No. 19-5848

IN THE SUPREME COURT OF THE UNITED STATES

SAQUAWN HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the District of Columbia Court of Appeals incorrectly applied its own rules of procedure or incorrectly interpreted local law when it denied petitioner's petition for rehearing en banc.

2. Whether the District of Columbia Court of Appeals erred by applying harmless-error analysis to the omission of a jury instruction requiring the jury to "find a community of purpose between the principal and the accomplice" in order to find petitioner guilty on an aiding-and-abetting theory for offenses arising out of a group shooting in which he participated.

ADDITIONAL RELATED PROCEEDINGS

District of Columbia Superior Court:

United States v. Harris, No. 07-CF1-22962 (Nov. 20, 2009)

District of Columbia Court of Appeals:

Harris v. United States, No. 09-CF-1482 (Nov. 19, 2015)

Harris v. United States, No. 09-CF-1482 (Mar. 3, 2017)

Harris v. United States, No. 09-CF-1482 (Apr. 11, 2019)

Supreme Court of the United States:

Harris v. United States, cert. denied, No. 17-5450 (Dec. 4, 2017)

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OPINION BELOW

The opinion of the court of appeals (App., infra, 1a-232a) is reported at 127 A.3d 400.[1]

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2015. A petition for rehearing was denied on March 3, 2017 (Pet. App. B1-B3). A motion for reconsideration was denied on April 11, 2019 (Pet. App. C1-C13). On June 24, 2019,

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[1] Petitioner's citations to the decision below reference the court of appeals' slip opinion, rather than the Westlaw version of that opinion that is reprinted in the petition appendix. For clarity, we have included the slip opinion as an appendix to this brief.

the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 8, 2019, and the petition was filed on September 4, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

Following a jury trial in the Superior Court of the District of Columbia, petitioner was convicted on one count of conspiracy to commit assault and murder, in violation of D.C. Code § 22-1805a (2001); one count of first-degree premeditated murder while armed, in violation of D.C. Code §§ 22-2101 and 22-4502 (2001); one count of assault with intent to kill while armed, in violation of D.C. Code §§ 22-401 and 22-4502 (2001); two counts of possession of a firearm during a crime of violence, in violation of D.C. Code § 22-4504(b) (2001); one count of carrying a pistol without a license, in violation of D.C. Code § 22-4504(a) (2001); and one count of unlawful possession of a firearm, in violation of D.C. Code § 22-4503(a) (2001). Gov't C.A. Br. 3-4; App., infra, 17a. The trial court sentenced petitioner to 800 months of imprisonment. Gov't C.A. Br. 6. The District of Columbia Court of Appeals affirmed. App., infra, 1a-232a.

1. Petitioner was a member of the 22nd Street Crew, a criminal street gang. App., infra, 4a, 6a. The gang was engaged in the distribution of illegal drugs and "committed numerous criminal acts in an effort to protect the territory of the gang and integrity of its operations." Id. at 5a.

On May 4, 2006, Omar Harrison got into an argument with the girlfriend of Alphonce Little, a 22nd Street Crew member. App., infra, 10a. Harrison issued a challenge to Little, and news of the dispute spread by word of mouth to Little, petitioner, and other gang members in the area, who all "raced toward Harrison from different directions on 22nd Street." Ibid. Petitioner and a gang member named Michael Tann began shooting at Harrison, and other gang members joined in, including Robert Foreman. Id. at 11a. Foreman was across the street from petitioner and Tann, but when he saw and heard them shooting at Harrison, he "felt compelled to join in the attack, and started shooting as well." Ibid.

The shots did not hit Harrison, and he managed to drive away uninjured. App., infra, 11a. But James Taylor, an innocent bystander, was struck in the head and killed. Ibid. And Bernard Mackey, another bystander, was grazed by a bullet. Id. at 11a-12a. Although both petitioner and Tann were aware of "the presence of other gang members" during the shooting, the evidence did not show that they were aware of Foreman's presence in particular. Id. at 12a.

2. Petitioner was charged with, among other things, the first-degree murder of Taylor, the assault with intent to kill while armed of Mackey, and conspiracy "to assault and kill anyone whose interests were contrary to those of" the 22nd Street Crew. App., infra, 6a, 53a. Petitioner was jointly tried with five co-defendants, including Tann, in a trial that lasted nine months.

Id. at 6a, 16a-17a. The government was unable to prove who fired the shots that struck Taylor and Mackey; some evidence indicated that it was Foreman. Id. at 12a, 52a-54a. Given that Foreman was a member of the charged conspiracy, the government argued to the jury that it could find petitioner guilty of the murder and assault either as a principal or as an accomplice. Id. at 53a-54a & n.17.

When discussing jury instructions, petitioner argued that accomplice liability required proof that he consciously helped the principal. App., infra, 54a. The trial court disagreed and instructed the jury using the District of Columbia's pattern instruction for aiding and abetting, which did not include a requirement of intentional association with the principal. Id. at 55a.

The jury found petitioner guilty on all counts, including first-degree murder and assault with intent to kill while armed. Gov't C.A. Br. 3-4. The trial court sentenced him to a total of 800 months of imprisonment. Id. at 6.

3. The District of Columbia Court of Appeals affirmed. App., infra, 1a-232a. As relevant here, petitioner challenged the sufficiency of the evidence on the counts of first-degree murder and assault with intent to kill, as well as the trial court's aiding-and-abetting instruction. Id. at 50a.

The court of appeals assumed arguendo that Foreman fired the shots that hit Taylor and Mackey and that petitioner was "unaware of Foreman's presence during the attack." App., infra, 63a. Even

under those assumptions, the court concluded, Tann and petitioner "could be held liable as aiders and abettors." Id. at 71a. Declining to "fully accept" either party's position on aiding-and-abetting liability, id. at 56a, the court reasoned that under the District of Columbia's aiding-and-abetting statute, (1) "the aider and abettor must have the mens rea of the principal actor" and a "purposive attitude towards the criminal venture"; (2) "a defendant is not responsible" for a third party's actions "when there is no community of purpose between the defendant and the third-party"; (3) "the defendant need not know of the presence of [the principal]"; and (4) "where the criteria in (1) above are met and the evidence at trial proves that the defendants by their action, foreseeably * * * incited action by a third party who shared in their community of purpose, aiding-and-abetting liability may be found," id. at 74a-75a (citation and internal quotation marks omitted). Applying those principles, the court found the evidence sufficient to support petitioner's convictions. Id. at 75a-85a.

The court of appeals concluded that "the trial judge committed instructional error when he told the jury that a defendant can be found liable as an aider and abettor 'if [he] knowingly aid[s] and abet[s] the crime without knowing who else is doing it,' without requiring that the jury also find a community of purpose between the principal and the accomplice." App., infra, 86a (brackets in original). It determined, however, that the error did not warrant

setting aside petitioner's convictions, because petitioner was "not harmed" by this error. Ibid. The court found "no reasonable possibility" that a properly instructed jury would have failed to find the community-of-purpose element satisfied. Id. at 87a. The court based that determination on the jury's finding of guilt on the charge of participating in "a criminal conspiracy with other members of the 22nd Street Crew to kill persons * * * whose 'interests' were contrary to that of the coconspirators"; the indictment's identification of Foreman as a member of that conspiracy; and "other evidence presented regarding the behavior of Robert Foreman, [petitioner], Tann, and other gang members at the time of the shooting." Id. at 86a.

Judge Glickman dissented on the issue of petitioner's aiding-and-abetting liability. App., infra, 213a-232a. In Judge Glickman's view, a person cannot be "found guilty as an aider and abettor under the law of the District of Columbia without proof that he intended to assist or encourage the principal offender." Id. at 214a. Additionally, Judge Glickman noted "[p]arenthetically" that he was "not persuaded to find harmless" the trial court's instructional error. Id. at 231a n.42.

4. Petitioner sought rehearing en banc. Under D.C. Appellate Rule 35(a), a "majority of the judges who are in regular active service may order that an appeal * * * be heard * * * en banc." D.C. Ct. App. R. 35(a). The court of appeals denied the petition, noting that four of the court's eight active judges

would have granted the petition and that one was recused. Pet. App. B1-B2. Petitioner moved to stay issuance of the mandate and for reconsideration, "or, in the alternative, for clarification of the basis for the denial of the petition." Pet. 6 (citation omitted).

While his motion for reconsideration was pending, petitioner filed a petition for a writ of certiorari in this Court. Pet. 6. Petitioner argued, among other things, that the court of appeals erred in affirming his convictions under a harmless-error analysis and in denying rehearing en banc when four of the seven non-recused judges voted for rehearing. 17-5450 Pet. 7-26. This Court denied the petition for a writ of certiorari. 138 S. Ct. 503.

5. The court of appeals denied petitioner's motion for reconsideration by an evenly divided vote. Pet. App. C1-C2. Although eight active judges were serving when the court denied rehearing en banc, former Chief Judge Washington's retirement from active service left the court with only seven active judges, one of whom remained recused. Id. at C3-C4 & n.2. Of the six participating judges, three voted for reconsideration and three voted against it. Id. at C1-C13.

a. Writing for the judges voting to deny reconsideration, Chief Judge Blackburne-Rigsby observed that, because the court had eight active judges when petitioner originally sought rehearing, four votes in favor of rehearing was not a majority of the judges in "regular active service." Pet. App. C3-C4 (Statement of

Blackburne-Rigsby, C.J., with Fisher and Thompson, JJ.) (quoting D.C. Ct. App. R. 35(a)). The chief judge explained that D.C. Rule 35(a) incorporates the "'absolute majority'" approach, under which "recused judges are counted as 'judges in regular active service' for the purpose of voting on petitions for rehearing en banc," as opposed to the "'case majority'" approach, which does not count recused judges. Ibid. The chief judge noted that, while Federal Rule of Appellate Procedure 35(a) was amended in 2005 to adopt the case majority rule, the D.C. Court of Appeals had stayed the implementation of those amendments in the District of Columbia and the Board of Judges -- which consists of the court of appeals' active judges meeting in their administrative capacity -- had voted to maintain the absolute majority rule pending further review. Pet. App. C3-C6 & n.1.

b. The three judges voting for reconsideration believed that the court was bound by the 2005 amendments to Federal Rule 35(a). Pet. App. C7-C12 (Statement of Beckwith, J., with Glickman and Easterly, JJ.). In those judges' view, the court's stay of the 2005 amendments should be deemed to have expired, and even if not, the court should nonetheless construe D.C. Rule 35(a) to follow the case majority approach. Id. at C10-C12.

ARGUMENT

Petitioner urges (Pet. 8-20) this Court to review whether the rules applicable to the District of Columbia Court of Appeals required it to grant rehearing en banc in the circumstances of

this case. Petitioner further contends (Pet. 20-33) that the court of appeals erred in affirming his convictions under a harmless-error analysis. Petitioner raised both contentions in his earlier petition for a writ of certiorari, which this Court denied. 138 S. Ct. 503 (No. 17-5450). The same result is warranted here.

1. Petitioner asserts (Pet. 8-20) that the District of Columbia Court of Appeals erred by denying rehearing en banc when four of the seven judges who were not recused voted for rehearing. According to petitioner, the court of appeals should abandon its absolute majority rule, and instead construe its appellate rules and local laws according to the case majority approach, so that recused judges are not counted as judges in "regular active service" when voting on rehearing petitions. Pet. 8-15. Petitioner made essentially the same arguments in his first certiorari petition, see 17-5450 Pet. 20-26, and this Court's review remains unwarranted.

a. The court of appeals has prescribed its own rules to "govern procedure in the District of Columbia Court of Appeals." D.C. Ct. App. R. 1; cf. D.C. Code § 11-743 (2001) ("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."). "[I]n interpreting its own procedural rules," the court of appeals is not "bound by the interpretation given to similar federal

procedural rules." West v. United States, 346 A.2d 504, 506 (D.C. 1975).

The Rules of the District of Columbia Court of Appeals provide that a "majority of the judges who are in regular active service" may order rehearing en banc, but do not specify whether this includes judges who are disqualified. D.C. Ct. App. R. 35(a). In contrast, Federal Rule of Appellate Procedure 35(a) was amended in 2005 to overrule the approach of seven of the 13 federal circuit courts by explicitly specifying that disqualified judges are excluded from the denominator in determining whether more than half of such a court's judges have voted for rehearing en banc. Fed. R. App. P. 35 advisory committee's note.

Petitioner argues (Pet. 20) that Federal Rule 35(a) "as amended in 2005 controls the D.C. Court of Appeals' consideration of cases en banc." That is incorrect. Although the federal appellate rules apply to the District of Columbia Court of Appeals by default, they do not apply when that court has "prescribe[d] or adopt[ed] modifications," D.C. Code § 11-743 (2001), as it has done with respect to Federal Rule 35 by enacting D.C. Rule 35. Because the District of Columbia Court of Appeals had already branched off from Federal Rule of Appellate Procedure 35 before it was amended in 2005, petitioner errs in suggesting (Pet. 15-20) that the court is bound to follow that amendment. That is particularly so given that, in the view of three judges of the court of appeals, implementation of the 2005 amendments to Federal

Rule 35(a) in the District of Columbia remains stayed pending further review. Pet. App. C3 & n.1, C5-C6 (Statement of Blackburne-Rigsby, C.J.). Although petitioner asserts (Pet. 17-20) that those judges erred in concluding that the stay remains in effect, his disagreement with how three members of the District of Columbia Court of Appeals interpret their court's own procedural rules and orders does not warrant this Court's review. Pernell v. Southall Realty, 416 U.S. 363, 366 (1974) ("This Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern."); cf. Ortega-Rodriguez v. United States, 507 U.S. 234, 251 n.24 (1993) (noting that courts of appeals' internal procedural rules may "vary considerably").

b. Petitioner's suggestion (Pet. 8-15) that this Court intervene to revise the District of Columbia Court of Appeals' en banc voting procedure because that procedure purportedly conflicts with local law is likewise misplaced. This Court has long treated "the decisions of the District of Columbia Court of Appeals on matters of local law * * * in a manner similar to the way in which [it] treat[s] decisions of the highest court of a State on questions of state law," requiring "'egregious error'" before it will second-guess "the courts of the District on local law matters." Pernell, 416 U.S. at 368-369 (quoting Fisher v. United States, 328 U.S. 463, 476 (1946)). Petitioner has not identified any such error here. He relies (Pet. 8-13) on D.C. Code

§ 11-705(d) (2001), which states that "rehearing before the court in banc may be ordered by a majority of the judges of the court in regular active service." But the language of that provision is wholly consistent with the en banc procedures followed here. Indeed, as petitioner he acknowledges (Pet. 8-9), most federal courts of appeals before 2005 had adopted the absolute majority rule for the "almost identically" worded "federal counterpart" to Section 11-705(d). See Fisher, 328 U.S. at 476 ("Where the choice of the Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere.").

The cases cited by petitioner (Pet. 14-15) do not suggest that this Court's intervention is warranted here. The question in those cases was whether certain federal judges were authorized to exercise judicial power, not whether the District of Columbia Court of Appeals had correctly applied its own specific law and procedures. See Yovino v. Rizo, 139 S. Ct. 706, 709 (2019) (per curiam) (whether deceased federal judge's vote counts in deciding merits of case); Moody v. Albemarle Paper Co., 417 U.S. 622, 624 (1974) (per curiam) (whether senior federal judges may vote on rehearing petitions); United States v. American Foreign S.S. Corp., 363 U.S. 685, 688 (1960) (whether retired federal judges may decide en banc cases at the merits stage). Indeed, even in the context of the federal courts of appeals, this Court has recognized their "significant authority * * * to govern their

own procedures." Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 99 (1993); accord Western Pac. R.R. Corp. v. Western Pac. R.R. Co., 345 U.S. 247, 259 (1953) (holding that litigants had no statutory right to a particular en banc voting procedure).

c. Petitioner does not assert that the local-procedural question in this case -- which can only arise when one or more judges are recused and the remainder are closely divided about an en banc petition -- arises with any frequency. And the chief judge made clear that the court of appeals "Rules Committee will consider and weigh, following the regular Rules process, the merits of both the 'absolute majority' and 'case majority' approaches" in deciding which one to follow prospectively. Pet. App. C6.

In any event, this case is a poor vehicle for review. Petitioner cannot obtain relief from the court below even if the case majority approach were adopted because the court of appeals now has only six non-recused judges in "regular active service," only three of whom would grant rehearing. See Pet. App. C4 (Statement of Blackburne-Rigsby, C.J.). Moreover, petitioner acknowledges that "the evenly divided court set no precedent." Pet. 14. This case thus presents only a non-precedential dispute among six judges of the District of Columbia Court of Appeals over the rules and orders of that court. No further review is warranted. See Pernell, 416 U.S. at 366.

2. Petitioner separately asks this Court to again consider the underlying merits of the decision below, which affirmed his

convictions under a harmless-error analysis. Pet. 20-33; see 17-5450 Pet. 7-20 (same). Petitioner's factbound assertions of error do not warrant this Court's review, and they are incorrect in any event.

a. The court of appeals correctly reviewed the instructional error in this case for harmlessness. Under Neder v. United States, 527 U.S. 1 (1999), "the omission of an element is an error that is subject to harmless-error analysis." Id. at 15; see also id. at 9 ("Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.") (emphasis omitted); United States v. Marcus, 560 U.S. 258, 264 (2010) (identifying "omitting mention of an element of an offense" and "erroneously instructing the jury on an element" as instructional errors subject to harmless-error analysis).

The court of appeals concluded here "that the trial judge committed instructional error when he told the jury that a defendant can be found liable as an aider and abettor 'if [he] knowingly aid[s] and abet[s] the crime without knowing who else is doing it,' without requiring that the jury also find a community of purpose between the principal and the accomplice." App., infra, 86a (brackets in original). That error -- omission of the "community of purpose" element -- is precisely the type of error

that Neder held to be subject to harmless-error analysis. See 527 U.S. at 8 ("The error at issue here * * * [is] a jury instruction that omits an element of the offense.").

Petitioner primarily tries to distinguish Neder by describing (Pet. 3-4, 21-22, 24, 29-31) the court of appeals' opinion as identifying three omitted elements from the trial court's jury instruction. That description cannot be reconciled with the court of appeals' opinion, which found "instructional error" based on only one omitted element: "the jury [must] also find a community of purpose." App., infra, 86a. To the extent petitioner disputes the court's determination, that disagreement with the court's application of the District of Columbia's aiding-and-abetting law to the instruction in this case does not merit this Court's review. See Pernell, 416 U.S. at 366.

Petitioner also tries to distinguish Neder on the ground that the element omitted from the jury instructions in that case was submitted to the trial judge, giving the defendant "every motive and opportunity to contest that element." Pet. 28-29. Those circumstances might be relevant to the "case-by-case" inquiry into "whether an error is harmless," but Neder's holding on the "categorical" determination that harmless-error review applies to this type of error sweeps more broadly. 527 U.S. at 14. Neder concluded that three prior cases "dictate[d]" its holding that instructional omissions are not structural errors that might warrant reversal irrespective of prejudice. Id. at 13; see id. at

11-13 (citing Pope v. Illinois, 481 U.S. 497, 499-501 (1987) (instruction defined element incorrectly); Carella v. California, 491 U.S. 263, 266 (1989) (per curiam) (conclusive presumption removed element from jury's consideration); California v. Roy, 519 U.S. 2, 3 (1996) (per curiam) (instruction omitted element entirely)). In none of those cases was "the defendant * * * on notice throughout his trial," Pet. 28, that some factfinder would be deciding the element ultimately omitted. Neder's holding thus applies, without qualification, to any "jury instruction that omits an element of the offense." 527 U.S. at 8; see id. at 13 ("[T]his Court has applied harmless-error review in cases where the jury did not render a 'complete verdict' on every element of the offense.").

Petitioner further argues (Pet. 28) that Neder is in "some tension" with decisions of this Court "establish[ing] 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." See also Pet. 20-27. But the cases petitioner cites, all of which preceded Neder, do not call into question Neder's clear holding. Two of those cases do not address the issue of harmless versus structural error at all.[2] Others stand for the

[2] For instance, in McCormick v. United States, 500 U.S. 257 (1991), the Court held that the court of appeals erred by affirming the conviction, but the government had not raised any claim of harmless error in this Court and the court of appeals had not affirmed under a harmless-error analysis. Id. at 265-266, 269-270 (faulting the court of appeals for not addressing whether trial court's instructions were erroneous, and for analyzing instead

proposition, expressly "reaffirm[ed]" in Neder, that a court cannot enter a directed guilty verdict.[3] 527 U.S. at 17 n.2. And the rest merely provide that a court cannot affirm a conviction based on a "separate, distinct, and substantially different offense" from the one tried before the jury. Cole v. Arkansas, 333 U.S. 196, 200 (1948).[4]

The court of appeals here did not affirm based on a separate offense, or, as petitioner frames it, a separate "theory of liability," Pet. 21. The prosecution argued an "aiding-and-abetting theory of liability" of murder and assault to the jury, App., infra, 53a-54a, and the trial judge instructed the jury on that theory, id. at 55a. The court of appeals found that those instructions omitted an element of aiding-and-abetting liability

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whether "a reasonable jury could find" guilt under a different theory) (citation omitted). Nor did the Court mention harmless error in Rewis v. United States, 401 U.S. 808 (1971), where it declined to rule on a "proposed interpretation" of a statute because the Court was "not informed of" any record evidence supporting guilt even under the new interpretation. Id. at 814.

[3] See Pet. 22 (citing Rose v. Clark, 478 U.S. 570, 578 (1986) and United Bhd. of Carpenters v. United States, 330 U.S. 395, 410 (1947)).

[4] See Cole, 333 U.S. at 197-198 (reversing where jury found defendant guilty of violating Section 2 of a statute but appellate court affirmed on theory that defendant violated Section 1); Chiarella v. United States, 445 U.S. 222, 236 (1980) (jury found defendant guilty of defrauding sellers of corporate stock and this Court refused to affirm conviction on theory that defendant defrauded the corporation); Dunn v. United States, 442 U.S. 100, 105-107 (1979) (reversing where jury found defendant guilty of making a false statement under oath in September but court of appeals affirmed on theory that defendant made a different false statement in October); cf. 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.").

-- a "community of purpose" element -- but determined that the error could be harmless if the jury would have found that element satisfied. Id. at 86a. None of the cases on which petitioner relies involved an analogous circumstance.

Indeed, Neder's reliance on California v. Roy, 519 U.S. 2 (1996) (per curiam), confirms that harmless-error review applies in cases like this. In Roy, the "trial court erroneously failed to instruct the jury that it could convict the defendant as an aider and abettor only if it found that the defendant had the 'intent or purpose' of aiding the confederate's crime." Neder, 527 U.S. at 12 (citation omitted). The Court held in that case, and reaffirmed in Neder, that such omissions are reviewed for harmless error. Ibid. After all, "an error in the instruction that defined the crime" is "as easily characterized as a misdescription of an element of the crime, as it is characterized as an error of omission." Roy, 519 U.S. at 5 (citation and internal quotation marks omitted). It follows that the trial court's erroneous failure to instruct the jury on an element of aiding-and-abetting liability in this case is likewise subject to harmless-error analysis. See Mitchell v. Esparza, 540 U.S. 12, 16 (2003) (per curiam) ("[T]he trial court's failure to instruct a jury on all of the statutory elements of an offense is subject to harmless-error analysis.") (citing Neder, 527 U.S. at 19; Roy, 519 U.S. at 2).

b. Petitioner does not meaningfully dispute the court of appeals' determination that, if harmless-error analysis applies, the error was in fact harmless. Although petitioner notes several points of disagreement with the court's finding of harmless error, Pet. 27-28 n.13, the court of appeals correctly determined -- after reviewing the nine-month trial record -- that "no reasonable possibility" existed that a properly instructed jury would have failed to find the "community of purpose" element satisfied. App., infra, 86a-87a. As the court explained, "the fact that there was a broader conspiracy to kill 'outsiders' among the 22nd Street Crew members informs the community of purpose that, as a factual matter, was shared between Tann, [petitioner], and Foreman at the time of the shooting." Id. at 77a n.28; see also id. at 76a (further discussing trial evidence demonstrating community of purpose). That factbound application of District of Columbia aiding-and-abetting law does not warrant this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

c. Petitioner acknowledges that "the opinion below is * * * not indicative of some deeper split of authority." Pet. 31. He nevertheless asserts that the court of appeals adopted an "outlier position" that conflicts with decisions of other courts. Pet. 26-27. Some of the decisions he cites are entirely

inapposite.[5] Several others vacated convictions based on the unique circumstances of those cases, but did not rule out that other similar cases could be affirmed under harmless-error analysis.[6] And the rest, like Cole v. Arkansas, supra, and unlike this case for the reasons explained above, involved theories on appeal that represented separate, distinct, and substantially different offenses from the theories presented at trial.[7] None of

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[5] See White v. Longino, 428 Fed. Appx. 491, 492 (5th Cir. 2011) (per curiam) (civil case), cert. denied, 566 U.S. 907 (2012); United States v. Truong, 425 F.3d 1282, 1289 n.2 (10th Cir. 2005) (refusing to address new theory on appeal because government "waived" the argument); see also Pet. 26 (citing separate opinion concurring in part and dissenting in part in Teal v. Angelone, 54 Fed. Appx. 776 (4th Cir.) (per curiam), cert. denied, 539 U.S. 948 (2003)).

[6] See United States v. Ness, 565 F.3d 73, 78-79 (2d Cir. 2009) (concluding "that the evidence concerning [the misstated element] was legally insufficient even if the instruction was correct," and that the theory would fail "as matter of law" "[e]ven if it had been presented"); United States v. Semenza, 835 F.2d 223, 225 (9th Cir. 1987) (remanding because "[t]here is evidence in the record that could support a trier of fact's finding [that defendant was guilty]" but "[t]here is also evidence that could support a contrary finding"); Garrett v. State, 905 A.2d 334, 339 n.5 (Md. 2006) ("[W]e acknowledge that there may be circumstances in which the exercise of appellate review warrants review of the sufficiency of the evidence utilizing a different theory than that presented at trial, and for which the jury was not instructed, to determine whether affirmance is appropriate.").

[7] See United States v. Farrell, 126 F.3d 484, 490 (3d Cir. 1997) (judge, in bench trial, found defendant guilty of attempting to persuade a coconspirator to withhold information from law enforcement and court refused to affirm on theory that defendant attempted to persuade the coconspirator to provide misinformation to law enforcement); Cola v. Reardon, 787 F.2d 681, 687-689 (1st Cir.) (granting collateral relief where jury found defendant guilty of unlawfully participating in loan transactions with a third party but appellate court affirmed conviction on theory that defendant unlawfully represented a third party at a bankruptcy proceeding), cert. denied, 479 U.S. 930 (1986); State v. Schmidt,

those decisions mentions Neder, much less holds that Neder does not govern an instructional omission like the one here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2019

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540 A.2d 1256, 1257-1258 (N.J. 1988) (reversing where jury found defendant guilty of possessing drugs as a principal but lower appellate court affirmed conviction on theory that defendant possessed drugs as a coconspirator even though "no charge was given on that theory").