11-55247

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD TAYLOR,

Petitioner-Appellant,

v.

MATTHEW CATE, Secretary of the California Department of Corrections and Rehabilitation,

Respondent-Appellee.

On Appeal from the United States District Court
for the Central District of California

No. CV 09-5267-ODW
The Honorable Otis D. Wright, II, Judge

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
KENNETH C. BYRNE
Supervising Deputy Attorney General
ERIC E. REYNOLDS
Deputy Attorney General
State Bar No. 227469
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2868
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Eric.Reynolds@doj.ca.gov
Attorneys for Respondent-Appellee

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

INTRODUCTION

In 1987, Petitioner and another man stole a vehicle and drove it to a restaurant, where they attempted a robbery. According to the evidence at trial, one man acted as a lookout. When the restaurant's owner intervened in the robbery, the other man fatally shot him with a handgun. Petitioner and his accomplice then fled without removing money from the restaurant's cash register. It is undisputed that Petitioner was one of the two men who committed the attempted robbery and murder. A jury found that Petitioner was the shooter, and convicted him of felony murder predicated on attempted robbery. The trial court sentenced Petitioner to life without the possibility of parole on the basis of the jury's finding that he was the shooter.

In March, 1996, Petitioner informed Los Angeles Police Department investigators that he was willing to reveal the identity of his accomplice, Hugh Hayes, who, according to Petitioner, was the actual gunman during the robbery. In 1999 Hayes was tried for murder. Petitioner testified for the prosecution at the trial. However, Hayes was acquitted.

Following Hayes's trial, the Deputy District Attorney who handled Petitioner's and Hayes's trials wrote a letter to the California Board of Prison Terms stating that he and the investigating detectives had "the firm

belief" that Hayes was the gunman and that Petitioner had been the lookout. In 2004, Petitioner filed a habeas petition in the California Supreme Court. In 2006, the Supreme Court issued an order to show cause before the Los Angeles Superior Court, regarding why Petitioner was not factually innocent of the firearm allegations and special circumstance and why he should not be resentenced. In response to the order to show cause, the People conceded that Petitioner was actually innocent of the allegations and special circumstance, but argued that Petitioner should be resentenced for first degree murder. The trial court found that Petitioner was factually innocent of the special circumstance and firearm use allegations, and resentenced Petitioner under California Penal Code section 1170(d) to 25 years to life in state prison, plus an additional term of nine years.

Petitioner sought federal habeas corpus relief. The district court denied the petition and dismissed it with prejudice. The court found that Petitioner's right to a jury trial was not violated because the jury was presented an alternate theory that Petitioner was guilty of felony murder as an aider and abettor. "That the jury found Petitioner more culpable than a mere aider and abettor does not negate the fact that they were presented with and deliberated on both theories." The court applied *Turner v. United States*, 396 U.S. 398 (1970) and *Griffin v. United States*, 502 U.S. 46 (1991)

to find that the evidence left no doubt that Petitioner was one of the two men that attempted the robbery. Thus, Petitioner was liable for murder whether he was the shooter or the lookout.

Over a sharp dissent by Judge Clifton, a majority of this Court reversed the district court and held in a published opinion filed on November 19, 2014, *Taylor v. Cate*, 772 F.3d 842 (9th Cir. 2014), (1) that resentencing Petitioner as an aider and abettor violated his Sixth Amendment right to a jury trial; and (2) the error is not amenable to harmless error analysis; thus, Petitioner is entitled to a new trial. A copy of the opinion is attached to this Petition.

This case presents two questions of exceptional importance warranting rehearing: (1) whether the majority's decision conflicts with the Supreme Court's repeated instruction that only the rare type of constitutional error—errors that infect the entire trial process and necessarily render it fundamentally unfair—requires automatic reversal (*Glebe v. Frost*, __U.S.__, 135 S.Ct. 429, 430-31 (2014)); and (2) whether resentencing a defendant who has been convicted of felony murder as an aider and abettor violates the Sixth Amendment when it is determined after the trial that the jury's findings that the defendant personally used a firearm was erroneous, but it is undisputed that the defendant aided and abetted the crime.

Rehearing en banc is necessary to resolve this issue. *See* Fed. R. App. Proc. 35(b)(1)(A), (B). Alternatively, panel rehearing should be granted for the same reasons. *See* Fed. R. App. Proc. 40.

ARGUMENT

I. THE PUBLISHED MAJORITY DECISION DIRECTLY CONFLICTS WITH SUPREME COURT AUTHORITY HOLDING THAT "STRUCTURAL ERROR" IS LIMITED SOLELY TO ERRORS THAT INFECT THE ENTIRE TRIAL PROCESS AND NECESSARILY RENDERS IT FUNDAMENTALLY UNFAIR

In *Chapman v. California*, 386 U.S. 18 (1967), the Supreme Court rejected the argument that errors of constitutional dimension necessarily require reversal of criminal convictions. Since *Chapman*, the Supreme Court has "repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986); *Rose v. Clark*, 478 U.S. 570, 576 (1986).[1] Only a "very limited" number of

[1] In federal habeas corpus cases, the reviewing court determines whether the alleged error had a substantial and injurious effect or influence in determining the jury's verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993); see also *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007) (even if state court does not have occasion to apply the test for assessing prejudice applicable under federal law, the *Brecht* standard applies uniformly in all federal habeas corpus cases under § 2254).

constitutional errors are deemed "structural" and require automatic reversal. *Johnson v. United States*, 520 U.S. 461, 468 (1997).

> We have emphasized, however, that while there are some errors to which *Chapman* does not apply, they are the exception and not the rule. [Citation.] Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." [Citation.]

Rose v. Clark, 478 U.S. at 578.

"A "structural" error . . . is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself . . . ." *Johnson v. United States*, 520 U.S. at 468, quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). The Supreme Court has found structural errors only in a very limited class of cases, where the error "infects the entire trial process and necessarily renders it fundamentally unfair." *Glebe v. Frost*, 135 S.Ct. at 430-431.

> One of those violations, involved in *Gideon v. Wainwright*, 372 U.S. 335 . . . (1963), was the total

> deprivation of the right to counsel at trial. [Another] violation, involved in *Tumey v. Ohio*, 273 U.S. 510 . . . (1927), was a judge who was not impartial. These are structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial. Since our decision in *Chapman*, other cases have added to the category of constitutional errors which are not subject to harmless error the following: unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 . . . (1986); the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8, . . . (1984); and the right to public trial, *Waller v. Georgia*, 467 U.S. 39, 49, n. 9 . . . (1984). Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S., at 577-578 . . . (citation omitted).

Arizona v. Fulminante, 499 U.S. at 309-310.

On the other hand, a "trial error" is an error "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. at 307-308.

In *Glebe v. Frost*, 135 S.Ct. 429, decided two days before the opinion in this case was filed and, therefore, not addressed by the majority, the Supreme Court reiterated that the vast majority of constitutional errors are subject to harmless-error analysis. In *Glebe*, the trial court restricted the defense's closing argument, thereby violating the defendant's constitutional rights to due process and the assistance of counsel. The Washington Supreme Court held that the improper restriction of closing argument was a trial error subject to harmless-error analysis and determined that any error was harmless beyond a reasonable doubt. *Id*. at 430. The defendant filed a habeas petition, which was denied by the district court. However, this Court, sitting en banc, reversed and instructed the district court to grant relief. This Court "held that the Washington Supreme Court unreasonably applied clearly established federal law by failing to classify the trial court's restriction of closing argument as structural error." *Id.* at 431. The Supreme Court reversed this Court's judgment. The Court held that even if the trial court had violated the Constitution, the mistake did not constitute structural error. *Id*. The Court stated:

> *Most* constitutional mistakes call for reversal only if the government cannot demonstrate harmlessness. Only the rare type of error—in general, one that infects the entire trial process and necessarily renders it fundamentally unfair—requires automatic reversal.

Id. at 430-31 (emphasis original, internal quotation marks and citations omitted).

Here, the majority concluded that because this case does not fall within an established category of trial error, the error must be structural.[2] But as Judge Clifton aptly pointed out in his dissent, "[t]hat is backwards. It is the category of structural errors that is the exception, not the rule." (Dis. at 23.) In other words, the proper analysis is to determine if the error was "one that infects the entire trial process and necessarily renders it fundamentally unfair . . . ." *Glebe v. Frost*, 135 S.Ct. at 431. If it is not such an error, then the error is necessarily a trial error. *Id.*

The error involved in this case—the prosecutor's good faith presentation of a theory of liability that was later determined to be wrong—is not a grave defect that tainted the entire trial process. The Supreme Court has never held that such an error is structural error requiring automatic reversal. Rather, any error in this case occurred during the presentation of the case to the jury, and may be "quantitatively assessed in the context of other evidence presented in order to determine whether its admission was

[2] In Argument II, below, Respondent demonstrates that the majority and dissent erroneously concluded that there was a constitutional violation in this case.

harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. at 308.

As Judge Clifton notes (Dis. at 24-25), there is analogous Supreme Court precedent. In *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (per curium), the Court held that instructing a jury on multiple theories of guilt, one of which is invalid, is not a structural error requiring that a conviction based on a general verdict be set aside on collateral review without regard to whether the flaw in the instructions prejudiced the defendant, but rather is subject to harmless error review. *Id.* at 58.

Hedgpeth is consistent with numerous other Supreme Court cases holding that instructional errors are not structural but instead trial errors subject to harmless-error review. *See*, e.g., *Neder v. United States*, 527 U.S. 1 (1999) (omission of an element of an offense); *California v. Roy*, 519 U.S. 2 (1996) (per curiam) (erroneous aider and abettor instruction); *Pope v. Illinois*, 481 U.S. 497 (1987) (misstatement of an element of an offense); *Rose v. Clark*, 478 U.S. 570 (erroneous burden-shifting as to an element of an offense).

Here, as in *Hedgpeth*, the prosecutor presented two mutually inconsistent theories of Petitioner's guilt: that Petitioner was the shooter or that he was the accomplice. The jury was instructed as to both theories of

liability, but, as in *Hedgpeth*, one of the instructed theories turned out to be incorrect. Although, here, one of the theories was wrong as a matter of fact, while in *Hedgpeth* the theory was wrong as a matter of law, the result was the same—the jury was erroneously instructed on a theory of guilt. Thus, the Court's reasoning in *Hedgpeth* applies equally here:

> Although these cases did not arise in the context of a jury instructed on multiple theories of guilt, one of which is improper, nothing in them suggests that a different harmless-error analysis should govern in that particular context. To the contrary, we emphasized in *Rose* that "while there are some errors to which [harmless-error analysis] does not apply, they are the exception and not the rule." [*Rose v. Clark*, 478 U.S.at 578]. And *Neder* makes clear that harmless-error analysis applies to instructional errors so long as the error at issue does not categorically "'vitiat[e] all the jury's findings.'" 527 U.S. at 11 . . . (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281 . . . (1993) (erroneous reasonable-doubt instructions constitute structural error)). An instructional error arising in the context of multiple theories of guilt no more vitiates all the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted.
>
> In fact, drawing a distinction between alternative-theory error and the instructional errors in *Neder*, *Roy*, *Pope*, and *Rose* would be "patently illogical," given that such a distinction "'reduces to the strange claim that, because the jury . . . received both a "good" charge and a "bad" charge on the issue, the error was somehow more pernicious than . . . where the only charge on the critical issue was a mistaken one.'" [Citation.]

Hedgpeth v. Pulido, 555 U.S. at 61.

Here, the majority concluded that the error here was not a "trial error" because the prosecutor was not aware of the error at the time of trial. (Opin. at 12.) However, the majority's treatment of this inadvertent error as structural leads to an illogical result. Under the majority's reasoning, the prosecutor's unknowing presentation of an incorrect theory of liability is not subject to harmless-error analysis. But had the prosecutor withheld exculpatory evidence that Petitioner was not the shooter, the constitutional error would be not be subject to automatic reversal. *See Strickler v. Greene*, 527 U.S. 263, 281-282 (1999) ("strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict").

Further, as Judge Clifton cogently pointed out (Dis. at 23), if the prosecutor here had actually known that Petitioner was not the shooter, but presented that theory to the jury anyway, the error would be deemed a "trial error" and subject to harmless error review. *See Hayes v. Brown*, 399 F. 3d 972, 984 (9th Cir. 2005) (en banc).

It is illogical for the majority in this case to disregard the customary harmless-error analysis because the prosecutor unknowingly presented a

factually incorrect theory of liability at trial. Indeed, most trial errors are unknown at the time they are committed. The prosecutor did not commit misconduct, and inadvertently presented a factually false theory of liability—one that was nonetheless supported by the witness's testimony at trial. And when the error was discovered, the prosecutor went to extraordinary lengths to correct Petitioner's sentence. But the result of the majority's decision is to penalize the prosecutor for doing the right thing more harshly than if there had been intentional misconduct.

The prosecutor's decision to give Petitioner the benefit of his belated confession did not "vitiate all the jury's findings." *Neder*, 527 U.S. at 11. The jury's most important finding—that Petitioner was guilty of murder—remained intact. The basis for Petitioner's conviction of attempted robbery and felony murder was his active, intentional participation in the attempted robbery—whether or not he personally used a gun during the aborted robbery—and Petitioner certainly never demonstrated to the state courts that he was actually innocent of the underlying crimes. Even if Petitioner was the lookout rather than the actual shooter, the evidence clearly showed—and the prosecutor correctly argued to the jury—that the lookout was an aider and abettor who knowingly and actively assisted his armed accomplice.

As Judge Clifton stated in his dissent:

> [Petitioner's] trial and resentencing were fair. The jury's most important findings remained intact, even considering [Petitioner's] revised, post-conviction version of events. It is hard to see the "fundamental unfairness" of a trial process where the defendant gambles on being acquitted, the jury convicts him of a crime in which he is indisputably involved, and the State then invests considerable effort to reduce his sentence in response to the defendant's post-trial admissions.

(Dis. at 26.)

This Court should not punish the People of the State of California for doing the right thing, nor should the Court create an incentive for states in the future to avoid doing the right thing. (Dis. at 29.) Thus, this case presents a question of exceptional importance warranting en banc consideration.

II. THE MAJORITY'S FINDING OF A SIXTH AMENDMENT VIOLATION CONFLICTS WITH THE SUPREME COURT'S DECISION IN *GRIFFIN V. UNITED STATES*

Respondent also contends that the panel's conclusion that Petitioner could not be resentenced as an aider and abettor because the jury did not find all the elements of aiding and abetting, conflicts with the Supreme Court's holding in *Griffin v. United States*, 502 U.S. 46.

The majority, citing *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000), concluded that the jury did not find all of the elements of aider and abettor

liability. (Opin. 10-11.) The majority incorrectly assumed that the jury found Petitioner guilty solely on the basis that he was the shooter. The majority stated that the jury had to choose between two mutually inconsistent roles, and "we know" the jury did not find Petitioner was an aider and abettor because it concluded Petitioner was the shooter. (Opin. 11-12.) However, the majority ignored the fact that the firearm allegations and special circumstance allegation were additional findings the jury had to make *after* they determined whether or not Petitioner was guilty of felony murder. In other words, the jury was first asked to determine guilt. Then, the jury had to decide the additional special allegations which required a finding that Petitioner was the shooter. The basis for Petitioner's conviction of attempted robbery and felony murder was his active, intentional participation in the attempted robbery—whether or not he personally used a gun during the aborted robbery. It is undisputed that Petitioner participated in the attempted robbery. Nothing in the finding of innocence as to the firearm-use or special-circumstance allegations changes the fact that Petitioner was properly found guilty by the jury of the underlying murder conviction. The jury's finding that Petitioner was subject to greater criminal liability for the special circumstances did not foreclose the possibility that he was guilty as an aider and abettor.

As Judge Clifton pointed out, aiding and abetting is only a theory of liability and does not have elements. (Dis. 20.) However, Judge Clifton then goes on to state that in this "unusual case" the aiding and abetting theory should be treated as having elements similar to the elements of a crime. (Dis. 21.) But the trial record clearly demonstrates that Petitioner was not denied his right to trial by jury as an aider and abettor. The jury was properly instructed on aiding and abetting as a theory for both the attempted robbery and the felony murder, and both convictions were overwhelmingly supported by the evidence.

The prosecutor was entitled to argue the alternative hypotheses of culpability here. Moreover, the jury's general verdict of guilt "was valid so long as it was legally supportable on one of the submitted grounds" regardless of which theory the jury ultimately selected. *Griffin v. United States*, 502 U.S. at 49. A general verdict need not be set aside "merely on the chance . . . that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient." *Id*. at 59-60 (citing *United States v. Townsend*, 924 F.2d 1385, 1414 (7th Cir. 1991)).

Here, neither theory presented to the jury was unconstitutional or legally barred. Neither theory was false or unsupported by the evidence.

And no error was committed at trial. Petitioner received a fair jury trial, at the conclusion of which the jury found him guilty of felony murder after having been given complete and correct instructions on the principles of aiding and abetting, felony murder, and the natural and probable consequences doctrine.

Because the published decision contravenes *Griffin v. United States*, en banc rehearing is necessary to rectify this errant decision.

CONCLUSION

For the foregoing reasons, rehearing en banc should be granted. Alternatively, majority rehearing is warranted.

Dated: January 2, 2014

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
KENNETH C. BYRNE
Supervising Deputy Attorney General

/S/ ERIC E. REYNOLDS
ERIC E. REYNOLDS
Deputy Attorney General
Attorneys for Respondent-Appellee

LA2012604124
51669430.doc

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1
FOR 11-55247

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for majority rehearing/petition for rehearing enbanc: (check (x) applicable option)

[X] Proportionately spaced, has a typeface of 14 points or more and contains 3,620 words (petitions and answers must not exceed 4,200 words).

or

[ ] In compliance with Fed.R.App.P. 32(c) and does not exceed 15 pages.

January 2, 2015
Dated

/s/ Eric E. Reynolds
Eric E. Reynolds
Deputy Attorney General

OPINION

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD TAYLOR, *Petitioner-Appellant,* v. MATTHEW L. CATE, Secretary of the California Department of Corrections and Rehabilitation, *Respondent-Appellee.*	No. 11-55247 D.C. No. 2:09-cv-05267-ODW-OP OPINION

Appeal from the United States District Court
for the Central District of California
Otis D. Wright II, District Judge, Presiding

Argued and Submitted
February 3, 2014—Pasadena, California

Filed November 19, 2014

Before: Mary M. Schroeder and Richard R. Clifton, Circuit Judges, and John R. Tunheim, District Judge.*

Opinion by Judge Schroeder
Partial Concurrence and Partial Dissent by Judge Clifton

---

* The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

SUMMARY**

Habeas Corpus

The panel reversed the district court's judgment denying a habeas corpus petition and remanded with instructions to grant the writ in a case in which Ronald Taylor, who was convicted and originally sentenced for felony murder based on a jury finding that Taylor was the shooter, was resentenced as an aider and abettor after the State of California concluded that he was not the shooter.

The panel held that the right to a jury trial in this case means that Taylor had the right to have a jury decide what conduct he committed, and that resentencing on the basis of facts that the jury did not find, and indeed that conflicted with what the jury did find, violated his Sixth Amendment rights. The panel wrote that there was no trial error that could be subject to harmless error analysis, and concluded that Taylor is entitled to a new trial.

Judge Clifton concurred in part and dissented in part. He agreed that constitutional error arose when the State resentenced Taylor as an aider and abettor. But he disagreed that the correct remedy is to grant the writ and order a retrial. He would hold that the error in this case is amenable to harmless error review, and would remand for further proceedings to determine whether Taylor suffered prejudice.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Case: 11-55247, 01/02/2015, ID: 9368671, DktEntry: 57, Page 3 of 29

COUNSEL

Kurt David Hermansen (argued), Law Office of Kurt David Hermansen, San Diego, California, for Petitioner-Appellant.

Kamala D. Harris, Attorney General of California, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, and Eric E. Reynolds (argued), Deputy Attorney General, Los Angeles, California, for Respondent-Appellee.

OPINION

SCHROEDER, Circuit Judge:

In 1987, two people entered a fast food restaurant, and one of them shot and killed the owner, Lewis Lim. A jury found that petitioner Ronald Taylor was the shooter, and convicted him of felony murder predicated on attempted robbery. The state trial court sentenced Taylor to life without the possibility of parole on the basis of the jury's finding that he was the shooter. In 1996, Taylor told the State that although he had been at the restaurant on the day of the crime, his cousin, Hugh Hayes Jr., was actually the shooter. The State believed Taylor and sought to have him resentenced as an aider and abettor. The state trial court resentenced Taylor as an aider and abettor to a term of imprisonment with the possibility of parole.

Taylor objected to resentencing, contending that the jury had not found him guilty of aiding and abetting the robbery, and that he was entitled to a new trial. The state courts did

not resolve Taylor's claim for procedural reasons, so he petitioned the federal court for a writ of habeas corpus, arguing that the State may not continue to hold him in prison on the theory that he aided and abetted a robbery, when the jury did not find the facts necessary to convict him of aiding and abetting. We agree. The State may not imprison Taylor for a criminal role the jury considered and expressly found he did not play.

BACKGROUND

On November 19, 1987, two men drove into the parking lot of Pioneer Chicken in Sunland, California. The taller of the two men entered the restaurant and requested the restroom key from Rajinder Kaur, an employee working behind the counter. Kaur gave him the key, and he left the restaurant to use the restroom, which had an outside entry, while the shorter of the two men was sitting on the hood of the car. The taller man then reentered the restaurant, walked behind the counter, and while he gave Kaur the key with his left hand, he pulled a gun from his pocket with his right hand. The shorter man had by that time entered the restaurant and was sitting in the dining area.

The owner of the restaurant, Lewis Lim, then came out of the kitchen. While the gunman was distracted by Lim, Kaur went through the kitchen door to summon help. Kaur testified she heard a punch and a gunshot. Lim was later found dead, having been shot in the back of the head. As Kaur was trying to leave, the shorter man hit her on the back and threw her to the ground. The two men fled in the car in which they had arrived.

Case: 11-55247, 11/19/2014, ID: 9318071, DktEntry: 52-1, Page 5 of 29

Police later found the car abandoned in a parking lot. It had been wiped down with brake fluid, but police discovered the palm print of petitioner Ronald Taylor on the driver's side rear window. When Taylor was arrested, he did not tell police the identity of his companion.

In March 1988, the Los Angeles County district attorney filed a three-count information against Taylor. Count 1 charged that Taylor murdered Lim, in violation of California Penal Code § 187(a). Count 1 specially alleged that Taylor committed the murder while in the commission of a robbery, a "special circumstance" under Penal Code § 190.2(a)(17) that was punishable by death or life without parole. Count 1 also specially alleged that Taylor personally used a firearm during the offense under Penal Code §§ 1203.06(a)(1) and 12022.5, and that a principal was armed with a firearm during the offense under Penal Code § 12022(a). Counts 2 and 3 alleged that Taylor committed attempted robbery and grand theft auto.

At Taylor's trial, the prosecutor sought a conviction under a theory of felony murder, because Lim was killed during an attempted robbery. The prosecutor argued that the man who shot Lim was guilty of attempted robbery as a principal, and that the second man was guilty of attempted robbery as an aider and abettor. The trial court instructed the jury on both felony murder and aiding and abetting liability.

There was a dispute at trial about whether Taylor, if he was present, was the shooter or the second man, and about whether the second man intended the robbery. The prosecutor contended that both the shooter and the second man, who was arguably acting as a lookout, knowingly participated in the robbery. The prosecutor therefore argued

that the evidence showed that Taylor was the shooter, but that if the jury disagreed, the jury should find that Taylor actively participated as the lookout. Defense counsel argued that any involvement Taylor had was as the second man and that he did not know that his companion intended to rob the restaurant.

The prosecutor also sought a finding of the "special circumstance"—murder in the commission of a robbery. Under California law, the "special circumstance" can apply to an aider and abettor only if the aider and abettor has the intent to kill. Cal. Penal Code § 190.2(c). The prosecutor acknowledged in closing that this was a felony murder case and that he did not prove that the lookout intended to kill Lim. The prosecutor therefore correctly told the jury that in order to find the "special circumstance," the jury had to find that Taylor was the actual shooter.

The jury found Taylor guilty of murder, attempted robbery, and grand theft auto. The jury found true the "special circumstance" that Taylor committed the murder during the commission of a robbery, and also the allegations that Taylor personally used a firearm and that a principal was armed with a firearm. The jury therefore found that Taylor was the shooter, not the second man.

On the basis of the "special circumstance" finding, the trial court sentenced Taylor to life without the possibility of parole. Cal. Penal Code § 190.2(a)(17). The California Court of Appeal affirmed Taylor's conviction, and the California Supreme Court denied his petition for review in 1991.

In 1996, Taylor contacted the Los Angeles Police Department and reported that although he had been at the

restaurant on the day of the crime, his cousin, Hugh Hayes Jr., was the one who shot Lim. The State investigated Taylor's claim. Taylor's brother told investigators that Hayes admitted to him shortly after the murder that he shot Lim. Hayes's former girlfriend told investigators that she overheard Hayes talking on the phone and admitting to the shooting. Kaur, the restaurant employee working behind the counter, positively identified Hayes in a photographic lineup. Trial testimony established that it was the taller of the two men who shot Lim, and investigators discovered that Hayes is much taller than Taylor.

In January 1999, the State tried Hayes for the murder of Lim, but the jury found him not guilty. Nonetheless, both the original case detective and the officers who investigated Hayes continued to believe that Hayes, not Taylor, was the shooter. In March 1999, the district attorney wrote to the California Board of Prison Terms and requested that Taylor's case be returned to the trial court for resentencing, given the new evidence that Taylor was not the shooter. The Board denied the request.

In 2004, Taylor, acting pro se, filed his fifth state habeas corpus petition, arguing that he was not the shooter and asking for a new trial. In May 2005, while the California Supreme Court was considering Taylor's petition, the district attorney again wrote to the California Department of Corrections and the California Board of Prison Terms to request that they recall Taylor's sentence. The district attorney repeated that new evidence—including the statements of Taylor's brother and Hayes's former girlfriend, as well as Kaur's identification of Hayes—showed that Hayes, not Taylor, was the shooter. The California Supreme Court then instructed the California Attorney General to

submit an informal response to Taylor's petition that addressed the district attorney's requests.

In its informal response, the State suggested that the California Supreme Court issue an order to show cause to the State regarding Taylor's claim that he was not the shooter. This would allow the State to file a statement of non-opposition to Taylor's claim. The State added, however, that even if Taylor was not the shooter, he was an aider and abettor, and urged that he was therefore properly convicted of the underlying crime of felony murder. The State suggested that the trial court strike the "special-circumstance" and firearm-use findings and resentence Taylor as an aider and abettor. The record does not indicate that Taylor, still acting pro se, had an opportunity to respond.

In March 2006, the California Supreme Court issued an order requiring the State to show cause why Taylor was "not factually innocent of the special circumstance and the firearm-use allegation, and why he should not be resentenced." In its response filed in the trial court, the State conceded that Taylor was actually innocent of the "special-circumstance" and firearm-use findings. The State again argued, however, that Taylor was properly convicted of felony murder because the jury could have found that, as the second man, he aided and abetted the attempted robbery. The State urged that the trial court strike the special findings and resentence Taylor as an aider and abettor.

Taylor, still acting pro se, filed a "Motion to Stop All Sentencing," arguing that the trial court could not resentence him as an aider and abettor because the jury never found that he was an aider and abettor. The trial court, however, refused to consider Taylor's argument on the ground that it could not

consider matters outside the scope of the California Supreme Court's order. The court resentenced Taylor as an aider and abettor to twenty-five years to life.

Taylor obtained counsel and appealed. The California Court of Appeal affirmed the trial court's decision. It held that the court correctly declined to address Taylor's claim that he was improperly resentenced for a crime no jury had found he committed, because the Supreme Court's order referred to resentencing. Under California law, the trial court must limit its inquiry upon remand from the Supreme Court to the matters identified in the remand order. *See, e.g.*, *People v. Lewis*, 91 P.3d 928, 936 (Cal. 2004); *People v. Bloyd*, 729 P.2d 802, 820 (Cal. 1987). The appellate court did not "express any view on the merits" of Taylor's claim. The California Supreme Court denied Taylor's petition for review. Taylor then petitioned the California Supreme Court for a writ of habeas corpus, again arguing that he could not be resentenced as an aider and abettor because the jury never found that he was an aider and abettor. The Court denied the petition.

Taylor then turned to federal district court and urged the same ground in a petition for relief under 28 U.S.C. § 2254. The magistrate judge applied the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d)(1), and concluded that the state court's resentencing was a decision entitled to deference, and that it was not unreasonable. The district court adopted the magistrate judge's decision and denied a certificate of appealability. This court issued a certificate of appealability on the following issue: "whether resentencing appellant as an aider and abettor violated appellant's due process and jury trial rights."

DISCUSSION

We review the district court's denial of Taylor's habeas petition de novo. *Gonzalez v. Knowles*, 515 F.3d 1006, 1011 (9th Cir. 2008). The district court said that the state court's rejection of Taylor's claim was reasonable under AEDPA. It treated the resentencing as if it were the product of a reasoned decision on Taylor's due process claim. As the State acknowledges on appeal, however, the district court erred in applying AEDPA's deferential standard of review. The California courts never addressed Taylor's claim that he was denied due process when he was resentenced for an offense no jury found he committed. *See* 28 U.S.C. § 2254(d) (AEDPA's standard of review applies to claims "adjudicated on the merits in State court proceedings"). Because there is no state court decision on the merits, we review Taylor's claim de novo.

It is undisputed that the jury found Taylor shot Lim, but Taylor was resentenced for assisting someone else commit the robbery. Taylor argued he was entitled to a new trial and a jury finding that he was an aider and abettor before he could be sentenced as one. The state trial court agreed with Taylor that, in hindsight, the jury was incorrect and that he was not the shooter, but nonetheless resentenced Taylor as an aider and abettor on the basis of facts the jury did not find. The state courts never even considered the claim that the resentencing violated his right to a jury trial as guaranteed by the Sixth and Fourteenth Amendments.

We conclude that the right to a jury trial in this case means that Taylor had the right to have a jury decide what conduct he committed. The Sixth Amendment and the Due Process Clause "entitle a criminal defendant to a jury

determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (alteration in original) (citation and internal quotation marks omitted); *see also United States v. Gaudin*, 515 U.S. 506, 510 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993). This right is "one of our most vital barriers to governmental arbitrariness," *Reid v. Covert*, 354 U.S. 1, 10 (1957), and "fundamental to the American scheme of justice," *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Resentencing on the basis of facts that the jury did not find, and indeed that conflicted with what the jury did find, violated Taylor's Sixth Amendment rights.

The dissent tries to compare this case to one involving prosecutorial misconduct during trial. Since such misconduct would be reviewed for its effect on the jury under the harmless error standard, *see Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005), and the prosecutor in this case did not even commit misconduct, the dissent asks us to conclude there must be review for harmless error here too. That argument does not come to grips with the problem in this case, which is the absence of any jury verdict to support the sentencing.

The state essentially asks us to ignore what the jury found. The state contends it is sufficient that the jury was instructed on aiding and abetting, along with felony murder. Yet the jury had to choose between two mutually inconsistent roles. To convict Taylor as an aider and abettor under California law, the jury would had to have found that he specifically intended to encourage or assist *someone else* in robbing the restaurant. *People v. Perez*, 113 P.3d 100, 103–05 (Cal. 2005) (noting a person cannot aid and abet

himself). We know the jury did not make this finding because it concluded Taylor was the person who robbed Pioneer Chicken and shot Lim.

Because we know the jury actually found that Taylor was the shooter, the State's reliance on *Griffin v. United States*, 502 U.S. 46 (1991), is misplaced. In *Griffin*, the Court held that when the prosecutor puts multiple theories to a jury, one of which is factually unsupported, the jury may be trusted to have relied on the theory that is supported by the evidence. *Id.* at 56. But in this case, since the prosecutor told the jury it could not find the "special circumstance" true if it found that Taylor was an aider and abettor, we know that the jury found that Taylor was the shooter. We thus cannot assume that the jury relied on aiding and abetting, because the jury's findings reveal it did not.

The actual identity of the shooter was not known to the prosecutor during trial. The State's evidence was properly presented to the jury. There was no trial error that could be subject to harmless error analysis. Neither the Petitioner nor the State has suggested that there was. Harmless error analysis is often utilized where an omission or misinstruction on the law may not have affected the jury verdict. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 15 (1999); *California v. Roy*, 519 U.S. 2, 5–6 (1996); *see also Arizona v. Fulminante*, 499 U.S. 279, 307–08 (1991) ("The common thread connecting these cases is that each involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless . . . ."); *Hedgpeth v. Pulido*, 555 U.S. 57, 60–62 (2008) (holding harmless error analysis appropriate where the jury was

Case: 11-55247 01/02/2015 ID: 9368761 DktEntry: 57 Page 35 of 52

instructed on multiple theories of guilt that would have supported conviction, and one theory which was legally invalid under California law).

The prosecutor in this case presented alternative theories of guilt, each of which was legally valid: that Taylor was the shooter, or that Taylor was an aider and abettor. In this case, unlike *Hedgpeth*, we know which theory the jury relied on. Because the prosecutor sought a penalty that could be imposed only if Taylor were the shooter, the jury was asked to find he was the shooter, and the trial record fully supports that finding. We now have extrinsic evidence that Taylor was not the shooter, but no jury has ever heard it. Taylor's resentencing on the basis of such evidence violated the Sixth Amendment and due process.

The dissent agrees that Taylor should not have been resentenced on the basis of conduct the jury found he did not commit. The dissent says we should remand to the district court to review the trial record for harmless error. Yet no error can be found in the trial record. The error was in the resentencing. Resentencing Taylor for a criminal role on which the jury was instructed, but did not find, violates his Sixth Amendment right to be tried and convicted by a jury. And it does so in a way that is not amenable to harmless error analysis. Taylor is entitled to a new trial.

CONCLUSION

The judgment of the district court is **REVERSED** and the case **REMANDED** with instructions to grant the writ.

CLIFTON, Circuit Judge, concurring in part and dissenting in part:

The State of California concluded that it had sentenced the petitioner in this case, Ronald Taylor, too harshly. Although the State thought he was guilty of murder, the crime for which he had been convicted, it concluded that he was an aider and abettor and not a principal. The State made this determination because Taylor, after denying his guilt at trial, subsequently came clean about his involvement in the crime and fingered the likely principal in an effort to get a lighter sentence. The State eventually came to the same conclusion. Although it was under no obligation to do so, the State then laudably moved to give him that lighter sentence as an aider and abettor.

On Taylor's petition for habeas corpus, the majority rules that the State may not resentence Taylor but must instead retry him or let him go. I expect that it may be difficult for the State to retry him successfully more than a quarter century after the crime was committed, for reasons having nothing to do with Taylor's actual guilt or innocence. Thus, the result of our decision may well be to free Taylor and wipe this crime off his record. By punishing California for doing the right thing in reducing Taylor's sentence, our decision will create a disincentive for states to correct prisoners' sentences in similar situations in the future.

That result is both illogical and unwarranted under the law. I agree with the majority, albeit with some hesitation, that constitutional error arose when the State resentenced Taylor as an aider and abettor, given that the jury originally found that Taylor was the principal. But I disagree that the correct remedy is to grant the writ and order a retrial.

Instead, I would hold that the error in this case is amenable to harmless error review, as is ordinarily the case when an error is discerned on habeas corpus review, and would remand to the district court for further proceedings to determine whether Taylor suffered prejudice.

I. Background

The following facts emerged at trial and, with one small exception noted below, are undisputed in the record before us. On November 19, 1987, petitioner Ronald Taylor and another man stole a car with the intent to use it to commit a robbery. The two men drove to a Pioneer Chicken restaurant in Sunland, California. The first man entered the restaurant and requested the key to the lavatory from Rajinder Kaur, the attendant behind the counter. Kaur gave him the key, and the man went out of the restaurant to the lavatory, which was entered from the outside. The man kept the lavatory door ajar and watched until two customers drove off. The second man was sitting on the hood of the car in which the men had arrived.[1]

The first man then reentered the restaurant, walked behind the counter, and gave Kaur the key back with his left hand while pulling a gun from his pocket with his right. The second man had by then also entered the restaurant and was sitting in the dining area near the restaurant cook. The owner

[1] This is the small exception. During a subsequent preliminary hearing in connection with charges brought against Hugh Hayes, Jr., the person Taylor eventually identified as the actual shooter, Taylor stated that the second man (who Taylor had by then confessed was himself) sat in the car. Wherever the second man was sitting, he was able to see the lavatory, so the difference appears immaterial.

of the restaurant, Lewis Lim, came out of the kitchen. While the gunman was distracted by Lim, Kaur went through the kitchen door to summon help. The gunman then punched Lim and shot him through the head. As Kaur was trying to leave, the second man struck her on the back and threw her to the ground. The two men fled in the stolen car in which they had come. The car was later found wiped down with brake fluid to remove fingerprints, but Taylor's palm print was found on it.

Taylor was arrested and charged with murdering Lim in violation of California Penal Code § 187(a). The State also alleged three special circumstances. First, it alleged that Taylor committed the murder while engaged in the commission of a robbery in violation of Penal Code § 190.2(a)(17). Next, the State alleged that Taylor personally used a firearm during the crime. Third, the State alleged that a principal was armed with a firearm during the offense.

There was a dispute at trial whether Taylor, if he was present at all, was the shooter or the second man. The second man could be held guilty of murder under an aiding and abetting theory, and the jury was instructed on this theory. But, as the prosecutor acknowledged at the time, the jury could not properly find Taylor guilty of the § 190.2(a)(17) special circumstance on an aiding and abetting theory. Under California law, someone found guilty as "an actual killer" does not need to "have had any intent to kill at the time of the commission of the offense" for the special circumstance to be found true, but someone who aided and abetted the murder is subject to the special circumstance only if it is found that he acted with "the intent to kill." Cal. Penal Code § 190.2(b), (c). The prosecutor conceded that he had not proven that the second man had the intent to kill Lim, so the jury could not

convict Taylor of the special circumstance if it found Taylor was the second man. This made a difference for Taylor's sentence: Taylor would only be eligible for life without parole or death if the jury found the special circumstance true. Cal. Penal Code § 190.2(a). Otherwise, Taylor would be eligible for a term of 25 years to life. Cal. Penal Code § 190(a).

At trial, Taylor could not deny, in light of his palm print, that he had helped wipe down the stolen getaway car, but he otherwise tried to minimize his involvement. His attorney argued that he wasn't "necessarily . . . even there at the time of the robbery." If he was there, the attorney argued, he was the second man, and he had no idea that the shooter planned to commit a robbery. Or, the attorney argued to the jury, the shooter might simply have wanted to execute Lim, not commit a robbery. If the jury believed this last theory, then even if it found that Taylor was the shooter, it could not convict Taylor of the first special circumstance, robbery murder.

In the face of the evidence against him, Taylor's defense amounted to a high-risk gamble. Taylor lost. The jury found him guilty of first degree murder, attempted robbery, and the unlawful taking of a vehicle. The jury also found that the murder was committed while Taylor was engaged in an attempted robbery and that Taylor personally used a firearm.

After the verdict was rendered but before the sentence was imposed, Taylor told his lawyer that he was present during the robbery but that someone else was the shooter. Taylor filed a motion for new trial or, in the alternative, sought to strike the finding that he was the shooter and had personally used a firearm. The trial court denied that motion,

and he was sentenced to life without parole. The verdict was upheld on appeal, and the California Supreme Court denied Taylor's petition for review.

Seven years later, hoping that "somehow [he wouldn't] die in prison," Taylor tried again to convince the State that he had not been the actual killer, identifying his cousin, Hugh Hayes, Jr., as the shooter. The Los Angeles Police Department and Los Angeles County District Attorney's Office concluded that was true, and the district attorney's office filed an information charging Hayes with murder. Taylor testified at Hayes's preliminary hearing that he and Hayes stole the car and drove around with a loaded gun looking for a place to rob, and that he had been with Hayes at the Pioneer Chicken during the attempted robbery. In 1999, Hayes was tried for the murder but was acquitted. There was, therefore, no adjudication inconsistent with the jury verdict finding that Taylor was the actual shooter. Nonetheless, that same year, the district attorney attempted to have Taylor's sentence recalled but failed.

Even though the State had not managed to convict the man it thought was the actual killer, the district attorney still supported the effort to reduce Taylor's sentence. In 2006, the California Supreme Court issued an order to show cause why Taylor should not be resentenced. The State agreed that Taylor should be resentenced, and Taylor was resentenced to 25 years to life as an aider and abettor, plus an additional six years for his prior prison time and felony record.

In 2008, after the resentencing and an unsuccessful appeal, Taylor filed another habeas corpus petition with the California Supreme Court. Taylor's argument was that the jury had already found factually that he was not the aider and

abettor in Lim's murder; because it had determined that he was the principal, so he could not be sentenced and held as an aider and abettor. The petition was summarily denied.

Taylor filed a habeas petition in federal district court. The district court, following the magistrate judge's recommendation, denied relief. But the majority has now accepted Taylor's argument and has ordered the writ to be granted, requiring the State either to retry Taylor or free him.

II. Discussion

As discussed in detail below, our opinion here leads to a result that seems to me strange and even a bit perverse. The evidence that Taylor aided and abetted murder was very strong. It seems unlikely that he has actually been prejudiced. Yet, the majority's remedy may well lead to Taylor being freed and the conviction wiped from his record. At a minimum, it imposes on the State the burden of trying to convict Taylor of a crime committed long ago, following a fair trial in which he could have been honest about his role but instead gambled for a full acquittal and lost. Moreover, this case has only arisen because California moved to resentence Taylor. Otherwise, Taylor would have had no basis for obtaining the writ. We should not punish California for doing the right thing, nor should we create an incentive for states in the future to avoid doing the right thing.

In my view, this case does not represent the kind of "extreme malfunction[] in [a] state criminal justice system[]" that may justify granting federal habeas relief. *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring in judgment)). There is no malfunction of any

kind, let alone an extreme one, when a state voluntarily moves to resentence a prisoner in response to that prisoner's belated confession.

It does not have to be like this. The Sixth and Fourteenth Amendments do not compel this illogical result.

A. The Sixth Amendment violation

Although the issue is not free from doubt, I agree with the majority that there has been a Sixth Amendment violation in this case. This violation stems from California's resentencing of Taylor under an aiding and abetting theory when the jury did not find all the "elements" of aiding and abetting. *See Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (reaffirming that a criminal defendant is entitled to "a jury determination that [he] is guilty of every *element* of the crime with which he is charged, beyond a reasonable doubt" (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)) (emphasis added)). I therefore concur in part with the majority.

I say that the issue is not free from doubt, however, because the federal courts have declined to treat the "elements" of aiding and abetting liability like the elements of a crime for all purposes. It is not *Apprendi* error to fail to allege the elements of aiding and abetting in an indictment. *See, e.g.*, *United States v. Schuh*, 289 F.3d 968, 976 (7th Cir. 2002). This is because aiding and abetting is not itself a substantive offense. *See United States v. Armstrong*, 909 F.2d 1238, 1241 (9th Cir. 1990). Rather, aiding and abetting is only a theory of criminal liability and does not have elements.

Normally, the failure of a jury to "find" a particular theory is not an issue that arises on appellate review. Jurors need not agree on a single theory of liability. *Schad v. Arizona*, 501 U.S. 624, 645 (1991). And jurors are presumed to be capable of determining which theory of liability, if any, fits the facts of a particular case. *Griffin v. United States*, 502 U.S. 46, 59 (1991). The issue of whether a jury has "found" a theory is usually not a question for an appellate court.

Nevertheless, I am persuaded that, in this unusual case, the failure of the jury to convict Taylor on an aiding and abetting theory should be treated like the failure of a jury to find an element of a crime. As the majority points out, we know that the jury settled on a theory that Taylor was the shooter, not an aider and abettor. We have previously considered the failure of a jury to find the elements of aiding and abetting liability as similar to the failure to find the elements of a crime. *See, e.g.*, *Martinez v. Borg*, 937 F.2d 422, 423 (9th Cir. 1991) (holding that "*Beeman* error is constitutional error because the jury did not have the opportunity to find each element of the crime beyond a reasonable doubt," and going on to apply harmless error review) (citing *People v. Beeman*, 674 P.2d 1318 (Cal. 1984)). Therefore, I agree that there is a constitutional violation in this case.

B. The proper remedy

I respectfully disagree with the majority, however, that the correct remedy for this constitutional violation is the granting of the writ. This resentencing error flowed directly from an inadvertent error by the State at Taylor's trial, as well as from Taylor's high-risk defense gamble. We should

therefore consider whether this error, like other trial errors, is amenable to review for harmless error.

When a prisoner challenges his sentence or conviction on collateral attack in federal court, and the court concludes that his constitutional rights have been infringed, the error falls into one of two categories. Only a "very limited" number of constitutional errors are deemed "structural" and require automatic reversal. *Johnson v. United States*, 520 U.S. 461, 468 (1997). These include grave defects tainting the entire process, such as a biased judge or the total deprivation of the right to counsel. *See id.* at 468–69 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Tumey v. Ohio*, 273 U.S. 510 (1927)). If the error does not fall into this very limited category, it is a "trial error" and is subject to harmlessness analysis, whereby the court is required to determine whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). *See generally Arizona v. Fulminante*, 499 U.S. 279, 306–12 (1991) (dividing errors into "structural defects" and "trial errors").

A "trial error" is an "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 307–08. It is clear that, even though Taylor's trial was fair, there was an "error" in the presentation of the case to the jury. The State presented a theory that turned out to be wrong. This theory led the jury wrongly to find that Taylor was the actual shooter.

That was a result that everyone today agrees was incorrect. If the State had not argued to the jury that Taylor was the shooter, the jury would not have found that he was. I therefore disagree with the majority that "[t]here was no trial error that could be subject to harmless error analysis." Maj. op. at 12. The trial error was that the State presented a theory that turned out to be wrong.

The only reason the majority reaches the conclusion that this was not a "trial error" is that the State was not aware of its error *at the time*. *See* Maj. op. at 12 ("The actual identity of the shooter was not known to the prosecutor during trial."). But this does not make a difference in distinguishing between trial errors and structural defects. For that purpose, an error is an error, regardless of whether someone is aware of it or not. The error was no more "structural" because it was unknowingly committed.

The majority assumes, in effect, that the error was structural because it does not fit neatly into an established category of trial error. That is backwards. It is the category of structural errors that is the exception, not the rule.

Suppose, in contrast to the actual facts here, the prosecutor had actually known that Taylor was not the actual shooter but argued and presented evidence to that effect to the jury anyway. That would be trial error subject to harmless error review. We have held that it is not structural error for a prosecutor *knowingly* to put a false theory to a jury. *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc). That kind of behavior by the prosecutor—described by us in *Hayes* as "pernicious" and surely worse than what happened here—would be considered a trial error and would not lead to an automatic reversal. *Id.* at 981 (quoting *Willhoite v.*

Vasquez, 921 F.2d 247, 251 (9th Cir. 1990) (Trott, J., concurring)).

But because the State did not knowingly present a factually false theory in this case—did not act perniciously here—the majority concludes that the error here was structural and does require an automatic reversal, without requiring Taylor to demonstrate actual prejudice. That result is counterintuitive, as well as at odds with precedent. It makes no sense to disregard the customary requirement for actual prejudice because the State unknowingly presented a false theory at trial. Logic compels that we conclude that the error in this case was a trial error.

Supreme Court precedent also leads to this conclusion. The Court has established that, even on direct review, a failure by the jury to find an element of a crime is susceptible to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 11 (1999). The failure of the jury to find the "elements" of aiding and abetting should not render the resentencing error structural, as the majority concludes.

The majority's approach is all the weaker because, unlike *Neder*, this case is on collateral and not direct review. As noted above, we have the power to grant the writ only as a "guard against extreme malfunctions in the state criminal justice systems." *Richter*, 131 S. Ct. at 786 (quoting *Jackson*, 443 U.S. at 332 n.5 (Stevens, J., concurring in judgment)). And there is no malfunction when the State willingly chooses to reduce a prisoner's sentence on account of his tardy confession.

There is analogous precedent from the Supreme Court on which we should rely. The case most similar to this situation

is *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (per curiam). California prosecuted Pulido for the same crime as here, aiding and abetting felony murder. The State presented two inconsistent theories: first, that Pulido formed the intent to aid and abet the underlying felony *before* the murder; and second, that he formed the necessary intent *after* the murder. *Pulido*, 555 U.S. at 59. Under California law, the second theory was invalid.

On habeas review, our court held that the error was structural. *Pulido v. Chrones*, 487 F.3d 669 (9th Cir. 2007) (per curiam). The Supreme Court reversed us. Even though one of the theories of aiding and abetting was invalid as a matter of law, harmless error review still applied.

Here, as in *Pulido*, the State put forward two mutually inconsistent theories of the defendant's guilt: that Taylor was the shooter or that he was the second man. We know that the jury adopted one of these theories, that he was the actual shooter, and implicitly rejected the other. The Supreme Court reversed us in *Pulido* because it would be "patently illogical" to "draw[] a distinction between alternative-theory error and the instructional error[] in *Neder*." 555 U.S. at 61 (internal quotation marks omitted). All that separates this case from *Pulido* is that one of the theories here was wrong as a matter of fact, not of law.

When a jury errs by accepting an incorrect legal theory, we apply harmless error review. In this rare situation when we know that the prosecutor caused the jury to credit the wrong evidence, there is no reason to apply a more stringent standard.

Comparing this case to trial error cases is enough to show that the error in this case should be subject to harmlessness review. Comparing this situation to structural errors leads to the same result. In fact, because structural defects are "the exception and not the rule," the majority should bear the burden of explaining why the resentencing error in this case warrants automatic reversal. *Pulido*, 555 U.S. 61. It cannot do so.

The Supreme Court has held that an error is structural when it "necessarily render[s] a trial fundamentally unfair" and "vitiates *all* the jury's findings." *Neder*, 527 U.S. at 11 (quoting *Rose v. Clark*, 478 U.S. 570, 577 (1986), and *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993)). Taylor's trial and resentencing were fair. The jury's most important findings remained intact, even considering Taylor's revised, post-conviction version of events. It is hard to see the "fundamental unfairness" of a trial process where the defendant gambles on being acquitted, the jury convicts him of a crime in which he is indisputably involved, and the State then invests considerable effort to reduce his sentence in response to the defendant's post-trial admissions.

California's decision to give Taylor the benefit of his belated confession did not "vitiate *all* the jury's findings." The most important findings stand: Taylor was present at the scene of the crime and was involved in an attempted robbery in which Lim was murdered. The only finding that is vitiated is that Taylor pulled the trigger. This is far short of what is required for us to find structural error.

C. The consequences of the majority's remedy

As noted above, to obtain habeas relief in federal court a petitioner must ordinarily demonstrate that the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 631. By concluding that the error here was structural, the majority opinion relieves Taylor of that burden. That probably makes a critical difference. I would remand to the district court for the parties to address that question and for the district court to make a factual determination. Based on the record as it appears to me at this point, however, the evidence against Taylor appeared strong, and I think it would be an uphill climb for him to make that showing.

Under California law, an aider and abettor must "share the specific intent of the perpetrator" of a crime in order to be found guilty. *Beeman*, 674 P.2d at 1326. In this case, Taylor would be guilty of aiding and abetting felony murder if he knew that the gunman entered Pioneer Chicken in order to rob it. It is doubtful that the jury would have concluded otherwise. Indeed, Taylor has since admitted that he and the gunman intended to rob a fast food restaurant that day and stole a car for that purpose. He admitted that they had robbed five or six restaurants in the previous month. Taylor's sole defense would presumably be that he didn't know that Hayes was planning to rob that particular restaurant. This seems extraordinarily weak, and the proposition that he could have persuaded the jury that his companion did not intend to rob the Pioneer Chicken seems fanciful. At oral argument before us, Taylor's counsel conceded that the argument that he was

not planning to rob the Pioneer Chicken was flimsy. We should not pretend otherwise.[2]

But retrying Taylor at this point would not be easy. The killing took place in 1987, more than a quarter century ago. Witnesses lose their memories, disappear, or die. Even with Taylor's testimony, Hayes was acquitted by a jury when he was tried years after the events. In addition, Taylor could have an argument that a retrial on an aiding and abetting theory would be barred under the Double Jeopardy Clause. *See, e.g.*, *Ashe v. Swenson*, 397 U.S. 436 (1970); *Santamaria v. Horsley*, 133 F.3d 1242 (9th Cir. 1998) (en banc). Taylor's counsel has understandably been quiet about this argument, responding to inquiry at oral argument by saying only that the question is not currently before this court. At a minimum, the majority opinion imposes on the State the burden of trying to convict Taylor of a crime committed long ago, following a fair trial in which he had could have been honest about his role but instead gambled for a full acquittal and lost.

This result is all the more bizarre considering how this case comes before us. Taylor objects that the State committed error in his resentencing. If California had not

[2] Moreover, the crime underlying the felony murder, attempted robbery, may have been complete as soon as the gunman went into the lavatory to case the joint. In California, attempt may consist of "a direct but ineffectual act" done toward the commission of a crime. Cal. Jury Instr. 6.00; *see, e.g.*, *People v. Dillon*, 668 P.2d 697, 704 (Cal. 1983) (substantial evidence supported the jury's finding that the defendant committed attempted robbery, where the defendant and his companions "watched for their opportunity" to rob a marijuana field without entering it). There was testimony in the first trial that Taylor watched the gunman go into the lavatory and keep the door ajar, so he would have known that the gunman planned a robbery.

moved to resentence him, this case would not be here. Taylor's only option would be to plead that, contrary to the jury verdict, he was actually innocent of the personal use of a firearm special circumstance. But this claim, without any supporting constitutional challenge, would likely fail. *See Herrera v. Collins*, 506 U.S. 390, 404–05 (1993).

To avoid all of this, the State could simply have declined to resentence Taylor. But we should be glad that it did. It would have been wrong for the State to hold Taylor on a theory of personal liability when it sought to convict Hayes under the same theory. "[T]here is surely something troubling about having the same sovereign, particularly acting through the same prosecutor, urge upon two juries a conviction of both A *and* B, when it is clear that the crime was committed by either A *or* B." *Thompson v. Calderon*, 120 F.3d 1045, 1070 (9th Cir. 1997) (en banc) (Kozinski, J., dissenting), *rev'd*, 523 U.S. 538 (1998).

We should not punish the State of California for doing the right thing in this case by forcing it to retry Taylor or free him. Neither should we discourage other prosecutors from doing the right thing in the future. Justice is not served by the result reached here.

I respectfully dissent.

CERTIFICATE OF SERVICE

Case Name: **Ronald Taylor v. Matthew Cate** No. **11-55247**

I hereby certify that on January 2, 2015, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

PETITION FOR REHEARING

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 2, 2015, at Los Angeles, California.

Z. Salena	s/ *Z. Salena*
Declarant	Signature

LA2012604124
51669527.doc

U.S.C.A. No. 11–55247

In the United States Court of Appeals

for the Ninth Circuit

Ronald Taylor,
Petitioner-Appellant,

v.

Matthew L. Cate, Secretary of the California Department of Corrections and Rehabilitation,
Respondent-Appellee

Appeal from the United States District Court
for the Central District of California
Honorable Otis D. Wright II, District Judge

Response to Petition for Rehearing and Suggestion for Rehearing En Banc

---

Kurt David Hermansen
Counsel for Defendant-Appellant
Law Office of Kurt David Hermansen
550 West C Street Suite 580
San Diego, CA 92101
KDH@KurtDavidHermansen.com
Tel.: (619) 236–8300
Fax: (619) 315–0436

Table of Contents

Page

Table of Authorities

Page

Cases

Constitutional Provisions

United States Court of Appeals
for the Ninth Circuit

Ronald Taylor, *Petitioner-Appellant*, v. Matthew L. Cate, Secretary of the California Department of Corrections and Rehabilitation, *Respondent-Appellee*.	No. 11–55247 D.C. No. 2:09-cv-05267-ODW-OP Central District of California, Los Angeles

Introduction

In its Petition for Rehearing, the State seeks en banc rehearing of the panel's November 19, 2014 opinion.[1/] That opinion found that Mr. Taylor's 2006 resentencing violated the Sixth Amendment, warranting reversal.

En banc rehearing is not warranted because this case is sui generis. And the majority's opinion correctly resolves this one-of-a-kind case. Further, the unique circumstances that arose here are unlikely to recur, and therefore raise no important questions.

[1/] *See Taylor v. Cate*, 772 F.3d 842 (9th Cir. 2014).

Factual Correction

Mr. Taylor adopts the majority opinion's factual background, which correctly summarizes the relevant facts.[2/] The Petition for Rehearing, however, makes two factual errors that warrant correction.

First, the State falsely asserts that Mr. Taylor's jury returned a general verdict.[3/] In fact, the jury returned a special verdict on Count 1. As the majority opinion correctly explains:

> Count 1 charged that Taylor murdered Lim .... Count 1 specially alleged that Taylor committed the murder while in the commission of a robbery, a "special circumstance" ... that was punishable by death or life without parole. Count 1 also specially alleged that Taylor personally used a firearm during the offense ..., and that a principal was armed with a firearm during the offense ....[4/]

In closing, the prosecutor explained that, under California law, "to find the 'special circumstance,' the jury had to find that Taylor

---

[2/] *Id.* at 844–46.
[3/] PFR 15. "PFR" stands for Petition for Rehearing.
[4/] *Taylor*, 772 F.3d at 844.

was the actual shooter."[5/] The jury so found. Although the prosecutor presented two theories — (1) that Mr. Taylor was the shooter, and (2) alternatively, that he was a second man who aided and abetted the shooter — the jury found that Mr. Taylor was the shooter.[6/]

The jury's guilty verdict on Count 1 contained special true findings on each special allegation, including the personal-firearm-use enhancement.[7/] As the majority opinion explains, the special verdict proves that "[t]he jury therefore found that Taylor was the shooter, not the second man."[8/] Hence, the State misleads this Court by falsely asserting that the jury returned a general verdict.

Second, the State erroneously claims that Mr. Taylor's liability as an aider and abettor is undisputed.[9/] This claim is false. Mr. Taylor maintains that, although he was the second man, he didn't aid

---

[5/] *Id.* at 845.

[6/] *Id.*

[7/] *See* Exhibit A, Jury Verdict in *People v. Taylor*, Los Angeles County Superior Court, case no. A710145. *See* 2ER 16.

[8/] *Taylor*, 772 F.3d at 845.

[9/] PFR 3.

and abet the shooter.[10/] And no jury has found him guilty of aiding and abetting. Thus, Mr. Taylor's liability is disputed.

Response to the Petition

1. The panel's Sixth-Amendment-error finding doesn't conflict with any Supreme Court authority.

The State argues that en banc rehearing is warranted because the panel's Sixth-Amendment-error finding conflicts with *Griffin v. United States*.[11/] Rehearing is unwarranted for two reasons. First, the Sixth-Amendment-error finding follows the Supreme Court's decisions. Second, the finding doesn't conflict with *Griffin*.

a. The panel's unanimous Sixth-Amendment-error finding follows *Apprendi v. New Jersey* and *Alleyne v. United States*.

Here, the three judge panel unanimously found that Mr. Taylor's 2006 resentencing — based on facts not found by a jury — violated the Sixth Amendment.[12/] The majority opinion's reasoning is unassailable:

[10/] *See Taylor*, 772 F.3d at 846.
[11/] 502 U.S. 46 (1991); PFR 13.
[12/] *Taylor*, 772 F.3d at 848; *id.* at 852 (Clifton, J., concurring and partially dissenting).

> It is undisputed that the jury found Taylor shot Lim, but Taylor was resentenced for assisting someone else commit the robbery …. The state trial court agreed with Taylor that, in hindsight, the jury was incorrect and that he was not the shooter, but nonetheless resentenced Taylor as an aider and abettor on the basis of facts the jury did not find.…
>
> We conclude that the right to a jury trial in this case means that Taylor had the right to have a jury decide what conduct he committed. The Sixth Amendment and the Due Process Clause "entitle a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 477 … (2000) …. Resentencing on the basis of facts that the jury did not find, and indeed that conflicted with what the jury did find, violated Taylor's Sixth Amendment rights.[13/]

The panel's unanimous finding is compelled by *Apprendi* and *Alleyne v. United States*.[14/] In 2013, in *Alleyne*, the Supreme Court held that the Sixth Amendment requires that any fact that exposes the accused to increased punishment "necessarily forms a constituent part of a new offense and must be submitted to the jury."[15/]

[13/] *Taylor*, 772 F.3d at 847.
[14/] 133 S. Ct. 2151 (2013).
[15/] *Id.* at 2162.

In California, aiding and abetting has three elements: (1) knowledge of the perpetrator's intent, (2) intent to encourage or assist the perpetrator, and (3) words or acts that assist or encourage the perpetrator.[16/] Since an accused cannot aid and abet himself, there must be proof that the accused assisted another person.[17/] As this Court held in 1991, in *Martinez v. Borg*,[18/] a conviction premised solely on aiding and abetting requires a unanimous jury finding on aiding-and-abetting's elements.

Here, the 1989 jury unanimously found that Mr. Taylor was the shooter.[19/] But in 2006, the State conceded, and the state trial court found, that new evidence proved Mr. Taylor was not the shooter. Then, based solely on an unproved aiding-and-abetting theory, the state trial court resentenced Mr. Taylor for the murder.[20/]

Because Mr. Taylor's resentencing rested solely on the unproved aiding-and-abetting theory, the Sixth Amendment demands that a

---

[16/] *People v. Beeman*, 674 P.2d 1318, 1326 (Cal. 1984).
[17/] *People v. Perez*, 113 P.3d 100, 103–05 (Cal. 2005).
[18/] 937 F.2d 422, 423–24 (9th Cir. 1991).
[19/] *Taylor*, 772 F.3d at 847–48.
[20/] *Id.* at 846.

jury find aiding and abetting's elements beyond a reasonable doubt.[21] As the majority opinion explains, "[w]e now have extrinsic evidence that Taylor was not the shooter, but no jury has ever heard it. Taylor's resentencing on the basis of such evidence violated the Sixth Amendment and due process."[22] Therefore, Mr. Taylor's 2006 resentencing violated the Sixth Amendment under *Alleyne*.[23]

b. The panel's opinion doesn't conflict with *Griffin v. United States* because Mr. Taylor's jury returned a special verdict, not a general verdict.

In 1991, in *Griffin*, the Supreme Court held that a *general* verdict may be affirmed if one theory lacks factual support, so long as sufficient evidence supports an alternative theory.[24] *Griffin* involved "a general verdict on a multiple-object conspiracy charge," where one object wasn't supported by sufficient evidence.[25] The Court held that "when the prosecutor puts multiple theories to a jury, one of which

---

[21] *Alleyne*, 133 S. Ct. at 2162; *Martinez*, 937 F.3d at 423–24.
[22] *Taylor*, 772 F.3d at 848.
[23] 133 S. Ct. at 2162.
[24] *Griffin*, 502 U.S. at 56.
[25] *Id.* at 47.

is factually unsupported, the jury may be trusted to have relied on the theory that is supported by the evidence."[26/]

Here, the majority opinion correctly distinguishes *Griffin* because, unlike in *Griffin*, no court can assume that Mr. Taylor's jury relied on aiding and abetting. Mr. Taylor's jury explicitly found that Mr. Taylor was the shooter.[27/] As the majority opinion explains:

> [I]n this case, since the prosecutor told the jury it could not find the "special circumstance" true if it found that Taylor was an aider and abettor, we know that the jury found that Taylor was the shooter. We thus cannot assume [like in *Griffin*] that the jury relied on aiding and abetting, because the jury's findings reveal it did not.[28/]

Moreover, the jury's finding that Mr. Taylor was the shooter conflicts with the aiding and abetting theory, since a shooter cannot aid and abet himself. In sum, because the record proves that the jury relied on the actual-shooter theory, *Griffin* is inapposite.

En banc rehearing is unwarranted. The panel's unanimous Sixth-Amendment-error finding is compelled by *Alleyne*. And that finding

---

[26/] *Taylor*, 772 F.3d at 848 (citing *Griffin*, 502 U.S. at 56).
[27/] *Id.* at 847–48; Ex. A.
[28/] *Taylor*, 772 F.3d at 848.

doesn't conflict with *Griffin*. Moreover, the unique facts that led to the Sixth Amendment error here are unlikely to recur. Thus, rehearing is unwarranted.

2. The majority's decision to reverse follows Supreme Court authority regarding the distinction between trial error and structural error.

In 1991, in *Arizona v. Fulminante*,[29/] the Supreme Court explained that "trial error" is an error that "occurr[s] during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other [trial] evidence ...."[30/] In 2014, in *Glebe v. Frost*,[31/] the Supreme Court stated that "[o]nly the rare type of error — in general, one that infects the entire trial process and necessarily renders it fundamentally unfair — requires automatic reversal."[32/]

The State asserts that the majority opinion errs by treating the Sixth Amendment sentencing violation as structural error. Counter

---

[29/] 499 U.S. 279 (1991).
[30/] *Id.* at 307–08.
[31/] 135 S. Ct. 429 (2014).
[32/] *Id.* at 430–31 (internal quotations and alterations omitted).

factually, the State alleges that an error occurred at trial — specifically, "the prosecutor's good faith presentation of a theory of liability that was later determined to be wrong."[33/] The State's assertion and allegation fail.

a. The State forfeited its trial-error claim by raising it for the first time in the Petition for Rehearing.

The State has conceded — in its district court answer,[34/] its appellee's brief,[35/] and the Petition for Rehearing [36/] — that "no error was committed at [Mr. Taylor's 1989] trial." Now, for the first time, the State takes a new position by claiming that an error occurred at trial. But as the majority opinion states, "[t]here was no trial error that could be subject to harmless error analysis. Neither the Petitioner nor the State has suggested that there was."[37/]

[33/] PFR 8.
[34/] 1ER 34.
[35/] Appellee's Brief at p. 16.
[36/] PFR 16.
[37/] *Taylor*, 772 F.3d at 848.

This Court should not address the State's belated trial-error claim. In 2014, *United States v. Hernandez-Estrada*,[38/] this Court held that it generally will not address claims raised for the first time in a petition for rehearing. Here, the State hasn't previously raised its trial-error claim. In fact, it has consistently taken — and still maintains — the inconsistent position that no error was committed at trial. Thus, this Court should not address the State's new and inconsistent claim.

b. Further, this Court should judicially estop the State from raising its clearly inconsistent trial-error claim.

In 2001, in *New Hampshire v. Maine*,[39/] the Supreme Court explained that judicial estoppel bars litigants from raising claims where: (1) the claim is "'clearly inconsistent' with its earlier position"; (2) a court has accepted the party's earlier position; and (3) asserting the new, inconsistent claim would prejudice the opposing party.[40/] Here, the State's trial-error claim is inconsistent with its

---

[38/] 749 F.3d 1154, 1159–60 (9th Cir. 2014).
[39/] 532 U.S. 742 (2001).
[40/] *Id.* at 749–51.

earlier — and present — position that "no error was committed at trial."[41/] The panel's opinion accepts that position, explaining that "[t]here was no trial error that could be subject to harmless error analysis."[42/] And Mr. Taylor is prejudiced by the State's delay in raising its trial-error claim, since he has been denied an opportunity to fully brief his opposition to that claim.[43/] Thus, this Court should estop the State from raising its inconsistent trial-error claim.

c. The State's belated trial-error claim lacks support.

The State has cited no authority directly supporting its new trial-error claim — i.e., the "prosecutor's good faith presentation of a theory of liability that was later determined to be wrong."[44/] And Mr. Taylor is not aware of any.

The State tries to support its trial-error claim by citing inapposite decisions involving various trial errors.[45/] But unlike those cases,

---

[41/] PFR 16; 1ER 34; Appellee's Brief at p. 16.

[42/] *Taylor*, 772 F.3d at 848.

[43/] This Court's January 5, 2015 order limits this response to 15 pages.

[44/] PFR 8.

[45/] PFR 9–12.

Mr. Taylor's trial didn't suffer from instructional error,[46] *Brady* error,[47] or prosecutorial misconduct.[48] Thus, the State's citations don't support its trial-error claim.

d. Supreme Court authority supports the majority opinion's holding that this case's unique facts require reversal.

To the extent that instructional-error cases are instructive in the Sixth Amendment context, they confirm that the error here was structural. In *Sullivan v. Louisiana*,[49] the Supreme Court held that an instructional error that "vitiates *all* the jury's findings" cannot be harmless.[50] Then, in 1999, in *Neder v. United States*,[51] the Supreme Court reaffirmed *Sullivan*, explaining that while failing to instruct on a single element *may* be harmless, an instructional error that invalidates all the jury's findings requires automatic reversal.

---

[46] *Hedgpeth v. Pulido*, 555 U.S. 57 (2008).

[47] *Strickler v. Greene*, 527 U.S. 263 (1999); *see also Brady v. Maryland*, 373 U.S. 83 (1963).

[48] *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005) (en banc).

[49] 508 U.S. 275 (1993).

[50] *Id.* at 281 (emphasis in original).

[51] 527 U.S. 1, 10–11 (1999).

That is the case here. The jury found that Mr. Taylor was the shooter, and that the shooter was guilty of murder.[52/] In 2006, the state trial court — with the prosecution's agreement and support — found that the jury was wrong.[53/] The jury's verdict with special findings was vitiated by Mr. Taylor's exoneration. Hence, Mr. Taylor's post-exoneration resentencing was structural error under *Sullivan* and *Neder*.

In the majority opinion's words, "the problem in this case … is the absence of any jury verdict to support the sentencing."[54/] No jury found that Mr. Taylor was the second man. And no jury has found that the second man was guilty as an aider and abettor. Instead, the resentencing judge found that Mr. Taylor was the second man, and that he was guilty as an aider and abettor.

Since the majority opinion's finding of structural error follows the Supreme Court's decisions, en banc rehearing is unwarranted.

[52/] *Taylor*, 772 F.3d at 847–48; Ex. A.
[53/] *Taylor*, 772 F.3d at 846.
[54/] *Id.* at 847.

Conclusion

This case does not present any important questions warranting rehearing or en banc rehearing. The majority correctly found that Mr. Taylor's 2006 resentencing based on facts not found by a jury violated the Sixth Amendment, entitling him to a new trial. This case is sui generis, involving circumstances that will likely never recur. And the State's absurd complaint that reversal here produces a disincentive for prosecutors to disclose exonerating evidence (i.e., unethical prosecutors will now hide evidence of actual innocence) is no reason to deny Mr. Taylor his Sixth Amendment jury trial right. Therefore, rehearing is unwarranted.

January 26, 2015

Respectfully submitted,
s/Kurt David Hermansen

Counsel for Defendant-Appellant

Certificate of Compliance
Under Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 40–1
for Case Number **11–55247**

I certify that: (check (x) appropriate option(s))

___ 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/ cross-appeal brief is:

___ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

or is

___ Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

_X_ 2. The attached brief is not subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because:

___ This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

or

_X_ This brief complies with a page or size-volume limitation established by separate court order dated January 5, 2015 (Dkt. No. 58) and is

_X_ Proportionately spaced, has a typeface of 14 points or more and contains __ 2,415 __ words.

Executed on: January 26, 2015

Respectfully submitted,
s/Kurt David Hermansen

Counsel for Defendant-Appellant

Z:\Taylor, Ronald\Taylor 11-55247\Briefs\Response to PFR\2015.01.26.Response to PFR.wpd

****

Certificate of Service When Not All Case Participants Are CM/ECF Participants

I hereby certify that on January 26, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Ronald Taylor, C77647
California Correctional Institute
P.O. Box 608
Tehachapi, CA 93581

s/Kurt David Hermansen

11-55247

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD TAYLOR,

Petitioner-Appellant,

v.

MATTHEW CATE, Secretary of the California Department of Corrections and Rehabilitation,

Respondent-Appellee.

On Appeal from the United States District Court
for the Central District of California

Case No. CV 09-5267-ODW
The Honorable Otis D. Wright, II, Judge

SUPPLEMENTAL APPELLEE'S BRIEF

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
KENNETH C. BYRNE
Supervising Deputy Attorney General
ERIC E. REYNOLDS
Deputy Attorney General
State Bar No. 227469
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2868
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov

Attorneys for Respondent-Appellee

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

INTRODUCTION

In accordance with this Court's Order dated June 15, 2015, Respondent hereby submits this supplemental brief addressing the question of "whether, assuming arguendo that a violation of the Sixth Amendment was committed in this case, the error is subject to harmless error analysis under *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) and, if so, whether the alleged error was harmless." As discussed below, any error in this case was trial error, and, therefore, subject to harmless error analysis under *Brecht*. The evidence at trial established beyond a reasonable doubt that Petitioner was one of the two men who participated in the attempted robbery of the restaurant. The evidence also conclusively established that both men—the shooter and the lookout—were equally liable for the murder of the restaurant owner. Thus, any Sixth Amendment error in this case did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637.

ARGUMENT

I. ANY ALLEGED SIXTH AMENDMENT VIOLATION IN THIS CASE IS TRIAL ERROR SUBJECT TO HARMLESS ERROR ANALYSIS UNDER *BRECHT*

"*Most* constitutional mistakes call for reversal only if the government cannot demonstrate harmlessness." *Glebe v. Frost*, __ U.S. __, 135 S. Ct.

429, 430, 190 L. Ed. 2d 317 (2014) (emphasis original, citing *Neder v. United States*, 527 U.S. 1, 8 (1999)). "Only the rare type of error—in general, one that "'infect[s] the entire trial process'" and "'necessarily render[s] [it] fundamentally unfair'"—requires automatic reversal. *Id*; *see also Davis v. Ayala*, __ U.S. __, 135 S. Ct. 2187, 2197 (2015).

Here, the majority's opinion cannot be reconciled with the Supreme Court's instructions to only find structural error in rare instances. The Supreme Court has "repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, most constitutional errors can be harmless." *Washington v. Recuenco*, 548 U.S. 212, 218 (2006) (internal quotation marks omitted). "Only in rare cases has th[e] Court held that an error is structural, and thus requires automatic reversal." *Id.* These "rare cases" involve the complete denial of counsel, a biased trial judge, a defective instruction defining proof beyond a reasonable doubt, denial of self-representation at trial, and racial discrimination in the selection of the grand jury. *Id.* at 218-19 n.2.

The Supreme Court has determined that "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Washington v. Recuenco*, 548 U.S. at 218 (internal

citations and quotations omitted). Trial errors subject to harmless-error review include: jury instructions that misstate an element of the offense; improper comment on defendant's silence at trial in violation of the Fifth Amendment; failure to instruct the jury on the presumption of innocence; and failure to give a jury instruction on a lesser included offense in a capital case in violation of the Due Process Clause. *Arizona v. Fulminante,* 499 U.S. 279, 306-07 (1991).

Here, the majority erroneously concluded that because this case does not fall within an established category of trial error, the error must be structural. But as Judge Clifton aptly pointed out in his dissent, "[t]hat is backwards. It is the category of structural errors that is the exception, not the rule." (Dis. at 23.) In other words, the proper analysis is to determine if the error was "one that infects the entire trial process and necessarily renders it fundamentally unfair . . . ." *Glebe v. Frost*, 135 S. Ct. at 431. If it is not such an error, then the error is necessarily a trial error. *Id.*

The error involved in this case—the prosecutor's good faith presentation of a theory of liability that was later determined to be factually incorrect—is not a grave defect that tainted the entire trial process. The basis for Petitioner's conviction of attempted robbery and felony murder was his active, intentional participation in the attempted robbery—whether or not

he personally used a gun during the aborted robbery—and he certainly never demonstrated to the state courts that he was actually innocent of the underlying crimes. Even if he was the lookout rather than the actual shooter, the evidence clearly showed—and the prosecutor persuasively argued to the jury—that the lookout was an aider and abettor who knowingly and actively assisted his armed accomplice. The evidence at trial conclusively established that the lookout was an active participant in the crime while it was going on. And that, furthermore, that individual was the individual who drove the getaway car that was used to leave the site of the shooting.

In *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (per curium), the Court held that instructing a jury on multiple theories of guilt, one of which is invalid, is not a structural error requiring that a conviction based on a general verdict be set aside on collateral review without regard to whether the flaw in the instructions prejudiced the defendant, but rather is subject to harmless error review. *Id.* at 58. *Hedgpeth* is consistent with numerous other Supreme Court cases holding that instructional errors are not structural but instead trial errors subject to harmless-error review. *See*, e.g., *Neder v. United States*, 527 U.S. 1 (1999) (omission of an element of an offense); *California v. Roy*, 519 U.S. 2 (1996) (per curiam) (erroneous aider and abettor instruction); *Pope v. Illinois*, 481 U.S. 497 (1987) (misstatement of an

element of an offense); *Rose v. Clark*, 478 U.S. 570 (1986) (erroneous burden-shifting as to an element of an offense).

Here, as in *Hedgpeth*, the prosecutor presented two mutually inconsistent theories of Petitioner's guilt: that Petitioner was the shooter or that he was the accomplice. The jury was instructed as to both theories of liability, but, as in *Hedgpeth*, one of the instructed theories turned out to be incorrect. Although, here, one of the theories was wrong as a matter of fact, while in *Hedgpeth* the theory was wrong as a matter of law, the result was the same—the jury was erroneously instructed on a theory of guilt. Thus, the Court's reasoning in *Hedgpeth* applies equally here:

> Although these cases did not arise in the context of a jury instructed on multiple theories of guilt, one of which is improper, nothing in them suggests that a different harmless-error analysis should govern in that particular context. To the contrary, we emphasized in *Rose* that "while there are some errors to which [harmless-error analysis] does not apply, they are the exception and not the rule." [*Rose v. Clark*, 478 U.S.at 578]. And *Neder* makes clear that harmless-error analysis applies to instructional errors so long as the error at issue does not categorically "'vitiat[e] all the jury's findings.'" 527 U.S. at 11 . . . (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281 . . . (1993) (erroneous reasonable-doubt instructions constitute structural error)). An instructional error arising in the context of multiple theories of guilt no more vitiates all the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted.

> In fact, drawing a distinction between alternative-theory error and the instructional errors in *Neder*, *Roy*, *Pope*, and *Rose* would be "patently illogical," given that such a distinction "'reduces to the strange claim that, because the jury . . . received both a "good" charge and a "bad" charge on the issue, the error was somehow more pernicious than . . . where the only charge on the critical issue was a mistaken one.'" [Citation.]

Hedgpeth v. Pulido, 555 U.S. at 61.

In the present case, any error occurred during the presentation of the case to the jury, and can therefore be quantitatively assessed in the context of other evidence presented in order to determine whether it had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht*, 507 U.S. at 637-38; see also *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007) (even if state court does not have occasion to apply the test for assessing prejudice applicable under federal law, the *Brecht* standard applies uniformly in all federal habeas corpus cases under § 2254). The majority concluded that the error here was not a "trial error" because the prosecutor was not aware of the error at the time of trial. (Opin. at 12.) However, the majority's treatment of this inadvertent error as structural leads to an illogical result. Under the majority's reasoning, the prosecutor's unknowing presentation of an incorrect theory of liability is not subject to harmless-error analysis. But had the prosecutor withheld exculpatory evidence that

Petitioner was not the shooter, the constitutional error would be not be subject to automatic reversal. *See Strickler v. Greene*, 527 U.S. 263, 281-282 (1999) ("strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict").

It is illogical to disregard the customary harmless-error analysis because the prosecutor unknowingly presented a factually incorrect theory of liability at trial. Indeed, most trial errors are unknown at the time they are committed. The prosecutor did not commit misconduct, and inadvertently presented a factually false theory of liability—one which was nonetheless supported by the witness's testimony at trial. And when the error was discovered, the prosecutor went to extraordinary lengths to correct Petitioner's sentence. But the result of the majority's decision is to penalize the prosecutor for doing the right thing more harshly than if there had been intentional misconduct.

The prosecutor's decision to give Petitioner the benefit of his belated confession did not "vitiate all the jury's findings." *Neder*, 527 U.S. at 11. The jury's most important finding—that Petitioner was guilty of murder—remained intact. The basis for Petitioner's conviction of attempted robbery and felony murder was his active, intentional participation in the attempted

robbery—whether or not he personally used a gun during the aborted robbery—and Petitioner certainly never demonstrated to the state courts that he was actually innocent of the underlying crimes.

As Judge Clifton stated in his dissent:

> [Petitioner's] trial and resentencing were fair. The jury's most important findings remained intact, even considering [Petitioner's] revised, post-conviction version of events. It is hard to see the "fundamental unfairness" of a trial process where the defendant gambles on being acquitted, the jury convicts him of a crime in which he is indisputably involved, and the State then invests considerable effort to reduce his sentence in response to the defendant's post-trial admissions.

(Dis. at 26.)

This Court should not punish the People of the State of California for doing the right thing, nor should the Court create an incentive for states in the future to avoid doing the right thing. (Dis. at 29.) Any Sixth Amendment error in this case was trial error and subject to harmless error review under *Brecht*.

II. ANY ERROR DID NOT HAVE A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT

Federal habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht*, 507 U.S. at 637. Under this test, relief is proper only if the federal court has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). There must be more than a "reasonable possibility" that the error was harmful. *Brecht*, 507 U.S. at 637. Review for harmless error under *Brecht* is "more forgiving" to state court errors than the harmless error standard the Supreme Court applies on its direct review of state court convictions. *Larson v. Palmateer*, 515 F.3d 1057, 1064 (9th Cir. 2008) A petitioner must show there is "a reasonable probability" that the jury would have reached a different result but for the alleged error. *Clark v. Brown*, 450 F.3d 898, 916 (9th Cir. 2006); *Henry v. Estelle*, 33 F.3d 1037, 1041 (9th Cir. 1993) (*Brecht* harmless error standard applies to constitutional magnitude, trial type errors, and is the equivalent of harmless error standard under California law), *rev'd on other grounds sub nom*. *Duncan v. Henry*, 513 U.S. 364, 366 (1995). The *Brecht* standard reflects the view that a "State is not to be put to th[e] arduous task

[of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." *Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (per curiam).

Here, any error was harmless under *Brecht* because the evidence at trial amply supported a finding that if Petitioner was the other man (the non-shooter), he actively and knowingly aided and abetted the shooter by (1) stealing the car with him; (2) "casing" the restaurant with him; (3) acting as the lookout inside the restaurant; (4) blocking and knocking down the victim/witness as she tried to leave during the robbery; (5) driving the getaway car; and (6) helping to wipe off the fingerprints of the getaway car before abandoning it. On direct appeal from the original trial, the California Court of Appeal found that substantial evidence supported the attempted-robbery conviction and the finding that the murder occurred during the commission of an attempted robbery, noting that *both* men, "the gunman *and* his accomplice[,] arrived at the restaurant in a [recently] stolen automobile." (1ER at 8.) On appeal following the resentencing, the state appellate court again noted that at trial "evidence was presented that [Petitioner] and another man stole a vehicle and drove it to a restaurant, where *they* attempted a robbery. (1ER at 18, italics added.) The court also found that the evidence

showed that the "lookout" was an "accomplice" to the robbery attempt. (1ER at 18-19.)

There was overwhelming evidence of *both* men's active participation in the attempted robbery and murder, there was no defense of alibi or lack of knowledge, and there was no evidentiary basis on which the jury could find the offense to be less than that charged. (1SER at 104-06.) Both men went into the restaurant with the specific intent to commit a robbery. (1SER at 112-14.) If Petitioner was not the shooter, he was the other man who acted as a lookout by sitting next to Hernandez and watching both the front door and the door to the kitchen. (1SER at 118-20.) After the restaurant owner was shot, the lookout impeded Ms. Kaur from leaving the restaurant and threw her to the floor. (1SER at 121.) Thus, the actions by both the shooter and the lookout demonstrated that both were culpable of committing homicide, and that the homicide was first-degree murder because it occurred during the commission of an attempted robbery. (1SER at 122.)

Although at trial the prosecutor posited that Petitioner was the actual shooter (1SER at 120, 122, 129-32), at no time did he concede that the other man—the "lookout" —might only have been an innocent onlooker who did not share the gunman's intent to rob. On the contrary, the prosecutor strenuously argued that the lookout was an active participant and an integral

part of the robbery attempt and therefore equally guilty of first degree felony murder as an "aider and abettor" to the attempted robbery. (1SER at 128-29, 133-34.)

Further, the evidence established beyond a reasonable doubt that Petitioner was one of the two men that attempted to rob the restaurant. As the district court cogently found:

> Moreover, the evidence left no doubt that Petitioner was one of the two men that attempted to execute the robbery. Two witnesses identified Petitioner as being involved in the robbery, although their description of the events appeared to indicate that Petitioner was the shooter. (RT at 122, 144-45, 197-200, 208.) In addition, Petitioner's palm print was recovered from the car that was used during the robbery, and he was found in possession of property stolen from that vehicle. (RT at 286-92, 309-15, 329-33, 361-64, 368-69.) Ultimately, Petitioner would have been criminally liable for the attempted robbery and first degree murder regardless of whether he was the shooter or the lookout.

(1ER 52.)

Accordingly, any alleged Sixth Amendment error was harmless in light of the overwhelming evidence of Petitioner's participation in the attempted robbery.

CONCLUSION

For the reasons set forth above, as well as those set forth in the Petition for Rehearing and Appellee's Brief, the judgment of the district court denying Petitioner's habeas petition under 28 U.S.C. § 2254 should be affirmed.

Dated: July 31, 2015

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
KENNETH C. BYRNE
Supervising Deputy Attorney General

/S/ ERIC E. REYNOLDS
ERIC E. REYNOLDS
Deputy Attorney General
Attorneys for Respondent-Appellee

LA2012604124
51855663.doc

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 11-55247

I certify that: (check (x) appropriate option(s))

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **supplemental brief** brief is

[X] Proportionately spaced, has a typeface of 14 points or more and contains 2,763 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

[ ] This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

or

[ ] This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words,

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains __ pages or __ words or __ lines of text.

[ ] 3. Briefs in **Capital Cases**.
This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words).

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains __ words or __ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

☐ 4. **Amicus Briefs**.

☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

or is

☐ Monospaced, has 10.5 or few characters per inch and contains not more than either 7,000 words or 650 lines of text,

or is

☐ Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed.R.App.P. 32 (a)(1)(5).

July 31, 2015
Dated

/s/ Eric E. Reynolds
Eric E. Reynolds
Deputy Attorney General

U.S.C.A. No. 11–55247

In the United States Court of Appeals

for the Ninth Circuit

Ronald Taylor,
Petitioner-Appellant,

v.

Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation,
Respondent-Appellee

Appeal from the United States District Court
for the Central District of California
Honorable Otis D. Wright, II

Appellant's Supplemental En Banc Brief

Kurt David Hermansen
Counsel for Defendant-Appellant
Law Office of Kurt David Hermansen
550 West C Street, Suite 580
San Diego, CA 92101
KDH@KurtDavidHermansen.com
Tel.: (619) 236–8300
Fax: (619) 315–0436

Table of Contents

Page

Table of Authorities

Page

Cases

Statutes

Constitutional Provisions

Other Authorities

United States Court of Appeals
for the Ninth Circuit

Ronald Taylor, *Petitioner - Appellant*, v. Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation, *Respondent - Appellee*.	No. 11–55247 D.C. No. 2:09-cv-05267-ODW-OP Central District of California, Los Angeles

Statement of Issues Presented for Review

1. Waiver and judicial-estoppel doctrines provide discretion for eschewing affirmative defenses raised for the first time on rehearing. Here — for the first time on rehearing — the Warden raises a harmless-*trial*-error defense to Taylor's exhausted Sixth-Amendment-*sentencing*-error claim. Because federal habeas courts cannot reach unexhausted claims, it would be fundamentally unfair to let the Warden transform Taylor's Sixth-Amendment-*sentencing*-error claim into a *trial*-error claim. Should this Court eschew the Warden's waived or estopped trial-error defense?

2. Under *Arizona v. Fulminante*,[1/] an error is structural if it defies harmless-error analysis

[1/] 499 U.S. 279 (1991).

(i.e., cannot be quantitatively assessed along with other evidence). Here, because the jury specifically found that Taylor was the shooter, there is no aiding-and-abetting verdict, only actual-shooter verdicts, which negate aiding-and-abetting liability. Given these unique facts, is the illegal, aiding-and-abetting-based 2006 resentencing — which is contrary to the jury's special verdicts — a structural error?

3. *Griffin v. United States*[2/] requires automatic reversal if the prosecution presents alternative theories and the record shows that the jury's verdict rests on a factually-invalid theory. Here, the jury found that Taylor was the shooter. Although the State agrees that Taylor is innocent of that role, it invited and received an illegal resentencing based on aiding-and-abetting liability, which the jury never found. Does *Griffin* require automatic reversal since no jury found Taylor was an aider and abettor?

4. An error is prejudicial under *Brecht v. Abrahamson*[3/] if a judge feels in equipoise regarding whether the error affected the jury's verdict. Here, the record proves that the jury was instructed on, but rejected, the aiding-and-abetting theory by finding Taylor was the shooter. Since the record proves that no jury

---

[2/] 502 U.S. 46 (1991).
[3/] 507 U.S. 619 (1993).

verdict supports the illegal, aiding-and-abetting-based resentencing, is the error prejudicial under *Brecht*?

Statement of Facts

In 1987, two men entered a Pioneer Chicken restaurant.[4/] One man shot and killed the owner, Lewis Lim, during an attempted robbery.[5/] In 1989, a jury found petitioner Ronald Taylor guilty of felony murder.[6/] The jury also found true a robbery-murder special circumstance and a personal-firearm-use enhancement, which the jury could only find true if Taylor was the shooter.[7/]

But a post-trial investigation revealed that Hugh Hayes, Taylor's cousin, was the real shooter.[8/] The State prosecuted Hayes, and Taylor testified against him at

---

[4/] *Taylor v. Cate*, 772 F.3d 842, 843 (9th Cir. 2014), *en banc reh'g granted*, 787 F.3d 1241–42 (9th Cir. 2015).

[5/] *Id.*

[6/] *Id.*

[7/] 2ER 16.

[8/] 2ER 72–73.

Hayes's 1997 preliminary hearing.[9/] Although Hayes was acquitted, the State honorably conceded that Taylor was wrongfully convicted as the shooter.[10/] Taylor filed a state-habeas-actual-innocence claim, asking for a new trial.[11/] In response, the State conceded that Taylor's was not the shooter, but asked the state court to vacate only the special-circumstance finding and personal-firearm-use enhancement.[12/]

In 2006, the state court found Taylor innocent of the actual-shooter role and — over Taylor's objection — resentenced him for aiding and abetting the offense.[13/] Taylor claimed that the illegal 2006 resentencing violated the Sixth Amendment because no jury found the facts neces-

---

[9/] 2ER 72–80.
[10/] 2ER 72–73, 135–36; Appellee's Brief at 10.
[11/] *Taylor*, 772 F.3d at 845.
[12/] *Id.* at 846.
[13/] *Id.* at 845–46.

sary to convict him for aiding and abetting the offense.[14/] The state courts didn't address Taylor's claim.[15/] Thus, it is undisputed that there was no state court adjudication on the merits, resulting in this Court applying de novo review, not deferential review under 28 U.S.C. § 2254(d).[16/]

Taylor's exhausted Sixth-Amendment claim: The illegal 2006 resentencing (based on aiding-and-abetting liability) denied Taylor his jury-trial right because the trial record proves that the 1989 jury found Taylor was the shooter, but that finding was replaced by the trial court's actual-innocence (of-being-the-shooter) finding.

In his state and federal habeas petitions, Taylor claimed that the illegal, aiding-and-abetting-based 2006 resentencing violated the Sixth Amendment because no jury ever found him guilty of aiding and abetting the offense.[17/]

[14/] *Id.*
[15/] *Id.* at 844.
[16/] *Id.* at 847.
[17/] 1ER 30, 45, 63.

(1) Trial evidence. First, the trial evidence supported the jury's finding that Taylor was the shooter. As the California appellate court succinctly stated on direct appeal, while "the evidence was not without contradiction, each eyewitness testified that the gunman left the restaurant before the second assailant, and one witness positively identified defendant as the first of the two men who left the restaurant …."[18/] Further, every witness said the shooter had bushy hair, which is how Taylor wore his hair on the day he was arrested.[19/] Hence, the evidence showed that Taylor was the shooter (even though he wasn't).

(2) Prosecutor's argument. Critically, the prosecutor urged the jury to find that Taylor was the shooter because, if the jury didn't, it couldn't find true the robbery-murder

---

[18/] 1ER 10.
[19/] 2ER 37.

special circumstance.[20] The prosecutor explained that the special circumstance required the jury to find that "the defendant either [was] the shooter or [had] the specific intent to kill."[21] Since the prosecutor conceded that he "didn't prove" that the "lookout had the specific intent to kill," the jury couldn't find the special circumstance true *unless* Taylor was the shooter.[22] And that is the theory that the prosecutor pressed on the jury: "I have proved to you that the defendant was the first man, not the second man. He was the man who … shot Lewis Lim."[23]

Additionally, the prosecutor asked the jury to find true a personal-firearm use enhancement, which required the jury to find that Taylor personally "had the gun in his

---

[20] 2ER 38.
[21] 2ER 39.
[22] 2ER 45.
[23] 2ER 45.

hand and was displaying it in a menacing manner."[24/] So, although the prosecutor presented the alternative, fallback theory that Taylor was the second man and that the second man aided and abetted the offense, the prosecutor unambiguously explained that the jury had to find Taylor was the shooter to find the special circumstance and the personal-firearm-use enhancement true.

(3) Jury instructions. Third, the jury instructions — true to the prosecutor's argument — required that the jury find Taylor was the shooter to find true (a) the robbery-murder special circumstance and (b) the personal-firearm-use enhancement.[25/] So even though the jury was instructed on aiding and abetting's elements,[26/] it was also in-

---

[24/] 2ER 42–43.
[25/] 2ER 12–13.
[26/] 1SER 87.

structed that it must unanimously reject the aiding-and-abetting theory to find true the special circumstance.[27/]

CALJIC 8.81.17 told the jury that, to find the robbery-murder special circumstance true, "it must be proved" that "[t]he murder was committed while [the] ~~[a]~~ defendant was [engaged in] in the [commission] [or] [attempted commission] of a robbery."[28/] By striking "a," the trial court's instruction required the jury to find that Taylor was "the" defendant who committed the attempted robbery. And because CALJIC 8.80/2 required jury unanimity to find the special circumstance true,[29/] the instructions collectively required the jury to unanimously find that Taylor was the shooter.

[27/] 2ER 12–13.
[28/] 2ER 13.
[29/] 2ER 12.

Further, Taylor's jury was instructed not to consider the second man.[30/] CALJIC 2.11.5 instructed the jury to "not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted."[31/] Because Taylor's verdicts show that the jury found Taylor was the shooter, CALJIC 2.11.5 required that the jury not consider the second man's culpability, and in turn required that the jury not decide whether the second man's conduct satisfied aiding and abetting's elements.

(4) Special Verdict Forms. Fourth, and most important, Taylor's verdict forms explicitly state that the jury found "the murder of Louis Lim was committed by defendant RONALD TAYLOR while the said defendant was … engaged in the attempted commission of robbery," and that

---

[30/] 2ER 53–54.
[31/] 2ER 53–54.

the robbery-murder special circumstance was therefore true.[32/] Hence, Taylor's special verdicts prove the jury unanimously found Taylor was the man who committed the attempted robbery, not the second man who arguably assisted the robbery's attempted commission. Further, the jury found true the personal-firearm-use enhancement, explicitly finding that during the "attempted commission of [robbery] …, the said defendant, RONALD TAYLOR, personally used a firearm."[33/] Together, these special findings prove that the jury unanimously found Taylor was the shooter, not that he aided and abetted the shooter.

Together, the trial evidence, prosecutor's argument, jury instructions, and special verdict forms prove that the jury: (1) found Taylor was the shooter; (2) did *not* find Taylor was the second man; and (3) was instructed that it

---

[32/] 2ER 16.
[33/] 2ER 16.

could not consider the second man's liability (i.e., whether he aided and abetted the offense).

Moreover, as the majority opinion explains, under *People v. Perez*,[34/] a person cannot aid and abet himself in California. So, *Perez* confirms that Taylor's jury couldn't find that Taylor aided and abetted himself in shooting Lim.

Nevertheless, although in 2006, Taylor was declared innocent of being the shooter, he was resentenced as an aider and abettor — based on evidence that no jury has ever heard (i.e., Taylor's 1997 testimony at Hugh Hayes's preliminary hearing).[35/] Because no jury heard that evidence and no jury found Taylor aided and abetted the offense, the illegal resentencing hearing violated the Sixth

---

[34/] 113 P.3d 100, 103–05 (Cal. 2005).
[35/] *See* 2ER 74–80.

Amendment under *Apprendi v. New Jersey*[36/] and *Sullivan v. Louisiana*.[37/]

The panel's opinion

The three-judge panel unanimously held that the illegal 2006 resentencing violated Taylor's Sixth Amendment jury-trial right because no jury found Taylor guilty of aiding and abetting the offense: "The jury had to choose between two mutually inconsistent roles" because "[t]o convict Taylor as an aider and abettor under California law, the jury would had to have found that he specifically intended to encourage or assist someone else in robbing the restaurant."[38/] And "[w]e know the jury did not make this finding because it concluded Taylor was the person who robbed Pioneer Chicken and shot Lim."[39/] Hence, the 2006 "[r]e-

---

[36/] 530 U.S. 466 (2000).
[37/] 508 U.S. 275 (1993).
[38/] *Taylor*, 772 F.3d at 847.
[39/] *Id.* at 847–48.

sentencing on the basis of facts that the jury did not find, and indeed that conflicted with what the jury did find, violated Taylor's Sixth Amendment rights."[40/]

Further, the two-judge majority held that the error was structural.[41/] "There was no trial error that could be subject to harmless error analysis. Neither the Petitioner nor the Warden has suggested that there was."[42/] Instead, Taylor's 2006 resentencing "for a criminal role on which the jury was instructed, but did not find, violates his Sixth Amendment right to be tried and convicted by a jury. And it does so in a way that is not amenable to harmless error analysis."[43/]

In a concurring and dissenting opinion, Judge Clifton agreed that the 2006 resentencing violated Taylor's Sixth

---

[40/] *Id.* at 847.
[41/] *Id.* at 847–48.
[42/] *Id.* at 848.
[43/] *Id.*

Amendment right to a jury verdict.[44/] But he would have remanded to the district court to determine whether that constitutional deprivation was harmless.[45/] Notably, the dissent had to transform Taylor's exhausted Sixth-Amendment-sentencing claim into a trial-error claim — i.e., that "the State presented a theory that turned out to be wrong" — to avoid finding the error structural.[46/]

Summary of Argument

First, this Court should not adopt the Warden's transmogrification of Taylor's exhausted claim (to conclude that harmless-error analysis applies) because: (a) Taylor's exhausted claim is a *sentencing* claim, not a *trial*-error claim; (b) the Warden waived the harmless-trial-error defense by not raising it below, and (c) the Warden should be judicially estopped from raising the harmless-trial-error

---

[44/] *Id.* at 852 (Clifton, J., concurring & dissenting).
[45/] *Id.* at 854–55.
[46/] *Id.* at 853.

defense on rehearing because it is inconsistent with its prior no-error defense.

Second, the Sixth Amendment sentencing error is structural under *Arizona v. Fulminante*'s[47] structural-error test because we know that the jury verdicts rested on the actual-shooter theory, so no verdict supports the illegal, 2006 aiding-and-abetting-based resentencing. Since the error defies harmless-error analysis, it is structural.

Third, *Griffin v. United States*[48] also requires automatic reversal. *Griffin* held that a conviction must be reversed if the record shows that the jury relied on a factually-invalid theory.[49] Here, the record shows that the jury adopted the actual-shooter theory, for which Taylor has been found innocent. Thus, *Griffin* requires automatic reversal.

---

[47] 499 U.S. 279 (1991).
[48] 502 U.S. 46 (1991).
[49] *Id.* at 49–50.

Fourth, assuming that Taylor's Sixth Amendment error is subject to harmless-error analysis, it is prejudicial under *Brecht v. Abrahamson*.[50/] The record shows that the error affected the jury's (hypothetical aiding-and-abetting-based) verdict because the jury was instructed on — but rejected — the aiding-and-abetting theory by finding Taylor was the shooter. Since the Court must, under *O'Neal v. McAninch*,[51/] be at least in "equipoise as to the harmlessness of the error," the error is prejudicial under *Brecht*.[52/]

Accordingly, this Court should grant the writ and order Taylor's release unless the State retries him within 60 days.

[50/] 507 U.S. 619 (1993).
[51/] 513 U.S. 432 (1995).
[52/] *Id.* at 435, 437-38.

Argument

Introduction: Sentencing Taylor as an aider and abettor — contrary to the jury's actual-shooter findings — was structural error but also requires reversal under *Brecht*, so this Court need not decide if the error was structural.

Under *Apprendi*[53/] and *Sullivan*,[54/] the Sixth Amendment's jury-trial right requires that a conviction be supported by a jury verdict of guilty beyond a reasonable doubt. Here, no jury verdict supports the illegal, 2006 aiding-and-abetting-based resentencing, so Taylor was denied his Sixth Amendment jury-trial right.[55/]

The record proves that Taylor's jury found that Taylor was the shooter, not an aider and abettor. The trial evidence, prosecutor's argument, the jury instructions, and (especially) the verdict forms prove that the jury's 1989

[53/] 530 U.S. at 477.
[54/] 508 U.S. at 277–78.
[55/] *See Taylor*, 772 F.3d at 847–48.

verdict doesn't support — in fact, it contradicts — the illegal, 2006 aiding-and-abetting-based resentencing.

1. Resolving the harmless-error issue is unnecessary because this Court should hold that the Warden waived and is judicially estopped from raising his newly minted, harmless-*trial*-error defense on rehearing, especially since the Warden can't morph Taylor's exhausted *sentencing*-error claim into a trial-error claim.

Fundamental fairness requires that this Court apply either waiver or judicial estoppel to eschew the Warden's newly minted harmless-trial-error defense. As Taylor explains in his Response to the Petition for Rehearing,[56/] the Warden's new defense — i.e., that the prosecutor committed harmless trial error by unknowingly presenting a false theory[57/] — transforms Taylor's exhausted Sixth-Amendment-*sentencing* claim into a different claim. It would be fundamentally unfair to let the Warden twist Taylor's ex-

---

[56/] Doc. 59, at 10–12.
[57/] PFR 4–13.

hausted Sixth-Amendment-sentencing-error claim into a trial-error claim, just to arrive at harmless-error review when the true claim presents a structural error.

The Warden's new harmless-trial-error defense side steps the Sixth-Amendment-sentencing error that the three-judge panel found occurred at the 2006 resentencing. Whether under waiver or judicial estoppel, this Court should eschew the Warden's belated attempt at impermissibly recasting Taylor's *sentencing*-error claim as a *trial*-error claim. Fundamentally, that recasting would be a Kafkaesque maneuver and antithetical to federal habeas's exhaustion requirement.[58/]

[58/] *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999).

2. Taylor's Sixth Amendment error was structural because, under *Arizona v. Fulminante*'s test, illegally resentencing Taylor based on facts no jury found, and on evidence no jury heard, isn't amenable to harmless-error analysis.

In 1991, in *Arizona v. Fulminante*,[59] the Supreme Court held that structural defects can never be harmless.[60] Although the Court stated that "most constitutional errors can be harmless,"[61] those that "defy analysis by 'harmless-error' standards" cannot.[62]

Under *Fulminante*, courts can review for harmlessness errors that "occur[ ] during the presentation of the case to the jury" — i.e., "trial errors" — because they may "be quantitatively assessed in the context of other evidence."[63] Structural errors, however, effect the trial mechanism itself and erode the "'basic protections'" without which "'a

---

[59] 499 U.S. 279 (1991).
[60] *Id.* at 309–11.
[61] *Id.* at 306.
[62] *Id.* at 309.
[63] *Id.* at 307–08.

criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'"[64/]

In 2006, in *United States v. Gonzalez-Lopez*,[65/] the Court stated that there is no "single, inflexible criterion" for deeming an error "structural."[66/] *Gonzalez-Lopez* explained that the primary (but not exclusive) analytical test for structural error rests on "the difficulty of assessing the effect of the error."[67/] Here, it is impossible to assess whether the illegal 2006 resentencing — which followed an actual-innocence finding that gutted the jury's verdict, and which was based on facts that no jury found, and on evidence that no jury heard — affected the 1989 jury verdicts. Thus, under *Fulminante*, the error here is structural.

[64/] *Id.* at 310 (quoting *Rose*, 478 U.S. at 577–78).
[65/] 548 U.S. 140 (2006).
[66/] *Id.* at 149, n.4.
[67/] *Id.*

a. The error here defies harmless-error analysis — and is therefore structural — because we definitively know that Taylor's jury found he was the shooter, so the illegal, aiding-and-abetting-based 2006 resentencing defies the jury's 1989 special verdicts.

The unique error here falls outside the harmless-error analytical framework, and is therefore structural. Because the 2006 actual-innocence finding gutted the jury's 1989 actual-shooter verdict, it is impossible to assess the effect of the 2006 resentencing on the invalidated 1989 verdict. Harmless-error analysis does not fit this unique scenario.

But let's take a step back. Theoretically, a court could determine that an error is harmless through one of two inquiries: (1) whether the error played a minor role at trial, and therefore couldn't have impacted the jury's actual verdict; or (2) whether a reasonable jury would have

reached the same result in a hypothetical new trial absent the error.[68/]

But of these two theoretical approaches, only the first approach is allowed. For example, in 1993, in *Sullivan v. Louisiana*,[69/] the Supreme Court explained that the Sixth Amendment's jury-trial guarantee permits only the first harmlessness inquiry: "Harmless-error review looks, we have said, to the basis on which 'the jury *actually rested* its verdicts.'"[70/]

Under *Sullivan*, harmlessness determinations must focus solely on "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error."[71/] And "[t]hat must be so, because to hypothesize a guilty

---

[68/] 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure 1714–15 (6th ed. 2011).

[69/] 508 U.S. 275 (1993).

[70/] *Id.* at 279 (quoting *Yates v. Evatt*, 500 U.S. 391, 404 (1991)).

[71/] *Id.*

verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be — would violate the [Sixth Amendment's] jury-trial guarantee."[72] In other words, "[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action … it requires an actual jury finding of guilty."[73]

Notably, the actual-verdict focus applies to all harmless-error analyses. Under *Chapman v. California*,[74] courts reviewing constitutional errors on direct appeal must ask whether "the error complained of … contribute[d] to the verdict obtained."[75] And *Brecht*[76] requires federal habeas courts to ask whether the "error 'had substantial and in-

---

[72] *Id.*
[73] *Id.* at 280.
[74] 386 U.S. 18 (1967).
[75] *Id.* at 24.
[76] 507 U.S. 619.

jurious effect or influence in determining the jury's verdict.'"[77/]

Here, the error must be structural because Taylor was resentenced in 2006 for aiding and abetting the offense, but we know that the actual jury found he was the shooter. And we also know that the jury's actual-shooter finding was erased by the trial court's subsequent actual-innocence finding.

Further, the entire trial record proves that the jury did not rest its verdicts on the aiding-and-abetting theory upon which his illegal resentencing was based.[78/] To return a guilty verdict for aiding and abetting, the jury would have needed to find beyond a reasonable doubt that the second man: (1) knew the perpetrator's unlawful purpose; (2) intended to commit, encourage, or facilitate the offense;

[77/] *Id.* at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

[78/] *See supra* pp. 5–12.

(3) promoted, encouraged, or instigated the offense; and (4) was Taylor.[79] We know that the jury didn't find any one of those facts.

Here, upholding the illegal, 2006 aiding-and-abetting-based resentencing would require this Court to impermissibly "hypothesize a guilty verdict that was never in fact rendered"[80] — and would be contrary to the actual verdicts rendered. Thus, habeas relief is warranted.

b. Contrary to the dissent's errant suggestion, *Neder v. United States* also requires automatic reversal because the Sixth Amendment error here vitiated all the jury's findings.

The dissent suggests that the error here isn't structural because, in *Neder v. United States*,[81] the Supreme Court held that "a failure by the jury to find an element of a

---

[79] *See People v. Beeman*, 674 P.2d 1318, 1326 (Cal. 1984); *see also* SER 87.

[80] *See Sullivan*, 508 U.S. at 279.

[81] 527 U.S. 1 (1999).

crime is susceptible to harmless error analysis."[82] But that suggestion fails because, even under *Neder*, Taylor's Sixth-Amendment-sentencing error is structural.

In 1999, *Neder* held that failing to instruct on a single offense element is subject to harmless-error review.[83] The Court explained that a jury's failing to find a single element can be reviewed for harmlessness because the jury verdict on the remaining elements provides a "[]reliable vehicle for determining guilt or innocence."[84] But *Neder* acknowledged that an error that "'vitiates *all* the jury's findings'" is structural.[85]

In *Washington v. Recuenco*,[86] the Court extended *Neder* to sentencing error — i.e., failing to submit a sentencing factor to the jury. Finding no constitutional distinction

---

[82] *Taylor*, 772 F.3d at 854 (Clifton, J., dissenting).
[83] *Neder*, 527 U.S. at 15.
[84] *Id.* at 9.
[85] *Id.* at 11 (quoting *Sullivan*, 508 U.S. at 281).
[86] 548 U.S. 212 (2006).

between offense elements and sentencing factors, *Recuenco* held that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error."[87/]

But Taylor's Sixth Amendment error is structural under *Neder* because *Neder* only held that failing to instruct the jury on a *single* offense element can be harmless.[88/] As Justice Scalia pointed out in his dissent, *Neder* didn't decide whether omitting *multiple* elements can be harmless.[89/] Further, here, unlike in *Neder*, there was no instructional error claim. Instead, Taylor's claim is that his jury failed to find *every fact* necessary for aiding-and-abetting liability.[90/] So, unlike *Neder*'s verdict, Taylor's verdicts — which explicitly rest on the actual-shooter theory —

[87/] *Id.* at 220–22.
[88/] *Neder*, 527 U.S. at 9–10, 16.
[89/] *Id.* at 33 (Scalia, J., dissenting).
[90/] *See supra* pp. 5–12.

aren't a "[]reliable vehicle for determining guilt or innocence" on the mutually-exclusive aiding-and-abetting theory.[91/]

In sum, since Taylor's jury's actual verdicts necessarily contradict every fact necessary for aiding-and-abetting-based liability, Taylor's illegal 2006 resentencing vitiated all the jury's hypothetical findings. The 2006 resentencing rests on a hypothetical, nonexistent, and counterfactual verdict. *Neder* doesn't allow this Court to ignore the actual verdicts,[92/] which the trial record proves were based exclusively on actual-shooter liability. Therefore, the error is structural under *Neder*.[93/]

[91/] *Neder*, 527 U.S. at 9 (majority opinion).
[92/] *Id.* at 19.
[93/] *Id.*

3. Alternatively, Taylor's claim requires automatic reversal under *Griffin v. United States* and *Hedgpeth v. Pulido* (*Pulido I*) (on which the Warden and dissent errantly rely) because Taylor's special verdicts prove that Taylor's jury unanimously relied on the invalid actual-shooter theory.

The Warden and the dissent cite two general-verdict cases to argue that Taylor's illegal 2006 resentencing doesn't require automatic reversal. The Warden relies on *Griffin v. United States*[94/] to ague that no error occurred during Taylor's illegal resentencing because reviewing courts should presume that juries return general verdicts based on factually-valid theories. And the dissent cites *Hedgpeth v. Pulido*,[95/] where the Supreme Court decided that a legal error invaliding one of two alternate legal theories is subject to harmless-error analysis. But, as is illustrated below, both *Griffin* and *Pulido I* are distinguish-

---

[94/] 502 U.S. 46 (1991).
[95/] 555 U.S. 57 (2008) (per curiam) (*Pulido I*).

able. Moreover, rather than help the Warden, *Griffin* and *Pulido I* require automatic reversal.

a. First, *Griffin* doesn't assist the Warden because Taylor's special verdicts prove his jury relied on the now-invalid actual-shooter theory — so, unlike in *Griffin*, this Court cannot presume that the jury relied on any other theory.

In 1991, in *Griffin*, the Supreme Court addressed whether a general verdict "must be set aside if the evidence is inadequate to support conviction as to one of" two alternate theories.[96/] Griffin argued that such a general verdict must be reversed under *Stromberg v. California*[97/] and *Yates v. United States*,[98/] which held that reversal is necessary where a general "verdict is supportable on one ground, but not on another, and it is impossible to tell

---

[96/] *Griffin*, 502 U.S. at 47.

[97/] 283 U.S. 359 (1931).

[98/] 354 U.S. 298 (1957), *overruled on another ground by Burks v. United States*, 437 U.S. 1, 8, 18 (1978).

which ground the jury selected."[99] Rejecting Griffin's *Stromberg-Yates* argument, *Griffin* applied a different, centuries-old presumption: "[A] general jury verdict [is] valid so long as it [is] legally supportable on one of the submitted grounds," where it is unclear whether the valid ground "was actually the basis for the jury's action."[100]

The *Griffin* Court distinguished *Stromberg* and *Yates* by explaining that those cases did not displace the older, general presumption.[101] Instead, *Griffin* explained that *Stromberg* and *Yates* represent an exception for *legally* invalid alternate theories.[102] *Stromberg* established that reversal is required if a general verdict may have rested on a constitutionally invalid theory.[103] And *Yates* expanded *Stromberg* by requiring a general verdict's reversal if it

---

[99] *Id.* at 312.
[100] *Griffin*, 502 U.S. at 49.
[101] *Id.* at 52–56.
[102] *Id.* at 55–56.
[103] *Id.*

may have rested on a legally (but not constitutionally) invalid theory.[104/]

Because *Griffin* involved a *factually* unsupported alternate theory, the Court adopted the general, common-law presumption[105/] against reversing a general verdict "'if any one of the counts is good … because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only.'"[106/] *Griffin* explained that this presumption justified distinguishing factual invalidity (which doesn't requires reversal under the common-law presumption) from legal invalidity (which requires reversal under the *Stromberg-Yates* exception).[107/] The factual-legal distinction "makes good sense" because "[j]urors are not generally

---

[104/] *Id.*

[105/] *Id.* at 49–50, 56.

[106/] *Id.* at 49–50 (quoting *Claassen v. United States*, 142 U.S. 140 at 146–47 (1891)).

[107/] *Id.* at 59.

equipped to determine whether a particular theory … is contrary to law."[108/] But "jurors *are* well equipped to analyze the evidence," which justifies presuming that jurors — when faced with multiple theories — rest general verdicts on factually adequate grounds.[109/]

Here, *Griffin* supports automatic reversal because Taylor's jury didn't return a general verdict; it returned special verdicts.[110/]

That is what the majority correctly concluded: "Because we know the jury actually found that Taylor was the shooter, the State's reliance on *Griffin* … is misplaced."[111/] Since the jury returned special verdicts, this Court "cannot as-

---

[108/] *Id.*
[109/] *Id.*
[110/] 2ER 16–17.
[111/] *Taylor*, 772 F.3d at 848.

sume that the jury relied on aiding and abetting, because the jury's findings reveal it did not."[112]

Further, not only is *Griffin* unhelpful to the Warden, its common-law presumption supports Taylor's argument that his Sixth-Amendment-resentencing error requires automatic reversal. As *Griffin* stated, its verdict-validity presumption survives absent "anything in the record to show the contrary …."[113] Here, the presumption that the jury relied on an aiding-and-abetting theory is rebutted because the record "show[s] the contrary"[114] — in fact, the jury's special verdicts prove beyond any doubt that the jury relied on the actual-shooter theory.[115] Thus, "the prob-

---

[112] *Id.*

[113] *Griffin*, 502 U.S. at 49–50 (quoting *Claassen*, 142 U.S. at 146–47).

[114] *See id.*

[115] 2ER 16–17.

lem in this case … is the absence of any jury verdict to support" the illegal 2006 resentencing.[116/]

In sum, *Griffin*'s presumption is rebutted because Taylor's jury returned special verdicts proving that it relied on a single theory — that Taylor was the man who robbed the Pioneer Chicken and shot Lim. But that theory is factually invalid because, in 2006, the resentencing judge found Taylor actually innocent of being the shooter. Therefore, the explicit factual basis of the jury's special verdicts is invalid, requiring reversal.

b. Second, *Pulido I* — which applies harmless-error analysis to *legal* errors that undermine *general* verdicts — is inapposite because (1) Taylor's jury returned special (not a general) verdicts, and (2) the actual-shooter theory is factually (not legally) invalid.

In 2008, in *Pulido I*,[117/] the Supreme Court limited the *Stromberg-Yates* exception by extending harmless-error

---

[116/] *Taylor*, 772 F.3d at 847.

[117/] 555 U.S. 57 (2008) (per curiam).

analysis to *legal* errors that invalid one basis supporting a general verdict.[118/] Pulido had been convicted in California for aiding and abetting a felony murder.[119/] But jury instructions erroneously permitted Pulido's jury to return a general guilty verdict if it found that Pulido formed the intent to aid and abet the underlying felony either (1) before the murder, or (2) after the murder.[120/] Although the latter theory was legally erroneous, the California Supreme Court found the error harmless.[121/] This Court granted federal habeas relief, relying on the *Stromberg-Yates* exception to hold that the error was structural.[122/]

Pulido I reversed and remanded the case to this Court to review for harmless error.[123/] *Pulido I* explained that

---

[118/] *Id.* at 61–62.
[119/] *Id.* at 59.
[120/] *Id.*
[121/] *Id.*
[122/] *Id.*
[123/] *Id.* at 62.

"neither *Stromberg* nor *Yates* had reason to address whether the instructional errors they identified could be reviewed for harmlessness"[124/] because they were decided before *Chapman*.[125/]

Notably, *Pulido I* doesn't address *Griffin* or the general, common-law presumption. Hence, *Pulido I* only limits the *Stromberg-Yates* exception for legally invalid general verdicts.

Here, the dissent suggests that the error here should be reviewed for harmlessness under *Pulido I*.[126/] But that suggestion is wrong for two reasons. First, Pulido's jury returned a general verdict, whereas Taylor's jury returned special verdicts.[127/] So, unlike in *Pulido I*, Taylor's jury's

---

[124/] *Id.* at 60–61.
[125/] 386 U.S. at 24.
[126/] *Taylor*, 772 F.3d at 854 (Clifton, J., dissenting).
[127/] *Compare Pulido I*, 555 U.S. at 58, *with* 2ER 16–17.

verdicts could only be based on one theory — that Taylor was the shooter.

Second, *Pulido I* involved a *legally*-invalid theory, which is subject to the *Stromberg-Yates* exception to the common-law presumption supporting general verdicts.[128] But Taylor's verdicts are based on a *factually*-invalid theory,[129] which means *Griffin*'s rebuttable presumption applies.[130] Although the dissent recognized this factual-error-versus-legal-error distinction,[131] it ignored the distinction's legal importance.

The legally-invalid theory in *Pulido I* was subject to harmlessness review. But the factually-invalid theory here — which was the only theory supporting Taylor's jury's

---

[128] *Pulido I*, 555 U.S. at 59.
[129] *Taylor*, 772 F.3d at 847–48.
[130] *Griffin*, 502 U.S. at 49–50.
[131] *Taylor*, 772 F.3d at 854 (Clifton, J., dissenting).

special verdicts — requires reversal under *Griffin*[132/] because the record shows that the jury relied on the invalid actual-shooter theory.[133/]

Therefore, *Pulido I* is inapposite. And under *Griffin*, this Court should conclude that the error requires automatic reversal.[134/]

4. Assuming that Taylor's claim is subject to harmless-error analysis, it requires reversal under *Brecht v. Abrahamson* because the trial record proves that the jury explicitly found Taylor was the shooter, and not an aider or abettor.

We know Taylor's 1989 jury found he was the shooter — not the alleged lookout. Thus, any argument that the error was harmless must fail. Inevitably, any harmless-error analysis will terminate with this unavoidable truth: The error here was prejudicial because Taylor's jury, in fact, relied on the invalid actual-shooter theory.

[132/] *Griffin*, 502 U.S. at 49–50.
[133/] 2ER 16–17.
[134/] *See Griffin*, 502 U.S. at 49–50.

Bearing this inevitability in mind, let's apply *Brecht v. Abrahamson*[135/] to this unique case.

a. Under *Brecht*, relief must be granted if the error leaves the court in equipoise about whether the constitutional error substantially and injuriously affected the jury's verdict.

In 1993, *Brecht* held that federal habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'"[136/] Actual prejudice exists if an "error 'had substantial and injurious effect or influence in determining the jury's verdict.'"[137/]

In 1995, in *O'Neal v. McAninch*,[138/] the Supreme Court held that while neither party bears a "burden of proof," the

---

[135/] 507 U.S. 619 (1993).

[136/] *Id.* at 637.

[137/] *Id.* (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

[138/] 513 U.S. 432 (1995).

Warden "bears the risk of equipoise."[139] Habeas relief must be granted unless the court "'is *sure* that the error did not influence the jury, or had but very slight effect.'"[140] "'*[I]f one is left in grave doubt*, the conviction cannot stand.'"[141] Moreover, where the record is so evenly balanced that a judge "feels himself in virtual equipoise as to the harmlessness of the error," the court must, under *O'Neal*,[142] treat the error as if it substantially and injuriously affected the jury's verdict.

---

[139] *Id.* at 436, 444–45.

[140] *Id.* at 437 (quoting *Kotteakos*, 328 U.S. at 764–65) (emphasis added).

[141] *Id.* at 437–38 (quoting *Kotteakos*, 328 U.S. at 764–65).

[142] *Id.* at 435, 437–38.

b. Applied to Taylor's unique facts, this Court's *Brecht* analysis in *Pulido v. Chrones* (*Pulido II*) shows that Taylor's jury relied on the actual-shooter theory, and not on an aiding-and-abetting theory, so the error is prejudicial.

In 2010, in *Pulido v. Chrones*,[143] this Court (on remand from the Supreme Court[144]) applied *Brecht*'s harmlessness standard to an instructional error that invalidated one of two alternative felony-murder theories.

The California Supreme Court had determined that an instructional error occurred at Pulido's trial, which let the jury find him guilty of aiding and abetting the offense if it found he formed the intent to aid and abet the robbery either (1) before the murder, or (2) after the murder.[145] But the state high court found the error was harmless under *Chapman*.[146]

---

[143] 629 F.3d 1007 (9th Cir. 2010) (*Pulido II*).
[144] See *Pulido I*, 555 U.S. at 62 & n.*.
[145] *Pulido II*, 629 F.3d at 1011.
[146] *Id.*

After this Court found that the error was structural and granted relief, the United States Supreme Court reversed and remanded to this Court to apply *Brecht*.[147/]

Applying *Brecht*, this Court reviewed the trial record, including (1) the jury instructions, (2) the verdict forms, and (3) the trial evidence, to determine whether the jury actually rested its verdict on the invalid late-joiner theory.[148/] Because the record indicated that Pulido's actual jury verdict didn't rest on the late-joiner theory, the error was harmless.

First, Pulido's robbery-murder special-circumstance instruction would have allowed the jury to rely on the late-joiner theory *only if* Pulido's post-murder conduct created a "grave risk" to the already-deceased victim's life — a the-

---

[147/] *Pulido I*, 555 U.S. at 62 & n.*.
[148/] *Pulido II*, 629 F.3d at 1012–20.

ory that "strain[e]d credulity."[149] So Pulido's jury instructions supported harmlessness.

Second, Pulido's verdict form stated that Pulido's jury found true that Pulido "engaged in or was an accomplice in the commission of robbery *during* the commission of the" charged felony murder.[150] So Pulido's verdict form's language excluded the late-joiner theory.

Third, the trial evidence supported harmlessness because, other than "Pulido's own uncorroborated testimony," no evidence supported the late-joiner theory.[151]

Accordingly, *Pulido II* concluded, "'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 instructional errors."[152]

---

[149] *Id.* at 1013–15.
[150] *Id.* at 1016.
[151] *Id.* at 1019.
[152] *Id.* at 1019–20 (quoting *Kotteakos*, 328 U.S. at (continued...)

Here, unlike in *Pulido II*, the trial record proves that Taylor's jury rested its verdicts on the actual-shooter theory, and not on the aiding-and-abetting theory. Thus, applying *Brecht* as this Court did in *Pulido II*, the error here is prejudicial because the entire record proves that Taylor's jury's special verdicts don't support the illegal 2006 resentencing.[153/]

First and foremost, the verdict forms definitively prove that Taylor's jury found "the murder of Louis Lim was committed by defendant RONALD TAYLOR while the said defendant was … engaged in the attempted commission of robbery," and that the robbery-murder special circumstance was therefore true.[154/] Further, the jury found true

---

[152/] (...continued)
765).

[153/] *See supra* pp. 5–12.

[154/] 2ER 16.

the personal-firearm-use enhancement.[155/] Hence, the special verdicts prove that the jury unanimously and explicitly found Taylor was the man who committed the attempted robbery, not the second man who arguably assisted the robbery's attempted commission. And because a person cannot aid and abet himself under *Perez*,[156/] we know beyond any doubt that the jury — by finding Taylor was the shooter — didn't find he aided and abetted the offense.

Second, the trial evidence shows that the jury found Taylor was the shooter because "each eyewitness testified that the gunman left the restaurant before the second assailant, and one witness positively identified defendant as the first of the two men who left the restaurant …."[157/]

[155/] 2ER 16.
[156/] 113 P.3d at 103–05.
[157/] 1ER 10.

Hence, the evidence led the jury to find that Taylor was the shooter.

Third, the prosecutor's argument urged the jury to find Taylor was the shooter. He argued that the evidence conclusively proved Taylor was the shooter.[158/] And he argued that the jury had to find Taylor was the shooter, because the jury could only find Taylor's robbery-murder special-circumstance and personal-firearm-use enhancement true if Taylor was the shooter.[159/]

Fourth, the jury instructions — which the jury presumably followed under *Weeks v. Angelone*[160/] — required that the jury find Taylor was the shooter to find true Taylor's robbery-murder special circumstance allegation and personal-firearm-use enhancement.[161/] CALJIC 8.81.17 provid-

---

[158/] 2ER 30–32, 39–42.
[159/] 2ER 38.
[160/] 528 U.S. 225, 234 (2000).
[161/] 2ER 12–13.

ed that, to find the robbery-murder special circumstance true, "it must be proved" that "[t]he murder was committed while [the] ~~[a]~~ defendant was [engaged in] in the [commission] [or] [attempted commission] of a robbery."[162] Hence, the jury had to find that Taylor was "the" defendant who committed the attempted robbery. And because CALJIC 2.11.5 barred the jury from "discuss[ing] or giv[ing] any consideration" to the second man's guilt, we know that the jury was prohibited from finding that the second man aided and abetted the offense.[163]

In sum, the trial record amply demonstrates that Taylor's jury actually relied on the admittedly false actual-shooter theory. The jury didn't find Taylor guilty as an aider and abetter. Thus, applying *Pulido II*'s inquiry re-

---

[162] 2ER 13.
[163] 2ER 53–54.

garding the basis for the jury's actual verdicts shows that the error here is prejudicial under *Brecht*.

Moreover, this Court should reject the dissent's efforts at painting Taylor's error as potentially harmless based on impermissible post hoc speculation regarding the likelihood of conviction on retrial.[164/] No Supreme Court case defining harmlessness allows reviewing courts to base harmlessness on post hoc speculation or post-trial evidence supporting guilt. In fact, several cases forbid it.

In 1946, in *Kotteakos v. United States*[165/] — whose reasoning *Brecht* adopted "in its *entirety*"[166/] — the Court explained that "it is not the appellate court's function to determine guilt or innocence" or "to speculate upon probable

---

[164/] *See Taylor*, 772 F.3d at 852–55 (Clifton, J., dissenting).

[165/] *Kotteakos v. United States*, 328 U.S. 750 (1946).

[166/] *See O'Neal*, 513 U.S. at 439.

reconviction."[167] In 1993, *Sullivan* said that a reviewing court cannot "hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be."[168] And, in 2004, in *Taylor v. Maddox*,[169] this Court held that federal habeas courts must not "examine whether there was sufficient evidence to support the conviction in the absence of the constitutional error."[170]

In the end, *Brecht* asks whether the "error 'had substantial and injurious effect or influence in deciding the jury's verdict.'"[171] Taylor's Sixth Amendment error necessarily stemmed from the verdicts because we know that the jury found Taylor was the shooter, so no jury verdict

---

[167] *Kotteakos*, 328 U.S. at 763–64.
[168] *Sullivan*, 508 U.S. at 279.
[169] 366 F.3d 992 (9th Cir. 2004).
[170] *Id.* at 1017 (internal quotation marks omitted).
[171] *Brecht*, 507 U.S. at 637 (quoting *Kotteakos*, 328 U.S. at 776).

supported the illegal, aiding-and-abetting-based 2006 resentencing. Because this Court must at least be in equipoise regarding prejudice, *Brecht* and *O'Neal* require granting relief.[172/]

Conclusion and Prayer for Relief

First, this Court need not address the Warden's belated (claim-distorting) harmless-trial-error defense. Rather, this Court should hold that the Warden waived or is judicially estopped from raising the harmless-trial-error defense for the first time on rehearing.

Second, Taylor's Sixth Amendment claim is structural under *Fulminante* because the illegal 2006 resentencing — based on facts that the 1989 jury didn't find — and on evidence that no jury has heard, defies harmless-error analysis.

[172/] *O'Neal*, 513 U.S. at 437–38.

Third, the error is also structural under *Griffin* and *Pulido I*, because we know from the special verdicts that the jury found true the factually invalid actual-shooter theory.

Fourth, assuming *Brecht*'s harmless-error standard applies, the error is prejudicial because we know that the illegal, aiding-and-abetting-based 2006 resentencing contradicts the jury's special verdicts' actual-shooter true findings.

Therefore, this Court should grant the writ and order that the State release Taylor unless it retries him within 60 days.

July 31, 2015

Respectfully submitted,
s/Kurt David Hermansen

Counsel for Defendant-Appellant

Certificate of Related Cases

Counsel for the Appellant is not aware of any related cases pending before this Court.

July 31, 2015

Respectfully submitted,
s/Kurt David Hermansen

Counsel for Defendant-Appellant

Certificate of Compliance
Under Fed. R. App. 32(a)(7)(C) & Circuit Rule 32–1
for Case Number **11–55247**

I certify that:

✔ 1. Under Fed. R. App. P. 32(a)(7)(C) and 35, and Ninth Circuit Rules 32–1, and 35–1 to 35–3, **the attached Supplemental En Banc Brief brief is**

■ **Proportionately spaced, has a typeface of 14 points or more and contains 6,733 words**, which is less than the 7,000 word limit established by this Court's June 15, 2015 order granting supplemental briefing.

Executed on: July 31, 2015

Respectfully submitted,
s/Kurt David Hermansen

Counsel for Defendant-Appellant

Z:\Box Sync\Clio\Taylor, Ronald\Taylor 11-55247\Briefs\Supp En Banc Brief\2015.08.05.really 7.31.FINAL Taylor_En Banc.wpd

****

Certificate of Service When Not All Case Participants Are CM/ECF Participants

I hereby certify that on July 31, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Ronald Taylor, C77647
California Correctional Institution
Facility D
P.O. Box 608
Tehachapi, CA 93581

s/Kurt David Hermansen