No. 20-7126

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IN THE SUPREME COURT OF THE UNITED STATES

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DOMINIC ANTHONY DAVIS ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

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# MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend (Pet. 8-17) that the court of appeals erred in applying harmless-error review to their claim premised on erroneous jury instructions. Petitioners further contend (Pet. 18-22) that aiding and abetting armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), does not qualify as a "crime of violence" within the meaning of 18 U.S.C. 924(c)(3)(A). No further review is warranted on either issue.

1. Petitioners observe (Pet. 4-5) that the jury was erroneously instructed that it could find them guilty of using a firearm during and in relation to a crime of violence under Section

924(c)(3)(A) based on either of two predicate offenses charged in the superseding indictment: (1) conspiracy to commit bank robbery or (2) armed bank robbery. While armed bank robbery qualifies as a crime of violence under Section 924(c)(3)(A), see pp. 4-7, infra, the government acknowledged in the court of appeals that conspiracy to commit bank robbery does not qualify as a crime of violence, see Gov't C.A. Br. 15-16. The court explained, however, why the instructional error had no effect on the outcome of petitioners' cases: "[t]he jury found [petitioners] guilty of armed bank robbery, which required the jury to conclude either that each [petitioner] personally employed a firearm during the robbery or aided and abetted a co-defendant in doing so." Pet. App. 4a. The court therefore had "no doubt that a properly instructed jury would have found [petitioners] guilty on the § 924(c) charge." Ibid.

Petitioners have not shown any error in the court of appeals' harmless-error analysis. Instead they contend (Pet. 8-17) that the court should not have reviewed their instructional-error claim for harmlessness at all. That is incorrect. When a jury is instructed that it can convict on alternative theories of guilt, one of which is legally invalid, that error is subject to harmless-error review. See Skilling v. United States, 561 U.S. 358, 414 (2010); Hedgpeth v. Pulido, 555 U.S. 57, 60-62 (2008) (per curiam); see Fed. R. Crim. P. 52(a). On collateral review, such an error is deemed harmless unless it had "'substantial and injurious effect or influence in determining the jury's verdict.'" Brecht v.

Abrahamson, 507 U.S. 619, 623 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

Petitioners argue (Pet. 9-17) that the court of appeals erred by not applying the "modified categorical approach" to the alternative-theory instructional error. Id. at 10. But as the court of appeals explained, "[t]he modified categorical approach applies 'when a defendant was convicted of violating a divisible statute,'" a circumstance not present here. Pet. App. 4a (quoting Descamps v. United States, 570 U.S. 254, 263 (2013)). The error in this case involved alternative instructions on separate offenses, one of which by its elements categorically constituted a crime of violence -- aiding and abetting armed bank robbery. The court of appeals correctly observed that, because the jury actually found petitioners guilty of that crime, they would have been able to rest a guilty verdict on the Section 924(c) count on that conduct alone, and thus the instructional error was harmless. See ibid.

Petitioners argue (Pet. 15-16) that the court of appeals' application of the harmless-error principle in this case conflicts with the Fourth Circuit's decision in United States v. Runyon, 983 F.3d 716 (2020), and the Eleventh Circuit's decision in In re Gomez, 830 F.3d 1225 (2016). That is incorrect. In Runyon, the Fourth Circuit determined that both of the defendant's charged predicate offenses categorically qualified as crimes of violence under Section 924(c)(3)(A), so the court had no need to apply a

harmless-error analysis. See 983 F.3d at 725. And in Gomez, which merely authorized a successive motion under Section 2255, the Eleventh Circuit found that the instructional error was not harmless because the record there did not clearly establish that the jury had unanimously found the defendant guilty of an offense that qualified as a crime of violence under Section 924(c)(3)(A). 830 F.3d at 1227. Here, by contrast, the court of appeals correctly made a different case-specific determination.

2. A conviction for armed bank robbery requires proof that the defendant (1) took or attempted to take money from the custody or control of a bank "by force and violence, or by intimidation," 18 U.S.C. 2113(a); and (2) either committed an "assault[]" or endangered "the life of any person" through "the use of a dangerous weapon or device" in committing the robbery, 18 U.S.C. 2113(d). For the reasons explained in the government's brief in opposition to the petition for a writ of certiorari in Johnson v. United States, No. 19-7079 (Apr. 24, 2020), armed bank robbery qualifies as a crime of violence under Section 924(c) because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A). See Br. in Opp. at 7-25, Johnson, supra (No. 19-7079).[1]

[1] We have served petitioners with a copy of the government's brief in opposition in Johnson, which is also available on this Court's online docket.

Petitioners contend (Pet. 18-22) that aiding and abetting armed bank robbery does not qualify as a crime of violence under Section 924(c)(3)(A), because aiding and abetting that crime does not require the use of intentional violent force. Petitioners are incorrect. When the government prosecutes a defendant based on aiding-and-abetting liability, the government must prove that either the defendant or one of his confederates committed each of the elements of the underlying offense and that the defendant was "punishable as a principal" for that offense because he took active and intentional steps to facilitate the crime. 18 U.S.C. 2(a); see Rosemond v. United States, 572 U.S. 65, 70-74 & n.6 (2014). If the substantive crime "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), then a conviction for aiding and abetting that crime necessarily includes proof of that force element.

As petitioners acknowledge (Pet. 20), every court of appeals to have considered the question has determined that aiding and abetting a crime that has a requisite element of the use of force under Section 924(c)(3)(A) and similar provisions qualifies as a crime of violence. See Br. in Opp. at 9-10, Mojica v. United States, No. 19-35 (Nov. 22, 2019), cert. denied, 140 S. Ct. 911

(2020).[2] This Court has previously denied review of that issue, see id. at 10, and the same result is appropriate here.

Petitioners note (Pet. 21) that a dissenting judge in In re Colon, 826 F.3d 1301 (11th Cir. 2016), suggested that aiding and abetting a robbery might not categorically qualify as a crime of violence under Section 924(c)(3)(A) because it "seems plausible that a defendant could aid and abet robbery without ever using, threatening, or attempting any force." Id. at 1306 (Martin, J., dissenting). As the other judges on the Colon panel recognized, however, aiding and abetting a robbery does qualify as a crime of violence. Id. at 1305 (majority opinion). The court explained that the dissent's reasoning -- which was premised on the suggestion that a defendant could be convicted of aiding and abetting without proof of the substantive offense -- was inconsistent with basic principles of accomplice liability. See ibid. ("Aiding and abetting * * * 'is not a separate federal crime, but rather an alternative charge that permits one to be found guilty as a principal for aiding or procuring someone else to commit the offense.'") (quoting United States v. Sosa, 777 F.3d 1279, 1292 (11th Cir. 2015)); see also, e.g., United States v. Deiter, 890 F.3d 1203, 1214 (10th Cir.) ("[I]t is well established that aiding and abetting is not an independent crime under

[2] We have served petitioners with a copy of the government's brief in opposition in Mojica, which is also available on this Court's online docket.

18 U.S.C. § 2; it simply abolishes the common-law distinction between principal and accessory.") (citation omitted), cert. denied, 139 S. Ct. 647 (2018).

Petitioners additionally contend (Pet. 22-33) that armed bank robbery itself does not qualify as a crime of violence under Section 924(c)(3)(A), asserting that robbery "by intimidation" does not require the use, attempted use, or threatened use of violent force, see Pet. 23-27; that federal bank robbery is not a specific-intent crime, see Pet. 27-29 (citing, inter alia, Carter v. United States, 530 U.S. 255, 267-268 (2000)); that the bank-robbery statute includes nonviolent extortion as an indivisible means of committing the offense, see Pet. 29-30, 32-33; and that federal armed bank robbery may be committed using an inoperable or fake gun, see Pet. 31. Those contentions lack merit for the reasons explained at pages 9 to 25 of the government's brief in opposition in Johnson, supra (No. 19-7079). Every court of appeals with criminal jurisdiction, including the court below, has recognized that Section 924(c)(3)(A) and similarly worded provisions encompass federal bank robbery and armed bank robbery. See id. at 7-8. This Court has repeatedly denied petitions for a writ of certiorari challenging the circuits' consensus on that issue, see id. at 8-9 & n.1, and the same result is warranted here.

The petition for a writ of certiorari should be denied.[3]

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

APRIL 2021

[3] The government waives any further response to the petition unless this Court requests otherwise.