AUG 26 2009
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No. 08-1394

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

REPLY BRIEF FOR PETITIONER

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The Government's opposition all but concedes the case for certiorari on the honest-services fraud question. And while the Government more vigorously opposes review of the juror prejudice issue, it identifies no valid ground for denying certiorari on that question either.

1. On the first question, the Government's opposition is most telling for what it does *not* say:

- It does not deny the clear circuit conflict on the important question whether 18 U.S.C. § 1346 requires proof that the defendant's conduct was intended to achieve private gain. Pet. 18-20, 22-23.
- It does not deny that the decision below directly implicates that conflict because Skilling did not act for private gain. Pet. 21.
- It does not deny that the Fifth Circuit honest-services fraud holding was wrong on the merits. Pet. 20, 23-26.

While tacitly conceding that the decision below incorrectly resolves an important question of law that has squarely divided the circuits—circumstances that would warrant acquiescence to certiorari in almost any other case—the Government declines to acquiesce. It instead offers two make-weight arguments against review.

a. The Government first argues that review should be denied as "interlocutory" because the Fifth Circuit remanded this case for resentencing and Skilling intends to file a Rule 33 motion for a new trial based on violations of *Brady v. Maryland*, 373 U.S. 83 (1963). Opp. 9. The Government notes that

this Court "routinely denies interlocutory petitions in criminal cases" (Opp. 10), but that is true only when review is sought *before* a defendant has been convicted. The Court "routinely" *grants* petitions where, as here, the defendant's conviction has been affirmed and only ancillary matters, such as resentencing, remain to be determined. *See, e.g., Corley v. U.S.*, 129 S. Ct. 1558 (2009); *Begay v. U.S.*, 128 S. Ct. 1581 (2008); *Zedner v. U.S.*, 547 U.S. 489 (2006); *Eberhart v. U.S.*, 546 U.S. 12 (2005). The Court even grants review in *pre*-conviction appeals when circumstances warrant. *See* Robert L. Stern et al., *Supreme Court Practice* 258-59 n.59 (8th ed. 2002). The Court just did so in *Weyhrauch v. U.S.*, 129 S. Ct. 2863 (2009), to address another circuit conflict concerning § 1346—over a much stronger "judicial economy" objection than the meager one asserted here. Br. Opp., *Weyhrauch v. U.S.*, No. 08-1196, at 11-13; *see Yeager v. U.S.*, 129 S. Ct. 2360 (2009) (reviewing denial of motion to dismiss indictment).

Skilling's Rule 33 motion does not justify a different course. That motion will implicate no issues relevant to the Fifth Circuit's honest-services fraud holding. There is no reason the Court should decline to resolve a circuit conflict on an important question of federal criminal law merely because the defendant intends to challenge his conviction, post-appeal, on wholly unrelated grounds. If this Court were to deny review of convictions because they might be challenged on other grounds post-appeal under Rule 33, or under 28 U.S.C. § 2255, this Court would rarely review criminal cases on direct appeal.

The "interests of judicial economy" (Opp. 9) would not be served by delaying review of the honest-services fraud issue. Most important, this Court

would lose the benefit of addressing together the three major, interrelated controversies concerning § 1346. *See infra* at 5-6. And delay would seriously risk the absolute *worst*-case scenario from the perspective of judicial economy: if Skilling's *Brady* motion prevails, and he is tried again and convicted under the Fifth Circuit's flawed honest-services holding, a *third* trial will be required if this Court finally reviews and rejects the Fifth Circuit's holding. By contrast, if the Court resolves the honest-services issue now, any further proceedings below will be subject to that guidance, and their finality will be much more certain.

Finally, judicial economy is not the only relevant interest. The Government's proposal for delay assumes the possibility that the Fifth Circuit's honest-services holding is incorrect—the Government simply suggests delaying review of the error because another potentially certworthy issue might arise, in theory, from the Rule 33 *Brady* proceedings. But if the Fifth Circuit's honest-services holding is wrong, then Skilling has *already* been imprisoned unjustly for almost three years. His liberty should not be a matter of convenience. If the Fifth Circuit's holding is wrong, the Court should say so now.

b. The Government next contends that review is unwarranted because any error in prosecuting Skilling under § 1346 was harmless. Opp. 10-11. The conspiracy count for which Skilling was convicted had three possible objects, including honest-services fraud and securities fraud. Pet. 2, 14; Pet. App. 19a-20a. The Government baldly asserts that because Skilling was also convicted on 12 substantive counts of securities fraud, "the jury's verdict on the conspiracy count would have been the same even without

the honest services theory." Opp. 11.

The Government's *ipse dixit* harmlessness claim does not justify denying review. Both the district court and Judge Higginbotham *rejected* the Government's position that the jury necessarily would have convicted Skilling for conspiracy absent the honest-services fraud charge. Pet. 14. Because the Fifth Circuit upheld the Government's honest-services fraud theory, it never reached the Government's alternative harmlessness argument. Pet. App. 29a. When an appellate court does not reach a Government contention that an otherwise certworthy error of law might be harmless, the Court's "normal practice" is to grant review, resolve the substantive issue, and then remand for the lower court to address harmlessness. *Neder v. U.S.*, 527 U.S. 1, 25 (1999); *see Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 172 (2007); *Carella v. California*, 491 U.S. 263, 266-67 (1989). The Government offers no reason to depart from the normal practice here.

The Government's harmlessness argument is also manifestly wrong. The 12 securities fraud counts cited by the Government were all tied directly to the conspiracy count by a *Pinkerton* instruction, which allowed the jury to convict Skilling for conspiracy to commit honest-services fraud, and then use that conspiracy finding to convict him vicariously for securities fraud committed by his co-conspirators. Pet. App. 29a n.18. Given the trial record, that is almost certainly what the jury actually did.[1] But it is not

[1] Contrary to the Government's starkly unsupported assertion that the securities fraud counts were based on Skilling's "own conduct and were supported by overwhelming evidence" (Opp. 11), a count-by-count review of the securities fraud convictions demonstrates that for every count, the evidence con-

Skilling's burden to prove that the jury relied on the honest-services fraud object to find him vicariously guilty of securities fraud; it is the Government's burden to *refute* that possibility, and to do so *beyond any reasonable doubt*. The Government's empty assertion, bereft of record analysis, that the jury surely *must* have found Skilling independently guilty of securities fraud—despite the glaring weakness of its independent securities-fraud case against Skilling and despite its express reliance at trial on vicarious liability—falls far short of that standard.

c. Finally, as an alternative to denying review, the Government recommends holding the petition pending the decision in *Black v. U.S*, No. 08-876, because that decision is likely to "clarify the reach" of § 1346. Opp. 12. But the same would have been true in *Weyrhauch*, yet the Court granted that petition, presumably because it presented a distinct but related issue meriting review in its own right.

The same is true here. Beyond asserting the truism that the Court "need not" address the private gain issue here before addressing *Black*'s economic harm issue (Opp. 12), the Government does not even try to explain why the Court *should not* address the two proposed rules in connection with each other. If anything, the grants in *Black* and *Weyhrauch* only strengthen the case for immediate review of the private gain issue. *See* Skilling *Black* Amicus Br. 19-21. Reviewing Skilling's case now would not only

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cerning Skilling's personal liability was weak to nonexistent, and that it was at least as likely, and typically much *more* likely, that the jury found that *others* committed the charged acts, holding Skilling vicariously liable for those acts through the conspiracy conviction based on honest-services fraud. Skilling C.A. Reply Br. 33-37, 39-45.

ensure resolution of all three major judicial controversies over the interpretation of § 1346, but would also allow the Court to consider how the economic harm rule proposed in *Black* compares with, and relates to, the private gain requirement at issue here. *Id.*

2. The Government's arguments against review of the second question presented—whether a presumption of juror prejudice arising from widespread community bias is rebuttable—are more vociferous, but they are no more meritorious.

a. The Government first contends that the Fifth Circuit erred in holding that a presumption of prejudice was warranted at all. Opp. 13. The Government notes that "only" 40% of all prospective jurors went so far as to openly admit, in response to one question on the questionnaire, that they had already prejudged Skilling's guilt. Opp. 15. But a broader review of prospective jurors' responses shows that 80% *expressed negative views* about Skilling and Lay or about the role they played in Enron's collapse, or expressed anger about Enron. Pet. 8. This Court has never suggested that there is some minimum percentage of prospective jurors who must admit an actual prejudgment of guilt to create a presumption of prejudice. That approach would contradict the very premise of the presumption, *viz.*, when bias or adverse publicity pervades the overall community, prospective jurors may hide, or simply fail to recognize, their own prejudice. *Cf. Smith v. Phillips,* 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring).

The Fifth Circuit's recognition that a presumption arose here does not conflict with *Patton v. Yount,* 467 U.S. 1025 (1984). Opp. 14. In *Patton,*

the Court found no presumption even though many in the jury pool had formed a view of the defendant's guilt, but only because the inflammatory publicity had occurred four years before trial and community passions had since subsided. *Id.* at 1032. The opposite is true here. Pet. App. 56a-60a.

The Government similarly errs in relying on statements from 37 potential jurors that they had limited exposure to publicity. Opp. 15. Even limited exposure to inflammatory publicity can be dangerously prejudicial. And the Houston community's bias arose not only from inflammatory publicity, but also from the "sheer number of victims" of Enron's collapse, the seismic effects of which rippled through the entire Houston economy. Pet. App. 58a. Unsurprisingly, almost every prospective juror cited by the Government as having experienced limited exposure to adverse publicity nevertheless made explicit statements evidencing bias against Skilling. *See* Skilling C.A. Reply Br. App'x 3.

The Government contends that the facts here are not precisely comparable to cases where the Court has presumed prejudice, citing the district court's finding that the corporate fraud charged was neither "heinous nor sensational." Opp. 16-17. But Skilling and Lay would not have been compared to Al Qaeda, Hitler, Satan, child molesters, and rapists (Pet. 6) if their crimes were not perceived as heinous and sensational. Nor does it matter that there was no pretrial confession or media circus inside the courtroom. Opp. 17. This Court's precedents do not recite a rigid checklist of required prejudice factors; they instead enunciate and apply a general principle fundamental to any reasonable conception of due process: when the community from which jurors are

drawn is pervaded with adverse publicity, and is broadly victimized by the defendants' alleged conduct, potential jurors may harbor undisclosed or unrecognized biases that voir dire cannot expose. *See Patton*, 467 U.S. at 1031 (presumption arises when community bias is so pervasive "that the jurors' claims that they can be impartial should not be believed"). Contrary to the Government's suggestion, this principle does not apply only in small towns, where virtually every resident sees virtually every local newspaper article or news broadcast. To the contrary, courts for decades have recognized the presumption in circumstances analogous to the instant case. Skilling C.A. Reply 88 & n.33.

b. The real issue here is not whether a presumption of prejudice arose, but what the consequences of that presumption are. Like the Fifth and Eleventh Circuits, the Government contends that the prosecution is entitled to rebut the presumption by proving through voir dire that each juror was not actually affected by the community bias giving rise to the presumption. Opp. 18-19. But in *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963), the Court reversed the conviction based on a presumption of prejudice "without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury." And in *Estes v. Texas*, 381 U.S. 532, 543-44 (1965) and *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966), the Court also reversed convictions without considering whether the presumption had been rebutted by voir dire. As those precedents demonstrate, when a defendant has been tried by a jury "exposed to prejudicial publicity," this Court "ha[s] *required reversal* of the conviction because *the effect of the violation cannot be ascertained*," through voir

dire or other means. *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) (emphasis added; quotation omitted).[2]

c. The Government next argues that the decision below does not conflict with decisions from other circuits. The Government dismisses the Third and Tenth Circuit decisions in *Riley v. Taylor*, 277 F.3d 261, 299 (3d Cir. 2001), and *U.S. v. McVeigh*, 153 F.3d 1166, 1182 (10th Cir. 1998), as "dicta" because, while they clearly hold that a presumption of prejudice is irrebuttable because voir dire cannot be trusted, the decisions did not find the presumption applicable on their facts. Opp. 19-20. The precedential force of a decision, however, is not limited to its specific result; it includes the legal standards a court applies in reaching the result. *Seminole Tribe v. Florida*, 517 U.S. 44, 66-67 (1996).

It is likewise irrelevant that *U.S. v. Higgs*, 353 F.3d 281, 307 (4th Cir. 2003), addressed the issue in the venue-transfer context. Opp. 19. *Higgs*' holding that a presumption of prejudice requires that venue be transferred necessarily means that if venue is *not* transferred, the conviction must be reversed.

Nor can the decision below be reconciled with *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005), merely because the court did consider "the results of the voir dire." Opp. 20. What matters is that *Daniels* reversed the conviction once the court found

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[2] *Remmer v. U.S.*, 347 U.S. 227 (1954), does not allow rebuttal of a presumption of juror prejudice arising from community bias. Opp. 17-18 & n.3. The presumption at issue in *Remmer* arose from an attempt to bribe a jury. *Id.* at 229. That presumption is less powerful, because there is no reason a given bribe attempt would render jurors' statements inherently less trustworthy.

a presumption of prejudice, even though voir dire did *not* expose individual juror bias. *Id.* at 1211-12. The decision below reaches exactly the opposite result, finding the presumption rebutted solely because voir dire (supposedly) did not expose explicit juror bias.

d. The Government also fails to distinguish the many conflicting state court precedents, including precedents applying the presumption to reverse convictions without considering rebuttal by voir dire. Pet. 32-33. Among the latter precedents, the Government falsely describes *Johnson v. State*, 476 So. 2d 1195 (Miss. 1985), as holding that an irrebuttable presumption can arise only in a "combination" of circumstances, Opp. 21, when the decision unambiguously holds that adverse publicity alone, when sufficiently inflammatory, can make the presumption conclusive. 476 So. 2d at 1215; *accord Gray v. State*, 728 So. 2d 36, 66 (Miss. 1998). And it is obviously irrelevant that a presumption of prejudice arose in *Commonwealth v. Frazier*, 369 A.2d 1224 (Pa. 1977), on the basis of facts different from those involved here (Opp. 22); the salient point is that *Frazier* reversed the conviction solely by presuming prejudice from adverse publicity, without considering whether voir dire rebutted the presumption. *Id.* at 1230; *see also Ruiz v. State*, 582 S.W.2d 915, 921-24 (Ark. 1979) (considering voir dire in finding presumption of prejudice, but rejecting juror statements of impartiality as rebuttal).[3]

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[3] The government does not even address *People v. Leonard*, 157 P.3d 973 (Cal. 2007), *DeRosa v. State*, 89 P.3d 1124 (Okla. Crim. App. 2004), and *State v. Laaman*, 331 A.2d 354 (N.H. 1974), presumably because those decisions ultimately concluded that no presumption arose. And it argues that *State v. Clark*, 442 So. 2d 1129 (La. 1983), addressed only when a pre-

e. Finally, the Government argues that, assuming the presumption is rebuttable, it was rebutted here. But the Government's arguments only confirm the importance of taking the presumption seriously.

The Government first contends that the jury's impartiality was proved merely because it acquitted Skilling on some counts. Opp. 22. The Government makes no effort to explain how partial acquittal establishes the absence of prejudice *beyond a reasonable doubt* (Pet. 34-35), as opposed to the more obvious inference: after overcharging Skilling, the Government could not prove its case on numerous charges even to a Houston jury.

Nor are the district court's findings of impartiality subject to deference (Opp. 23): because the court failed to apply a presumption and thus improperly required Skilling to *disprove* prejudice, its findings are legally meaningless. Pet. 34.

Lastly, the Government insists that the presumption was rebutted despite Juror 11's openly hostile statements. Opp. 24-25. The Government does not defend the juror's outrageously prejudicial statements, but simply cites the juror's more neutral comments, as if they canceled out his explicit hostility. While "ambiguous and at times contradictory" statements may not be "unusual and do not establish juror bias" (Opp. 25) *in the normal case*, a presumption arises precisely because the case is *not* normal, in that juror promises of impartiality cannot be accepted at face value. If Juror 11's statements suffice

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sumption of prejudice requires a change of venue. Opp. 21. As discussed above, neither point undermines those courts' basic, precedential holdings that the presumption of prejudice is irrebuttable.

to rebut the presumption of prejudice—rather than to confirm it—the presumption has no meaning at all.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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