No. 23-631

In The Supreme Court of the United States

HOLLIS GREENLAW, BENJAMIN LEE WISSINK, CARA DELIN OBERT & JEFFREY BRANDON JESTER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONERS' REPLY BRIEF

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REPLY BRIEF

In its brief in opposition (BIO), respondent contends that the issues raised in the petition are unworthy of this Court's review because (1) the Fifth Circuit's decision does not conflict with *Neder v. United States*, 527 U.S. 1 (1999); (2) there is "no meaningful disagreement" among the lower courts concerning the proper application of *Neder*; and (3) there is no "special justification" for overruling *Neder*. BIO, at 12-25. None of these arguments is persuasive.

I. The Fifth Circuit's Decision Conflicts with *Neder* and *Hurst v. Florida*, 577 U.S. 92, 102 (2016).

Respondent argues that the Fifth Circuit correctly applied *Neder*'s harmless-error analysis in petitioners' case, notwithstanding the fact that petitioners at trial contested the *mens rea* elements that were misdefined in the jury instructions (while, by contrast, Neder did not contest the "materiality" element omitted from his jury instructions). BIO, at 15-17. Respondent further asserts that the Fifth Circuit's reliance on the supposedly "overwhelming evidence" of the petitioners' guilt of properly-defined *mens rea* elements also was a proper application of *Neder* and *Chapman v. California*, 386 U.S. 18 (1967). BIO, at 16-17.

Respondent misreads *Neder* and also fails to account for *Hurst v. Florida*, 577 U.S. 92, 102 (2016), which limits *Neder* to cases in which a defendant did not contest an omitted or misdescribed element.

A. *Neder*'s Threshold Requirement: The Defendant Did Not "Contest" the Omitted or Misdefined Element at Trial.

Neder held that its "narrow" rule[1] permits an appellate court to find a jury instruction error harmless only if *both* (1) the defendant did not "contest" the omitted or misdescribed element *and* (2) the evidence of the defendant's guilt of that element (as properly defined) is "overwhelming." *Neder*, 527 U.S. at 15-17; *see also Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (per curiam) (applying *Neder* to misdefined elements).

Conversely, when a defendant at trial objected to the misdefined element in the jury instructions and contested the element before the jury (as if it were properly defined)—as petitioners did, including in three petitioners' trial testimony—an appellate court should not be able to deem the error harmless. In that circumstance, an appellate court's deeming the error harmless on the ground that court considers evidence of a properly-defined element to be "overwhelming" would usurp "the factfinding role reserved for the jury." *People v. Merritt*, 392 P.3d 421, 431 (Cal. 2017) (Liu, J., concurring).

Hurst confirms petitioners' interpretation of *Neder*. In *Hurst*, the Court held that a Sixth Amendment error occurred when the capital defendant's jury was not required to find an aggravating

[1] *See Neder*, 527 U.S. at 17 n.2 (noting that the Court's holding only applied to "the narrow class of cases like the present one").

factor that served as an "element" of the defendant's death-penalty eligibility. *Hurst*, 577 U.S. at 102-03. Rather than engage in harmless-error analysis in the first instance—which the State had requested, based on the fact that Hurst had not contested two different "eligibility" aggravating factors in the trial court[2]—this Court remanded for the Florida Supreme Court to do so under *Neder*. In remanding, this Court specifically described *Neder*'s harmless-error test as turning on the fact that the omitted element at Neder's trial was "uncontested":

> [W]e do not reach the State's assertion that any error was harmless. *See Neder v. United States*, 527 U.S. 1, 18-19 (1999) (*holding that the failure to submit an uncontested element of an offense to a jury may be harmless*). This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here.

Hurst, 577 U.S. at 102 (emphasis added). Justice Alito dissented, contending that this Court should find the error harmless because the uncontested evidence of two death-eligibility factors was "overwhelming." *Id.* at 106.

On remand, the Florida Supreme Court explicitly disagreed with Justice Alito and refused to find the error harmless. *Hurst v. State*, 202 So.3d 40, 68-69 (Fla. 2016).

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[2] Brief for Respondent, *Hurst v. Florida*, No. 14-7505, 2015 WL 4607695, at *41.

B. An Appellate Court's Finding of Harmlessness Is Precluded When *Any* Evidence Could Permit a Rational Juror to Possess a Reasonable Doubt About the Omitted or Misdefined Element.

This Court further held in *Neder* that, when a defendant did not "contest" the omitted (or misdefined) element at trial, an appellate court still cannot deem the error harmless unless the prosecution on appeal demonstrates that there was no evidence at trial "that could rationally lead to a contrary finding with respect to the omitted element." *See Neder*, 527 U.S. at 20 (citation and internal quotation marks omitted).

Respondent disputes petitioners' position that *Neder* held that such evidence can be "*any* evidence in the record on which a jury could possess a reasonable doubt . . . even if the appellate court considers the prosecution's evidence as 'overwhelming' compared to the defendant-appellant's evidence" about the disputed element (Pet. 28). *See* BIO, at 15. Respondent misconstrues this aspect of *Neder*.

This Court has long held that an appellate court, when reviewing erroneous jury instructions to determine whether they harmed a defendant's ability to defend against the charges, must *not weigh* competing evidence on appeal, even if appellate judges consider the prosecution's evidence to be "overwhelming."[3] *Neder* did not overrule such cases.

[3] *See United Broth. of Carpenters & Joiners of America v. United States*, 330 U.S. 395, 407-08 (1947); *Bollenbach v. United States*, 326 U.S. 607, 614 (1946); *Stevenson v. United States*, 162 U.S. 313, 314 (1896).

Thus, *any* evidence offered by a defendant at trial that would permit a rational juror to acquit, *even if weak compared to the prosecution's countervailing evidence that clearly is sufficient to convict*, forecloses an appellate court's harmless-error ruling under *Neder*. *Cf. United States v. White*, 972 F.2d 590, 605 n.4 (5th Cir. 1992) (King, J., concurring in part and dissenting in part) ("The standard for a rational acquittal is much more permissive [than the sufficient-evidence standard under *Jackson v. Virginia*, 443 U.S. 307 (1979)]. A rational jury obviously need not find a fact beyond a reasonable doubt to rationally acquit. There must only be *some* evidence, however slight, to acquit.").

In petitioners' case, assuming *arguendo* that the second step of the *Neder* test is even appropriate in view of the fact that petitioners contested the *men rea* elements, the record certainly contains sufficient evidence for a rational juror to possess a reasonable doubt that the petitioners intended to cheat and deprive others of money or property. Most significantly, three of the four petitioners testified and denied conspiring or intending to defraud or deprive anyone of money or property. Pet. 7-9, 19.

Remarkably, in its curt harmless-error analysis, the Fifth Circuit did not mention the three petitioners' testimony. Despite that glaring omission, respondent contends that the court engaged in a "principled explanation"[4] of its harmlessness determination because its brief harm analysis followed "a detailed review of the evidence in the facts section of

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[4] *Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring).

its opinion (Pet. App. 3a-7a) and its discussion of the sufficiency of the evidence [under the *Jackson v. Virginia* standard] (*id*. at 8a-27a)." BIO, at 18. According to respondent, the Fifth Circuit "did not need to cut and paste, or otherwise replicate, its discussion in the harmless-error section of its opinion." BIO, at 18.

This argument clearly demonstrates that respondent, like the Fifth Circuit—explicitly in its original, withdrawn opinion and implicitly in its substituted opinion—confuses review of the prosecution's evidence under *Jackson v. Virginia*, *supra*, with the *very* different type of review required under *Chapman* and *Neder*. The "principled explanation" mentioned by Justice O'Connor should be a careful and detailed analysis of *all* the evidence, including (of course) the defendants' testimony, in a light most favorable to the defendants. The Fifth Circuit clearly did not engage in that type of harmless-error analysis.

In sum, the Fifth Circuit's harmless-error analysis conflicts with *Neder* in two fundamental ways. First, the court failed to acknowledge that petitioners "contested" the *mens rea* elements (as properly defined)—which should have ended the court's harmless-error analysis and led to a reversal of petitioners' convictions. Second, assuming *arguendo* that the Fifth Circuit was permitted to consider the evidence at trial in assessing harm, the court failed to determine whether, when viewing the evidence in a light most favorable to petitioners, a rational juror could have possessed a reasonable doubt about petitioners' *mens rea* (based on properly-defined "intent to defraud" and "scheme to defraud" elements). The Fifth Circuit judges wrongly deemed the jury in-

struction errors harmless based on the judges' perception, essentially as "appellate jurors," that evidence of petitioners' *mens rea* was "overwhelming."

II. A Widespread Division Exists Among the Lower Courts Concerning How to Apply the Harmless-Error Test Set Forth in *Neder*.

Respondent first contends that there is "no meaningful disagreement" among the federal circuit courts concerning *Neder*. BIO, at 20-21, 24. Respondent further argues the conflict between the Fifth Circuit's decision and decisions of some *state* appellate courts applying *Neder* "is irrelevant because a state court's adoption of a more stringent approach to harmless error than the one described in *Neder* would not conflict with the uniform *Neder*-based approach of the federal courts of appeals." BIO, at 21-22 n.7. Respondent is wrong on both points.

A. There Is Disarray About the Meaning of *Neder* Among the Federal Circuit Courts.

As Judge Lipez recognized a decade ago,[5] there is widespread division among the federal circuit courts concerning *Neder*—both an inter-circuit split and several intra-circuit splits. For instance, in some of their decisions, the First and Fourth Circuits have held that harmless-error analysis under *Neder* is not

[5] *United States v. Pizarro*, 772 F.3d 284, 303 (1st Cir. 2014) (Lipez, J., concurring).

permitted if a defendant (unlike Neder) "contested" an omitted or misdefined element at trial. *See, e.g.*, *United States v. Legins*, 34 F.4th 304, 323 (4th Cir. 2022);[6] *United States v. Zhen Zhou Wu*, 711 F.3d 1, 20 (1st Cir. 2013) ("[H]ere, the defendants *did* contest the prosecution's [evidence of an omitted element], thus making this case different from *Neder*."). A recent Tenth Circuit decision, *United States v. Kahn*, 58 F.4th 1308 (10th Cir. 2023), similarly conflicts with the Fifth Circuit's approach:

> Where an element of an offense is contested at trial, as it was here, the Constitution requires that the issue be put before a jury—not an appellate court. *See Neder*, 527 U.S. at 18-19. . . . For this court to now essentially retry the case on appeal and opine on what verdict the jury would have reached if it had been properly instructed asks too

[6] Respondent contends that the Fourth Circuit has not required the omitted or misdefined element to be "uncontested" for the error to be deemed harmless and, instead, has approvingly cited the decisions of several other circuit courts, which, in applying *Neder*, asked only whether the evidence of the omitted element was "overwhelming." BIO, at 21. *Legins* contradicts respondent's position. In *Legins*, the Fourth Circuit, in finding an omitted element in jury instructions to be harmless, required *both* that the omitted element was "uncontroverted" at trial *and* that the evidence of that element was "overwhelming" before the court would deem the error harmless. *Legins*, 34 F.4th at 323-24. The Fourth Circuit's citation in *Legins* to the decisions of other circuit courts was merely to establish that the other courts applied harmless-error analyses to errors under *Apprendi v. New Jersey*, 530 U.S. 466 (2000)—not for the purpose of adopting the specific harmless-error analyses of those courts. *Legins*, 34 F.4th at 322.

> much of an appellate court. This is particularly true here, where we would be determining Dr. Kahn's subjective intent on a cold record. This court will not wade into the evidence to now apply the correct instructions—that is the jury's prerogative.

Id. at 1319; *but see United States v. Freeman*, 70 F.4th 1265, 1282 (10th Cir. 2023) ("[W]e reject Freeman's assertion that, pursuant to *Neder*, the omission of an element in the jury instructions cannot be harmless if the element was contested at trial.").

In addition, concerning the second part of the *Neder* test (which the Fifth Circuit applied despite the fact that petitioners had contested the misdefined elements), the Fifth Circuit's "overwhelming evidence" approach clearly is at odds with other Fourth Circuit decisions that have assessed harm even where a defendant contested an omitted or misdefined element. Those decisions found harm if there was "any" evidence on which a rational juror could have had a reasonable doubt about an omitted element, even if scant or weak compared to the prosecution's countervailing evidence from the appellate judges' perspective. *See, e.g.*, *United States v. Smithers*, 92 F.4th 237, 251-52 (4th Cir. 2024) ("True, much of the [defendant's] testimony wasn't particularly convincing, as weighed against the prosecution's evidence. And a jury might very well not have believed Smithers' testimony that he was acting with a legitimate medical purpose. But copious evidence of a defendant's guilt does not necessarily make an instructional error harmless."). That approach dif-

fers significantly from the Fifth Circuit's approach in petitioners' case. Pet. 20-22.

The First Circuit—in cases in which a defendant (unlike Neder) had contested an omitted or misdefined element—has alternatively assessed the evidence of the element but has refused to engage in the type of "overwhelming evidence" analysis conducted by the Fifth Circuit. *See United States v. Prigmore*, 243 F.3d 1, 22 (1st Cir. 2010) ("[T]he contested nature of the testing evidence in this case might well suffice to distinguish it from *Neder* in and of itself. *In any event, while the government's evidence of the purpose behind the testing was strong, the competing evidence was not inherently incredible. That effectively ends the matter*.") (emphasis added). Petitioners' testimony denying an intend to defraud and intent to deprive anyone of money or property was not "inherently incredible"—and, thus, the jury instruction errors in their case cannot be deemed harmless.

As the foregoing discussion demonstrates, the federal circuits are in widespread disarray concerning how to apply *Neder*.

B. Several State Appellate Courts' Decisions Add to the Division Among the Lower Courts.

Respondent does not appear to dispute that some *state* appellate courts have rendered decisions applying *Neder* that conflict with the Fifth Circuit's decision in petitioners' case. *See* BIO, at 21-22 n.7. Nevertheless, respondent contends such a conflict is unimportant because the state courts are free to apply a "more stringent" harmless-error test. *Id.*

Respondent's position would make sense if any of the state court decisions cited in the petition (Pet. 23-24 n.11)[7] had invoked their own state's law in support of their harmless-error analyses. But none did so. Instead, they all interpreted this Court's decision in *Neder*—which thus adds to the inconsistent approaches in the lower courts about what the U.S. Constitution requires in an appellate court's harmless-error analysis of an element omitted from, or misstated in, jury instructions. *See Chapman*, 386 U.S. at 21 (holding that harmless-error analysis related to federal constitutional violations is a federal question and, thus, a state appellate court's harmless-error analysis is subject to review by this Court); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 678 n.3 (1986) (unless a state appellate makes a "plain statement" that its harmless-error analysis of a federal constitutional violation was based on state law, this Court will assume the ruling was based on federal law). Therefore, in deciding whether to grant certiorari, this Court should consider the division among state and federal appellate courts. *See, e.g.*, *Chaidez v. United States*, 568 U.S. 342, 34 (2013) ("We granted certiorari . . . to resolve a split among federal and state courts on whether *Padilla* [*v. Kentucky*, 559 U.S. 356 (2010),] applies retroactively.").

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[7] *See also State v. Jackowski*, 915 A.2d 767, 773 (Vt. 2006) (rejecting the dissenting judges' argument that the jury instruction error was harmless under *Neder*, and concluding that "Where, as here, intent is the central—and only—issue, and the defendant presents minimally sufficient evidence rebutting intent, we cannot say that an erroneous jury instruction on that issue amounts to harmless error.").

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Finally, although presented in the specific context of a misdefined element in jury instructions, this case also presents the Court an opportunity to provide much-needed broader guidance on the role of "overwhelming evidence" in harmless-error analysis more generally—something the Court attempted to do in granting certiorari in *Vasquez v. United States,* No. 11-199, only to dismiss the petition as improvidently granted after oral argument. *See* 566 U.S. 376 (2012).

III. *Stare Decisis* Should Not Stand in the Way of Overruling *Neder*.

Respondent contends that "*stare decisis* considerations . . . compel adherence to the quarter century of precedent that follows *Neder*" and that no "special justification" exists for overruling *Neder*. BIO, at 25. Yet again, respondent errs.

The fact that several federal circuit courts have been unable to follow the "narrow" rule set forth in *Neder* and the fact that the state and federal courts have taken such divergent approaches support overruling *Neder*. In addition, as noted in the petition, many judges throughout the country have strongly criticized *Neder*, and several state courts have refused to follow its test as a matter of state law. Pet. 32-33; *see also Jordan v. State*, 420 P.3d 1143, 1155-57 (Alaska 2018) (adopting Justice Scalia's dissent in *Neder* as a matter of state constitutional law).

At the very least, this Court should clarify that *Neder*'s harmless-error rule *solely* applies to cases in which a defendant at trial did not contest the prosecution's evidence of an omitted or misdefined ele-

ment in the jury instructions. *Pizarro*, 772 F.3d at 312 (Lipez, J., concurring) ("I . . . urge the Supreme Court . . . to clarify that *Neder* requires a reviewing court to conclude beyond a reasonable doubt that an omitted element is uncontested before the omission can be found harmless . . . .").

CONCLUSION

The Court should grant the petition for a writ of certiorari.

April 16, 2024

Respectfully submitted,

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