No. 11-674

In the Supreme Court of the United States

JEFFREY K. SKILLING, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that an erroneous jury instruction on an alternative theory of guilt was harmless beyond a reasonable doubt because the evidence of guilt on the legally correct theory was so overwhelming that the instructional error would not have altered the jury verdict.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 638 F.3d 480.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2011. A petition for rehearing was denied on August 29, 2011 (Pet. App. 19a-21a). The petition for a writ of certiorari was filed on November 28, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiracy to commit securities fraud and wire fraud, in violation of 18 U.S.C. 371

(Count 1), and on 18 other charges: 12 counts of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff, and 18 U.S.C. 2 (Counts 2, 14, 16-20, 22-26); five counts of making false representations to auditors, in violation of 15 U.S.C. 78m(a) and (b)(2) and 78ff, and 18 U.S.C. 2 (Counts 31-32, 34-36); and one count of insider trading, in violation of 15 U.S.C. 78j(b) and 78ff, and 18 U.S.C. 2 (Count 51). The district court sentenced petitioner to a total of 292 months of imprisonment, to be followed by three years of supervised release, and ordered petitioner to pay $45 million in restitution. Pet. App. 2a-3a.

The court of appeals affirmed petitioner's convictions but vacated his sentence and remanded for resentencing. *United States* v. *Skilling*, 554 F.3d 529, 595 (5th Cir. 2009), vacated in part, 130 S. Ct. 2896 (2010). On certiorari review, this Court concluded that the jury instructions for one of the three objects of the conspiracy charged in Count 1 were flawed, vacated the court of appeals' ruling on that count, and remanded for a determination whether the instructional error was harmless. *Skilling* v. *United States*, 130 S. Ct. 2896, 2934-2935 (2010). On remand, the court of appeals determined that the error was harmless beyond a reasonable doubt, affirmed petitioner's convictions, and again remanded for resentencing. Pet. App. 1a-18a.

1. Petitioner was the president, chief operating officer, and, for several months in 2001, the chief executive officer of Enron Corporation, a large, publicly traded energy company. The evidence at trial showed that between 1999 and 2001, petitioner orchestrated a massive scheme to deceive Enron's shareholders, federal regulators, and the investing public about the company's financial condition and performance. Petitioner and his coconspirators artificially inflated Enron's share price by

reporting false earnings and concealing large losses. In meetings and conference calls with investors, petitioner made false representations about the success of Enron's businesses. Petitioner also authorized the manipulation of Enron's financial accounting. In August 2001, petitioner resigned from Enron and about four months later, Enron collapsed into sudden bankruptcy. *Skilling*, 554 F.3d at 534-538.

At the time of its bankruptcy, Enron was composed of four major businesses, three of which are relevant here: Wholesale, which bought and sold energy; Enron Energy Services (EES), which sold energy to end-users; and Enron Broadband Services (EBS), which bought and sold telecommunications bandwidth capacity. 554 F.3d at 535. The conspiracy charge (Count 1) and securities-fraud charges (Counts 2, 14, 16-20, 22-26) on which the jury found petitioner guilty were based on petitioner's conduct in fraudulent schemes affecting those businesses. See, *e.g.*, Second Superseding Indictment (SSI) ¶¶ 27-87 (Doc. 97) (Count 1); C.A. R.E. Tab 21, at 16, 23-24, 26-35 (jury instructions).

a. Wholesale was Enron's most profitable division and produced nearly 90% of Enron's revenue, mainly through speculative trading. Petitioner and his co-conspirators lied about the nature of Wholesale, calling Wholesale a "logistics" company instead of the more volatile "trading company," which, because of its high-risk investments, would have been perceived less favorably in the securities markets. Petitioner told Ken Rice, the CEO of EBS, that if investors perceived Enron as a trading company, its stock would "get whacked." 554 F.3d at 535; see, *e.g.*, SSI ¶¶ 66, 103 (Count 23 alleging securities fraud based on petitioner's assertion that Enron was not a "trading business" and his related

statements at a January 25, 2001, analysts conference); Gov't C.A. Br. 26-27.

b. Petitioner's conspiracy also involved the false portrayal of EES as a promising business when it was in fact suffering substantial losses. By early 2001, EES should have recorded many millions of dollars in losses as a result of deteriorating conditions in the California utilities markets. But in late January 2001, petitioner falsely told analysts in a conference call that the situation in California had had little impact on Enron and would not jeopardize earnings targets. 554 F.3d at 536-537; see SSI ¶¶ 64, 103 (Count 22 based on this call); Gov't C.A. Br. 25-26 (same). In March 2001, instead of disclosing EES's significant first-quarter losses, petitioner approved a reorganization to shift EES's losses to Wholesale and thereby conceal the losses. 554 F.3d at 535. Petitioner then falsely told investors that EES's "first quarter [2001] results were great" when they were down substantially, that EES "had an outstanding second quarter," and that the reason for moving EES's risk-management books to Wholesale was to obtain more "management efficiency." *Id.* at 535-537; see, *e.g.*, SSI ¶¶ 70, 72, 103 (Counts 25 and 26); Gov't C.A. Br. 30-33 (same). By August 2001, EES had lost over $700 million in that year alone. 554 F.3d at 535.

c. Petitioner engaged in similar fraudulent schemes to conceal the failure of EBS. Enron invested $1 billion in EBS but EBS lost money every quarter. Petitioner set earnings targets at levels that EBS executives warned petitioner could not be met, and petitioner refused to change those targets. Instead, to meet the inflated targets, EBS "monetized," or sold as securities, the projected future revenue from EBS contracts, an accounting maneuver that EBS's CEO likened to "one

more hit of crack cocaine on these earnings." When EBS continued to lose money, Enron merged EBS into Wholesale and lost its entire $1 billion initial investment in EBS. 554 F.3d at 536. Petitioner, however, knowingly made false representations about the financial condition of EBS to analysts, stating at a January 2001 analyst conference that EBS had "sustainable high earnings power." *Id.* at 537. Petitioner similarly stated on a special March 2001 analyst conference call arranged to address rumors about EBS's poor condition that EBS was having a "great quarter," even though petitioner knew that to be false. *Ibid.*; see, *e.g.*, SSI ¶¶ 66-69, 103 (Counts 23-24); Gov't C.A. Br. 26-29.

d. Petitioner's fraudulent schemes with his co-conspirators also took numerous other forms. For instance, petitioner arranged deals between Enron and two partnerships (LJM and LJM2) run by Andy Fastow (Enron's Chief Financial Officer) to hide non-performing assets and concoct earnings for Enron where none existed. Petitioner arranged for the sale of a Brazilian power plant (called "Cuiaba") and Nigerian power-generating barges when Enron could not find buyers for those deteriorating assets by promising LJM a guaranteed rate of return in secret, oral side-deals that invalidated Enron's asserted gains from the sales. 554 F.3d at 538-540; see, *e.g.*, SSI ¶¶ 62, 101 (Counts 14, 16, and 20 based on petitioner's false Securities and Exchange Commission (SEC) filings involving those transactions); Gov't C.A. Br. 42-44, 46-47, 57-58, 60 (same).

e. Petitioner similarly directed that Enron's earning figures be altered after the close of the relevant financial quarter to ensure that the earnings it reported would beat the consensus estimate of stock analysts. For instance, after the end of the 2000 accounting year,

petitioner directed that Wholesale convert its reserves for contingent liabilities into earnings in order to meet (through fraud) earnings targets. 554 F.3d at 537-538; see, *e.g.*, SSI ¶¶ 62, 101 (Count 18 based on petitioner's false SEC filing); Gov't C.A. Br. 59 (same).

f. On August 14, 2001, petitioner abruptly resigned from his position as Enron's CEO, at a time when he knew that Enron faced mounting financial problems and was suffering substantial undisclosed losses. On September 6, 2001, petitioner called his broker and tried to sell 200,000 shares of Enron stock. When the broker explained that he would have to report the transaction to the SEC because petitioner was still listed as an Enron affiliate, petitioner told him to hold the sale until he could get a letter saying he was no longer part of Enron's management. Petitioner obtained that letter on September 10, 2001, and on September 17, the first day that the markets opened after the September 11 terrorist attacks, conveyed to his broker an order to sell 500,000 shares of Enron stock along with instructions that he did not want the people at Enron to know about the sale. Petitioner later testified under oath before the SEC in December 2001 that he had sold the stock because he was "scared" by September 11 and had no other reason for his sale of the stock. 554 F.3d at 541-542; see SSI ¶ 120 (Count 51 for insider trading).

2. In February 2004, a federal grand jury indicted petitioner and Richard Causey, Enron's chief accounting officer. First Superseding Indictment (Doc. 16). The indictment charged petitioner with numerous substantive securities-fraud counts for making false and misleading statements to investors, the SEC, and auditors and on SEC filings. *Id.* at 41, 44-50. In Count 1, the indictment charged petitioner with conspiracy (1) to com-

mit securities fraud and (2) to defraud Enron of money and property through the use of interstate wire communications. *Id.* at 34-41.

In July 2004, the grand jury returned a superseding indictment adding Kenneth Lay, who had succeeded petitioner as CEO, as a defendant. See SSI. The superseding indictment supplemented Count 1 to allege that the conspiracy in which petitioner, Lay, and Causey participated included as a (third) object a scheme to "depriv[e] Enron and its shareholders of the intangible right of honest services" through use of interstate wire communications. SSI ¶ 87. The indictment, like its predecessor, recounted petitioner's massive scheme to deceive Enron and the investing public by manipulating earnings, making false statements to the SEC and the public, concealing losses through sham transactions, and enriching himself in the process. SSI ¶¶ 1-88.

After a four-month trial, the jury found petitioner guilty of conspiracy (Count 1), 12 counts of securities fraud (Counts 2, 14, 16-20, 22-26), five counts of making false representations to auditors (Counts 31-32, 34-36), and one count of insider trading (Count 51). The jury found petitioner not guilty on nine other counts of insider trading (Counts 42-50). 554 F.3d at 542.[1]

3. In January 2009, the court of appeals affirmed petitioner's convictions but vacated his sentence and remanded for resentencing, based on its conclusion that the district court erred in applying a sentencing enhancement under the Sentencing Guidelines. 554 F.3d

[1] Causey pleaded guilty before trial to one count of securities fraud. Docs. 603-604, 1181. The jury found Lay guilty on all ten counts charged against him, but after Lay died in July 2006, the district court vacated Lay's conviction and dismissed the indictment against him. *United States* v. *Lay*, 456 F. Supp. 2d 869, 875 (S.D. Tex. 2006).

at 595. The court rejected petitioner's argument that his conspiracy conviction was flawed because it was premised in part on an improper theory of honest-services fraud. *Id.* at 542-547.

This Court granted certiorari, 130 S. Ct. 393 (2009), and, as relevant here, held that the honest-services mail- and wire-fraud statute, 18 U.S.C. 1346, applies only to schemes to defraud involving bribery or kickbacks. *Skilling*, 130 S. Ct. at 2907, 2931. Because the jury was instructed that honest-services fraud was one of the objects of the conspiracy (Count 1) but the indictment did not allege a bribe or kickback scheme qualifying as honest-services fraud, the Court concluded that petitioner's conspiracy conviction was flawed. *Id.* at 2934. The Court explained that harmless-error analysis applies to instructional errors like that here, which allow a jury to convict on alternative theories when one of those theories is legally erroneous. *Ibid.* The Court accordingly vacated the court of appeals' ruling on the conspiracy count and remanded for a determination whether the instructional error was harmless. *Id.* at 2934-2935.

4. On remand, the court of appeals held that the instructional error was harmless beyond a reasonable doubt. Pet. App. 1a-18a.

a. The court of appeals stated that it had conducted a "thorough examination of the considerable record" developed during the four-month jury trial in this case. Pet. App. 8a. Based on that "thorough" review, the court "conclude[d] beyond a reasonable doubt that the verdict would have been the same absent the alternative-theory error." *Ibid.* The court explained that the jury had "overwhelming evidence that [petitioner] conspired to commit securities fraud," *ibid.*, and

illustrated that evidence by discussing "five fraudulent schemes," each of which was proved by "overwhelming evidence" and "represent[ed] efforts by [petitioner] and his co-conspirators to manipulate Enron's reported earnings or conceal Enron's losses from the investing public with the intent and result of affecting Enron's stock price." *Id.* at 17a. Because petitioner's role in those securities-fraud schemes with co-conspirators was "overwhelming[ly]" proved as proper bases for his conspiracy conviction, the court concluded that the "honest-services instruction was harmless error beyond a reasonable doubt." *Ibid.*

The court of appeals noted that, notwithstanding the overwhelming evidence of petitioner's participation in a securities-fraud conspiracy, the jury had the "option" to base its conspiracy verdict on a "pure honest-services theory," because the court found sufficient evidence that "[s]ome" misleading statements by petitioner were made only to Enron's board of directors and not to the investing public. Pet. App. 8a n.4. But the court explained that harmless-error review does not turn only on such a bare potential for such a verdict. The court reasoned that under the harmlessness standard set forth in *Neder* v. *United States*, 527 U.S. 1 (1999), an instructional error on an alternative theory of guilt is harmless if the reviewing court can "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." Pet. App. 4a (quoting *Neder*, 527 U.S. at 19). To resolve that issue, the court "asks whether the record contains evidence that could rationally lead to [an acquittal] with respect to the [valid theory of guilt]," *id.* at 4a-5a (quoting *Neder*, 527 U.S. at 19) (bracketed text added by court of appeals), *i.e.*, the the-

ory that "[petitioner] conspired to commit securities fraud." *Id.* at 8a & n.4.

b. The court of appeals explained that each of five "overwhelmingly prove[n]" securities-fraud schemes established that the jury verdict would have been the same absent the error. Pet. App. 8a-17a. Those separate schemes focused on (1) the transfer of losses and risk-management books from EES to Wholesale to make EES falsely appear more profitable, *id.* at 8a-10a; (2) the false portrayal of Wholesale as a low-risk "logistics" power company rather than a "highly volatile trading" company, *id.* at 10a-11a; (3) the use of the LJM and LJM2 partnerships to book false earnings for Enron and hide nonperforming assets, *id.* at 11a-13a; (4) the underreporting of losses at EBS and subsequent merger of EBS into Wholesale to conceal those losses, *id.* at 13a-15a; and (5) the fraudulent inflation of earnings by moving funds from accounting reserves into earnings after the end of Enron's accounting year, *id.* at 15a-17a.

The court of appeals summarized the "overwhelming" evidence for each of these schemes and explained why petitioner's contrary evidentiary contentions did not undermine that proof. Pet. App. 8a-17a. The court repeatedly determined that petitioner's claims about the evidentiary record compiled during the four-month trial were incorrect. See, *e.g.*, *id.* at 9a ("[petitioner's] record citations * * * do not substantiate his claim"), 10a ("The record also proves that [petitioner's] claim is false."), 14a-15a ("The record shows that" petitioner's claims about "the Government's theory at trial" are "not true."), 16a ("We disagree that the record shows [what petitioner claims it does]."). With respect to two of petitioner's five fraudulent schemes that the court discussed, the court observed that petitioner's reliance on

his own testimony did not undermine its conclusion that those two schemes were overwhelmingly proved at trial. *Id.* at 9a-10a, 11a. First, the court explained that petitioner's own testimony that the transfer of losses and risk-management books from EES to Wholesale employed proper accounting and complied with disclosure rules was "unsupported by other evidence" and was rejected by the jury when it found him guilty. *Id.* at 9a-10a. The court declined to give that "unsupported" testimony any weight in its harmless-error analysis. *Id.* at 10a. Second, the court noted that petitioner's self-serving testimony that Wholesale was, in fact, a "logistics company," even if accepted, did "not undermine the Government's proof at trial" that petitioner fraudulently concealed "the reality that Wholesale was driving up its profits through highly risky and volatile trading operations, not through its energy distribution system." *Id.* at 11a.

c. After concluding that the alternative-theory instructional error on the conspiracy count (Count 1) was harmless beyond a reasonable doubt, the court of appeals further held that, even if the instructional error were not harmless with respect to that count, it was "harmless with respect to most of the other charges." Pet. App. 18a n.6. The court rejected petitioner's claim that a *Pinkerton* instruction given to the jury (under which petitioner might be held liable for the conduct of co-conspirators within the scope of the conspiracy) infected petitioner's other convictions. *Ibid.*; cf. *Pinkerton* v. *United States*, 328 U.S. 640 (1946) The court explained that "most—if not all—of the other convictions rest on [petitioner's] own conduct" and would not have been affected by any error in Count 1. Pet. App. 18a n.6.

ARGUMENT

Petitioner contends (Pet. 25-38) that the court of appeals' harmless-error analysis conflicts with *Neder* v. *United States*, 527 U.S. 1 (1999), and with decisions of other courts of appeals. Petitioner argues that the court of appeals should have ruled in petitioner's favor because, petitioner asserts, he "strongly contested" his guilt at trial and a reasonable juror could have acquitted him, Pet. 27. See Pet. 25-34. Petitioner further contends that the court of appeals "categorically excluded" petitioner's own testimony from its harmless-error analysis in conflict with one decision from another court of appeals. Pet. 34-38. Those contentions are incorrect. The court of appeals correctly held that the instructional error in this case was harmless beyond a reasonable doubt based on its "own thorough examination of the considerable record in this case," Pet. App. 8a, and its fact-bound decision does not conflict with any decision of this Court or any other court of appeals. The petition for a writ of certiorari should therefore be denied. In the alternative, the Court may wish to hold the present case pending its decision in *Vasquez* v. *United States*, No. 11-199 (to be argued Mar. 21, 2012), and then dispose of the petition as appropriate in light of that decision.

1. a. The court of appeals correctly applied applicable harmless-error standards in determining that the instructional error identified by this Court was harmless beyond a reasonable doubt. The court explained that the relevant inquiry for the alternative-theory instructional error at issue turns on "whether the record contains evidence that could rationally lead" a jury to acquit on the valid, securities-fraud-scheme theory on which it was instructed. Pet. App. 4a-5a (quoting *Neder*,

527 U.S. at 19). Under that test, the court explained, an error is harmless if a reviewing court can "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error" based on a "through examination of the record." *Id.* at 4a (quoting *Neder*, 527 U.S. at 19). The court then "thorough[ly] examin[ed]" the "considerable" trial record here and concluded that, "under [that] standard," the "overwhelming evidence that [petitioner] conspired to commit securities fraud" established "beyond a reasonable doubt that the verdict would have been the same absent the alternative-theory error." *Id.* at 8a.

Petitioner argues (Pet. 26) that harmless-error analysis turns on the "objective[]" determination of "what a *reasonable* juror *could* have done" and that an instructional error is not harmless if the defendant both contests guilt and presents sufficient evidence to support a not-guilty finding. He further contends (Pet. 29) that the court of appeals failed to conclude that a guilty verdict on the conspiracy count based on the securities-fraud theory was the "*only* rational outcome on the *entire* record." But the court of appeals recognized that an error is not harmless beyond a reasonable doubt if "the record contains evidence that could rationally lead to an acquittal" on the valid theory of guilt. Pet. App. 4a-5a (brackets omitted). And it explained for each of five securities-fraud schemes (any one of which independently established petitioner's guilt on the conspiracy charge) why petitioner failed to present evidence undermining the overwhelming evidence of his guilt. *Id.* at 8a-17a. Indeed, the court repeatedly explained that petitioner had misstated the record in his contrary arguments. See p. 10, *supra*.

Petitioner suggests (Pet. 23-24, 29) that the court of appeals mistakenly believed the relevant standard requires only "sufficient" evidence on which a jury might have convicted petitioner of conspiracy based on a valid, securities-fraud theory. But the opinion never says that the alternative-theory error was harmless if the evidence of securities fraud was "sufficient." Rather, its analysis turned on whether a "rational[]" jury "*could*" have "*acquitt[ed]* with respect to the valid theory of guilt." Pet. App. 4a-5a (emphasis added; citation and brackets omitted). The court explained that its harmlessness analysis focused only on petitioner's "five fraudulent schemes" for which the court concluded based on its "thorough examination" of the record that the trial evidence was "overwhelming" and declined to rely on "strong evidence" of petitioner's other securities-fraud schemes. *Id.* at 8a, 17a. That approach is inconsistent with petitioner's suggestion that the court's harmlessness analysis turned on the lower test of evidentiary sufficiency.

Petitioner suggests (Pet. 30-31) that the erroneous honest-services instruction posed an "especially serious risk of an improper conviction" because it was "broad and amorphous." But this Court explicitly held in this case that harmless-error review applies in this context, *Skilling* v. *United States*, 130 S. Ct. 2896, 2934 (2010), and the court of appeals correctly concluded that the error was harmless beyond a reasonable doubt. The court of appeals specifically rejected petitioner's view that honest-services fraud played a significant role in the case against petitioner. The court explained, for instance, that the government invoked the honest-services theory "in relation to [petitioner's] co-defendant, Ken Lay" but "focused *exclusively* on conduct that consti-

tutes securities fraud" when discussing petitioner during its opening and first closing arguments. Pet. App. 7a (emphasis added). The government "once" "mentioned the honest-services theory in relation to [petitioner]," *ibid.*, but in the context of the four-month jury trial and the overwhelming securities-fraud evidence in this case, such a passing reference would have had no meaningful impact on the verdict. Petitioner's counsel himself acknowledged in the court of appeals that "[t]here certainly were acts of securities fraud" and that "securities fraud [was] all over this case." 4/2/2008 Tr. 64-65 (available at Gov't C.A. Opp. to Mot. for Release, Exh. C (filed Aug. 12, 2010)). Yet petitioner argued that, notwithstanding such securities fraud, a harmless-error analysis in the alternative-instruction context requires a showing that it was "*impossible* for the jury to heavily rely on the invalid [honest-services] theory." *Ibid.* (emphasis added); accord Pet. C.A. Remand Br. 3-4, 14-15 (advancing same impossible-to-tell argument on remand).[2] The court of appeals correctly rejected that "impossible-to-tell" standard and instead correctly applied *Neder*. Pet. App. 5a n.1 (explaining that "[t]he impossible-to-tell standard is more stringent than the *Neder* standard," and because it "is inconsistent with harmless-error review, we hereby abandon it.").

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[2] Petitioner submitted a post-argument letter to the court of appeals stating that petitioner's counsel merely conceded that the government had presented evidence and argument about securities fraud. That post-argument assertion, however, does not reflect petitioner's position at oral argument and does not undermine petitioner's repeated acknowledgment of the securities fraud established in this case. See Gov't C.A. Remand Br. 33 n.7. That acknowledgment at the time worked hand-in-glove with petitioner's "impossible-to-tell" standard for harmlessness, which petitioner has now abandoned in this Court.

In addition, the jury convicted petitioner of numerous securities-fraud counts premised on the same fraudulent schemes underlying the conspiracy charge. See pp. 3-6, *supra* (noting illustrative securities-fraud counts of conviction for each scheme). It is difficult to see how the jury could have rendered that verdict without also finding that petitioner conspired to commit securities fraud.[3] Although petitioner asserts without elaboration (Pet. 31 n.16) that, if the conspiracy count falls, all his remaining counts of conviction are invalid, the court of appeals specifically rejected that claim and held that "most—if not all—of the other convictions rest on [petitioner's] own conduct" and remain valid even if petitioner's conspiracy conviction were overturned. Pet. App. 18a n.6.

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[3] Petitioner contends (Pet. 27 & n.14) that "[i]t would be absurd" to deny that a rational jury could have acquitted petitioner on the conspiracy charge based on securities-fraud schemes, because "the jury *did* acquit [petitioner] of 9 counts at the very heart of the Government's case," *i.e.*, nine insider-trading counts (Counts 42-50). Notably, in a post-decision letter to this Court, petitioner described those acquittals as "essentially meaningless" because, he asserted, "the Government abandoned its case on them." Letter to William K. Souter from petitioner's counsel 2 (June 28, 2010). In any event, the jury was charged that insider trading was "*not* an object of the conspiracy." C.A. R.E. Tab 21, at 27 (emphasis added). Moreover, the jury was further instructed that insider trading required proof beyond a reasonable doubt that petitioner used material, nonpublic information "in making his decision to sell Enron stock." *Id.* at 49. Although the government did not abandon those counts, it did not present direct proof of petitioner's reasons for the stock sales underlying the acquitted counts, one of which was based on a written, long-term sales contract, see *id.* at 51. The jury convicted petitioner on the one insider-trading count on which the government provided direct evidence of petitioner's false explanation for his September 2011 stock trade. See p. 6, *supra*.

Petitioner incorrectly suggests (Pet. 27) that the evidence at trial made this a close case and that the government admitted as much. The government, however, explained to the court of appeals that the evidence of petitioner's guilt on Count 1 was "overwhelming," see, *e.g.*, Gov't C.A. Remand Br. 16-27, and the court of appeals agreed after conducting its "own thorough examination of the considerable record in this case." Pet. App. 8a-17a.

Nothing in the court of appeals' approach conflicts with *Neder*. In *Neder*, the district court failed to instruct the jury on an element of the charged fraud offenses and the error therefore "preclude[d] the jury from making a finding on the *actual* element of the offense." 527 U.S. at 6, 10. In that context, the Court concluded that harmless-error analysis was available and that an error is harmless if the reviewing court finds "beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Id.* at 19. The court of appeals applied that precise test. Pet. App. 4a. *Neder* also made clear that the error would not be harmless, "for example," in cases where "the defendant contested the omitted element and raised evidence sufficient to support a contrary finding." 527 U.S. at 19. Here, the court of appeals determined the record as a whole did not raise evidence from which a rational jury could have acquitted petitioner on the valid, securities-fraud theory of conspiracy. The court based that holding on the overwhelming evidence of petitioner's guilt. Nothing in that holding departs from *Neder*.

b. Petitioner contends (Pet. 31-33) that the court of appeals decision conflicts with decisions in other courts of appeals. That is incorrect. The decisions petitioner cites simply reflect the fact-bound nature of harmless-

error review, which turns on an evaluation of the record in each case.

Petitioner selectively quotes *United States* v. *Prigmore*, 243 F.3d 1, 21-23 (1st Cir. 2001), to suggest that an error is not harmless if the defense evidence "was not inherently incredible," *id.* at 22. But the court of appeals explained that its analysis "focus[ed] on the nature and weight of the evidence," and it observed that, while the government did present strong evidence, the defense evidence was itself sufficiently weighty that the district court deemed it a "close" question whether to grant the defendants' motions for judgments of acquittal. *Ibid.* *Prigmore* does not suggest that the court of appeals here was wrong in its evaluation of the overwhelming evidence of petitioner's guilt.

In *United States* v. *Hollingsworth*, 257 F.3d 871, 876-877 (8th Cir. 2001), cert. denied, 534 U.S. 1100 (2002), overruled on other grounds, *United States* v. *Diaz*, 296 F.3d 680, cert. denied, 537 U.S. 940 (2002), the court of appeals concluded that the failure to submit to the jury the question of what quantity of methamphetamine the defendant was manufacturing was not harmless. Although the amount of precursor chemicals was not itself disputed, the court explained that the defendant validly challenged the method of calculating a drug quantity based on those precursors, numerous factual disputes surrounded that calculation, and the "evidence could [have] le[]d a rational jury" to attribute to the defendant only a small quantity of methamphetamine, even if that "result seem[ed] unlikely." *Id.* at 877. The court here did not merely find harmlessness because a verdict for petitioner was "unlikely." It concluded beyond a reasonable doubt (based on overwhelming evidence) that the verdict here would not have changed absent the error.

United States v. *Black*, 625 F.3d 386, 391-394 (7th Cir. 2010), cert. denied, 131 S. Ct. 2932 (2011), is similar. In *Black*, the court assessed the impact of an erroneous alternative honest-services fraud instruction and concluded that the error was harmless as to one fraud count but not another. The court explained that, while it concluded that a rational jury would have been "unlikely" to acquit on the first count under the valid instruction, the government did "not [present] a solid pecuniary-fraud case" with sufficiently strong evidence to warrant a finding of harmlessness. *Id.* at 392. The court then concluded that the instructional error in the second fraud count was harmless because the defendants' defense was "implausible" and "the evidence of pecuniary fraud [was] so compelling that no reasonable jury could have refused to convict." *Id.* at 392-393. Nothing in *Black* suggests a standard inconsistent with the court of appeals' decision here.[4]

c. In any event, this case would be a poor vehicle for review. Each of the five securities-fraud schemes that the court of appeals found "overwhelmingly" proved at trial would independently support petitioner's conspiracy conviction. Petitioner must therefore establish that the court of appeals erred in its "thorough examination of the considerable record" (Pet. App. 8a) compiled dur-

[4] *United States* v. *Coniglio*, 417 Fed. Appx. 146 (3d Cir. 2011), is also distinguishable. In that case, the court of appeals could not say that the erroneous honest-services instruction did not contribute to the jury's verdict, where the valid and invalid theories were "inextricably intertwined" and the case involved "a large amount of sharply contested, circumstantial evidence." *Id.* at 149 & n.4 In any event, *Coniglio* would not give rise to a circuit conflict warranting this Court's review, because it is an unpublished decision that has no precedential effect for future cases. See 3d Cir. Internal Operating P. 5.7; *DiBella* v. *Borough of Beachwood*, 407 F.3d 599, 602 n.**** (3d Cir. 2005).

ing the four-month jury trial in this case with respect to each of the five schemes. Petitioner has failed to do so. And a fact-intensive inquiry based on the voluminous record in this case is unworthy of this Court's plenary review. Cf. Pet. 8 (noting that petitioner's "recitation of the record includes more detail than the Court sees in most petitions"); Pet. 25 (beginning of petitioner's argument for review).

2. Petitioner argues (Pet. 34-38) that the court of appeals "categorically excluded" all of petitioner's testimony from its review of the record and that its decision conflicts with one other court of appeals. That is incorrect.

The court of appeals discussed petitioner's own testimony in the context of only two of the five securities-fraud schemes that independently support petitioner's conviction. Pet. App. 9a-10a, 11a. And with respect to the second scheme, the court explained that petitioner's testimony, even if accepted, would "not undermine the Government's proof at trial" showing that petitioner engaged in a scheme to conceal the volatile nature of Wholesale's trading operations. *Id.* at 11a. Rather than categorically exclude petitioner's testimony from the analysis, the court considered the testimony and concluded based on its evaluation of the record that it would not have affected the verdict of a rational jury.

In the context of petitioner's fraudulent scheme to transfer losses and risk-management books from EES to Wholesale, the court of appeals stated that petitioner's testimony did not alter the conclusion that the evidence overwhelmingly established that petitioner engaged in that scheme. Pet. App. 9a-10a. The court reasoned that the jury did, in fact, find petitioner guilty and thus would have necessarily rejected petitioner's

self-serving testimony that "contested his liability under any theory of guilt," where that testimony was "unsupported by other evidence or testimony in the record." *Id.* at 10a. That ruling is consistent with the jury's untainted guilty verdict on Count 25, which focused on petitioner's false explanation of the transfer that hid EES's substantial losses. See Gov't C.A. Br. 30 (filed Nov. 13, 2007). In this context, the court could properly conclude that a reasonable jury would not have acquitted petitioner based on his "unsupported" testimony in the face of "overwhelming" evidence of guilt.

The court of appeals' decision does not, as petitioner contends (Pet. 37-38) conflict with *United States* v. *Ofray-Campos*, 534 F.3d 1 (1st Cir.), cert. denied, 555 U.S. 1020 (2008), and 555 U.S. 1140 (2009). The court in *Ofray-Campos* explained that the defendant's "testimony on his own behalf is a factor in conducting the harmless error analysis." *Id.* at 28-29. But in *Ofray-Campos* the court explained that "the Government did not substantively impeach [the defendant's] testimony" and the government's evidence of the defendant's participation in a larger drug conspiracy was based only on two witnesses who provided weak and "uncorroborated" evidence of guilt: one established "nothing beyond the fact that [the defendant] was present during drug transactions" and the other simply asserted with no "detail" that the defendant helped "stash cocaine." *Id.* at 27-28. Given the "relative paucity of evidence" of guilt (*id.* at 29), *Ofray-Campos* simply reflects that a defendant's testimony can be part of the harmless-error inquiry but provides no basis for disputing the court of appeals' conclusion here that petitioner's uncorroborated testimony could not have led a jury to "rationally" acquit petitioner

of a conspiracy given the "overwhelming evidence" in this case.

3. Although this Court has granted review in *Vasquez* v. *United States*, No. 11-199 (to be argued Mar. 21, 2012), to address two questions concerning harmless-error review, this case need not be held for the Court's decision in *Vasquez*. The first question presented in *Vasquez* asks whether the court of appeals erred by basing its harmless error analysis "solely on the weight of the untainted evidence without considering the potential effect of the error" on the jury. 11-199 Pet., at i. The second question similarly focuses on the effect of the error by asking whether the court of appeals violated Vasquez's "Sixth Amendment right to a jury trial" by failing to "consider[] the effects of the district court's error on the jury." *Ibid.* But the court of appeals here specifically considered the effect of the instructional error in this case, and it rejected petitioner's contention that the error "made it more likely that the jury would rely on the honest-services theory rather than on the securities-fraud theory" in convicting petitioner on Count 1. Pet. App. 7a. The Court's resolution of the questions in *Vasquez* therefore should not alter the proper disposition of the present case.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the Court may wish to hold the petition pending its decision in *Vasquez* v. *United States*, No. 11-199, and then dispose of the petition as appropriate in light of that decision.

Respectfully submitted.

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