No. ______

In the Supreme Court of the United States

ANTHONY CLARK ODOM,
Petitioner,
v.

JERRY B. ADGER and DIRECTOR BRIAN WILSON; Petitioners Probation Agent, South Carolina Department of Probation, Parole, and Pardon Services,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Chapman v. California* this Court held that Constitutional errors may be found harmless only if the prosecution establishes "beyond a reasonable doubt" that the error "did not contribute to the verdict obtained." 386 U.S. 18, 24 (1967). In *Sullivan v. Louisiana*, the Court held that the Sixth Amendment requires that a court must examine "the basis on which the jury actually rested its verdict,". The proper inquiry is "whether the guilty verdict actually rendered in this trial was surely un-attributable to the error." 508 U.S. 275, 279 (1993). *Sullivan* further suggested that the absence of a jury verdict on every element of an offense can never be harmless. In *Neder* this Court found an exception to *Sullivan* reasoning that where the evidence is overwhelming and a crime element is undisputed, a failure to instruct on a crime element is not a structural error. 527 U.S. 1 (1999). The question presented is:

Whether there is a structural error in a trial when a court directs a verdict as to a contested element of the crime charged, at the close of the State's case in chief, denying the Defendant an opportunity to offer proof or argue an element, and where the jury is instructed to not debate that crime element.

PARTIES TO THE PROCEEDINGS BELOW

The following were parties to the proceedings in the United State Court of Appeals for the Fourth Circuit:

1. Anthony C. Odom, the petitioner, was the appellant in the court below.

2. Respondents, Jerry B. Adger, director of the South Carolina Department of Probation, Parole and Pardon Services and Brian Wilson, petitioner's supervising probation agent, were the appellees in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony C. Odom ("Odom" or "Petitioner") respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Court of Appeals for the Fourth Circuit in *Odom v. Adger*, No. 16-7552.

OPINIONS BELOW

The final opinion of the Fourth Circuit affirming denial of relief, *Odom v. Adger*, is unpublished and is reproduced in the Appendix A, App. 1-10.

The October 7, 2016 order of the United States District Court for the District of South Carolina denying relief is unpublished and is reproduced in Appendix B, App. 11-43.

The April 22, 2015 opinion of the South Carolina Supreme Court denying relief is unpublished and is contained at Appendix F, App. 93-114.

JURISDICTION

The Fourth Circuit issued an opinion on January 19, 2018 and Petitioner timely petitioned for rehearing. On February 16, 2018, the court denied rehearing, reproduced in Appendix E, App. 91-92. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2, clause 3 of the Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury ...."

The Due Process Clause of the Fifth Amendment provides: "[N]or shall any person ... be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed...."

The Fourteenth Amendment provides: "No State shall... deprive any person of life, liberty or property without due process of law."

28 U.S.C. Section 2254 (d) provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to , or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States...."

STATEMENT OF THE CASE

Petitioner Odom was charged in South Carolina with two indictments which both alleged violations of South Carolina Code § 16-15-342. App. 2. Both charges were based upon a series of internet chat sessions in an adult chat room occurring from May 4-6, 2006. App. 3. A jury found Petitioner guilty of one count of criminal solicitation of a minor, based upon chats that occurred from May 4-5, 2006, and acquitted the Petitioner of the count involving chats that allegedly occurred on May 6,

2006. App. 94. The Petitioner did not testify during any phase of the trial.

I. Material Facts.

Odom was charged with criminal solicitation of a minor under South Carolina law, which requires that the defendant be 18 years of age or older at the time of the solicitation. *See State v. Odom*, 772 S.E.2d 149, 151 & n.1 (S.C. 2015) (quoting S.C. Code Ann § 16-15-342). App. 2.

In order to prove Petitioner's age, the prosecution (near the close of the State's case) sought to rely on certified copies of Department of Motor Vehicle records showing Petitioner's birthdate. App.4. The Petitioner objected, arguing that the prosecution failed to disclose the records to the defense before trial, as required by state criminal procedure rules. App. 2-4. When asked at trial if Petitioner would be willing to stipulate the Petitioner's age to avoid the disclosure issue, Petitioner's counsel refused. App. 4. The prosecution clarified that it was not proposing to introduce the records into evidence, but instead were seeking to have the court take judicial notice of Odom's birthdate. App. 4. The defense continued to object to this request on the ground that a court may not take judicial notice of an element of a criminal offense. App. 4.

Petitioner's counsel also questioned the authenticity of the DMV records, and lack of a records custodian and therefore the reliability of the proffered DMV Records. App. 118-121. Defense counsel also objected to the taking of judicial notice based upon specific state statutes dealing with DMV Records. App. 120-121. The trial court at first agreed to allow further argument on the issue to be taken up later, however, near the conclusion of the state's case in chief, the trial court instructed the jury on the age element before allowing the additional argument. App. 123-125. Significantly, relying on the alleged DMV records the trial court judge (while not admitting the records into evidence) took conclusive judicial notice of Odom's age and instructed the jury that it "must find [the date of birth] conclusive" and was "not allowed to debate [it]." App. 4. The court gave the same instruction at the end of the trial. App. 4. Since the judge did not allow the issue to be revisited, Petitioner's counsel was not allowed to contest or defend the issue in the presentation of his case, nor allowed to argue to the jury that the state failed to prove the element. The Petitioner submitted additional argument in Odom's Notice of Motion & Motion for New Trial again contesting the taking of judicial notice of a crime element and contending that South Carolina case law supports that South Carolina DMV Records are often times incorrect and inaccurate and thus subject to dispute. App. 115-117.

II. Proceedings Below

Upon conviction the Petitioner appealed to the South Carolina Supreme Court as a direct appeal, contending, among other things, that the trial judge made a Constitutional error by taking conclusive judicial notice of a contested element of the crime charged. App. 2. The Petitioner argued that such error was structural to the trial. On April 22, 2015 the South Carolina Supreme Court issued its opinion affirming the conviction of Petitioner. App. 2. The court agreed that a constitutional error was committed and determined that the S.C. Rule of Criminal Procedure

201 "cannot be construed as a license to conclusively establish a fact that is an element of the offense charged." App. 104-106. The court held that "[t]he taking of judicial notice of Appellant's date of birth was tantamount to a directed verdict on the element of the accused's age, a practice which is clearly forbidden. *See United Bhd. Of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 408 (1947)("[A] judge may not direct a verdict of guilty no matter how conclusive the evidence.")." App. 106-107. Despite recognizing that the taking of conclusive judicial notice was a constitutional error, the South Carolina Supreme Court relied upon *Neder v. United States* to find that the error was subject to harmless error review. App. 107-108. The court then relied upon evidence that the Petitioner had claimed to be forty years old in the internet chats and "the jury's ability to view [Petitioner's] appearance in the courtroom" as sufficient to find the error harmless beyond a reasonable doubt (*citing State v. Lauritsen*, 261 N.W.2d 755, 757 (Neb. 1978). App. 108. A subsequent timely rehearing request was denied. App. 19.

The Petitioner then filed a petition for habeas corpus relief with the district court pursuant to 28 U.S.C. §§ 2254. App. 11-43. The district court issued the Writ granting summary judgment against the Petitioner and in favor of the Respondents, and denied the issuance of a Certificate of Appealability (COA). App. 11-43.

By Order of April 13, 2017 the Fourth Circuit granted the Petitioner's motion for a Certificate of Appeal on the issue of whether the district court correctly concluded that the trial court's taking conclusive judicial notice of Odom's age, which was an element of the offense of conviction, was subject to harmless-error review, reviewing the habeas petition *de novo*. App. 5-6.

By Order of January 19, 2018 the Fourth Circuit affirmed the district court's ruling. App. 1-10. The Fourth Circuit accepted that a constitutional error had been committed but reasoned that according to *Arizona v. Fulminate* that does not "automatically require reversal of a conviction." *Fulminate*, 499 U.S. 279 at 306 (1991). App. 6. Without making a determination as to whether the error was a structural error or was of the type subject to harmless error analysis, the Fourth Circuit cast its ruling under the framework of the amendments to 28 U.S.C. § 2254 enacted in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and stated their review was to determine if the state court ruling was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). App. 1-10. The Fourth Circuit determined that, "in light of *Neder*'s holding" the state court's ruling in the current case was not an unreasonable application of federal precedent. App. 10.

A subsequent request by the Petitioner for rehearing was denied by the Fourth Circuit by order of February 16, 2018. App. 91-92.

REASONS FOR GRANTING THE WRIT

There is no dispute that a Constitutional error was made when, toward the end of the state's case in chief, the trial judge directed a verdict against Odom on one of the elements of the crime charged.

It is well-established law that courts are forbidden from directing verdicts against criminal defendants on any element of a crime. *See Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) ("Although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence."). The government in this case does not dispute that the trial court erred when it took judicial notice of Petitioner's birthdate instead of submitting the issue to the jury. App. 6. The Fourth Circuit stated that "Due process requires the prosecution to prove every element of a criminal offense beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 364 (1970), and that the defendant is over 18 is an element of criminal solicitation of a minor under state law, *State v. Reid*, 679 S.E.2d 194, 202 (S.C. Ct. App. 2009); *Odom*, 772 S.E.2d at 151, 155-56." App. 6.

United States Supreme Court review is necessary to clarify prior precedent governing when a constitutional error is structural and when an error, though it "prevent[s] the jury from making a finding on [an] element" of the criminal offense, nevertheless is subject to harmless-error review. *Neder v. United States*, 527 U.S. at 11. Review in this case is also proper in order to require the appellate court (prior to making the 28 U.S.C. § 2254(d)(1) determination of whether or not the lower court's decision was contrary to, or an unreasonable application of, federal law) make a finding as to whether the constitutional error in a case such as the Petitioners is structural or is subject to harmless error review.

Since *Neder v. United States* was decided there have been decisions by state courts of last resort and courts of appeals rendering conflicting opinions on the issue of when the directing of a verdict on a criminal element is a structural error. *Sullivan* suggested that the failure of the jury to render a verdict on *every* element of an offense can *never* be harmless. *Neder* concluded that in that regard *Sullivan* swept too broadly, 527 U.S. at 11, but it did not overrule *Sullivan*. Instead, this Court in *Neder* reasoned that a failure to instruct on a crime element *where the evidence is overwhelming* and the element is *undisputed* was not a structural error, still the Court expressly reaffirmed the right of the accused not to suffer a directed verdict on a contested element, *Id*. at 17 n.2. The current case is an opportunity for this Court to resolve whether *Neder* should be interpreted so broadly that any trial judge can take conclusive judicial notice of contested element(s) of a crime, prevent the Petitioner from contesting that element in his defense, and not allow the jury to debate the element, and yet such an error still be subject to harmless error analysis. The Petitioner's case is one in which the element in question was both undeniably contested and for which there was scant, if any, evidence submitted which would "overwhelm" the finder of fact.

The Fourth Circuit has rendered conflicting opinions on the issue at hand such as in the case of *United States v. Ramirez-Castillo*, 748 F.3d 205 (4th Cir., 2014) in which they found the directing of a verdict against the defendant to be structural error. In *Ramirez-Castillo* the appellate court concluded that the district court "directed a verdict for the Government" depriving the Appellant of the right to have a jury make the "requisite finding of "guilty" or "not guilty" and that such error was structural. *Id*. at 216. In that case the court instructed the jury "that certain facts essential to conviction had been conclusively established." *Id*. at 214. In that case the Fourth Circuit points out that the Sixth Amendment protects the right to a jury trial and "[w]here 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. Citing *Rose v. Clark*, 478 U.S. 570, 578 (1986) (internal citations and quotation marks omitted)" *Id*. at 216 The court notes that the Fifth Amendment right to Due Process and the Sixth Amendment jury trial guarantee "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 509-10, 115 S. Ct. 2310, 132 L.Ed.2d 444 (1995) The right to a trial by jury "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of guilt." *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993) (Citing *Sparf v. United States*, 156 U.S. 51, 105-06, 15 S. Ct. 273, 39 L.Ed. 343 (1895)); *see also United States v. Muse*, 83 F.3d 672, 679 (4th Cir.

1996) (explaining that it is a "fundamental principle that if a defendant avails himself of his Sixth Amendment right to trial by jury, only the jury can reach the requisite finding of 'guilty'"(internal quotation marks omitted)).

As this Court has noted, "the right to have a jury make the ultimate determination of guilt has an impressive pedigree." *Gaudin*, 515 U.S. at 510. Indeed the reasoning in *Ramirez-Castillo* is consistent with both *Sullivan* and *Neder (*which also cites to *Rose)* but is not uniformly followed even within the Fourth Circuit as the Petitioner's case before you demonstrates.

In the current case the Fourth Circuit references the pre-*Neder* case of *United States v. Johnson*, 71 F.3d 139 (4th Cir. 1995). *Johnson* is consistent with *Ramirez-Castillo* (and is in fact cited in *Ramirez Castillo*) in as much as it also ruled that a directed verdict on an element of the offense was structural error. Referring to the line of Supreme Court cases including *Sullivan* and *Gaudin,* the court of appeals in *Ramirez-Castillo* cites to the *Johnson* case stating that "[t]he case law in this circuit is consistent with these authorities. As we have recognized, after a trial judge instructed the jury on applicable law, 'the next steps are strictly for the jury: (1) determining the facts as to each element of the crime, and (2) applying the law as instructed by the judge to those facts." *United States v. Johnson*, 71 F.3d 139, 142 (4th Cir. 1995). It is therefore an 'error of constitutional magnitude' for the trial judge to 'instruct[ ] the jury as a matter of law that a fact essential to conviction has been established by the evidence, thus depriving the jury of the opportunity to make this finding.' *Id*. (internal quotations omitted); *see also United States v. Jinwright*, 683 F.3d 471, 479 (4th Cir. 2012)(explaining that '[a] court runs afoul of [the Fifth and Sixth Amendments'] protection when it issues an instruction that relieves the government of its burden of proof with respect to an element of a charged offense'). *United States v. Ramirez-Castillo*, 748 F.3d 205, 212-13 (4th Cir. 2014).'

Again, however, the Fourth Circuit's ruling in *United States v. Johnson* is inconsistent with the ruling in the Petitioner's case. In *Johnson*, this Court found that the taking of conclusive judicial notice in a criminal case was not subject to harmless error analysis, stating "For the same reasons the Supreme Court held the error in Sullivan v. Louisiana, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) was not subject to harmless error review, the error in the current case is not subject to harmless error review. Analogous to the jury in Sullivan not making the essential findings of fact necessary to support the verdict, the jury in the case before us never made an independent finding as to the federally insured status of the ASFCU [Arlington Schools Federal Credit Union]; the jury was conclusively instructed that the ASFCU was a credit union within the meaning of 18 U.S.C.A. Sec. 2113(g) and was not instructed that the ASFCU's federally insured status was an element of the crime on which it needed to make a finding. Because we are not left with any evidence that the jury may have considered independent of the district court's mandatory presumption, at most, we can conclude that the "jury would surely have found [Johnson] guilty." *Sullivan*, 508 U.S. at ----, 113 S. Ct. at 2082. However, according to the *Sullivan* Court, this "is not enough" to bring the error within Chapman 's rubric; rather to fall within Chapman 's rubric, we must be able to conclude that 'the jury's actual finding of guilty ... would surely not have been different absent the constitutional error.' *Id.* To hold otherwise would be to engage in the type of speculation and hypothesizing censured by the Supreme Court in *Sullivan*. In sum, we hold harmless error review of the error presented in the case before us is unavailable." *Johnson* 71 F.3d 139, 144 (4th Cir.1995).

In a footnote to its Order in the current case, the Fourth Circuit points out that it is unwilling to rule as to whether *United States v. Johnson* is still good law, but instead decides to "leave for another day the status" of the *Johnson* case in light of *Neder*. App. 9. This footnote is an indicator of the uncertainty and inconsistency of the circuit courts in dealing with the post-*Neder* rulings of this type.

The uncertainty and error can also be seen in the Fourth Circuit's truncated reasoning in Petitioner's case, determining that the lower court ruling was not contrary to established Supreme Court precedent, without ever making a determination as to what federal law applies. The Fourth Circuit never actually determined whether the Constitutional error in this matter was structural or not. The failure to rule on this fundamental aspect of the case undermines the decision because making such a determination is a condition precedent to making a determination as to whether the state court ruling is contrary to, or an unreasonable application of, federal law, or not (*see* 28 U.S.C. § 2254(d)(1) upon which the Fourth Circuit relies to deny relief to the Petitioner). The failure to make the determination as to the proper legal standard to apply could logically imply that the Fourth Circuit believes it would be reasonable in this case to find the constitutional error either structural or subject to harmless error analysis. The Fourth Circuit should be required to make that determination before they are allowed to examine the reasonableness of the state court ruling. Finding that the state court ruling was not an unreasonable application of federal law without establishing what federal law requires was improper as to this Petitioner and reveals the confusion and uncertainty that supports the granting of this writ.

There is in fact no need for such uncertainty as this Court has a long history of protecting the right to a jury trial on all elements of a crime such that "regardless of how overwhelming the evidence may point in that direction," no court may direct a verdict for the government, *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977). Though the lower courts have at times taken *Neder* to be a sharp detour from *Sullivan* the long history of this Court reasoning needs clarification to insure the consistent protection of the right to a jury trial on every element of a crime which has previously been a hallmark of this Court for decades.

The First Circuit in *United States v. Pizarro*, 772 F.3d 284 (1st Cir. 2014) sets forth an understanding of the pivotal issue of *Neder* that is both compelling and practical, writing, "[t]he concurrence by the writing judge asserts that, based on the 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. In this case, the Fourth Circuit did not apply these parameters of *Neder* but has instead taken *Neder* to preclude a constitutional error from being structural unless it is virtually identical to one of the previously found structural errors. As the District Court points out, a defective reasonable doubt instruction, *Sullivan v. Louisiana*, 508 U.S. 275 (1993); a complete denial of counsel, *Johnson v. United States*, 520 U.S. 461 (1997); biased trial judge, *Turney v. Ohio*, 273 U.S. 510 (1927); racial discrimination in selection of a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986); denial of self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168 (1984); denial of a public trial, *Waller v. Georgia*, 467 U.S. 39 (1984) have been found to be structural errors. App. 32.

Some state courts have also understood *Neder* to allow the taking of judicial notice of even a contested element to be subject to harmless error review. The Supreme Court of Wisconsin concluded in *State v. Harvey*, 647 N.W.2d 189 (Wis. 2002) (Sykes, J.) that a trial court committed constitutional error in taking judicial notice on one of the elements of a sentencing enhancement. Although no evidence was submitted on that element, the court ruled the error was harmless under *Neder* because the element was not disputed and was indisputable. *Id.* at 202. The reasoning in *State v. Harvey* which does not require the state to prove every element of the crime is inconsistent with the interpretation of *Neder* in *Ramirez-Castillo* and badly undermines the presumption of innocence.

The Petitioner's case presents an ideal opportunity for review whereas the Fourth Circuit's interpretation of *Neder* has become so expansive that it now includes as potentially harmless error cases in which (1) the court directs a verdict against the accused on an element of the crime (2) the directed verdict is given prior to the accused having the opportunity to present any evidence in his defense, (3) the directed verdict is based upon documents which are contested and which are not presented as evidence nor shown to the jury, (4) the accused is precluded from rebutting, disputing or contesting the judge's finding on the element, (5) the accused consistently disputes and contests all efforts by the state to prove that element, and (6) the evidence relied upon to find the error harmless consists of evidence that cannot reasonably be described as overwhelming . This case is a clear example of a case for which *Sullivan* demands a finding of structural error and one in which the narrowing of automatic structural error determinations set out in *Neder* was surely not meant to overcome the protections to access and rely upon the jury system which are so fundamental to our Constitution and the administration of justice.

The lower courts in this case have evidenced a disregard for the reasonable qualifiers set forth in *Neder* and in doing so have expanded its reach significantly. Specifically, *Neder* is by its reasoning confined to allowing harmless error analysis in cases where the elements of the crime for which the judge directed a verdict were undisputed and indisputable. Unlike *Neder*, all of the elements in Petitioner's case were certainly in dispute and contested, and it is not reasonable to conclude that the evidence in the record can support the contention that the element was indisputably proven. The Fourth Circuit lists the only two pieces of "evidence" which the state supreme court cited could support the finding. Specifically, the only presented "fact" used for corroboration was that in the alleged chat Petitioner is claimed to have stated he was forty (40) years of age, and claimed to have made comments on an age difference with the other chat participant. App. 5. However, Odom was not forty years of age at the time the chats occurred nor was he even forty by the time of trial. App. 34. Odom was years younger than the age of forty in 2006 (when the crime of which he is accused was alleged to have occurred) and in 2011(when the trial was actually conducted). App. 34. Likewise, the only other "indisputable" evidence relied upon by the state supreme court to satisfy the *Neder* reasoning was the presence of Petitioner in the court room, though no physical description of Petitioner is in the record, nor is there any charge for the jury to look at him for age purposes. In fact the jury charges rightly made it clear that Petitioner's appearance was not a fact for the jury to consider, as he never testified or had any evidence about his age placed before the jury. The South Carolina Supreme Court supports their reliance on the jury viewing the Petitioner by citing *State v. Lauritsen*, 199 Neb. 816, 261 N.W. 2d 755 (1978). The Lauritsen case, however, requires the defendant's age be corroborated and in that case had a defendant which testified at trial, whereas the Petitioner did not. App. 108. Also there was evidence in *State v. Lauritsen* that the defendant in that case drank, the court took judicial notice of the legal drinking age of the time of 19 years of age, went to taverns frequently and was a "Wizard of the Ku Klux Clan", and the jury was still charged they had to find the defendant 18 years of age or older beyond a reasonable doubt. The dissent in *State v. Lauritsen* also pointed out that the case should have been reversed for failure to prove an element of the crime, even with the evidence so listed in the record. None of these types of arguable facts are present in the Petitioner's case. Therefore, because the only evidence supporting the age element in this case is a chat reference to being an age (40) which was different from the age conclusively noticed by the trial judge, and which was multiple years older than the Petitioner's actual age even by the time of trial some five years after the chats occurred, it is not reasonable to conclude that the evidence on this contested element was overwhelming.

The current case further highlights the need to clarify *Neder* in as much as the Petitioner was not allowed to argue the disputed element. Because the Judge took conclusive judicial notice of the element prior to the defense being allowed to present its case, the court not only directed a verdict improperly, it also effectively barred the Petitioner from defending against that element. Review from this Court is needed to clarify the limits of *Neder* to mandate that the lower courts can not deny individuals the right to a trial by jury on every element of the crime for which they are charged, when the defendant contests those elements and in circumstances where the defendant is prevented from offering evidence to contest those elements.

When, as in the current case, a directed verdict is made on a disputed element of the crime charged, and where there is little or no evidence supporting that element, the lower courts apparently lack direction. As a result, courts have turned to divergent, often contradictory factors to determine whether such defect is structural or subject to harmless error analysis. This case exemplifies how the lower courts have improperly interpreted *Neder* as effectively closing the door on structural errors in the trial process in nearly all cases. The right to a trial by jury is fundamental so that clarification of those rights is needed by this court.

CONCLUSION

For the reasons stated, it is respectfully requested that the Court grant the petition for writ of certiorari to clarify the limits of *Neder* and to protect the fundamental right as citizens of the United States to have a jury of one's peers decide guilt or innocence.

Respectfully Submitted.

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