th 713, 726, 936 P. 2d 1235, 1243 (1997). After Pulido was convicted, however, the absence of this instruction was the basis of his direct appeal. *Ibid.*

California law on when the trial court has a duty to instruct *sua sponte*, allowing the issue to be raised on appeal despite absence of a request, was less than clear at the time of the direct appeal. See generally 5 B. Witkin & N. Epstein, California Criminal Law, Criminal Trial § 610, p. 869 (3d ed. 2000). The California Supreme Court chose to resolve the case on harmless error rather than resolve this thorny procedural

default question. See *Pulido*, 15 Cal. 4th, at 726, 936 P. 2d, at 1243.[7]

The California Supreme Court found the error in the murder instruction was harmless because another properly given instruction had resolved the issue. *Ibid.* The omitted instruction was not prejudicial because the jury had been "instructed that the robbery-murder special-circumstance allegation could not be found true unless defendant was engaged in the robbery *at the time of the killing*." *Id.,* at 726-727, 936 P. 2d, at 1243 (emphasis in original). The California Supreme Court reasoned the special-circumstance instruction and finding demonstrated the jury did not accept Pulido's defense that he had joined the robbery only after Flores was killed. *Id.*, at 727, 936 P. 2d, at 1244.

The Ninth Circuit found the California Supreme Court's reliance on the special-circumstance instruction to be in error. *Pulido v. Chrones,* 487 F. 3d 669, 673-674 (CA9 2007). It held that the trial court's error of substituting an "or" for an "and" had "erroneously enlarg[ed] the scope of activity that would qualify as murder-robbery under the special circumstance." *Id.*, at 674. This subtle flaw was sufficient to make the Ninth Circuit believe that the jury could have found the special circumstance to be true without finding Pulido had been involved in the robbery when Flores was killed. *Id.*, at 675. The Ninth Circuit reasoned when the jury could have based its special-circumstance finding on the theory that "the murder was committed 'in order to carry out or advance' the robbery," the

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7. The California Supreme Court subsequently clarified that the trial court has no duty to instruct *sua sponte* on doctrines of law not well established at the time of trial. See *People* v. *Michaels*, 28 Cal. 4th 486, 529, 49 P. 3d 1032, 1058 (2002). Under current law, Pulido's claim would be defaulted.

California's Supreme Court's determination that the jury had convicted Pulido on a valid legal theory "does not follow." *Ibid*.

The flaw in the special-circumstance instruction went unnoticed by anyone at trial. See J. A. 33-57. Neither the trial court judge nor the jury questioned the instruction. *Ibid*. Furthermore, the error went unrecognized by the state courts on direct appeal. See *Pulido*, 15 Cal. 4th, at 726-727, 936 P. 2d, at 1243-1244. It was not until the case reached the Federal District Court that the error received attention. App. to Pet. for Cert. 51a.

The likelihood that the jury noticed and relied on a flaw that no one else noticed through the trial and appeal is remote on its face. It becomes even more remote when "pondering all that happened" in light of the evidence in the case.

Pulido's convictions for first-degree felony murder and robbery are supported by strong evidence establishing Pulido's guilt. Given that both Pulido and Aragon are dubious characters, see 15 Cal. 4th, at 717-719, 936 P. 2d, at 1237-1238, it is likely the jury relied on the other evidence. See *id*., at 717, 936 P. 2d, at 1237-1238. The prosecution presented substantial physical evidence linking Pulido to both the robbery and the scene of the murder. *Ibid*. Pulido's fingerprints were on both the cash register taken from the Shell station and on an unopened can of Coke on the store counter. *Ibid*. Meanwhile, Aragon's fingerprints were not found at the scene of the murder nor on the register. *Ibid*. This physical evidence alone is sufficient to negate any "grave doubt" that the jury's findings of guilt were based on incorrect instructions. See *O'Neal*, 513 U. S., at 435-436. But this is not all the evidence that supported the prosecution's theory that Pulido intended to participate in the robbery. See *Pulido*, 15 Cal. 4th, at

717-718, 936 P. 2d, at 1237. The jury heard evidence that Pulido had been seen in possession of a .45-caliber pistol, the same type of gun used to murder Flores. *Ibid*. Pulido had even volunteered information regarding the murder-robbery before being charged for the offense and had voluntarily led police to the location where .45 caliber cartridges bearing ejection marks similar to those found at the Shell station were found. *Ibid*.

In contrast, there is little evidence supporting Pulido's innocence. First, Pulido offered his own testimony blaming Aragon for the murder. *Id*., at 718, 936 P. 2d, at 1237-1238. This is a self-serving statement unlikely to be given much weight, particularly in light of Pulido's multiple lies blaming a variety of other people and his admission in the recorded phone call from jail. See *id*., at 717, 936 P. 2d, at 1237. There is also no physical evidence supporting Pulido's account since Aragon's fingerprints are missing from the scene of the murder, the cash register, and the murder weapon. See *ibid*. The only other evidence supporting Pulido's defense is the testimony of a neighbor, who believes that in the early morning of the murder he heard a loud bang and a voice yelling, as if a person was addressing someone else. *Ibid*. This evidence supports only the proposition that two people were involved and says nothing about either person's role in the crime.

With no reliable, living witnesses to the actual robbery and killing, the physical evidence assumes great importance. The damning piece of evidence that cannot be reconciled with Pulido's version of events is his fingerprints on the Coke can. His explanation that he might have touched the can on some earlier, unspecified occasion, *id*., at 718, 936 P. 2d, at 1238, is preposterous. It is a matter of common knowledge that soft drinks are fast-moving items in convenience stores' inventories,

and everyone knows that Coke is a top brand. It is highly unlikely that a can he had touched on a prior occasion, when it would have been toward the front of the shelf, would still be there even a day later.

C. The Jury's Questions.

The jury's questions during deliberations demonstrate that the jury was not confused as to whether Pulido had intended to participate in the robbery before the killing. Instead, the jury's questions demonstrate that the jury was wrestling with the question of whether it could convict Pulido if it believed Pulido's only involvement was aiding Aragon's plan to commit the robbery. If the jury believed Pulido's story that he had "engaged in or was an accomplice in" robbery under duress from Aragon after the murder occurred, the jury would not have found Pulido was "engaged in or an accomplice in the commission of or attempted commission of robbery during the commission of the crime charged in Count 1 [murder]." See J. A. 56; *Pulido*, 15 Cal. 4th, at 727, 936 P. 2d, at 1243.

The first question the jury asked was whether a conclusion of aiding and abetting a robbery was equivalent to finding the defendant guilty of robbery. J. A. 33. The trial judge's response referred the jury back to CALJIC 3.01. J. A. 34. CALJIC 3.01 instructed that "mere presence at the scene of the crime" and "knowledge a crime is being committed" were insufficient to convict Pulido as an accomplice. Intent is also required. J. A. 35. This instruction, the jury's conclusion Pulido was guilty of robbery, and prosecution's theories that Pulido had either acted alone, or had aided Aragon with knowledge of Aragon's intent to commit the robbery, work together to dispel any "doubt" as to whether the jury rejected Pulido's story of events. If the jury had believed Pulido's story that he was waiting outside the

Shell station, and had been forced into opening the cash register, it would not have convicted Pulido for robbery, because the required intent would have been missing.

The jury's question on the felony-murder instruction, CALJIC 8.27, supports this conclusion. See J. A. 36-38. The difference between the two felony-murder definitions offered by the jury relate to whether the jury could convict solely because he "facilitated by aiding" or whether the jury could convict because it found he both intended the robbery and somehow aided in the robbery. J. A. 37-38. Conspicuously absent is any question about the time of joining the robbery. The jury seemed to be grappling with the harshness of the standard felony-murder rule as applied to minor accomplices. This is the same problem that led to a prohibition of capital punishment for such accomplices in *Enmund* v. *Florida*, 458 U. S. 782 (1982). There is no indication from this question the jury was concerned with the exotic "late joiner" problem.

The only question that relates to timing is the one at J. A. 41. Here the jury asked whether knowledge of the perpetrator's purpose must precede the crime. That is, if Aragon committed the robbery and Pulido assisted, did Pulido need to know Aragon was going to rob the store before he actually did? This is not the same timing problem as the "late joiner" theory. The fact that the jury asked about this issue and not the "late joiner" issue tends to indicate they were not concerned with the latter, consistent with the state of the evidence contradicting that theory.

The jury's questions and verdicts indicate the jury found guilt and the special circumstance to be true because Pulido intended to participate in the robbery, but they could not agree whether he intended to kill Flores or personally acted as the triggerman. This is confirmed by the fact that the jury deadlocked on the

special allegations of personal use of a firearm and personal infliction of great bodily harm. *Pulido*, 487 F. 3d, at 672. Furthermore, if the jury had any question as to whether the special circumstance could be true if Pulido had merely facilitated the robbery by taking the cash register away from the scene of the crime, the jury would have asked. A jury that draws diagrams to demonstrate its confusion on a legal theory, asks at least nine probative questions during deliberations, takes three days to deliberate, and has been instructed that it cannot return convictions unless they are unanimous is not the type of jury that would unquestioningly interpret an ambiguous instruction to require such a harsh result. See J. A. 33-54. If the jury really had bought into Pulido's defense—that he had been coerced into opening the cash register by Aragon after the killing—the jury would not have found the special circumstance to be true without asking for clarification. The contradiction between that version of the facts and the word "during" in the verdict form, see J. A. 56, would have prompted a question from this inquisitive jury.

The jury's questions support the conclusion of the California Supreme Court. The questions demonstrate the jury was carefully considering and probing all the evidence before it—including the physical evidence—when it made its decision. The typographical error recognized by the District Court and the Ninth Circuit is insufficient to undermine this proactive and curious jury's conclusions. The typographical error does not create "grave doubt" as to whether the "error had a substantial and injurious effect on the jury's verdict." The error in this case had no such effect.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

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