No. _____

IN THE
Supreme Court of the United States

VAGAN ADZHEMYAN,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR *WRIT OF CERTIORARI* TO THE
NINTH CIRCUIT COURT OF APPEALS

PETITION FOR *WRIT OF CERTIORARI*

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QUESTIONS PRESENTED

Whether the Sixth Amendment allows a district court to refuse to instruct jurors on the only contested element of the federal kidnapping statute after previous jurors were unable to convict when instructed on every statutory element.

Whether a district court's failure to instruct jurors on contested statutory elements is reviewed for harmless error under *Neder* or for structural error.

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I.
PETITION FOR A *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Vagan Adzhemyan respectfully prays that a *writ of certiorari* issue to review the decision of the U.S. Court of Appeals for the Ninth Circuit in the Memorandum opinion filed on February 10, 2020. [Appendix A-1.] This Court extended the deadline to file the Petition for Certiorari to 150 days from the date of the lower court judgment. [Order, Order List: 589 U.S., March 19, 2020.]

II.
OPINIONS BELOW

The Court of Appeals for the Ninth Circuit issued an unpublished Memorandum opinion denying his direct appeal of the denial of his motion under 28 USC § 2255 after a conviction for kidnapping and conspiracy pursuant to 18 U.S.C. §§ 1201(a)(1) and 1201(c). *United States v. Gibson*, 803 Fed. Appx. 77 (9th Cir. Feb. 10, 2020). [Appx. A-1.]

III.
JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

IV.
RELEVANT CONSTITUTIONAL PROVISIONS

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property without due process of law . . ." U.S. Const. Amend. V. "In all

criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation;. . ." U.S. Const. Amend. VI.

V.
STATUTE INVOLVED

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds ***for ransom or reward or otherwise*** any person, [ ] when--

> (1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense; shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.
>
> (c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

18 U.S.C. § 1201(a)(1), (c) (emphasis added).

VI.
STATEMENT OF THE CASE

Petitioner Vagan Adzhemyan and codefendant Galvin Gibson faced charges of conspiracy to kidnap and kidnapping "for ransom or reward or otherwise," in violation of 18 U.S.C. §§ 1201(c) and 1201(a)(1) on October 1, 2009. [CR 46.][1] In the

[1] Petitioner will refer to the District Court Clerk's Record as "CR," and the Ninth Circuit Clerk's Record as "ACR," and Petitioner's Excerpts of Record as "ER," Gibson's Excerpts of Record as "GER"; the Supplemental Excerpts of Record as "SER," Sealed Excerpts of Record as "Sealed ER," Adzhemyan's Opening Brief as "AOB," Gibson's Opening Brief as "GOB," and the U.S.' Answering Brief as "UAB."

first trial—consistent with the Superseding Indictment—the government presented evidence of an alleged ransom demand by Mr. Adzhemyan to obtain a conviction for kidnapping alleged victim Sandro Karmryan. [CR 46; ER 508.]

Crafting his defense after receiving notice of the elements listed in the Superseding Indictment, Mr. Adzhemyan testified at the first trial that he was the target of a murder-for-hire plot ordered by Karmryan—through his ties to the Russian/ Armenian mafia—and he confronted Karmryan to obtain recorded proof of this plot as an "insurance policy" against his murder. [ER 54-56, 70-101, 174, 484.] The plan went awry when Karmryan's mafia associate/ bodyguard (and possibly hit man) accidentally shot Karmryan in the buttocks. [GER 240-243.] Mr. Adzhemyan never planned to kidnap Karmryan. The jury heard this evidence, the district court excluded a justification instruction, and the jury deadlocked favoring acquittal for both defendants resulting in a mistrial on February 18, 2010. [CR 151; ER 538.]

Exploiting the complete lack of clarity in the Ninth Circuit concerning kidnapping's "ransom or reward or otherwise" element, the government—despite relying on the same Superseding Indictment—successfully eliminated this essential element before retrial, citing *Gawne v. United States*, 409 F.2d 1399, 1403 (9th Cir. 1969). [CR 177, 185, 187; AOB 11.] Government counsel requested, "the elimination and the exclusion of all the evidence as it goes to the defendant's purported belief . . . and any argument about . . . why the why is important in this case, because, again, the why is not an element of the offense." [GER 276.]

The district court agreed with the government on retrial and thwarted the defenses' every hint of the murder-for-hire plot as part of a justification defense, to show the defendants' purpose for acting, and to expose alleged victim Karmryan's biases and fraudulent conduct on cross-examination. [ER 271-273, 285, 296-303, 321-328, 372-373, 380-402, 407-411.] The district court stated:

> [A]ll evidence relating to any purported necessity or justification defenses are excluded from this case. That means excluded from witnesses, excluded from closing arguments in this matter. . . . [The government has] ***shifted the focus of the case since the time of the indictment***. And they did so and have narrowed down the scope of the issues in order to not open the door into evidence that is frankly ***irrelevant because motive is not an element of kidnapping***.

(Emphasis added.) [ER 291-292.]

> During the course of this trial, at no point is counsel permitted to suggest whether on direct examination of defense witnesses or on cross-examination of the government's witnesses or during closing argument raise the issue of the purported plot to kill Mr. Adzhemyan.

[ER 304-305.]

> I've ruled in this matter knowing that the Court is not going to change its mind, and it's improper, and it's just going to essentially pollute the information that is properly admissible.

[ER 331.]

Nevertheless, the defense reiterated at sidebar that that Mr. Adzhemyan had an absolute right to contest every element of the crimes for which grand jury indicted him.

> Now, that's what he was indicted on [ransom, or reward or otherwise]. That's what the indictment says, and all I'm saying is ***I am going to introduce evidence that it was for a different purpose***.

> Now, your Honor is going to rule that that is not justification. You are going to say that even if that was his purpose, that isn't justification. ***But he has a right at least to show that what's charged by the government is not true, and what's charged as overt acts is not true***.
>
> So if your Honor wants to advance it and say this is not justification, that's fine. ***But the point is that we are contesting the very items that are in the indictment***. And he had a right to be indicted.

(Emphasis added.) [ER 288.]

The district court—over vigorous defense objections, contrary to the language written by congress, and contrary to the Ninth Circuit model jury instruction—excluded the element of "ransom or reward or otherwise" (or "ransom, reward or other benefit" from the model jury instruction) on retrial, and even admonished the jury that a "kidnapper's motivation is not an element of the offense." [ER 431-432.]

The Ninth Circuit held on direct appeal that the district court erred in excluding the element of "ransom or reward or benefit" from the jury instructions. [Appx. A-2 at 3.] However, that Memorandum opinion isolated the district court's exclusion of the murder-for-hire plot to the justification defense without assessing this error in terms of: (a) the right to meaningfully present a defense to each element of the charged crimes; (b) the fact of the hung jury in the first trial (where all elements were instructed); (c) the right to confront the witnesses against him concerning the element of "ransom or reward or otherwise;" (d) the right to the disclosure of all reports under *Brady* and *Giglio* impeaching the government's star witness on matters related to this essential element *before the retrial ended*; and (3)

the right to be tried on the elements found by the grand jury listed in the Superseding Indictment.

Curiously, the Ninth Circuit found this instructional error to be harmless "because of the uncontroverted evidence that Defendants used the victim's ATM card to obtain cash from the victim's bank account." [Appx. A-2 at 3.] However, that three-judge panel failed to explain how this evidence was admissible in lieu of the district court's total exclusion of "irrelevant" evidence of motive or purpose.[2]

In his § 2255 motion after that first appeal, Petitioner argued, among other things, ineffective assistance of appellate counsel for failing to argue structural error. The district court denied that motion, and Petitioner appealed. The Ninth Circuit affirmed, holding that under *Gawne v. United States*, 409 F.2d 1399 (9th Cir. 1969) the crime charged *did not* include the "ransom, reward, or otherwise" language. Appendix A-1, page 2-3. On direct appeal, the Ninth Circuit had held that the elements *did* include "ransom, reward, or benefit" and found error (but harmless). Thus, the two Ninth Circuit opinions reviewing this trial disagree as to what the elements of the charged offense were.

[2] *See* Fed. Rule Evid. 103(d): "To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means." *See also* Fed. Rule Evid. 105: "If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly."

VII.
SUMMARY OF THE ARGUMENT

1. The judicial elimination of a statutory element and the confusion among the circuits about the law support granting this Petition.

Several circuit courts of appeal have held that motive or purpose is irrelevant to a federal kidnapping charge, while others adhere to this Court's guidance defining "ransom or reward or otherwise" as an element where a "benefit" to the captor is required. The uncertainty among the circuit courts surrounding this element has not abated since the 1930s. Notwithstanding the term "expectation of benefit" from *Gooch v. United States*, 297 U.S. 124 (1936) or "nonpecuniary" motives from *United States v. Healy*, 376 U.S. 75, 81 (1964), some circuit courts instead fixate on remarks from the Senate Judiciary Committee (citing a Department of Justice Memorandum) that recommended the language "not only for reward, but for any other reason." *See Healy*, 376 U.S. at 81.[3] Needless to say, Congress never enacted the Department of Justice's terminology.

In *Gawne v. United States*, 409 F.2d 1399 (9th Cir. 1969), the Ninth Circuit held a kidnapper's motive or purpose is irrelevant. "Thus the true elements of the offense are an unlawful seizure and holding, followed by interstate transportation." *Id*. at 1403. Subsequently, however, the Ninth Circuit held that, "the crucial

[3] *See also Chatwin v. United States*, 326 U.S. 455, 459 (1946) (government alleged "ransom or reward or otherwise" and attempted to prove a "benefit to the transgressor").

elements of the crime of kidnapping are: (1) a seizing, confining, etc., and (2) a holding or detention for (3) ransom or reward or otherwise." *United States v. Etsitty*, 140 F.3d 1274, 1274 (9th Cir. 1998). A defendant charged in the Ninth Circuit with kidnapping lacks any guidance whatsoever if "ransom or reward or otherwise" constitutes an element of the offense. Indeed, in this case, as noted above, the Ninth Circuit took one position on direct appeal and the opposite position on appeal of the § 2255 motion.

Mr. Adzhemyan's case exemplifies the need for additional guidance from this Court. The government was unable to convict Petitioner after the court instructed the jurors on every element of the offense and Petitioner argued the one contested element. The government tried the Petitioner again, but this time the district court excluded evidence on the contested element and omitted any instruction on that element. Predictably, the jury convicted. Appeal followed and the conviction was affirmed by the Ninth Circuit, which held that it was error to not instruct on a statutory element, but that the error was harmless: "The district court erred by failing to include the 'for ransom, reward, or benefit" language . . ." Appendix A-2, Slip Opn. Page 3.

Petitioner then filed a motion under 28 USC § 2255, arguing appellate counsel was ineffective for failing to argue structural error, among other things. The district court denied that motion. The Ninth Circuit affirmed the denial of the § 2255 motion, holding the government need *not* prove all the statutory elements (citing *Gawne*, which eliminated a statutory element): "Hence, the trial court did not commit

structural error, and so [Petitioner's] appellate counsel was not ineffective for failing to argue that the trial court had committed such an error." Appendix A-1, Slip Opn., page 2. Thus, six Ninth Circuit judges have now issued two different holdings on the same legal issue arising from the same trial.

Circuit courts continue to ignore this Court's holdings in *Gooch, Chatwin*, and *Healy* and, as noted, the Ninth Circuit in this case has held both ways in this case alone. As a result, the government is able to add or remove an essential element of 18 U.S.C. § 1201(a) depending on the strengths and weaknesses of its case, or to change course on retrial if they failed to prove the kidnapping charge on the first try.

2. The confusion surrounding the continued vitality of *Neder* supports granting this Petition.

This Court discarded the "structural" error approach to the deprivation of the right to a jury trial in *Neder v. United States*, 527 U.S. 1 (1999) after noting the overwhelming evidence of materiality, which Neder never argued or contested at trial. Courts throughout this country have noted the difficulty of reconciling *Neder* and *Apprendi,* pointing to Justice Scalia's passionate dissent in *Neder,* his repudiation of *Neder* in his concurrence in *Apprendi,* and the logical inconsistencies of the two cases.

VIII.
REASONS FOR GRANTING THE PETITION

(1). The judicial elimination of the essential element of "ransom or reward or otherwise" from the federal kidnapping statute supports granting this Petition, and this Court should resolve the split among the federal circuit courts of appeal on this issue.

The government in this case was unable to convict Petitioner after the court instructed the jurors on every element of the offense and Petitioner contested one statutory element only. The government tried the Petitioner again, but this time the district court excluded evidence and argument on the contested element and omitted any instruction on that element. Predictably, the jury convicted. Appeal followed and the conviction was affirmed by the Ninth Circuit, which held that it was error to not instruct on a statutory element, but that the error was harmless: "The district court erred by failing to include the 'for ransom, reward, or benefit" language . . ." Appendix A-2, Slip Opn. Page 3.

Petitioner then filed a motion under 28 USC § 2255, arguing appellate counsel was ineffective for failing to argue structural error, among other things. The district court denied that motion. The Ninth Circuit then affirmed the denial of the § 2255 motion, holding the government need *not* prove all the statutory elements (citing Ninth Circuit precedent that eliminated a statutory element): "Hence, the trial court did not commit structural error, and so [Petitioner's] appellate counsel was not ineffective for failing to argue that the trial court had committed such an error." Appendix A-1, Slip Opn., page 2.

Thus, six Ninth Circuit judges have now issued two different holdings on the same legal issue arising from the same trial. Three Ninth Circuit judges affirmed Petitioner's conviction by saying the district court erred, but the error was harmless. The next three Ninth circuit judges affirmed the denial of the § 2255 motion, which argued ineffective assistance of appellate counsel for failing to raise structural error, by holding any such argument would be futile because the district court did *not* err in omitting the statutory element.

This petition for certiorari follows. First, this Court should clarify whether the federal kidnapping statute, 18 U.S.C. § 1201, requires proof beyond a reasonable doubt that the defendant "holds for ransom, reward, or otherwise," as congress wrote the statute *or* if the Ninth Circuit (and other circuits) may by judicial fiat eliminate that statutory element. *See*, *Gooch v. United States*, 297 U.S. 124, 128 (1936) ("Evidently, Congress intended to prevent transportation in interstate or foreign commerce of persons who were being unlawfully restrained in order that the captor might secure some benefit to himself") and *Gawne v. United States*, 409 F.2d 1399, 1403 (9th Cir. 1969) ("the true elements of the crime of kidnapping are an unlawful seizure and holding, followed by interstate transportation."). Other circuits are also split on this issue.

The circuits are as split and confused about the elements of kidnapping as the Ninth Circuit was in this case. Thus, this Court should grant this Petition and decide whether the statutory elements of § 1201 do or do not have to be proved beyond a reasonable doubt. This Court should also grant this Petition to decide

whether *Neder* applies to a case where a defendant contests the omitted element or in any case at all.

Criminal laws are designed to hold a defendant accountable as much as hold the government to specific elements enacted by congress for charging and proving a crime was committed. Procedural fairness demands that a grand jury find proof of each element of an offense in order to indict, that the prosecutor present evidence concerning each element at trial, that a district court admit evidence concerning each element and instruct the jury on those elements, and that the jury only convict if it is convinced beyond a reasonable doubt that the government proved each element of the crime charged.

In the first trial, the grand jury's Superseding Indictment included the element of "ransom or reward or otherwise," the government presented evidence of ransom demands, the defense presented evidence that Mr. Adzhemyan was motivated to obtain proof that Karmryan hired a hit man to kill him, the district court excluded a necessity instruction, included the "ransom or reward or otherwise" element in the instructions, and the jury became hopelessly deadlocked favoring acquittal.

On retrial, the district court followed *Gawne* and eliminated the "ransom or reward or otherwise" element from the jury instructions and added that, "[a] kidnapper's motivation is not an element of the offense." [ER 07.] The district court also eliminated all evidence concerning this element over vigorous objections from the defense. The three-judge panel determined that the district court committed

instructional error on an essential element (despite *Gawne*) and based its harmless error ruling on ATM evidence admitted for the limited purpose of establishing the instrumentality of interstate commerce. The Ninth Circuit court neglected to consider the exclusion of evidence and mis-instruction as it applied to the harmless error. That error was abetted by appellate counsel's ineffective assistance of counsel for failing to argue structural rather than harmless error on the contested statutory element.

This Court should grant Mr. Adzhemyan's petition for a *writ of certiorari* because neither the courts, the prosecutors, nor the defendants know how to treat the element of "ransom or reward or otherwise," and the confusion has not abated since the 1930s. In other words, additional percolation in the lower courts seems unlikely to resolve the confusion given that different circuits treat the issue differently as do different panels in the Ninth Circuit.

a) *Gawne* conflicts with this Court's holdings, and Mr. Adzhemyan's due process rights were violated by alleviating the government of its burden to prove each element beyond a reasonable doubt.

The Ninth Circuit in *Gawne*, as well as a number of other circuit courts of appeal, have effectively removed an essential element from the kidnapping statute (18 U.S.C. § 1201(a)), and have disregarded this Court's holdings in *Gooch*, *Chatwin*, and *Healy* concerning the element of "ransom or reward or otherwise." *Gawne* listed the "true" elements of kidnapping as "an unlawful seizure and holding, followed by interstate transportation." *Gawne*, *supra*, 409 F.2d at 1403.

However, this Court never stated that "ransom or reward or otherwise" was not an element of kidnapping, and never held that the kidnapper's purpose was irrelevant.

> Evidently, Congress intended to prevent transportation in interstate or foreign commerce of persons who were being unlawfully restrained in order that the captor ***might secure some benefit to himself***. . . . Holding an officer to prevent the captor's arrest is something done with the ***expectation of benefit*** to the transgressor. So also is kidnapping with purpose to secure money. ***These benefits***, while not the same, ***are similar in their general nature and the desire to secure either of them may lead to kidnapping***. If the word reward, as commonly understood, is not itself broad enough to include ***benefits expected*** to follow the prevention of an arrest, they fall within the broad term, "otherwise."

Gooch, *supra*, 297 U.S. at 128 (emphasis added). In *Chatwin*, the "ransom or reward or otherwise" element was applied to evaluate the alleged kidnapper's purpose or the "benefit to the transgressor." 326 U.S. at 459. In *Healy*, this Court preserved the element of "ransom or reward or otherwise" in holding that the kidnapper's purpose need not be illegal to satisfy the element of 18 U.S.C. § 1201(a). *Healy*, *supra*, 376 U.S. at 82 ("we find no compelling correlation between the propriety of the ultimate purpose sought to be furthered by a kidnaping and the undesirability of the act of kidnaping itself."). The Ninth Circuit oversimplified this statement: "kidnaping is undesirable in itself, without regard to its purpose." *Gawne*, *supra*, 409 F.2d at 1403.

Several other circuit courts have eliminated "ransom or reward or otherwise" as an element of kidnapping. *See Gawne*, *supra*, 409 F.2d 1399 ("Thus the true elements of the offense are an unlawful seizure and holding, followed by interstate transportation."); *see also United States v. Martell*, 335 F.2d 764, 766 (4th Cir. 1964)

("This being so, use of the statutory language, 'ransom or reward or otherwise,' was not necessary."); *Brooks v. United States*, 199 F.2d 336 (4th Cir. 1952); *United States v. Bentley*, 310 F.2d 685 (6th Cir. 1962), *cert. denied*, 372 U.S. 946, *reh. denied*, 373 U.S. 954, (1963) ("indictment need not contain any details of purpose or motive, and that it is sufficient if it charges such purpose or motive to be for 'ransom, or reward, or otherwise"); *United States v. Atchison*, 524 F.2d 367, 369 (7th Cir. 1975) ("Since it now appears to be well settled that purpose is not an element of the offense of kidnaping and need not be charged or proved to support a conviction under the kidnaping statute"); *Hayes v. United States*, 296 F.2d 657, 665-667 (8th Cir. 1961) ("obviously 'otherwise' comprehends any purpose at all."); *Dawson v. United States*, 292 F.2d 365 (9th Cir. 1961) (concerning the sufficiency of indictment that did not allege a purpose); *Loux v. United States*, 389 F.2d 911, 916 (9th Cir.), *cert. denied*, 393 U.S. 867 (1968) (indictment need not allege any purpose).

Other circuit courts preserved this element and require the government to prove some benefit to the kidnapper. *See Clinton v. United States*, 260 F.2d 824, 825 (5th Cir. 1958) ("obviously 'otherwise' comprehends any purpose at all. If appellant desired to know more of the purpose the government intended to prove for his unlawful holding, he could have made a proper motion before trial to that end."); *United States v. Osborne*, 68 F.3d 94, 100 (5th Cir. 1995) ("the government must prove . . . (1) the transportation in interstate commerce; (2) of an unconsenting person who is; (3) held for ransom, reward, or otherwise, and (4) the acts were done knowingly and willingly"); *United States v. Gabaldon*, 389 F.3d 1090, 1094 (10th Cir.

2004) ("Our cases have interpreted this statute to require, *inter alia*, that the victim be (1) held against his or her will (2) for some benefit to the captor."); *DeHerrera v. United States*, 339 F.2d 587, 588 (10th Cir. 1964) ("The use in the statute of the words 'or otherwise' shows an intent of Congress to include within the offense any holding of a kidnaped person for a purpose desired by the captor and negatives the need for ransom or reward.").

In this case alone, the Ninth Circuit has decided this issue two different ways (each time to affirm the conviction), once in the direct appeal and once in the appeal of the § 2255 motion.

This Court should intervene to address the departure by some, but not all, federal courts from the statutory language of 18 U.S.C. § 1201(a) and this Court's guidance in *Gooch*, *Chatwin*, and *Healy*. Additionally, the circuit split in the circuit courts appears unlikely to resolve without this Court's intervention. Of equal import, this Court should eliminate the wiggle-room for federal prosecutors that would exploit the uncertainty in the law and attempt to convict a defendant without an essential element enacted by congress after unsuccessfully prosecuting the case with the full accompaniment of elements.

(2.) The Ninth Circuit's use of "harmless error" in a case where the defendant contested the omitted element, the jury hung, and then the trial court eliminated the instruction was error.

a) On its face, *Neder* cannot be reconciled with Apprendi, confuses lower courts, and does not apply to a case with a contested element.

This Court should consider the application of structural error to a failure to instruct on a contested statutory element. This Court discarded the "structural"

error approach to the deprivation of the right to a jury trial in *Neder v. United States*, 527 U.S. 1 (1999) after noting the overwhelming evidence of materiality (which Neder never argued at trial). Courts throughout this country have noted the difficulty of reconciling *Appendi* (decided after *Neder*) and *Neder,* pointing to Justice Scalia's dissent in *Neder,* his repudiation of *Neder* in his concurrence in *Apprendi,* and the logical inconsistencies of the cases.

In *Neder*, a five-justice majority held that where a jury is not instructed on an element of an offense, appellate courts were to apply a harmless error analysis despite the deprivation of the Sixth Amendment right to a jury trial on that element. On those facts, this Court held "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Id. at 9 (emphasis added).

In *Neder*, Justice Scalia (joined by Justices Souter and Ginsburg) dissented in part because he believed "that 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." Id at. 30. Just Scalia's impassioned dissent notes the importance of jury decisions about guilt:

> Even if we allowed (as we do not) other structural errors in criminal trials to be pronounced "harmless" by judges -- a point I shall address in due course -- it is obvious that we could not allow judges to validate *this* one. The constitutionally required step that was omitted here is distinctive, in that the basis for it is precisely that, absent voluntary waiver of the jury right, *the Constitution does*

> *not trust judges to make determinations of criminal guilt*. Perhaps the Court is so enamoured of judges in general, and federal judges in particular, that it forgets that they (we) are officers of the Government, and hence proper objects of that healthy suspicion of the power of government which possessed the Framers and is embodied in the Constitution. Who knows? -- 20 years of appointments of federal judges by oppressive administrations might produce judges willing to enforce oppressive criminal laws, and to interpret criminal laws oppressively -- at least in the view of the citizens in some vicinages where criminal prosecutions must be brought. And so the people reserved the function of determining criminal guilt *to themselves*, sitting as jurors. {Id. at 54-55 (emphasis in the original).]

After *Neder*, this Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a case whose text and progeny suggest *Neder* was wrongly decided (particularly in a case like this). As noted by the Illinois Court of Appeals in *People v. Nitz*, 353 Ill. App. 3d 978, (2004),

> A distinct, five-member majority of the United States Supreme Court has undeniably emerged in the five years since *Neder v. United* States was decided, a majority that has repeatedly, and consistently, taken measure of the sixth amendment's right to a trial by jury in a manner completely incompatible with the harmless error analysis contained in the *Neder* decision. The four justices departing from the majority in *Neder* v. United States have now each authored a majority opinion that belies the logic that led to the *Neder* ruling. *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999) (Justice Souter); *Apprendi*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (Justice Stevens); *Ring*, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (Justice Ginsburg); Blakely, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (Justice Scalia). Justice Thomas has formed the majority, joining in each of the right-to-a-trial-by-jury decisions. He has clearly abandoned the views expressed by his companions in *Neder v. United States*. See *Apprendi*, 530 U.S. at 499-523, 147 L. Ed. 2d

> at 460-75, 120 S. Ct. at 2367-80 (Thomas, J., concurring, joined in part by Scalia, J.); Blakely, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531. This five-member majority has provided "intelligible content to the right of jury trial." *Blakely*, 542 U.S. at 305, 159 L. Ed. 2d at 415, 124 S. Ct. at 2538. As Justice Scalia put it in his *Apprendi* special concurrence, our Founding Fathers reserved the right, lost for a time in decisions like *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990), and *Neder v. United States*, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999), but rediscovered in the new millennium, "to have a jury determine those facts that determine the maximum sentence the law allows." *Apprendi*, 530 U.S. at 499, 147 L. Ed. 2d at 460, 120 S. Ct. at 2367 (Scalia, J., concurring).

Other courts have been unable to reconcile *Appendi* and *Neder*. *See, United States v. Guevara*, 2002 U.S. App. LEXIS 6861 (2nd Cir. 2002)(order denying Petition for Rehearing) ("the government fails to recognize that *Apperendi* runs somewhat counter to *Neder*."); *State v. Fero*, 125 Wn. App. 84, 99 (2005) ("We find that *Neder* is inapplicable to violations of Blakely."); *Freeze v. State*, 827 N.E. 2d 600 (Ind. Ct. App. 2005) ("We believe the validity of *Neder* might be short-lived, in light of the seismic shift in the Supreme Court's Sixth Amendment jurisprudence since 1999. Specifically, Justice Scalia wrote a vigorous dissent in *Neder*, joined in part by Justice Stevens and fully by Justices Ginsburg and Souter — in other words, four of the five members of the *Blakely* majority. Justice Thomas, the fifth *Blakely* justice, was in the *Neder* majority. After *Neder*, and beginning at least with *Apprendi*, he has repudiated a narrow interpretation of the Sixth Amendment jury trial right and has joined Justice Scalia's broad view of it. *See also Shepard v. United States*, ___ U.S. ___, 125 S.Ct. 1254, 1264, 161 L.Ed.2d 205 (Thomas, J.,

concurring) (disavowing his concurring vote in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), a five-four Sixth Amendment decision upon which criminal history "exception" to *Apprendi-Blakely* rule is based).")

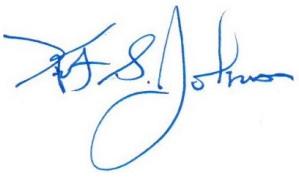
This Court should grant this Petition to clarify if *Neder* survives *Apprendi*.

VIII.
CONCLUSION

For the foregoing reasons, Petitioner requests the Court grant the Petition for *Writ of Certiorari* and settle the issue of whether the element of "ransom or reward or otherwise" of the federal kidnapping statute must be pleaded and proven beyond a reasonable doubt, or discarded at the whim of a prosecutor bent on winning a case at any cost and the issue of whether failure to instruct on an element can be harmless error.

Dated: 9 July 2020

Respectfully submitted,



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