No. 19-5848

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THE COURT OF APPEALS CONTRAVENED FEDERAL LAW BY COUNTING A DISQUALIFIED JUDGE IN A VOTE TO REHEAR EN BANC.

A. Under federal law, a disqualified judge is not in "regular active service."

The governing federal statutes, correctly interpreted, yield the unsurprising result that when four out of seven eligible judges vote to grant a rehearing petition, the petition is granted, not denied. Congress specified in virtually identical statutes that both the federal courts of appeals and the D.C. Court of Appeals may rehear cases en banc if ordered by a majority of the judges in "regular active service." D.C. Code § 11-705(d); 28 U.S.C. § 46(c). The government does not dispute that the phrase "regular active service" as it appears in these federal statutes should be interpreted consistently, and must exclude disqualified judges if the statutes are to be coherent. *See* Pet. 9-12. On the critical question of statutory interpretation, the government thus concedes that the Court of Appeals erred in denying the rehearing petition, because a 4-3 majority of eligible judges voted to "grant the petitions for rehearing," Pet. App. B.

Rather than defend a reading of the statutes that would count disqualified judges, the government merely observes that "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)." BIO 12. This is a far cry from arguing that this interpretation of the statutory language is correct. To the contrary, this Court, through its rulemaking power, effectively said that these courts had erred. The Advisory Committee on Appellate Rules expressly emphasized that the 2005 amendment to Federal Rule of Appellate Procedure 35(a) was adopted because the case majority approach is the "better interpretation" of the statute. Fed. R. App. P. 35, Advisory Committee Note to 2005 Amendments. That other courts previously misinterpreted the statutory language is no defense of the D.C. Court of Appeals' equally erroneous interpretation.

The question presented in this case fits comfortably in a line of cases in which this Court has reined in deviations from the governing en banc statutes. *See Yovino v. Rizo*, 139 S. Ct. 706, 709 (2019) (per curiam) (erroneously counting deceased judge's vote in en banc proceedings); *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 625-26 (1974) (same as to senior judge's vote); *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 688 (1960) (erroneously permitting retired judge to participate in en banc proceedings). The government argues that "[t]he 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." BIO 12. But whether a disqualified judge should be counted in voting to rehear a case en banc is not meaningfully different from whether a court of appeals may count a senior judge in a vote to rehear en banc, the question presented in *Moody*; or whether a court may count the vote of a deceased judge in an en banc case, the question presented in *Yovino*. This Court did not treat these cases as exercises of the lower courts' "significant authority . . . to govern their own procedures," BIO 12–13 (quoting *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 99 (1993) (omission in BIO), because the courts' procedures contravened the governing statute. Indeed, the respondent in *Yovino*, much like the government, asserted "that 'each Court of Appeals is vested with a wide latitude of discretion to decide for itself' just how the power to review cases en banc 'shall be exercised.'" Br. in Opp'n, *Yovino v. Rizo*, No. 18-272, 2018 WL 5802459, at *30 (U.S. Nov. 5, 2018) (quoting *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 259 (1953)). This Court reversed then, and it should do so now.

B. Federal law required the Court of Appeals to follow Federal Rule 35(a).

While the undisputed meaning of § 11-705(d) is sufficient to resolve the case, the 2005 clarifying amendment to Federal Rule 35(a) independently warrants reversal. The government acknowledges that, by statute, federal rule amendments ordinarily govern in the D.C. Court of

Appeals, but, citing the court's power to "prescribe[] or adopt[] modifications" to the federal rules, D.C. Code § 11-743, the government claims that the court "had already branched off from Federal Rule of Appellate Procedure 35 before it was amended in 2005," and so the court "is [not] bound to follow that amendment." BIO 10. The major flaw in this argument is that, in its decision denying reconsideration, the Court of Appeals unanimously rejected it. Not a single judge below subscribed to the view that the 2005 amendment did not apply because the Court of Appeals had adopted its own Rule 35(a). Rather, all judges agreed that the 2005 amendment would govern under § 11-743 in the absence of a stay. *See* Pet. App. C at 6 (Statement of Blackburne-Rigsby, C.J.); *id.* at 10 (Statement of Beckwith, J.). The court's unanimous view reflects the fact that, at all times before 2005, the court followed the substance of Federal Rule 35(a) wholesale and never departed from it. "The result of this decision is that, as a matter of law, [D.C.] Rule [35(a)] *is* Federal Rule [35(a)], not a conceptually distinguishable rule with identical language." *Flemming v. United States*, 546 A.2d 1001, 1005 (D.C. 1988).

The government posits that "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." BIO 11. But Petitioner is not asking this Court to grant review in order to decide the status of the 2005 stay—a question resolved by *Johnson v. United States*, 647 A.2d 1124 (D.C. 1994) (en banc), *see id.* at 1125 (holding that a stay for one year would be invalid)—but rather to enforce federal statutes, including Congress's mandate that the Court of Appeals "shall" follow the federal rules "unless" it acts to modify them. D.C. Code § 11-743. Congress gave the Court of Appeals two exclusive options: either follow the federal rules, or prescribe its own through notice-and-comment rulemaking. *See id.*; 28 U.S.C. § 2071(a)-(b). An indefinite stay for fourteen years and counting allows the court to do neither. Indeed, the view of the judges who denied

reconsideration turns the statute on its head. In their view, the court "cannot," by "omission or inadvertently, adopt the 2005 amendment to Fed. R. App. P. 35(a)." Pet. App. C at 5. Those judges believed that the court must affirmatively opt in to a federal rule amendment, whereas Congress mandates that the court follow those rule amendments unless the court affirmatively opts out. The issue before this Court is not an interpretation of a local rule or order, but whether the Court of Appeals may thwart congressional statutes governing its own powers.

C. These issues warrant this Court's review.

This case presents important questions regarding the federal statutes that govern en banc voting and the Court of Appeals' shirking of its statutory obligation to follow the federal rules. However, the government suggests that these important issues do not warrant this Court's review because it is unclear if they "arise[] with any frequency." BIO 13. That is not so. The court below stated that it has "consistently applied the 'absolute majority' rule" before this case, indicating that the situation has arisen multiple times. Pet. App. C at 6; *see also id.* at 3. And it will continue to arise with frequency in the future. Petitioner is aware of at least two pending petitions for rehearing en banc in the Court of Appeals in which three active judges, and the court's recently confirmed eighth judge, *see* 165 Cong. Rec. S6771-03 (daily ed. Nov. 21, 2019), may be disqualified. *See* Statement, *Ashby v. United States*, No. 14-CF-414 (D.C. Apr. 1, 2019); Statement, *Fenner v. United States*, No. 14-CF-425 (D.C. Jan. 4, 2019). Five out of eight active judges on the court have joined directly from positions at public agencies that litigate a large number of cases before the court. And a sixth judge is married to a judge on the D.C. Superior Court. Thus, disqualifications will continue to arise with frequency on the D.C. Court of Appeals, and how those disqualifications affect en banc voting remains an important and recurring issue.

The government also argues against review because the Court of Appeals intends to

someday review the merits of the 2005 amendment. BIO 13. But there is no telling when that review, which was first announced 14 years ago, will be complete. It is also unclear what rule the court might then adopt, which may or may not be consistent with the governing federal statute. Whenever and however the court amends its rules, the statutory question presented will remain.

While the question presented is all but certain to arise repeatedly in the District of Columbia, the statutory question of whether a disqualified judge is in "regular active service" matters for other federal courts. The same use of the phrase "regular active service" appears in the en banc procedures of other non-Article III courts, which were not altered by the 2005 amendment to Rule 35(a), and the same uncertainty is present in those courts. *See* C.A.A.F. R. 6(a); U.S. Vet. App. IOP VII(b)(1)-(2). This Court should finish what it started in 2005 and provide a "uniform national interpretation" of this consistent statutory phrase. Fed. R. App. P. 35, Advisory Committee Note to 2005 Amendments; *see also* Pet. 13.

The government's arguments that this "is a poor vehicle for review," BIO 13, are without merit. The government previously argued that this case's only vehicle problem was that "petitioner's petition for reconsideration of the denial of rehearing en banc [was] still pending before the court of appeals," which could "potentially still grant that petition." Br. for U.S. in Opp'n 15, *Harris v. United States*, No. 17-5450 (U.S. Oct. 30, 2017). That obstacle has been cleared away by the order denying reconsideration. Now the government claims that "Petitioner cannot obtain relief from the court below" because, of six active judges who are not disqualified, "only three" would grant rehearing. BIO 13. But Petitioner is not asking this Court to direct the Court of Appeals to hold a new vote on the rehearing petition. The vote already occurred. If this Court were to reverse, then the result "would be to confirm that on March 3, 2017, a 4-3 majority had *granted*, not denied, rehearing en banc." *See* Pet. App. C at 8 n.5 (Statement of Beckwith, J.).

The government also claims this case is a poor vehicle because the decision below was evenly divided, and thus failed to set any precedent. BIO 13. But, as explained in the Petition, that is a reason to grant review, not deny it. *See* Pet. 14-15. This Court has said that a court's en banc procedures "should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it," and absent such clarity this Court will act. *W. Pac. R.R. Corp.*, 345 U.S. at 267-68. The court below was unable to supply the needed clarity. It is in this Court's power to do so. *Pernell v. Southall Realty*, 416 U.S. 363, 368 (1974).

Indeed, given the absence of any material legal dispute, this case presents an "obvious error"—and an "egregious" one—that this Court should correct. *See id.* at 369 (citation omitted). And it is clear enough to be resolved summarily. Summary disposition is particularly appropriate as the issue was thoroughly vetted during the 2005 amendment process, when this Court and the Advisory Committee carefully considered whether disqualified judges should be counted for en banc voting. Having concluded that they should not, this Court should summarily reverse.

II. A CRIMINAL CONVICTION CANNOT BE AFFIRMED BASED UPON AN UNTRIED THEORY OF GUILT.

Petitioner and the government have offered starkly different ways to reconcile two principles in this Court's cases. On the one hand, this Court has consistently held that, as a matter of due process, 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); *accord Cole v. Arkansas*, 333 U.S. 196, 202 (1948); *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991). On the other hand, this Court has held that a conviction can be affirmed even where an essential element was omitted from the jury instructions if that error is harmless. *See Neder v. United States*, 527 U.S. 1, 9-10 (1999). Petitioner argues that the tension between these principles is illusory because *Neder* allows affirmance in only a "narrow class of cases" where the defendant knew

about the element omitted from the jury instructions and could have contested that element at trial. *Id.* at 17 & n.2. In contrast, the government argues that *Neder* allows an appellate court to affirm a conviction on any theory, however novel, unless it is a "'separate, distinct, and substantially different offense' from the one tried before the jury." BIO 17 (quoting *Cole*, 333 U.S. at 200).

The government's broad reading of *Neder* is wrong, but the fundamental dispute and the disparate approaches taken by the Court of Appeals here and by the vast majority of other courts demonstrate serious confusion that warrants this Court's review either way. The government does not dispute that this case is a prime candidate for this Court to explain how *Neder* dovetails with the line of cases from *Cole* to *McCormick*. In this case, Petitioner's murder conviction was affirmed based on a "community of purpose/foreseeability" theory of liability that had never before been recognized, was never advanced by the government, and contained three elements that played no part in the theory of liability advanced at trial, which required only that Petitioner's and the fatal shooter's criminal conduct coincided. If the complete absence of this new theory from any stage of the trial can be treated as a harmless instructional error, then the vast majority of federal courts of appeals and state high courts have adopted an overly cabined reading of *Neder*. But if the omission of essential elements of criminal liability not merely from the jury instructions but from the entire trial is *per se* harmful, then the Court of Appeals' application of *Neder* in this case was a serious error. Regardless of the outcome, this case is an ideal vehicle to clarify the important and recurring issue of when a court may affirm a conviction on grounds not raised at trial.

1. Properly understood, *Neder* is not in tension with this Court's cases recognizing that a conviction cannot be affirmed on a theory of liability that was not presented at trial. *Neder* relied heavily on the fact that materiality, the omitted element, was not contested at trial even though the defendant understood that it was an essential element of the offense; and the defendant conceded

that he could not contest it at a retrial. *See Neder*, 527 U.S. at 15 (noting that the petitioner "did not contest the element of materiality at trial" and "does not suggest that he would introduce any evidence bearing upon the issue of materiality if so allowed"); *id.* at 16 ("The evidence supporting materiality was so overwhelming, in fact, that Neder did not argue to the jury—and does not argue here—that his false statements of income could be found immaterial."); *id.* at 17 ("[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element *was uncontested* and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." (emphasis added)).

Neder, by its terms and by its logic, does not extend harmless error review to cases like the present one where the defendant had no notice of, or motive or opportunity to defend against, an omitted element. In such cases, reviewing the existing record for harmlessness is an absurd exercise. If a defendant is aware of an element necessary for his guilt, but the trial court erroneously omits that element from the jury instructions, then an appellate court can look at the evidence and arguments presented at trial to contest the element and at least hypothesize as to what a properly instructed jury would have found. But when the trial court's rulings and instructions make clear that a particular element is not even at issue in the case, then the record can say nothing about what evidence or arguments the defendant would have made had it been a live issue at trial. An appellate court cannot guess what evidence and argument the defendant would have presented, nor could it surmise what the jury would have found had it heard that unknown evidence and argument. The trial would have been radically different in ways the existing record could never reveal. To affirm a conviction on harmless-error grounds in that scenario would "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" *Neder*, 527 U.S. at 8-9 (quoting *Rose v.*

Clark, 478 U.S. 570, 577-78 (1986)). This is exactly the situation in which a conviction cannot be affirmed: an appellate court cannot "retr[y] a case on appeal under different instructions and on a different theory than was ever presented to the jury." *McCormick*, 500 U.S. at 270 n.8.[1]

The government does not dispute that Petitioner had no notice, motive, or opportunity to contest essential elements of the "community of purpose/foreseeability" theory. The government also does not dispute that, even if Petitioner had the prophetic foresight to predict this novel theory, he would have been barred from presenting evidence or arguing to the jury that it should acquit him due to the absence of any of those elements. *See* Pet. 30 n.15. That is because the government pursued a theory under which none of these elements mattered. At the trial that occurred, the highly debatable questions of whether Petitioner and the fatal shooter, Robert Foreman, shared a "community of purpose," or whether Foreman's unexpected attack was "foreseeable" were irrelevant—all that mattered is that Petitioner's and Foreman's conduct coincided, no matter how much their purposes differed or how unforeseeable Foreman's attack was.

To try to counter Petitioner's reading of *Neder*, the government relies heavily, yet mistakenly, on three cases cited by the *Neder* majority: *Pope v. Illinois*, 481 U.S. 497 (1987), *Carella v. California*, 491 U.S. 263 (1989) (per curiam), and *California v. Roy*, 519 U.S. 2 (1996) (per curiam). *See* BIO 15-16, 18. The government asserts, with little elaboration, that these cases permitted harmless-error analysis even when the defendant lacked notice of an omitted element, BIO 15-16, but that is incorrect. Rather, in each case the defendant had notice and a full opportunity to litigate every element of the offense, and he could not claim that he would have

[1] Contrary to the government's contention that "Petitioner primarily tries to distinguish *Neder*" on the basis of the number of omitted elements, BIO 15, Petitioner has consistently argued that it is the lack of notice and opportunity to contest at trial at least one essential element that distinguishes this case from *Neder*. *See* Pet. 22-26, 28-31. Whether the number of omitted elements is one, two, or three does not alter that critical distinction.

tried the case differently but for the instructional error. *See Pope*, 481 U.S. at 503 (question in obscenity case of whether magazines "were utterly without redeeming social value" was litigated and presented to jury at trial, though jury told to assess social value under state-wide standard rather than reasonable-person standard); *see also id.* at 504 (Scalia, J., concurring) (explaining that difference in standards was negligible); *Carella*, 491 U.S. at 264-66 (all elements were contested and included in jury instructions, but jury was erroneously instructed to presume element if it found certain facts; error could be harmless only if the predicate facts that triggered the presumption would also "conclusively establish" the element itself); *see also id.* at 270-71 (Scalia, J., concurring in the judgment); *Roy*, 519 U.S. at 3, 5 (state habeas case in which the defendant did not claim "that the error at issue here is of the 'structural' sort that 'defies analysis by harmless error standards'"; trial court instructed the jury on every element, and, although court mistakenly described *mens rea* as knowledge rather than intent, there was no meaningful difference between the two mental states); *see also id.* at 7 (Scalia, J., concurring).

The United States has itself advanced Petitioner's position in prior merits briefing before this Court, where it has embraced this reconciliation of *Neder* with *Cole* and its progeny. In *United States v. Cotton*, 535 U.S. 625 (2002), the United States forcefully argued that the pertinent distinction that permitted harmless error review in *Neder*, but not in *Cole*, *McCormick*, or other like cases, was the fact that, in *Neder*, "the defendant had adequate notice of the [omitted element] and opportunity to contest it." *See* Reply Br. for U.S., *United States v. Cotton*, No. 01-687, 2002 WL 535148, at *8 (U.S. April 8, 2002); *see also id.* at *13-14 & n.9.

Recognizing the fundamental unfairness in affirming a conviction where the defendant lacked notice and opportunity to contest an element, the government contends that this "might be relevant to the 'case-by-case' inquiry into 'whether an error is harmless,'" but not the

"'categorical' determination that harmless-error review applies." BIO 15. The flaw with this "case-by-case" approach is that it suggests there is some class of cases where an appellate court could determine the outcome of a case tried under one set of rules as if it had been tried under a different set of rules, with different evidence and arguments, contrary to this Court's precedent. *See, e.g.*, *McCormick*, 500 U.S. at 270 n.8. This is like trying to determine who would have won a game of chess when the players thought they were playing checkers.

Even if the government were correct that the absence of notice and opportunity to contest an element does not categorically preclude harmless-error analysis but bears on whether the error was harmless, reversal is still warranted. The Court of Appeals never took into account Petitioner's undisputed lack of notice or opportunity to contest the elements of the theory on which it affirmed.

2. The United States, contrary to its position in *Cotton*, now offers a different way of harmonizing the cases. It asserts that harmless-error review always applies when an appellate court relies on a theory of guilt that was not advanced at trial, except that an appellate court can never "affirm a conviction based on a 'separate, distinct, and substantially different offense' from the one tried before the jury." BIO 17 (quoting *Cole*, 333 U.S. at 200). This theory is wrong. But even if it were correct, it is not the theory being applied by the vast majority of federal circuits or state high courts. Thus, this Court's review is still warranted.

a. The government's "substantially different offense" theory does not actually reconcile this Court's cases. The government implicitly concedes that neither *McCormick* nor *Rewis v. United States*, 401 U.S. 808 (1971), fit its theory. *See* BIO 16 & n.2. In *McCormick*, a state legislator was tried and convicted of extortion under the Hobbs Act for accepting cash gifts; the Fourth Circuit affirmed that conviction based on the same cash gifts and under the same statute. *See McCormick*, 500 U.S. at 265-66, 269-70. Still, this Court reversed the Fourth Circuit because

it had affirmed on the basis of several "specified factors" that the jury had not been instructed to consider in distinguishing illegal bribes from legitimate campaign contributions. *Id.* at 269. Similarly, in *Rewis*, the defendants were convicted under the Travel Act for running a gambling operation that attracted out-of-state customers, and the government urged this Court to affirm for the same conduct and under the same statute, but with the added element of "active encouragement" of the customers' interstate travel. *Rewis*, 401 U.S. at 813. This Court recognized that the "active encouragement" theory may be valid, but "because it is not the interpretation of [the statute] under which petitioners were convicted," it "cannot be employed to uphold these convictions." *Id.* at 814.

Because neither *McCormick* nor *Rewis* fits the government's "substantially different offense" theory, the government argues that these cases "do not address the issue of harmless versus structural error at all," suggesting the Court overlooked the issue. BIO 16. That is wrong. These cases expressly disavowed any case-by-case harmless-error analysis because they recognized the categorical rule that a conviction cannot be affirmed on a theory not presented at trial, no matter how strong the government's evidence might appear. *See McCormick*, 500 U.S. at 270 & n.8 (if court of appeals' new legal theory were correct, then the conviction "should not have been affirmed on that basis but should have been set aside and a new trial ordered" because "[a]ppellate courts *are not permitted* to affirm convictions" on theories not presented at trial (emphasis added)); *Rewis*, 401 U.S. at 814 (new legal theory "cannot" be a basis for affirmance).

b. The government's theory also does not draw a sensible line between cases where harmless-error analysis is or is not appropriate. Although it is not entirely clear, the government appears to be asserting that harmless-error review is barred only if an appellate court seeks to affirm a conviction based on a different statutory provision or different predicate facts. *See* BIO

17 & n.4. But, in such cases, there is no greater obstacle to the sort of analysis the Court of Appeals did here: look at the trial record as it exists and assess whether a jury would likely have found guilt based on the different statutory provision or factual theory. For example, the government cites *Dunn v. United States*, 442 U.S. 100 (1979), as a case in which harmless-error review was barred because the jury convicted the defendant for a false statement in September while the court of appeals affirmed on the basis of a false statement in October. *See* BIO 17 n.4 (citing *Dunn*, 442 U.S. at 105-07). But the defendant's October statement had merely "adopted his September statement," *Dunn*, 442 U.S. at 104-05, a scenario seemingly amenable to a harmless-error analysis predicated on the likelihood that a jury that convicted for the September statement would also have done so for the identical October statement. This Court acknowledged that "[t]here is, to be sure, no glaring distinction between the Government's theory at trial and the Tenth Circuit's analysis on appeal." *Id.* at 107. But rather than engage in harmless-error inquiry, this Court reversed, citing *Cole* for the proposition that "appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Id.*

The government's theory, if adopted, simply leads to arbitrary distinctions. In light of *Cole*, the government would concede that if the District of Columbia had a statute that provided for traditional accomplice liability in section 1 and liability under the "community of purpose/foreseeability" theory in section 2, then Petitioner's conviction could not be affirmed. *See* BIO 17 & n.4. Or perhaps if the Court of Appeals had labeled its "community of purpose/foreseeability" theory as something other than a form of "aiding-and-abetting" liability, then the government would concede that the court affirmed on the basis of a separate offense. *See* BIO 17-18.). Indeed, the dissenting judge below recognized that the majority's new theory was, in substance, a watered-down version of *Pinkerton* liability for co-conspirators, *see generally*

Pinkerton v. United States, 328 U.S. 640, 644 (1946), affirming "on a theory that [Petitioner and his co-defendant] were Foreman's coconspirators rather than a theory that they were his aiders and abettors." Resp. App. 223a (Glickman, J., concurring in part and dissenting in part); *see also id.* at 221a-222a. But because these distinct theories are defined by case law rather than statute and labeled under the same broad category, the government sees no obstacle to harmless-error review. There is no support or rationale for that unprincipled position, and it contravenes this Court's holdings that appellate courts cannot affirm convictions for the exact same offense when tried "on the basis of a theory not presented to the jury." *Chiarella*, 445 U.S. at 236. That view would also contravene this Court's holdings that an appellate court cannot affirm on a common-law theory of liability, such as a *Pinkerton* theory, unless that theory was properly instructed to the jury. *See Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949) ("A verdict on [a conspiracy] theory requires submission of [that theory] to the jury."); *see also United States v. Brown*, 823 F.2d 591, 599 (D.C. Cir. 1987).

For the government's "substantially different offense" standard to have any coherence, it must be because any time an appellate court adds a new element then the offense is "substantially different." And that would be true in this case, where the Court of Appeals added at least one new element, "community of purpose," without which Petitioner's conviction could not stand.

c. Even assuming the government's "substantially different offense" theory is the proper constraint on harmless-error review, this Court's review is still needed. As the cases cited in the Petition show, the lower courts have in effect read *Neder* much more narrowly than the government. *See* Pet. 26-27. Although the government purports to distinguish these cases on various grounds, BIO 19-20 & nn. 5-7, it does not dispute that these cases articulate Petitioner's view of *Cole* and its progeny. If the government is correct, then these courts have got it all wrong.

This case is an ideal vehicle to clarify how the lower courts should apply harmless-error review in the frequent scenario where they reject the legal basis of a conviction while recognizing an alternative basis.

3. Underscoring the dangers of an unconstrained power to affirm convictions on new theories, the Court of Appeals' harm analysis was deeply flawed. *See* Pet. 24 n.12, 27 n.13. The government repeats the same erroneous reasoning used by the Court of Appeals: that the jury's guilty verdict on a conspiracy count demonstrates the jury would have found the "community of purpose" element satisfied. BIO 19. The glaring error with this reasoning is that the parties did not litigate, and the jury did not find, that the charged conspiracy included Foreman, or that the shooting of Harrison was in furtherance of that conspiracy. None of that mattered at Petitioner's trial. Evincing the weakness of the government's evidence on these points is the government's strategic decision to forgo a *Pinkerton* theory of co-conspirator liability on the murder charge against Petitioner, despite successfully pursuing that theory against Petitioner's co-defendants in connection with charges that did not involve Foreman. *See* Resp. App. 18a, 98a.

As flawed as the court's analysis of the existing record was, there is no cause for this Court to delve into these case-specific errors because of the more fundamental problem: assessing harm on the existing record is an incoherent exercise because the record would be radically different had these new elements formed any part of the government's case at trial and had Petitioner known his liability for murder would turn on them. This case presents a straightforward legal issue: whether an appellate court can add new elements to an offense that were never raised at trial and then affirm the conviction on harmless-error grounds. Whatever disagreements there are between the government and Petitioner on that question, it is unquestionably a significant one, and this is an ideal vehicle to address it in a case with high stakes.

Respectfully submitted,

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