NO. 19-_____

In the Supreme Court of the United States

MARK A. BECKHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Because only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty, when, if ever, is it constitutionally permissible for an appellate court to conclude that a district court's refusal to instruct the jury as to two elements of a crime constitutes harmless error?

LIST OF PROCEEDINGS

United States District Court Eastern District of Missouri Eastern Division

No. 4:16-CR-300 (RLW)

United States of America, Plaintiff, v.
Mark A. Beckham, Defendant.

Verdict/Order Dates:

Jury Verdict: September 13, 2017

Denying Post-Trial Motion for Acquittal/New Trial: November 7, 2017

Denial of Motion for Stay: August 10, 2017

United States Court of Appeals for the Eighth Circuit

United States of America, Plaintiff-Appellee v.
Mark A. Beckham, Defendant-Appellant

No. 18-1406

Opinion Dates:

Eighth Circuit Opinion: March 8, 2019

Granting Bail Pending Appeal: May 15, 2018

Rehearing Denial: April 15, 2019

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PETITION FOR CERTIORARI

Mark A. Beckham petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App.1a-15a) is reported at 917 F.3d 1059. The order denying rehearing en banc (App.34a) is unreported. The Eighth Circuit's order granting Petitioner's release on bail pending appeal (App.16a-17a) is unreported. The order of the Eastern District of Missouri, Eastern Division (App.18a-20a) denying Petitioner's motion to stay trial due to pending Supreme Court case is unreported. The district court's order (App.21a-33a) denying Petitioner's motion for acquittal or, in the alternative, a new trial is unreported.

JURISDICTION

The judgment of the Eighth Circuit was entered on March 8, 2019. A timely petition for rehearing en banc was denied on April 15, 2019. A timely application to extend the time to file a petition for a writ of certiorari was granted by Justice Gorsuch on July 3, 2019, extending the time to file this petition until August 13, 2019 (Sup. Ct. Docket No. 19A24). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- **U.S. Const. art. III, § 2, cl. 3**,

  The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

- **U.S. Const. amend. VI**

  In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

- U.S. Const. amend. V

  No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- 26 U.S.C. § 7212(a)

  Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof

shall be fined not more than $3,000, or imprisoned not more than 1 year, or both.

INTRODUCTION

This case presents an important and recurring question that has divided the courts of appeals: when, if ever, is it harmless error for a district court to refuse to instruct a jury as to certain elements of a crime?

Article III, § 2, cl. 3, of the Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury[.]" The Sixth Amendment echoes: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]" Indeed, this Court held, less than two months ago, that "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government." *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019).

Notwithstanding the constitutional guarantee to a jury in all criminal trials, this Court has held that failure to instruct a jury as to an essential element of a crime may constitute mere harmless error in certain, rare circumstances. *See Neder v. United States*, 527 U.S. 1, 15-20 (1999). Specifically, and building upon its prior precedent in *Chapman v. California*, 386 U.S. 18 (1967), this Court held two decades ago that omission of an element is harmless as long as it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder*,

527 U.S. at 15 (quoting *Chapman*, 386 U.S. at 24). This Court continued:

> In this situation, where 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.

Id. at 16 (emphasis added).

This pronouncement in *Neder* has divided the courts of appeals—and the circuit split continues to widen. Rather than uniformly applying *Neder*'s holding in instances where a jury was not instructed as to certain essential elements, the courts of appeals—while all ostensibly looking to *Neder*—have formulated different tests for determining whether the error is harmless.

In the decision below, the Eighth Circuit correctly concludes that the district court erred in failing to instruct the jury on two essential elements of the sole count of conviction: 26 U.S.C. § 7212(a). App.7a. However, with respect to the first omitted element, and relying on *Neder*, the decision below concludes the instructional error was harmless because Beckham did not "contradict" testimony relevant to the missing element—not because the evidence was overwhelming. App.8a-9a. With respect to the second omitted element, the decision below concludes the instructional error was harmless because the evidence pertinent to that essential element was "overwhelming"—not because the evidence was uncontradicted. App.9a. In short, the Eighth Circuit's iteration of *Neder* is that instruc-

tional error is harmless if evidence of an omitted element is *either* uncontested *or* overwhelming.

In stark contrast, the Ninth Circuit construes *Neder* as requiring *both* uncontested *and* overwhelming evidence in support of an omitted element to deem the error harmless. *See United States v. Guerrero-Jasso*, 752 F.3d 1186, 1193-95 (9th Cir. 2014).

The First Circuit is, itself, internally divided on this question. On the one hand, the First Circuit has held that "the omission of an element is harmless only when the reviewing court draws two conclusions beyond a reasonable doubt: the element is uncontested, and the element is supported by overwhelming evidence." *United States v. Pizarro*, 772 F.3d 284, 298 (1st Cir. 2014). But, on the other hand, the First Circuit expressed uncertainty about whether it, in fact, needed to find both prongs. Troubled by the intra-circuit split and the inter-circuit split on this issue, Judge Lipez, after authoring the majority opinion, drafted a separate concurring opinion, requesting guidance from this Court: "Given that the Sixth Amendment right to a jury trial is at stake, I urge 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 (Lipez, J., concurring).

The Fifth Circuit reads *Neder* in an altogether different manner. In *United States v. Stanford*, 823 F.3d 814, 831 (5th Cir. 2016), the Fifth Circuit—rather than construing *Neder* as setting forth either a one or two-pronged test—concluded that *Neder*, instead, rejected a "formal, categorical approach in favor of a functional, case-by-case determination regarding whether an instruction error can be considered harmless," noting

that in *Neder*, "the error was considered harmless where proof of the element missing from the instruction was inherent in proof of the overall conviction, so the jury could not have failed to find the element." *Id.* at 832. In other words, according to the Fifth Circuit's view of *Neder*, "the missing element was logically encompassed by a guilty verdict and was not in fact contested" and, therefore, the instructional error was harmless. *Id.*

Further muddying the waters, opinions out of the Second, Fourth, and Eleventh Circuits, each apply *Neder* in vastly different ways. *See United States v. Needham*, 604 F.3d 673, 679 (2d Cir. 2010), *abrogated on other grounds by Taylor v. United States*, 136 S. Ct. 2074 (2016); *United States v. Brown*, 202 F.3d 691, 701 (4th Cir. 2000); *United States v. Neder*, 197 F.3d 1122, 1129 (11th Cir. 1999).

As it stands, there is an acknowledged and deep split among the circuits as to when, if ever, the omission of an essential element from a jury instruction can constitute harmless error. It is difficult to overstate the implications of this divergence and its deleterious effect on the right to a trial by jury. This case presents the perfect vehicle to resolve the circuit split, to avoid further deviating decisions from lower courts on this issue, and to do what Judge Lipez implored this Court to do: "clarify the line between an unconstitutional, directed guilty verdict and a harmless failure to instruct on an element." *Pizarro*, 772 F.3d at 303 (Lipez, J., concurring).

This Court's review is also warranted because the question presented in this petition is of great significance. The constitutional right to a jury trial is a

"promise that stands as one of the Constitution's most vital protections against arbitrary government." *Haymond*, 139 S. Ct. at 2373. Given the troubling circuit split, this Court should decide when, if ever, that right can be diminished.

Finally, review is warranted because the decision below is incorrect. At trial, Petitioner did everything in his power to avoid the instructional error that is now apparent. At every stage, the Government objected and the district court refused Petitioner's requests. At trial, Petitioner was acquitted of every count on which the jury was properly instructed as to each element necessary for a conviction. However, after the jury was instructed that it only needed to conclude, beyond a reasonable doubt, that the Government had proved three out of the five essential elements necessary for a conviction under 26 U.S.C. § 7212(a), Petitioner was convicted of that single count. The Eighth Circuit then concluded that the district court's instructional error was harmless based on its particular iteration of the *Neder* standard.

Petitioner respectfully requests that this Court grant review.

STATEMENT OF THE CASE

A. Factual Background and Proceedings in the District Court

In 2009 and 2010, Petitioner Mark A. Beckham prepared and filed tax returns for John Horseman, owner of a financial advisory firm, JM Horseman Group, LLC. App.2a. In 2011, the IRS began a civil audit of Horseman's 2009 individual tax return, and later expanded the audit to include Horseman's 2010 individual and corporate tax returns. App.3a.

Horseman's 2009 and 2010 individual returns claimed "nonpassive" losses from a business, Arbor Homes, Inc. App.2a. To claim nonpassive losses, a taxpayer must have sufficient economic investment in a business and the taxpayer must also "materially participate" in the entity's activities. App.2a.

During the audit, IRS Revenue Agent Anthony Grinstead requested information regarding Horseman's participation in Arbor Homes. App.3a. Beckham allegedly provided Grinstead with Horseman's 2009 day planner, which contained entries showing that Horseman had worked several hundred hours for Arbor Homes. App.3a.

The civil audit of Horseman eventually turned criminal and on February 22, 2017, Beckham was ultimately charged in a superseding indictment with one count of corruptly endeavoring to obstruct the due administration of the internal revenue laws in violation of 26 U.S.C. § 7212(a)'s omnibus clause (Count 1)

and three counts of willfully assisting in the preparation of false tax returns in violation of 26 U.S.C. § 7206(2) (Counts 2 through 4). App.4a.

On June 27, 2017, this Court granted certiorari in *United States v. Marinello*, 839 F.3d 209 (2d Cir. 2016), *cert. granted* 137 S. Ct. 2327 (2017), to resolve a circuit split over whether Section 7212(a)'s omnibus clause requires that there was a pending IRS action or proceeding, such as an investigation or audit, of which the defendant was aware when he engaged in the purportedly obstructive conduct.

On July 28, 2017, Beckham filed a motion to stay his trial pending this Court's decision in *Marinello*, expressly arguing that *Marinello* would impact the trial and the jury instructions as to the elements of Count 1. App.5a. The Government filed a response in opposition to this request and the district court denied Beckham's motion. App.5a.

On September 6, 2017, the trial commenced. At the instruction conference, Beckham objected to Jury Instruction 9—the instruction relevant to the Section 7212(a) offense—as it did not require the jury to conclude that the Government had proved beyond a reasonable doubt that he knew about the IRS audit at the time he committed a corrupt act. App.5a. The Government opposed Beckham's objection and the district court overruled it, opting instead to utilize a special verdict form, rather than modifying the erroneous instruction. App.5a-6a. Beckham objected to the use of the special verdict form, arguing that it did not cure the incorrect instruction. App.6a.

The jury acquitted Beckham of each of the three Section 7206(2) charges on which the jury was properly

instructed as to each essential element. App.6a. However, the jury convicted Beckham of violating Section 7212(a) after concluding that the Government had proved, beyond a reasonable doubt, the existence of only three elements: (1) in any way corruptly (2) endeavoring (3) to obstruct or impeded the due administration of the Internal Revenue Code. App.6a-7a. After returning a verdict of guilty as to that count, the jury indicated on the special verdict form that Beckham had committed one corrupt act after learning of the audit: delivering the day planner to Agent Grinstead. App.6a. Neither the jury instructions, nor the special verdict form itself, instructed the jury to apply the beyond a reasonable doubt standard of proof to the questions posed on the form.

Petitioner timely filed a motion for judgment of acquittal or, in the alternative, new trial, which the district court denied. App.6a. The district court sentenced Petitioner to 36 months' imprisonment. App.6a.

B. Proceedings in the Eighth Circuit

Beckham timely appealed. App.6a. On May 1, 2018, Beckham filed a motion for release on bail pending appeal arguing that this Court's intervening decision in *Marinello v. United States*, 138 S. Ct. 1101 (2018) issued on March 21, 2018, made clear that the district court erred in its instructions to the jury concerning the scope and elements of the sole count of conviction. On May 15, 2018, the Eighth Circuit granted the motion, allowing Beckham to remain on bail pending appeal. App.16a.

On appeal, as relevant here, Beckham challenged his conviction under Section 7212(a) on the ground

that the district court erred in overruling his objection to the jury instruction. App.1a-2a. Specifically, Beckham argued the district court had committed reversible error in failing to instruct the jury as to the elements of the count consistent with this Court's recent decision in *Marinello*.

The decision below accurately notes that, before *Marinello*, the Eighth Circuit required proof of only three elements for a Section 7212(a) offense: "(1) in any way corruptly (2) endeavoring (3) to obstruct or impede the due administration of the Internal Revenue Code." App.6a (quoting *United States v. Williams*, 644 F.2d 696, 699 (8th Cir. 1981). The decision below also correctly concludes that *Marinello* "added two elements —a nexus and knowledge of a currently-pending or reasonably foreseeable proceeding—that this Court did not previously require." App.7a.

In response, the Government conceded the jury instruction on the sole count of conviction was erroneous but argued the special verdict form remedied the error and that, even if the form failed to cure the error, the error was harmless. App.7a.

The decision below—relying on *Neder* and *United States v. Dvorak*, 617 F.3d 1017, 1024-25 (8th Cir. 2010)—concluded that harmless error analysis was warranted under the circumstances where two essential elements were left out of the jury instructions. App. 6a. Setting out its iteration of the *Neder* analysis, the Eighth Circuit explained, "[a]n instructional error is harmless beyond a reasonable doubt if the evidence supporting the jury's verdict is so overwhelming that no rational jury could find otherwise." App.7a (citing *Neder*, 527 U.S. at 18-19).

The decision below then applied *Neder* to the first omitted element: *Marinello*'s nexus requirement. App.7a. The decision below explains that because Grinstead testified that he received Horseman's day planner from Beckham while conducting the audit and because Beckham never contradicted this testimony, "no rational juror could find that Beckham did not give the day planner to the IRS." App.9a. Based solely on this, the decision below found the "jury instruction error harmless as to the nexus requirement." App.9a.

The decision below then applied *Neder* to the second omitted element, acknowledging that *Marinello* also "requires a defendant to act with knowledge or a reason to know of a pending or imminent IRS proceeding, such as an IRS audit." App.9a (citing *Marinello*, 138 S. Ct. at 1104). The decision below then hastily concluded, "the evidence overwhelmingly shows Beckham knew of a currently-pending IRS audit at the time he gave Agent Grinstead Horseman's day planner" because Beckham was acting as Horseman's representative throughout the audit. App.9a. Based solely on this, the decision below concluded that the district court's failure to instruct the jury as to this element was harmless beyond a reasonable doubt. App.9a.

As this analysis illustrates, the decision below focused on *Neder*'s "uncontested and supported by overwhelming evidence" language, *see Neder*, 527 U.S. at 17, but concludes that omission of an element from an instruction is harmless if it is *either* uncontested *or* supported by overwhelming evidence.

Following this after-the-fact analysis of the record, the Eighth Circuit panel concluded, based on its appli-

cation of the *Neder* standard, "that no rational jury could find reasonable doubt as to either of the two *Marinello* elements" and that, therefore, "failure to instruct the jury on those elements was harmless." App.9a.

Beckham sought rehearing *en banc*, which was denied. App.34a. Beckham timely petitioned for review from this Court on August 13, 2019.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A PERFECT VEHICLE TO RESOLVE THE CIRCUIT SPLIT ON THE PROPER INTERPRETATION OF *NEDER*.

The courts of appeals expressly disagree about the proper method for determining whether omission of an essential element (or elements) from a jury instruction constitutes harmless error that somehow does not violate a criminal defendant's Sixth Amendment right to have a jury determine every element necessary to a finding of guilt. Indeed, had Beckham been prosecuted in California or Massachusetts rather than Missouri, his conviction would have been reversed.

In *Pizarro*, the First Circuit affirmed the appellant's convictions despite concluding that the district court erred by failing to instruct the jury as to an essential element in two separate counts. *See Pizarro*, 772 F.3d at 287. Justifying its conclusion, the court explained that the Supreme Court held that "[i]n this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was un-

contested 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." *Id.* at 297-98 (quoting *Neder*, 527 U.S. at 17).

Pizarro then expressly notes that it is inclined to conclude that this Court's "statements in *Neder* and its prior precedent, the omission of an element is harmless only when the reviewing court draws two conclusions beyond a reasonable doubt: the element is uncontested, and the element is supported by overwhelming evidence." *Id.* at 298. However, rather than reaching a decision as to whether *both* conclusions must be made prior to making a determination that omission of an essential element constitutes only harmless error, the court concludes that it "need not decide whether this view of the law is correct because, in this case, we conclude beyond a reasonable doubt both that Pizarro has never contested the omitted drug quantity elements and that they were supported by overwhelming evidence." *Id.*

After concluding that the instructional error, under the facts present in *Pizarro*, was harmless error, the majority opinion author, Judge Lipez, drafted separately, a concurring opinion in which he explains:

> In analyzing the complex issues in this case, I became aware of the significant inconsistency in the way courts have reviewed for harmlessness the failure to instruct on an element of a crime. I write separately to express my concern regarding this inconsistency, which exists within my circuit and in other courts, and the potentially unconsti-

> tutional applications of *Neder*, that have resulted from it. Given that the Sixth Amendment right to a jury trial is at stake, *I urge the Supreme Court to clarify the line between an unconstitutional, directed guilty verdict and a harmless failure to instruct on an element*.

Pizarro, 772 F.3d at 303 (Lipez, J., concurring) (emphasis added). Describing the confusion stemming from this Court's holding in *Neder*, Judge Lipez expounds:

> *Neder*, however, did not unequivocally answer whether its two-part formulation for finding an omitted element harmless in Neder's case—that the element was both uncontested *and* supported by overwhelming evidence—was merely descriptive of the circumstances in Neder itself or also prescriptive for any finding of harmlessness where an element was omitted.

Id. (Lipez, J., concurring) (emphasis in original). Judge Lipez continues, "[n]otwithstanding the conjunctive 'and' linking 'uncontested' and 'supported by overwhelming evidence,' courts have taken inconsistent positions on whether a defendant's contest of an omitted element, even one supported by overwhelming evidence, renders the omission non-harmless." *Id.* at 304 (Lipez, J., concurring). In the end, Judge Lipez concludes that this Court,

> deliberately chose to make the harmlessness inquiry more demanding where an element was omitted. Hence, I think the Court in *Neder* intentionally prescribed the two-pronged inquiry requiring consideration of

> whether the omitted element was uncontested *and* whether the record contained overwhelming evidence of that element, and only when both prongs are met can a reviewing court conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.

Id. at 310 (Lipez, J., concurring) (emphasis in original).

In *Stanford*, the Fifth Circuit articulated an altogether different formulation of the *Neder* standard. There, the Fifth Circuit reversed the appellant's conviction for conspiracy to distribute a controlled substance analogue ("CSA") because the district court had ruled that the Government was not required to prove that Stanford knew that a specific compound was a CSA. *See Stanford*, 823 F.3d at 822. At his trial, much like Beckham, Stanford identified a circuit split and argued that the Government was required to prove that he knew the compound was a CSA. *Id.* at 826. The district court refused to instruct the jury on this element and, instead, sent the issue to the jury via a special interrogatory. *Id.* at 826-27. The jury returned a guilty verdict. *Id.* at 827. And the jury answered "yes" to the special interrogatory regarding whether Stanford knew the compound was a CSA. *Id.* The special interrogatory did not specify the standard of proof to be applied by the jury in answering the question. *Id.* at 828.

Stanford appealed his conviction. During the appeal, this Court decided *McFadden v. United States*, 135 S. Ct. 2298 (2015), holding that in prosecutions like the one in *Stanford*, "the Government must prove that a defendant knew that the substance with which

he was dealing" was a CSA. *McFadden*, 135 S. Ct. at 2305. The Government argued the instructional error exposed by this Court's intervening *McFadden* decision was harmless. *See Stanford*, 823 F.3d at 827. The Fifth Circuit concluded otherwise. *Id.*

In concluding that the instructional error was not harmless, the Fifth Circuit, unsurprisingly, discussed *Neder*. *Id.* at 830-32. However, the "uncontested and supported by overwhelming evidence" standard so often cited by other courts of appeals did not rear its head. Instead, the Fifth Circuit focused on the fact that in *Neder*, "the error was considered harmless where proof of the element missing from the instruction was inherent in proof of the overall conviction, so the jury could not have failed to find the element." *Id.* at 832. In other words, the Fifth Circuit concluded that because the error addressed in *Neder* was the district court's failure to submit the issue of materiality to the jury as one of the elements of filing a false tax return, the missing element was "logically encompassed by a guilty verdict and was not in fact contested." *Id.* Stated simply, "If the missing income was not material, there was no reason for Neder to exclude it from his tax returns." *Id.*

Further illustrating the circuit divide on this issue, the Ninth Circuit, applying the *Neder* standard, concluded that an instructional error was not harmless because the defendant had contested the omitted element. *See Guerrero-Jasso*, 752 F.3d at 1193-95. The Ninth Circuit, thus, viewed the *Neder* standard as one requiring *both* that an omitted element was uncontested *and* supported by overwhelming evidence in order to conclude that the error was harmless beyond a reason-

able doubt. Indeed, the court concluded that Guerrero-Jasso's contest of the omitted element precluded a finding of harmlessness despite the fact that evidence supporting the omitted element was arguably overwhelming. *Id.* at 1194.

Of particular note, when this Court remanded *Neder* itself to the Eleventh Circuit, that court concluded this Court had not held that "the failure to instruct on materiality can never be harmless error unless the Government shows both that Neder never contested materiality and that the evidence overwhelmingly supports the materiality of every charged falsehood." *Neder*, 197 F.3d at 1129. The Eleventh Circuit determined, "whether Neder contested materiality may be considered but is not the pivotal concern" in deciding whether the instructional error was harmless. *Id.*

The Second Circuit takes yet another approach to this inquiry. There, under *Neder*, contesting an omitted element does not in and of itself render the instructional error harmless. *See Needham*, 604 F.3d at 679. Rather, if an omitted element was contested, in the Second Circuit, a court must engage in an additional inquiry:

> if the evidence supporting the omitted element was controverted, harmless error analysis requires the appellate court to conduct a two-part inquiry, searching the record in order to determine (a) whether there was sufficient evidence to permit a jury to find in favor of the defendant on the omitted element, and, if there was, (b) whether the jury would non-

> etheless have returned the same verdict of guilty.

Id. (quoting *United States v. Jackson*, 196 F.3d 383, 386 (2d Cir. 1999)).

The Fourth Circuit expressly rejects the Second Circuit's take on *Neder* and proposes its own. *See Brown*, 202 F.3d at 701 n.19. First, the Fourth Circuit is in the camp that, at least initially, presumes an appellate court must find an instructional error harmless if the omitted element is both "uncontested and supported by overwhelming evidence." *Id.* at 700-01 (quoting *Neder*, 119 S. Ct. at 1837). Second, however, even where a defendant contested the omitted element, in the Fourth Circuit's view, "*Neder* mandates a second inquiry." *Id.* at 701. "In that event, we must determine whether the 'record contains evidence that could rationally lead to a contrary finding with respect to that omitted element.'" *Id.* (quoting *Neder*, 119 S. Ct. at 1839). The Fourth Circuit then concludes:

> If not, then the error is harmless. But if the element was genuinely contested, and there is evidence upon which a jury could have reached a contrary finding, the error is not harmless. It is not harmless because, in that circumstance, we cannot determine beyond a reasonable doubt that the "jury verdict would have been the same absent the error."

Id. (quoting *Neder*, 119 S. Ct. at 1838) (footnote omitted).

This Court should resolve the deep circuit split on this issue. Any further difference in interpretation of when omission of an essential element is harmless

error is unjust. The numerous differing opinions and tests created among the courts of appeals makes clear that there is no possibility of the circuit conflict resolving itself without this Court's intervention. This case presents an excellent opportunity for resolving this issue.

II. THE QUESTION PRESENTED IS IMPORTANT.

Given the circuit split, this case presents the perfect opportunity to revisit the tenets of *Neder*, especially in light of more recent precedent that calls the vitality of *Neder* squarely into question. As Justices Scalia, Ginsburg and Souter explained in their dissenting opinion in *Neder*, "depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged—which necessarily means his commission of *every element* of the crime charged—can never be harmless." *Neder*, 527 U.S. at 30 (Scalia, J., dissenting) (emphasis in original).

And, as Justices Gorsuch, Ginsburg, Sotomayor and Kagan recently reinforced in their plurality opinion, "one of the Constitution's most vital protections against arbitrary government" is that "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *Haymond*, 139 S. Ct. at 2373. If this premise stands, it is difficult—if not impossible—to reconcile with the decision below and with similar cases throughout the country where a jury did not actually find the defendant guilty of all essential elements of the crime charged, but where a defendant's liberty has been taken by an appellate panel's findings of fact based on its review of a district court's record.

In that respect, *Haymond* is directly on point. While at first glance a case about supervised release proceedings, the fundamental premise of *Haymond* directly conflicts with *Neder*. As in *Haymond*, no jury found that the Government proved, beyond a reasonable doubt, that Neder or Beckham committed each of the acts necessary to put them behind bars. Instead, judges filled in the gaps, determining that the essential elements held back from the jury had indeed been proved by the Government beyond a reasonable doubt. However, "juries in our constitutional order exercise supervisory authority over the judicial function by limiting the judge's power to punish. A judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct." *Haymond*, 139 S. Ct. at 2376. But under *Neder*—and the various iterations of its holding applied by the courts of appeals—judges are permitted to make factual findings of criminal conduct that the jury never made—and that is the fatal flaw. Each element of a crime is a factual finding. Thus, as in this case, where an appellate panel makes two factual findings never made by the jury, a defendant's rights under the Fifth and Sixth Amendments are violated.

Since *Neder*, this Court has consistently recognized the importance of the Fifth and Sixth Amendment right to a jury trial. *See Apprendi v. New Jersey*, 530 U.S. 466, 500 (2000) (Thomas, J., concurring) ("in order for a jury trial of a crime to be proper, *all elements* of the crime must be proved to the jury (and, under *Winship*, proved beyond a reasonable doubt)") (emphasis added); *Alleyne v. United States*, 570 U.S. 99, 103 (2013) ("Any fact that, by law increases the penalty for a crime *is an 'element'* that must be submitted to the

jury and found beyond a reasonable doubt") (emphasis added); *Neder*, 527 U.S. at 30 ("When this Court deals with the content of this guarantee—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy") (Scalia, J., dissenting).

If, as this Court has repeatedly held since *Neder*, any "element" must be submitted to the jury and found beyond a reasonable doubt, the premise of *Neder* that "the omission of an element is an error that is subject to harmless-error analysis" cannot possibly stand—or, at a minimum, requires clarification. *Neder*, 527 U.S. at 15.

In *Alleyne*, this Court emphasized that the Fifth and Sixth Amendments require "that each element of a crime be proved to the jury beyond a reasonable doubt." *Alleyne*, 570 U.S. at 104. As this Court explained, "[t]he substance and scope of this right depend upon the proper designation of the facts that are elements of the crime." *Id.* at 104-05. But in the case now before this Court and in all cases that fall within *Neder*'s progeny, there is no dispute that the jury did not find all elements of the crime.

In the end, the very premise of *Neder* directly conflicts with more recent cases decided by this Court—making the question presented by this case an important one that this Court should tackle head on.

III. THE DECISION BELOW WAS WRONGLY DECIDED.

In this case, the jury acquitted Beckham of every count on which it was properly instructed; the jury was not properly instructed as to the elements of the only count of conviction; the jury found that the Gov-

ernment proved only 60 percent of the crime (*i.e.*, three of five elements) beyond a reasonable doubt; and Beckham repeatedly requested that the jury be required to find the *Marinello* elements beyond a reasonable doubt—but the district court sustained the Government's objections to his requests.

On appeal, the Eighth Circuit held that the instructional error was harmless beyond a reasonable doubt, applying an iteration of *Neder* that squarely conflicts with other circuits. With respect to *Marinello*'s nexus requirement, the Eighth Circuit determined that the evidence was uncontroverted—but not that it was overwhelming. App.8a-9a. The analysis was simply that Beckham delivered Horseman's day planner to an IRS revenue agent, and that Beckham had not contradicted this evidence. This, of course, glossed over the fact that the jury expressly concluded that the Government had *not* proved that Beckham had any involvement in falsifying the day planner or that he even knew it contained false entries. With respect to *Marinello*'s knowledge of a pending IRS proceeding element, the Eighth Circuit concluded the evidence was overwhelming—but not that it was uncontroverted. App.9a. Put simply, the Eighth Circuit concluded that omission of an essential element is harmless if the omitted element was *either* uncontested *or* if the evidence in support of the element was overwhelming.

Furthermore, analysis of whether Beckham disputed a *Marinello* element at trial misses the mark. The district court was crystal clear, both before and during trial, that it would not instruct the jury as to the *Marinello* elements. Thus, as a matter of fundamental trial strategy, to spend any time disputing

elements the jury would not be required to find would make no sense. The Government should not be entitled to object to a criminal defendant's request that a jury be required to find two essential elements beyond a reasonable doubt, to prevail in its objection, and then to argue on appeal the error was harmless because Beckham had not dedicated significant resources at trial to contest the elements that would, by definition, have no effect on the jury's verdict.

Furthermore, on the merits, the Eighth Circuit's conclusion that the *Marinello* nexus element was uncontroverted is unfounded. At trial, it was hotly disputed whether Beckham played any role in Horseman's falsifying of entries in the day planner and whether Beckham knew Horseman's day planner contained false entries. On the special verdict form, the jury had the opportunity to find that Beckham caused Horseman to falsify the day planner—but the jury did not make that finding. Nonetheless, the Government argued, and the decision below agreed, that this evidence was uncontroverted. In this respect, notwithstanding this Court's attempts in *Marinello* to significantly curb undue prosecutions under Section 7212(a), the Eighth Circuit essentially concluded that delivering another person's day planner to an IRS revenue agent falls within the scope of Section 7212(a)—regardless of whether the messenger, perhaps even a mail carrier, had any reason to know it contained false entries.

Instead, where the jury acquitted Beckham of every count on which it was properly instructed, and where the jury was only required to find 60 percent of the elements of the sole count of conviction, the Eighth Circuit should have reversed and remanded for

a new trial. Moreover, because the Eighth Circuit panel adopted an erroneous reading of *Neder*, this Court should grant review to clarify when, if ever, it is harmless for a district court to refuse to instruct a jury as to every essential element of a criminal statute.

This case presents the perfect opportunity to clarify the law and to conclude—as it already has in a different context—that "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *Haymond*, 139 S. Ct. at 2373.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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