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No. 11-199

IN THE
Supreme Court of the United States

ALEXANDER VASQUEZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF JEFFREY K. SKILLING AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

This brief addresses the following question encompassed by the petition for a writ of certiorari:

Whether an error can be deemed harmless, consistent with *Neder v. U.S.*, 527 U.S. 1 (1999), and the Sixth Amendment, on the basis of a determination that the government's evidence of guilt is "overwhelming," even when the jury reasonably could have acquitted the defendant without the error.

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BRIEF OF JEFFREY K. SKILLING AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief is submitted on behalf of Jeffrey K. Skilling in support of petitioner.[1]

INTEREST OF AMICUS CURIAE

Skilling has a direct interest in the correct analysis of harmless error, as detailed in his own pending petition for a writ of certiorari raising closely related harmless-error questions. *See Skilling v. U.S.*, No. 11-674, filed Nov. 28, 2011 ("*Skilling* Pet.").

As elaborated further in his petition—and in this Court's own prior opinion in *Skilling v. U.S.*, 130 S. Ct. 2896 (2010)—Skilling was convicted of alleged frauds at Enron Corporation in a case involving alternative theories of guilt. The heart of the government's case was a conspiracy count alleging multiple objects, including "honest services" fraud and securities fraud. The jury convicted on 19 of 28 counts in a "general verdict" form, i.e., without specifying whether jurors found Skilling guilty of conspiracy on the honest-services object, or the securities-fraud object, or both.

In *Skilling*, this Court concluded unanimously that the "honest services" object was invalid as applied to Skilling. But rather than reverse the conviction, the Court remanded to the Fifth Circuit to determine whether the government could establish

[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus* or his counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed concurrently herewith.

that inclusion of the invalid object was harmless beyond a reasonable doubt.

The Fifth Circuit, however, misconstrued the harmless-error standard enunciated by this Court in *Neder v. U.S.*, 527 U.S. 1 (1999), and thereby found the honest-services fraud error harmless based merely on the strength of the government's case, with little or no regard for the challenge to that case mounted by Skilling's defense. *Skilling* Pet. 23-24, 27-31. The court even held that Skilling's own extensive testimony in his own defense was immaterial to the harmless-error inquiry, and it therefore categorically excluded all consideration of that testimony from the analysis. *Id.* at 24, 34-37.

As Skilling's petition argues, the Fifth Circuit's analysis reflects a deep and abiding misunderstanding of the harmless-error inquiry mandated by *Neder*, as applied to the alternative-theory context. The fundamental harmless-error questions presented in Skilling's petition overlap substantially with the questions presented in this case, and thus the Court's decision here could well affect the issues raised by Skilling. Skilling accordingly has a direct and substantial interest in the harmless-error issues presented here.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented in this case is whether an appellate court conducting harmless-error analysis should consider only the weight of the evidence absent the error, or whether it should also consider the effect of the particular error on the particular jury. Pet. i. The Seventh Circuit below—similar to the

Fifth Circuit in Skilling's case—opted for the former approach, finding a trial error harmless because, in its view, "although the issue is close," the evidence of the defendant's guilt was strong enough to "move[] the jury to convict Vasquez" absent the error. Pet. App. 15A-18A; *see also Skilling* Pet. 23-24.

There are strong arguments that harmless-error analysis should or must consider the subjective, prejudicial effect of the actual error on the actual jury. *See*, *e.g.*, *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993); Pet. Br. 11-43. This brief, however, assumes that this Court's *Neder* decision supplanted the *Sullivan* approach, such that harmless-error analysis is only an objective assessment of how an error could have affected a reasonable jury, given the full record of the case. Even on that view, the court below, like the Fifth Circuit in Skilling's case, fundamentally erred in finding the respective errors in those cases harmless. The relevant question is not, as those courts believed, whether the government's evidence is sufficiently strong to convince the appellate court of the defendant's guilt. Rather, an appellate court is precluded from finding a trial error harmless—even when the government's case is "overwhelming," *Skilling* Pet. 24—unless, absent the error, there is no triable issue of fact for the jury to resolve not already necessarily resolved in the original finding of guilt. That approach is dictated by this Court's decision in *Neder*, and by the fundamental guarantees of the Sixth Amendment. And under the proper analysis, both the decision below, and the Fifth Circuit's decision in Skilling's case, must be reversed.

ARGUMENT

I. *NEDER* PRECLUDES A FINDING OF HARMLESSNESS WHEN THE RECORD INCLUDES EVIDENCE SUFFICIENT FOR A RATIONAL JURY TO ACQUIT ABSENT THE TRIAL ERROR

This Court held in *Neder* that the erroneous omission of an element from the jury charge is subject to harmless-error review, even though a finding of harmlessness in those circumstances would affirm a conviction without the jury ever having found one of the elements of the crime beyond a reasonable doubt. The Court reconciled that holding with the Sixth Amendment's fundamental jury-trial right by explaining that harmless error can only be found when—as in *Neder*—the omitted element was uncontested, and, thus, no reasonable jury that voted to convict with the error could have voted to acquit without it. *Neder* thus makes clear that, contrary to the approach of the Seventh Circuit below, the Fifth Circuit in Skilling's case, and many other courts, an error cannot be deemed harmless simply because the appellate court believes the government's case to be strong. If a triable issue of fact concerning the defendant's guilt, not already necessarily resolved by the jury's original verdict, remains absent the error, then the error cannot, consistent with the Sixth Amendment and this Court's precedent, be considered harmless.

A. *Neder* Establishes That An Error Cannot Be Deemed Harmless Merely Based On "Overwhelming" Government Evidence, If A Triable Issue Of Fact Remains Concerning The Defendant's Guilt

If this Court rejects the approach to harmless error analysis described in *Sullivan* and pressed by the petitioner, and instead holds that harmless-error analysis should be based on an objective view of the record evidence, then the analysis is controlled by this Court's opinion in *Neder*. A constitutional error is harmless, *Neder* explains, only when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." 527 U.S. at 18. Thus, in *Neder*, the question was whether it was clear that the jury would have found the defendant guilty if the omitted element had been included.

In considering how to approach this harmless-error question, the *Neder* Court sought to strike "an appropriate balance between 'society's interest in punishing the guilty [and] the method by which decisions of guilt are to be made.'" 527 U.S. at 18 (alteration in original) (quoting *Connecticut v. Johnson*, 460 U.S. 73, 86 (1983) (plurality opinion)). *Neder* explains that the government's interest in determining the defendant's guilt or innocence must be weighed against the fundamental right to have a jury, rather than a judge—or three judges—decide a criminal defendant's guilt. The right to a jury determination of guilt "was designed 'to guard against a spirit of oppression and tyranny on the part of rulers,'" and "'was from very early times insisted on by our ancestors in the parent country, as the great

bulwark of their civil and political liberties.'" *Id.* at 19 (quoting *U.S. v. Gaudin*, 515 U.S. 506, 510-15 (1995), in turn quoting 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873)).

Neder strikes this balance by holding that an error may be deemed harmless only when no rational juror who voted to convict in the original trial could have acquitted absent the error, based on the record as a whole. Because jurors are presumed rational (absent evidence to the contrary), a trial error cannot be said to have affected the guilt determination if only one outcome—guilt—would have been rational absent the error. As *Neder* explains, the omission of an element is not harmless if "the record contains evidence that *could rationally* lead to a contrary finding with respect to the omitted element." *Id.* at 19 (emphasis added). By contrast, "where an omitted element is supported by uncontroverted evidence," such that the jury could not rationally have acquitted on the element, the jury-trial right remains secure. *Id.* at 18; *see also id.* at 17 (omission of element harmless because element "was uncontested and supported by overwhelming evidence"); *id.* at 19 (error is harmless "where a defendant did not, and … could not, bring forth facts contesting the omitted element"). But "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding" by a rational jury, the right to a jury determination on that element precludes the reviewing court from deeming the error harmless. *Id.* at 19.

Accordingly, the question on harmless error review cannot be simply whether the government's

case against the defendant, in the court of appeals' view, was strong, or even "overwhelming." Although the strength of the government's evidence is certainly relevant—e.g., a weak prosecution case alone could preclude a finding of harmlessness—what really matters is whether the trial record as a whole, without the error, provided *any rational basis for the jury to reach a different conclusion as to the defendant's guilt*. If it is not clear that the verdict would have been the same absent the error because a triable question of fact about the defendant's guilt remains, a trial error cannot be considered harmless, because the jury—not the appellate court—must be the entity to answer that triable question. *Neder*, 527 U.S. at 18-19.[2]

This approach was reaffirmed by the Court in *Mitchell v. Esparza*, 540 U.S. 12 (2003). The question in *Mitchell* was whether a charging error—which allowed a defendant convicted of aggravated murder to be eligible for the death penalty even

[2] To be sure, an error can sometimes be considered harmless when a triable issue of fact theoretically exists without the error, but the original jury verdict demonstrates that the jury has already resolved the question against the defendant. For example, when the facts of the case and the jury's verdict demonstrate that the jury necessarily found facts that could only have rationally led to a guilty verdict, regardless of the error, an error may be deemed harmless, *see*, *e.g.*, *Sullivan*, 508 U.S. at 281, even if the evidence at trial was otherwise contested. Similarly, if the error results in the exclusion of cumulative evidence, such that there is no plausible basis to suppose that the jury originally resolved a contested question in the government's favor only because of the excluded evidence, the error can be deemed harmless. *See*, *e.g.*, *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). No such situation is presented in this case, or in Skilling's, *see Skilling* Pet. 23, 28.

though the jury was not required to find that he was a "principal offender"—was harmless. The Court held that it was, because even though the jury never found that the defendant was the "principal offender," "he was the only defendant charged in the indictment," and "[t]here was no evidence presented that anyone other than respondent was involved in the crime or present at the store." *Id.* at 18-19. In support of this conclusion, the Court cited *Neder*'s statement that "[w]here a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." *Id.* at 19.

This Court's precedents thus make clear that, even in the face of strong government evidence, an appellate court may not deem a trial error harmless if the defendant presented evidence contesting the government's case, such that there remains a triable issue of fact as to whether the defendant is guilty beyond a reasonable doubt. It is only when the evidence, viewed as a whole, is so overwhelmingly one-sided that no juror who had originally voted to convict on the tainted record could rationally have voted to acquit on a clean one, that an error may properly be deemed harmless under the objective approach to harmless-error reflected in *Neder*.

B. Any Other Reading Of *Neder* Conflicts With The Fundamental Right To Have Guilt Determined By A Jury, Not An Appellate Panel

The conclusion that an appellate court cannot deem a trial error harmless when a rational juror who found the defendant guilty in the original trial could have acquitted absent the error is compelled not only by this Court's precedents, but also by the jury trial guarantee found in Article III and the Sixth Amendment. That ancient right—which Blackstone described as "the grand bulwark of [the Englishman's] liberties," *Neder*, 527 U.S. at 30 (Scalia, J., concurring in part and dissenting in part) (alteration in original) (quoting 4 W. Blackstone, Commentaries *349)—guarantees that questions of guilt will be determined by a jury, not a judge. A 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." *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977). "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*." *Id.* at 572-73 (emphasis added; citations omitted).

In a harmless-error case, of course, the defendant has already been convicted by a jury. But the jury's conviction was, by hypothesis, based on a tainted record. Thus, the question must be whether the jury *necessarily* would have reached the same verdict absent the taint. And *Neder* recognizes that the only way to reach that judgment, absent conclusive evi-

dence from the original jury verdict that the error did not matter (*supra* note 2), is to ask whether a rational juror who found the defendant guilty on the record tainted by the error *could* have voted to acquit, if the error had never affected the proceedings. If a defendant presents literally no defense on an issue, as was the case in *Mitchell* (and is often the case), or presents a defense that is utterly irrational (e.g., he was exploring Pluto when the crime occurred), then the court of appeals does not invade or trammel upon the jury-trial right in affirming the conviction. In such cases, *Neder* suggests, the general interest in punishing the guilty outweighs the right to have all determinations of guilt made by a jury, as only an unreasonable jury ignoring its legal duties could vote to acquit in such cases, and appellate courts need not presume irrationality in the jury room.

It is a different case entirely, however, when a rational jury *could* have voted to acquit based on the evidence presented at trial—even if the court of appeals judges themselves strongly believe the evidence favored conviction. When the government presents a strong but contested case, the contest must be decided by a jury, not by an appellate panel after the fact. Any other approach would deny the defendant his Sixth Amendment right to a jury determination of his guilt.

II. THE SEVENTH CIRCUIT'S HARMLESS-ERROR ANALYSIS IS INCONSISTENT WITH *NEDER* AND THE SIXTH AMENDMENT RIGHTS IT SAFEGUARDS

Regardless whether the Seventh Circuit should have considered the impact of the particular error in this trial on the particular jury that determined Vasquez's guilt, the Seventh Circuit clearly misapplied this Court's harmless-error jurisprudence. Though purporting to examine "the evidence as a whole" when conducting its harmlessness analysis, Pet. App. 17A, the Seventh Circuit ignored entirely the evidence put forth by Vasquez at trial in support of his defense. Because that evidence plainly sufficed to establish a triable issue of fact concerning Vasquez's guilt, the admission of his lawyer's statement cannot now be deemed harmless—under the Sixth Amendment, only a jury, untainted by the lawyer's statement, may decide whether Vasquez is guilty.

A. The Seventh Circuit's Harmless-Error Analysis Wrongly Considered Only The Government's Evidence, And Ignored The Defendant's

1. Vasquez and two co-defendants, Joel Perez and Carlos Cruz, were arrested following a failed cocaine deal that was intercepted when Alejandro Diaz, another putative participant in the transaction who was cooperating with law enforcement agents, tipped off his contact with the DEA. Pet. App. 3A-4A. The facts surrounding the crime are fairly straight-forward. The deal was set in motion when Perez contacted Cruz about obtaining a kilogram of

cocaine. *Id.* at 3A. Cruz then called Diaz, whom he knew to have been involved in selling cocaine. *Id.* Cruz, Perez, and Diaz arranged for the deal to take place on August 5, 2008.

On that day, Cruz and Perez drove to a Shell gas station, where they met Diaz. *Id.* Diaz instructed them to follow him to a second location to get the drugs, but Perez instead walked to a Denny's parking lot next door, where Vasquez was waiting for him, driving Perez's black Bonneville. *Id.* Perez got in the car with Vasquez and called Cruz to tell him that he wanted to complete the deal at the current location, rather than following Diaz to another site. *Id.* Cruz then followed Perez to the Denny's lot. *Id.* Diaz called Cruz to find out why he wasn't following him, and Cruz told Diaz that Perez wanted to complete the deal in the parking lot. *Id.* Perez instructed Cruz to tell Diaz "we got the money here," and Vasquez supposedly repeated the statement. *Id.* at 3A-4A. Cruz hung up, under the impression that Diaz was returning to the Shell station to complete the deal. *Id.* at 4A.

A few minutes later, after Diaz had contacted his DEA handler, law enforcement agents surrounded the parking lot and approached the Bonneville to arrest Cruz, Perez, and Vasquez. *Id.* As the officers approached the car, Cruz raised his hands to surrender, but Vasquez—with Perez still in the passenger seat—put the car in reverse, striking two police vehicles. *Id.* He then shifted course and headed for the exit. *Id.* Vasquez sped away, and when the police located the Bonneville in a nearby Walmart parking lot several minutes later, Vasquez was nowhere to be found. *Id.* A bystander told the police

that he had seen two men run from the car toward a McDonald's, and a detective pursued Vasquez and Perez on foot through the kitchen of the McDonald's and out the back door. *Id.* The police successfully apprehended both men and found a cell phone on Vasquez and two on Perez. *Id.* Phone records showed that several calls were made between Vasquez and Perez on the day before and the day of the arrest. *Id.* at 4A-5A. After the Bonneville had been towed to the police station, a search uncovered $23,000 in cash in a hidden compartment in the car. *Id.* at 5A.

Vasquez's key witness in support of his defense at trial was Perez's wife, Marina. *Id.* at 6A, 12A. Marina testified that her husband had asked her to pick him up at the scene of the failed drug deal that day, but she had asked Vasquez to go in her place. *Id.* at 12A. Vasquez agreed to do so and took Perez's black Bonneville, rather than his own car, as a matter of convenience. *Id.* If credited, Marina's testimony suggests that Vasquez had no idea that a drug deal was planned but instead showed up at the scene in the car with the hidden cash only by happenstance. *See id.*

The government was suspicious of Marina's story and sought a continuance based on recordings of telephone conversations between Marina and her husband, who was incarcerated at MCC at the time, that it had obtained. *Id.* at 12A-13A. The government insisted that these recordings went to the truthfulness and accuracy of Marina's testimony; Vasquez's counsel vigorously objected. *Id.* at 13A. The trial judge found that the "recordings were admissible as evidence of Marina's interest, bias and

prejudice, and of her prior inconsistent statements." *Id.* Specifically, the judge stated that "[w]ith respect to interest, bias, and prejudice … if any of these statements can be interpreted as such to indicate an interest, bias or prejudice, *they would go in for their truth*." *Id.* at 16A (quotation omitted). The government re-called Marina to the stand as a rebuttal witness when the trial resumed and introduced the MCC recordings, which, among other things, included Marina telling her husband that Vasquez's lawyer had said that "everybody is going to lose" if they go to trial. *Id.* at 13A-14A.

A jury convicted Vasquez of conspiring to possess more than 500 grams of cocaine with intent to distribute. *Id.* at 2A, 6A. The jury, however, found Vasquez not guilty on a second count charging him with attempted possession with intent to distribute more than 500 grams of cocaine. *Id.* at 5A-6A.

2. On appeal, the Seventh Circuit found that the trial judge erred in admitting the MCC recordings into evidence for their truth. *Id.* at 16A; *see also id.* at 18A (Hamilton, J., dissenting). The Seventh Circuit majority noted, however, that this error would only warrant reversal of Vasquez's conviction and remand for a new trial if it was not harmless. *Id.* at 16A (citing *U.S. v. Olano*, 507 U.S. 725, 734 (1993)). The majority recited the following test for harmless error: "whether, in the mind of the average juror, the prosecution's case would have been significantly less persuasive had the improper evidence been excluded." *Id.* at 16A-17A (quoting *U.S. v. Emerson*, 501 F.3d 804, 813 (7th Cir. 2007)). The burden of proof on the harmlessness inquiry, the court stated, "lies on the government to prove that a reasonable jury

would have reached the same verdict without the challenged evidence." *Id.* at 17A (citing *U.S. v. Williams*, 493 F.3d 763, 766 (7th Cir. 2007)).

The Seventh Circuit majority proceeded to review the record. The court stated that it was "[l]ooking at the evidence as a whole" to determine whether the trial judge's error in admitting the MCC recordings was harmless. *Id.* at 17A. The court detailed the evidence that formed the government's case against Vasquez: Vasquez's flight from the crime scene, the cell phone logs showing that Vasquez had repeatedly contacted Perez prior to the aborted drug deal, Vasquez supposedly telling Cruz to "tell him we got the money here," similarities between the drug deal intercepted by police here and that underlying Vasquez's prior drug conviction in 2002, and the $23,000 in cash hidden in the Bonneville that Vasquez was driving. *Id.* at 17A-18A. Against this backdrop, the Seventh Circuit reasoned that "[t]his evidence … would have moved the jury to convict without a nudge from anything it heard in the government's rebuttal case," which included the improper introduction of the MCC recordings to refute Marina's testimony in support of Vasquez's defense. *See id.* at 18A.

Inconsistent with its assertion that it "look[ed] at the evidence as a whole," however, the court took no notice of any evidence that Vasquez put forth to contest the government's case against him. That evidence included Marina's testimony that Perez had asked her to pick him up that day, but she had asked Vasquez to go instead (suggesting Vasquez lacked both the knowledge and intent required to conspire). A rational juror (absent the error) could have relied

on this innocent explanation of Vasquez's presence at the scene to acquit him on the conspiracy charge. There was no more powerful proof of this rational possibility than the juror's actual decision on the evidence before it to acquit Vasquez on the intent-to-distribute charge.

B. The Seventh Circuit's Harmless-Error Analysis Is Inconsistent With *Neder*

As noted, the list of evidence catalogued in the Seventh Circuit's brief review of the trial record omitted entirely any evidence that Vasquez had presented in support of his defense, which was premised on the assertion that "he was only an innocent bystander who just happened to be in the wrong place at the wrong time." Pet. App. at 12A. Such evidence, however, clearly existed: in its description of the proceedings at trial, the Seventh Circuit majority itself noted that "Vasquez called several witnesses, including Perez's wife, Marina," in support of his defense. *Id.* at 6A. The Seventh Circuit majority's failure to take this evidence contesting the government's theory of the case into account when conducting its harmless-error review is at odds with this Court's decision in *Neder*.

As Judge Hamilton, dissenting below, put it, the majority essentially found that the error in admitting the MCC recordings was harmless "because the government had so much other evidence against Vasquez." *Id.* at 23A. But as discussed above, the focus should have been on "whether the record contains evidence that could rationally lead to a contrary finding [i.e., an acquittal]," had the lawyer's statement been excluded. *Neder*, 527 U.S. at 19. In

order to make that determination, a court obviously must review and consider any evidence introduced at trial that might support "a contrary finding" by the jury. The Seventh Circuit majority simply did not do so in this case.

The record, however, indicates that Vasquez presented such evidence, which should have been taken into account in the harmlessness inquiry. For example, "Marina Perez's testimony provided an innocent explanation for Vasquez's presence on the scene in the car with the hidden money." Pet. App. at 25A (Hamilton, J., dissenting). Moreover, Cruz testified that Perez was not supposed to bring any money with him to the deal, at least arguably negating any inference of culpability to be drawn from the cash hidden in the Bonneville that Vasquez was driving. *See id.* And Cruz's testimony that Vasquez had said "tell him we got the money here" at the scene of the crime was subject to strong credibility attacks: Cruz was a cooperating witness who admitted on the stand that he had lied to the government about Vasquez, and he acknowledged that he first told the government only a week before the trial that Vasquez had made this alleged statement. *Id.* at 25A-26A. There was thus at least a plausible basis for the jury to discredit Cruz's testimony that Vasquez had said "tell him we got the money here."

In short, despite the majority's cursory review of the record, Vasquez cast doubt on several features of the government's case and presented credible evidence of his own that, if believed, could have supported his account of how he innocently found himself at the scene of the deal. Whether or not Vasquez's defense was sufficient to warrant his ac-

quittal on the conspiracy charge was, of course, a question for the jury to decide. *See Neder*, 527 U.S. at 19 ("A reviewing court making this harmless-error inquiry does not … become in effect a second jury to determine whether the defendant is guilty." (quotation omitted)). But in order for a reviewing court to fulfill its function of "ask[ing] whether the record contains evidence that could rationally lead to a contrary finding," *id.*, that court must actually review and consider the *entire record* to judge whether it contains a sufficient basis to permit a reasonable jury to find in the defendant's favor (or whether the original guilty verdict necessarily resolved all triable issues of fact in the government's favor). The Seventh Circuit majority's failure to address the entire record reflects its deeper analytical error, *viz.*, evaluating harmlessness by examining only the strength of the government's case, rather than by asking whether there were triable issues of fact that could have been resolved in the defendant's favor absent the error.

III. THE FIFTH CIRCUIT'S HARMLESSNESS ANALYSIS IS SIMILARLY INCONSISTENT WITH *NEDER*

The Fifth Circuit's finding of harmlessness in Skilling's case was, if anything, even more at odds with *Neder* than the decision below. But it exemplifies the kind of misunderstanding and misuse of the *Neder* standard that all too commonly characterizes harmless-error review in the lower courts.

The defense evidence in Skilling's case was extensive. *Skilling* Pet. 8-20. Yet the Fifth Circuit ignored Skilling's evidence, believing that its task un-

der *Neder* was not to decide whether it was clear beyond a reasonable doubt that a rational jury would have found Skilling guilty absent the error, but merely to determine whether "the evidence presented at trial proves that Skilling conspired to commit securities fraud." *Id.* at 23. Applying that incorrect standard, the Fifth Circuit found the error in Skilling's case—the inclusion of an invalid "honest services" fraud charge—to be harmless, because in its view, the government's evidence supporting the valid legal theory (securities fraud) was "overwhelming." *Id.* at 24.

Had the Fifth Circuit applied the appropriate legal standard, the court would have had no choice but to find the error non-harmless. As extensively detailed in Skilling's petition for certiorari, Skilling contested the government's securities-fraud case at every step. *Id.* at 8-20. Indeed, even the government never argued to the Fifth Circuit that the error in Skilling's case was harmless because its evidence of guilt on securities fraud was "overwhelming."[3] On the contrary, one lead prosecutor acknowledged after trial that the case against Skilling was plagued by "fundamental weaknesses," because Skilling "took steps seemingly inconsistent with criminal intent," there were "no 'smoking gun' documents," and prosecutors relied heavily on cooperating witnesses who had "marginal credibility." Hueston, *Behind the*

[3] The government instead argued that its honest-services fraud case was essentially identical to its securities-fraud case, so the court could be confident that the actual verdict reflected a valid guilty finding on securities fraud. The Fifth Circuit squarely (and correctly) rejected that argument. *Skilling* Pet. 23, 28.

Scenes of the Enron Trial, 44 Am. Crim. L. Rev. 197, 197-98, 201 (2007). Under any plausible reading of *Neder*, the Fifth Circuit's harmlessness determination was plainly incorrect.

Even more egregious, the Fifth Circuit expressly recognized that Skilling's own testimony "contested his liability under any theory of guilt." *Skilling* Pet. 35. Yet the court wholly ignored Skilling's testimony, finding it to have been "self-serving," and determining that the jury must have already rejected it by rendering its original guilty verdict. *Id.* at 24. The latter finding was, of course, incorrect—the jury may well have believed Skilling's testimony as to the valid securities-fraud count, but disbelieved him on the invalid honest-services count. And the court's former finding—that the testimony was "self-serving" and thus unworthy of belief—is a classic question for the jury, and one the Fifth Circuit could not have more directly and erroneously usurped in affirming Skilling's conviction. Indeed, the trial record makes clear beyond all doubt that the jury *did not* fully reject Skilling's testimony. After hearing Skilling's extensive testimony in his defense (something Vasquez did not offer), and the government's evidence that Skilling engineered an alleged "pump and dump" scheme to inflate Enron's stock price and then sell his shares of Enron stock, the jury *acquitted* Skilling on nine of ten counts of insider trading, *id.* at 35-36—acquittals on which this Court relied as key evidence that the jury was not biased against Skilling. *See Skilling*, 130 S. Ct. at 2916.

The Fifth Circuit's decision undermined the fundamental role of the jury in determining guilt and innocence. But that is the necessary consequence of

applying the "overwhelming evidence" test, rather than the analysis required by *Neder* and the Sixth Amendment. On the full record, the government's case against Skilling was neither overwhelming, nor undisputed, nor bereft of rational bases on which a reasonable jury could acquit Skilling of the only valid legal theory of conspiracy the government put forth. The Fifth Circuit in Skilling's case, like the Seventh Circuit below, could find harmlessness only by improperly acting as the thirteenth juror. A proper application of the harmless error standard in this case will help ensure that courts do not make the error the Fifth Circuit made in Skilling, and that other courts make all too frequently in other cases.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below, as well as the judgment of the Fifth Circuit in Skilling's case.

Respectfully submitted,

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