No. 12-641

In the Supreme Court of the United States

STEPHEN G. HOUSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether harmless-error review applies where a jury instruction provided alternative theories of guilt, one of which was erroneous.

2. Whether the court of appeals erred in its application of harmless-error review.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A62) is reported at 684 F.3d 1173.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2012. A petition for rehearing en banc was denied on August 14, 2012 (Pet. App. A63). The petition for a writ of certiorari was filed on November 13, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on eight counts of deprivation of rights under color of law, in violation of 18 U.S.C. 242, and four counts of making false statements in a matter within the

jurisdiction of a federal agency, in violation of 18 U.S.C. 1001. Pet. App. A4, A64-A65. He was sentenced to 18 months in prison, to be followed by three years of supervised release. *Id.* at A66-A68. The court of appeals vacated petitioner's convictions on four of the Section 242 counts and affirmed the convictions on the remaining eight counts. *Id.* at A1-A62.

1. Petitioner was a police officer with the Federal Protective Service (FPS). Pet. App. A3. In that capacity, he carried a badge and gun, drove an FPS squad car, and enforced the law on property operated by the General Services Administration (GSA). *Id.* at A3-A4. On at least eight occasions, petitioner used his police power and FPS squad car to stop and detain motorists on state roads outside of GSA-run property. *Id.* at A8-A22. FPS policy prohibits FPS officers from conducting traffic stops for minor traffic violations outside of federal property. Petitioner had been reprimanded for violating that policy and warned to stop doing so. *Id.* at A5-A7. But petitioner continued to conduct traffic stops on state roads in violation of FPS policy. *Id.* at A8-A22.

The stops follow a similar pattern. They typically occurred after petitioner approached the motorist from behind at a high rate of speed. See Pet. App. A9-A13, A21. Once petitioner detained the motorist, he would summon local law enforcement to the scene. *Id.* at A9, A11-A12, A15, A17, A22. When the local police arrived, they sometimes cited, and in two cases arrested, the motorist. *Id.* at A9, A15, A17. Other times, the local authorities were unavailable, or let the motorist go without a citation. *Id.* at A11-A12. During several of the incidents, the motorist was forced to wait on the side of the road, or at another location designated by petitioner, for an extended period of time before local law

enforcement arrived. *Id.* at A9, A12, A21-A22. None of the motorists petitioner had stopped felt free to leave during the stops. *Id.* at A9-A22.

Petitioner filed written incident reports that purported to describe several of these stops. See Pet. App. A12-A13, A15, A17, A19, A22. At trial, the motorists gave accounts of the events that materially conflicted with the accounts in petitioner's reports and testified that the reports' description of events giving rise to their respective seizures was false. *Id.* at A10-A13, A16-A22.

2. A grand jury returned a 12-count superseding indictment charging petitioner with eight counts of depriving a motorist of the Fourth Amendment right to be free from unreasonable seizure, in violation of 18 U.S.C. 242, and four counts of "making false statements in a matter within the jurisdiction of the Federal Protective Service," in violation of 18 U.S.C. 1001. Pet. App. A4. The Section 242 charges were based on the eight incidents in which petitioner stopped and detained motorists. *Id.* at A4-A5. The Section 1001 charges stemmed from four incident reports petitioner wrote about the stops; specifically, the indictment alleged that those reports contained materially false statements about the stops they described. *Ibid.*

As relevant here, the district court instructed the jury that "under the Fourth Amendment a law enforcement officer must have authority or jurisdiction and sufficient legal basis to make a traffic stop" and that "[i]f you find from the evidence in this case that the defendant did not have authority or jurisdiction as a federal police officer to make a traffic stop in Georgia, then you may find and you would be authorized to find the actions in doing so were unreasonable." Pet. App. A26. Petitioner unsuccessfully objected to this instruc-

tion, *ibid.*, and was ultimately convicted on all twelve counts, *id.* at A29.

3. On appeal, petitioner argued that the evidence was insufficient to support his convictions; the district court erred in instructing the jury; the district judge improperly interjected himself into the trial; the court improperly excluded evidence; the prosecutor improperly commented on petitioner's decision not to testify; trial counsel provided ineffective assistance; and cumulative error deprived him of a fair trial. Pet. App. A2. Specifically, as relevant to this petition, petitioner argued that "the district court erred when it instructed the jury that a traffic stop is unreasonable under the Fourth Amendment whenever effected by a law enforcement officer without jurisdiction or authority." *Id.* at A50.

The court of appeals agreed with petitioner that the jury instruction was erroneous, and, as a result, reversed four of petitioner's eight Section 242 convictions. Pet. App. A51. The court held that the instruction misstated the Fourth Amendment reasonableness standard. *Ibid.* It explained that, under *Whren* v. *United States*, 517 U.S. 806 (1996), "a traffic stop is reasonable under the Fourth Amendment when supported by probable cause or reasonable suspicion even if it is inconsistent with agency policy." Pet. App. A51. The court concluded that the instruction erroneously allowed the jury to find petitioner guilty on the Section 242 charges if it found petitioner lacked jurisdiction or authority to conduct the stops, even if probable cause or reasonable suspicion had existed. *Ibid.*

The court of appeals held, however, that the jury instruction error was harmless as to the four Section 242 convictions for the traffic stops about which petitioner wrote materially false reports. Pet. App. A51-A52. The

court explained that those Section 242 convictions "do not stand alone; they stand together with [petitioner's] convictions [under Section 1001] for making false statements." *Id.* at A52. The court determined, based on the jury's guilty verdict on the Section 1001 charges, that "the jury credited the motorists' accounts of those seizures and discredited [petitioner's] accounts of those seizures" and that the jury must have found that petitioner "lacked probable cause or reasonable suspicion for [the] seizures" the false reports described. *Ibid.* Accordingly, the court of appeals concluded that the erroneous jury instruction did not contribute to the jury's verdict on those Section 242 counts. *Ibid.*

ARGUMENT

Petitioner does not contend that the court of appeals erred in its articulation of the applicable Fourth Amendment reasonableness standard under *Whren* v. *United States*, 517 U.S. 806 (1996). Indeed, the court of appeals *agreed* with petitioner's contention below that the district court's jury instruction was inconsistent with *Whren*. Rather, petitioner contends (Pet. 5-20) that the court of appeals erred in concluding that the instructional error was harmless. The court of appeals' decision is correct, and it does not conflict with any decision of this Court or another court of appeals. This Court's precedents establish that the type of instructional error at issue is not structural, and petitioner's remaining contention challenges only the court of appeals' factbound conclusion that the jury instruction did not affect the verdict on the four sustained Section 242 convictions. Further review is not warranted.

1. As petitioner acknowledges (Pet. 10), the court of appeals held (as he urged) that the jury instruction at issue—permitting the jury to find that petitioner violat-

ed Section 242 if the traffic stop exceeded agency authority, even if supported by probable cause or reasonable suspicion—ran afoul of *Whren*, and it reversed four of petitioner's convictions on that basis. Pet. App. A50-A51. The merits of the jury instruction therefore is not at issue here, and the court of appeals' conclusion that the instruction was erroneous creates no conflict with any decision of this Court or any other federal court of appeals.

2. The normal standard of harmless-error review under *Chapman* v. *California*, 386 U.S. 18 (1967), applies to a jury instruction—like the one at issue in this case—that provides the jury alternative bases for conviction, one of which runs afoul of *Whren*. See *Skilling* v. *United States*, 130 S. Ct. 2896, 2934 & n.47 (2010). Petitioner appears to argue, relying on this Court's decision in *Stromberg* v. *California*, 283 U.S. 359 (1931), that such a *Whren*-based instructional error is structural and accordingly can never be deemed harmless. Pet. 7-13. But this Court has expressly rejected the argument that a conviction based on a general verdict rises to the level of a structural error, where the jury was instructed on alternative theories of guilt and one of those theories was improper; such instructional error is subject to harmless-error review. See *Skilling*, 130 S. Ct. at 2934 & n.47; *Hedgpeth* v. *Pulido*, 555 U.S. 57, 58, 60-61 (2008) (per curiam). The Court in *Hedgpeth* explained that while *Stromberg* did not address whether the instructional error it identified "could be reviewed for harmlessness, or instead required automatic reversal," nothing about the error "suggests that a different harmless-error analysis [than that applied in other instructional-error contexts] should govern." 555 U.S. at 60-61. And *Skilling* made clear that harmless-error review in this

context applies on direct review. 130 S. Ct. at 2934 (alternative-theory error "does not necessarily require reversal"). *Hedgpeth* and *Skilling* thus foreclose petitioner's claim of structural error.

3. Petitioner alternatively contends that the court of appeals erred in its application of harmless-error review, in conflict with decisions of this Court and of other courts of appeals. Pet. 13-20. Any factbound disagreement as to the application of harmless-error review on the record in this case, however, would not create any legal conflict and thus would not warrant this Court's review. And, in any event, the court of appeals committed no error.

The Court held in *Chapman* "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24; see *Neder* v. *United States*, 527 U.S. 1, 18 (1999) ("Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?"). That is precisely the standard the court of appeals in this case articulated (Pet. App. A31) and applied (*id.* at A51-A52). The court of appeals' explanation and application of the *Chapman* standard, moreover, is consistent with the decisions of the other courts of appeals that petitioner cites (Pet. 14-16), which differ only in the ultimate outcome on their specific facts.

Petitioner's main argument is, contrary to the conclusion of the court of appeals, that the jury instruction error was in fact not harmless. See Pet. 17-19. Specifically, petitioner argues that the court of appeals' reliance on the Section 1001 convictions was misplaced because the jury could have concluded that the incident reports completed by petitioner were false in certain

respects that did not necessarily obviate the existence of probable cause or reasonable suspicion for the traffic stops at issue. *Ibid.* That highly factbound contention does not merit further review. Review of a court of appeals' application of law to fact is particularly unnecessary where, as here, such application required the court of appeals to make a finding in the first instance about whether the error affected the verdict. See *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986) ("[A]n 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.") (emphasis added).

In any event, the court of appeals correctly applied the harmless-error standard in this case. As an initial matter, the court of appeals agreed with petitioner that the Section 242 convictions "standing alone, do not tell us whether the jury found that [petitioner] lacked probable cause or reasonable suspicion for the seizures underlying those convictions," or whether the jury instead relied only on the lack of agency authority. Pet. App. A52. The court of appeals therefore reversed the four Section 242 convictions that stand alone, *i.e.*, are not accompanied by a corresponding Section 1001 false statement conviction. *Ibid.*

The court of appeals concluded, however, that the instructional error was harmless as to the Section 242 convictions that "stand together with [petitioner's] convictions for making false statements." Pet. App. A52. The court of appeals reasonably determined that the Section 1001 convictions meant that "the jury credited the motorists' accounts of those seizures [*i.e.*, the seizures described in the incident reports] and discredited [petitioner's] accounts of those seizures." *Ibid.* The

record reflects that each of the motorists involved testified that the incident reports were false, *id.* at A4-A5, A13, A18, A20, and A22, and that those reports were the only evidence of the probable cause or reasonable suspicion that petitioner claimed justified the seizures. Accordingly, the court of appeals did not err in concluding that the jury's decision to credit the motorists' testimony—which it must have done to find the incident reports "materially false" (18 U.S.C. 1001(a))—is tantamount to a conclusion that petitioner lacked probable cause or reasonable suspicion for the seizures.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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