

No. 16-679

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**In the Supreme Court of the United States**

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STEPHEN DOMINICK MCFADDEN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the instructional error at petitioner's trial, identified by this Court in *McFadden v. United States*, 135 S. Ct. 2298 (2015), was harmless.

2. Whether the court of appeals correctly applied the knowledge requirement for the Controlled Substance Analogue Enforcement Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-13, articulated by this Court in *McFadden*.

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 823 F.3d 217.

**JURISDICTION**

The judgment of the court of appeals was entered on May 19, 2016. A petition for rehearing was denied on June 30, 2016 (Pet. App. 69a-70a). On September 19, 2016, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 25, 2016. The petition for a writ of certiorari was filed on November 22, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted on one count of conspiring to distribute

controlled substance analogues, in violation of 21 U.S.C. 841(b)(1)(C) and 846; and eight counts of distributing a controlled substance analogue, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 2a, 7a, 11a. Petitioner was sentenced to 33 months of imprisonment. *Id.* at 8a. The court of appeals affirmed. *Id.* at 8a-9a; 753 F.3d 432. In 2015, this Court vacated that decision, holding that the jury instructions improperly omitted an element because they did not require the jury to find that petitioner knew the substances he sold were controlled. 135 S. Ct. 2298, 2303-2307. The Court remanded the case for the court of appeals to consider whether that instructional error was harmless. *Id.* at 2307. On remand, the court of appeals affirmed six of petitioner's counts of conviction, vacated three others, and remanded for resentencing. Pet. App. 16a-23a.

1. Under the Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act), Pub. L. No. 99-570, 100 Stat. 3207-13, “[a] controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I.” 21 U.S.C. 813. The Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, makes it unlawful, *inter alia*, “for any person knowingly or intentionally” to distribute a controlled substance. 21 U.S.C. 841(a)(1). Accordingly, the combination of the Analogue Act and the CSA makes it unlawful for any person knowingly or intentionally to distribute a controlled substance analogue when intended for human consumption.

The term “controlled substance analogue” is generally defined to mean a substance:

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

21 U.S.C. 802(32)(A).<sup>1</sup>

2. In July 2011, law enforcement officials began investigating the use and distribution of synthetic stimulants commonly known as “bath salts” in the Charlottesville, Virginia, area. Pet. App. 4a-5a. Bath salts are used as recreational drugs and, when ingested, are capable of producing effects similar to those produced by controlled substances, including ecstasy, cocaine,

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<sup>1</sup> The majority of courts to have considered the question have held that the foregoing definition must be read in the conjunctive, *i.e.*, that a substance qualifies as a controlled substance analogue only if it satisfies Subsection (i) *and* either Subsection (ii) or Subsection (iii). See *United States v. Turcotte*, 405 F.3d 515, 521-523 (7th Cir. 2005) (surveying case law), cert. denied, 546 U.S. 1089 (2006). The government does not dispute in this case that that is a proper construction of the statute. See 135 S. Ct. at 2305 n.2 (noting the government’s acceptance of this proof requirement for this case and assuming it to be correct without deciding the issue).

methamphetamine, and methcathinone. *McFadden*, 753 F.3d at 437.

The investigation focused on a video rental store, operated by Lois McDaniel, that sold bath salts. 753 F.3d at 437. Using confidential informants, investigators purchased bath salts from McDaniel. The bath salts contained substances later proved at trial to be controlled substance analogues.<sup>2</sup> *Id.* at 437-438. McDaniel agreed to cooperate with investigators and she told them that petitioner had supplied the bath salts she was selling. *Id.* at 437. The bath salts petitioner provided were “white and off-white powders packaged in small plastic bags.” 135 S. Ct. at 2303. Petitioner marketed the substances as “‘Alpha,’ ‘No Speed,’ ‘Speed,’ ‘Up,’ and ‘The New Up,’” and “compared them to cocaine and crystal meth.” *Id.* at 2302. McDaniel purchased the bath salts for \$15 per gram and resold them for \$30 to \$70 per gram. *Ibid.*

McDaniel agreed to make recorded phone calls to petitioner to order more bath salts. *McFadden*, 753 F.3d at 437; Pet. App. 5a. The first recorded call took place on August 25, 2011. Pet. App. 5a. In the recorded calls (which were introduced into evidence at petitioner’s trial, see *id.* at 19a-20a & n.3), petitioner “described the active ingredients in the bath salts and gave instructions on how the bath salts were to be consumed.” *Id.* at 5a. Petitioner also “described the

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<sup>2</sup> Testing by the Drug Enforcement Administration revealed that the bath salts contained: 3,4-methylenedioxypropylvalerone (MDPV) and 3,4-methylenedioxymethcathinone (MDMC), also known as methylone. 753 F.3d at 437-438. Additional bath salts later recovered from McDaniel’s store contained a combination of MDPV, MDMC, and 4-methylethylcathinone (4-MEC) (also proved at trial to be a controlled substance analogue). *Ibid.*

stimulant effects of the bath salts and compared the effects to those of cocaine or methamphetamine.” *Ibid.* For example, petitioner stated that he gave McDaniel “the straight chemical.” C.A. J.A. 735. Petitioner also stated one of his products was “straight Alpha,” a “replacement for the MDPV,” *ibid.*, which petitioner had previously sold until it was listed as a controlled substance, 753 F.3d at 437 & n.2. In the same conversation, petitioner indicated that he made, or mixed, some of his own product, telling McDaniel “[t]he one that I make for you is probably just a hair under that with just a little bit of a different type of bath, you know, and the Alpha is, well, the Alpha mixed with the 4-MEC gives you a No Speed Limit-like feeling, just not as intense.” C.A. J.A. 735. Petitioner also told McDaniel that he was out of chemicals and was “waiting for my chemicals to come in.” *Id.* at 738. Petitioner talked of distributing a “4-MEC” blend called “new Sheens”; discussed adding “a little extra kick” to a blend called “Hardball”; and described “Hardball” as a blend with “five active chemicals in it” or “five ingredients.” *Id.* at 735-741, 746, 749.

In his recorded phone calls with McDaniel, petitioner also discussed which of his products was the “most powerful” and which gave the most “intense” “feeling.” C.A. J.A. 735. Petitioner explained to McDaniel that one substance (a mixture of a chemical called Alpha and 4-MEC) was like cocaine; that the “No Speed Limit” was like crystal meth; and that the “new Sheens” was “more like \* \* \* meth” or “synthetic meth” than like synthetic cocaine. *Id.* at 735-737, 738; see *id.* at 738 (petitioner describing the “new Sheens” as giving “a harder hit to a shorter period of

time”); C.A. J.A. 741-742 (petitioner asked McDaniel whether her customers were using a product “for aromatherapy” or were “putting it directly on a burner”).

At times, petitioner sought to avoid explicit discussion about the nature of the substances he was selling. For example, when McDaniel asked petitioner which of his products was an alternative for methamphetamine, petitioner responded, “we don’t talk about that, you know that.” C.A. J.A. 744. Petitioner also spoke obliquely when advising McDaniel about which of his bath salts should be snorted or smoked. *Id.* at 741-742.

2. On November 14, 2012, a federal grand jury sitting in the Western District of Virginia returned a superseding indictment charging petitioner with one conspiracy count and eight substantive counts related to his distribution of substances containing the controlled substance analogues MDPV, MDMC, and 4-MEC. 753 F.3d at 437. Three of the substantive distribution counts related to shipments petitioner made before law-enforcement officers began supervising the telephone conversations between McDaniel and petitioner (Counts 2-4), and the remaining five substantive counts corresponded to shipments he made on or after August 26, 2011 (Counts 5-9). Pet. App. 7a.

a. At trial, in addition to the transcripts of the recorded phone calls between petitioner and McDaniel and other evidence, the government presented expert testimony that the chemical structures of MPDV and 4-MEC are similar to methcathinone, a Schedule I controlled substance pursuant to the Controlled Substances Act (CSA), while MDMC’s chemical structure is substantially similar to MDMA (ecstasy), also a

Schedule I controlled substance. 753 F.3d at 438. The experts also explained that MPDV and 4-MEC each produce a stimulant effect on the central nervous system that is substantially similar to that produced by methcathinone and that MDMC's stimulant effect is substantially similar to MDMA's. *Ibid.*

Petitioner "presented evidence that he was not aware of the Analogue Act, or that the CSA prohibited the distribution of controlled substance analogues." Pet. App. 8a. Petitioner adduced testimony from his brother, an immigration-enforcement officer and former police officer. C.A. J.A. 633. Petitioner's brother testified that, in early 2011, he and petitioner discussed petitioner's desire to start an "aroma therapy business" involving incense, oils, and bath salts. *Id.* at 634. At that time, bath salts were sold in many stores in Staten Island (where petitioner lived) and petitioner "was concerned about the legalities of these items that he was going to put into this aroma therapy business." *Id.* at 635. Petitioner's brother advised him to use the Drug Enforcement Agency (DEA) "website and check the schedule there," but petitioner "didn't find anything" relating to analogues on the DEA website. *Id.* at 635, 639; see *id.* at 644-645. Petitioner informed his brother that a "ban [was] coming" in October 2011 and, although petitioner had an opportunity to sell his soon-to-be-banned products at a profit, petitioner disposed of them "down the toilet." *Id.* at 640-641.

b. Petitioner asked the district court to instruct the jury that it could return a guilty verdict only if it found that petitioner knew that the substances he distributed "possessed the characteristics of controlled substance analogues, including their chemical

structures and effects on the central nervous system.” 135 S. Ct. at 2303 (internal quotation marks omitted). The court rejected that request and, following circuit precedent, instructed the jury that “the statute required that ‘the defendant knowingly and intentionally distributed a mixture or substance that has’ substantially similar effects on the nervous system as a controlled substance and [t]hat the defendant intended for the mixture or substance to be consumed by humans.’” *Ibid.* (brackets in original). The jury convicted petitioner on all nine counts. *Ibid.*

3. Petitioner appealed, arguing, *inter alia*, that the district court had erred by refusing to instruct the jury “that the government was required to prove that he knew, had a strong suspicion, or deliberately avoided knowledge that” the substances he distributed “possessed the characteristics of controlled substance analogues.” 135 S. Ct. at 2303 (citation omitted). The court of appeals rejected petitioner’s argument, relying on circuit precedent holding that the only “intent” the government was required to prove was petitioner’s intent that “the substance at issue be consumed by humans.” 753 F.3d at 441, 444.

4. This Court reversed, holding that the jury instructions did “not accurately convey th[e] knowledge requirement” of the Analogue Act, which requires the government to “prove that a defendant knew that the substance with which he was dealing was ‘a controlled substance.’” 135 S. Ct. at 2302, 2305. The Court explained that the requisite knowledge can be proved in two ways. First, the Court held, “it can be established by evidence that a defendant knew that the substance with which he was dealing is some controlled substance—that is, one actually listed on the federal drug

schedules or treated as such by operation of the Analogue Act—regardless of whether he knew the particular identity of the substance.” *Id.* at 2305. Second, the Court explained that knowledge “can be established by evidence that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue,” because he knew that the substance was substantially similar in chemical structure to a schedule I or II CSA controlled substance and because he knew, represented, or intended that the substance had an effect on the central nervous system that is substantially similar to that of a schedule I or II CSA controlled substance. *Ibid.*; see *ibid.* (“A defendant who possesses a substance with knowledge of those features knows all of the facts that make his conduct illegal.”).

Because the district court’s jury instructions “did not fully convey the mental state required by the Analogue Act,” this Court remanded petitioner’s case to the court of appeals for a determination of whether “any error in the jury instructions was harmless because no rational jury could have concluded that [petitioner] was unaware that the substances he was distributing were controlled.” 135 S. Ct. at 2307 (citing *Neder v. United States*, 527 U.S. 1, 15 (1999)).

5. On remand, the court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-23a.

The court of appeals explained that the government may establish harmless error when an element has been omitted from jury instructions by “show[ing] ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” Pet. App. 13a (quoting *Chapman v. California*, 386 U.S.

18, 24 (1967)). The court explained that “[t]he reviewing court must ‘conduct a thorough examination of the record,’ and if ‘the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error . . . [,] it should not find the error harmless.’” *Ibid.* (quoting *Neder*, 527 U.S. at 19) (brackets and ellipses in original). In the context of an instructional error, the court noted that the government can establish harmlessness when “the omitted element is supported by overwhelming evidence admitted at trial.” *Id.* at 13a-14a. But, the court explained, “evidence of an element omitted from jury instructions will not be deemed overwhelming if the defendant had ‘genuinely contested’ the omitted element with evidence that could have caused ‘disagreement among the jurors about’ the contested element.” *Id.* at 15a (quoting *United States v. Brown*, 202 F.3d 691, 702 (4th Cir. 2000)).

The court of appeals rejected the government’s argument that overwhelming evidence established petitioner’s knowledge that the bath salts were regulated or controlled under the CSA or Analogue Act (*i.e.*, the first method this Court discussed to establish the requisite *mens rea*). Pet. App. 16a-18a. The court explained that at trial, petitioner “countered the government’s evidence of his guilty knowledge by presenting evidence that he tried to comply with the law and intentionally avoided selling substances listed on the CSA schedules.” *Id.* at 17a. The court therefore concluded that the evidence was “sufficient to permit, but not so overwhelming to compel, the jury to find that [petitioner] knew that federal law regulated the bath salts as controlled substances.” *Id.* at 18a.

The court of appeals next turned to the second method this Court identified to establish mens rea, *i.e.*, that petitioner “knew ‘the specific analogue he was dealing with.’” Pet. App. 18a (quoting 135 S. Ct. at 2305). The court concluded that the evidence of petitioner’s “guilty knowledge” was not sufficiently overwhelming with respect to the counts of conviction premised on acts of distribution that took place before the date of the first recorded call. *Id.* at 19a. The court therefore vacated those three counts of conviction. *Id.* at 19a, 23a.

But as to Counts Five through Nine, which charged conduct after the beginning of the recorded calls, the court held that the “recorded telephone conversations overwhelmingly establish[ed] that [petitioner] knew the bath salts’ chemical structures and physiological effects” (*i.e.*, the second method of establishing the requisite mens rea). Pet. App. 18a, 23a. In particular, the court held that “[t]he nine recorded telephone conversations, beginning on August 25, 2011, established [petitioner’s] thorough and detailed knowledge of chemicals identified in” six of his counts of conviction. *Id.* at 21a. The court identified several statements petitioner made in those recorded phone calls that established petitioner’s knowledge of the chemical structure of the substances he distributed. First, petitioner “discussed the composition of his products, characterizing a mixture called ‘Alpha’ as ‘the straight chemical’ and ‘the replacement for the MPDV.’” *Id.* at 20a. Second, when asked about a mixture labeled “No Speed Limit,” petitioner declared that “Alpha mixed with the 4-MEC gives you a No Speed Limit-like feeling, just not as intense.” *Ibid.* Third, petitioner described a substance called “‘Hardball’ as a blend with

‘five active chemicals in it’ or ‘five ingredients.’” *Ibid.* And finally, petitioner described “adding ‘a little extra kick’ to a blend called ‘Hardball.’” *Ibid.* The court of appeals further explained that the evidence petitioner introduced that he “consulted the CSA schedules on the DEA website \* \* \* demonstrated that he had sufficient knowledge about his products’ chemical structures to be able to compare them to the list of chemical names on the CSA schedules.” *Id.* at 21a-22a. And the court noted that “[l]aboratory tests confirmed that [petitioner’s] statements accurately described the chemical composition of his products.” *Id.* at 21a.

In addition, the court of appeals found overwhelming evidence that petitioner knew the physiological effects of his products. Pet. App. 22a. The court relied on petitioner’s recorded statements “describ[ing] the ‘feeling’ caused by different blends, comparing their effects to those of cocaine and methamphetamine.” *Ibid.* The court also relied on the government’s “evidence that [petitioner’s] descriptions accurately reflected the actual physiological effects of the blends.” *Ibid.* And the court noted that, even if petitioner were correct that his “descriptions of the physiological effects were merely ‘sales talk,’ the Analogue Act defines analogues to include substances merely *represented* to have the relevant physiological effects.” *Ibid.* (citing 21 U.S.C. 802(32)(A)(iii)).

The court of appeals therefore affirmed the counts of conviction based on conduct that took place on or after the date of the first recorded phone call. Pet. App. 23a. The court vacated the sentences on those counts and remanded to the district court for resentencing on those counts. *Ibid.*

**ARGUMENT**

Petitioner urges (Pet. 13-29) this Court to review the court of appeals' application of the harmless-error standard to the instructional error in this case. Review of that question is not warranted because the court of appeals correctly applied the harmless-error standard articulated by this Court. Petitioner also asks (Pet. 29-34) this Court to review the court of appeals' application of this Court's articulation of the requisite knowledge standard to the facts of his case. Review is unwarranted, however, because the court of appeals' opinion is correct and does not conflict with any decision of this Court or of another court of appeals. In addition, review is unwarranted in any event because this case is in an interlocutory posture.

1. This Court's review is unwarranted at this time because this case is in an interlocutory posture. The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 23a. The district court has not yet resentedenced petitioner. The interests of judicial economy would be best served by denying review in this Court while petitioner awaits resentencing. He can then raise his current claims—together with any additional claims that may arise in the district court and be passed on in the court of appeals—in a single petition for a writ of certiorari seeking review of the final judgment against him. See *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting that the Court “ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from” the most recent judgment). The interlocutory posture of the case “of itself alone furnishe[s] sufficient ground for the denial” of the peti-

tion. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Abbott v. Veasey*, 137 S. Ct. 612 (2017) (Roberts, C.J., respecting the denial of certiorari); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition); see generally Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 282-283 (10th ed. 2013).

2. Review of the first question presented is unwarranted because the court of appeals correctly applied the established legal standard for assessing harmless error to the facts of this case.

a. i. Rule 52(a) of the Federal Rules of Criminal Procedure provides that “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.” Similarly, 28 U.S.C. 2111 provides that, “[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.” Harmless-error doctrine “focus[es] on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.” *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). That focus ensures that the “substantial social costs” that result from reversal of criminal verdicts will not be imposed without justification. *United States v. Mechanik*, 475 U.S. 66, 72 (1986). The requirement that errors must “affect substantial rights” to warrant reversal requires, outside of the narrow category of “structural errors,” see *Neder v. United States*, 527 U.S. 1,7-8 (1999), that courts conduct an “analysis of the district court record \* \* \* to determine whether the error was prejudi-

cial,” *i.e.*, whether it “affected the outcome of the district court proceedings.” *United States v. Olano*, 507 U.S. 725, 734 (1993) (discussing Rule 52(a)).

Because the harmless-error inquiry is designed to separate errors that mattered from errors that do not justify the high costs of a retrial, the task of an appellate court is to review the record to assess an error’s likely effect on the outcome of a trial. “[I]n typical appellate-court fashion,” *Neder*, 527 U.S. at 19, appellate courts review the record to form a judgment whether, absent the error, the ultimate outcome likely would have been the same. In assessing the likelihood that an error was harmless, courts employ an objective standard that considers the effect of the error on an average, reasonable jury “in relation to all else that happened.” *Kotteakos v. United States*, 328 U.S. 750, 764 (1946). Where (as here) the error is constitutional, the reviewing court may conclude that it is harmless only when it is “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 24 (1967).

ii. In *Neder*, this Court applied the established harmless-error test to hold that the omission of an offense element from the jury instructions may be found harmless beyond a reasonable doubt. 527 U.S. at 15-20. Petitioner contends (Pet. 14-17) that this Court’s decision in *Neder* left ambiguous how lower courts should evaluate instructional error for harmlessness—because, he asserts, it failed to clarify whether the omission of an element from jury instructions can be harmless based on overwhelming evidence in the record on that element, or whether the omitted element must also be either uncontested or

subsumed in proof of a different (properly instructed) element. No such ambiguity exists.

The Court in *Neder* reiterated that courts must apply the harmless-error standard articulated in *Chapman* in a “case-by-case” manner. *Neder*, 527 U.S. at 14. As in virtually any area of law, the application of a legal standard to disparate sets of facts will yield disparate outcomes. And when, as in the harmless-error context, a legal test requires a holistic review of a complex set of facts (such as a trial record), certain features of the underlying facts will be significant (or even determinative) in some cases and insignificant in others. In *Neder*, the Court held that *Chapman*’s constitutional-error test (*i.e.*, whether it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,” *Chapman*, 386 U.S. at 24) applies to instructional errors, including the omission of an element from the jury instructions. *Neder*, 527 U.S. at 8-15. In applying that test, the Court in *Neder* reviewed the record evidence and concluded that the omission of an element—there, the materiality of *Neder*’s false statements about his income to a determination of his tax liability—was harmless. The Court’s review focused on the strength of the evidence supporting materiality, concluding that that evidence “was so overwhelming \* \* \* that *Neder* did not argue to the jury \* \* \* that his false statements of income could be found immaterial.” *Id.* at 16. The Court thus concluded, based on the trial record in that case that the instructional error was harmless because “the omitted element was uncontested and supported by overwhelming evidence.” *Id.* at 17.

Petitioner argues (Pet. 15-17) that the decision in *Neder* left open the question whether a court's finding that the trial record contained "overwhelming evidence" in support of an omitted element could ever satisfy the harmless-error standard without something more, such as a finding that the omitted element was "uncontested." 527 U.S. at 17. That is not so. The Court in *Neder* held that the error was harmless in that case because the "omitted element [was] supported by uncontroverted evidence." *Id.* at 18. But in so holding, the Court emphasized two points. First, relying on cases considering the erroneous admission or exclusion of evidence, the Court held that the ultimate harmless-error inquiry is "essentially the same" across those different types of constitutional errors: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Ibid.* Second, the Court explained that that ultimate determination is often intensely record-dependent and requires a "case-by-case approach." *Id.* at 14; see *id.* at 19. In any such inquiry, factors that are significant or determinative in one case may be insignificant in a different case. In *Van Arsdall*, this Court explained that an inquiry into whether an unconstitutional denial of a defendant's confrontation rights was harmless will "in a particular case depend[] upon a host of factors." 475 U.S. at 684. Because the same is true with respect to an instructional error, the Court in *Neder* could not have provided more specific guidance beyond articulating the applicable legal standard and instructing that the standard should be applied, on a case-by-case basis, to the underlying record.

b. The court of appeals in this case correctly articulated and applied the harmless-error standard established and elucidated by this Court's decisions, considering the various factors discussed in *Neder*, including the strength of the government's evidence, petitioner's contrary proof, and the facts otherwise found by the jury.

The omitted element in this case was petitioner's knowledge "that the substance with which he was dealing was 'a controlled substance.'" 135 S. Ct. at 2305. Proof of that element could have been established in either of the two ways identified by this Court. See p. 9, *supra*. On remand, the court of appeals held that omission of an instruction on the first method of proof (knowledge that the substance was a controlled substance) was not harmless because, although the government presented sufficient evidence for a jury to find such knowledge, such a finding was not "compelled" because petitioner had contested the "government's evidence of his guilty knowledge by presenting evidence that he tried to comply with the law." Pet. App. 17a. The court also held that the failure to instruct on the second method of proving knowledge (knowledge of the identity of the analogue he was distributing, including the features that made it an analogue) was not harmless with respect to the counts of conviction that were based on defendant's actions before the recorded phone calls—because the evidence about what petitioner knew up to that point could have supported a jury determination that petitioner "began selling his products before knowing their identity, chemical structures, or physiological effects when ingested." *Id.* at 19a; see *id.* at 18a-19a. Those portions of the court of appeals' decision illus-

trate that it followed the same approach this Court followed in *Neder*: it examined the evidentiary record, weighing the presence and the strength of the evidence on both sides, to assess whether the government proved “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Id.* at 13a (quoting *Chapman*, 386 U.S. at 24).

The court of appeals applied the same *Neder* methodology in holding that the instructional error was harmless with respect to six counts of conviction (the conspiracy count and five of the substantive counts). Pet. App. 19a-23a. The court relied on petitioner’s own words—presented in the form of recorded phone calls—in concluding that the record contained overwhelming evidence (beyond “[a]ny reasonable uncertainty”) that petitioner had “full knowledge of the chemical structures and physiological effects of his products.” *Id.* at 19a. In those calls, petitioner discussed mixing different “chemical” substances to create a “replacement for” a substance that had recently been added to the schedule of controlled substances. *Id.* at 20a. He further explained that the mixture of two substances (“Alpha” and “4-MEC”) gave a user a feeling similar to that of cocaine and “crystal meth.” *Ibid.* In later conversations, petitioner explained that he had created a new blend with “five active chemicals in it.” *Ibid.* Viewing that unchallenged evidence<sup>3</sup> in light of the record as a whole,

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<sup>3</sup> Although petitioner at one point challenged the relevancy of the recorded calls, Pet. App. 20a n.3, he did “not dispute the accuracy of the recordings and transcripts admitted at trial” and did not “point to evidence that would contradict the contents of those conversations,” *id.* at 19a-20a.

the court of appeals concluded beyond a reasonable doubt that the evidence established petitioner’s “thorough and detailed knowledge of chemicals identified in” the relevant counts, “their chemical structures, their effects, and their similarity to other controlled substances.” *Id.* at 21a; see *id.* at 22a-23a (“Accordingly, we conclude that because overwhelming evidence established that [petitioner] knew, as of August 25, 2011, the specific features of the substances he was selling, the district court’s omission of the knowledge element from the jury instructions was harmless error with regard to [petitioner’s] convictions under [six counts of conviction].”).<sup>4</sup>

Petitioner’s challenge to the court of appeals’ harmless determination is nothing more than a fact-bound disagreement about the application of a settled legal principle to a particular case. In vacating several of petitioner’s counts of convictions—and in holding that *none* of those counts could be sustained on the first method of proving knowledge identified by this Court—the court of appeals explained that, although the government had introduced evidence from which a reasonable jury could conclude that petitioner had the requisite knowledge, such a conclusion was not compelled because that evidence was contested. Pet. App. 17a-19a. The Fourth Circuit has elsewhere explained that an instructional error is harmless *either* when the omitted element is supported by overwhelming or uncontested evidence *or* when the evi-

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<sup>4</sup> The court of appeals also found overwhelming evidence that petitioner knew or represented that the physiological effects of the products he distributed were similar to those of controlled substances. Pet. App. 22a. Petitioner does not appear to challenge that conclusion.

dence, although contested, is sufficiently overwhelming that a reasonable jury could not have found it to be lacking on the omitted element. *United States v. Brown*, 202 F.3d 691, 701 (2000). Petitioner’s disagreement with the court of appeals’ conclusion about the strength of the evidence does not present a question of general importance that would warrant this Court’s review.

c. Petitioner errs in contending (Pet. 17-23) that the proper standard for determining whether an instructional error is harmless is the subject of a deep circuit conflict. As discussed, this Court has specified the applicable standard and any variation among outcomes in court of appeals decisions results from variations in facts and trial records underlying different decisions.

i. Petitioner argues (Pet. 17-20) that the decision below conflicts with the Fifth Circuit’s decision in *United States v. Stanford*, 823 F.3d 814, cert. denied, 137 S. Ct. 435 (2016), because (Pet. 18) the Fifth Circuit in *Stanford* “rejected any claim that overwhelming evidence is sufficient in itself under *Neder*” to conclude that an instructional error was harmless. No conflict exists.

The defendant in *Stanford* (like petitioner) was convicted of violating the Analogue Act before this Court’s decision clarifying the knowledge required for such a conviction and his jury was not properly instructed on the knowledge element. *Stanford*, 823 F.3d at 826-827. But the circumstances of *Stanford* differed from this case in at least one important respect: the jury in *Stanford* was asked in an interrogatory whether the defendant “knew that” the substance he distributed “was a controlled substance analogue”

—a question the jury answered in the affirmative. *Id.* at 828. In determining whether the instructional error in *Stanford* was harmless, the Fifth Circuit focused on whether the affirmative answer to that interrogatory rendered the error harmless. *Ibid.* The court ultimately concluded that it did not because the jury was not instructed that it should answer the question posed in the interrogatory under a “beyond a reasonable doubt” standard. *Ibid.*; see *id.* at 827-835. That holding does not conflict with the decision below because it focused on an aspect of the trial record in *Stanford* that did not exist in this case.

The court in *Stanford* also rejected the government’s argument that ample evidence in the record established that the defendant had the requisite state of mind. 823 F.3d at 835. That holding also does not conflict with the holding below. The evidentiary record in one case may fall short of satisfying the *Chapman* standard while the evidentiary record in a different case may be sufficient; that circumstance is unsurprising and does not suggest that the cases conflict. Unlike the recorded-conversation evidence in this case—which permitted the jury to hear petitioner discuss, in his own words, the chemical makeup and effects of the compounds he created—the reliability of the government’s evidence in *Stanford* was contested. *Id.* at 835 n.17. That is sufficient to explain (and harmonize) the disparate results.

Petitioner also contends (Pet. 19) that the decisions conflict based on the Fifth Circuit’s holding that the instructional error was not harmless because it distorted the trial record. That contention is misplaced. The defendant in *Stanford* argued that the omission of the proper intent requirement from the jury’s instruc-

tions violated his constitutional rights in two distinct ways: it resulted in his conviction absent a finding that one of the elements of the crime of conviction was satisfied, and it prevented him from presenting a complete defense. See 823 F.3d at 828, 836. The portion of the opinion discussing distortion of the trial record addressed the second asserted injury—a distinct constitutional injury that petitioner did not claim below. In the court of appeals, petitioner argued that the instruction error violated his right to have a “jury determine[] all of the elements of the offense” he was charged with. Pet. C.A. Supp. Br. 13. Although he suggested that the instructional error affected the evidence he chose to present at trial, see *id.* at 6, he did not argue—and has therefore waived his right to argue—that the instructional error inflicted a distinct constitutional harm by preventing him from presenting a complete defense. Because petitioner never asserted that claim, the Fifth Circuit’s disposition of Stanford’s complete-defense claim cannot form the basis of a conflict with the decision below. For the same reason, the decision below does not conflict with the D.C. Circuit’s decision in *United States v. Sheehan*, 512 F.3d 621, 632-633 (2008), in which the defendant argued that she was unconstitutionally prevented from presenting a complete defense because the trial judge blocked her efforts to put on evidence of her lack of intent. In that case, as in *Stanford* and in this case, the court of appeals applied the *Chapman* standard to the particular claims, facts, and circumstances of the case. *Ibid.* The disparate results are attributable to differences in those claims, facts, and circumstances.

Indeed, the Fifth Circuit has elsewhere applied *Neder* in precisely the way the court of appeals applied it in this case, evaluating whether evidence presented to the jury on the relevant element was sufficiently “overwhelming” to support a guilty verdict, even when that evidence was contested. See *United States v. Skilling*, 638 F.3d 480, 483-488 (5th Cir. 2011), cert. denied, 132 S. Ct. 1905 (2012). Petitioner therefore cannot establish any conflict between the legal rules applied in the Fourth and Fifth Circuits. And this Court does not ordinarily grant certiorari to review the fact-bound application of an established legal rule.

ii. Petitioner also argues (Pet. 17-23) that the court of appeals’ interpretation of *Neder* conflicts with decisions of the Ninth and Second Circuits, as well as with decisions of two state supreme courts, in what petitioner contends (Pet. 21) is a multi-faceted circuit conflict about “when, if ever, overwhelming evidence of an omitted [element] is sufficient to render omission of an element harmless error.” Petitioner is incorrect. Each of the decisions petitioner relies on applied the *Chapman* standard to the facts of the particular case to determine whether, beyond a reasonable doubt, the asserted error had no effect on the verdict.

In particular, petitioner errs in contending (Pet. 21) that the Ninth Circuit’s decision in *United States v. Zepeda-Martinez*, 470 F.3d 909 (2006), conflicts with the decision below because the Ninth Circuit “permit[s] the Government to introduce *new* evidence post-conviction to support its harmless error argument.” Pet. 21. Initially, even if that were true, that would not be a basis for reviewing the decision be-

low—because the practice petitioner ascribes to the Ninth Circuit would be *less* favorable to petitioner than the Fourth Circuit’s approach to his case. Review is not warranted to resolve an asserted dispute that has no relevance to petitioner. But in any event, the practice petitioner cites is limited to the Ninth Circuit’s consideration of whether a violation of the rule articulated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is harmless in a particular case. See *Zepeda-Martinez*, 470 F.3d at 913; see also *United States v. Guerrero-Jasso*, 752 F.3d 1186, 1196 (9th Cir. 2014) (Berzon, J., concurring) (cited at Pet. 21). Consistent with *Neder*’s admonition that a reviewing court should “conduct a thorough examination of the record,” 527 U.S. at 19, the Ninth Circuit looks to evidence that was introduced at a defendant’s sentencing hearing to “assist [the court] in determining what evidence [the parties] *would have introduced* at trial had the issue been properly presented.” *Zepeda-Martinez*, 470 F.3d at 913 n.3 (emphasis added; citation omitted). And elsewhere the Ninth Circuit’s articulation of the harmless-error standard for reviewing the omission of an element from jury instructions has mirrored petitioner’s. See, e.g., *United States v. Conti*, 804 F.3d 977, 981-982 (2015) (explaining that reviewing court should consider whether the record contained “overwhelming evidence” of the omitted element and “whether the defendant contested the omitted element”).

Petitioner similarly errs in arguing (Pet. 22) that the court of appeals’ decision conflicts with the Second Circuit’s decision in *United States v. Jackson*, 196 F.3d 383 (1999), cert. denied, 530 U.S. 1267 (2000), which petitioner contends “applie[d] a multi-step test

under which the court may find an error harmless even if the jury *could* have reasonably acquitted on the trial record, so long as the court concludes that it *would have* convicted instead,” Pet. 22—a practice that petitioner contends the Fourth Circuit has rejected. Again, petitioner posits a purportedly conflicting practice that appears to be less favorable to petitioner and to similarly situated defendants than the practice used by the Fourth Circuit in this case. If such a conflict existed, it would not be a basis for granting this petition for a writ of certiorari. In any case, petitioner has not identified any decision in which the Second Circuit found an error to be harmless where the evidence was sufficient to support acquittal but the court of appeals believed the jury would have convicted anyway. In both *Jackson* and *Monsanto v. United States*, 348 F.3d 345 (2003) (cited at Pet. 22), the Second Circuit panels held that a properly instructed jury could not have acquitted the relevant defendant. *Jackson*, 196 F.3d at 387-388; *Monsanto*, 348 F.3d at 351 & nn.5-6; see also *United States v. Guevara*, 298 F.3d 124, 128 (2d Cir. 2002) (finding “insufficient evidence to support a jury finding” in the defendant’s favor on the missing element, and therefore holding that, in the absence of the error, the jury would still have returned a verdict against the defendant). Because both the Second Circuit and the Fourth Circuit apply the *Chapman* framework to the facts and circumstances of a particular case, no conflict exists.

Petitioner’s contention (Pet. 22-23) that the decision below conflicts with decisions of the Idaho and Connecticut Supreme Courts fares no better. Petitioner is correct (Pet. 23) that the Idaho Supreme

Court has repeated the guidance in *Neder* that “where the evidence supporting a finding on the omitted element is overwhelming and uncontroverted, so that no rational jury could have found that the state failed to prove that element, the constitutional violation may be deemed harmless.” *State v. Perry*, 245 P.3d 961, 976 (2010). That court has also explained, however, that “whether the [omitted] element was contested” is but one “consideration[]” to include in making the ultimate beyond-a-reasonable-doubt determination that the jury verdict would have been the same absent the error. *State v. Lilly*, 122 P.3d 1170, 1172 (2005). That approach is consistent with this Court’s approach in *Neder* and with the application of *Neder* in federal courts of appeals. Finally, petitioner relies (Pet. 23) on *State v. Velasco*, 751 A.2d 809 (2000), in which the Supreme Court of Connecticut declined to hold that an instructional error was harmless. But, unlike in petitioner’s case, the evidence on the missing element in *Velasco* was *not* overwhelming. *Id.* at 814. That case therefore offers little guidance on how that court would conduct the harmless-error analysis in the face of overwhelming evidence of guilt and should not be interpreted as requiring a finding that evidence was both uncontested and overwhelming before a court may determine that an instructional error was harmless.

3. a. Petitioner also argues (Pet. 29-34) that the court of appeals applied the wrong substantive standard under the Analogue Act in evaluating whether the evidence was sufficient to establish the requisite knowledge, and contends that the court’s decision conflicts with decisions of the Fifth, Seventh, and Tenth Circuits. Petitioner is wrong about the stand-

ard applied by the court of appeals—and is therefore also wrong that any conflict exists.

Petitioner contends (Pet. 34) that the court of appeals held that “proof of a defendant’s knowledge of his products’ chemical names and effects” necessarily establishes “the knowledge-of-chemical-structure element of the offense.” That is incorrect. The court of appeals correctly recognized this Court’s holding that the government may establish the requisite mental state in an Analogue Act case by proving that a defendant “knew the specific analogue he was dealing with” because he knew, *inter alia*, that the substance was substantially similar in chemical structure to a controlled substance. 135 S. Ct. at 2305; see Pet. App. 10a (“Under this second method of proof, knowledge of the substance’s chemical structure and physiological effects is sufficient to support a conviction.”); Pet. App. 11a (explaining that the government must prove that a defendant “knew either the legal status of the substance, or the chemical structure and physiological effects of that substance”).

Petitioner argues (Pet. 29-34) that the court of appeals relieved the government of its burden of establishing knowledge of chemical structure by “conflat[ing]” petitioner’s knowledge of the substances’ names and physiological effects with his knowledge of the substances’ chemical structures. Pet. 30. That contention is not supported by the decision below or by this Court’s decision in *McFadden*. The court of appeals relied on direct and circumstantial evidence that petitioner knew that the substances he distributed had a chemical structure similar to that of controlled substances—and this Court has left no doubt that the government is entitled to rely on such evi-

dence. See 135 S. Ct. at 2306 n.3. The court of appeals relied on petitioner's own statements, captured on recorded phone calls, displaying his knowledge about the "composition of his products," which he sometimes mixed himself. Pet. App. 20a. For example, petitioner made repeated statements that the "straight chemical" he called "Alpha" qualified as a "replacement" for MDPV, which was declared a controlled substance while petitioner was in the business of making and selling analogues. *Ibid.*; see *id.* at 19a-22a; see also C.A. J.A. 735, 738. Petitioner also discussed different mixtures of chemicals he had created, including identifying the number or type of ingredients in some, and compared the resulting substances to controlled substances. Pet. App. 20a. Based on that evidence, the court of appeals correctly concluded that petitioner's own words had demonstrated petitioner's "thorough and detailed knowledge of chemicals identified in" the relevant counts of conviction, "their chemical structures, their effects, and their similarity to other controlled substances." *Id.* at 21a; see *id.* at 18a ("[W]e agree with the government that the recorded telephone conversations overwhelmingly establish that [petitioner] knew the bath salts' chemical structures and physiological effects."); *id.* at 19a (concluding that petitioner's "telephone conversations \* \* \* demonstrated his full knowledge of the chemical structures and physiological effects"); *id.* at 21a (describing overwhelming "evidence of [petitioner's] knowledge of the substances' chemical structures and physiological effects").

Petitioner is incorrect (Pet. 33-34) that his argument amounts to more than a "fact-bound misapplication of law to fact" because, in "finding harmless er-

ror, the panel necessarily held that proof of a defendant's knowledge of his products' chemical names and effects is sufficient to satisfy (indeed, *compels* the jury to find established) the knowledge-of-chemical-structure element of the offense." The court of appeals relied on more than knowledge of the names and effects of the substances he sold. As explained, it also relied on evidence (in the form of petitioner's own words) that petitioner understood the nature of the chemicals he was using and knew enough about their structures to effectively mix them—and to later alter his recipe to avoid using a controlled substance—to produce products that would get people high. Petitioner's critique of the court of appeals' decision therefore boils down to a disagreement with the court's application of the correct legal standard to the facts of this case. And this Court ordinarily "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

b. Petitioner's contention (Pet. 31-33) that the court of appeals' treatment of the substantive Analogue Act question in this case conflicts with decisions of the Fifth, Seventh, and Tenth Circuits lacks support because it is premised on petitioner's erroneous understanding of the court of appeals' decision. Petitioner relies, for example, on the Fifth Circuit's decision in *Stanford*, arguing that the court in that case held that proof that a defendant knew the name of the substance he distributed was not sufficient to prove that he knew the relevant facts about the substance's chemical structure. But the record in that case did not contain evidence that that defendant mixed his own substances and knew how to replace one chemical

for another when the former was added to the schedule of controlled substances. That form of evidence, from petitioner's own recorded words, was in the record below and it was critical to the court of appeals' holding. Petitioner also contends (Pet. 32-33) that the decision below conflicts with the Seventh Circuit's decision in *United States v. Turcotte*, 405 F.3d 515, 528 (2005), cert. denied, 546 U.S. 1089 (2006), and with the Tenth Circuit's decision in *United States v. Makkar*, 810 F.3d 1139, 1144 (2015), because those cases would not require a jury to infer knowledge of chemical structure from knowledge of physiological effects. Because, as explained, that is not what the court of appeals held in this case, no conflict exists. In any event, this Court recently denied two petitions for a writ of certiorari raising the same asserted conflict. *Haugen v. United States*, 137 S. Ct. 292 (2016) (No. 15-1294); *Carlson v. United States*, 137 S. Ct. 291 (2016) (No. 15-1136).

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2017