No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SAQUAWN HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The District of Columbia Court of Appeals voted 4-3 in favor of en banc rehearing in Petitioner's appeal from a murder conviction. Without explanation, the court treated that vote as a denial of rehearing. Petitioner filed a "Motion for Reconsideration" maintaining that the 4-3 vote was a grant of rehearing under the applicable federal statute. *See* D.C. Code § 11-705(d) (rehearing upon vote of "a majority of the judges … in regular active service"); *see also* 28 U.S.C. § 46(c) (same as to federal circuit courts). After two years, an equally divided court voted 3-3 to deny reconsideration (one of the judges who had voted in favor of rehearing had since taken senior status, without replacement). Three judges found that the original 4-3 vote was not a grant of rehearing because there was one recused judge, and four out of eight is not a majority. App'x C at 3. Three judges found to the contrary, concluding that recused judges are excluded for determining what counts as a "majority of judges … in regular active service." *Id.* at 11; *see* Fed. R. App. 35(a) (judges "in regular active service *and who are not disqualified*"). They reasoned that Federal Rule 35(a) is not only a persuasive interpretation of a substantively identical federal statute, 28 U.S.C. § 46(c), but is itself binding on the D.C. Court of Appeals. App'x C at 9-11; D.C. Code § 11-743. The questions presented are:

I. Whether the federal statute providing that en banc rehearing is granted upon the vote of "a majority of judges of the court in regular active service," D.C. Code § 11-705(d), excludes recused judges from the count, as the substantively identical 28 U.S.C. § 46(c) has been decisively interpreted. *See* Fed. App. R. 35(a).

II. Whether Rule 35(a), as amended in 2005 to expressly exclude recused judges from the count, is binding on the D.C. Court of Appeals, which has never "prescribe[d] or adopt[ed]" any modification to that rule in the decades since the amendment. D.C. Code § 11-743.

III. Where a defendant is tried and convicted on an invalid theory of criminal liability, whether an appellate court can "affirm a conviction on the basis of a theory not presented to the jury," *Chiarella v. United States*, 445 U.S. 222, 236 (1980).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Saquawn Harris respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals.

OPINION BELOW

The opinion of the District of Columbia Court of Appeals appears as Appendix A to this petition and is reported as *Tann v. United States*, 127 A.3d 400 (D.C. 2015). The Order denying rehearing en banc appears at Appendix B. The Order denying reconsideration of the denial of rehearing en banc appears at Appendix C. The relevant proceedings and trial court rulings are unpublished.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on November 19, 2015. The District of Columbia Court of Appeals denied rehearing without explanation on March 3, 2017. Upon a motion to reconsider, the District of Columbia Court of Appeals denied reconsideration of the denial of rehearing on April 11, 2019. On June 24, 2019, Chief Justice Roberts extended the time to file this petition for a writ of certiorari to September 8, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS AND RULES INVOLVED

D.C. Code § 11-705(d)[1] provides: "A rehearing before the court in banc may be ordered by a majority of the judges of the court in regular active service."

Its counterpart governing the federal circuit courts of appeals provides that en banc rehearing may be "ordered by a majority of the circuit judges of the circuit who are in regular active service." 28 U.S.C. § 46.

[1] Though codified in the D.C. Code, § 11-705 is federal statutory law enacted by Congress as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970.

Federal Rule of Appellate Procedure 35(c) provides: "A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc."

D.C. Code § 11-743 provides: "The District of Columbia Court of Appeals shall conduct its business according to the Federal Rules of Appellate Procedure unless the court prescribes or adopts modifications of those Rules."

STATEMENT OF THE CASE

A. Factual Background and Trial

Petitioner was charged with first-degree murder and related crimes in the death of James Taylor. The forensic evidence and eyewitness testimony showed that Taylor, a bystander killed during a shooting targeting someone else, was not shot by Petitioner or his alleged accomplice, but rather by a third person, Robert Foreman. The Court of Appeals operated from that premise. App'x A at 63 ("Although the evidence was disputed at trial, we assume for purposes of this opinion that it was Robert Foreman who fired the bullets that hit James Taylor."). The government argued that Foreman heard Petitioner's gunshots and decided to join the affray of his own initiative. There was no evidence of any coordination between Petitioner and Foreman, and the government conceded that Petitioner was unaware of Foreman's presence until after the shooting was over. App'x A at 63.

The government nonetheless sought to hold Petitioner accountable for Foreman's independent attack by claiming that Petitioner had aided and abetted Foreman in a murder, despite conceding that Petitioner did nothing to knowingly or intentionally assist him. The government's legal theory of aiding and abetting liability—which it pressed before, during, and at the closing of trial—was that in addition to traditional accomplice liability for one who intentionally aids the principal with the intent that the principal succeed, there is a second form of accomplice liability for one who merely targets the same victim as the principal, but may not even know that the principal exists. *See id.* at 54-58; *see also* Govt's

Pre-trial Mtn. to Preclude Argument at 3 (Aug. 11, 2008) (arguing that the only "relevant" issues are whether Petitioner was shooting at the same time as Foreman and had "the same intent"). Petitioner adamantly disagreed, arguing that accomplice liability requires an intent to assist the principal which was absent in this case. The trial court accepted the government's position, rejected defense counsel's motion for judgment of acquittal mid-trial, and ultimately instructed the jury that Petitioner could be convicted if he "knowingly aid[ed] and abet[ed] *the crime*, without knowing who else [was] doing it." App'x A at 86 (emphasis added); 5/19/09 Tr. at 40. While defense counsel requested that the jury be instructed that the Petitioner could not be an accomplice unless he was "consciously helping the person that was the principal," the trial court again rejected that position, and instructed jurors that it is "not the law" that "[i]f you don't know who the shooter is or that they are present, you … can't be an aider and abettor." App'x A at 55. Petitioner was convicted of murder and related offenses.

B. Direct Appeal

On direct appeal, Petitioner re-asserted his challenge to the government's theory of accomplice liability and the trial court's jury instructions on that theory, reiterating that the mere coincidence of two unrelated actors attempting the same crime simultaneously did not suffice to make one the accomplice of the other. App'x A at 54. The government maintained its contrary position, defending the theory of liability it presented to the jury and convinced the trial court to instruct the jury on. *Id.* at 56-57.

The D.C. Court of Appeals unanimously agreed with Petitioner's position that the government's charged and argued theory of accomplice liability was baseless, holding that it was constitutional error for the trial court to instruct the jury that it may convict under that theory. *Id.* at 86. But two judges (over dissent) nonetheless continued to articulate an entirely new form of aiding and abetting liability that it reasoned made the error harmless in this case. The theory had never been presented by the government at trial, it was not the subject of evidence or argument before the trial court, it had never

been briefed or argued by the parties on appeal, and the jury had never been instructed to make findings as to Petitioner's guilt under this newfangled theory. The majority held that *A* is liable as *B*'s accomplice if, (1) with the same mens rea as *B*, (2) he commits an act that incites *B*'s crime, even if he does so unintentionally, (3) he shares *B*'s "community of purpose," and (4) *B*'s crime was a foreseeable result of *A*'s conduct. *Id.* at 74-75. Only the first of those four elements was the subject of evidence, argument, and jury instructions at trial.

The majority acknowledged that there had been no jury instruction or jury findings on the elements of its newly announced theory of accomplice liability: the parties did not present evidence or argument on the questions of whether Petitioner incited Foreman or shared a "community of purpose" with him, nor did they address the foreseeability of Foreman's intervening actions. The Court nevertheless affirmed Petitioner's convictions. It reasoned, in a single paragraph, that there was "no reasonable possibility" that the jury would have failed to convict defendant on this entirely new theory of criminal liability, based on a trial record in which none of the litigants so much as addressed such a theory of liability. *Id.* at 86. The Court placed heavy, albeit mistaken, reliance on the fact that Foreman was indicted as one of nine co-conspirators, reasoning that the "jury's finding on the conspiracy count" thus showed that it had effectively found the "community of purpose" between Petitioner and Foreman required under its newly announced accomplice-liability test. *Id.* at 86-87. The premise of that reasoning—that the jury's verdict drew some conclusion about Foreman's participation in the charged conspiracy—is unfounded, as Foreman's case was severed and he was not a co-defendant in this case, so that the jury had no occasion to consider whether he was in fact a co-conspirator. *Id.* at 1, 5-6 (noting the six charged co-defendants, which did not include Foreman).

Judge Glickman dissented. He disagreed with the majority's "novel theory" of accomplice liability as a matter of substance, and would have held that an accomplice must "intend to assist or

encourage" the principal, as Petitioner had argued at trial and on appeal. *Id.* at 213. More fervently, Judge Glickman objected to the majority "devising" such a theory where it was "not relied on at trial or argued on appeal." *Id.* He also found the majority's cursory harm analysis to be faulty, concluding not only that the error was harmful, but further that it was "unfair and inappropriate for the majority to find that the trial court's 'erroneous' failure to instruct the jury on the 'community of purpose' theory of liability was harmless without affording [Petitioner] an opportunity to address that question," given that the Court had adopted a new theory of accomplice liability which no party addressed and, thus, that no party addressed a harm analysis under such a theory. *Id.* at 231, n.42.

C. En Banc Petition and Motion for Reconsideration.

Petitioner timely filed for rehearing en banc on March 2, 2016. In that petition he argued that the Court of Appeals "'cannot affirm a criminal conviction on the basis of a theory not presented to the jury.'" Reh'g Pet. at 7-10 (quoting *Chiarella v. United States*, 445 U.S. 222, 236 (1980), citing *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991)). He further argued that affirming on a theory of criminal liability that the government never presented, on which Petitioner lacked notice or an opportunity to present evidence and argument to refute, and on which the jury made no findings, violated Petitioner's Fifth and Sixth Amendment rights to Due Process and a trial by jury. *Id.* One year later, the Court of Appeals issued an order indicating that four of the seven judges participating had voted to grant the rehearing petition. App'x B. The order, without explanation, further indicated that rehearing en banc was denied. *Id.* While nine judges make up a full complement of judges on the D.C. Court of Appeals, there was a longstanding vacancy on the D.C. Court of Appeals throughout the petition's pendency (and through today), and one sitting judge (Judge McLeese, who was formerly an Assistant United States Attorney and assisted in the prosecution of Petitioner) chose to recuse himself,

id., leaving seven judges eligible to consider the rehearing petition. The vote was thus 4-3 in favor of granting the rehearing petition, with one judge recused from the case. *Id.*

Six days after the denial, Petitioner filed a motion to reconsider the denial of the en banc petition "or, in the alternative, for clarification of the basis for the denial of the petition." Mtn. to Reconsider (March 9, 2017). The motion argued that the applicable rules of appellate procedure dictate that the 4-3 vote constituted a grant of the rehearing petition, and if the Court of Appeals had some unstated basis for concluding otherwise, it should set forth its reasons so that Petitioner might seek further review in this Court. The United States filed no response and took no position on this motion to reconsider. As the initial deadline for seeking certiorari in this Court approached, Petitioner filed a motion for "Prompt Resolution of [the] Pending Motion to Reconsider" with the D.C. Court of Appeals, (July 11, 2017), explaining the need for the court to explain how a 4-3 vote in favor of granting rehearing might constitute a denial of rehearing en banc. But the court still offered no explanation when the deadline for filing a petition for certiorari with this Court arrived, so Petitioner filed a July 31, 2017, petition for a writ of certiorari. That Petition explained the exceedingly odd posture of the case, noting that "[g]iven the Court of Appeals' silence, Petitioner is left to speculate as to why the court treated a 4-3 vote in favor of rehearing as resulting in a denial of the petition." Pet'n for Cert. at 22, 17-5450 (July 31, 2017). The United States argued in its brief in opposition that granting certiorari would be premature, "because petitioner's petition for reconsideration of the denial of rehearing en banc is still pending before the court of appeals," so "that court could potentially still grant that petition and reconsider its decision," making this Court's review "unwarranted." BIO at 15, No. 17-5450. This Court denied certiorari on December 4, 2017.

On April 11, 2019, the D.C. Court of Appeals' judges finally offered a glimpse into why

their 4-3 vote was treated as a denial of rehearing, though the court was equally divided as to whether that treatment was correct. App'x C. The three judges who had voted to deny rehearing en banc in the first instance also voted to deny reconsideration. They explained that, in their view, the D.C. Court of Appeals adheres to an "absolute majority" approach to granting en banc rehearing. *Id.* at 3 (Statement of Blackburne-Rigsby, C.J.).[2] Under that approach, the four votes in favor of rehearing en banc did not constitute a "majority" of judges in regular active service, because in addition to the seven judges participating in the en banc vote there was one recused judge. *Id.* at 3. Therefore, the reasoning went, the court was comprised of eight active judges and four is not a majority of eight. While the three judges indicated that they were merely "reaffirm[ing]" the court's adherence to a case majority approach, *id.* at 3, they did not indicate when or by what means the court adopted that approach in the first place. *Id.* Indeed, three judges took the opposite view and argued that the court was bound to follow a "case majority" approach to en banc rehearing, as Petitioner had argued. *Id.* at 7 (Statement of Beckwith, J.). That is the approach followed by all of the Federal Circuit Courts of Appeals and it has been expressly codified in the federal rules since 2005. *See* Fed. R. App. 35(a). Under that view, the vote of four out of seven judges participating in the case constituted the majority necessary to grant en banc rehearing, and the recused judge did not factor into that count. Judge Beckwith noted that the court is "bound under D.C. Code § 11-743 to conduct our business under Federal Rule 35(a)," which makes clear its implementation of the "case majority" approach. *Id.* at 10. Judge Beckwith also pointed out that if the court had at some unspecified time adopted the "absolute majority" approach, that decision was "not made known through a published order" or "otherwise revealed

[2] For a discussion of the "absolute majority" versus the "case majority" approach, *see* Fed. App. R. 35(a), Advisory Committee Note to 2005 amendments (collecting cases and explaining why the "case majority" approach is mandated by federal statute).

to the public." *Id.* at 10. Judge Beckwith concluded that such an "unannounced decision purporting to 'adhere to' an unpublicized rule looks more like an after-the-fact justification" than an enforceable legal rule. *Id.* at 11. Because the vote on the motion to reconsider was 3-3—one of the judges who had voted to grant en banc rehearing had since taken senior status[3]—it was denied.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT THE VOTE OF A MAJORITY OF JUDGES PARTICIPATING IN A CASE SUFFICES FOR EN BANC REVIEW UNDER D.C. CODE § 11-705, JUST AS IT DOES UNDER THE SUBSTANTIVELY IDENTICAL 28 U.S.C. § 46(C).

D.C. Code § 11-705(d), passed by Congress, states: "A rehearing before the court in banc may be ordered by a majority of the judges of the court in regular active service. The court in banc for a rehearing shall consist of the judges of the court in regular active service.…" The plain terms of this statute dictate that recused judges are not "in regular active service," as the second sentence above makes abundantly clear. *Id.* Because the en banc court hearing a case would not "consist of" any recused or disqualified judges, recused judges are outside the scope of judges "in regular active service" under the statute. *Id.* This statutory provision was passed by Congress in 1970 as part of the District of Columbia Court Reform and Criminal Procedure Act. It is worded almost identically to its federal counterpart, 28 U.S.C. § 46, which states that hearing or rehearing before a circuit court *en banc* may be ordered by "a majority of the circuit judges of the circuit who are

[3] Judge Washington took senior status two weeks after the order denying rehearing en banc, on March 17, 2017. The Court of Appeals now has two vacancies, so that there are currently only seven active judges on the court (one nomination is now pending Senate confirmation). Only six of the seven judges participated in the vote to reconsider because Judge McLeese was recused despite Petitioner's waiver of any conflict of interest that he might have owing to any participation he once had in the underlying prosecution.

in regular active service. A court in banc shall consist of all circuit judges in regular active service …." 28 U.S.C. § 46(c).

Until 2005, there was a deep split in the federal circuit courts over whether recused or disqualified judges are judges in "regular active service" under 28 U.S.C. § 46(c). *See* Fed. App. R. 35(a), Advisory Committee Note to 2005 amendments (recounting seven circuits following "absolute majority" rule, and six following "case majority" rule). In 2005, this Court promulgated an amendment to Rule 35 that ended the debate, concluding that the statutory phrase in 28 U.S.C. § 46(c)—"judges . . . in regular active service"—did not include judges who were disqualified from hearing the case and the "case majority" rule was thereby adopted across the federal circuits. The amendment removed any ambiguity by stating clearly that rehearing *en banc* can be granted by a "majority of the circuit judges who are in regular active service *and who are not disqualified*." Fed. R. App. P. 35(a) (emphasis added). The Advisory Committee Note to the amendment makes it clear that the rule change was a clarification of what § 46(c) and Rule 35 had meant all along, and it was adopted by this Court because some federal circuits were misreading the statute (and pre-2005 federal rule) to require an absolute majority (including disqualified judges), which could not be reconciled with the statute.[4] The Advisory Committee analyzed 28 U.S.C. § 46(c) and concluded that the "case majority" approach, which excludes disqualified judges from the count,

[4] Some circuits ascribed to the erroneous "absolute majority" approach in binding opinions. *See*, *e.g., Ahlers v. Norwest Bank Worthington*, 794 F.2d 388 (8th Cir. 1986). Some were simply following a local rule, internal operating procedure, or custom that disqualified judges would be counted. *See, e.g.*, *United States v. Nixon*, 827 F.2d 1019, 1020–21 (5th Cir. 1987) (explaining that court was bound to deny rehearing petition because of its local rule "which provides that a case cannot be heard or reheard en banc unless a majority of all judges in regular active service on this Court—including any who may be recused in the particular case—vote that the case be heard or reheard en banc"); *Lewis v. Univ. of Pittsburgh*, 725 F.2d 910, 928–30 & n.1 (3d Cir. 1983) (statement of Adams, J.) (noting Third Circuit's "custom" of counting recused judges, but questioning whether that custom is consistent with § 46(c)).

is the "best interpretation" of the statutory language. Fed. R. App. P. 35, Advisory Committee Note to 2005 amendments; *see also* Memorandum from then-Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules to Judge David F. Levi, Chair, Standing Committee on Rules of Practice & Procedure 133 (May 14, 2004) ("[T]he Note was changed to put more emphasis on the fact that the case majority rule is the best interpretation of § 46(c)."), *available at* https://www.uscourts.gov/sites/default/files/fr_import/AP5-2004.pdf.

There is a compelling textual basis for the conclusion that Congress mandated the case majority approach. The second sentence of § 46(c), like the second sentence of D.C. § 11-705(d), states: "A court in banc shall consist of all circuit judges in *regular active service*…." 28 U.S.C. § 46(c) (emphasis added). A judge who is disqualified from a case could not conceivably sit on the *en banc* court, so the phrase "regular active service" must exclude disqualified judges. Because Congress would not give the same phrase in the adjacent sentences of the same statute two different meanings, it follows that the majority of the judges in "regular active service" necessary to grant en banc rehearing also excludes disqualified judges. *See* Fed. R. App. P. 35, Advisory Committee Note to 2005 amendments; *accord Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 903 (4th Cir. 1983) (en banc) ("Concentrating on the second sentence of § 46(c), we perceive insoluble difficulties [in any reading other than the case majority approach]."). "[I]t would ascribe to Congress a petulant inconsistency, devoid of any apparent explanation, were we to hold that a judge, though disqualified, should be treated as though he were part of the quorum for the purposes of the vote on whether to hear or rehear the case *en banc*." *Arnold*, 712 F.2d at 905. This Court has found the Advisory Committee's Notes "are 'a reliable source of insight into the meaning of a rule,'" *Hall v. Hall*, 138 S. Ct. 1118, 1130 (2018) (quoting *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002)), and a "respected source of scholarly commentary," *Tome v. United States*, 513 U.S.

150, 160 (1995) (plurality opinion) (citing *Huddleston v. United States*, 485 U.S. 681, 688 (1988); *United States v. Owens*, 484 U.S. 554, 562 (1988)).

Because Congress used the same phrase—"regular active service"—in both 28 U.S.C. § 46(c) and D.C. Code § 11-705(d), that phrase should be given the same meaning in both statutes. *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). Thus, this Court's adoption of the case majority approach as the "best interpretation" of § 46(c) compels the same interpretation of § 11-705(d). The Advisory Committee's textual analysis of the first two sentences of § 46(c) applies with equal force to the materially indistinguishable § 11-705(d). The second sentence of § 11-705(d) states: "The court in banc for a rehearing shall consist of the judges of the court in *regular active service*. . . ." D.C. Code § 11-705(d) (emphasis added). Because disqualified judges cannot be included in the definition of judges in "regular active service" in the second sentence of § 11-705(d)—a disqualified judge would be legally barred from sitting on the *en banc* court—so too they cannot be included where the same term "regular active service" appears "cheek by jowl" in the first sentence. *Arnold*, 712 F.2d at 904; *see also Textile Mills Sec. Corp. v. C.I.R.*, 314 U.S. 326, 332 (1941) ("[I]it is difficult to perceive how the word 'court' in the second sentence was used in a different sense than in the preceding sentence."). The phrase "regular active service" also cannot be read to include a judge who has recused herself, because such a judge is legally disqualified from serving on the case. When a judge recuses, "he is *out of service* insofar as that particular case is concerned. To disqualify means to debar legally. That is synonymous with lack of legal capacity, i.e., with inability to serve." *Arnold*, 712 F.2d at 904. A disqualified judge is therefore "not one of the circuit judges in regular active service" for that case. *Id.*

The Advisory Committee also noted important policy concerns that favored the "case majority" approach, and those policy concerns apply with equal force in the D.C. Court of Appeals.

For instance, counting disqualified judges in the voting analysis would "defeat[] the purpose of recusal." Fed. R. App. P. 35, Advisory Committee Note to 2005 amendments. Unless disqualified judges are excluded, "a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc." *Id.* In this case, Judge McLeese unquestionably intended his recusal to be a neutral act that would have no effect on the outcome of this case, but the Court of Appeals counted his decision no differently than if he had voted against rehearing *en banc*. The result is that a judge who recused himself because he was personally and substantially involved in the prosecution of Petitioner is treated as if he had cast the decisive vote to assure that Petitioner's conviction stands. Congress could not possibly have intended that result. *See Arnold*, 712 F.2d at 904 ("It would obviously contradict the purpose of disqualification to treat the situation precisely as though the disqualified judge had voted 'No.'"). Congress used the phrase "regular active service" simply to clarify that, for purposes of granting rehearing *en banc*, certain judges—senior judges and visiting judges—would be excluded from the count. *See Moody v. Albemarle Paper Co.*, 417 U.S. 622, 625–26 (1974). The phrase "regular active service" was not meant to codify an absolute majority approach that would conflict with the statutes and rules mandating judicial disqualification. *Arnold*, 712 F.2d at 904.

This Court should grant review to ensure that two substantively identical federal statutes, 28 U.S.C. § 46(c) and D.C. Code § 11-705(d), are interpreted harmoniously.[5] While the federal

[5] This Court has made clear that "Acts of Congress affecting only the District, like other federal laws, certainly come within this Court's Art. III jurisdiction," so that this Court is "not prevented from reviewing the decisions of the District of Columbia Court of Appeals interpreting those Acts in the same jurisdictional sense that [it is] barred from reviewing a state court's interpretation of a state statute." *Whalen v. United States*, 445 U.S. 684, 687 (1980). Although "as a matter of judicial policy" this Court has generally deferred to the D.C. Court of Appeals in interpreting "Acts of Congress applicable only within the District of Columbia," *id.*, such deference is not warranted here as an evenly divided court failed to resolve the statutory issue one way or the other.

statute governing the federal circuit courts of appeals has already been decisively interpreted by Rule 35 so that rehearing en banc is granted upon the vote of a majority of non-recused judges in regular active service, this Court should ensure that the same standard applies to the substantively identical § 11-705(d). The Advisory Committee emphasized the importance of a "uniform national interpretation of § 46(c)," Fed. R. App. P. 35, Advisory Committee Note to 2005 amendments, and that same concern with uniformity applies to the D.C. Court of Appeals given the congressional mandate for consistent court procedures. The Advisory Committee recognized that "[t]he courts of appeals should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches." Fed. R. App. P. 35, Advisory Committee Note to 2005 amendments. That concern with a uniform national standard applies with equal force to the D.C. Court of Appeals, not only because Congress used identical language in § 46(c) and D.C. Code § 11-705(d), but also because Congress has long provided that the local D.C. Courts "conform its practice, as far as is practicable, to both the uniform civil rules for the District Courts and those which apply to the Circuit Courts of Appeals." *McKelton v. Bruno*, 428 F.2d 718, 719 (D.C. Cir. 1970). Congress made that command even more explicit in the District of Columbia Court Reorganization Act of 1970, which, though leaving open the possibility for local modifications, established that that D.C. Court of Appeals "*shall* conduct its business according to the Federal Rules of Appellate Procedure." D.C. Code § 11-743 (emphasis added). Thus, Congress has mandated that the same *en banc* voting procedures should apply in both the federal courts of appeals and the D.C. Court of Appeals.

The case for this Court intervening is particularly strong given that the D.C. Court of Appeals itself is evenly divided over whether to follow the "absolute majority" or "case majority" approach, leaving this Court as the only potential tiebreaker in a case with grave stakes.[6] This Court has already carefully considered the statutory issues in issuing the 2005 amendments to Rule 35(a), and endorsed the view that the case-majority rule is the "best interpretation" of the statutory language. Given that this Court has already carefully considered this issue, summary reversal would be warranted because it is undisputed that, prior to the "Statement" of three judges who voted to deny reconsideration, "no case law, statute, or rule … explicitly informed the public or any litigant that the voted of a majority of nonrecused judges would be insufficient to secure en banc review." App'x C at 7 (Statement of Beckwith, J.). That itself is a denial of Due Process, as "[i]t is essential, of course, that a circuit court, and the litigants who appear before it, understand the practice—whatever it may be—whereby the court convenes itself en banc." *W. Pac. R. Corp. v. W. Pac. R. Co.*, 345 U.S. 247, 260–61 (1953). A court's procedure for rehearing cases en banc "should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it," and the failure to clearly explain the procedures warrants reversal by this Court. *Id.* at 267–68. Even now, litigants have no guidance as to how the D.C. Court of Appeals will count *en banc* votes in future cases given that the evenly divided court set no precedent. And although this Court has generally given lower courts broad latitude in adopting *en banc* procedures, it has not hesitated to correct practices that contravene the governing statutes. *See, e.g.*, *Moody*, 417 U.S. at 624 (noting "the importance of the question" whether senior judges may vote to grant rehearing *en banc*); *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 687 (1960) (noting that certiorari was granted "to consider a question of importance," i.e., whether a

[6] Petitioner is serving a fifty year sentence on the first-degree murder charge.

judge who retired between the issuance of an order granting rehearing *en banc* and the *en banc* ruling was eligible to participate); *cf. Yovino v. Rizo*, 139 S. Ct. 706, 709 (2019) (per curiam) (granting certiorari and holding that vote of judge who died prior to issuance of *en banc* ruling could not be counted).

Finally, the earlier petition for certiorari following the initial denial of en banc review, *see* 17-5450, does not counsel against this Court's review. The initial denial of en banc rehearing was unaccompanied by any explanation so that Petitioner was left to guess as to the Court of Appeals' reasoning. The United States opposed certiorari in 2017 because the pending motion for reconsideration in the Court of Appeals rendered certiorari premature. BIO at 15, No. 17-5450 ("petitioner's petition for reconsideration of the denial of rehearing en banc is still pending before the court of appeals" so "that court could potentially still grant that petition and reconsider its decision," making review "unwarranted."). And this Court has repeatedly made clear that it may grant Petitions to review denials of *reconsideration* of en banc denial. *See, e.g.*, *Lords Landing Village Condo. Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 897 (1997) (granting certiorari from denial of motion to reconsider denial of en banc rehearing); *Huddleston v. Dwyer*, 322 U.S. 232, 235 (1944) (same); *Chicago Great Western R. Co. v. Basham*, 249 U.S. 165, 166 (1919) (granting certiorari from the denial of "a second petition for rehearing"); *cf. Am.-Foreign S. S. Corp.*, 363 U.S. at 686 (noting grant of certiorari after denial of "petition for further rehearing en banc").

II. THIS COURT SHOULD GRANT REVIEW TO ENFORCE THE STATUTORY COMMAND THAT FEDERAL RULE 35(A) APPLIES IN THE D.C. COURT OF APPEALS AND PRECLUDES COUNTING DISQUALIFIED JUDGES.

This Court should also grant review to enforce Congress's statutory mandate that the Federal Rules apply in the D.C. Court of Appeals absent express amendment or modification. D.C. Code § 11-743, another congressionally enacted provision, provides that the "District of Columbia

Court of Appeals *shall* conduct its business according to the Federal Rules of Appellate Procedure *unless* the court prescribes or adopts modifications of those Rules." D.C. Code § 11-743 (emphasis added). An analogous statute requires the D.C. Superior Court to presumptively follow the federal rules of procedure. D.C. Code § 11-946 ("The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in Title 23) unless it prescribes or adopts rules which modify those Rules."). These statutes dictate that federal procedural rules automatically apply in the D.C. courts absent express rejection or modification. *See Flemming v. United States*, 546 A.2d 1001, 1005 (D.C. 1988) ("By deciding not to modify the Federal Rule, the Superior Court did not 'adopt' a rule of its own but merely allowed the Federal Rule to take effect by operation of section 11-946. The result of this decision is that, as a matter of law, Superior Court Rule 23(b) *is* Federal Rule 23(b), not a conceptually distinguishable rule with identical language." (emphasis in original)); *see also Cormier v. D.C. Water & Sewer Auth.*, 959 A.2d 658, 664 n.3 (D.C. 2008); *Dillard v. Yeldell*, 334 A.2d 578, 580 (D.C. 1975). Sections 11-743 and 11-946 follow Congress's longstanding command that the local courts of the District of Columbia shall "conform [their] practice, as far as is practicable, to both the uniform civil rules for the District Courts and those which apply to the Circuit Courts of Appeals." *McKelton*, 428 F.2d at 719.

Since the 2005 amendment to Federal Rule 35(a), the D.C. Court of Appeals has never rejected it, modified it, or altered it in any way.[7] One week after the 2005 amendments took effect

[7] The court has issued various orders rejecting and modifying different federal rule amendments, and it is no stranger to doing so. *See, e.g.*, Order (D.C. Nov. 30, 2006) ("ORDERED that the amendment to Federal Rule of Appellate Procedure 25(a)(2)(D), which is scheduled to take effect on December 1, 2006, and new Federal Rule of Appellate Procedure 25(a)(5), which is scheduled to take effect on December 1, 2007, are not adopted by this Court."), *available at* http://www.dccourts.gov/internet/documents/Order2006-11-30.Pdf.

and thereby became law in the District on December 1, 2005, the Court of Appeals purported to temporarily and retroactively stay them on December 8, 2005. App'x C at 9 (Statement of Beckwith, J., recounting history).[8] But that stay expired long ago. There has been no "further order" extending the stay or rejecting the amendment. By the order's own terms, the 2005 stay would dissolve, without further order, upon "the completion of th[e Court of Appeals'] review of the amendments." *Id.* Undoubtedly, review of the question whether or not to adopt the Supreme Court's clarifying amendment to Rule 35(a) ended long ago. That question is one of routine statutory construction and does not require extensive empirical study or analysis. In any event, it is inconceivable that this Court's review has lasted for the past fourteen years.

Indeed, the Court of Appeals itself has stated that far shorter "stays" are contrary to the statutory scheme absent affirmative action modifying or rejecting the federal rules. *Johnson v. United States*, 647 A.2d 1124, 1125 (D.C. 1994) (en banc) (statement of Farrell, J., joined by all other judges). In *Johnson*, the Court of Appeals recognized that, because it has the power to reject federal rules, it also has "the lesser power to stay the effectiveness of those rules to give the deliberative processes of both the trial and appellate courts time to work." *Id.* But this power to stay the federal rules cannot authorize a stay of years—"it would indeed be *contrary to the statute* if this court were routinely, without adequate justification, to grant stays of the duration (*one year*) requested in this case." *Id.* (emphasis added). If one-year stays cannot routinely be justified, *id.*,

[8] Order (D.C. Dec. 8, 2005) ("In accordance with Section III of the D.C. Court Reform and Criminal Procedure Act of 1970, D.C. Code § 11-743 (2001), it is ORDERED, *nunc pro tunc* to November 30, 2005, that the amendments to the General Rules of this Court, *which would otherwise be effected by the amendments to the Federal Rules of Appellate Procedure* 4, 26 and 45, 27, 28.1 and *35* are, in accordance with D.C. Code § 11-743, stayed with respect to the corresponding General Rules of this Court pending the completion of this Court's review of the amendments or until further order of this Court." (emphasis added)), *available at* http://www.dccourts.gov/internet/documents/Ordfedrappproc.Pdf.

then a fourteen-year stay to study an issue of simple statutory construction would violate the statute, and therefore the 2005 stay must have terminated long ago. It terminated whenever the Court of Appeals completed its review of the 2005 amendments, and the amended Federal Rule 35(a) went into effect because the court took no action to reject, alter, or modify it. *See Fleming*, 546 A.2d at 1005 n.10 (noting that because the Superior Court did not "propose to modify the amended Federal Rule of Criminal Procedure [23]," "the amendment to Superior Court Criminal Rule 23 effected by the amendment to Federal Rule of Criminal Procedure 23 is thus deemed by operation of D.C. Code § 11-946 to be in effect" upon termination of stay).

Even assuming the Court of Appeals' review of the 2005 amendments took more than a decade, and that a stay to allow for such a lengthy review were consistent with D.C. Code § 11-743, it is beyond question that the court completed its review of the 2005 amendments no later than June 24, 2016. On that date, the court issued a notice stating that it had completed a comprehensive review of the Federal Rules of Appellate Procedure. *See* Notice at 1, No. M-255-16 (D.C. June 24, 2016). The Notice begins by observing, "Pursuant to D.C. Code § 11-743 (2012 Repl.)," the Court of Appeals "must conduct its business according to the Federal Rules of Appellate Procedure (FRAP), unless the court adopts or prescribes modifications of those rules." *Id.* The Notice then states, "This court has on a number of occasions stayed the application of new amendments to the FRAP pending further review." *Id.* The Notice then states, "The court *has now conducted a further review* . . . ." *Id.* (emphasis added). "As a result of that review," the court proposed amendments to its rules and invited comments. *Id.* In the Notice, the court proposed expressly adopting some of the federal amendments, rejecting or revising others, and deferring consideration of others. *See, e.g.*, *id.* at 2 (declining to adopt federal approach to calculating time, although Court may adopt that approach in the future); *id.* at 6 (endorsing Fed. R. App. P.

4(a)(1)(C)'s treatment of *coram nobis* appeals); *id.* at 8 (rejecting language from Fed. R. App. P. 12.1); *id.* at 13 (adopting Fed. R. App. P. 26.1's language "in slightly revised form"). The Notice did not address the 2005 amendment to Rule 35(a) at all[9]—it certainly did not propose prescribing or adopting a modification to it, or rejecting it.

Because the court completed its comprehensive review of the Federal Rules amendments, and failed to propose any modification to Rule 35(a), the 2005 stay has dissolved by its own terms and the amended Federal Rule 35(a) governs the business of this Court automatically pursuant to § 11-743. The three judges who voted to deny en banc review and reconsideration of that denial reasoned to the contrary, concluding that the court's failure to expressly amend, modify, or adopt the 2005 amendments to Rule 35(a) "reflects that the court has yet to deliberate the merits of adopting the 2005 amendment" so that the December 8, 2005 stay remains in place. App'x C at 6 (Statement of Blackburne-Rigsby, C.J.). Those judges deemed it somehow inappropriate for the court to adopt federal rule amendments "by omission or inadvertently." *Id.* But that is exactly what the statute mandates. The statutory presumption is that the federal rules of appellate procedure apply in the District "unless the court prescribes or adopts modifications." D.C. Code § 11-743. If the court fails to prescribe or modify a different rule, then the federal rule applies by operation of statute. Now, fourteen years later, the Court of Appeals has never prescribed or adopted modifications to Rule 35 as amended in 2005.[10] That means that, by operation of D.C.

[9] The Notice did propose adopting an amendment to Rule 35(b)(2) that changed the maximum length of rehearing petitions from ten to fifteen pages, *see* Notice at 17, but did not address Rule 35(a) at all.

[10] The three judges who voted to deny rehearing *en banc* explain that a body called the "Board of Judges" voted at a private meeting—mere days before issuing the initial Order denying en banc rehearing—to "continue to adhere to the 'absolute majority' rule for voting on en banc petitions." App'x C at 3 (Statement of Blackburne-Rigsby, C.J.). This private meeting, the results of which were not made public until four years after the fact, cannot be deemed to have "prescribed or modified" the 2005 amendment to Rule 35(a). To prescribe its official rules, the D.C. Court of

Code § 11-743, Rule 35 as amended in 2005 controls the D.C. Court of Appeals' consideration of cases en banc. It makes no difference whether the court's silence as to Rule 35(a) was intentional or inadvertent, though it appears to be the latter. All that matters is that the Court did not prescribe or adopt modifications to it, and thus § 11-743 mandates that Federal Rule 35(a) governs.

III. THIS COURT SHOULD GRANT REVIEW TO REINFORCE ITS LONGSTANDING COMMANDS THAT AN APPELLATE COURT CANNOT AFFIRM ON A THEORY OF GUILT THAT WAS NOT TRIED TO THE JURY.

The underlying merits of Petitioner's appeal also warrant this Court's review. The substantive question implicates a protection at the heart of the Sixth Amendment: a defendant's constitutional right to a jury determination on every element of the crime with which he is charged. *See United States v. Gaudin*, 515 U.S. 506 (1995). It similarly implicates core trial protections at the heart of the Fifth and Sixth Amendments: the right to have notice of the charges, to present defense evidence and argument countering those charges, to confront adverse witnesses, and to effective assistance of counsel. This Court has noted that "[N]o principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 597 (2004) ("[N]otice of the Government's factual assertions and a fair opportunity to rebut those assertions before a neutral decisionmaker are essential elements of due process.") (citation and quotation marks omitted).

The D.C. Court of Appeals abrogated each of these fundamental rights by affirming

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Appeals must provide public notice and an opportunity for comment before issuing or amending rules. *See* 28 U.SC. § 2071(a)–(b) ("all courts established by Act of Congress," such as the D.C. Court of Appeals, may prescribe rules "only after giving appropriate public notice and an opportunity for comment"). For the same reason, the December 8, 2005 stay, which was not preceded by notice or an opportunity to comment, cannot be deemed to have "prescribed or modified" Rule 35(a).

Petitioner's conviction based on a legal theory that was simply never tried. This Court has, for decades, been unequivocal that appellate courts may not, under the guise of harmless error review, affirm a criminal conviction under an untried theory of liability. The Court of Appeals' utter disregard for this core constitutional principle implicates "an important question of federal law … in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). Furthermore, as explained below, it is a principle that warrants reinforcement by this Court in light of potential confusion resulting from this Court's 5-4 opinion in *Neder v. United States*, 527 U.S. 1 (1999).

A. It Was Error to Affirm Based on an Untried Theory of Guilt.

The Court of Appeals in this case unanimously found that the government's legal theory of accomplice liability was invalid, as the government's view—adopted by the trial court in its jury instructions—erroneously omitted three critical elements necessary for establishing accomplice liability. App'x A at 74-75. The government maintained throughout trial, and the trial court agreed, that Petitioner was liable as Foreman's accomplice so long as he acted with the same mens rea as Foreman, the killer, and fired shots around the same time as Foreman. The Court of Appeals *sua sponte* recognized a different and new form of accomplice liability consisting of four elements, only the first of which was the subject of evidence at trial that was deliberated upon and found by the jury: Petitioner must have (1) acted with the same mens rea as Foreman, (2) committed an act that incited Foreman's crime, even if he did so unintentionally, (3) shared Foreman's "community of purpose," and (4) been reasonably able to foresee Foreman's crime as a result of Petitioner's conduct. *Id.*

It is well-established under the Fifth Amendment's Due Process Clause and the Sixth Amendment right to a jury trial that, once the Court of Appeals concluded that Petitioner was tried and convicted on an impermissible theory of criminal liability, his conviction should have been vacated without further inquiry. This Court has repeatedly held that an appellate court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury," *Chiarella v. United*

States, 445 U.S. 222, 236 (1980); *Dunn v. United States*, 442 U.S. 100, 107 (1979) ("[A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial."); *Rewis v. United States*, 401 U.S. 808, 814 (1971) ("[W]e need not rule on this part of the Government's theory because it is not the interpretation . . . under which petitioners were convicted."); *Jackson v. Virginia*, 443 U.S. 307, 314 (1979) ("It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process."). To affirm a criminal conviction upon a theory of liability that was never tried to a jury would "offend[] the most basic notions of due process," *Dunn*, 442 U.S. at 106, because "[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made," *Cole*, 333 U.S. at 201. Just as a trial court cannot enter a directed guilty verdict, neither can an appellate court. *See Rose v. Clark*, 478 U.S. 570, 578 (1986); *Carpenters v. United States*, 330 U.S. 395, 410 (1947) ("To repeat, guilt is determined by the jury, not the court.").

The reasons that an appellate court cannot affirm a conviction upon a theory that was never charged, tried, or put before a jury are self-evident and on full display here. In this case, Petitioner did not have any notice or opportunity to present evidence or argument on the three omitted elements of accomplice liability that the Court of Appeals announced (incitement, community of purpose, and foreseeability), because the government's trial theory and the trial court's rulings rendered those factors immaterial to the case. For the Court of Appeals to nonetheless view the existing trial record and conclude anything at all about what evidence and argument Petitioner could or would have advanced had the government proceeded upon a valid theory of criminal liability is not only an absurd exercise, but one that flouts Petitioner's due process and jury trial rights. A trial court's erroneous ruling that certain essential elements are immaterial to criminal

liability obviously pervades the trial and what evidence was adduced at it, such that it cannot be harmless because an appellate court has no means to gauge what evidence and argument would have been presented on those elements but for the error. To hold otherwise is to do extreme violence to the basic underpinnings of the Constitution's criminal trial guarantees.

This Court's decisions in *Cole* and *McCormick v. United States*, 500 U.S. 257 (1991), illustrate the point and control the analysis here. In *Cole*, this Court established that an appellate court cannot affirm a conviction for one offense based upon the appellate court's conclusion that the record established the defendants were guilty under a different theory of that offense. 333 U.S. at 197. *Cole* concerned a criminal trial where the defendants were charged, tried, and convicted under § 2 of an Arkansas strike-violence law. *Id.* at 197-98. Petitioners challenged their § 2 convictions in an appeal to the Arkansas Supreme Court, which affirmed their convictions based on its conclusion that "the evidence had shown that the petitioners had violated § 1 of the Arkansas Act," which was "separate and distinct from the offense described" and actually tried under § 2.[11] *Id.* at 198. This Court unanimously reversed, explaining:

> If, as the State Supreme Court held, petitioners were charged with a violation of § 1, it is doubtful both that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; *it is certain that they were not tried for or found guilty of it*. It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

Id. at 201 (citing *De Jonge v. Oregon*, 299 U.S. 353, 352 (1937) (emphasis added)). The Court stressed this point, finding error because the Arkansas Supreme Court had "not affirmed these

[11] Section 2 of the law made it "unlawful for any person acting in concert with one or more other persons, to assemble at or near any place where a 'labor dispute' exists and by force or violence prevent … any person from engaging in any lawful vocation, or for any person acting … in concert with one or more other persons, to promote, encourage or aid any such unlawful assemblage." 333 U.S. at 198. Section 1, on the other hand, proscribed using violence or threatening violence to prevent or attempt to prevent a person from lawfully working. *Id.*

convictions on the basis of the trial petitioners were afforded," rather, "[i]t affirmed their conviction as though they had truly been tried and convicted of a violation of § 1 when in truth they had been tried and convicted only of a violation of a single offense charged in § 2." *Id.* at 201. The Court concluded "petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined at trial." *Id.* The Court of Appeals decision below is in direct violation of *Cole*'s commands. Petitioner was not charged, tried, or convicted of aiding and abetting Foreman under the "community of purpose/foreseeability" theory pronounced by the appellate court. There was no allegation that Petitioner incited Foreman, shared a community of purpose with him,[12] or should have foreseen his actions. There was no evidence or argument on those topics, the jury was not instructed on them, and there was no verdict evincing any jury finding on those three elements erroneously omitted from the trial. *Cole* thus dictates that the appellate court had no power to affirm Petitioner's convictions under a theory of liability that he was "not tried for or found guilty of." *Id.* at 201.

McCormick compels the same conclusion. In *McCormick*, this Court overturned the

[12] The multi-defendant indictment did include Foreman as one of nine named conspirators in a drug-distribution scheme, but Foreman was not tried with Petitioner, so that the petit jury was never faced with deciding whether Foreman was part of the conspiracy, and the government expressly disavowed any theory of conspiracy liability as to the murder. *See* 7/21/08 Tr. 142-43; 5/14/09 Tr. 71. That the government did not even view such a theory of conspiracy liability as a viable option speaks volumes about the strength of the "community of purpose" and foreseeability elements that the Court of Appeals concocted post-trial. As Judge Glickman noted in his dissent, the majority's new test was a mangled reformulation of traditional conspiracy principles, despite the government's disavowal of any conspiracy theory as to this offense. App'x A at 222 ("My colleagues' theory substitutes 'community of purpose' for the conspiratorial agreement that is the *sine qua non* of *Pinkerton*. But this is no small difference, because *Pinkerton* liability for the reasonably foreseeable acts of co-conspirators is based on the existence of an agency relationship between the conspirators. Such a relationship is created by their agreement but not by their mere 'community of purpose' as my colleagues use that term.").

defendant's conviction for a Hobbs Act violation where the jury was erroneously instructed that a quid pro quo was not a necessary element of the offense. The court of appeals in that case, "after announcing a rule of law for determining when payments are made under color of official right, went on to find sufficient evidence in the record to support findings" of guilt. 500 U.S. at 269-70. This Court found otherwise, writing that "even assuming the Court of Appeals was correct on the law, the conviction should not have been affirmed on that basis but should have been set aside and a new trial ordered," *id.* at 270. This conclusion was compelled by the court's recognition of the necessity of firm boundaries between the roles of judge and jury:

> This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. *Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury*.

Id. at 271 n.8 (emphasis added). *McCormick*, like *Cole*, is on all fours with this case. The trial court ruled that the jury was not required to find any particular relationship between Petitioner and the interloping principal (Foreman): the only questions relevant to Petitioner's homicide liability as an accomplice, under the government's reasoning and the trial court's rulings, was whether he (1) acted with the requisite mens rea and (2) "participated in the crime as something he wished to bring about," *i.e.*, that he acted around the same time as Foreman. App'x A at 55; *id.* (accomplice liability does not require "you knowingly aid and abet the [principal]," it suffices if "you knowingly aid and abet the crime"); *see also* Govt's Pre-trial Mtn. to Preclude Argument at 3 (Aug. 11, 2008) (arguing that the only "relevant" issues are whether Petitioner was shooting at the same time as Foreman and had "the same intent"). The Court of Appeals ignored *McCormick*'s directive that under these circumstances—where Petitioner was convicted under a concededly invalid theory of criminal liability—the verdict must be "set aside and a new trial ordered," *id.* at 270. Instead of "examin[ing] the record in light of the instructions given the jury," the Court of Appeals engaged

in the prohibited analysis of "consider[ing] the evidence in light of its own standard," *id.* at 276, and concluded that the existing record—in which no evidence or arguments were directed at whether Petitioner and Foreman shared a "community of purpose," or whether Foreman's intervening shots were "foreseeable"—supported a hypothetical jury determination on those requirements for accomplice liability. App'x A at 86-87.

Lower courts confronting this issue, in general, have faithfully followed the commands of *Cole* and *McCormick*, which preclude appellate courts from affirming convictions under a theory of guilt that was not actually tried. *United States v. Ness*, 565 F.3d 73, 80 (2nd Cir. 2009) ("This theory [of liability] was not presented to the jury and therefore cannot support an affirmance."); *United States v. Farrell*, 126 F.3d 484, 491 (3rd Cir. 1997) ("[W]e will not independently review the record before us and attempt to assess the evidence relevant to an alternative theory, not passed upon by the court below, upon which to uphold a conviction that we have found to be erroneous on the theory put forth by the district court."); *United States v. Semenza*, 835 F.2d 223, 225 (9th Cir. 1987) ("As an appellate court, we are not free to resolve this issue [of an element not presented below]."); *Cola v. Reardon*, 787 F.2d 681, 693 (1st Cir. 1986) (agreeing, on habeas review, that Appellant's convictions were "unconstitutionally affirmed on a theory of guilt not set forth at trial"); *White v. Longino*, 428 F. App'x. 491, 492 (5th Cir. 2011) (unpublished per curiam decision) ("This court will not consider new theories of liability raised for the first time on appeal."); *Teal v. Angelone*, 54 F. App'x. 776, 785 (4th Cir. 2003) (unpublished per curiam decision) ("Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury." (quoting *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991)); *United States v. Truong*, 425 F.3d 1282, 1289 n.2 (10th Cir. 2005) (declining to consider possible alternative basis for sustaining jury verdict, where fact-finder did

not consider basis and government did not argue basis on appeal); *Garrett v. State*, 905 A.2d 334, 340 (Md. 2006) (reversing defendant's conviction because it was improper to "affirm[] under the legal theory of concurrent intent, a theory that was interjected for the first time on appeal"); *State v. Schmidt*, 540 A.2d 1256, 1258 (N.J. 1988) ("We hold that a jury in a criminal case must be appropriately instructed on the theory of liability that is advanced in support of a criminal conviction; absent such instruction, a conviction cannot stand.").

The absence of a deep split of authority should not preclude this Court's review; the D.C. Court of Appeals' outlier position itself merits review to bring it into alignment with this Court's commands. Petitioner was deprived of his most fundamental right to a trial and jury determination of his guilt or innocence when the appellate court substituted its own judgment, in the first instance, for the required jury determination of his guilt or innocence. *See Neder*, 527 U.S. at 32 (Scalia, J., concurring in part and dissenting in part) ("*[T]he Constitution does not trust judges to make determinations of criminal guilt.*") (emphasis in original). Correcting that fundamental error, evident from the face of the Court of Appeals' opinion itself, is sufficient cause to grant certiorari in this case. S. Ct. Rule 10(c). Moreover, as detailed in the next part, certiorari is warranted to clarify how this Court's opinion in *Neder* intersects with the body of cases detailed above.[13]

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[13] While Petitioner maintains that there is no harm analysis to conduct when a defendant is convicted on an invalid theory of criminal liability—*i.e.*, the error is structural—it is worth noting that the D.C. Court of Appeals' single page of harm analysis commits critical and obvious errors. Most critically, the Court stressed the fact that Foreman was indicted as a co-conspirator, App'x A at 86-87, reasoning that the "jury's finding on the conspiracy count" thus showed that it had effectively found the "community of purpose" between Petitioner and Foreman required under its newly announced accomplice-liability test. Foreman, however, was not a co-defendant in this case at all, *id.* at 1, 5-6—his case was severed—so it is wrong to conclude that the jury's verdict somehow evinced a finding that Foreman was a co-conspirator of, or shared a "community of purpose" with, Petitioner. Moreover, the conspiracy conviction said nothing about whether this particular shooting—which was allegedly retaliating at the intended target for slapping a friend's girlfriend—satisfied the "foreseeability" element of the Court's new theory of accomplice liability. Indeed, the government never alleged that the shooting at the intended target was a foreseeable act

B. This Court Should Grant Review to Eliminate Any Confusion *Neder v. United States* Has Injected into this Well-Established Doctrine.

Cole, *McCormick*, and the litany of cases cited above established that an appellate court cannot affirm a criminal conviction upon a theory of liability that a defendant was not actually tried and convicted of at trial. There is some tension between that line of cases and this Court's 5-4 opinion in *Neder v. United States*, 527 U.S. 1 (1999). While that perceived tension is superficial, as explained below, this Court has yet to offer direction about how *Neder* fits within the framework of cases discussed above, and certiorari is warranted to provide that missing guidance.[14] Unlike *Cole*, *McCormick*, and the other cases discussed above, the defendant in *Neder* was charged, tried, and convicted on the precise theory under which this Court ultimately affirmed his conviction. The issue in *Neder* was whether the omission from jury instructions of a single element of the charged offenses—the "materiality" of false statements as it related to fraud and tax offenses—might be deemed harmless where that element was "uncontested" and erroneously determined by the trial judge, rather than the jury. 527 U.S. at 2-4, 9.

Critically, in *Neder*, the defendant was on notice throughout his trial that materiality was an element of the charged offenses, thus providing him with every motive and opportunity to

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in furtherance of a conspiracy centered around dealing drugs, protecting drug turf, and intimidating, assaulting, or killing competitors or government cooperators. App'x A at 4-7. It disavowed conspiracy liability as to this shooting because it was personal, not drug or obstruction of justice related, so that a reasonable jury could easily have found that it did not fall under a communal purpose of the alleged conspirators. *Id.* at 213-14 (Glickman, J., dissenting).

[14] Petitioner raised this argument about *Neder*'s inapplicability to the facts of this case in his Petition for Rehearing En Banc, at 8 n.1 (March 2, 2016), which was of course the first opportunity he had to make the argument. The government did not argue on direct appeal that the Court of Appeals should adopt a new theory of accomplice liability and affirm on that basis; that was a course the panel-majority of the Court of Appeals charted *sua sponte*. *See* App'x A at 213 (Glickman, J., dissenting) (objecting to the majority "devising" a new theory of liability where it was "not relied on at trial or argued on appeal"). Indeed, the government has never—at trial, on appeal, or in opposition to rehearing—argued in support of the new test for accomplice liability announced by the D.C. Court of Appeals in this case.

contest that element, though he ultimately decided not to do so. This Court simply held that an instructional error—leaving the materiality element for the trial court's determination rather than the jury's—might be deemed harmless in "the narrow class of cases like the present one" where the element was "uncontested" by the defendant "and supported by overwhelming evidence." *Id.* at 17; *id.* at 15 ("Petitioner underreported $5 million on his tax returns, and did not contest the element of materiality at trial."). Indeed, in *Neder*, even on appeal the defendant did "not suggest that he would introduce any evidence bearing upon the issue of materiality if so allowed," *id.*

Even that narrow ruling sharply divided this Court, where four Justices, in two separate dissenting opinions, disagreed that such an instructional error could ever be harmless if preserved. Justice Scalia's dissent, joined by Justices Souter and Ginsburg, concluded that even where a defendant has notice of all the elements of the offense for which he is being tried, unlike here, it remains structural error to remove any single element of the charged offense from the jury's consideration. *Neder*, 527 U.S. at 30 (Scalia, J., concurring in part and dissenting in part) ("I believe that depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged—which necessarily means his commission of *every element* of the crime charged—can never be harmless."). In criticizing the majority's contrary conclusion, Justice Scalia pointed out that "we do not know, when the Court's opinion is done, *how many* elements can be taken away from the jury with impunity, so long as appellate judges are persuaded that the defendant is surely guilty." *Id.* at 33 (emphasis in original). That is an apt point in this case, where the Court of Appeals affirmed Petitioner's convictions despite the fact that only one of the four elements that the Court of Appeals recognized as essential to accomplice liability was tried to, and decided by, the jury.

The four dissenting Justices' criticisms aside, this case is in stark contrast to *Neder*. In

Neder, the defendant had notice, motive, and a full opportunity to present evidence contesting the materiality element that was ultimately determined by the trial judge, but he chose not to do so. In this case, by contrast, the Court of Appeals announced three entirely new elements of accomplice liability—incitement, community of interest, and foreseeability—which were utterly immaterial under the trial court's instructions so that Petitioner had no notice, motive, or opportunity[15] to present evidence or argument on those points. Also, unlike in *Neder*, Petitioner here would absolutely contest the newfangled incitement, community of purpose, and foreseeability elements upon retrial, as their existence was highly debatable. *See* Petition for Rehearing En Banc at 9–10.

The apparent tension between *Cole* and *McCormick* on the one hand, and *Neder* on the other, is thus illusory. There is an ironclad rule that an appellate court cannot affirm a criminal conviction upon a theory of liability that was not charged and tried, as *Cole* and *McCormick* make clear, which was exactly what the Court of Appeals erroneously did in this case. *Neder* confronted a categorically different scenario, where the defendant was afforded notice and an opportunity to defend against each and every element necessary for the conviction that this Court ultimately affirmed, and this Court found that stripping one of those elements from the jury's consideration and leaving it for the trial court's determination might be harmless, at least where that element was uncontested. *Neder*, 527 U.S. at 4. That makes some sense,[16] because in that circumstance, the

[15] Even if Petitioner had the prescience to foresee the Court of Appeals' new theory of accomplice liability, any evidence or argument directed at the three new elements omitted from the trial court's instructions would have been barred at trial as irrelevant under the trial court's rulings that contemporaneous actors who have the same mens rea are liable as accomplices regardless of whether those three additional elements are present. App'x A at 54-55.

[16] Petitioner's principal position is that there is no need to reconsider *Neder*, as the stark differences between that case and this one do not call for such a reconsideration here; *Neder* can be readily reconciled with *Cole* and *McCormick*, and this case is a good vehicle to articulate such a reconciliation. However, should this Court disagree with that assessment, Petitioner maintains as a backup position that the Court should reconsider *Neder*, as the four dissenting justices espoused the better view that is more faithful to the Sixth Amendment's jury trial command.

trial record is at least arguably susceptible to a harmless error analysis, where the Court can weigh the evidence that was presented to the trier of fact on each element, even if the evidence as to a single element was put before the wrong trier of fact (the judge, rather than the jury, in *Neder*). But where an essential element of a criminal offense is not put before any trier of fact in the trial court—where there is no notice, motive, or opportunity for the defendant to create a trial record on such an element or elements, as here—that is a structural defect with the trial that is per se harmful. *Cole*, 333 U.S. at 201; *McCormick*, 500 U.S. at 269-271 & n.8. This latter type of error, present here as to three distinct elements, fits squarely within what *Neder* described as eliding harmless error analysis, because it injects "a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself,'" and thus "deprive[s] defendants of 'basic protections' without which 'a criminal trial cannot reliability serve its function as a vehicle for determination of guilt or innocence.'" *Neder*, 527 U.S. at 8-9 (citations omitted). This Court should thus grant certiorari to clarify that *Neder* did nothing to upset the entrenched line of precedents holding that an appellate court cannot affirm on a theory of criminal liability that was not tried below. *Cole*, 333 U.S. at 201; *McCormick*, 500 U.S. at 269-271 & n.8; *Chiarella*, 445 U.S. at 236; *Dunn*, 442 U.S. at 106; *Rewis v. United States*, 401 U.S. at 814; *Jackson*, 443 U.S. at 314; *see also Carpenters*, 330 U.S. at 410; *Rose*, 478 U.S. at 578.

C. In the Alternative, this Court Should Summarily Reverse the Judgment Below.

Given that the Court of Appeals' affirmance in this case contravened a well-entrenched line of this Court's precedents and "offends the most basic notions of due process," *Dunn*, 442 U.S. at 106, this case is appropriate for summary reversal where the opinion below is an outlier and not indicative of some deeper split of authority. This Court need look no further than the face of the Court of Appeals' opinion to find clear constitutional error. The court itself found constitutional error in the theory of liability that Petitioner was tried on, and then *sua sponte*

affirmed Petitioner's convictions based on an entirely new theory of liability that was neither the basis of his conviction nor even argued on appeal.[17] App'x A at 231 n.42 (Glickman, J., dissenting) (reasoning that it is "unfair and inappropriate for the majority to find that the trial court's 'erroneous' failure to instruct the jury on the 'community of purpose' theory of liability was harmless without affording [Petitioner] an opportunity to address that question").

To summarily reverse, this Court need do no more than recite the Court of Appeals' conclusions and cite to this Court's plain and well-entrenched opinions categorically prohibiting that type of analysis. *Chiarella*, 445 U.S. at 236 (court of appeals "cannot affirm a criminal conviction on the basis of a theory not presented to the jury"); *McCormick*, 500 U.S. at 271 n.8

[17] That is another reason counseling in favor of summary reversal, namely, the extraordinary fact that the Court of Appeals developed its novel theory of accomplice liability without any briefing or argument from the parties supporting such a position. A basic principle of our system of justice is that "appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *NASA v. Nelson*, 562 U.S. 134, 147 n.10 (2011) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)). *McCormick* is once again instructive here. Justice Scalia's concurrence reveals that the Justices were faced with a situation similar to that of the Court of Appeals in this case. Each party argued for a different interpretation of the statute at issue, but Justice Scalia preferred a third, unargued interpretation. However, Justice Scalia specifically acknowledged that to adopt that interpretation would violate norms of fairness to the parties and of appellate review. *McCormick*, 500 U.S. at 277 (Scalia, J., concurring) ("I do not feel justified in adopting that interpretation without briefing and argument."); *id*. at 280 ("I mean only to raise this argument, not to decide it, for it has not been advanced and there may be persuasive responses.").

When faced with this same dilemma, the Court of Appeals chose not to pick one of the two interpretations argued by the parties, as did the majority in *McCormick*, or to raise a third interpretation for further briefing, as did Justice Scalia in his concurrence. Instead, it ventured out on its own to contrive a new theory of accomplice liability—without aid of briefing or argument—which, as Judge Glickman's dissent correctly noted, no other jurisdiction adheres to and violated the most basic tenets of procedural fairness to the litigants. App'x A at 231 ("In the past, when this court has considered deciding an appeal on a basis 'the parties failed to identify and brief'—a discretionary departure from the general rule that points not urged on appeal are deemed to be waived—we have taken care to 'ensure procedural fairness, both to the government and to the defense, by providing each party with the opportunity to brief the issue. This is so even when the issue injected by the court involves settled legal principles. There is no reason to deviate from that rule of basic fairness here.") (citations omitted).

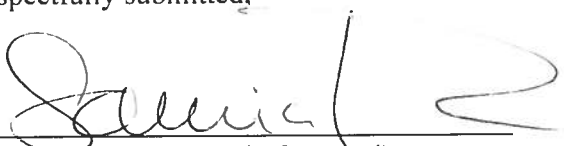
("Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury."); *Cole*, 333 U.S. at 201 ("[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made"); *Dunn*, 442 U.S. at 106 ("[A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial."); *Rewis*, 401 U.S. at 814 ("[W]e need not rule on this part of the Government's theory because it is not the interpretation . . . under which petitioners were convicted."); *Jackson*, 443 U.S. at 314 ("It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process.").

The Court of Appeals' opinion giving such short shrift to fundamental constitutional rights should not evade correction simply because few, if any, other courts have gone so far afield. Summary reversal is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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September 4, 2019

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SAQUAWN HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

Samia Fam, a member of the Bar of this Court and the Counsel of Record for Petitioner, hereby attests that on September 4, 2019, she sent one copy of the Motion for Leave To Proceed *In Forma Pauperis*, Petition for the Writ of Certiorari, and Appendix to:

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by placing these documents in properly addressed envelopes with fully prepaid first-class postage affixed thereon, and depositing the envelopes with the United States Postal Service.

Electronic copies of these documents were also delivered via e-mail to:

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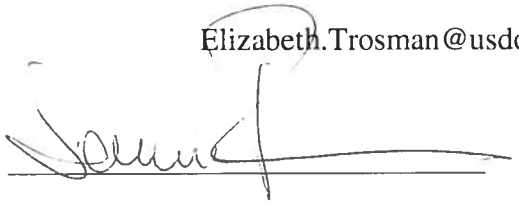

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