No. 16-679

In The
Supreme Court of the United States

STEPHEN DOMINICK MCFADDEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members and, with its affiliates, represents more than 40,000 attorneys. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. It frequently appears as *amicus curiae* before this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and its counsel has made any monetary contribution to the preparation or submission of this brief. The parties received 10 days' notice of the intention to file the brief.

SUMMARY OF THE ARGUMENT

In *Neder v. United States*, 527 U.S. 1, 9 (1999), the Court held that the failure to submit to the jury an essential element of an offense is subject to the harmless error test. Since then, a "significant inconsistency" has developed "in the way courts have reviewed for harmlessness the failure to instruct on an element of a crime," making this issue ripe for "the Supreme Court to clarify the line between an unconstitutional, directed guilty verdict and a harmless failure to instruct on an element." *United States v. Pizarro*, 772 F.3d 284, 303 (1st Cir. 2014) (Lipez, J., concurring).

Indeed, more than a dozen federal judges have acknowledged the conflict among the courts of appeals over the harmless-error standard that applies when a trial judge fails to instruct a jury on an element of the offense and thus effectively directs a verdict in favor of the Government on that element. *See id.*; *Monsanto v. United States*, 348 F.3d 345, 350-51 (2d Cir. 2003) (Calabresi, joined by Sack and Garaufis, JJ.); *United States v. Brown*, 202 F.3d 691, 701 n.19 (4th Cir. 2000) (King, joined by Murnaghan and Michael, JJ.); *United States v. Perez*, 280 F.3d 318, 333 (3d Cir. 2002) (Ambro, joined by Scirica and Pollak, JJ.); *United States v. Haire*, 371 F.3d 833, 839-40 (D.C. Cir. 2004) (Sentelle, joined by Henderson and Garland, JJ.); *United States v. DiLeo*, 625 F. App'x 464, 2015 WL 5099473 at *18 (11th Cir. 2015) (Martin, J., dissenting).

There are formidable grounds to recognize that, whenever a defendant genuinely contests an essential

element, no further harmless error review is justified once the appellate court determines that the trial court erred in refusing to instruct the jury on that element. This is simply because, as Chief Justice Rehnquist and Justice Scalia agreed in their opposing opinions in *Neder*, the Constitution forbids judges from directing verdicts no matter how overwhelming the evidence. *Compare Neder*, 527 U.S. at 17 n.2 (majority opinion by Rehnquist, C.J.), *with id.* at 33 (Scalia, J., joined by Souter and Ginsburg, JJ., concurring in part, dissenting in part).

In petitioner's case, the missing element of *mens rea* was contested and the evidence at trial offered competing inferences – as acknowledged by the Fourth Circuit panel opinion on remand below. Yet, the appellate panel affirmed six of nine convictions based on its *post-hoc* assessment of the weight of evidence from the record of the flawed trial, ignoring the prospect that, had the trial judge not directed the verdict on the disputed element, petitioner could have presented additional evidence not relevant at the first trial (his own testimony, for example), to persuade a properly instructed jury of his innocence.

Thus, this case presents the issue not confronted in *Neder* – what, if any, harmless error review is justified when an essential element is contested, and would be again upon remand before a properly instructed jury. *Amicus* submits that whenever a defendant genuinely contests an element, neither a trial judge nor an appellate panel can supplant the jury's role in making

a finding on that element, even in the face of overwhelming evidence at the first trial.

ARGUMENT

The Court Should Grant Certiorari to Confirm that Instructional Error as to a *Contested* Element is Never Harmless

A. The Constitution Prohibits Judges from Directing a Verdict on a *Contested* Element of a Criminal Offense

For centuries, this Court has held that the Constitution forbids judges from directing verdicts in criminal cases. Indeed, in *Neder*, the majority opinion written by Chief Justice Rehnquist responded to Justice Scalia's accusation in his concurrence and dissent that permitting harmless error judicial review would be permitting a directed verdict, by once again reaffirming that directing a verdict is not constitutionally permissible. *Neder*, 527 U.S. at 17 n.2 (citing *Rose v. Clark*, 478 U.S. 570, 578 (1986) (Powell, J.)).

In *Rose*, as expressly reaffirmed in *Neder*, Justice Powell explained:

> Similarly, harmless-error analysis would presumably not apply if a court directed a verdict for the prosecution in a criminal trial by jury. We have stated that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such

> a verdict . . . regardless of how overwhelmingly the evidence may point in that direction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977) (citations omitted). *Accord*, *Carpenters v. United States*, 330 U.S. 395, 408 (1947). This rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. *See Duncan v. Louisiana*, 391 U.S. 145 (1968). Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

Rose, 478 U.S. at 578.

If the Constitution prohibits a trial court from directing a verdict on an essential element of an offense, and it unquestionably does, then an appellate court one step removed from the trial can have no greater constitutional power. This is not to diminish the role of judges; it is a recognition that the Constitution has historically and exclusively assigned to jurors the task of determining guilt.

In his concurring and dissenting opinion in *Neder*, Justice Scalia reviewed the extensive constitutional reasons for holding that harmless error cannot apply to a denial of a defendant's right to have a jury determine each and every element of a criminal offense. *Neder*, 527 U.S. at 30 (Scalia, J., joined by Ginsberg, Souter, JJ.). Calling the jury trial right the "spinal column of American democracy," Justice Scalia pointed

out that this is the only right that is placed in both the body of the Constitution (Article III, § 2, cl. 3) and also the Bill of Rights (Sixth Amendment). *Id.*

If anything, Justice Scalia's eloquent historical account of the significance of the jury trial right understated the contribution that this right made to the founding of this country. Prior to the Declaration of Independence, Boston criminal defense attorney John Adams was called upon to defend Boston merchant John Hancock and his re-named schooner Liberty upon the charge of openly sailing untaxed Madeira wine into Boston Harbor.[2] For obvious reasons, the Crown brought its charges in the British Admiralty courts, rather than face an unsympathetic colonial jury.[3] Invoking the Magna Carta, and its centuries-old guarantee of a jury trial for British citizens, attorney Adams decried the loss of this cherished right of Englishmen, and then turned his opening statement into a pamphlet for circulation throughout the colonies. That is one reason why the Crown's denial of the right to a jury appears as a listed grievance in the Declaration of Independence, and would later be doubly bolted onto our Constitution by its Framers.

From these beginnings, this Court has always accorded the jury trial right the respect it earned at the

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[2] *See* John Adams, Argument and Report, in 2 Legal Papers of John Adams 172-210 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

[3] Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 2-3 (1966) (describing jury trial right's "virtual enshrinement in our Federal Constitution").

start of the nation. *See, e.g*., *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995) (Scalia, J.) ("The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged."); *Bollenbach v. United States*, 326 U.S. 607, 615 (1946) (Frankfurter, J.) ("In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process can be."); *Ex Parte Milligan*, 71 U.S. 1, 123 (1866) (Davis, J.) ("This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity.").

Indeed, the continuing unanimity in this Court's endorsement of the prohibition on directed verdicts in criminal cases is testament to the faith that this Court has kept with this original promise of the Constitution. *Neder*, 527 U.S. at 17 n.2 (Rehnquist, C.J.); *id*. at 33 (Scalia, J., concurring in part and dissenting in part). *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 408-09 (1947) ("For a judge may not direct a verdict of guilty no matter how conclusive the evidence."). As this Court has declared:

> [The jury's] overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in

> command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, . . . regardless of how overwhelmingly the evidence may point in that direction. The trial judge is hereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused.

United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977) (Brennan, J.) (citations omitted).

The constraint that the prohibition on directed verdicts places upon appellate review was recognized by this Court in *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) ("The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilt."). By comparison, this Court first recognized the possibility of harmless constitutional error in *Chapman v. California*, 386 U.S. 18 (1967), but only for errors that "are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.* at 22.[4] Even as to such errors,

[4] The doctrine of harmless error appellate review for non-constitutional error is often identified as originating with this Court's opinion in *Kotteakos v. United States*, 328 U.S. 750, 764 (1946). *See Brecht v. Abrahamson*, 507 U.S. 619, 623, 637 (1993) (distinguishing more stringent *Chapman* harmless error review from *Kotteakos* standard).

however, it is the burden of the Government to prove that they are harmless beyond a reasonable doubt. *Id*. at 24.

But this Court has never characterized the jury trial right as unimportant or insignificant. To the contrary, this Court has previously explained:

> The guarantees of jury trial in the Federal and State constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.

Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968) (White, J.).

The *Neder* opinion marks no departure from this unbroken chain of constitutional precedent. In *Neder*, this Court confronted an individual defendant's claim of instructional error in a tax prosecution for failure to report $5 million in income. The defendant had conceded below and again in this Court that this amount was material income as to him, thereby satisfying the materiality element of the tax charge against him. *Neder*, 527 U.S. at 15 ("Petitioner underreported $5 million on his tax returns, and did not contest the element of materiality at trial. Petitioner does not suggest

that he would introduce any evidence bearing upon the issue of materiality if so allowed."). As here, the trial court in *Neder* had followed erroneous but then-applicable circuit law to deny a jury charge on an essential element. During subsequent oral argument in this Court, defense counsel essentially conceded that the defendant would not controvert materiality upon remand. *See* Transcript of Oral Argument in *Neder* (available at https://www.oyez.org/cases/1998/97-1985).

This Court emphasized that "Neder did not argue to the jury – and does not argue here – that his false statements of income could be found immaterial." *Neder*, 527 U.S. at 16. Under these unique circumstances – when an element was essentially consistently stipulated by the defense at trial, again on appeal, and again for purposes of any remand – this Court held that it was harmless error for the trial court not to instruct on this element.

The *Neder* opinion concluded that, in this "narrow class of cases," 527 U.S. at 17 n.2, the error was harmless under *Chapman*, if "beyond a reasonable doubt . . . the omitted element was uncontested *and* supported by overwhelming evidence, such that the jury verdict would have been the same absent the error . . . ." *Id.* at 17 (emphasis added). The context in which this Court used the term "uncontested" was indeed narrow – the defense had essentially stipulated that it had not, could not, and would not contest the missing essential element.

Mindful of the importance of the jury trial right, the *Neder* majority opinion held:

> In a case such as this one, *where a defendant did not, and apparently could not, bring forth facts contesting the omitted element*, answering the question of whether the jury verdict would have been the same absent the error, does not fundamentally undermine the purposes of the jury trial guarantee.

Neder, 527 U.S. at 19 (emphasis added). The lack of a defense contest to the omitted element was pivotal – it made undertaking harmless error analysis consistent with the fundamental purposes of the jury trial guarantee because the defendant did not, and would not, contest the element before the jury.

Even in this rare context, this Court nonetheless went on to require that a reviewing appellate court conduct a searching examination of the record under the reasonable doubt standard to determine whether the "omitted element was uncontested *and supported by overwhelming evidence*, such that the jury verdict would have been the same absent the error . . . ." *Neder*, 527 U.S. at 17 (emphasis added). In so holding, the *Neder* majority reached common ground with the remaining Members of the Court on the shared principle that a directed criminal verdict is beyond the constitutional power of federal judges.

The *Neder* standard thus places threshold significance on the lack of controversy by the defendant

regarding the element omitted from the jury instructions. Only in the absence of such a controversy does the *Neder* harmless-error test invite appellate courts to go the next step and assess whether the evidence of record is, actually, both uncontroverted *and* overwhelming. In substance, this Court ruled that even if the defense failed to contest the omitted element, an appellate court must still assure itself that *overwhelming* evidence establishes the element beyond a reasonable doubt.[5] As the Solicitor General argued in its brief to the Court in *Neder*, "an [instructional] error should be found harmless when an appellate court can determine that the defendant did not dispute the element at trial, *and*, in light of the proof, the element was indisputable." Brief for the United States in *Neder v. United States*, No. 97-1985, 1999 WL 6660, at *6-7 (emphasis added); *accord id*. at *25 ("[A]n appellate court can find an instructional omission harmless when it can conclude beyond a reasonable doubt that the element was uncontroverted *and* established by overwhelming proof, such that the jury verdict would have been the same absent the error.") (emphasis added).

[5] *Compare Burks v. United States*, 437 U.S. 1 (1978) (double jeopardy bars retrial if appellate court determines evidence insufficient, regardless of remedy sought by defendant).

B. The Circuits are Split Over Whether Overwhelming Evidence Can Render Harmless the Omission of a *Contested* Element, and the Issue is a Recurring One

Two judges in the First Circuit have penned lengthy opinions on whether *Neder*'s language requiring that the omitted element be "uncontested *and* supported by overwhelming evidence," *Neder*, 527 U.S. at 17 (emphasis added), imposes disjunctive or cumulative requirements. In *United States v. Pizarro*, 772 F.3d 284 (1st Cir. 2014), Judge Lipez interpreted *Neder* to require a two-part inquiry, in which an instructional error is deemed harmless only if the omitted element is: (1) "uncontested" by the defendant at trial, and (2) supported by "overwhelming evidence." Thus, where the trial court refuses to instruct the jury on an element of the offense, it is not sufficient on appeal for the Government to identify overwhelming evidence in support of the omitted element: "*Neder* . . . requires that an omitted element be uncontested in order to be found harmless." *Id.* at 304 (Lipez, J., concurring).[6]

> *Neder* prescribed harmless-error review for "the *narrow* class of cases" where there was "a failure to charge on an *uncontested* element of

[6] Judge Lipez cited a number of First Circuit cases that reversed convictions for instructional error where the omitted element was contested by the defendant. *See, e.g.*, *United States v. Zhen Zhou Wu*, 711 F.3d 1, 20 (1st Cir. 2013); *United States v. Bailey*, 270 F.3d 83, 89 (1st Cir. 2001); *United States v. Prigmore*, 243 F.3d 1, 22 (1st Cir. 2001).

> the offense." *Neder*, 527 U.S. at 17 n.2 (emphases added).
>
> Hence, the Court evidently used the requirement that the omitted element be "uncontested" to justify departing from its repeated statements that harmless error review would be unavailable where a court had directed a jury verdict of guilty in a criminal case. The Court emphasized that it was not taking an "'in for a penny, in for a pound' approach" – i.e., by permitting harmless error review where the omitted element was uncontested, the Court was carving out an extremely limited exception to its bar against reviewing directed guilty verdicts for harmlessness.
>
> . . . .
>
> Thus, even where a reviewing court concludes beyond a reasonable doubt that an omitted element is supported by overwhelming evidence, I believe that the omission of that element is not harmless unless the court also concludes beyond a reasonable doubt that the element was "uncontested."

Id. at 309-10.

Judge Lipez observed that "*Neder* did not explicitly elaborate on what would have been sufficient to 'contest' the omitted element." *Id*. at 310. Because the Court "focused on the fact that Neder 'did *not argue*'" at any stage of the proceedings that a rational jury could have found in his favor on the element in question (i.e., materiality), Judge Lipez "construed

'uncontested' to mean that the defendant did not argue that a contrary finding on the omitted element was possible." *Id*. at 311 (quoting *Neder*, 527 U.S. at 16).

Judge Lipez's concurring opinion cataloged the federal cases from the First, Second, Fourth, Ninth, and Eleventh Circuits reflecting what he describes as "The Debate over 'Uncontested.'" *Id*. at 304-07. In his view, a "significant inconsistency" has developed "in the way courts have reviewed for harmlessness the failure to instruct on an element of a crime," making this issue ripe for "the Supreme Court to clarify the line between an unconstitutional, directed guilty verdict and a harmless failure to instruct on an element." *Id*. at 303.

In response to Judge Lipez's concurrence, Judge Torruella penned a concurrence of his own, appending "a non-exhaustive list of thirty relevant cases – from the Supreme Court, First Circuit, and other circuit courts of appeal – that discuss the constitutional harmless-error test." *Id*. at 312-30 (Torruella, J., concurring). Contrary to the position taken by Judge Lipez, Judge Torruella opined that

> nothing in *Neder* supports, much less compels, a conclusion that the Supreme Court intended to supplant the standard *Chapman* harmless-error test with a new, mandatory, exclusive, two-pronged test (in which an omitted element must be both "uncontested" and "supported by overwhelming evidence") for cases in which the jury instructions erroneously omitted an element of the offense.

Id. at 318. To Judge Torruella's view, "such an interpretation is exceedingly strained and finds scant support in *Neder* itself, not to mention the numerous cases citing *Neder* over the past fifteen years. To the extent that there is inconsistency in the wake of *Neder*, [Judge Lipez's] concurrence adds to the confusion by presenting the issue as a much closer question than it is." *Id*. at 313.

Jurists from other circuits have likewise written opinions expressing concern, indeed confusion, over the proper application of the harmless-error analysis. *See*, *e.g.*, *Monsanto v. United States*, 348 F.3d 345, 350-51 (2d Cir. 2003) ("There is some tension between the harmless-error analysis in *Neder* and our articulation of it," which "has been noted by at least one other circuit court.") (citing *United States v. Brown*, 202 F.3d 691, 701 n.19 (4th Cir. 2000)). And the number of cases in which appellate judges have been forced to apply the harmless-error test to instructional error is significant: this year alone, the courts of appeals have confronted more than a dozen cases in which they have applied *Neder* to determine whether flawed jury instructions were harmless. *E.g.*, *United States v. Nosal*, ___ F.3d ___, 2016 WL 7190670 (9th Cir. Dec. 8, 2016); *United States v. Elonis*, 841 F.3d 589 (3d Cir. 2016); *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016); *United States v. Wynn*, 827 F.3d 778 (8th Cir. 2016); *United States v. Choudhry*, 649 F. App'x 60, 2016 WL 2942532 (2d Cir. 2016); *United States v. Stanford*, 823 F.3d 814 (5th Cir. 2016); *United States v. Ford*, 821 F.3d 63 (1st Cir. 2016); *United States v. Maslenjak*, 821 F.3d

675 (6th Cir. 2016); *United States v. Alexander*, 817 F.3d 1205 (10th Cir. 2016); *United States v. Reza-Ramos*, 816 F.3d 1110 (9th Cir. 2016); *United States v. Janis*, 810 F.3d 595 (8th Cir. 2016); *United States v. White*, 810 F.3d 212 (4th Cir. 2016); *see also United States v. Alvarado*, 816 F.3d 242, 259 (4th Cir. 2016) (Davis, Senior Judge, dissenting) ("I cannot conclude beyond a reasonable doubt that a rational jury given the correct instructions would have reached the same outcome."), *cert. denied*, ___ U.S. ___ (U.S. Nov. 28, 2016).

C. This Case Presents an Ideal Vehicle to Resolve the Lower Court Confusion Over the Harmless Error Test Applicable to Instructional Errors

This case presents an ideal vehicle for the Court to address "The Debate over 'Uncontested,'" *Pizarro*, 772 F.3d at 304-07 (Lipez, J., concurring), because the omitted element was the most intangible element in a criminal trial – the defendant's mental state. One cannot identify an offense element more central to the mission of our criminal justice system than *mens rea*, nor one more peculiarly committed to a jury's determination by our Constitution. *United States v. Houston*, 792 F.3d 663, 669 (6th Cir. 2015) ("[A]ppellate judges are better equipped to assess materiality than to evaluate states of mind based on a cold record. The defendant in *Neder* 'did not, and apparently could not, bring forth facts contesting the omitted element,' – something that is not true in this case, where the defendant

has plenty to work with in contesting the mental-state determination.") (citation omitted); *cf. Tellabs, Inc. v. Makor Issues & Rights, Inc.*, 551 U.S. 308, 328 (2007) (determination of *mens rea* in civil fraud case "will fall within the jury's authority to assess the credibility of witnesses, resolve any genuine issues of fact, and make the ultimate determination whether [defendants] acted with scienter.").

In 2015, the Court held in petitioner's case that the trial court erred by failing to instruct the jury on the necessary *mens rea* for the charged offense of distribution of bath salts as a "controlled substance analogue." 21 U.S.C. § 802(32)(A). *McFadden v. United States*, 135 S. Ct. 2298, 2305 (2015). The Court remanded the case to the Fourth Circuit to conduct an inquiry "in the first instance" as to whether this error in the failure to give a jury instruction on an essential element was harmless under the guidance of *Neder*. *Id*. at 2307.

Upon remand, the Fourth Circuit concluded that: "With respect to all nine counts, therefore, the jury instructions omitted the required [*mens rea*] element that McFadden knew either that the bath salts were regulated as controlled substances or that the bath salts had the features of controlled substance analogues." App. 12a-13a. Further, the Fourth Circuit acknowledged that the jury's guilty verdicts did not reflect an implicit finding on this essential element. App. 14a, n.2. Accordingly, there is no dispute that petitioner's convictions are based upon a judgment as to which there was never a jury determination on the

mens rea necessary for a conviction. *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (defendant must be " 'blameworthy in mind' before he can be found guilty"); *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978) ("[I]ntent generally remains an indispensable element of a criminal offense").

Unlike *Neder*, where the defendant did not contest the inferences to be drawn from the proof of the omitted element either at trial, on appeal, or even during oral argument before this Court, *Neder*, 527 U.S. at 15, petitioner here contested the omitted element, denying that he acted with the requisite *mens rea.* Indeed, the Fourth Circuit reversed three out of nine counts, precisely because it determined that a jury could go either way on the *mens rea* element: "The jury therefore reasonably could have concluded from the evidence that McFadden's guilty knowledge had not been established at the time he made the shipments corresponding with Counts Two, Three, and Four." App. 19a. Further, the Fourth Circuit held that, based upon the evidence, a jury could find that petitioner lacked the *mens rea* necessary for conviction of intent to distribute controlled substances. App. 17a.

Despite this controversy over the contested *mens rea* element, the Fourth Circuit deemed the instructional error harmless as to six other counts based on its view that a recorded conversation of petitioner "demonstrated his full knowledge of the chemical structures and physiological effects of his products." App. 19a. To be sure, the Fourth Circuit recognized that petitioner had contested *mens rea*, as he described

those same conversations as "mere 'sales talk,' completely unconnected with any actual knowledge he might have." App. 20a-22a. Petitioner also presented evidence that he had checked the DEA website to confirm that the salts were not listed controlled substances, App. 8a, 17a, and that petitioner began selling the products after having seen the same salts being publicly sold on Staten Island. App. 19a. From that evidence, petitioner argued that a rational jury could draw the inference that he did not have the requisite criminal intent. *See generally Lighting Fixture & Elec. Supply Co. v. Cont'l Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969) (collecting cases) ("[E]ven though the basic facts are undisputed," there may still remain a dispute "regarding the material *factual inferences* that properly may be drawn from these facts.") (Emphasis added).

But the three appellate judges – considering in hindsight the trial record made when the Government was erroneously relieved of its *mens rea* burden of proof and petitioner could not challenge it – concluded that petitioner's defense as to his *mens rea* "grossly understate[ed] the evidence of his knowledge of the substances' chemical structures and physiological effects." App. 21a. Weighing the evidence and preferring the government's hypothetical summation/closing argument on the omitted issue of *mens rea*, the Court of Appeals affirmed convictions on six counts, denying petitioner an opportunity to have a properly instructed jury resolve the contested, essential element of *mens rea*.

The constitutional task of resolving factual inferences – especially on matters of intent – belongs to juries, not judges. Juries make their decisions based upon a record adduced by adversaries motivated to shape that record by foreknowledge of their respective legal burdens. Even then, juries are free to bring their common sense to bear upon what inferences are reasonable from that record. Here, for example, the same evidence that the Fourth Circuit found sufficient for a jury to acquit on the omitted *mens rea* element for some counts, could have been credited against any *mens rea* finding on all counts. *Compare Coleman v. Johnson*, 132 S. Ct. 2060, 2064 (2012) (rejecting appellate court's "fine-grained factual parsing" of evidence to assess the defendant's criminal intent because this was the jury's task).

Furthermore, the Court of Appeals "focus[ed] only on the evidence actually presented at trial . . . ignor[ing] the possibility that [petitioner] might have done more to counter that [*mens rea*] evidence if he had known that it mattered for the verdict." *United States v. Stanford*, 823 F.3d 814, 837 (5th Cir. 2016), *cert. denied on other grounds*, No. 16-454, 2016 WL 5851763 (U.S. Nov. 7, 2016); *see also Brown*, 202 F.3d 700 n.18 ("Speculating that a defendant could not have challenged an element not then at issue represents an untoward leap of logic.").

And such a limited review is particularly unjust in cases like this one, where "petitioner elected not to take the stand to testify as to his ignorance of chemical structure . . . when it was clear that the jury's only

inquiry into his state of mind would be to ask whether he intended his products for human consumption," Petition at 6 & 16, a state of mind that was not in dispute because of the lower court's legal error. "[T]he appellate court could not logically term harmless an error that presumptively kept the defendant from testifying." *Luce v. United States*, 469 U.S. 38, 42 (1984); s*ee also Owens v. United States*, 483 F.3d 48, 59 (1st Cir. 2007) ("A defendant's testimony could be crucial in any trial, and it could be difficult for us to determine whether or not a jury would have found his testimony credible.").

In the end, petitioner was denied his Sixth Amendment right to have counsel in closing argument "sharpen and clarify . . . the inferences to be drawn" from the evidence, *Herring v. New York*, 422 U.S. 853, 860 (1975), to persuade a jury to resolve an essential dispute regarding *mens rea* in his favor. *See id.* ("The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem."). The *mens rea* instructional error effectively pretermitted meaningful closing argument on a contested element – surely a type of constitutional error that is harmful, if not structural. *Compare United States v. Miguel*, 338 F.3d 995, 1001 (9th Cir. 2003) (holding that it was structural error to prohibit closing argument where "[r]easonable inferences from the evidence supported the defense theory."), *with Glebe v.*

Frost, 135 S. Ct. 429, 431 (2014) ("[E]ven assuming that *Herring* established that complete denial of summation amounts to structural error, it did not clearly establish that the restriction of summation also amounts to structural error.").

The right to have a lay jury, as opposed to professional judges, peer into the heart and mind of a defendant to assess his true intentions is a core feature of the Constitution, intended by its Founders to be a permanent legacy and safeguard engrained in our adversarial system of criminal justice. It distinguishes our nation from just about every other. Reassigning to appellate judges the initial and final resolution of this contested, essential element, rather than leaving that task in the hands of the jury, would constitute a momentous shift in sixth amendment jurisprudence.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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December 2016