No. 15-1292

In The Supreme Court of the United States

DENNIS M. CARONI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF AMICI CURIAE OF ASSOCIATIONS OF CRIMINAL DEFENSE ATTORNEYS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are organizations comprised of more than 3,000 practicing criminal defense lawyers from across the nation, committed to preserving fairness in the state and federal criminal justice systems and defending the rights of individuals guaranteed by the Constitution of the United States.

California Attorneys for Criminal Justice ("CACJ") is a nonprofit statewide organization of criminal defense lawyers founded in 1972, with members across the state of California. CACJ has appeared in this Court as amicus curiae on several occasions, and its amicus brief was cited in the dissenting opinion in *Kaley v. United States*, 134 S. Ct. 1090, 1104, 1112 (2014) (Roberts, C.J., dissenting).

The Florida Association of Criminal Defense Lawyers ("FACDL") is a statewide organization of criminal defense lawyers with 28 chapters, including its Miami chapter founded in 1963. FACDL and FACDL-Miami have appeared in this Court as amicus curiae, most recently in *Commonwealth of Puerto Rico v. Sanchez Valle*, 15-108; *Luis v. United States*, 14-419; and *Kaley v. United States*, 12-464.

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[1] Counsel for amici gave 10-day notice to counsel for the parties of the intention to file this brief. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel has made any monetary contribution to the preparation or submission of this brief.

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL's amicus briefs have been cited by this Court or by concurring or dissenting justices in cases such as *Luis v. United States*, 136 S. Ct. 1083, 1095 (2016), *Kaley v. United States*, 134 S. Ct. 1090, 1104, 1112 (2014) (opinion of the Court and Roberts, C.J., dissenting), *Rita v. United States*, 551 U.S. 338, 373 n.3 (2007) (Scalia, J., concurring in the judgment), and *United States v. Booker*, 543 U.S. 220, 266 (2005).

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has approximately 9,200 direct members in 28 countries – and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges

committed to preserving fairness and promoting a rational and humane criminal justice system.

SUMMARY OF THE ARGUMENT

Petitioner Caroni has petitioned for a writ of certiorari on the following issue:

> Whether A Trial Court's Error In Directing A Verdict On Venue Can Be Deemed Harmless When That Element Was Genuinely Contested By The Defendant.

At Petitioner's criminal trial, Petitioner was erroneously barred from challenging before the jury the Government's satisfaction of its burden to prove venue, and was erroneously deprived of a jury instruction asking the jury to make a necessary finding on this constitutionally necessary element of each of the offenses for which he was on trial. This constitutional error was acknowledged by all three members of the Eleventh Circuit panel below. Purporting to apply this Court's holding in *Neder v. United States*, 527 U.S. 1 (1999), in the manner that some, but not all, circuits have done, two members of the panel decided to weigh the trial evidence on venue for themselves, and found it "overwhelming" on the issue.

The dissenting judge (the Honorable Judge Martin) was less persuaded by the weight of the evidence, which she described as "limited," App. 46, especially given that neither Petitioner nor his alleged co-conspirator doctors had ever traveled to the District. App.

39. But the dissent focused instead on the more relevant issue – who is supposed to decide essential elements of criminal offenses – the jury or a judge – and concluded that taking this essential element away from the jury denied Defendant his constitutional rights both to a jury trial and to venue.

The availability and proper standard for harmless error review of this species of constitutional error is a recurring constitutional issue that divided this Court in *Neder*, and which has splintered the circuit courts since.

This Court should grant review of this issue pursuant to 28 U.S.C. § 1254(1) because the circuit court below has entered a decision in conflict with decisions of other circuits and has decided an important question of federal law either in a way that conflicts with relevant decisions of this Court or decides an important question of federal law that has not been, but should be, settled by this Court. Supreme Court Rule 10.

ARGUMENT

This Court Should Grant Review to Clarify When Harmless Error Will Justify Denial of the Right to a Jury Determination on a Contested Essential Element

For centuries, this Court has held that the Constitution forbids judges from directing verdicts in criminal cases. Indeed, in *Neder*, the majority opinion

written by Chief Justice Rehnquist responded to Justice Scalia's charge in his concurrence and dissent that permitting harmless error judicial review would permit directing a verdict, by once again reaffirming that directing a verdict is not constitutionally permissible. *Neder*, 527 U.S. at 17 n.2 (reaffirming *Rose v. Clark*, 478 U.S. 570, 578 (1986) (Powell, J.) (no directing criminal verdicts), responding to Scalia, J., concurring and dissenting, 527 U.S. at 33).

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

> Similarly, harmless-error analysis would presumably not apply if a court directed a verdict for the prosecution in a criminal trial by jury. We have stated that 'a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction.' *United States v. Martin Linen Supply Co*., 430 U.S. 564, 572-573 (1977) (citations omitted). *Accord*, *Carpenters v. United States*, 330 U.S. 395, 408 (1947). This rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. *See Duncan v. Louisiana*, 391 U.S. 145 (1968). Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

Rose, 478 U.S. at 578.

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

In his concurring and dissenting opinion in *Neder*, Justice Scalia reviewed the extensive constitutional reasons for holding that harmless error cannot apply to a denial of a defendants' right to have a jury determine each and every element of a criminal offense. *Neder*, 527 U.S. at 30 (Scalia, J., joined by Ginsberg, Souter, J.J.). Calling the jury trial right the "spinal column of American democracy," Justice Scalia pointed out that this is the only right that is doubly placed in both the body of the Constitution (Article III, § 2, cl. 3), and also the Bill of Rights (Sixth Amendment). *Id.*

If anything, Justice Scalia's eloquent historical account of the significance of the jury trial right understated the contribution that this right made to the founding of this country. Prior to the Declaration of Independence, Boston criminal defense attorney John Adams was called upon to defend Boston merchant John Hancock and his re-named schooner Liberty upon the charge of openly sailing untaxed Madeira wine into

Boston Harbor.[2] For obvious reasons, the Crown brought its charges in the British Admiralty courts, rather than face an unsympathetic colonial jury.[3] Invoking the Magna Carta, and its centuries old guarantee of a jury trial for British citizens, attorney Adams decried the loss of this cherished right of Englishmen, and then turned his Opening Statement into a pamphlet for circulation throughout the colonies. That is one reason why the Crown's denial of the right to a jury appears as listed grievance in Declaration of Independence, and would later be doubly bolted onto our Constitution by its Framers.

The Founders' commitment to the right of jury trial was further expressed in the corresponding Constitutional guarantee that criminal defendants cannot be given just any jury, but rather must be tried before a jury in the vicinage of the alleged offense – a constitutional right to be tried before the proper jury in the correct venue. Having survived British laws requiring the trial of treason in England, the Framers also double bolted the constitutional right of venue onto Article III of the original Constitution and the Sixth Amendment. *United States v. Cabrales*, 524 U.S. 1, 6 & n.1 (1998) ("The Constitution twice safeguards the defendants' venue right. . . .").

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

[3] Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 3 (1966).

From these beginnings, this Court has always accorded the jury trial right the respect it earned at the start of the nation. *See, e.g*., *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995) (Scalia, J.) ("The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged."); *Bollenbach v. United States*, 326 U.S. 607, 615 (1946) (Frankfurter, J.) ("In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process can be."); *Ex Parte Milligan*, 71 U.S. 1, 123 (1866) (Davis, J.) ("This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity.").[4]

Indeed, the continuing unanimity in this Court's endorsement of the prohibition on directed verdicts in criminal cases is testament to the faith that this Court has kept with this original promise of the Constitution. *Neder*, 527 U.S. at 17 n.2 (Rehnquist, C.J.) & 33 (Scalia, J., dissenting). *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 408-09 (1947) ("For

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[4] *See* Powell, *Jury Trial of Crime*s, 23 Wash. & Lee L. Rev. at 2 (describing jury trial right's "virtual enshrinement in our Federal Constitution").

a judge may not direct a verdict of guilty no matter how conclusive the evidence."). As this Court has declared:

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

United States v. Martin Linen Supply Co., 430 U.S. 564, 752-73 (1977) (Brennan, J.) (citations omitted).

The constraint that the prohibition on directed verdicts places upon appellate review was recognized by this Court in *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) ("The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilt.").

By comparison, this Court first recognized the possibility of harmless constitutional error in *Chapman v. California*, 386 U.S. 18 (1967) for errors that "are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the

conviction." *Id*. at 22.[5] Even as to such errors, however, it is the burden of the Government to prove that they are harmless beyond a reasonable doubt. *Id*. at 24.

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

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

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

The *Neder* opinion marks no departure from this unbroken chain of constitutional precedent. But *Neder* has since been used by some circuits, including by the majority opinion below, to encroach upon the exclusive role of the jury through unwarranted applications of

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

harmless error review. *See, e.g.*, *United States v. Pizzaro*, 772 F.3d 284, 303 (1st Cir. 2014) (Lipez, J., concurring) ("I write separately to express my concern regarding this inconsistency, which exists within my circuit and other courts, and the potential unconstitutional applications of *Neder v. United States*, 527 U.S. 1 (1999), that have resulted from it. Given that the 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.").

It is incumbent upon this Court to restore the bright line between the divergent roles of judges and juries that the Framers intended to safeguard.

In *Neder*, this Court confronted an individual defendant's claim of instructional error in a tax prosecution for failure to report $5 million in income, when the defendant had conceded below and in this Court that this amount was material income as to him, thereby satisfying the materiality element of the tax charge against him. The trial court had erroneously concluded that the materiality issue was for the court to determine. During oral argument in this Court, defense counsel was asked whether the defendant would controvert materiality upon remand, and he replied in the negative. *Neder*, 527 U.S. at 15 ("Petitioner underreported $5 million on his tax returns, and did not contest the element of materiality at trial. Petitioner does not suggest that he would introduce any evidence bearing upon the issue of materiality if so allowed.").

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

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

Mindful of the importance of the jury trial right, this Court held:

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

Neder, 527 U.S. at 19 (emphasis added). The importance placed by this Court upon the lack of a defense contest directed to the omitted element was pivotal – it was what made undertaking harmless error consonant with the fundamental purposes of the jury trial guarantee.

Even in this rare context, this Court nonetheless went on to require that a reviewing appellate conduct a searching examination of the record under the reasonable doubt standard to determine whether the "omitted element was uncontested *and supported by overwhelming evidence*, such that the jury verdict would have been the same absent the error." *Neder*, 527 U.S. at 17 (emphasis added).

The *Neder* standard thus places threshold significance on the lack of controversy regarding the element omitted from the jury instructions. Only in the absence of any controversy does *Neder* authorize appellate courts to go further to assess whether the evidence of record is, actually, both uncontroverted and overwhelming. In substance, this Court ruled that even if the defense does not affirmatively contest the omitted element, an appellate court must still assure itself that the uncontroverted record evidence establishes the element beyond a reasonable doubt.[6]

Here, contrary to the narrow circumstances applicable in *Neder*, defense counsel attempted to contest

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

the omitted element of venue by the only two means available to a lawyer to speak to a jury about an essential element – through closing argument marshaling the evidence, and by soliciting a corresponding jury instruction. By precluding all defense counsel argument and any jury instruction on this essential element, the trial court took this essential element away from the jury and directed a verdict upon it.

All members of the Eleventh Circuit panel acknowledged this to be error. But the majority opinion concluded it was harmless by sifting through the evidence to assess its weight. Without squarely addressing the fact that venue was actually contested by defendant, the majority simply weighed the evidence, and then labeled the record evidence it selected both overwhelming and uncontroverted. App. 10-11.

In so doing, the majority performed the very task that this Court has disclaimed. *Bollenbach v. United States*, 326 U.S. at 615 ("It is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process can be.").

The dissent, by contrast, looked to whether venue was actually contested at trial (it was), and whether the record evidence sustained the government's *Chapman* burden to prove that a "rational jury" could only have determined that venue was proper. App. 46 n.3, 47. Conceding that there was evidence from which a

jury could find venue, the minority nonetheless recognized that there was also contrary evidence, making this a contested issue for a jury to decide in the first instance.

Other circuits are also divided on *Neder*'s import. In *Pizzaro*, for example, two concurring judges of the First Circuit strongly disagreed on whether *Neder*'s language requiring that the omitted element be "uncontested *and* supported by overwhelming evidence"[7] imposed disjunctive, cumulative, or multiple factor requirements. *Compare Pizzaro*, 772 F.3d at 310 (to be harmless, element must be both uncontested and supported by overwhelming evidence) (Lipez, J., concurring) *with Pizzaro*, 772 F.3d at 318 (only overwhelming evidence necessary) (Torruella, J., concurring).

Some appellate judges construe *Neder* as authorizing a judicial finding of the missing element if they satisfy themselves the evidence is overwhelming, regardless of whether it has been contested. *Pizzaro*, 772 F.3d at 318 (Torruella, J., concurring). The Fourth Circuit holds that if the defense contests the missing element, a court then must nonetheless go on to determine whether there is evidence supporting a contrary finding by the jury. *United States v. Brown*, 202 F.3d 691, 700-01 (4th Cir. 2000).

Judge King, writing for the Fourth Circuit in *Brown*, identified a common problem encountered by appellate courts in assessing the impact of a missing

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[7] *Neder*, 527 U.S. at 17.

essential element instruction – the fact that credibility determinations belong to juries. In *Brown*, the Fourth Circuit examined whether the absence of a jury finding on which three predicate offenses were committed to justify a Continuing Criminal Enterprise offense was harmless. 202 F.3d at 699. Because the government's predicate offense allegations and evidence relied upon witnesses whose credibility had been challenged, the Fourth Circuit was "unable to discern which of these witnesses were actually believed and relied upon by the jury." *Id.* at 702.

Moreover, the Fourth Circuit forthrightly admitted that the absence of an instruction forcing the jury to focus on their need to agree on three specific predicates enabled them to "'avoid discussion of the specific factual details of each violation.'" *Brown*, 202 F.3d at 702 (quoting *Richardson v. United States*, 526 U.S. 813, 819 (1999) (requiring CCE instruction)). Rightfully reluctant to engage in speculation as to the credibility decisions a jury could make, Judge King also pointed out that the lack of a necessary instruction could have "cover[ed]-up 'wide disagreement among the jurors about just what the defendant did, or did not, do.'" *Id*. (quoting *Richardson*, 526 U.S. at 819).

By contrast here, the Eleventh Circuit majority opinion turned the uncertainty created by the lack of a jury finding into a license to substitute its assessment of the evidence for the jury's. Noting that venue for a conspiracy offense can be established by a co-conspirator engaging in an overt act within the forum, and that

that act need not itself be criminal, the majority concluded that this low sufficiency threshold was likely satisfied here. App. 10.

But the defense did contest the legally relevant issue – whether the overt acts within the District were "in furtherance" of the alleged conspiracy so as to be attributable to the conspiracy. *Cabrales*, 524 U.S. at 8-9. *See* App. 43 n.3 (dissenting opinion) ("The defendants here contested whether their conspiracy extended to the Northern District of Florida.").

More to the point, and as the *Brown* opinion acknowledged, failing to direct the jury's fact-finding mission by giving the omitted instruction permitted the jury to avoid any discussion of the specific factual venue details needed to justify their reaching any verdict. For example, the lack of any financial transaction, bank account, or defendant conduct, in Florida is directly relevant to venue, but not to an offense allegedly committed in Louisiana.

Judges within the Second Circuit have formulated a different, multi-factor test in *United States v. Jackson*, 196 F.3d 383, 386 (2d Cir. 1999), holding that even if the omitted element is contested, and even if the evidence is sufficient to find for the defense on it, the appellate court must still assess whether the verdict would be the same in order to deem the error harmless. The Second Circuit later acknowledged its uncertainty about whether its own three-part test in *Jackson* strays from the constitutional limits upon their authority. *See, e.g.*, *Monsanto v. United States*, 348 F.3d

345, 351 (2d Cir. 2003) (Calabresi, J.) (noting that Fourth Circuit in *Brown* had rejected Second Circuit's multi-factor *Jackson* test, and expressing Second Circuit's own concern about the "tension" between *Jackson* and *Neder*). *See also United States v. Guerrero-Jasso*, 752 F.3d 1186, 1194 (9th Cir. 2014) (dual requirement).

Without question, this issue will recur for as long as lawyers and judges try criminal cases before juries – a feature of our justice system intended by its Founders to be a permanent legacy and safeguard. The current disarray in the appellate treatment of this fundamental right – whether viewed as a jury trial right or a venue right – is attributable, at least in part, to the lack of guidance provided by this Court in *Neder*.

More important, placing the initial and final resolution of contested essential elements in the hands of appellate judges, rather than trial juries, is a momentous step in the journey of our justice system which should not occur by misapplication or misunderstanding of either this Court's precedent or the Constitution left us by its Drafters.

In this case, not only was the missing element of venue contested (taking this case out of the narrow class of cases addressed in *Neder*), it was also the subject of controverted evidence. Thus, the facts of this case present the issue not confronted in *Neder* – what, if any, harmless error review is justified when the error is contested at trial, and would be again upon remand before a properly instructed jury.

There are formidable grounds to recognize that, once a defendant contests an essential element, no further harmless error review is justified after this error is detected by an appellate court. This is simply because, as Chief Justice Rehnquist and Justice Scalia agreed in their opposing opinions in *Neder*, the Constitution forbids judges from directing verdicts no matter how overwhelming the evidence.

But this case also presents the next question of just what harmless error is constitutionally justified when an appellate court is called upon to surmise what a jury would have done had it been told its constitutional duty. Working with nothing more than the "dead records" lamented by Justice Frankfurter in *Bollenbach*, and appreciating the *Brown* opinion's recognition of the limits of any appellate court's ability to assess a jury's witness credibility determinations, harmless error analysis must give any reasonable doubt not just to the defendant, but also to the role of the jury as the sole body authorized by our Constitution to make such judgments.

That is not satisfied if the evidence is merely sufficient to find the element in the eyes of the appellate court (the standard of some circuits, and of the majority opinion below). Rather, the standard can be no less than that that no reasonable jury could find otherwise. Here, the fact that the members of the panel of the Eleventh Circuit disagreed amongst themselves is compelling evidence that a reasonable jury (properly instructed on remand) could reach different conclusions.

A hallmark justification for the harmless error doctrine is that it avoids the social costs of repeating needless trials, and this is entitled to weight. But arrayed against this interest is the guarantee given at the dawn of our country that juries will adjudge guilt, a guarantee honored by this Court ever since, and the more recent reality that committing defendants to substantial periods of time in prison notwithstanding constitutional error (20 years for Petitioner here) also has a cost to society.

CONCLUSION

For the foregoing reasons, Amici Curiae CACJ, FACDL, NYCDL, and NACDL respectfully submit that this Court should grant a writ of certiorari to review the issue whether directing a verdict on venue can be deemed harmless when that element was genuinely contested by the defendant.

Respectfully submitted,

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