No. 11-__

IN THE

Supreme Court of the United States

JEFFREY K. SKILLING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DANIEL M. PETROCELLI
(*Counsel of Record*)
dpetrocelli@omm.com
M. RANDALL OPPENHEIMER
MATTHEW T. KLINE
DAVID J. MARROSO
O'MELVENY & MYERS LLP
1999 Avenue of the Stars,
7th Floor
Los Angeles, California 90067
(310) 553-6800

WALTER DELLINGER
JONATHAN D. HACKER
ANTON METLITSKY
DEANNA RICE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Petitioner

QUESTIONS PRESENTED

This Court's decision in *Neder v. U.S.*, 527 U.S. 1 (1999), holds that a constitutional error is harmless only when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 18. If "the record contains evidence that could rationally lead to [an acquittal]" absent the error, then the error cannot be deemed harmless. *Id.* at 19.

The questions presented are:

1. Whether *Neder* permits a court conducting a harmless-error analysis in the context of an "alternative theory" case to consider only the strength of the Government's case on the legally valid theory, without regard to whether the defendant contested that theory enough to create a factual dispute that rationally could have been resolved in the defendant's favor.

2. Whether a court conducting a harmless-error analysis in the context of an "alternative theory" case may categorically exclude the defendant's testimony in his own defense on the legally valid theory.

PARTIES TO THE PROCEEDING

Petitioner is Jeffrey K. Skilling, defendant-appellant below. Additional defendants in the district court, who were not parties in the court of appeals and are not parties here, were Kenneth L. Lay and Richard A. Causey.

Respondent is the United States of America, appellee below.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES
(continued)

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeffrey K. Skilling respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The decision of the court of appeals following remand from this Court is reported at 638 F.3d 480, and is reprinted in the Appendix to the Petition ("App.") at 1a-18a.

JURISDICTION

The court of appeals issued its decision on April 6, 2011. App. 1a. Petitions for rehearing and rehearing en banc were denied on August 29, 2011. App. 19a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

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

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

INTRODUCTION

This case returns to this Court after remand to the Fifth Circuit in *Skilling v. U.S.*, 130 S. Ct. 2896 (2010), to conduct a harmless-error analysis. The court of appeals' analysis, however, bears no resem-

blance to the inquiry mandated by this Court's precedents. A summary reversal is in order.

Jeffrey K. Skilling is serving a 24-year sentence for alleged frauds at Enron. His convictions arise from an "alternative theory" prosecution—the core alleged offense 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. The Government, however, contended that the improper honest-services object was harmless beyond a reasonable doubt because it was superfluous. According to the Government, the only conduct alleged to be honest-services fraud was *also* securities fraud, and thus Skilling was permissibly convicted of conspiracy despite the impermissible honest-services object. Rather than address that contention in the first instance, this Court remanded the case to the Fifth Circuit to evaluate the Government's harmless-error argument.

On remand, the court of appeals squarely *rejected* the Government's theory. The court held that the trial record included "evidence that would prove honest-services fraud, but not securities fraud," thereby refuting the Government's submission that "a conviction on honest-services grounds in this case would necessarily find facts establishing guilt on securities-fraud grounds." App. 8a n.4.

But the court did not vacate the convictions and remand the case for a new trial focused on the securities-fraud theory alone. The court instead found the honest-services charge to be harmless on the basis of an argument so remarkable the Government did not even advance it in the remand proceeding. According to the court of appeals, the honest-services object was harmless simply because the Government's securities-fraud case was strong enough to establish—to the court's satisfaction—that Skilling committed securities fraud. The "crux of the matter," the court asserted, was simply "whether, under the *Neder* standard, the evidence presented at trial proves that Skilling conspired to commit securities fraud." App. 8a.

That analysis is completely at odds with this Court's precedents governing the harmless-error inquiry, and with decisions of other circuits applying those precedents. Under this Court's decision in *Neder v. U.S.*, 527 U.S. 1 (1999), a court conducting harmless-error review in this context must "conduct a thorough examination" of the entire record, including the defendant's side of the case, to determine whether he "contested the [valid theory] and raised evidence sufficient to support" an acquittal by a rational juror on that theory. *Id.* at 19. If a reasonable jury *could* have acquitted on the valid theory, a new trial is mandatory, because under the Sixth Amendment, only the *jury* can decide guilt on a valid offense. *Id.* (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 where the valid theory was both "uncontested and supported by

overwhelming evidence," *id.* at 17, the jury could not rationally have voted to acquit on the valid theory, so the reviewing court can be confident that the invalid theory did not affect the outcome.

The decision below makes a mockery of *Neder*'s harmless-error standard and the critical jury-trial-right safeguard it represents. Far from considering whether Skilling "contested" guilt and thereby created a material dispute for jurors to resolve on the securities-fraud schemes, the decision explicitly *excludes from the analysis* Skilling's extensive and detailed testimony forcefully contesting his guilt. And it ignores other crucial documents and testimony favorable to the defense.

Even the Government did not go so far as to argue that Skilling's testimony in his own defense could properly be excluded from the harmless-error analysis. Yet having rejected the Government's separate theory of harmlessness (which did not require excluding Skilling's testimony), the court could find harmlessness only by ignoring Skilling's side of the case, because nobody in this case—including the Government—has ever suggested that Skilling had no serious defense to the Government's securities-fraud evidence. Indeed, prosecutors openly conceded the exact opposite, *viz.*, that their case had significant weaknesses, including crucial witnesses seriously impeached by favorable plea deals, the absence of any "smoking gun" documents, and conduct by Skilling inconsistent with criminal intent. And the actual jurors, of course, acquitted Skilling on nine of the most important counts in the case.

As things stand, Skilling is serving a 24-year prison sentence based on a core conviction for conspiring to commit securities fraud, when *nobody knows whether the jury convicted him of conspiring to commit securities fraud*, because a reasonable jury most certainly *could* have acquitted him of securities fraud while finding him guilty of the invalid honest-services fraud offense. It was only his appellate panel—not his jury—that clearly convicted Skilling of securities fraud.

In addition to offending the Sixth Amendment and this Court's precedents, the decision below contradicts the consistent course of harmless-error review in the circuits before and after this Court's decision in *Skilling*. Before *Skilling*, courts applying *Neder* recognized that even a strong Government case would not make an error harmless where the defense adduced evidence sufficient to permit a rational juror to acquit absent the error. And the First Circuit *specifically* held that a defendant's own testimony must be considered in the harmless-error analysis. The Fifth Circuit held the opposite here.

Since *Skilling*, several courts have grappled with the application of *Neder* to the particular context of alternative-theory honest-services error. The Third and Seventh Circuits got it right, reversing convictions where a reasonable juror *could* have acquitted on a valid alternative theory, even if it was not *likely* that the actual jurors did acquit. The Fifth Circuit here, by contrast, did not analyze how a reasonable juror would have evaluated Skilling's defense, but instead focused on the Government's case and weighed evidence, inferences, and credibility for itself. Unless reversed by this Court, the decision will

be relied upon by courts in the Fifth Circuit and elsewhere to find alternative-theory errors harmless so long as the Government presented a strong case on a valid theory, even where the defendant presented credible testimony in his own defense on that theory, and even where a juror rationally could have relied on that testimony and other evidence to acquit on the valid theory.

Accordingly, certiorari should be granted and the decision should be reversed. Indeed, the court of appeals' departure from the *Neder* rule is so blatant and indefensible that summary reversal is warranted. *See Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (per curiam) (summary reversal on harmlessness standard in alternative-theory case).

STATEMENT OF THE CASE

A. Background

In 2001, Enron Corporation, then one of the largest corporations in America, went bankrupt. Skilling was a longtime Enron executive, serving as its President and COO before assuming the position of CEO, which he held from February to August 2001. In 2004, Skilling was indicted along with Enron Chairman and CEO Ken Lay and Enron Chief Accounting Officer Richard Causey for alleged Enron-related crimes. Count One of the indictment alleged an overarching conspiracy to commit wire or securities fraud. The other counts, which charged Skilling with securities fraud, making false statements to Enron's auditors, and insider trading, alleged con-

duct that flowed from the conspiracy described in Count One. R:881-902.[1]

B. The Distinct, Alternative Fraud Theories

The Count One conspiracy alleged multiple objects. One was the so-called "honest-services" theory of wire fraud. 18 U.S.C. § 1346. As it did in other Enron prosecutions, the Government asserted numerous alleged acts of "honest services" fraud during trial. As described to jurors in closing, its central theory was that Skilling conspired to create a "culture" to "do transactions that maximized financial reporting earnings as opposed to maximizing the economic value of the transactions." R:36467. Skilling thus allegedly de-emphasized the "actual operations of the company" in favor of "[m]eeting the [Wall Street] consensus estimate." R:36513; *see* R:21239, 22848, 22843. Skilling's focus on "numbers" rather than "actual operations," the Government said, were criminal violations of his fiduciary duties of "honesty," "candor," "loyalty," and "honest services." R:14751, 14757-58, 14784, 14799-800, 15114-15, 15864-67, 21224-25, 22769-70, 29610-11, 32262-64, 36522, 36568, 37013-14, 37043, 37065. At bottom, the Government argued, Skilling violated his duty "to do [his] job and to do it appropriately." R:37065.

A second, distinct object of the alleged conspiracy was securities fraud. As the Fifth Circuit panel below correctly explained, the Government's securities-fraud case essentially relied on five alleged

---

[1] Citations to "R" and "SR3" refer to the record and supplemental record in the court of appeals; "JKS" refers to exhibits below; "GX" refers to exhibits introduced by the Government; "DX" refers to exhibits introduced by Skilling.

"schemes," each of which involved Skilling's supposed participation in purportedly fraudulent transactions or misstatements. But for each scheme, Skilling mounted a vigorous defense to the Government's securities-fraud theory, based not only on his own direct testimony, but also on contemporaneous documents and admissions extracted from the Government's own witnesses, as shown below.

C. The Sharply Contested Evidence Of Securities Fraud

The following recitation of the record includes more detail than the Court sees in most petitions for certiorari. But it is necessary to frame the legal error at issue, *viz.*, whether the Fifth Circuit misinterpreted *Neder*'s harmless-error standard. As the following recitation shows, there was more than enough record evidence to permit a reasonable juror to acquit Skilling of securities fraud. The point is not that jurors were *required* to acquit him of securities fraud. It is that they rationally *could* have acquitted him of securities fraud, thereby eliminating any confidence that Skilling's convictions rested on the valid securities-fraud object, rather than on the legally invalid honest-services fraud object.[2]

1. *LJM Transactions*

The Government at trial contended that Skilling conspired to use LJM and LJM2, two partnerships

[2] Each of the following "schemes" also included an honest-services fraud version, i.e., a version that allowed the jury to find a criminal breach of fiduciary duty without finding all the elements of securities fraud. *See* Skilling C.A. Remand Br. 23-35.

run by Andrew Fastow, who served as Enron's CFO, to hide Enron's nonperforming assets and book earnings to meet its earnings targets. The Government argued that Skilling was intimately involved in the Enron-LJM "Barges" deal, which involved the sale of Enron's interest in power-generating barges off the coast of Nigeria, and the Enron-LJM "Cuiaba" deal, which involved the sale of Enron's interest in a power plant in Brazil. The Government claimed that Skilling had agreed that Enron would buy the assets back from LJM if a permanent buyer could not be found, essentially insuring LJM against a loss while Enron booked gains on the sales.

The evidence that Skilling approved or was aware of any buy-back promises was far from uncontested. Indeed, the *only* evidence of Skilling's involvement in the Barges and Cuiaba deals came from Fastow, R:21278-80, an admitted fraudster and thief whose credibility was seriously impeached. *Infra* at 30, 36. Skilling himself denied making any buy-back promises. R:28708-09. Enron Treasurer and Government witness Ben Glisan likewise testified he had no knowledge that Skilling ever provided buy-back guarantees on Barges or Cuiaba, R:24617-18, and no other witness said that Skilling made these promises.[3] Fastow further conceded that Skilling never used the word "guarantee"—that was merely Fastow's "interpretation." R:22271. Fastow admitted that the "promise" was legally unenforcea-

[3] In fact, Glisan and Chris Loehr said they heard that, if anyone, *Rick Causey—not* Skilling—implied LJM would not lose money on Cuiaba. R:24337, 22718.

ble, R:21818-20, and that "there was some risk" to LJM in both deals, R:21268-69.

A reasonable juror could have concluded from that record that Skilling did not make any buy-back promises in connection with Barges and Cuiaba.[4]

2. *Enron Broadband Services*

The Government also alleged that Skilling conspired to underreport the projected losses of Enron's broadband division, Enron Broadband Services ("EBS"), and that when those losses became too large to hide within EBS, Skilling merged EBS into Enron's Wholesale division to keep the public unaware.

That theory was also sharply contested. Skilling presented evidence showing that *every* fact that he supposedly hid from investors regarding EBS's financial problems was publicly disclosed. Directly contrary to the Fifth Circuit's conclusion that Skilling concealed EBS's loss of $102M in 2001, Skilling's evidence showed that the loss was *repeatedly* disclosed:

- Enron's July 12, 2001, earnings release states: "Enron Broadband Services reported a $102 million IBIT loss…." DX11907 at 959.
- On a July 12, 2001, analyst call, Skilling stated: "Broadband services reported $102 million

[4] The honest-services version of the alleged LJM fraud was that Skilling subjected Enron to improper risk by permitting Enron's CFO to wear two hats—CFO of Enron, and general partner of LJM. R:21238-39; 29830-32; 36529-31. The Government argued that this conflict exposed to Enron to "*Wall St. Journal* risk," i.e., risk of public criticism for the conflict. R:36529-31.

IBIT losses in the second quarter…." DX20605 at 6.

- Enron's 10-Q for the second quarter of 2001 reports the same loss. GX1034:2528.

Skilling also presented evidence rebutting the Government's assertion that EBS met its earnings targets in 2000 only by engaging in transactions that fell outside of its "core" businesses. Ken Rice (CEO of EBS) admitted that "dark fiber sales and swaps are part of EBS's intermediation business," and made clear, "I don't want to give the impression that there's anything wrong with that." R:17919-20. Enron's head of Investor Relations agreed that the sales were "part of Enron's business." R:16199-200.

Skilling's evidence also showed that these transactions were fully disclosed. Enron's 10-Q stated: "Gross margins for the first quarter of 2000 *primarily reflects* earnings from sales of *excess fiber capacity* and an increase in *market value of [EBS's] merchant investments*." GX1033:2510 (emphases added). Other EBS disclosures similarly address these transactions—be they contract monetizations, fiber deals, or gains and losses in merchant investments (*e.g.*, EBS's investment in a company like Avici). R:16200-02, 17917, 17920-21, 20999; GX1028:22; GX1032:2341; GX1033:2510. Both Rice and fellow EBS executive Kevin Hannon testified that *all* fiber sales and merchant investments were adequately disclosed. Asked whether there was "any problem with how Enron or EBS disclosed its gains," Rice said: "No, there's no problem that I know of." R:17920-21. Other witnesses confirmed "there were repeated disclosures." R:20999; *see* R:16201.

Rice and Hannon also confirmed that LJM2 paid a *market* price for the fiber it bought. Rice said, "[i]t was a negotiated arm's length transaction," R:17922, and Hannon agreed, "they were all legitimate transactions," R:20997, based on "heated discussions" with LJM2, R:21000-01; 17922-23 (Rice; same). Hannon confirmed that five months after EBS sold dark fiber to LJM2, the market price of fiber went up—meaning that LJM2 netted a *profit*. R:21000.

Like EBS's other "merchant investments," its investment in Avici, an internet start-up, was properly disclosed. Hannon admitted that Avici was a shrewd investment, properly disclosed, and that the LJM hedge "had nothing to do with" Enron's reported gain. R:20999, 21003. One witness initially claimed Enron's Avici disclosure was inadequate, but conceded on cross examination that he was wrong and it was properly disclosed in Enron's earnings release. R:15270, 16229-54; GX1009:3. Skilling also presented evidence to show that Enron had properly disclosed two Blockbuster-EBS video-on-demand contracts, labeled Braveheart I and II,[5] and Rice admitted they were legal, R:17616-17.

A reasonable juror could have concluded from that record that Skilling did not conspire to hide EBS losses.[6]

---

[5] Enron disclosed Braveheart I in a press release: "[EBS] reported a $60[M] IBIT loss for 2000 [including a] successful monetization of a portion of Enron's broadband delivery platform." GX1011:3. So too with Braveheart II, which represented $58M of $83M in revenue. DX30661:3.

[6] The honest-services version of the alleged EBS fraud was that Skilling made a bad business judgment investing so heavi-

3. *Wholesale*

The Government also accused Skilling of fraudulently portraying Wholesale as a "logistics" company (one that made profits by delivering gas and electric power to customers and energy trading), rather than as a mere "trading" company (like Goldman Sachs). According to the Government, the two labels "imply very different levels of risk." R:24173.

This theory, too, was vigorously contested at trial. Skilling showed that Enron operated one of the largest physical energy networks in the world—something no mere "trading" company owns. R:28310-15; JKS:5-12. He also showed that whatever labels he used, Enron's *actual risks* were fully disclosed. The proof of this was Enron's SEC filings, which quarterly disclosed Enron's "Value-at-Risk," or "VaR." Enron's Annual Report also disclosed that Enron's "commodity price risk," a subset of "Trading Market Risk," was as high as $81M in 2000 (well-up from 1999), and highlighted that "increased price volatility in power and gas markets caused Enron's value at risk to increase significantly." GX996:1180. Similar filings disclosed Enron's actual risk. GX994:1050; GX1021:1549-50. Because these risks were disclosed, the Government could object only to Skilling's subjective label for Wholesale as a "logistics" company. But labels like "logistics" and "trad-

---

ly in the broadband business when the market was turning against it and the so-called "tech-stock bubble" was bursting. R:14759-60, 36497-98.

ing" have *no* accounting significance and are *not* addressed in any SEC or other rules.[7]

A reasonable juror could have concluded from that record that Skilling did not conspire to mislead investors about Wholesale's risks.[8]

4. *Accounting Reserves*

The Government also sought to establish that Skilling conspired to manipulate Enron's accounting reserves for contingent liabilities in order to hit specific earnings targets. The Government challenged three reserve reports, but its case was not strong enough on two of them to justify a harmlessness finding, according to the Fifth Circuit. App. 17a. The one reserve report cited by the decision below involved the Q4 2000 reserves. Skilling purportedly told Wholesale in January 2001 to shift as much of its excess reserves to earnings as needed to report 41 cents per share, allegedly causing Enron's stock

---

[7] Skilling also presented evidence, in the form of Enron's Daily Position Reports ("DPRs")—documents recording the company's *actual* daily gains and losses—to show that the actual single-day gains and losses attributed to trading activity were significantly smaller than the Government claimed and, in fact, arose from anomalies in small trading positions, not speculative bets. DX5339; DX5346-47; R:28902-06. The DPRs, Enron's VaR, and its passing tests like the Kupiec test (GX289:418), all showed that Enron's actual "open" positions (i.e., those exposed to price risk) were modest, and that Enron's controls worked. *E.g.*, R:28907-11.

[8] The honest-services version of the alleged Wholesale fraud was that Skilling was overly focused on short-term earnings targets and thus caused Wholesale to take on "too much risk." R:36446; *see* R:19710-11, 19847, 22389, 36508-12.

price to go up after Enron reported its quarterly earnings.

Skilling again strongly disputed this theory at trial. He presented extensive evidence showing that Wholesale's reserves were already in place by January 2001. For example, "[o]n December 29, 2000," Enron set a $369 million gas-and-power reserve to account for significant volatility in energy prices. GX4643; *see* R:21729-30; DX4126:5797; DX4893:68450. Accordingly, Enron's earnings were at 40 cents on December 30, and another unit—not Wholesale—contributed the extra penny in earnings. R:19612-13, 18331-41.

The accuracy and reasonableness of the $369M reserve was confirmed by Enron accountant Georgeanne Hodges in a memo to Arthur Andersen. GX4643. Hodges' memo was supported by corroborating evidence, including:

- Andersen's approval of the analysis, which "concurred with the reserve theory and determined [$369M] was reasonable," DX4126:5797;
- Government witness Wes Colwell, who confirmed the memo "took into account the way some of these contracts might perform," R:21735;
- Defense expert Walter Rush, who confirmed the memo's analysis and validity, R33932-36; and
- The Enron Board Audit Committee's review of the reserve, R:33936.

No government witness challenged the accuracy of the final reserve amount, R:21734-41, and nobody disputed that the way in which it was released in 2001 fully reflected abating market volatility. R:19623-24, 18331-41.

Unable to show that the reserve *amount* was flawed, the Government attacked the reserve *process*, arguing that Skilling unlawfully set amounts, in part, based on Enron's desired level of earnings. R:19345-47, 19350-61. But Skilling disputed that fact, as just shown, and his expert further testified that fixing reserves based in part on earnings targets is, in any event, *permissible* under the accounting rules, *if* the final reserve amount is reasonable: "The requirement is that you get the reserve right. As long as you get the reserve right, that's fine." R:33930.

A reasonable juror could have concluded from that record that Skilling did not conspire to manipulate reserves in contravention of accounting rules.[9]

5. *EES*

Finally, the Government asserted that Skilling conspired to transfer losses and the risk-management books from Enron's retail division, Enron Energy Services ("EES"), to Wholesale, a higher-revenue division. The aim of this transfer, the Gov-

[9] The honest-services version of the alleged reserves fraud was that even if "backing into" reserves is not securities fraud, the practice is still somehow "wrong," as several Government witnesses insisted. R:16140 ("I think that's wrong"), 18377 ("I felt it was wrong"), 36525 ("It's not supposed to be backwards like that.").

ernment hypothesized, was to make EES appear more profitable than it actually was.

Yet again, the Government's theory that Skilling orchestrated an illegal resegmentation of EES was sharply contested at trial.

First, Skilling argued that Enron had a good business reason to resegment EES. Wholesale's and EES's relationship long had been inefficient and contentious, culminating in an unauthorized $90M trading loss by EES to Wholesale in early December 2000. R:28976-82; DX21358. This triggered the resegmentation in late March 2001, and Enron publicly reported this efficiency rationale for the transfer. DX20603:6. Witness after witness agreed that the transfer created efficiencies,[10] supporting Skilling's claim of innocent intent.

In addition, substantial evidence validated the accounting and disclosures for the resegmentation. Dave Delainey, former CEO of Enron Wholesale, testified that Causey and Colwell (Enron's top accountants) told Skilling that the accounting for the transfer was "rock-solid." R: 19976-78, 20277-79. Arthur Andersen likewise approved the accounting and disclosures, R:20277-79, 33965-72, 33985-86, as did Skilling's unrebutted accounting expert. R:33986, 33942-88.

---

[10] R:20332 (Delainey: "Q: ... more efficient? A: Absolutely"); R:21209 (Hannon: done "to improve the operation of EES"); R:19445 (Curry: "better systems ... could be leveraged"); R:20174-75, 20193-94 (Belden: "better job could be done of that supply acquisition," "better job of handling the EES functions"); R:16559 (Koenig: "sure there were [efficiencies]"); R:26711 (Herndon: "definitely efficiencies").

Skilling disputed that bad debts, contract losses, and unanticipated expenses motivated the resegmentation, and his evidence supported his defense. He showed that bad-debt losses were not shifted by the resegmentation, because they had *always* been recorded in Wholesale. R:29335. Enron's "Schedule C"—a Wholesale reserves document, R:19339-40—confirmed that the "negative CTC exposure" (i.e., the bad debt) was carried on Wholesale's books in 2000, months before the 2001 resegmentation. GX:2920; R:19338-40.

Skilling also showed that no "contract losses" were shifted. His accounting expert testified that the FASB accounting rules for establishing a reserve require that, when there is a *range* of equally possible outcomes, a reserve must be set at the *lowest* alternative, even if that number is zero. R:33921-24, 34059. The Government's key witness on alleged "contract losses," Wanda Curry, claimed potential "losses" could be as high as $250M. R:19414. She admitted, however, that her analysis was incomplete and that she had no role in reserve decisions. SR3:4146, 4171. Delainey dismissed Curry's estimate, cutting it to $100-150M, but that was "eyeballed." R:20460-63. Skilling testified that Lou Pai, Enron's executive closest to the EES contracts, assured him that *no* losses were likely to occur, R:28990-92, and documents confirmed that Enron had eliminated its contract risk at its largest alleged exposure, R:29011-13, DX6998:129. Tellingly, Wholesale did *not take a reserve* for these contracts in Q1 2001, *see* GX2920—meaning the FASB reserve test was *not* met, and no EES "contract loss" was moved to Wholesale.

Skilling's evidence also showed that "unanticipated expenses"—i.e., a California energy surcharge—did not motivate the EES resegmentation. Two analyses of the surcharge done March 1, and 27-28, 2001, calculated potential impacts on EES. DX33125 & DX20702. These studies estimated the charge could result in a loss, an immaterial loss, or even a "$17M" *gain*—meaning the FASB reserve test was not met. *Id.*; R:33924, 29009-10.[11] Delainey claimed the surcharge "loss" was real and led to the resegmentation, but he admitted on cross that he knew nothing about the analyses showing Enron might realize a gain. R:19991-92, 20472-74. Delainey was also demonstrated (through incontestable videotape and computer records) to have lied about key facts concerning this chronology. Skilling C.A. Merits Br. 48-49; DX20728:31-32; R:19975-76, 30753-55; DX22380-83.

Unable to show any real loss *prior* to the March 29 resegmentation decision, the Government noted that Wholesale took reserves *after* the decision but before the Q1 2001 earnings release on April 17—for something called "Tariff" and "Tariff-fuel adjustment." R:30400-08. The Government, however, offered no proof that Skilling knew about these reserves prior to the decision or that the reserves motivated the decision. Indeed, Delainey—Skilling's accuser—admitted he had no knowledge of the "Tariff" reserves. R:20472-74. And the Government offered no evidence of the content of these reserves or

[11] The Enron employee running the analysis said that if he was forced to choose on March 1, the $17M *gain* was the most likely. R:26623-24.

how they were funded. *Id.*; R:34322-27, 30400-08; GX6621.

If any such evidence existed on this point, the Government would have elicited it from Wes Colwell—Wholesale's top accountant, key decision-maker on reserves, and the architect of the EES re-segmentation. Tellingly, the Government never asked him any questions on these or any other EES topics, R:19300-73, as Skilling pointed out in closing, R:36761.

A reasonable juror could have concluded from that record that Skilling did not conspire to misstate EES's losses.[12]

* * * *

In response to the array of evidence adduced by Skilling to support his defense to securities fraud, the Government took care to ensure that jurors had an alternative path to conviction. It fought vigorously for an honest-services fraud instruction (R:41328), successfully requested instructions specifically advising jurors that there were "two different" fraud theories and that jurors could rely on *either* theory (R:36412-14), successfully opposed Skilling's request for a special-verdict form, ensuring that the actual basis for any fraud finding would be unknown (R:35899, 36020-21), and repeatedly reminded jurors during closing that they could convict on honest-services grounds *or* securities-fraud grounds (R:37042, 37047, 37013-14, 37065-66). The Govern-

[12] The honest-services version of the alleged EES fraud was that the EES resegmentation was improper because it lacked a sufficient "business purpose." R:19979-80; 20582-83; 36525-31.

ment returned to the latter point in the culmination of its closing rebuttal, emphasizing to jurors that even if they did not find the demanding elements of securities fraud, the Government needed only to prove that Skilling agreed "to do something illegal," including violating his duty of "good faith and honest services," i.e., his duty "to do [his] job and to do it appropriately." R:37065.

D. Verdict, Sentencing, Appeal, And Decision By This Court

On May 25, 2006, the jury acquitted Skilling of 9 counts of insider trading. The jury convicted Skilling on 19 counts: one count of conspiracy to commit securities or wire fraud; 12 counts of securities fraud; five counts of making false statements to auditors, and one count of insider trading. Skilling was sentenced to 292 months' imprisonment, three years of supervised release, and $45 million in restitution. App. 3a. He has been incarcerated in federal prison since December 13, 2006.

On appeal, the Fifth Circuit affirmed the convictions, holding, inter alia, that the Government's broad and vague fiduciary-breach theory of honest-services was legally valid and a permissible basis for Skilling's conspiracy conviction. *U.S. v. Skilling*, 554 F.3d 529, 542-47 (5th Cir. 2009).[13]

This Court granted certiorari and rejected the Fifth Circuit's honest-services ruling. The Court

---

[13] The Fifth Circuit vacated Skilling's sentence, holding that the lower court erred in applying a "financial institution" enhancement. *Skilling*, 554 F.3d at 595. Resentencing has not yet occurred.

held that § 1346 criminalizes only bribery and kickback schemes, *Skilling*, 130 S. Ct. at 2931, and that construed that way, "Skilling did not commit honest-services fraud," *id.* at 2934. And because the objects of the conspiracy charged in Count One included the invalid theory of "honest services" fraud, the Court held that "Skilling's conviction is flawed." *Id.*

That was not the end of the matter, however, because errors in alternative-theory cases, like errors in most other cases, are subject to harmless-error review. *See Hedgpeth*, 555 U.S. 59-62. The Court recognized the parties' disagreement on the harmlessness issue, noting the Government's position that "any juror who voted for conviction based on [the honest-services theory] also would have found [Skilling] guilty of conspiring to commit securities fraud." *Skilling*, 130 S. Ct. at 2934 (quotation omitted). Rather than resolving the harmlessness question itself, the Court remanded the case to the Fifth Circuit to consider the parties' harmless-error arguments in the first instance.

E. Court Of Appeals' Opinion On Remand

The Government argued on remand that the inclusion of an erroneous honest-services theory as an object of the conspiracy was harmless beyond a reasonable doubt. The Government contended that its trial theory actually alleged only one overall scheme aimed at deceiving the public about Enron's financial position, so that any act alleged to be honest-services fraud was *also* an act of securities fraud. Thus, on the Government's view, the court could be certain that the jury found Skilling guilty on the valid securities-fraud theory, and did not rely independently

on the legally invalid honest-services theory. U.S. Remand Br. 15-29.

The court of appeals rejected the Government's argument. It correctly explained that the Government at trial introduced evidence that "would prove honest-services fraud, but not securities fraud," and thus the Government was wrong in asserting that "a conviction on honest-services grounds in this case would necessarily find facts establishing guilty on securities-fraud grounds." App. 8a n.4.

Nevertheless, the court of appeals found the inclusion of the invalid honest-services charge harmless, on a theory the Government *never pressed*. The court found that in an alternative-theory case such as this one, this Court's harmless-error decision in *Neder* "permits a court to find harmlessness based solely on the strength of the evidence supporting the valid theory." App. 6a n.2. Accordingly, the court considered it irrelevant that jurors had the option, based on the evidence and instructions, "to rely on a pure honest-services theory to convict Skilling." App. 8a n.4. Even if a reasonable juror could have relied on that invalid theory, that possibility—even probability—"has no effect on the strength of the evidence going to the other alleged fraudulent schemes and on whether that evidence satisfies the *Neder* standard." *Id.*

Thus, the "crux of the matter," the court believed, was "whether, under the *Neder* standard, the evidence presented at trial proves that Skilling conspired to commit securities fraud." App. 8a. So long as the trial evidence was sufficient to "prove[] that Skilling participated in a scheme to deceive the in-

vesting public about Enron's financial condition," the court believed the *Neder* standard allowed it to "conclude beyond a reasonable doubt that absent the honest-services instruction, the jury would have convicted Skilling under a valid theory of guilt—conspiracy to commit securities fraud." App. 6a.

Applying that understanding of *Neder*, the court marched through each of the foregoing "schemes," focusing almost entirely on the strength of the Government's evidence, without addressing the exculpatory affirmative witness testimony, cross-examination concessions, or documentary evidence—briefly summarized above—that Skilling adduced at trial. Indeed, the court's only extended discussion of the defense case came in explaining why the court was *excluding* Skilling's most important evidence—his own two weeks of trial testimony—from its harmless-error analysis: "The jury, by finding him guilty, necessarily determined that his own self-serving testimony, in which he contested his liability under any theory of guilty, including the honest-services theory, was not worthy of belief. Therefore, we too decline to give Skilling's testimony any weight in our harmless-error review[.]" App. 9a-10a.

Finding this one-sided recitation of the evidence to be "overwhelming" in the Government's favor, the court concluded that "the honest-services instruction was harmless error beyond a reasonable doubt." App. 17a.

Skilling's petitions for rehearing and rehearing en banc were denied. Six judges recused themselves. App. 21a.

REASONS FOR GRANTING THE PETITION

I. THE HARMLESS-ERROR STANDARD APPLIED BY THE FIFTH CIRCUIT DIRECTLY CONTRADICTS DECISIONS OF THIS COURT AND OTHER CIRCUITS

A. *Neder* Requires A New Trial For An Alternative-Theory Error When The Record Includes Evidence Sufficient For A Rational Jury To Acquit On The Legally Valid Theory

1. In *Yates v. U.S.*, 354 U.S. 298 (1957), this Court held that when a court instructs a jury on alternative theories of guilt and one of the theories is legally erroneous, any conviction is flawed. *Id.* at 311-12. In *Hedgpeth*, this Court clarified that *Yates* errors, like most other errors, are subject to harmless error analysis. 555 U.S. at 59-62. Thus, when a criminal jury is instructed on alternative theories of guilt, and one is later held to be legally invalid, the defendant's conviction must be reversed unless the Government can prove that inclusion of the invalid theory was harmless beyond a reasonable doubt. *Id.*

2. *Hedgpeth* also makes clear that alternative-theory errors should be analyzed under the harmless-error rule announced in *Neder*. *See Hedgpeth*, 555 U.S. at 60-61. *Neder* holds that a constitutional error is harmless 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. The error at issue in *Neder* was the omission of an element of the offense from the jury's instructions, and thus the question was whether the jury would have found the defendant guilty if the element

had been included. The answer, *Neder* holds, depends not on divining what the actual jurors subjectively did or would have done, but on determining objectively what a *reasonable* juror *could* have done. Thus 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," the reviewing court cannot deem the error harmless. *Id.* at 19.

3. Applied to the alternative-theory context, *Neder* permits a court to find the inclusion of a legally invalid theory harmless only where the legally valid theory "was uncontested and supported by overwhelming evidence." *Id.* at 17. If "the defendant contested the [legally valid theory] and raised evidence sufficient to support a contrary finding" on that theory (*id.* at 19), then there can be no confidence that the jury found guilt on the valid theory rather than the invalid theory, so a new trial is required. Otherwise, the appellate court would usurp the fundamental role of the jury in determining the defendant's guilt on the valid theory.

B. The Fifth Circuit's Decision Contravenes *Neder*'s Harmlessness Standard

A straightforward application of *Neder* precludes any conclusion that the honest-services fraud theory rejected by this Court had no impact on Skilling's trial and conviction. The Government's securities-fraud case was nowhere close to so open-and-shut that no reasonable juror could have voted to acquit. One of the lead prosecutors 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 Scenes of the Enron Trial*, 44 Am. Crim. L. Rev. 197, 197-98, 201 (2007). And Skilling strongly contested every "scheme" alleged by the Government to be securities fraud, as shown above. It would be absurd to suggest that Skilling did not "raise[] evidence sufficient to support a contrary finding" on the securities-fraud theory. *Neder*, 527 U.S. at 19. Indeed, the jury *did* acquit Skilling of 9 counts at the very heart of the Government's case—counts alleging that Skilling traded on inside information and thus profited personally from his "schemes."[14]

---

[14] The acquittals speak volumes about the jury's view of the Government's overall securities-fraud case, which generally asserted that Skilling was directing a massive "pump and dump" conspiracy, i.e., a scheme to inflate Enron's share value and then profit personally by selling the inflated shares. The insider-trading acquittals show that jurors almost totally rejected the "dump" side of the Government's pump-and-dump theory.

In fact, the Government did *not* contend that Skilling failed to adduce evidence sufficient for jurors rationally to find for the defense on securities fraud. To the contrary, recognizing that Skilling did introduce such evidence here, the Government argued that "in many instances harmless-error analysis does not depend on whether the defendant introduces evidence to contest an issue." U.S. Remand Br. 10. This was such a case, the Government asserted, because the Government's honest-services case was essentially identical to securities fraud, so the court could be confident that the actual verdict reflected a valid guilty finding on securities fraud. *Id.*[15]

As noted, the court of appeals rejected the Government's harmlessness theory, correctly recognizing that the evidence and instructions permitted jurors to find Skilling guilty of an invalid theory of honest-services fraud independent of securities fraud. *Supra* at 23. Instead of reversing and remanding for a new trial untainted by an honest-services theory, however, the court of appeals turned to an argument the Government did not make, finding the honest-services theory harmless simply because of the supposed strength of the Government's legally valid se-

---

[15] As the parties agreed below, an alternative-theory error can be harmless not only where the defendant failed to contest the valid theory, but also where convicting the defendant on the invalid theory *required* the jury to find facts that would also establish guilt on the valid theory. Additionally, if there was insufficient evidence on the invalid theory to sustain a conviction, but sufficient evidence on the valid theory, the reviewing court can be confident the jury did not rely on the invalid theory. Neither of these alternative means of proving harmless error is at issue here.

curities-fraud case. App. 8a n.4. But in applying that approach, the court did not conclude—as *Neder* would require—that a guilty finding on the securities fraud object was the *only* rational outcome on the *entire* record. Instead, as the court construed the issue before it, the "crux of the matter" was simply "whether, under the *Neder* standard, the evidence presented at trial proves that Skilling conspired to commit securities fraud." App. 8a; *see* App. 6a (honest-services theory harmless so long as evidence was sufficient to "prove[] that Skilling participated in a scheme to deceive the investing public about Enron's financial condition"). The court thus focused almost exclusively on the Government's evidence, occasionally referring to Skilling's defense arguments only to explain why the court did not consider them persuasive. *E.g.*, App. 10a, 15a, 16a.

The court of appeals had things backwards. Although the strength of the Government's evidence is certainly relevant under *Neder*—a weak prosecution case alone could preclude a finding of harmlessness—what really matters is whether the defendant *contested* the evidence, and thereby established a *rational basis* for acquittal on the valid theory. *See supra* Part I.A. If the defendant raised a triable question of fact about his guilt on the valid theory, an invalid theory cannot be considered harmless, because the court cannot be confident that jurors would have found guilt on the valid theory if they had not been given the option of relying on the invalid theory. *Neder*, 527 U.S. at 18-19. The Fifth Circuit thus fundamentally misconstrued *Neder* as requiring focus on the strength of the evidence in support of the valid securities-fraud theory, rather than on whether

there was evidence supporting *Skilling's defense* that could rationally have led a jury to vote for acquittal on that theory.

The error in the court of appeals' approach is well illustrated by its discussion of the "Cuiaba" and "Nigerian Barges" transactions. The Government claimed these transactions involved "secret side deals"—allegedly intended to prop up Enron's earnings—concocted and principally implemented by Enron CFO Andrew Fastow. A key issue at trial was whether Skilling approved Fastow's secret side deals. According to the court of appeals, "the evidence overwhelmingly proved" Skilling's involvement in the transactions. App. 11a. The evidence to which the court referred, however, was nothing more than the testimony of Fastow himself. App. 11a-13a. And Fastow was an admitted fraudster whose testimony the Government purchased with a plea deal. Fastow's testimony may have been minimally sufficient to support a conviction for securities fraud, but it was nowhere close to *requiring* rational jurors to convict—especially given the contrary evidence adduced by Skilling. *See supra* at 8-10. Rational jurors plainly could have rejected Fastow's uncorroborated and badly compromised testimony, but as the Fifth Circuit construed *Neder*, the court was allowed to resolve credibility doubts in Fastow's favor, and to rely on his testimony alone to establish the harmlessness of the invalid honest-services theory.

Finally, it bears emphasis that the invalid theory of guilt in this case—honest-services fraud—was so broad and amorphous as to create an especially serious risk of an improper conviction. Honest-services fraud was a problematic theory—before this Court

constrained it in *Skilling*—precisely because it was so vague as to "raise … due process concerns." *Skilling*, 130 S. Ct. at 2931. Skilling's jurors easily could have applied that vague theory here to convict him simply because they believed he did not act in Enron's best long-term interests, without ever concluding that his conduct and mens rea satisfied all the elements of securities fraud. Finding harmlessness under these circumstances cannot be reconciled with Skilling's fundamental right to have his guilt on securities fraud determined by a jury, rather than an appellate court.[16]

C. The Fifth Circuit's Decision Conflicts With Decisions Of Other Circuits Properly Construing *Neder*

The Fifth Circuit's decision conflicts not only with *Neder* but also with decisions of other federal courts of appeals, thereby creating uncertainty regarding the harmlessness standard applicable to alternative-theory errors.

1. The First Circuit has taken an approach to harmless-error review under *Neder* diametrically opposed to the Fifth Circuit's. In *U.S. v. Prigmore*, 243 F.3d 1 (1st Cir. 2001), the court found an instructional error non-harmless beyond a reasonable doubt, even though "the government's evidence … was strong." *Id.* at 22. What mattered, the court

[16] In addition to the conspiracy count directly implicated by the honest-services fraud error, Skilling was convicted on other counts, which were linked to the conspiracy conviction by a *Pinkerton* instruction and in other ways, such that if the conspiracy count falls, the remaining counts fall as well. Skilling C.A. Remand Br. 39-58.

recognized, was that "the competing evidence was not inherently incredible. That effectively ends the matter." *Id.* at 22; *see id.* ("In our view, the evidence of guilt in this case is quite substantial …. We do not believe, however that the evidence is so one-sided as to render harmless the underlying instructional error we have identified.").

The Eighth Circuit similarly held that a finding of harmlessness is forbidden by *Neder* even if a jury's acquittal "seems unlikely," because the only relevant question under *Neder* is whether the "jury could have rationally found for the defendant," and "unlikely does not equal irrational." *U.S. v. Hollingsworth*, 257 F.3d 871, 876, 877 (8th Cir. 2001), overruled in part on other grounds by *U.S. v. Diaz*, 296 F.3d 680 (8th Cir. 2002)).

2. Several circuits have also applied *Neder* in the wake of this Court's *Skilling* decision to the particular context of alternative-theory errors, correctly holding that an invalid theory is harmless beyond a reasonable doubt only if no reasonable juror could have found for the defendant on the valid theory. In *U.S. v. Black*, 625 F.3d 386 (7th Cir. 2010)—a case remanded in light of this Court's decision in *Skilling*—the Seventh Circuit held that an instructional error involving an invalid honest-services fraud theory was not harmless. *Id.* at 392. Even though the evidence supporting the valid pecuniary fraud theory was very strong, the court held, it was "not conclusive." *Id.*; *see id.* ("[T]he question is … whether a reasonable jury might have convicted the defendants of depriving the company of their honest services for private gain but not have convicted them of pecuni-

ary fraud. That is unlikely, but no stronger assertion is possible.").[17]

In *U.S. v. Coniglio*, 417 F. App'x 146 (3rd Cir. 2011), the Third Circuit held that an alternative-theory error was not harmless even though the Government placed greater emphasis on the valid theory and even though it was not "probable" that the jury relied on the invalid theory. *Id.* at 149. The invalid theory was not harmless, the court explained, because that case—like this one—"involve[d] a large amount of sharply contested, circumstantial evidence." *Id.* at 149 n.4; *see id.* at 149.

3. The foregoing decisions properly recognize that *Neder* requires a court conducting harmless-error review to determine whether the defendant contested the prosecution's evidence enough to permit a rational jury to decide that, absent the error, the prosecution had not proved its case beyond a reasonable doubt. In the alternative-theory cases, the courts acknowledged that the evidence supporting the valid theory was strong, but properly recognized that a strong case for the valid theory does not suffice to render a legally invalid theory harmless under *Neder* when the defendant presents a credible defense. The decision below, by contrast, holds that *Neder* permits the court to focus singularly on the strength of the Government's case and to resolve disputed issues itself, without regard to whether the

---

[17] Applying the same harmlessness standard, the *Black* court also found that the alternative-theory error was harmless as to a different count, because on that charge the "only rational explanation" for the guilty verdict was the valid theory. 625 F.3d at 393; *see supra* note 15.

defendant contested the Government's case enough to create a material factual dispute a rational jury *could* resolve in the defendant's favor.

This disagreement over the proper standard for harmless error is unacceptable—and profoundly unfair to Skilling, who is serving 24 years in prison for a general-verdict conviction that would have been reversed in any of these other circuits. This Court should grant review—or summarily reverse—and reiterate the proper standard for harmless-error review in the alternative-theory error context.

II. THE FIFTH CIRCUIT'S DECISION TO EXCLUDE SKILLING'S TESTIMONY FROM THE HARMLESS-ERROR ANALYSIS CONTRADICTS *NEDER* AND OTHER CIRCUIT DECISIONS

A. *Neder* Requires A Court To *Consider*, Not *Exclude*, A Defendant's Testimony In His Own Defense

As explained, the *Neder* rule requires a finding that an alternative-theory error is non-harmless when the record contains enough evidence for a juror to "rationally" vote to acquit on the valid theory. 527 U.S. at 19. The record here includes such evidence *at least* in the form of Skilling's own testimony, which provided a reasonable and detailed explanation for every act the Government claimed to be securities fraud. R:28175-29497; 29603-30700; 30713-30853.

The Fifth Circuit held, however, that Skilling's testimony must be categorically excluded from the harmless-error analysis because the "jury, by finding

him guilty, necessarily determined that his own self-serving testimony, in which he contested his liability under any theory of guilt, including the honest-services theory, was not worthy of belief." App. 9a-10a. Thus, the court "decline[d] to give Skilling's testimony any weight in [its] harmless-error review when unsupported by other evidence or testimony in the record." App. 10a.

The court's reasoning makes no sense and cannot be reconciled with *Neder*. It is of course true that the jury convicted Skilling; that is a prerequisite to any harmless-error analysis. But it is obviously *not* true that the jury, by convicting Skilling, "necessarily determined" that *all* of his testimony was "unworthy of belief." The conviction shows only that the jury did not believe his testimony *as to at least one of the two fraud theories asserted by the Government*. But nobody knows which one. In an alternative-theory case, the mere fact of conviction can never answer whether the jury rejected a defendant's testimony as to all theories, as to the valid one, or as to the invalid one. And that is especially true when the invalid theory was the broad and vague honest-services theory asserted here. For example, the jury could rationally have found that Skilling was truthful in testifying that he did not intentionally mislead investors (securities fraud), while being unpersuaded that his decisions were in Enron's best long-term interests (honest-services fraud). Finally, the court of appeals' logic is difficult to square with the jury's decision to acquit Skilling on nine counts of insider trading, consistent with his testimony that the challenged trades were not made on the basis of the inside information allegedly at issue in the securities-

fraud conspiracy charge. R:29363-80; 29663-86. A jury unwilling to believe anything Skilling said on any subject would not likely have returned those acquittals. *See Skilling*, 130 S. Ct. at 2916 (citing these acquittals to show that jurors were not biased against Skilling).

The exclusion of Skilling's testimony plainly contradicts the deeply-rooted rule that "questions of credibility … are for the jury." *Crane v. Kentucky*, 476 U.S. 683, 688 (1986) (quotation omitted). Rather than recognize that it was for the jury to decide the extent to which Skilling was credible on either of the Government's fraud theories, the court of appeals *itself* decided that Skilling's testimony was "self-serving." App. 10a. But *every* defendant's testimony is self-serving—including the testimony of innocent defendants. To exclude the testimony from the harmless-error analysis on that basis is thus to exclude every defendant's testimony from that analysis—including defendants who are not, in fact, guilty of the valid offense charged against them.

The Fifth Circuit's logic is also internally contradictory. If a witness's testimony can be excluded from harmless-error review because it is "self-serving," then Fastow's testimony should have been first to the dustbin. Fastow was an admitted fraudster and thief who traded his testimony against Skilling for a huge reduction in his own jailtime. Yet the court of appeals inexplicably held that Fastow's testimony *alone* provided "overwhelming" evidence of Skilling's guilt. App. 11a-12a. The court's dispositive reliance on Fastow's testimony belies the court's assertion that self-serving testimony cannot play any role in the harmless-error inquiry. The correct ap-

proach is described by *Neder*: the extent to which a witness's incentives make his testimony non-credible is a question *for the jury*, not for the reviewing court.[18]

By "declin[ing] to give Skilling's testimony any weight in [its] harmless-error review," App. 10a, the court of appeals not only ignored this Court's precedents, but also usurped the fundamental role of the jury in determining guilt or innocence.

B. The Fifth Circuit's Exclusion Of Skilling's Testimony From The Harmlessness Analysis Creates A Circuit Conflict

The decision below conflicts with the First Circuit's decision in *U.S. v. Ofray-Campos*, 534 F.3d 1 (1st Cir. 2008). There, the court noted that the jury by its guilty verdict had "chose[n] to credit the accounts of the cooperating witnesses over the admittedly self-serving testimony of the defendant." *Id.* at 28. The court nevertheless held that the defendant's "countervailing testimony on his own behalf is a factor in conducting the harmless error analysis." *Id.* at 28-29. And the court ultimately found the error harmful, in part, based on the defendant's testimony. *Id.*

The Fifth Circuit below was presented with the identical situation—a defendant who had been convicted despite having presented "self-serving" testi-

[18] To be sure, there may be instances in which a defendant's testimony is so facially non-credible that a reasonable juror could not rationally credit it. But nobody suggests that Skilling's reasonable, detailed testimony is fairly described in those terms.

mony. But rather than considering whether a reasonable jury *could have* rationally credited that testimony—as the First Circuit did, consistent with *Neder*—the Fifth Circuit simply excluded it from the analysis.

That conflict is further reason for this Court to grant certiorari in this case. There should be no doubt among lower courts that a defendant's testimony matters in determining whether a rational jury could have acquitted in the absence of the constitutional error.

CONCLUSION

The Court should grant the petition for certiorari and either summarily reverse or set the case for plenary consideration.

Respectfully submitted,

DANIEL M. PETROCELLI
(*Counsel of Record*)
dpetrocelli@omm.com
M. RANDALL OPPENHEIMER
MATTHEW T. KLINE
DAVID J. MARROSO
O'MELVENY & MYERS LLP
1999 Avenue of the Stars,
7th Floor
Los Angeles, California 90067
(310) 553-6800

WALTER DELLINGER
JONATHAN D. HACKER
ANTON METLITSKY
DEANNA RICE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

November 2011